

# Culture Wars in the Public School

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# Our Values

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- As a society, we express our values through legislation and litigation.
- When there is a clash of important values, we sometimes have to choose one value over another. This makes for difficult cases for SCOTUS to decide.
- Abortion. Same sex marriage. Immigration. Religious freedom. Free speech.



# The Public School

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- Everyone wants the public schools to reflect our values.
- As soon as we all agree on what those values are, we will be fine.
- In the meantime, we argue over a lot of things.

# Remember the “Boobies Case”?

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- Should students be allowed to wear “I (heart) Boobies” bracelets at school?
- Whose decision should this be?
  - A. Parents
  - B. Teachers
  - C. The principal
  - D. 14 judges of the Circuit Court



# Racial Issues

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- Our longest lasting and most divisive “culture war” is about how people of different races live, work and go to school together.
- *Brown v. Board of Education* settled one issue, but left a lot of others undecided.
- So today we argue over Confederate statues and schools named after Confederate generals. Values continue to clash.

# Let's Look at Three Areas

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- Religion
- Sexuality
- Patriotism



# Internal Tension in the 1<sup>st</sup> Amendment

- The 1<sup>st</sup> Amendment grants a right of the free exercise of religion, but also prohibits a government “establishment” of religion.
- For people who work in the public sector, that creates internal tension.
- If teachers want to participate in “Meet Me at the Pole” is that “free exercise” or an improper “establishment”?



# Consider the Candy Cane Case

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- *Morgan v. Swanson*: principals prohibited the distribution of religious-oriented gifts at a holiday party, where other gifts were OK.
- This was unconstitutional viewpoint discrimination: 659 F.3d 359 (5<sup>th</sup> Cir. 2011).
- Principals not personally liable due to murkiness of the law. “No federal court of appeals has ever denied qualified immunity to an educator in this area.”



# Things Have Changed

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- In the early days, challenges involving religion and the public schools were typically brought by a plaintiff outside of the religious mainstream, claiming that the school was fostering an “establishment of religion.”
- Not so anymore. Today the litigation is just as likely to be from a mainstream Christian organization claiming an infringement on free exercise.



# How It Used To Be

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- In an early school prayer case, the plaintiff's attorney was asked about the value of religious tradition. The response:

“I think tradition is not to be scoffed at. But let me say this very candidly. I think it is the final arrogance to talk constantly about ‘our religious tradition’ in this country and equate it with this Bible....it suggests that the public schools...are a kind of Protestant institution to which others are cordially invited.” *Abington School District v. Schempp*.



# Decades Later

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- Abington is one of the early “school prayer” cases which are now “clearly established.” You can’t be reciting the Lord’s Prayer or reading from the Bible over the P.A.
- But that still leaves a lot of room for arguments.
- SEE NEXT SLIDE!



# Taking a Knee at the 50-Yard Line

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- Coach Kennedy prayed right after the game. On the 50 yard line.
- After receipt of a complaint about this, the superintendent told him to cease.
- Coach sought injunction. Lost.
- Note: the 9<sup>th</sup> Circuit did not say that this created an “establishment” problem. This was a free speech case.

# Why Coach Kennedy Lost

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- The coach based his case on retaliation for the exercise of free speech.
- 9<sup>th</sup> Circuit held he was acting as an employee—not a private citizen.
- “He spoke as a public employee, not as a private citizen, and his speech was therefore unprotected.”
- SCOTUS denied cert.

# The Concord Christmas Spectacular

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- Program involves 600 students in a 90-minute production. Two string orchestras, a symphony orchestra, a concert band, two jazz bands, five choirs and small chamber groups.
- It concluded with 20 minutes on “The Story of Christmas.” This featured readings from the Gospels, and a live nativity scene with students portraying Mary, Joseph, angels, shepherd and the three wise men.
- Baby Jesus?





# Is This the Public School? Or the Church?

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# Years of Litigation

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- FFRF sued in 2014. District made changes to the program, bringing in other faiths, but sticking with a 20-minute Christmas story and live nativity.
- District court said the program was an establishment of religion.
- School made further changes, and this time it passed muster.

# 7<sup>th</sup> Circuit Ruling

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- “The nativity tableau no longer stands out...it has become just another visual component for a single song.”
- Christmas carols “have permeated mainstream society” and without the live nativity or Gospel readings, are OK.
- The Spectacular is “primarily entertainment and pedagogy.”



# Culture Wars?

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- There was a Facebook page titled Save Concord's Christmas Spec's Nativity Scene. Over 7000 "likes."
- Hundreds of people wore T-Shirts supporting the Spectacular at school board meeting.
- Yard signs.
- Someone sent a death threat to the FFRF. (!)
- Court noted the "powerful ovation" from the audience for the nativity scene.



# The Honorable Judge Grinch

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“The parties put us in the uncomfortable position of Grinch, examining the details of an impressive high school production. But we accept this position, because we live in a society where all religions are welcome.”

*Freedom from Religion Foundation v. Concord Community Schools*, 885 F.3d 1038 (7<sup>th</sup> Cir. 2018)

# Other Religious Issues

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- Can the school board pray at the meeting?
- Can the cheerleaders use banners with Scripture quotes on them?
- Can we support the Fellowship for Christian Athletes?





# Recent Decisions

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- 5<sup>th</sup> Circuit is OK with prayer at school board meetings. *AHA v. Birdville ISD*.
- 9<sup>th</sup> Circuit is not: *FFRF v. Chino Valley USD*.



# Cheerleader Banners

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- Texas Court of Appeals is OK with cheerleaders using banners that overtly support Christianity. *Kountze ISD v. Matthews*.
- The court held that the banners reflect the private, personal speech of the students.

# But What If We Lose????

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# Fellowship of Christian Athletes

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- District court in Colorado held that school's support of the FCA and an upcoming mission trip crossed the line and amounted to government support of religion. *American Humanist Assn. v. Douglas County*.





# Favoring Islam over Christianity?

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- NJ district is being sued over allegations that the middle school curriculum promotes Islam and short changes Christianity and Judaism.  
*Hilsenrath v. School District of the Chathams*

# Sexuality

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- There is actually a direct connection between the fallout from the early school prayer cases and subsequent litigation over gay and lesbian student groups.
- When Congress failed to adopt a proposed constitutional amendment to overturn the school prayer decisions, the fallback position was adoption of The Equal Access Act.

# Equal Access Act

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- The law requires secondary schools that receive federal funding to provide “equal access” to school facilities to all non-curriculum related student groups.
- It was intended to protect Bible studies and prayer groups, but the big winners have been the gay/lesbian student groups.





# What's Settled. What's Not.

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- Courts are not in unison about sexual orientation as a protected characteristic under Title VII--in employment.
- But it's settled that schools cannot discriminate against a student group based on sexual orientation.
- Unsettled: the status of transgender students. But let's look at the trend....

# Trends: 6<sup>th</sup> Circuit

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- “Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.” *Dodds v. US DOE* (6<sup>th</sup> Cir. 2016)

# Trends: 7<sup>th</sup> Circuit

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- “A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX.” *Whitaker v. Kenosha USD*, 7<sup>th</sup> Cir. 2017).



# Trends: 3<sup>rd</sup> Circuit

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- “...transgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding them from discrimination. There can be ‘no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.’” *Doe v. Boyertown Area School District*, 3<sup>rd</sup> Cir. 2018.

# Transgender Students

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- Schools continue to be challenged by transgender individuals, and by parents of other students.
- See NSBA's excellent Transgender Litigation Chart: <https://www.nsba.org>.

# Patriotism

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# The Pledge in Our Schools

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- 1943: *West Virginia SBOE v. Barnette* establishes a free speech right not to recite the Pledge in public school.
- The case presented a clash of two important values: freedom of speech and religion vs. fostering patriotism in our public schools.

# 21<sup>st</sup> Century

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- Suit against a Texas district alleges a student was punished for refusing to recite the Pledge.
- Court refused to dismiss the case, finding that the allegations were sufficient to allege an unwritten custom or practice in the district.
- One teacher faces possible personal liability because the law on this is “clearly established.” *Arceneaux v. Klein ISD*.

# Extracurriculars?

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- *V.A. v. San Pasqual Valley USD*: California court ruled in favor of a kneeling football player and awarded almost \$200,000 in fees to the plaintiffs.

# Let's Summarize Some Key Points

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- In the operation of the public schools, these culture war issues come with the territory.
- As a society, we express our values through the slow, cumbersome process of legislation.
- Litigation occurs when values clash.
- In the most difficult cases we are dealing with a clash of two good values.
- Consider....



# Clash of Good Values

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- *Barnette*: Free speech v. Patriotism
- *Tinker*: Free speech v. Respect for Authority
- *Brown*: Equal Protection v. Local control

# Deciding Factors

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- Sometimes a court case involving a clash of values is based on the source of the values.
- *Barnette*: The value of patriotism comes from the curriculum and policy of the state and local district. The value of free speech comes from the 1<sup>st</sup> Amendment to the Constitution.

# Sometimes the Judges Have to Decide Which Value Is More Important

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- *Brown v. Board*: Local control of our public schools is built into our laws and customs: a good and important value.
- But it is less important than the value of treating people of different races equally.
- And Equal Protection under the law is a constitutional value.

# The Lawyer's Role

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- “It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.” Model Rules of Professional Conduct, 2.1, comment 2.



# The Mary Poppins Approach

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- “In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits.”  
Model Rules of Professional Conduct, 2.1,  
comment 1.

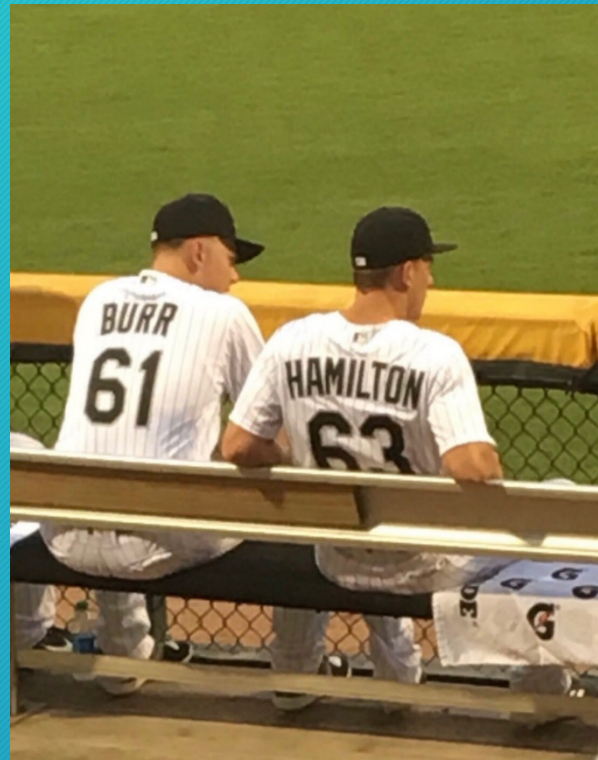
# Got a Better Idea?

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- Our system of values clarification through legislation and litigation is frustrating, expensive, time consuming and generally a very poor way of doing business.
- But it's better than an autocratic government.
- And it beats dueling.

# Get It?

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