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Will Courts Defend Free Speech -- Or Forced Speech To Promote A Political Agenda?

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One of the great liberal (in the true sense of the word) decisions by the Supreme Court is *West Virginia Board of Education v. Barnette*, the 1943 case where the justices struck down a law that forced school children of the Jehovah's Witness faith to salute the flag and recite the Pledge of Allegiance or face punishment for declining to do so.

The Court saw that compulsory speech was unconstitutional and un-American because, as Justice Jackson wrote, it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to reserve from all official control." In telling the state that it could not mandate the rote utterance of certain words, the Court was upholding liberty – the cornerstone of the nation.

Today's "liberals" have forgotten the wisdom of *Barnette*. They care little about liberty and instead desire to impose their ideas by force.

We see their authoritarianism popping up all around, and one place is mandatory speech. A number of states have enacted laws that require pregnancy clinics to post signs informing women who go there for help that the government has made family planning services, including abortion, available at low cost or even free. Even if the people who operate the clinic believe that abortion is morally wrong, they must post the sign or, like the Jehovah's Witness children in *Barnette*, face punishment by the government.

Hawaii has enacted such a law and it is under challenge in federal district court. In *Calvary Chapel Pearl Harbor v. Chin*, the plaintiff argues that the law is unconstitutional. As attorney Ken Connelly of the Alliance Defending Freedom, which is assisting the plaintiffs, argues [here](#), "No one should be forced to provide free advertising for the abortion industry, least of all pro-life centers that exist to help women choose life for their babies."

He's right. Those who favor abortion have abundant resources to inform women of that option and where to obtain one (even at taxpayer expense) without forcing people who do not favor it to spread their message. In fact, the pro-abortion side is so able to advertise its message that it's difficult to believe that this law is anything other than a political victory dance.

But the Hawaii case may be rendered moot by a case the Supreme Court may hear this year, *National Institute of Family and Life Advocates v. Becerra*. The case arose out of a California law that, just like in Hawaii, compels pro-life clinics to advertise the availability of abortion. It comes to the Supreme Court from the Ninth Circuit, which upheld the law on the grounds that it is a reasonable regulation of "professional speech."

Seriously? Since when does a mandate to post a prescribed sign have anything to do with speech regarding professional services?

As Cato Institute's amicus brief supporting the petition in the case argues, it has nothing to do with any proper regulation of speech by a professional. Ilya Shapiro and Thomas Berry point out, "The quality of true 'professional speech' that justifies limited regulation – namely an asymmetry of expert knowledge – is entirely absent here."

In other words, California's statute actually has nothing to do with *professional speech*; it simply forces *professionals* to speak in ways they may regard as morally wrong or harmful. "When a message can be understood by any individual who reads a website, brochure, or advertisement," Shapiro and Berry continue, "it is not unique to the doctor-patient relationship."

Moreover, if the Ninth Circuit's decision were to stand, it would set a horrible precedent for all sorts of speech mandates that politicians might decide upon to help advance their political agendas. The Ninth Circuit was content to allow the government to force medical providers to post messages deemed relevant "to the health of the state's citizens," but that is so broad that almost anything could be mandated. The government should not be allowed to, write Shapiro and Berry, "put a thumb on the scale for the state's favored viewpoint."

Again, right, but I would mention that "the state" in fact has no viewpoint. Rather, some people have managed to use the state's coercive power to force people who disagree with their viewpoint to bow down to them. That is not what government is supposed to be for.

Cathy Rose of the Family Research Counsel hits the nail squarely on the head, saying here, "In the war of ideas, the government should never force one side to carry the flag of the other. It's not fair. More than that it's government forced speech and that's not constitutional."

Oh, but what about the state's supposed interest in ensuring that women know about the availability of abortion? That is no more compelling than the argument in *Barnette* that the government needed to promote national unity. Whether it needed to do that or not, the means used – mandated speech – was inappropriate and unconstitutional. The same is true here.

The Supreme Court needs to rule strongly against the concept of mandated speech, which offends the First Amendment just as much as does the suppression of speech.

If it doesn't, we will undoubtedly see more and more such mandates, and probably more intrusive ones. It is bad enough to be compelled to post a sign that conveys information you regard as immoral, but why stop at signs? Could California mandate the equivalent of a Miranda warning for pregnant women? The Ninth Circuit's decision opens the door to such abominations.

I will watch these cases and write about their outcomes in the following months.