This 80-Year-Old Supreme Court Case Offers Hope for Teachers Who Think DEI Has Gone Too Far

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Last month, the Supreme Court's landmark First Amendment decision in *West Virginia v. Barnette* (1943) turned 80 years old. Remarkable for its enduring relevance as a guarantor of free speech, *Barnette* is now key to the emerging legal pushback against the excesses of so-called diversity, equity, and inclusion (DEI) programs—as a recent civil rights lawsuit demonstrates.

Barnette involved a constitutional challenge to a West Virginia law mandating daily flag salute and recitation of the pledge of allegiance in public schools. Several students who were Jehovah's Witnesses objected to this requirement, citing their belief that reciting the pledge of allegiance is an act of idolatry.

The Supreme Court then famously invalidated the law on compelled speech grounds, and in doing so, the elegant pen of Justice Robert H. Jackson delivered one of the most memorable lines in all of constitutional law. He explained:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Applying that principle, the Court determined that the West Virginia law was unconstitutional because "the compulsory flag salute requires affirmation of a belief and an attitude of mind," and forcing a student to recite the pledge requires that he "utter what is not in his mind."

Critically, the Court was not concerned with whether the children were required to believe what they were saying or merely recite the words along with their classmates. Nor did it matter to the Court that the students could clarify their actual beliefs with their peers and teachers relatively easily. Instead, the Court rightly recognized that the intimate and personal way in which the

students were compelled to affirm a contrary belief by standing, saluting the flag, and reciting the pledge was inherently injurious to their First Amendment rights.

Eighty years later, Brooke Henderson and Jennifer Lumley, two employees of the Springfield Public School District in Springfield, Missouri, have sued the school district to vindicate *Barnette*'s constitutional principle against compelled speech. The events leading to their suit began when the district implemented mandatory districtwide "equity" trainings in fall 2020. The topics of the training included "Oppression, White Supremacy, and Systemic Racism" and tools on "how to become Anti-Racist educators."

Specifically, these sessions taught that believing in colorblindness is a form of white supremacy, that systemic racism is "woven into the very foundation of American culture, society, and laws," and that American institutions all contribute to or reinforce "the oppression of marginalized social groups while elevating dominant social groups." Participants were also told that being sufficiently "anti-racist" means not remaining "silent or inactive" because doing so constitutes "white silence"—a form of white supremacy.

As the Heritage Foundation's GianCarlo Canaparo highlights in a recent law review article, anti-racism is itself a distinct ideological viewpoint with "two central premises from which its policy prescriptions flow." The first is that racism is the sole cause of disparities between racial and ethnic groups. The second is that the cure for past discrimination is present discrimination.

These suppositions, taken together, inform anti-racism's view of "equity," which it defines as numerically equal outcomes between races. Anti-racism's policy for achieving "equity," therefore, requires "antiracist discrimination" to establish this numerical equality between racial and ethnic groups.

During training sessions, employees were required to answer questions and give responses affirming anti-racist assertions. To complete their training, Henderson and Lumley both gave many answers that they did not actually believe.

Henderson and Lumley subsequently sued, alleging that their speech was unconstitutionally compelled during the trainings. A federal district court rejected their claims, but the pair have appealed their case to the U.S. Court of Appeals for the 8th Circuit.

What the district court failed to recognize is that just like in *Barnette*, Henderson and Lumley were repeatedly forced to utter what was not in their minds by affirming an *ideological message* with which they disagreed. They were required to participate in exercises such as locating themselves on an "Oppression Matrix" and a "Social Identities" chart. The underlying premises for these activities can be traced to the anti-racism theories associated with Ibram X. Kendi. When Henderson and Lumley completed these exercises, they were forced to adopt the viewpoint of the district and its equity trainers.

Whatever one may think of the contestable and value-laden assertions advanced by the training, the First Amendment rights of Henderson, Lumley, and every other similarly situated public employee were violated when they were required to betray their true beliefs and affirm this viewpoint.

It is indisputable that one cannot be compelled to salute the flag and honor the nation. It should be equally clear that one cannot be forced to disparage her either.

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