

The Washington Post

The government can't make you use 'zhir' or 'ze' in place of 'she' and 'he'

Josh Blackman

June 16, 2016

The New York City Commission on Human Rights recently announced that employers, landlords and other professionals are required to use a transgender person's preferred pronoun "regardless of the individual's sex assigned at birth." The Equal Employment Opportunity Commission similarly determined that failing to use a person's preferred pronoun could violate federal anti-discrimination laws.

Though these mandates may seem like acts of civility, they in effect impose ideas about gender identity on speakers. Requiring people to voice beliefs that they do not hold, or even understand, is a flagrant and unacceptable violation of the freedom of speech.

In one of the rare areas of agreement in constitutional law, the Supreme Court has consistently held that requiring people to express certain ideas is unconstitutional. The Supreme Court's seminal pronouncement on the doctrine of compelled speech involved a student who practiced the Jehovah's Witness faith. He was disciplined for refusing to salute the American flag and recite the pledge of allegiance. In *West Virginia State Board of Education v. Barnette*, the court ruled that this state action violated the First Amendment. "If there is any fixed star in our constitutional constellation," wrote Justice Robert Jackson, "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."

Students who did not agree with saluting or pledging allegiance to the flag could not be compelled to do so. It was not enough to tell someone "recite the pledge, but don't believe it." Our law does not recognize a distinction between the speech and the thought behind it.

The Supreme Court has consistently and unanimously reaffirmed *Barnette*. In *Wooley v. Maynard*, the justices found that a resident of New Hampshire could not be forced to display a license plate on his car that said "Live Free or Die." In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, the court held that parade organizers could not be forced to allow an LGBT group to march in the St. Patrick's Day parade. These precedents demonstrate that the government cannot compel the expression of ideas that a speaker may not hold.

With respect to transgender nomenclature, critics may counter that refusing to use a person's preferred pronoun amounts to harassment and is no different from using a slur. There are at least three critical distinctions. First, derogatory slurs exist in the vernacular for a specific reason: to be derogatory. The same cannot be said for pronouns, which have existed in language since time immemorial as a benign shorthand to identify people. Imposing a mandate that millennia-old nomenclature is now harassment is a bridge too far. Furthermore, unlike laws regulating the definition of marriage, the state has never played *any* role in granting its imprimatur to language one way or the other. New York's unprecedented pronoun mandate is the first instance of the government dictating speech.

Second, while a non-binary view of gender may be orthodoxy in certain segments of society, a near-majority of Americans reject it as a fact of life. A recent CBS News/New York Times poll asked about which public bathroom transgender people should be allowed to use. Forty-six percent responded that they "should have to use the public bathrooms of the gender they were born as." Forty-one percent responded that they "should be allowed to use the public bathrooms of the gender they identify with." Imposing an idea on 46 percent of Americans who do not hold that belief cannot be reconciled with the marketplace of ideas guarded by our First Amendment.

Third, there is a subtle but critical line between promoting tolerance and controlling thought. UCLA Law Professor Eugene Volokh explained that the New York law "requir[es] people to actually say words that convey a message of approval of the view that gender is a matter of self-perception rather than anatomy." As the polling suggests, reasonable minds disagree about sex and gender identity. Requiring everyone to adopt a new vernacular ends any debate.

The notion that the state can now control language is reminiscent of "Newspeak," the fictional language in the dystopian classic "1984." Taking a page from Orwell, the Big Apple actually *requires* speakers to use the invented gender-free pronoun "ze," a word that does not appear in five different dictionaries I checked. A future version of this regime could potentially outlaw gendered pronouns altogether, so as to accommodate gender-fluid individuals. Taken to its natural conclusion, this effort to promote tolerance is frighteningly intolerant.

Over the past two decades, popular support for same-sex marriage skyrocketed, in large measure due to the marriage equality movement's two-pronged message: We only want to love each other the way you do, and we are not imposing any of our beliefs on you. This is a remarkably effective rallying cry and convinced millions of Americans (myself included) to alter their views on this issue. New York City now throws away that carrot and wields a stick: If you do not immediately express a view of the world you disagree with, the government will impose a \$125,000 fine.

This Orwellian tactic is not the way to change hearts and minds. New York should go back to the drawing board and draft up a more inclusive way of being more inclusive.

Josh Blackman is a constitutional law professor at the South Texas College of Law, Houston and an adjunct scholar at the Cato Institute. He is the author of "Unraveled: Obamacare, Religious Liberty, and Executive Power." He blogs at JoshBlackman.com and tweets at @JoshMBlackman.