UNCONSTITUTIONAL GOVERNMENT SPEECH

In Wooley v. Maynard, the United States Supreme Court held that the state of New Hampshire could not impose criminal sanctions on a citizen who covered the motto "Live Free or Die," which appeared on his motor vehicle license plate. This Comment analyzes the Wooley decision and discusses the fundamental first amendment doctrines at issue, including compelled speech, symbolic speech, and governmental speech. The author concludes that this case marks the development of a constitutional restriction on government's participation in the system of political expression.

The first amendment to the United States Constitution provides, in part, "Congress shall make no law . . . abridging the freedom of speech . . . ."1 Strictly construed, this language prohibits legislatively imposed restraints on the exercise of free speech by individuals. This prohibition does not expressly restrict speech by the government itself. However, the United States Supreme Court was recently confronted with a direct challenge to the constitutionality of governmental speech. In Wooley v. Maynard,2 the Supreme Court exhibited an increased willingness to decide the controversy surrounding governmental speech against the government and its agencies. This decision marks the evolution of a new judicial attitude toward protections guaranteed by the first amendment.

The Supreme Court held in Wooley that the state of New Hampshire could not constitutionally enforce criminal sanctions against residents who cover from view the motto "Live Free or Die," which appears on state issued passenger vehicle license plates. In a 7-2 decision, Chief Justice Burger, writing for the majority, stated that forcing "an individual . . . to be an instrument for fostering public adherence to an ideological point of view . . . 'invades the sphere of...

1. The first amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

2. The freedom of speech secured by the first amendment against abridgment by the United States Congress is applied to the states through the fourteenth amendment. Schneider v. State, 308 U.S. 147 (1939); Gitlow v. New York, 268 U.S. 652 (1925).

intellect and spirit which it is the purpose of the First Amendment to
our Constitution to reserve from all official control." This ruling,
which focuses on the purpose of the first amendment, reflects an
expansive reading of first amendment principles and has significant
implications for future interpretations of the first amendment's rela-
tionship with governmental activities.

In *Wooley*, appellee George Maynard had been convicted for
knowingly obscuring the slogan on his motor vehicle license plate. Mr. Maynard had covered the motto with tape because it was repug-
nant to his political beliefs. After his state conviction was entered, Maynard brought a civil action seeking declaratory and injunctive
relief in federal district court pursuant to 42 U.S.C. section 1983. The
district court held in favor of Maynard and ordered a permanent
injunction against all further arrests for covering the motto. Respondent Neal Wooley, Chief of Police of Lebanon, New Hampshire,
appealed to the United States Supreme Court, which heard the case
on November 29, 1976.

Historic difficulties with first amendment principles surfaced as
the Court attempted to resolve the major constitutional issues re-
garding the legal consequences of expression and dissent. The

statute has been interpreted to include the motto which appears on the license
plate. State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972). Initially, the appellee,
George Maynard, merely placed tape over the motto. However, because neigh-
borhood children kept removing the tape, Mr. Maynard snipped the words "or
Die" off the license plate and covered the resulting hole, as well as the words
"Live Free," with tape.
6. In an affidavit Mr. Maynard stated that he believed life was more precious
than freedom. He also asserted religious objections to the motto. *Wooley v.
Maynard*, 430 U.S. 705, 707 n.2. (1977). However, the religious objections are
beyond the scope of this discussion.
7. Actually, Maynard was convicted on three separate occasions. He refused
to pay the fines imposed as sentences for the violations and was incarcerated for
a period of 15 days.
8. Section 1983 reads:
Every person who, under color of any statute, ordinance, regulation,
custom, or usage, of any State or Territory, subjects, or causes to be
subjected, any citizen of the United States or other person within the
jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the
party injured in an action at law, suit in equity, or other proper proceed-
ing for redress.
10. The Supreme Court noted probable jurisdiction in *Wooley v. Maynard*,
11. Although the first amendment guarantee of freedom of speech was added
to the Constitution in 1791, it was not until 1919, in *Schenck v. United States*, 249
U.S. 47 (1919), that the Supreme Court began to address systematically the
question of the scope of free-speech principles. As to historical difficulties in
Court in *Wooley* was confronted with three fundamental constitutional doctrines. First, Maynard challenged his conviction on the ground that New Hampshire had unlawfully compelled him to perform acts reasonably likened to speech, thereby violating the compelled speech doctrine. Second, Maynard contended that his conviction infringed on his right to expression through protected symbolic speech. Finally, and most significantly, he challenged the constitutionality of New Hampshire’s participation in activity amounting to political expression. The Supreme Court’s treatment of these fundamental first amendment doctrines make *Wooley* one of the most important free speech cases heard by the Burger Court.

**Compelled Speech**

One of Maynard’s principal constitutional defenses to his conviction was that the state of New Hampshire, by requiring him to display the motto on his license plate, compelled him to engage in speech, thereby violating his first amendment rights. The Supreme Court agreed, stating:

> We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.”

The main support for the Court’s holding was *West Virginia State Board of Education v. Barnette*. In this case the Court held uncon-...
institutional a state statute requiring public school children to recite the pledge of allegiance while simultaneously saluting the flag. Justice Jackson, writing the majority opinion, stated: "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." Compelling children to affirm a belief by speech and gesture was deemed by the Court to be an unconstitutional infringement upon first amendment rights.

In comparing Wooley to Barnette, the Court contrasted the forced salute of the flag and recitation of the pledge of allegiance with the required display of a political motto. The Court decided that the difference was "essentially one of degree," with both situations comprising unconstitutional attempts by states to compel speech on behalf of their residents.

The dissent in Wooley, written by Justice Rehnquist, also relied on the holding in Barnette but disagreed with its application to Wooley. The dissent stated that the difference between the two cases was not merely one of degree but one of kind. This difference in kind was based on the nature of the acts performed. In Barnette, the school children were required actively to speak words and to stand with arms extended in a saluting gesture. In Wooley, the compelled act was the display of a motto which appeared on a license plate. Thus, Barnette involved active conduct whereas Wooley involved only passive conduct because Maynard would be required to display a license plate regardless of the appearance of a motto thereon. Justice Rehnquist concluded: "The State has not forced appellees to 'say' anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to 'speech,' such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture."

14. 319 U.S. at 642.
15. The Court stated: "Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree." 430 U.S. at 715.
16. Justice Blackmun joined in the dissent. Id. at 719 (Rehnquist, J., dissenting).
17. The states' power to license automobiles has been upheld in a number of cases. E.g., Sproles v. Binford, 286 U.S. 374 (1932); Carley & Hamilton, Inc. v. Snook, 281 U.S. 66 (1930).
18. 430 U.S. at 720 (Rehnquist, J., dissenting). The dissent continued: "The Court recognizes, as it must, that this case substantially differs from Barnette, in which school children were forced to recite the pledge of allegiance while giving the flag salute. . . . However, the Court states "the difference is essentially one of degree." But having recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain. Id. at 721.
Recognition of this distinction between the two cases does not end the inquiry. The passive-active differentiation exists, but is it a satisfactory basis for deciding the constitutional issue involved? The dissent in Wooley argued that compelling passive acts is not unconstitutional because the passive act carries no affirmation of belief. The dissent reasoned that first amendment principles are only implicated when the state places the citizen in the position of either appearing to assert or actually asserting the truth of the message. Because the state of New Hampshire had not placed Maynard in a position of appearing to assert the truth of "Live Free or Die," no compelled speech existed.\(^\text{19}\) The majority disagreed, stating that compelling passive acts also results in identification between the actor and the message conveyed, thus falling within the ambit of Barnette and constituting compelled speech.

The little constitutional precedent on point supports the dissent. In Engel v. Vitale,\(^\text{20}\) the Court struck down a state statute requiring public school children to recite a prayer in class.\(^\text{21}\) In Torcaso v. Watkins,\(^\text{22}\) a unanimous Court held that a newly appointed notary public could not be denied his commission because he refused to take an oath, required by the Maryland Constitution, declaring his belief in the truth of a religious tenet.\(^\text{23}\) In Baggett v. Bullitt,\(^\text{24}\) the Court invalidated a requirement that teachers take an oath swearing to promote respect, by precept and example, for the flag and the institutions of the United States and the state of Washington.\(^\text{25}\) In each of

\(^{19}\) Id.
\(^{21}\) In Shelton v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963), the district court invalidated a requirement that school children sing the National Anthem in class, stating that "government authority may not directly coerce the unwilling expression of any belief, even in the name of 'national unity.'" Id. at 775.
\(^{22}\) 367 U.S. 488 (1961)
\(^{23}\) Justice Black, speaking for the majority, stated: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.'" Id. at 495.
\(^{24}\) 377 U.S. 360 (1964).
\(^{25}\) In Cole v. Richardson, 405 U.S. 676 (1972), the Court articulated the general proposition that:

[N]either federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs. . . . Nor may employment be conditioned on an oath that one has not engaged, or will not engage, in protected speech activities such as the following: criticizing institutions of government; discussing political doctrine that approves the overthrow of certain forms of government; and supporting candidates for political office. Id. at 680.
these cases the government compelled active conduct which resulted in an unconstitutional restriction of first amendment rights.

Although prior to *Wooley* the Court had not confronted the problem of compelled passive activity, the decisions rendered in the compelled speech cases emphasized the connection between active conduct and the appearance of, or actual endorsement of, the truth of the message conveyed. Even in *Barnette*, on which the majority in *Wooley* relied, the Court stated: "It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."27

The compelled speech doctrine prohibits forced activity which places the actor in a position of affirmatively asserting, or appearing to assert, the truth of a political or philosophical message. In each case, the determination of whether compelled speech exists invariably depends upon whether a viewer would reasonably conclude that

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26. For cases considering the related question of governmental subsidy of political speech by affiliated organizations such as labor unions and bar associations, see note 75 and accompanying text infra.


To 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.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. . . . Hence the validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

*Id.* at 634.
the actor was affirming the truth of the message. Many factors must be considered in ascertaining whether conduct is sufficiently associated with the actor to convey the reasonable impression that the actor is asserting the truth of the message. These factors include whether the actor is compelled to perform active or passive conduct; whether observers are aware, or by observation become aware, that the actor is engaging in activity similarly required of all persons situated in the actor's class or category; what the physical proximity is between the required activity and the actor himself; and how visible and conspicuous the activity or motto is. This list is not exhaustive because the determination is basically one of fact and a variety of circumstances is possible.

Of primary importance is the recognition that compelled speech principles only apply when there is a sufficient relationship between the actor and the activity to convey a reasonable impression that the actor is asserting the truth of the message carried by the activity.

28. For example, if a viewer observed the children involved in Barnette, the reasonable conclusion drawn would be that the children believed in the patriotic message conveyed by saluting the flag and reciting the pledge of allegiance.

29. The active-passive distinction is especially relevant because of its relation to the purpose underlying the compelled speech doctrine. The Court in Barnette, where the compelled speech doctrine originated, was concerned with the dangers inherent in a ceremonial setting where groups of people appear, through required activity, to affirm the truth of a political tenet or precept. See note 76 infra. Surely, the oath cases demonstrate that a ceremonial setting is not essential to a finding of compelled speech, but the emphasis put upon the ceremonial aspect in the majority of cases indicates the Court's willingness to invalidate state statutes which compel active conduct.

30. In State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972), on which the dissent in Wooley relied, the New Hampshire Supreme Court stated its opposition to the claim of compelled speech:

   Similarly, we think that viewers do not regard the uniform words or devices upon registration plates as the craftsmanship of the registrants. They are known to be officially designed and required by the State of origin. The hard fact that a registrant must display the plates which the State furnished to him if he would operate his vehicle is common knowledge.

   Id. at 336-37, 295 A.2d at 457.

31. In general, display of a motto on a lapel button carries a greater degree of appearance of affirmation of belief than display of a motto on a license plate. See text accompanying note 18 supra.


33. Id. at 721 (Rehnquist, J., dissenting). In fifth amendment self-incrimination cases, the Court makes a similar distinction between compelled conduct which is communicative or testimonial and compelled conduct which is not communicative and therefore not violative of the right against self-incrimination. See United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars); Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars); Warden v. Hayden, 387 U.S. 294 (1967) (utilization of articles of clothing); Schmerber v. California, 384 U.S. 757 (1966) (submission to blood test).
Because the first amendment grants protection to communications, compelled conduct which does not involve communication by the actor is beyond the scope of the compelled speech doctrine.

The dissent in Wooley correctly dismissed the compelled speech challenge to Maynard's conviction because Maynard was not forcibly placed in a position of appearing to assert the truth of the motto. A reasonable observer would not conclude that Maynard believed in the truth of "Live Free or Die" simply because his required license plate displayed the motto. A reasonable observer would conclude that the government which instituted the motto believed in its truth and was communicating this belief to the public through the required motto. Therefore, no compelled speech existed in Wooley, and proper disposition of the case depends on more applicable first amendment principles.

**Symbolic Speech**

The federal district court that heard Wooley ruled that Maynard's conviction was unconstitutional because he was engaged in protected, symbolic speech. The court reasoned that the act of covering the motto was intended to call attention to the motto's effacement and thereby communicate Maynard's disagreement with its contents. New Hampshire citizens were aware that the motto appeared on the license plates of passenger vehicles. The likelihood therefore was great that they would interpret Maynard's conduct as an expression


35. The Court stated, in footnote 15 of its opinion, that a minimum degree of identifiability between the actor and the message conveyed is required to invoke compelled speech principles:

It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator.

430 U.S. at 717 n.15.

Although this statement correctly expounds the method of disposition of compelled speech cases, it is hardly consistent with the reasoning used in the text of the majority opinion. The difference between the compelled acts in Barnette and the compelled display of the motto upon United States currency whenever tender of that currency is made is also one of degree, yet the Court differentiates between display of the motto in Wooley and display of the motto on the dollar bill. This inconsistency is difficult to explain and evidences the Court's problems in deciding Wooley on compelled speech principles.

36. For discussion of unconstitutionality of government speech, see notes 61-103 and accompanying text infra.

of conscientious objection to the motto. Having concluded that Maynard's act of obscuring the motto was intended to be expression, and was readily perceived as such, the district court enjoined further prosecution for this expression of an idea through conduct.\(^{38}\)

However, the Supreme Court, including the majority and the dissenting justices,\(^{39}\) dismissed the symbolic speech defense on the ground that Maynard's intent in placing tape over the motto was not to communicate affirmative opposition to the motto. The Court's reasoning was based upon Maynard's request to the trial court that he be issued license plates on which no motto appeared. Because of this request for expurgated plates, the Court determined that Maynard's overriding concern was to free himself from the class of persons required to display the motto.\(^{40}\) Communicating affirmative opposition to the motto was not the purpose of covering the motto; therefore, no symbolic speech existed.

In formulating this approach to the issue of symbolic speech, the Court relied substantially on\(^{41}\)Spence v. Washington. In this case, a college student had hung an upside-down American flag with a peace symbol attached to it outside his apartment window. He was convicted under Washington's "improper use" statute forbidding the exhibition of a United States flag to which figures, symbols, or other extraneous material are attached or superimposed.\(^{42}\) The student testified without contradiction at trial that he displayed his flag in such a manner to protest against then-recent United States actions in Cambodia and fatal events at Kent State University.\(^{43}\) His express purpose was to associate the American flag with peace instead of with war. The Supreme Court overturned his conviction on the

\(^{38}\) Id. at 1387.

\(^{39}\) Justice Brennan was the only member of the Court who appeared to support the symbolic speech claim. Wooley v. Maynard, 430 U.S. 705, 713 n.10 (1977).

\(^{40}\) The majority stated in footnote 10:

'...We note that appellees' claim of symbolic expression is substantially undermined by their prayer in the District Court for issuance of special license plates not bearing the state motto. ... This is hardly consistent with the stated intent to communicate affirmative opposition to the motto. Whether or not we view appellees' present practice of covering the motto with tape as sufficiently communicative to sustain a claim of symbolic expression, display of the "expurgated" plates ... would surely not satisfy that standard.'


\(^{43}\) Id. at 1387. See also State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).
ground that the appellant was engaged in protected, symbolic speech. The Court emphasized that the symbolic speech doctrine applies only when the surrounding circumstances indicate purposeful activity designed to convey a point of view which would be understood by those viewing the activity.44

As the Supreme Court in Wooley reasoned, the crux of the symbolic speech issue was the intent of Maynard at the time he covered the motto. The district court found that an intent to communicate existed; the Supreme Court found that one did not.

The basic question was one of fact, and primary reliance in answering this question should have been placed upon Maynard's statement of his purpose in covering the motto. Maynard stated that his chief concern in obscuring the motto was his refusal to be coerced by the state to advertise a slogan which he found politically abhorrent.46 Maynard did not expressly request that the state of New Hampshire remove the motto from all passenger vehicle license plates. He never objected to the motto as applied to all automobile owners within the state. Thus, Maynard was not objecting to the state's policy of requiring the motto in general; he was only objecting because he was required to display the motto. This distinction is crucial to the Supreme Court's disposition of the symbolic speech issue. The Court ruled that because Maynard was not purposely conveying a message in opposition to the motto, no symbolic speech had occurred.46 There

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44. The Court in Spence stated:
The context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. . . . A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it. . . . An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.


46. If a person destroys United States Selective Service records to protest against the Vietnamese War, he is engaged in symbolic speech. However, according to the Court in Wooley, if he burns his selective service records solely to protest against the possibility that he may be drafted into participation in the war, no symbolic speech would exist. The person would merely be attempting to free himself from that class of individuals required to fight in the war. In the absence of any statement against the war in general, the Court would dismiss a symbolic speech challenge to a conviction for burning the records because there was no purposeful activity designed to convey a particularized message. For criticism of the Court's reasoning, see text accompanying notes 47-55 infra.
was no purposeful expression of a viewpoint through activity.

This construction of the symbolic speech issue demonstrates the Court's willingness to grant less protection to communication by conduct than to communication by pure speech. If Maynard had driven his automobile while simultaneously speaking over a loudspeaker, "I object to the requirement that I display the motto 'Live Free or Die,'" the Court would have determined at the outset that Maynard was engaged in speech. Justification for arrest and punishment for such speech would depend on the existence of any legitimate state interests warranting a restriction upon the exercise of pure speech. Paradoxically, obscuring the motto, which essentially communicates to others Maynard's same objection to display of the motto, does not even meet the definitional test of symbolic speech. To support a finding of symbolic speech, the Court requires conduct primarily intended to convey a particularized message which would be understood by those viewing the conduct. This strict requirement does not exist in pure speech cases where the mere act of speaking automatically triggers first amendment principles regardless of whether a particularized message is intended.

The distinction between pure speech and symbolic speech is a result of the difficulties involved in finding the communicative aspect in a wide variety of conduct. To some extent, all conduct is communicative, because the observer of the conduct can make certain conclusions about the actor's reasons and justifications for his behavior. Often the actor's behavior can be interpreted in differing

47. In Cox v. Louisiana, 379 U.S. 536, 555 (1965), Justice Goldberg stated: "We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct...as these amendments afford to those who communicate ideas by pure speech." Accord, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Walker v. City of Birmingham, 388 U.S. 307 (1967).

48. Justice Holmes stated in Frohwerk v. United States, 249 U.S. 204, 206 (1919): "[T]he First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language." In Schenck v. United States, 249 U.S. 47 (1919), the Court similarly stated that spoken words, which are within the freedom of speech protected by the First Amendment, may be subject to restrictions if they create a clear and present danger. See also Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925).

49. Professor Emerson states:

To some extent expression and action are always mingled; most conduct involves elements of both... The guiding principle must be to determine which element is predominant in the conduct under consideration. Is expression the major element and the action only secondary? Or is the action the essence and the expression incidental?
ways and given different meanings. It becomes very difficult to ascertain accurately whether a person, by his conduct, is intending to communicate. Conduct which is non-communicative is not protected by the first amendment because it does not aid in the exchange of ideas.

The Supreme Court focused upon Maynard's request for expurgated plates in holding that he did not intend to engage in communicative conduct. The district court relied on the fact that Maynard must have intended to communicate because everyone viewing the taped-over motto would understand Maynard's objection to its contents.

Behavior is often motivated by more than one purpose. In Wooley, it is clear that Maynard objected to the motto. By obscuring the motto, Maynard expressed his opposition to self-display of the motto and communicated this opposition to others. Regardless of which purpose was paramount, it is clear that Maynard had some intention to communicate to others his objection to the content of the motto.

Recent commentators have suggested that courts employ a "substantially" or "primarily communicative" intention test to support a finding of symbolic speech in difficult cases. The decision in Wooley supports this assessment. Despite the fact that Maynard had more than one purpose in covering the motto, the Court found that the communicative intent was not primary and therefore dismissed Maynard's symbolic speech claim.

The sole justification for such a strict test lies in the problem of proving communicative intent. Because proving intent is so difficult,
the Court requires an extra burden of proof to be met by individuals
who assert that their conduct is symbolic speech.

Such a justification is not persuasive in view of the fundamental
quality of first amendment protections. The Court's requirement
that conduct be primarily communicative places an undue restriction
upon the right of expression through conduct. Instead, symbolic
speech determinations should focus on whether reasonable evidence
exists to conclude that any communicative intent existed at the time
the activity in question was performed. This method of construing
symbolic speech issues preserves a necessary burden of proof and
simultaneously gives maximum protection to fundamental first
amendment rights.

Application of this test to the facts in Wooley would lead to the
conclusion that Maynard was engaged in symbolic speech. Rea-
sonable evidence did exist which indicated that Maynard possessed
some communicative intent when he covered the motto.

However, a finding that Maynard's conduct satisfies the defin-
tional test of symbolic speech does not provide the final answer to the
case. Symbolic speech, as opposed to pure speech, takes place
through a non-verbal medium. When the medium serves sufficiently
important state interests, destruction of the medium is unlawful re-
gardless of any intention to communicate by such destruction. Illustra-
tive is United States v. O'Brien, in which respondent O'Brien
was convicted of burning his draft card in violation of federal law.
O'Brien had burnt his draft card to communicate his opposition to
the Vietnamese War and therefore challenged his conviction on the
ground that he was engaged in protected, symbolic speech. The Court
recognized the communicative nature of his conduct but upheld his
conviction, reasoning that the medium of his communication, the
draft card, served sufficiently important federal interests to justify
criminal conviction for its destruction.

55. Cox v. Louisiana, 379 U.S. 559, 574 (1965); Terminiello v. Chicago, 337 U.S.
1, 4 (1949); Marsh v. Alabama, 326 U.S. 501, 509 (1946); Lovell v. Green, 303 U.S.
404, 405 (1938).
57. "[E]ven on the assumption that the alleged communicative element in
O'Brien's conduct is sufficient to bring into play the First Amendment, it does
not necessarily follow that the destruction of a registration certificate is
constitutionally protected activity." Id. at 376.

A finding of symbolic speech merely triggers examination of the constitution-
ality of prohibiting destruction of the medium—whether it is a draft card or a
motto appearing on a license plate. In Street v. New York, 394 U.S. 576 (1969), a
Similarly, in *Wooley*, the medium of communication was the license plate, or more precisely, that part of the license plate where the motto appeared. New Hampshire required the motto as part of its licensing scheme. When, as in *Wooley*, the state requires the medium of communication as a means to promote an asserted governmental interest, then destruction of the medium is unlawful regardless of any intent to communicate by its destruction. Supra. Maynard’s obliteration of the motto was therefore unlawful unless he could demonstrate either the unconstitutionality of the required display of the motto or the unconstitutionality of the motto itself. The finding of symbolic speech merely initiates an examination of the constitutionality of New Hampshire’s requirement that passenger vehicle license plates display the motto “Live Free or Die.”

In the preceding discussion of compelled speech, it is shown that the requirement that Maynard display the motto was not unconstitutional because his display of the motto did not convey a reasonable impression that he was affirming the truth of the motto. Therefore, to challenge successfully his conviction, Maynard must have demonstrated that the motto itself is unconstitutional. A finding of symbolic speech is parasitic on the ultimate and decisive issue in *Wooley*, which involved the constitutionality of New Hampshire’s participation in political and ideological speech.

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See also *Spence v. Washington*, 418 U.S. 405 (1974). In *Wooley*, the district court recognized the parasitic nature of the symbolic speech issue but unsatisfactorily dismissed it by assuming, without discussion, that the motto was constitutionally objectionable. 406 F. Supp. at 1387.

For example, if the medium of Maynard’s symbolic expression were a license plate upon which appeared the motto “New Hampshire is Nice,” destruction of the medium by covering it with tape would be unlawful, even though Maynard would be engaging in symbolic speech by communicating his opposition to the contents of the motto. If the motto is permissible, then obliteration of it is punishable.


The distinction between the requirement of the motto and the motto itself is exemplified by *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), and *Engel v. Vitale*, 370 U.S. 431 (1962). In *Engel*, the Court struck down the requirement that school children participate in religious prayer but allowed willing school children to continue praying in class. In *Abington*, the Court struck down prayer recitation in public schools altogether, despite the fact that unwilling school children did not have to participate in the prayer ceremony.
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To reverse his conviction, Maynard had to argue that his conduct, amounting to symbolic speech, was protected because the motto itself was unconstitutional political expression by New Hampshire. However, prior to Wooley, the Supreme Court had never proscribed government activity which amounted to political speech. In fact, the Court had not faced a case challenging such political speech. In Wooley, the Court confronted the motto "Live Free or Die," which clearly conveyed a political message.61 By initiating and compelling placement of the motto upon passenger vehicle license plates, New Hampshire participated in conduct substantially identical to speech.62

A few constitutional cases have discussed incidentally the issue of governmental promulgation of ideological views. In Public Utilities Commission v. Pollack,63 passengers on municipal streetcars and buses brought an action against the transit commission challenging the constitutionality of broadcasting radio programs through loudspeakers on the streetcars and buses. The Court upheld the legality of the radio programs on the grounds that such programs did not interfere with the passenger's conversation and, more significantly, that there was no showing that the radio broadcasts contained any political or philosophical content.64 The majority did suggest that any use of the radio programs to broadcast political messages would be objectionable.65 In dissent, Justice Douglas stated:

When we force people to listen to another's ideas, we give the propagandist a powerful weapon. Today it is a business enterprise working out a radio program under the auspices of government. Tomorrow it may be a dominant political or religious group. Today the purpose is benign; there is no invidious cast to the programs. But the vice is inherent in the system. . . . It may be but a short step from a cultural program to a political program.66

61. The . . . motto, which is reminiscent of the words of Patrick Henry—"[B]ut as for me, give me liberty or give me death."—derives from the words of Major General John Stark, reputed to have been written in 1809 as part of a toast in a letter to former comrades-at-arms: "Live free or die; death is not the worst of evils."

63. 343 U.S. 451 (1952).
64. Id. at 463.
65. Id.
66. Id. at 469 (Douglas, J., dissenting).
In *Abington School District v. Schempp*, the Court struck down the recitation of official prayers in public schools. Justice Clark, writing the majority opinion, contended that the religious exercises violated the first amendment command that the government maintain strict neutrality, neither aiding nor opposing religion. In the earlier case of *Engel v. Vitale*, in which the Court invalidated the required narration of prayer in public schools, Justice Black stated: "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves . . . ." Justice Douglas, in his concurring opinion, stated that the first amendment dictates that the government have no interest in theology or religion.

In *Lehman v. City of Shaker Heights*, the Court upheld the right of a city transit system to prohibit the display of political campaign advertisements on municipal buses. Asserted justifications for the decision were that users of the buses would be subjected to a blare of propaganda and that problems would arise with the distribution of limited space to a large number of campaigning politicians. The mention of the possibility of harmful official interference with the political process indicates a distrust of political speech by government agencies. This attitude toward government participation in

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68. Id. at 225.
70. For distinction between the requirement of prayer and the prayer itself, see note 60 supra.
71. 370 U.S. at 435.
72. Id. at 443 (Douglas, J., concurring). See also McGowan v. Maryland, 366 U.S. 420, 563-64 (1961) (Douglas, J., dissenting) (Justice Douglas dissented from the majority's holding that the state of Maryland could constitutionally restrict the operation of a wide variety of business on Sundays).
74. Id. at 304.
75. In a related area, the Court ruled that a labor union, created pursuant to federal law, had no authority to make political expenditures with required dues payments over the employee's objection. *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). In *Lathrop v. Donohue*, 367 U.S. 820 (1961), the Court, in a plurality opinion, upheld the right of a state bar association to expend required dues payments for political purposes. The Court in *Lathrop* did not reach the first amendment question, stating that the petitioner had not sufficiently alleged the particular political expenditures to which he objected. However, both Justices Douglas and Black argued in dissent that the first amendment issue was properly before the Court. They contended that political expenditures of required dues money was an unconstitutional infringement upon free speech. Justice Douglas stated: "[T]he First Amendment applies strictures designed to keep our society from becoming moulded into patterns of conformity which satisfy the majority." *Id.* at 885 (Douglas, J., dissenting).

The dissenting opinions in *Lathrop* have been affirmatively cited in *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that the government may not
the system of political expression is especially manifest in Barnette, where the Court focused on the constitutional and political problems which inevitably arise whenever official support and approval is marshalled behind a particular message or belief.76

finance the dissemination of ideas to which dues-payers disagree when the financial backing of the dissemination comes from required dues payments.

In addition, many lower courts have confronted the constitutionality of state-university newspapers which make political endorsements. Such endorsements have been upheld because the state has a legitimate interest in providing students a forum of expression and, of greater consequence, because there has never been any showing that official state control has been exerted over the editorial content of the paper. In Veed v. Schwartzkopf, 353 F. Supp. 148, 152 (D. Neb. 1973), the district court stated that any such official state control "would raise grave constitutional questions." See, e.g., Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Arrington v. Taylor, 380 F. Supp. 1348 (D.N.C. 1974).

These cases were concerned with government authorization of organizations which make political endorsements. They did not involve speech by government entities; rather, they dealt with speech by organizations associated with government entities. However, these decisions do indicate the courts' negative attitude toward political speech by organizations affiliated with government.

76. In Barnette, the majority overruled the holding and rationale of Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), where Justice Frankfurter stated, in favor of the required flag salute and recitation of the pledge of allegiance:

We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security. . . .

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization . . . .

Id. at 595-96.

Justice Jackson, writing the majority in Barnette, answered the Gobitis decision, stating:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to those whose unity it shall be. . . . Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal
However, no court has explicitly ruled on the constitutionality of government speech. Even in Wooley the Court ostensibly evaded the issue while unsatisfactorily attempting to decide the case on compelled speech grounds. Nevertheless, an implied recognition of New Hampshire's unconstitutional participation in political speech is evident in the Court's statement that "a state measure which forces an individual...to be an instrument for fostering public adherence to an ideological point of view... 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.'" Reluctance to announce expressly the unconstitutionality of governmental speech is the result of the recognition that the first amendment does not, by its terms, prohibit governmental political expression. However, a broad interpretation of the first amendment to encompass a prohibition against governmental speech corresponds to the purpose and intent of the Framers in enacting the first amendment.

The drafters of the first amendment intended its guarantees to be read in a broad and liberal sense. Professor Emerson, a leading authority on first amendment principles, states that the precise meaning of the first amendment at the time of its adoption is a matter of dispute. However, he reasons that the provision was intended to assure the new nation the basic elements of a system of free expression as then conceived. As constitutional law has developed, the first amendment has come to have the same broad significance for our present, more complex society. The fundamental purpose of the first amendment is to guarantee an effective system of expression suitable for the present time. A broad interpretation of the first amendment is essential to the perpetuation of free government by free men.

opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

319 U.S. at 640-41.


78. In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816), Justice Story stated:

The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.


80. Id.

81. Marsh v. Alabama, 326 U.S. 501, 509 (1946); Martin v. City of Strutters,
The Framers of the Constitution were concerned with restrictions placed upon basic individual rights by dominating governments. The drafters' purpose was to preserve and maintain a political machinery which would protect the people's right and ability to govern themselves.

Governmental intrusion into the system of political expression impinges upon first amendment purposes and principles in two respects. First, speech by the government inhibits the process of the political mechanism itself. Freedom of expression is a method of achieving a more adaptable and hence a more stable political environment by maintaining the balance between healthy disagreement and necessary consensus. Governmental speech distorts this system by its coercive effect upon the otherwise free exercise of choice by the citizenry. As Justice Jackson stated in *Barnette*: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."

Freedom to choose and to decide among competing directions and


82. In his first inaugural address, Thomas Jefferson stated: "Let us restore to social intercourse that harmony and affection without which liberty and even life itself are but dreary things. . . . W[e] have gained little if we countenance a political intolerance as despotic, as wicked and capable of . . . bitter and bloody persecutions." *The Complete Jefferson* 394-85 (S. Padover ed. 1943).

83. The principle that man possesses the ability to govern himself is the result of the recognition of man's essential capacity to reason. John Locke stated:

The *Freedom* then of Man and Liberty of acting according to his own will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will.


Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .

In *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), the Court stated: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *See also* T. Emerson, *The System of Freedom of Expression* 6-9 (1970); note 76 supra.


86. 319 U.S. at 641. *See also* A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 15-16 (1948). Professor Meiklejohn similarly states that the exercise of political choice by the electorate must be made without coercion from the state.
policies which the government should adopt would have little practical significance if those in power were allowed to influence and to coerce the will of the citizens. The potential for abuse is clear if the government could place its power and prestige in a position of supporting particular political ends. Justice Black, in *Engel v. Vitale*, objected to required prayer in public schools, stating: "When the power, prestige and financial support of government is placed behind a particularized religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

These apprehensions are as aptly applied to government participation in political speech. Governmental speech will necessarily tend to distort the political mechanism by consolidating public opinion and coercing minority support to the detriment of government's ability to adapt to change and ultimately to exist in a stable and democratic state. These are precisely the political dangers which the Framers sought to prevent by adoption of the first amendment.

A second difficulty arising from governmental speech is that it elevates the position and the prestige of government to a potentially dangerous level. Such speech by government will not only establish certain political and ideological propositions as true but will also establish an appearance of government infallibility. As government consolidates more support and agreement behind its positions and policies, its appearance of credibility strengthens. Minority views become less forceful as government increases its image and prestige. The effect will not only inhibit the democratic process but will also encroach upon social progress as government becomes an overwhelmingly powerful institution in society. Government's power to promulgate beliefs will increase as government's position in society rises to that of the ideological spokesman for an ever-growing majority. The inevitability of abuse is clear. Governmental participation in speech will lead to a loss of individual freedom as the prestige of government increases and predominates in significance over the individual and alternative social institutions. Governmental political speech necessarily tends to inhibit intellectual diversity and social progress.

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88. *Id.* at 431.
89. This course of argument may lead to the conclusion that governmental political speech is prohibited by the express language of the first amendment because governmental speech indirectly abridges the individual's right to free speech. However, the indirectness of the abridgment places governmental political speech beyond the express language of the first amendment.
90. Alexis de Tocqueville, in his famous work, *Democracy in America*, pointed out the harmful effect that "majority tyranny" can have on the vitality of a
The purpose of the first amendment is to protect citizens from the very dangers that governmental speech will necessarily cause. Its basic unconstitutionality is clear. However, the prohibition against governmental speech should not be absolute. To interpret and apply this first amendment principle to actual disputes, it is necessary to define the exact nature and extent of this prohibition against government's participation in political and in ideological speech.

To qualify as governmental speech, the message asserted must be identifiable with the government as a whole. Clearly, the President, as the executive, may engage in political speech, as may congressmen or the Congress as a whole, and the Supreme Court justices, or the Supreme Court as a whole. The dangers inherent in governmental political expression arise because the government can use its power and prestige to influence political and social direction; therefore, such speech is only prohibited when exercised by, or apparently exercised by, the government as a whole. In addition, the speech, or activity likened to speech, must embody a political or philosophical message. Mere speech without objectionable content is permissible.

democratic state. A. de Tocqueville, Democracy in America (1832). In Z. Chafee, Government and Mass Communications (1947), Professor Chafee recognized the disproportionate amount of power government can obtain when it affirmatively attempts to influence and to direct social and political policy. This observation is especially true in view of the power of mass media and the limited number and variety of entities having access to the avenues of mass media. See generally Finman & Macaulay, Freedom to Dissent: The Vietnam Protests and the Words of Public Officials, 1966 Wis. L. Rev. 632.

91. In Methodist Fed'n for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956), a religious social organization brought suit against members of the Senate Internal Security Subcommittee, alleging that the subcommittee had falsely published a defamatory pamphlet which declared plaintiff to be a Communist front. In dismissing the complaint the Court stated:

Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.

Id. at 731. For sovereign immunity aspects of high-level government officials' liability, see Barr v. Matteo, 360 U.S. 564 (1959).

92. Although the motto “Live Free or Die” was instituted by the legislature, it is identifiable with the state of New Hampshire as a whole.

Governmental speech violates the first amendment rights of each resident within the jurisdiction of the government body which engages in political speech. Therefore, any individual within that jurisdiction would have standing to challenge the legitimacy of such speech. The infringement upon first amendment rights satisfies the "trifling interest" test, thereby conferring standing on all residents.94 Thus, in Wooley, the fact that an automobile owner brought the action is immaterial to the final disposition of the case. Any New Hampshire resident has standing to challenge the constitutionality of the motto because each resident's first amendment rights have been violated.

Similarly, the fact that the state required people to display the motto is immaterial. The motto itself is unconstitutional, not the required display of the motto.95 Even if New Hampshire placed the motto "Live Free or Die" on billboards overlooking the state's highways,96 it would be unconstitutional.97

No first amendment guarantee is absolute.98 The prohibition against governmental speech would similarly be subject to possible legitimate state interests which justify restrictions upon first amendment rights. In Wooley, New Hampshire unsuccessfully attempted to justify the motto on two grounds. First, the State contended that because registration of passenger automobiles was legitimate, the motto, as part of that registration scheme, was per-

94. In United States v. SCRAP, 412 U.S. 669, 689 n.14 (1973), the Court stated: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing . . . ." In Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961), the Court held that a person who cannot take a loyalty oath without committing perjury has standing to challenge the constitutionality of the oath. See, e.g., Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Baker v. Carr, 369 U.S. 186 (1962).

95. See note 60 and accompanying text supra.


97. This point illustrates the irrelevancy of the symbolic speech issue. Although the facts in Wooley involve defacement of a license plate, Maynard would have a valid constitutional challenge to the motto whether he had obscured it or not. See notes 57-60 and accompanying text supra.

missible. The Supreme Court rejected this contention, stating: "Even were we to credit the State's reasons and 'even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' 100

Second, New Hampshire maintained that the motto was permissible because it promoted patriotism and state pride. The Court agreed that promotion of patriotism is a legitimate state interest, 101 but stated that such an interest cannot outweigh the first amendment rights at stake. 102

However, it is possible that situations could arise whereby governmental speech may be allowed. Such speech, designed to arouse patriotism during a time of war, may be justified, depending upon the content of the message conveyed. Another plausible state justification for governmental political expression may arise when the administrative inconvenience in halting the speech outweighs the "de minimis" effect of the governmental speech. 103

CONCLUSION

The first amendment embodies principles which preserve individual civil liberties. When these civil liberties are threatened, the first amendment must expand to provide the necessary protections. The growth of government coupled with the development of mass media presents new questions concerning freedom of expression and of communication. 104 As the number and the variety of entities having

99. The motto was placed only on passenger vehicle license plates, not on commercial vehicle license plates. The state argued that this differentiation fulfilled an integral function of the registration and licensing process.

100. 430 U.S. at 716 (1977) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

101. Id. at 716. In Barnette, the Court stated: "'[T]he state may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.'" West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (quoting Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940)).


103. This justification applies where the United States has already issued currency bearing the motto "In God We Trust." The near impossibility of recalling all currency and issuing new expurgated currency outweighs the minimal effect of the motto. However, this justification would not prevent the issuance of new currency without the philosophical motto appearing on it. See Aronow v. United States, 432 F.2d 242 (9th Cir. 1970); note 93 and accompanying text supra.

access to the avenues of mass media decrease, the power and the prestige of these entities increase. The potential for abuse threatens first amendment freedoms.

The Supreme Court in Wooley v. Maynard made significant statements concerning the compelled speech and symbolic speech aspects of the first amendment. More importantly, the Court's implied recognition of the unconstitutionality of government speech has major implications for the future of the system of political expression. The emphasis on the purpose of the first amendment demonstrates the Court's favorable disposition to grant full constitutional protection to freedom of speech. Now is the time for the judiciary to define expressly the limits of governmental activities in the political machinery. The decision in Wooley indicates the Court's willingness to set these boundaries.

JAY S. BLOOM

Constitutional commentators have also been considering the status of governmental speech as it affects public school book selections and curriculae. See, e.g., Goldstein, Asserted Constitutional Right of Public School Teachers to Determine What They Teach, 124 U. Pa. L. Rev. 1293 (1976); Schauer, School Book, Lesson Plans, and the Constitution, 78 W. Va. L. Rev. 287 (1976).