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FIRST AMENDMENT—FREE SPEECH

Wooley v. Maynard, 97 S. Ct. 1428 (1977).

In *Wooley v. Maynard*,[1] the Supreme Court reviewed an action seeking declaratory and injunctive relief brought in federal court by George Maynard,[2] who was convicted[3] for covering the state motto on his license plate, in violation of a New Hampshire statute.[4] Mr. Maynard, a Jehovah's Witness, considered the state motto, "Live Free or Die," repugnant to his moral and religious beliefs.[5] Appellee Maynard was arrested and convicted three times for his statutory violations.[6] He did not seek a state court review of his convictions[7] but served out his fifteen day jail term. Upon discharge from prison, Maynard filed suit in federal court seeking equitable relief—specifically, to prevent future arrests for obscuring the state motto and to require issuance to him of license plates not bearing the state motto.

Wooley presented the Supreme Court with three issues: the proper jurisdictional forum for the controversy, the legitimate scope of federal equitable power and the resolution of a conflict with the first amendment. The Court, in an opinion written by Chief Justice Burger, held that despite appellees' failure to exhaust their state appellate remedies, federal jurisdiction was not precluded because appellees sought wholly prospective relief.[8] The Court also held that the district court's granting of injunctive relief to the appellees was not error, since the "exceptional circumstances" necessary to invoke such a strong remedy were present.[9] Finally, in the constitutional realm, the Court struck down the New Hampshire statute prohibiting removal of the state motto from license plates.[10] The Court decided that the first amendment prohibits a state from requiring an individual to display ideological messages on his private property "in a manner and for the express purpose that [they] be observed and read by the public."[11]

JURISDICTION

The State of New Hampshire claimed the district court was precluded from exercising jurisdiction in the controversy because of the *Younger*[12] doctrine of "equitable restraint," which precludes the federal courts from intervening in on-going state criminal proceedings. Appellees in *Younger v. Harris* filed a complaint in the federal district court seeking injunctive relief against prosecution by the Los Angeles district attorney in a pending state case. The federal petition was filed after the state had indicted appellee for violation of the state statute. The United States Supreme Court refused to enjoin the district attorney in order to avoid "violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances."[13]

The *Wooley* Court noted, however, that *Younger* principles cannot deny an individual

[1] Wooley v. Maynard, 97 S. Ct. 1428 (1977).

[2] Mrs. Maynard was also a party to the action since, as joint owner of the family cars, she is no less likely to be subjected to state prosecution than her husband. 97 S. Ct. at 1433.

[3] He was arrested November 27, 1974, and given a $25 suspended fine. He was arrested for the second time on December 28, 1974, and given a 15 day jail term, which he served. He was arrested for the third time January 3, 1975. Maynard received no punishment in addition to the 15 day jail term for his last conviction. 97 S. Ct. at 1432.

[4] N.H. REV. STAT. ANN. § 262:27-c (Supp. 1973).

[5] Mr. and Mrs. Maynard believe it would be contrary to Jehovah's Kingdom to serve up their lives for the state. 97 S. Ct. at 1431 n.2.

[6] *See* N.H. REV. STAT. ANN. § 262:27-c (Supp. 1973).

[7] Time for appeal from Maynard's convictions had expired before Maynard filed the federal action. Wooley v. Maynard, 406 F. Supp. 1381, 1384 n.4 (D.N.H. 1976).

[8] 97 S. Ct. at 1433.

[9] "To justify injunctive relief there must be exceptional circumstances and a clear showing that an injuction is necessary in order to afford adequate protection of constitutional rights." 97 S. Ct. at 1434 (quoting Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935)).

[10] N.H. REV. STAT. ANN. § 263:1 (1966) requires every non-commercial car to bear a license embossed with "Live Free or Die." Section 262:27-c (Supp. 1973) makes it a misdemeanor knowingly to obscure the figures or letters on any number plate.

[11] 97 S. Ct. at 1435.

[12] Younger v. Harris, 401 U.S. 37, 41-46 (1971).

[13] *Id.* at 41.

resort to a federal forum when there is a "genuine threat of prosecution" and there is no pending state action on the controversy.[14] The requirement of a "genuine threat of prosecution" was demonstrated in *Steffel v. Thompson*,[15] a case cited in *Wooley*[16] as authority for this issue. In that case, petitioner showed a "genuine threat of prosecution" by establishing a police intention to arrest him if he engaged in pamphleteering. The *Steffel* Court recognized that if there was a pending state criminal proceeding, the federal plaintiff would still be provided with a forum to vindicate his constitutional rights, and therefore, the federal courts would not intervene.[17] But if there were no pending state proceeding, as was the case in *Steffel*, the refusal of a federal court to exercise jurisdiction would leave the plaintiff "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[18]

A fortiori, Mr. Maynard demonstrated a "genuine threat of arrest." He had, unlike petitioner in *Steffel*, already been arrested and convicted three times for obscuring the state motto, and there was no indication that arrests would cease if he once again engaged in similar activity. The Supreme Court in *Wooley* stated that the Maynards were placed in the same ideological/practical dilemma as petitioner in *Steffel*, since there was no pending state action to provide a forum for the Maynards' constitutional claim.[19] Thus, the Court concluded that the district court had had jurisdiction to resolve the dispute.[20]

This part of the *Wooley* opinion is well-reasoned and supported by precedent. It seems that the intention of the *Steffel* Court was to provide a forum for federal claims when there is no contemporary state action to resolve the conflict. By serving his jail term and ignoring state appellate review, Mr. Maynard had divorced himself from the state judicial system. Thus, if he was to obtain relief, his only option was to petition the federal courts.

New Hampshire next attempted to establish Mr. Maynard's failure to appeal his state conviction as a basis for denial of federal jurisdiction, citing *Huffman v. Pursue, Ltd.*[21] for the proposition that "a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in District Court."[22] However, the Court noted that *Huffman* was factually inapposite and therefore not controlling.[23] In *Huffman*, the petitioner wanted the federal court to review the lower state court's ruling. The district court's refusal to exercise jurisdiction was upheld, because "[f]ederal post-trial intervention, in a fashion designed to annul the results of a state trial . . . deprives the State of a function which quite legitimately is left to them, that of overseeing trial court dispositions of constitutional issues which arise in civil litigation over which they have jurisdiction."[24] Unlike the appellee in *Huffman*, Mr. Maynard was not seeking to annul his lower court convictions.[25] The relief he sought was purely prospective—to preclude further prosecutions under a state statute Maynard thought was unconstitutional.

The petitioner in *Huffman* had been indicted for a statutory violation, but he had not been through the state trial proceeding. The *Wooley* Court correctly recognized that the Maynards' petition was not an attempt to prevent effectuation of pending state court proceedings: the New Hampshire court had already convicted Maynard, and he had fully served his appointed sentence. A key phrase which limits the applicability of *Huffman* is: "[*A*] *party in appellee's posture* must exhaust his state appellate remedies."[26] Since Maynard was not in the same position as the appellee in *Huffman*, the Court's refusal to require an exhaustion of state court remedies for access to federal jurisdiction was principled.

Equitable Powers

After deciding that the federal courts had jurisdiction, the *Wooley* Court discussed the

[14] 97 S. Ct. at 1433.
[15] 415 U.S. 452 (1975).
[16] 97 S. Ct. at 1433.
[17] 415 U.S. at 462.
[18] *Id.*
[19] 97 S. Ct. at 1433.
[20] *Id.*
[21] 420 U.S. 592 (1975).
[22] *Id.* at 608. This meant *Younger* standards had to be met when there was no exhaustion of the state court proceedings.
[23] 97 S. Ct. at 1433.
[24] 420 U.S. at 609.
[25] He did not ask to have his record expunged, nor did he ask for relief from a potential license revocation. 97 S. Ct. at 1433.
[26] 420 U.S. at 608 (emphasis added).

appropriate remedies available should the Maynards prevail on the merits. Appellees sought both declaratory and injunctive relief against enforcement of the New Hampshire statute. The principle enunciated in *Steffel,* which permits federal declaratory relief when there is no pending state action but there is a "genuine threat of prosecution," vested the *Wooley* Court with authority to grant the Maynards' prayer for declaratory relief without further extension of existing precedent. However, the "stronger injunctive medicine" is not usually granted to enjoin enforcement of state criminal statutes.[27] In fact, the Court in *Spielman Motor Co. v. Dodge*, a case in which petitioner brought suit to restrain the District Attorney of New York from instituting criminal proceedings against him, said that generally a court will not enjoin "the enforcement of a criminal statute even though unconstitutional."[28] However, the *Wooley* Court pointed out that when there are "exceptional circumstances" and a "clear showing that an injunction is necessary to protect federal rights," the courts are permitted to enjoin state enforcement.[29]

The Court noted that the three prosecutions Mr. Maynard had already suffered through, the surety of future prosecutions and the effect such prosecutions had on the appellees' ability to lead normal lives were exceptionally burdensome circumstances involving deprivation of federal rights.[30] Consequently, the *Wooley* Court decided that the district court was not limited to the granting of declaratory relief.[31]

The *Wooley* decision helped to clarify several particularly difficult areas of the law. Ever since *Younger,* the Supreme Court has been extremely careful not to tip the balance of federalism.[32] This cautious approach was historically sound, since clearly the federal courts were not meant to sit as capricious masters over the state courts or legislatures.[33] Yet the *Steffel* Court recognized "the paramount role Congress has assigned to the federal courts to protect constitutional rights."[34] Previously, the Court had recognized federal court power to issue declaratory judgments[35] and grant preliminary injunctions.[36] However, it had expressly reserved its judgment on the advisability of granting permanent injunctions against enforcement of state laws.[37] In *Wooley,* the Court finally decided that its *Steffel*-mandated role as constitutional protector might require it (or other federal courts) on occasion to prohibit the effectuation of state statutes.[38]

Interestingly, the *Wooley* Court stated that there were exceptions to the general *Spielman* bar against federal injunctions aimed at state criminal laws, thereby intimating that it was following clear precedent. Yet the Court failed to cite any previous cases decided on this ground. Thus, although it appears that *Wooley* is the first case to be explicitly categorized as an exception, the Court did not extensively discuss its rationale or the substantiation of an abstract principle.[39]

Justice White in his dissent criticized the majority for the rather vague rationale it used to justify the granting of equitable relief.[40] According to Justice White, the majority departed from established case law without explaining why the case at hand merited different consideration. The argument posited by Justice White was that prior to the Supreme Court's declaration that the New Hampshire statutes were unconstitutional, the state officers arresting Mr. Maynard had only been doing their duty; therefore, there had been no exceptional circumstances. The majority, however, properly focused not only on Maynard's past arrests, but also on the possibility of his future arrest and the disruptive effect such a threat would have on his normal living habits.[41]

In support of the majority opinion, it should be recognized that the federal courts have exercised their constitutional power to declare state statutes void since the nascent days of the republic.[42] A plantiff in federal court would

[27] Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

[28] 295 U.S. 89, 95 (1935).

[29] 97 S. Ct. at 1434 (quoting *Spielman Motor,* 295 U.S. at 95).

[30] *Id.*

[31] *Id.*

[32] *See, e.g.,* Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974).

[33] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[34] 415 U.S. at 473.

[35] *Id.* at 463.

[36] 422 U.S. at 930.

[37] 415 U.S. at 462.

[38] 97 S. Ct. at 1433.

[39] *See generally id.* at 1434.

[40] *Id.* at 1437.

[41] *Id.* at 1434.

[42] Cohens v. Virginia, 19 U.S. 264 (1821). Defendant was convicted for selling lottery tickets contrary to Virginia law, and he claimed protection under an act of Congress.

derive little benefit from the court's exercise of this power if the federal court did not have strong medicine to back up its decision. In the *Wooley* case, Mr. Maynard had, within a two-month period, gone to jail and faced revocation of his driver's license. There could be no surety that the state of New Hampshire would immediately cease its prior arrest policy,[43] especially in view of *State v. Hoskin*,[44] a pre-*Wooley* case, in which the Supreme Court of New Hampshire upheld the identical license plate statute struck down by the United States Supreme Court in *Wooley*. By granting an injunction, the Supreme Court of the United States removed the element of uncertainty which underlies the mere issuance of a declaratory judgment. In a criminal justice system dedicated to ensuring prior notice of what conduct will evoke penal sanctions, the *Wooley* decision represents a step forward.

The Court's decision to grant a federal injunction was grounded upon firm constitutional principles. The Constitution, through the tenth amendment, left all residual powers not specifically delegated to the federal government to the states.[45] This broad grant of police powers allows a state to legislate for the health, morals, safety and well-being of its citizens. However, the statutes enacted by each state legislature must not conflict with the strictures of the United States Constitution.[46] When there is a conflict, the Supreme Court of the United States has power to declare the conflicting statute unconstitutional.[47] The Supreme Court in *Wooley* exercised this option and declared the New Hampshire license plate statute constitutionally infirm. This ruling, in effect, precluded the State of New Hampshire from asserting that the aforementioned statute legitimately furthered an allowable state interest. When the Supreme Court declares a state statute unconstitutional, it is not withdrawing a small portion from the nebulous mass known as the states' plenary powers; rather, it is saying that the particular statute in controversy does not fit within that mass of powers at all.[48] Since the statute in *Wooley* was held to be outside the scope of New Hampshire's power,[49] New Hampshire cannot legitimately contend that it has an interest in the enforcement of the statute. If New Hampshire has no valid interest in enforcing the statute, then a federal injunction prohibiting prosecutions under that statute does not usurp any constitutional power from New Hampshire's crime prevention arsenal.

Constitutional Merits

The Supreme Court applied a two-tiered test to determine whether Mr. Maynard was allowed to cover the state motto on his license plates. First, it decided whether his conduct was entitled to first amendment protection. Then, it measured the interest Maynard had in exercising that first amendment freedom against the countervailing interests of the state in retaining the motto.

At the district court level the Maynards claimed that the act of masking the motto was protected by the first amendment because (1) it was done to avoid making a required affirmation and (2) it was "symbolic speech."[50] The three-judge district court[51] accepted the Maynards' "symbolic speech" argument and did not consider whether the first argument was operative.[52] The district court believed covering the state motto communicated the Maynards' strong disagreement with the motto message, thus transforming the action into protected "symbolic speech" within the purview of *Tinker v. Des Moines School District*[53] and *Spence v.*

[43] Nothing compels a state legislature to immediately erase statutes declared unconstitutional from their books.

[44] 112 N.H. 332, 295 A.2d 454 (1972).

[45] U.S. Const. amend. X.

[46] Cohens v. Virginia, 19 U.S. at 394.

[47] *Id.* at 404.

[48] The United States Supreme Court discussed this point in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). See text accompanying note 69.

[49] 97 S. Ct. at 1435.

[50] The concept of "symbolic speech" is discussed in detail in United States v. O'Brien, 391 U.S. 367 (1968). The *O'Brien* Court noted that it did not accept the theory that a limitless variety of conduct could be labeled "speech" just because a person engaging in that conduct intended to express an idea. *Id.* at 376. Instances where the Court held the activity of individuals to be protected "symbolic speech" are Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), and Spence v. Washington, 418 U.S. 405 (1974).

[51] Because the plaintiffs sought an injunction against a state statute on grounds of its unconstitutionality, a three-judge district court was convened. pursuant to 28 U.S.C. § 2281 (1965). 406 F. Supp. at 1383.

[52] Judge Bownes would have rested the decision on both grounds. 406 F. Supp. at 1386 n. 9.

[53] 393 U.S. 503 (1969).

Washington.[54] In *Tinker*, the United States Supreme Court said that the wearing of black armbands as a protest against war was closely akin to "pure speech."[55] Since the wearing of the armbands was divorced from actual or potentially disruptive conduct, the school board could not overcome the plaintiff's right to express freely his opinion.[56] Appellant in *Spence* engaged in a "form of communication," even though he did not use spoken or written words,[57] by displaying a peace symbol on the American flag. The Supreme Court held that this display, combined with the factual context of the times (several days after the Kent State shootings and the Cambodian invasion), was a form of protected expression.[58]

In contrast, the Supreme Court, reviewing *Wooley* on appeal,[59] affirmed the district court judgment, basing its decision on what it perceived to be an unconstitutional requirement of ideological affirmation and not on the "symbolic speech" issue.[60] Both the majority[61] and the dissent[62] noted that the Maynards' claim of symbolic speech was undermined by their request for the issuance of a special license not bearing the state motto. In contrast, appellants in *Tinker* and *Spence* desired to convey affirmatively ideological messages by their actions. Wearing a black armband or flying a flag embossed with a peace symbol were activities universally recognized as being content-laden. The Maynards' request for a special license suggested a greater desire *not* to display "Live Free or Die," than a desire affirmatively to disavow acceptance of the state motto. Yet the Supreme Court asserted that the right to refuse affirmation is as constitutionally protected as the right to speak.[63] The landmark case cited to support this proposition was *West Virginia State Board of Education v. Barnette*.[64] In that case, the State Board of Education ordered that the flag salute become a regular part of the program of activities in the public schools. All teachers and pupils were required by statute to participate in the salute with a penalty of expulsion for non-compliance. Appellees were Jehovah's Witnesses who refused to salute the flag for religious reasons. The Supreme Court affirmed the lower court's ruling striking down the statute. It was noted that school attendance was not optional; therefore, the Jehovah's Witnesses either had to flout state attendance requirements or be subjected to participation in an ideological affirmation that was repulsive to their religious beliefs.

The *Barnette* Court said that government censorship of speech is allowable only where there is a showing of a "clear and present danger."[65] The Court then stated: "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."[66] The state of West Virginia could not offer any reasons which qualified as "immediate and urgent" necessities for the continued operation of the statute. As the Court noted, "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[67]

The *Barnette* decision overruled *Minersville School District v. Gobitis*,[68] which had upheld a similar flag salute statute. The *Gobitis* Court had assumed the state had power to impose flag saluting on children in public school. However, the *Barnette* Court found it unnecessary to determine whether non-conformist belief would exempt students from this duty, because it held that the states do not have the power to make the salute a legal duty.[69]

The majority in *Wooley* recognized that there was a difference between the actions required of an individual in *Barnette* and those in *Wooley*. The flag salute necessitated an active verbal affirmation of political belief, while displaying a license plate was a purely passive act. However, Chief Justice Burger felt this was merely a diffence in degree, not in kind.[70] Display of license plates on automobiles in New Hamp-

[54] 418 U.S. 405 (1974).
[55] 309 U.S. at 505.
[56] *Id.* at 508.
[57] 418 U.S. at 409.
[58] *Id.* at 410.
[59] Since a state statute had been struck down as unconstitutional, the state had a right to direct appeal to the United States Supreme Court.
[60] 97 S. Ct. at 1435.
[61] *Id.* at 1434.
[62] *Id.* at 1438 (Rehnquist, J., dissenting).
[63] *Id.* at 1435.
[64] 319 U.S. 624 (1943).
[65] *Id.* at 633.
[66] *Id.*
[67] *Id.* at 634.
[68] 310 U.S. 586 (1940).
[69] 319 U.S. at 638.
[70] 97 S. Ct. at 1435.

shire, like school attendance in West Virginia, was mandatory.[71] Thus, when the Maynards drove their car in public, they were constantly "an instrument for fostering public adherence to an ideological point of view [they found] unacceptable."[72] The New Hampshire statute was seen as requiring the Maynards to use their personal property as a "mobile billboard" for the state's ideological message.[73]

The Court's task was not completed after merely identifying the Maynards' act as one meriting first amendment protection. Following the thrust of free speech cases since *Schenk v. United States*,[74] the *Wooley* Court evaluated the countervailing interests which the state had for maintaining "Live Free or Die" on all passenger plates. The two interests advanced by the state were that the display of the motto facilitated the identification of passenger vehicles and promoted appreciation of history, individualism, and state pride.[75] The district court[76] directly applied the *O'Brien*[77] test to the facts before it and found that the balance swung in favor of the Maynards' interests rather than the state's. In *O'Brien*, the Court held that even speech-related activity could be controlled (1) if the governmental regulation is within the constitutional power of the government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to suppression of free expression; and (4) if the incidental restrictions on alleged first amendment freedoms are no greater than essential for furtherance of that interest.[78]

The *Wooley* District Court found the New Hampshire statute failed the last two parts of the test: (1) the governmental interest (having people read the motto)[79] was related to suppression of free speech, and (2) even if the purpose was neutral (*i.e.*, for identification purposes), the stifling effect of the statute was greater than essential for furtherance of the state interest.[80]

The Supreme Court, although not directly referring to *O'Brien*,[81] analyzed the respective interests of the Maynards and the state and came up with the same result as the district court had reached. The state's interest in officially communicating to others proper appreciation of history and state pride was deemed by the Supreme Court in *Wooley* not ideologically neutral.[82] The Court agreed that the state may pursue such interests in many ways, "[h]owever, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[83] Like the district court in *Wooley*, the Supreme Court rejected the state's other argument—that the motto was necessary for identification purposes—because of the procedure used by the state to implement that interest.

The Court's ruling on the constitutional merits presents a potentially far-reaching doctrine. Both the majority and Justice Rehnquist in his dissent dealt with the question of whether United States currency with "In God We Trust" printed on it is constitutionally permissible. The majority seemed to suggest that there was a difference between money and license plates in terms of public display time.[84] Yet, that type of analysis seems to undermine the "difference of degree" rationale which the majority used for extending *Barnette's* prohibition of active verbal affirmation to *Wooley's* passive affirmation.[85]

Justice Rehnquist, in his dissent, saw "the logic of the Court's opinion lead[ing] to startling . . . and . . . totally unacceptable results."

[71] See note 10 *supra*.

[72] 97 S. Ct. at 1435.

[73] *Id.*

[74] 249 U.S. 47 (1919). Justice Holmes first formulated his famous "clear and present danger" test in this case. Defendants were convicted of making antidraft circulars and the Supreme Court upheld the convictions under the Espionage Act of 1917.

[75] 97 S. Ct. at 1436.

[76] 406 F. Supp. at 1388.

[77] 391 U.S. 367 (1968).

[78] *Id.* at 377.

[79] See text accompanying notes 88–89.

[80] 406 F. Supp. at 1388.

[81] The Court said that it had to measure the countervailing interests of the state and cited *O'Brien* as an example of the prior use of this technique. 97 S. Ct. at 1436.

[82] 97 S. Ct. at 1436.

[83] *Id.*

[84] [W]e note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the National Motto.

97 S. Ct. at 1436 n.15.

[85] See text accompanying note 70.

"I cannot imagine," he said, "that the statutes . . . proscribing defacement of U.S. currency impinge upon the First Amendment rights of an atheist."[86] Justice Rehnquist was correct in asserting that the logic of *Wooley* could find permissible the removal of "In God We Trust" from currency without penalty; however, why he found the result "totally unacceptable," and why the majority tried to distinguish license plates from money is hard to explain. Perhaps both sides were looking at the problem with extreme biases. The governments of New Hampshire and the United States have placed "Live Free or Die" and "In God We Trust" on license plates and currency for a reason. The reason cannot be New Hampshire's claim that it aided in identification of passenger cars: a neutral slogan like "Scenic New Hampshire" would have served the same purpose.[87] Similarly, the United States could not claim that the addition of the U.S. motto materially aided detection of counterfeit currency. Rather, the reason must be that the respective governments chose to display these ideologically charged mottoes for their intrinsic meaning. They are clear statements of philosophical convictions. The *Wooley* Court perceptively noted that the New Hampshire statute effectively required citizens to use their private property as "mobile billboards" for the state's message.[88] Although the vast majority of Americans may agree with both New Hamsphire's and the United States' mottos, as the Court said in *Barnette*, "[o]ne's right to life, liberty, and property, to free speech . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[89] Thus, United States statutes prohibiting currency defacement should be held unconstitutional to the extent that they restrict an individual from obscuring "In God We Trust."

After declaring the New Hampshire statutes substantively infirm,[90] the Court noted that the motto requirement was also procedurally defective because there were "reasonable alternatives." The "reasonable alternative" doctrine was substantially formulated in *Schneider v. State*.[91] In that case, a state statute which prohibited the distribution of leaflets on city streets, ostensibly to eliminate littering, was struck down by the Court. The Supreme Court stated: "We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."[92] The Court then cited several different alternatives which the city could have used to prevent littering without stifling free speech.

For the next eleven years the "reasonable alternative" doctrine remained relatively dormant. Surprisingly, the same day the Court revived and expanded the doctrine to include commerical activity,[93] it narrowed its application in the free speech area.[94] In *Feiner v. New York*, a man was arrested and convicted for causing a public disturbance, which resulted from an unpopular speech he had delivered to a large crowd. The Supreme Court refused to reverse the conviction, stating that the petitioner was neither arrested nor convicted for the making or the content of his speech—rather it was the reaction which the speech engendered.[95] The Court chose not to apply the "reasonable alternative" test and failed to note the options which were available to the local police; for example, they could have tried to calm the loud crowd or to protect the speaker. Instead the police forced the speaker to refrain from further speech.

Wooley seems to be an affirmation of the principle established in *Schneider* that the State may not broadly stifle first amendment freedoms in order to facilitate routine state functions when there are less burdensome alternatives. Yet, it is difficult to determine how far the present Court would be willing to go in protecting speech, if it were presented with a volatile situation like the one in *Feiner*. Both *Schneider* and *Wooley* presented clear cases: the Court could unhesitatingly proclaim the superiority of speech interests over everyday admin-

[86] 97 S. Ct. at 1439.

[87] This slogan was printed on New Hampshire plates prior to enactment of the "Live Free or Die" requirement in 1969. In addition, the evidence strongly suggested that the state plates generally consist of two letters followed by four numbers, so that they are easily identifiable without the motto.

[88] See text accompanying note 73.

[89] 319 U.S. at 638.

[90] 97 S. Ct. at 1435.

[91] 308 U.S. 147 (1939).

[92] *Id.* at 162.

[93] Dean Milk v. Madison, 340 U.S. 349 (1951).

[94] Feiner v. New York, 340 U.S. 315 (1951).

[95] *Id.* at 320.

istrative ones, since non-controversial alternatives were available. However, it has been much more hesitant to protect speech that is unpopular and generates an unfavorable or undesirable response. It often seems as if its rationale is that one can say whatever he wants and receive first amendment protection, as long as people either like what he says or do not seriously listen to what he says.

Justice Rehnquist employed his own type of "reasonable alternative" test in the dissent. He claimed that the Maynards were perfectly free to place bumper stickers on their car disavowing affirmation of the state motto—as long as they did not cover the motto. However, that rationale is plainly refuted in recent Court opinions. In *Miami Herald Publishing Co. v. Tornillo*,[96] the Supreme Court dealt with an argument made by the city of Miami which was identical to Justice Rehnquist's argument. The city argued that its "Right to Access" law, which forced the area newspapers to publish rebuttals, did not restrict the papers from printing anything they wanted. The Court said arguing that the "statute does not amount to a restriction of appellant's right to speak because 'the statute in question here has not prevented the *Miami Herald* from saying anything it wished' begs the core question."[97] It was "[c]ompelling editors or publishers to publish that which '"reason" tells them should not be published' [which] is at issue in this case."[98] Similarly in *Wooley*, the question is not whether the Maynards can somehow override the political statement they are carrying, but whether they can be forced to carry the statement at all. The Supreme Court in *Wooley*, upholding first amendment principles, answered in the negative.

[96] 418 U.S. 241 (1974).

[97] *Id.* at 256.

[98] *Id.*

Conclusion

The Court's decision in *Wooley* represents a wholesome desire to reaffirm the individual's rights in a majoritarian society. The strong support for the extension of *Barnette*, evidenced in *Tornillo*, *Rowan v. Post Office Dep't*[99] and *Wooley*, reflects a concern for each individual, regardless of his political, philosophical, or religious beliefs. In the past, the government tried not only to proselytize the masses with majoritarian ideologies, but also to force each individual to participate in such activity.[100] Clearly the State has an interest in promoting itself, and *Wooley* recognizes that right. However, *Wooley* prevents the government from overextending its influence. Such a holding faithfully adheres to the well-established principles of the first amendment and raises the hope that the Court will expand still further the rights of individuals in relation to those of the majority.

[99] 397 U.S. 728, 737 (1970). There the Court said: "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status . . . ."

[100] *E.g.*, the forcing of children to salute the flag in *Barnette*, 319 U.S. 624 (1943).