10-1976

Wooley v. Maynard

Lewis F. Powell Jr.

Affirm

3 J/Ct invalidated N.H. statute making it a crime to remove or deface the "motto" on state auto licence plate "Live free or die".

Reps are Jehovah witnesses who think this violates religious beliefs. Husband convicted & did not appeal, but wife — not convicted but threatened — entitled to fed. juris under Steffel

PRELIMINARY MEMORANDUM

Affirm. On the merits, DC is correct - in spades. Mrs. Maynard cd. bring it even if her husband couldn't, so no younger - res judicata issue, either.

Phil

May 27, 1976, Conf.
List 1, Sheet 1

Appeal from DNH (Coffin, Gignoux, Bownes)

No. 75-1453-ATX

WOOLEY et al. — Federal/Civil

v.

MAYNARD et al. — Timely

1. Summary. The lower court has enjoined enforcement of a New Hampshire statute making it a crime to obscure the motto "Live Free or Die" on a license plate issued by that state. The case also presents the question whether one who has been convicted under the challenged statute in state court, did not appeal and does

not attack those convictions, can secure federal relief from future prosecutions.

2. Facts. Appellees are George and Maxine Maynard, husband and wife and both Jehovah's Witnesses. They believe that their government, "Jehovah's Kingdom" offers them "everlasting life," and that "[i]t would be contrary to that belief to give up life for the state, even if it meant living in bondage." As an expression of this belief, they have since 1974 covered the state motto on the license plates of their two cars with brightly colored reflective tape. This puts them in violation of New Hampshire RSA 262:27-c:

> Any person who . . . knowingly obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle . . . shall be guilty of a misdemeanor.

George has been arrested three times for his crime. Acting pro se, he explained at each trial his religious motivation, but took no appeal from the convictions that were entered against him despite this objection. On the first occasion he was fined $25 and the fine suspended. On the second he was given a suspended sentence of six months and fined $50 more. For refusing to pay the accumulated fines he served fifteen days in jail. His third conviction was "continued for sentencing," a disposition that apparently means no sentence, Mr. Maynard being already in jail at the time this third trial began. Maxine has never been arrested, although she is part owner of each of the two cars and as such subject to prosecution.

The time in which to appeal the last of George's convictions

had expired when the Maynards brought this suit for declaratory and injunctive relief against future arrests and prosecutions. Their claim is that the enforcement of the statute against them for obscuring the state motto would violate their First and Fourteenth Amendment rights.

3. Decision below. DNH dealt first with the Younger problem. There was a clearly sufficient threat of prosecution, but no pending prosecution with which to interfere. Huffman v. Pursue, 420 U.S. 592 (1975), was distinguished as a case in which state appellate remedies were still open to the plaintiff, and the attack was on a prior state adjudication. Here, the relief sought was "purely prospective." Nor was Mr. Maynard bound by a state litigation of the constitutional issue: "Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdemeanor proceedings, collateral estoppel principles do not preclude this court from considering this issue." In any event Mrs. Maynard, the subject of no state proceedings of any kind, was not barred from federal court. She had her own beliefs, her own interest in the cars, and thus was under a "separate threat of prosecution." This was not a case "in which legally distinct entities are so closely related that they should all be subject to to the Younger considerations which govern any of them." Doran v. Salem, Inn, Inc., 422 U.S. 922, 928 (1975) (of three corporations engaging in the same conduct, one, the subject of state proceedings, could be barred by Younger while the other two were not because "the interest of avoiding conflicting outcomes in litigation of similar issues . . . must of necessity be subordinated to the claims

of federalism"). The DC also cited Steffel v. Thompson, 415 U.S. 452 (1974), in which federal relief was sought by two persons threatened with state prosecution for handbilling, and only the one who had been arrested for the offense was barred by Younger.

On the merits, the DC found it unnecessary to consider whether the challenged statute unconstitutionally compelled the affirmation of a particular belief, see West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943) (pledge of allegiance in public schools), although one judge (Bownes) would have rested on this ground. It was sufficient that the obscuring of the motto constituted symbolic speech protected by the First Amendment. As to the First Amendment interest, the DC had no doubt that the Maynards' message of strong disagreement with the motto was "philosophical and political," and also "likely to be readily understood" by those who observed the license plates. It thus enjoyed the same protection as the wearing of black armbands in Tinker v. Des Moines School District, 393 U.S. 503 (1969), and the taping of a peace symbol to the American flag in Spence v. Washington, 418 U.S. 405 (1974). As an infringement of symbolic speech, the statute failed the four-part test of United States v. O'Brien, 391 U.S. 367 (1968) (Regulation must be (1) "within the constitutional power of the government," and (2) must "further an important or substantial governmental interest," (3) which interest must be "unrelated to the suppression of free expression," and (4) accomplished by an "incidental infringement on alleged First Amendment freedoms . . . no greater than is essential to the furtherance of that interest.") Insofar as the statute was justified by the state's interest in promoting the appreciation of

history, state pride, and tourism, it was "directly related to the suppression of free expression" and therefore failed the third of O'Brien's tests. Insofar as it was justified by the state's interest in facilitating vehicle identification, the statute failed the fourth of O'Brien's tests. The motto was not necessary to identify the car as a New Hampshire vehicle, as proven by the fact that only passenger cars are required to carry it. (There was, the court noted, no showing that passenger and non-passenger cars had the same numbers, so as to make the motto necessary to distinguish them.) Citing Spence, supra, at 414 n.8, the court recognized that a statute's failure under O'Brien is not necessarily dispositive of its validity. The court then stated, however, that "neither of the interests New Hampshire has identified is sufficiently weighty to justify the interference with plaintiff's protected expression." It elaborated to the extent of rejecting the state's argument that the Maynards' First Amendment interests were minimal because of the alternative means of conveying their message, such as by bumper stickers near to, and disclaiming, the license plate motto. This argument had been rejected in Spence, supra, at 411 n.4, which in turn had quoted Schneider v. State, 308 U.S. 147, 163 (1939):

"[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

The DC therefore granted the requested relief, except that it refused to order the state to issue the Maynards special plates not bearing the motto. This would be an unnecessary and "ill-advised" interference.

4. Contentions. Appellants, officials of the State of New Hampshire, contest both rulings of the DC. (1) On the Younger point, they assert that George Maynard "expressly raised" a First Amendment defense in his state prosecutions. They argue that his failure to pursue state appellate remedies bars a federal adjudication. Appellees answer that there is no state proceeding to be protected from federal interference by Younger. They distinguish Huffman on the grounds that here the relief sought was entirely prospective, and that here there was no "deliberate decision" to bypass state appellate remedies in favor of a federal forum. This is shown, assertedly, by the fact that George Maynard underwent three state prosecutions before filing this suit. Appellees further align with the DC's determination that Maxine in any case can maintain the suit.

(2) On the merits, appellants recite the same state interests they relied on below. Their principal attack, however, is on the "communicative quality" of the prosecuted act. Unlike the acts in Spence and Tinker, which derived their expressiveness "from the then emotional Vietnam conflict," the obscuring of the motto is ambiguous, as is the motto itself. Appellants' acts would be seen by the observer as "pure whimsy," which is what they were. At stake are the "vehicle registration systems" of a number of states (e.g., North Carolina: "First in Freedom"), not to mention the national currency ("In God We Trust"). Appellees align with the DC. They argue that their conduct was even more expressive than the acts in Spence and Tinker, which involved no verbal message at all, and in any case more protected than the acts in those cases, since

appellees' alternative was the displaying of a slogan they conscientiously oppose.

5. Discussion. (1) In Huffman the plaintiff sought federal relief from the state court judgment "immediately," while state appellate remedies were still available, and the relief sought was directed specifically at that state court judgment--an order closing the plaintiff's movie theatre. Here, no further state appeal was available and the relief sought was purely prospective, having no direct effect on Mr. Maynard's past convictions. This case is therefore distinguishable from Huffman as far as Younger is concerned. The policies underlying Younger, see Steffel v. Thompson, 415 U.S. at 462, of avoiding disruption and duplication of state proceedings do not seem implicated, leaving only the danger of "reflecting negatively upon the state court's ability to enforce constitutional principles." Id. The importance of that danger is largely a policy matter, but it does seem that Younger could only bar relief here if it is generally to bar federal adjudication of a claim that could be taken to a state court. Appellees could seek declaratory or injunctive relief in a state court, rather than a federal one, but otherwise their only state remedy is defense to a state prosecution if one is brought. It does not seem that the existence of an unappealed state conviction for the same conduct should be dispositive, since the conviction might not have been worthwhile appealing if, for example, no sentence was imposed, as happened after Maynard's first conviction.

Even if Younger doesn't bar Mr. Maynard, however, there is the res judicata question reserved in Huffman. 420 U.S. at 606 & n.18.

If appellants are right that because Maynard "based his defense [in state court] upon the First Amendment," andtherefore litigated the constitutionality of the statutes, Petn at 12, then collateral estoppel is a potential bar. The issues litigated in state court are identical to those in federal court, but the decisive issues are legal ones, to which collateral estoppel does not apply "if injustice would result." 1B Moore, Federal Practice 4234. A sufficient danger of injustice may arise from the facts that (again) if estopped, the first conviction may not have seemed important, and that/ the proponent of a federal claim would be bound by the determination of a state court. If the DC is right that the First Amendment issue was not litigated in state court, Petn App at 28 n.6, then res judicata stands in Mr. Maynard's way only insofar as it bars the First Amendment claim because it should have been raised. But this seems unlikely, for the reasons stated above and also because the federal declaratory and injunctive suit is not the same "cause of action" as the state prosecution.

The foregoing is of importance, of course, only if Mrs. Maynard is barred to the same extent as her husband. The DC is probably correct that she is not. The event that gives rise to both appellants' prosecutions--the existence of the tape on the license plates--is the same, but Mrs. Maynard's offense (which could be only that she "permit[ted]" tape placed there by Mr. Maynard to remain) is nonetheless a distinct offense. It could have been committed, for example, while Mr. Maynard was in jail.

(2) On the merits, the DC also seems correct. Its determination that the attachment of the tape constituted a "philosophical and

political" communication, and one comprehended as such by the observer, would appear to be a factual determination that is not clearly erroneous. It also serves to limit the case to a very few kinds of license plate defacement. (North Carolina's is the only other plate described by appellants as having a political or philosophical motto. Closest rival: "Oklahoma is OK.")

The DC's O'Brien analysis also seems unexceptionable. The vehicle identification justification is very weak, and the interest of the state in having no defacement of its motto is just the kind of

The DC's O'Brien analysis also seems unexceptionable. The interest in of the state/preventing disrespect for its motto is just the kind of interest considered inadequate in O'Brien and Spence. The non-expression related interest of the state in vehicle identification may have some plausibility, in that police will at least be distracted by the tape and have to go to more than the usual trouble to verify the car's identity. In this respect the state's non-expression related interest is greater than in Spence, where the defaced flag had little or no non-expression related function. On the other hand the license plates are like the flag in that they are not owned by the state (at least the state does not so claim). Inasmuch as the plates carry a verbal message, their defacement is perhaps a more significant expression than was the defacement of the flag in Spence. On the whole, the interference with the state's non-expression related interest does not seem significant. The alleged threat to the national currency is specious. Defacement thereof must be prevented in order to preserve confidence in its authenticity.

There is a motion to affirm.

Conference 5-27-76

Court USDC, D. N.H.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 75-145

NEAL R. WOOLEY, ETC., ET AL., Appellants

vs.

GEORGE MAYNARD, ET UX.

4/12/76 - Appeal

Affirm

(Relisted for Rehnquist)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....							✓						
Stevens, J.							✓						
Rehnquist, J.				✓									
Powell, J.							✓						
Blackmun, J.				✓									
Marshall, J.							✓						
White, J.							✓						
Stewart, J.							✓						
Brennan, J.							✓						
Burger, Ch. J.							✓						

Conference 6-3-76

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 75-145

Wooley
vs.
Maynard

Relist
for
Rehnquist

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
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Stevens, J.													
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Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

No. 75-1453

There is rather persuasive - especially as to effect of this case as a precedent on U.S. currency, coins, passports & other possibly items issued by govt for nearly two centuries

Neal R. Wooley, etc., et al., Appellants

v.

George Maynard, et ux.

On Appeal from the United States District Court for the District of New Hampshire.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 10 1976

Recirculated: _____

MR. JUSTICE REHNQUIST, dissenting.

Applying the "freedom of speech" clause of the First Amendment, as applied to the States through the Fourteenth Amendment, the judgment of the District Court has granted appellees a permanent right to deface the New Hampshire license tags affixed to their cars by covering with tape the portion bearing the State motto, "Live Free or Die." The District Court's reasoning, used to invalidate a New Hampshire statute forbidding such defacement, betokens a like fate for longstanding federal statutes which prohibit the defacing of words such as "In God We Trust" on the face of United States currency, or of the eagle in the Great Seal of the United States on official passports. Because the Court's summary affirmance of this judgment to my mind constitutes an extension of our "symbolic speech" cases which is at once significant, unarticulated, and unwarranted, I dissent. I would note probable jurisdiction and set the case down for oral argument.

I.

As the Court's opinions in this area amply demonstrate, e.g., Spence v. Washington, 418 U.S. 405 (1974), any claim for First Amendment protection such as that advanced by appellees must be measured according to its factual setting and against a careful consideration of the State's interest in regulating conduct when such regulation is assertedly overborne by that Amendment.

The underlying facts are not disputed. Appellees George and Maxine Maynard, married residents of New Hampshire and owners of two registered passenger cars, were in possession of the State's standard-issue license plates for such vehicles. On these plates, typical of some 325,000 so issued by appellant Clarke as Commissioner of the Department of Motor Vehicles (DMV), are imprinted by raised letters the words "New Hampshire" (bottom), the State's motto, "Live Free or Die" (top), the year, and the usual combination of numbers and letters matching those appearing on the registration certificate and in turn identifying appellees in DMV files as the registered owners. As relevant here, sometime in early 1974 appellees began placing pieces of reflective, non-transparent red tape completely over the motto on the plates attached to their cars, and thereafter proceeded to drive on the public

highways around Lebanon, New Hampshire. Beginning in late 1974, George Maynard was arrested and prosecuted three times for violating N.H. Rev. Stat. Ann. § 262:27-c (Supp. 1973), which in pertinent part provides:

> "Any person who knowingly . . . obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle . . . shall be guilty of a misdemeanor."

The resulting convictions subjected him to both fines and incarceration; none was appealed.[1/]

On March 4, 1975, appellees brought this § 1983 action in the District Court. Their principal claim was that because they were Jehovah's Witnesses and disagreed with the religious and political implications of New Hampshire's motto, they had a right under the First Amendment to express their own views to the motoring public by obliterating the motto and venturing forth on the highway. They prayed for a declaration that § 262:27-c was unconstitutional as applied to them, and for injunctive relief against appellant local and state officials barring future prosecutions for its violation.[2/]

After an initial grant of temporary injunctive relief, a three-judge court held a brief evidentiary hearing. Testifying in his behalf, Maynard explained that his own beliefs

conflicted with the idea assertedly expressed in the motto, namely, that one's political freedom should be valued at least as highly as one's life. He stated: "I would rather live under bondage and still be alive to be able to enjoy my conscience and enjoy life that has everything to offer."[3] Thus, "[b]y taping [the motto] over," he was transmitting both an objection on "political grounds" and an expression "publicly to let people know of my faith."[4] Red reflective tape ensured that "people will recognize what I am doing," i.e., "bear[ing] witness to the truth of God's kingdom."[4a] Asked whether he, as a printer by profession, could counter the perceived message of the motto by his own printed bumper sticker, Maynard first stated, "Yes, but the State would object to it ," referring to the statement that if he made such a bumper sticker it would be "an illustration of a dog raising his leg on the State motto."[5] Pressed, he admitted that such a sticker would violate no State law, and proffered only that "[i]t wouldn't be very dignified."[6]

The State established that another alternative was available to appellees. Appellant Clarke stated that within the usual course of its operation the DMV could produce for appellees, for a fee of $5.00, one of its "vanity plates" without the State motto.[7]

In defense of its decision to place the State motto on the great majority of plates destined for passenger cars,[8] the State offered two rationales, which for convenience can be referred to as "communicative" and "functional." Under the first, as summarized by the District Court, the State "believes that the dissemination of the motto and the association of it with New Hampshire serves a number of values: fostering appreciation of state history and tradition; creating state pride, identity, and individualism; and promoting tourism." 406 F. Supp. 1381, 1386 (1976). Under the second, supported by the undisputed testimony of appellant Wooley, the Lebanon chief of police, the presence of the motto on almost all passenger cars operates in the context of other classes of motor vehicles to determine, at least as an initial visual matter, whether the vehicle bearing a particular plate is properly registered within the class as indicated by the plate's markings.[9] On the basis of this testimony and that of DMV Commissioner Clarke, the District Court found that "the presence of the motto on the plates aids in the identification of New Hampshire passenger cars." Ibid.

The District Court first held that appellees' "acts of covering the motto . . . constitute symbolic speech within the meaning of Tinker [v. Des Moines School District, 393 U.S. 503 (1969)] and Spence [v. Washington, supra]." Id., at 1387.

Applying the four-part test enunciated by this Court in United States v. O'Brien, 391 U.S. 367, 377 (1968), set out in the margin,[10/] the District Court reasoned that the "communicative" interest furthered by the State motto was "directly related to the suppression of free expression within the meaning of O'Brien." 406 F.Supp., at 1388. It stated:

> "Although a government may perhaps single out certain messages for special protection when they appear on public property, see Spence [,at 408-409], Spence teaches that the governmental interest in preventing individuals from interfering with the communication of the state sponsored message by engaging in symbolic expression is not an interest that meets the third requirement of the O'Brien test." Ibid.

As to the second, "functional" rationale - concededly unrelated to speech - the District Court held that § 262:27-c failed the fourth tenet of O'Brien: "the defacement statute's effect on [appellees'] First Amendment freedoms is certainly 'greater than is essential to the furtherance of that interest'." Ibid.

Since neither interest advanced by the State was found to justify the restriction on appellees' right of free expression, § 262:27-c was in the District Court's view unconstitutional as applied to appellees. Appellants were permanently enjoined from prosecuting appellees "for covering over that portion of their license plates that contains the motto 'Live Free or Die'." Id., at 1389.

II.

This remarkable decree is supported by reasoning which to me represents either an unparalleled extension of Spence,[11] a serious misapplication of O'Brien, or perhaps both.

Accepting for the moment the proposition that New Hampshire's "communicative" interest in disseminating its motto is analogous to Washington's interest in preserving the flag as a national symbol in Spence, 418 U.S., at 412-415, I have serious doubts whether the limited holding in Spence is controlling on these facts. First, license plates attached to cars driven on the public highway - aside from the question of actual title/- to such emblems are hardly comparable to a "privately owned flag . . . displayed . . . on private property." Id., at 408-409. Since the communication occurs via the medium of property purchased from the State, this case is closer to those where the State has dedicated its property for a particular purpose and can thus restrain expression thereon by a neutral "time, place, and manner" regulation such as § 262:27-c. E.g., Cox v. Louisiana, 379 U.S. 536, 554 (1965); Adderly v. Florida, 385 U.S. 39, 42 (1966). See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975). If the rule in Cox and Adderly applies here, appellees' concession that their disagreement with the

motto could be forcefully and legally conveyed by a homemade bumper sticker would appear to undercut substantially any claim that a neutral "place" regulation directed at the plate itself cannot be applied constitutionally to their competing choice of location.

If Spence cannot be distinguished on this ground, affirmance of the decision below extends Spence into areas which I do not think were contemplated by that Court. Granted, the license plate here is not completely like "a flag that is public property." 415 U.S., at 409, in that appellees have at least a possessory interest as against others. Nevertheless, this decision draws into question heretofore unquestioned prohibitions[12] against defacing "possessory" property like coin, currency, and passports, to name but a few. The Court today must be prepared to give serious consideration to a First Amendment claim that one who sincerely disagreed on political or religious grounds with the national motto "In God We Trust" could obliterate it from the face of a one dollar bill.[13] Similarly, strong feelings of "hawkish" political sentiment could apparently immunize one who blotted out the olive branch clenched by the eagle in the United States seal appearing on the passport. If by the District Court's holding the Federal Government no longer has the power to protect the communicative

aspects of its official symbols appearing on such items from being wholly displaced by private citizens, then this Court should say so only after plenary consideration.

But even if I am wrong in my reading of Spence, that case involved kind of neither/nor addressed the/"functional" rationale for § 262: 27-c established by the State here. While the District Court made a finding that the motto's presence "aids in the identification" of properly-registered vehicles, it thereafter rejected this concededly valid function as insufficient:

> "That the presence of this motto on the license plates is required for identification is belied by the fact that only passenger cars are required to have license plates that contain the motto "Live Free or Die." 406 F. Supp., at 1388 (emphases added).

The shift in focus by the District Court obviously did not give full weight to the State's contention. As I have noted,[14/] it did not argue / that the motto, any more than the words "New Hampshire," was the sine qua non of its identification system. On the contrary, it established / its role as an "aid" -- as one element in the visual authentication for some 325,000 New Hampshire registrations. That showing / cannot be so easily dismissed under O'Brien. That license plate "fraud" is perhaps not overly rampant in that State does not minimize its substantial interest in mandating and preserving the identifying

characteristics of what is, after all, the outward sign of a license to use its highways. No one would contend, for example, that a dollar bill would be any less recognizable as such were the words "In God We Trust" inked out, but that would not gainsay Congress' power to protect, singly or in toto, each facial characteristic of that bill irrespective of the claim that a given "communicative" characteristic is not "required" for identification. I do not read O'Brien as so narrowly restricting legislative power in this area.

Since I believe that the District Court's decision can be upheld only by combining an extension of Spence with a contraction of O'Brien, I would set this case down for oral argument.

FOOTNOTES

1/I do not here address the separate contention of appellants that George Maynard's failure to appeal his convictions, and thereby take his First Amendment claim to the New Hampshire Supreme Court, bars this federal court action under Younger v. Harris, 401 U.S. 37 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). Appellee Maxine Maynard, found by the District Court to have an ownership interest in the Maynard family cars and to be under a separate threat of prosecution, argues that at least as to her Younger considerations do not bar federal equitable relief. For present purposes, I accept the validity of this contention.

2/Appellees also alleged that §262:27-c, together with the statutory requirement that the standard plates for their cars bear the State motto, N.H. Rev. Stat. Ann. § 263:1 (Supp. 1973), violated their right to be free from "compelled affirmations of belief" under West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). 406 F. Supp. 1381, 1386 & n. 9 (1975). The District Court expressly did not reach this claim. It did note, however, that the Supreme Court of New Hampshire had a few years earlier rejected such a claim in State v. Hoskin, 112 N.H. 332, 295 A.2d 454 (1972).

cont.

(fn 2 cont.)

In Hoskin, after first determining that the "letters" referred to in § 262:27-c included the State motto, and that that section therefore operated to penalize its obliteration by tape, the supreme court rejected the Barnette claim by distinguishing the factual setting of license plate display:

> "The Barnette case struck down a compulsory oral and symbolic declaration of belief. The statutes which the defendants attack require no such conduct. Their argument proceeds upon the hypothesis that the requirement that they display the State motto upon vehicles registered by them compels them to affirm that they believe and support a sentiment or sentiments with which they disagree. This hypothesis we do not accept.
>
> . . . .
>
> "The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it is a matter of belief. . . . One who spends the coin or currency of the United States bearing the motto "In God We Trust" . . . is not understood by others to proclaim his belief in [that] sentiment. . . . 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. Nothing in the statutes of this State preclude him from displaying his disagreement with what appears thereon provided the methods used do not obscure the number plates." Id., 112 N.H., at 336-337, 295 A.2d, at 456-457.

(fn 2 cont)

It is not clear whether appellees press this/Barnette claim as an assertedly alternate basis to support the District Court's judgment. See Motion to Dismiss, at 12 & n. 8. Whether or not this separate First Amendment theory is properly before us, I note only that there is no basis in the record to support any factual conclusion that "viewers . . . regard [the motto] upon [appellees'] registration plates as the craftsmanship" of appellees. 295 A.2d, at 457. Quite in a contrary direction, Mr. Maynard testified his use of tape was necessary to draw attention to his license plate. Without the tape, his display of the motto would under Hoskin seem neither "personal" nor "communicative."

3/Transcript of Hearing, September 22, 1975, at 14-15.

4/Id., at 11-12.

4a/ Id., at 17.

5/Id., at 36. Mr. Maynard offered into evidence an example of a bumper sticker he had fashioned previously and attached to his car, which to him conveyed a tenet of his religious belief. It was not directed at negating the motto on the license plate. Id., at 33-34, 36.

6/Id., at 36.

7/N.H. Rev. Stat. Ann. § 260:10-a (Supp. 1973).

8/See n. 2 supra.

9/Appellant Clarke, DMV Commissioner, had explained that there were numerous special statutory categories of vehicles, e.g., "antique" cars, the license plates for which bore in lieu of the State motto a word denoting the registration category. By contrast to these special categories, a patrolling officer could identify the overwhelming majority of passenger cars, displaying motto-bearing plates, as properly registered, at least as a matter of visual inspection. Appellant Wooley elaborated on direct examination by the State:

> "Q. If a piece of non-transparent tape appears across the top of a license plate, . . . would you comment upon any difficulty you might have in identifying that vehicle?
>
> "A. Yes. The designation has been pointed out, such as the word commercial, tractor, trailer, antique, these are all visible means by which myself, as a police officer, would be looking for on a plate attached to any vehicle. There are numerous occasions where people use what we commonly refer to as a screwdriver transfer, where any set of plates or plate may be attached to a vehicle that is not assigned to that vehicle. The specific occasion that I personally was involved in was the use of . . . a trailer plate attached to a motor vehicle . . . . The fact that the word 'trailer' was visible gave me an immediate indication that that plate did, in fact, not belong on a pleasure car. And without the words or some distinguishing marks, it becomes more difficult for a police officer to visually look at a car and a plate, or whatever the vehicle may be, and determine whether or not that plate

(fn 9 cont)

Transcript of Hearing, at 68-69.

may, in fact, belong on that vehicle." /

Chief Wooley was not cross-examined by appellees.

10/ "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

11/I accept for purposes of argument the essentially factual conclusion of the District Court that appellees' act of covering the motto with reflective tape "was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," and that their conduct was also "symbolic speech." Spence, 418 U.S., at 409.

12/E.g., 18 U.S.C. §§ 331-333, 499, 500, 1543, 1546.

13/But see, e.g., Engel v. Vitale, 370 U.S. 421, 437-442 & n. 5 (1962) (Douglas, J., concurring).

14/See text and n. 9 supra.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

No. 75-1453 - Wooley v. Maynard

Circulated: 10 76

Recirculated: _____

MR. JUSTICE STEVENS, concurring.

My concurrence in the Court's summary affirmance of the District Court's judgment rests largely on my willingness to accept the following finding of fact as not clearly erroneous:

> Although the act of covering the motto on a license plate may, in some cases, be an act of pure whimsy, it is clear that plaintiffs' act of masking the motto with reflective red tape is motivated by deeply held, fundamentalist religious beliefs that death is an unreality for a follower of Christ and, to a lesser extent, that it is wrong to give up one's earthly life for the state, even if the alternative is living in bondage. Plaintiffs' act of covering the "Live Free or Die" accomplishes two closely interrelated objectives: it relieves them of the burden of displaying a message which offends their beliefs, and, at the same time and more importantly, it communicates their strong disagreement with implications of the message. We have no doubt that plaintiffs' interest implicates the First Amendment. Whatever else may be said about the motto "Live Free or Die", it expresses philosophical and political ideas. Plaintiffs' desire not to be aligned with these ideas falls within the ambit of the First Amendment.

For three reasons I am persuaded that an affirmance in this case does not presage the demise of official use of words such as "In God We Trust" or official use of familiar

symbols such as "an olive leaf clenched by an eagle."

First, a finding that a statement on a license plate on one's car is tantamount to an affirmation of belief can be accepted without adopting a like conclusion with respect to the use of money or a visit to a public building.

Second, an affirmation of belief in death conflicts more directly with certain specific religious faiths than does the motto "In God We Trust" or the symbolic eagle.

Third, the state interest in the unmasked motto on its license plates is significantly less than the federal interest in the protection of its currency and its national monuments.

There is merit in Justice Rehnquist's view that the case should be briefed and argued. However, since there is only a finite amount of time available in which we can do our work, the Court must exercise a measure of discretion in evaluating the importance of cases which are fully briefed and argued, even on its mandatory docket. Not without some doubt, I therefore concur in the summary affirmance.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: 10 76

Recirculated: _____

No. 75-1453 - Wooley v. Maynard

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For three reasons I am persuaded that an affirmance in this case does not presage the demise of official use of words such as "In God We Trust" or official use of familiar

symbols such as "an olive leaf clenched by an eagle."

First, a finding that a statement on a license plate on one's car is tantamount to an affirmation of belief can be accepted without adopting a like conclusion with respect to the use of money or a visit to a public building.

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Third, the state interest in the unmasked motto on its license plates is significantly less than the federal interest in the protection of its currency and its national monuments.

There is merit in Justice Rehnquist's view that the case should be briefed and argued. However, since there is only a finite amount of time available in which we can do our work, the Court must exercise a measure of discretion in evaluating the importance of cases which are fully briefed and argued, even on its mandatory docket. Not without some doubt, I therefore concur in the summary affirmance.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 10, 1976

Re: 75-1453 - Wooley v. Maynard

MEMORANDUM TO THE CONFERENCE

The enclosed draft concurrence is not intended to dissuade you from voting to note probable jurisdiction, for there is considerable force to Bill's dissent. However, I can't get over the fact that the case really involves nothing more than the masking of two license plates.

If we do affirm summarily, I would like to avoid the risk that I think Bill's dissent creates, that lower courts may regard our summary affirmances as undermining the use of various familiar mottos and symbols.

Respectfully,

Enclosure

Conference 6-10-76

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 75-145

Wooley
VS.
Maynard

Relist
for
Rehnquist
(He's working)
I should take a
look at this
& vote if
other want

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Stevens, J.													
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Burger, Ch. J.													

June 14, 1976

No. 75-1453 Wooley v. Maynard

Dear Bill:

Your dissent has persuaded me to vote to note in the above case.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

P. 3, 4, 6, 9

Gail + Sally - we may well note this - so follow what happens & keep this in file if Noted

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: JUN 15 1976

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

NEAL R. WOOLEY, ETC., ET AL. *v.* GEORGE MAYNARD ET UX.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR DISTRICT OF NEW HAMPSHIRE

No. 75–1453. Decided June —, 1976

MR. JUSTICE REHNQUIST, dissenting.

Applying the "freedom of speech" clause of the First Amendment, as applied to the States through the Fourteenth Amendment, the judgment of the District Court has granted appellees a permanent right to deface the New Hampshire license tags affixed to their cars by covering with tape the portion bearing the State motto, "Live Free or Die." The District Court's reasoning, used to invalidate a New Hampshire statute forbidding such defacement, betokens a like fate for longstanding federal statutes which prohibit the defacing of words such as "In God We Trust" on the face of United States currency, or of the eagle in the Great Seal of the United States on official passports. Because the Court's summary affirmance of this judgment to my mind constitutes an extension of our "symbolic speech" cases which is at once significant, unarticulated, and unwarranted, I dissent. I would note probable jurisdiction and set the case down for oral argument.

I

As the Court's opinions in this area amply demonstrate, *e. g., Spence* v. *Washington,* 418 U. S. 405 (1974), any claim for First Amendment protection such as that advanced by appellees must be measured according to its factual setting and against a careful consideration of the State's interest in regulating conduct when such regulation is assertedly overborne by that Amendment.

The underlying facts are not disputed. Appellees George and Maxine Maynard, married residents of New Hampshire and owners of two registered passenger cars, were in possession of the State's standard-issue license plates for such vehicles. On these plates, typical of some 325,000 so issued by appellant Clarke as Commissioner of the Department of Motor Vehicles (DMV), are imprinted by raised letters the words "New Hampshire" (bottom), the State's motto, "Live Free or Die" (top), the year, and the usual combination of numbers and letters matching those appearing on the registration certificate and in turn identifying appellees in DMV files as the registered owners. As relevant here, sometime in early 1974 appellees began placing pieces of reflective, nontransparent red tape completely over the motto on the plates attached to their cars, and thereafter proceeded to drive on the public highways around Lebanon, New Hampshire. Beginning in late 1974, George Maynard was arrested and prosecuted three times for violating N. H. Rev. Stat. Ann. § 262:27–c (Supp. 1973), which in pertinent part provides:

> "Any person who knowingly . . . obscures or permits to be obscured the figures or letters on any number plate attached to any motor vehicle . . . shall be guilty of a misdemeanor."

The resulting convictions subjected him to both fines and incarceration; none was appealed.[1]

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[1] I do not here address the separate contention of appellants that George Maynard's failure to appeal his convictions, and thereby take his First Amendment claim to the New Hampshire Supreme Court, bars this federal court action under *Younger* v. *Harris*, 401 U. S. 37 (1971), and *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). Appellee Maxine Maynard, found by the District Court to have an ownership interest in the Maynard family cars and to be under a separate threat of prosecution, argues that at least as to her *Younger* considerations do not bar federal equitable relief. For present purposes, I accept the validity of this contention.

On March 4, 1975, appellees brought this § 1983 action in the District Court. Their principal claim was that because they were Jehovah's Witnesses and disagreed with the religious and political implications of New Hampshire's motto, they had a right under the First Amendment to express their own views to the motoring public by obliterating the motto and venturing forth on the highway. They prayed for a declaration that § 262:27-c was unconstitutional as applied to them, and for injunctive relief against appellant local and state officials barring future prosecutions for its violation.[2]

[2] Appellees also alleged that § 262:27–c, together with the statutory requirement that the standard plates for their cars bear the state motto, N. H. Rev. Stat. Ann. § 263:1 (Supp. 1973), violated their right to be free from "compelled affirmations of belief" under *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624 (1943). 406 F. Supp. 1381, 1386 and n. 9 (1975). The District Court expressly did not reach this claim. It did note, however, that the Supreme Court of New Hampshire had a few years earlier rejected such a claim in *State* v. *Hoskin,* 112 N. H. 332, 295 A. 2d 454 (1972). In *Hoskin,* after first determining that the "letters" referred to in § 262:27–c included the state motto, and that that section therefore operated to penalize its obliteration by tape, the supreme court rejected the *Barnett* claim by distinguishing the factual setting of license plate display:

"The *Barnette* case struck down a compulsory oral and symbolic declaration of belief. The statutes which the defendants attack require no such conduct. Their argument proceeds upon the hypothesis that the requirement that they display the State motto upon vehicles registered by them compels them to affirm that they believe and support a sentiment or sentiments with which they disagree. This hypothesis we do not accept.

. . . . .

"The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they endorse that motto or profess to adopt it is a matter of belief. . . . One who spends the coin or currency of the United States bearing the motto 'In God We Trust' . . . is not understood by others to proclaim his belief in [that] sentiment. . . . Similarly, we think that viewers do not regard the uniform words or devices upon registration plates as the craftsman-

After an initial grant of temporary injunctive relief, a three-judge court held a brief evidentiary hearing. Testifying in his behalf, Maynard explained that his own beliefs conflicted with the idea assertedly expressed in the motto, namely, that one's political freedom should be valued at least as highly as one's life. He stated: "I would rather live under bondage and still be alive to be able to enjoy my conscience and enjoy life that has everything to offer." [3] Thus, "[b]y taping [the motto] over," he was transmitting both an objection on "political grounds" and an expression "publicly to let people know of my faith." [4] Red reflective tape ensured that "people will recognize what I am doing," *i. e.*, "bear[ing] witness to the truth of God's Kingdom." [5] Asked whether he, as a printer by profession, could counter the perceived message of the motto by his own printed bumper sticker, Maynard first stated, "Yes, but the State would object to it," referrring to the state-

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ship 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. Nothing in the statutes of this State preclude him from displaying his disagreement with what appears thereon provided the methods used do not obscure the number plates." *Id.*, 112 N. H., at 336–337, 295 A. 2d, at 456–457.

It is not clear whether appellees press this *Barnette* claim as an assertedly alternate basis to support the District Court's judgment. See Motion to Dismiss, at 12 and n. 8. Whether or not this separate First Amendment theory is properly before us, I note only that there is no basis in the record to support any factual conclusion that "viewers . . . regard [the motto] upon [appellees'] registration plates as the craftsmanship" of appellees. 295 A. 2d, at 457. Quite in a contrary direction, Mr. Maynard testified his use of tape was necessary to *draw attention* to his license plate. Without the tape, his display of the motto would under *Hoskin* seem neither "personal" nor "communicative."

[3] Transcript of Hearing, September 22, 1975, at 14–15.

[4] *Id.*, at 11–12.

[5] *Id.*, at 17.

ment that if he made such a bumper sticker it would be "an illustration of a dog raising his leg on the State motto." [6] Pressed, he admitted that such a sticker would violate no state law, and proffered only that "[i]t wouldn't be dignified." [7]

The State established that another alternative was available to appellees. Appellant Clarke stated that within the usual course of its operation the DMV could produce for appellees, for a fee of $5, one of its "vanity plates" *without* the state motto.[8]

In defense of its decision to place the state motto on the great majority of plates destined for passenger cars,[9] the State offered two rationales, which for convenience can be referred to as "communicative" and "functional." Under the first, as summarized by the District Court, the State "believes that the dissemination of the motto and the association of it with New Hampshire serves a number of values: fostering appreciation of state history and tradition; creating state pride, identity, and individualism; and promoting tourism." 406 F. Supp. 1381, 1386 (1976). Under the second, supported by the undisputed testimony of appellant Wooley, the Lebanon chief of police, the presence of the motto on almost all passenger cars operates in the context of other classes of motor vehicles to determine, at least as an initial visual matter, whether the vehicle bearing a particular plate is properly registered within the class as indicated by the plate's markings.[10] On the basis of

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[6] *Id.*, at 36. Mr. Maynard offered into evidence an example of a bumper sticker he had fashioned previously and attached to his car, which to him conveyed a tenet of his religious belief. It was not directed at negating the motto on the license plate. *Id.*, at 33–34, 36.

[7] *Id.*, at 36.

[8] N. H. Rev. Stat. Ann. § 260:10–a (Supp. 1973).

[9] See n. 2, *supra*.

[10] Appellant Clarke, DMV Commissioner, had explained that there were numerous special statutory categories of vehicles, *e. g.*, "antique"

this testimony and that of DMV Commissioner Clarke, the District Court found that "the presence of the motto on the plates aids in the identification of New Hampshire passenger cars." *Ibid.*

The District Court first held that appellees' "acts of covering the motto . . . constitute symbolic speech within the meaning of *Tinker* [v. *Des Moines School District,* 393 U. S. 503 (1969)] and *Spence* [v. *Washington, supra*]." *Id.,* at 1387. Applying the four-part test enunciated by this Court in *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968), set out in the margin,[11] the Dis-

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cars, the license plates for which bore in lieu of the state motto a word denoting the registration category. By contrast to these special categories, a patrolling officer could identify the overwhelming majority of passenger cars, displaying motto-bearing plates, as properly registered, at least as a matter of visual inspection. Appellant Wooley elaborated on direct examination by the State:

"Q. If a piece of non-transparent tape appears across the top of a license plate, . . . would you comment upon any difficulty you might have in identifying that vehicle?

"A. Yes. The designation has been pointed out, such as the word commercial, tractor, trailer, antique, these are all visible means by which myself, as a police officer, would be looking for on a plate attached to any vehicle. There are numerous occasions where people use what we commonly refer to as a screwdriver transfer, where any set of plates or plate may be attached to a vehicle that is not assigned to that vehicle. The specific occasion that I personally was involved in was the use of . . . a trailer plate attached to a motor vehicle . . . . The fact that the word 'trailer' was visible gave be an immediate indication that that plate did, in fact, not belong on a pleasure car. And without the words or some distinguishing marks, it becomes more difficult for a police officer to visually look at a car and a plate, or whatever the vehicle may be, and determine whether or not that plate may, in fact, belong on that vehicle." Transcript of Hearing, at 68–69.

Chief Wooley was not cross-examined by appellees.

[11] "[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free

trict Court reasoned that the "communicative" interest furthered by the state motto was "directly related to the suppression of free expression within the meaning of *O'Brien*." 406 F. Supp., at 1388. It stated:

> "Although a government may perhaps single out certain messages for special protection when they appear on public property, *see Spence* [, at 408–409], *Spence* teaches that the governmental interest in preventing individuals from interfering with the communication of the state sponsored message by engaging in symbolic expression is not an interest that meets the third requirement of the *O'Brien* test." *Ibid.*

As to the second, "functional" rationale—concededly unrelated to speech—the District Court held that § 262:-27–c failed the fourth tenet of *O'Brien:* "the defacement statute's effect on [appellees'] First Amendment freedoms is certainly 'greater than is essential to the furtherance of that interest.'" *Ibid.*

Since neither interest advanced by the State was found to justify the restriction on appellees' right of free expression, § 262:27–c was in the District Court's view unconstitutional as applied to appellees. Appellants were permanently enjoined from prosecuting appellees "for covering over that portion of their license plates that contains the motto 'Live Free or Die.'" *Id.*, at 1389.

II

This remarkable decree is supported by reasoning which to me represents either an unparalleled extension of *Spence,*[12] a serious misapplication of *O'Brien,* or perhaps both.

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expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

[12] I accept for purposes of argument the essentially factual con-

Accepting for the moment the proposition that New Hampshire's "communicative" interest in disseminating its motto is analogous to Washington's interest in preserving the flag as a national symbol in *Spence*, 418 U. S., at 412–415, I have serious doubts whether the limited holding in *Spence* is controlling on these facts. First, license plates attached to cars driven on the public highway—aside from the question of actual title to such emblems—are hardly comparable to a "privately owned flag . . . displayed . . . on private property." *Id.*, at 408–409. Since the communication occurs via the medium of property purchased from the State, this case is closer to those where the State has dedicated its property for a particular purpose and can thus restrain expression thereon by a neutral "time, place, and manner" regulation such as § 262:27–c. *E. g., Cox* v. *Louisiana*, 379 U. S. 536, 554 (1965); *Adderly* v. *Florida*, 385 U. S. 39, 42 (1966). See also *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209 (1975). If the rule in *Cox* and *Adderly* applies here, appellees' concession that their disagreement with the motto could be forcefully and legally conveyed by a homemade bumper sticker would appear to undercut substantially any claim that a neutral "place" regulation directed at the plate itself cannot be applied constitutionally to their *competing* choice of location.

If *Spence* cannot be distiguished on this ground, affirmance of the decision below extends *Spence* into areas which I do not think were contemplated by that court. Granted, the license plate here is not completely like "a flag that is public property," 415 U. S., at 409, in that appellees have at least a possessory interest as against

---

clusion of the District Court that appellees' act of covering the motto with reflective tape "was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," and that their conduct was also "symbolic speech." *Spence*, 418 U. S., at 409.

others. Nevertheless, this decision draws into question heretofore *un*questioned prohibitions [13] against defacing "possessory" property like coin, currency, and passports, to name but a few. The Court today must be prepared to give serious consideration to a First Amendment claim that one who sincerely disagreed on political or religious grounds with the national motto "In God We Trust" could obliterate it from the face of a one-dollar bill.[14] Similarly, strong feelings of "hawkish" political sentiment could apparently immunize one who blotted out the olive branch clenched by the eagle in the United States seal appearing on the passport. If by the District Court's holding the Federal Government no longer has the power to protect the communicative aspects of its official symbols appearing on such items from being wholly displaced by private citizens, then this Court should say so only after plenary consideration.

But even if I am wrong in my reading of *Spence*, that case neither involved nor addressed the kind of "functional" rationale for § 262:27–c established by the State here. While the District Court made a finding that the motto's presence *"aids* in the identification" of properly registered vehicles, it thereafter rejected this concededly valid function as insufficient:

> "That the presence of this motto on the license plates is *required* for identification is belied by the fact that only passenger cars are required to have license plates that contain the motto 'Live Free or Die.'" 406 F. Supp., at 1388 (emphasis added).

The shift in focus by the District Court obviously did not give full weight to the State's contention. As I have noted,[15] it did not argue that the motto, any more than the words "New Hampshire," was the *sine qua non*

[13] *E. g.*, 18 U. S. C. §§ 331–333, 499, 500, 1543, 1546.

[14] But see, *e. g.*, *Engel* v. *Vitale*, 370 U. S. 421, 437–442 and n. 5 (1962) (Douglas, J., concurring).

10 [15] See text and n. 9, *supra*.

of its identification system. On the contrary, it established its role as an "aid"—as one element in the visual authentication for some 325,000 New Hampshire registrations. That showing cannot be so easily dismissed under *O'Brien*. That license plate "fraud" is perhaps not overly rampant in that State does not minimize its substantial interest in *mandating* and *preserving* the identifying characteristics of what is, after all, the outward sign of a *license* to use its highways. No one would contend, for example, that a dollar bill would be any less recognizable as such were the words "In God we Trust" inked out, but that would not gainsay Congress' power to protect, singly or *in toto*, each facial characteristic of that bill irrespective of the claim that a given "communicative" characteristic is not "required" for identification. I do not read *O'Brien* as so narrowly restricting legislative power in this area.

Since I believe that the District Court's decision can be upheld only by combining an extension of *Spence* with a contraction of *O'Brien*, I would set this case down for oral argument.

Conference 6-17-76

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 75-145

Wooley

vs.

Maynard

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.				✓									
Rehnquist, J.				✓									
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.							✓						
White, J.				✓									
Stewart, J.							✓						
Brennan, J.							✓						
Burger, Ch. J.				✓									

November 22, 1976

No. 75-1453 Wooley v. Maynard

This case is here on appeal from a three judge district court in New Hampshire (opinion by Coffin, J.), this is the New Hampshire automobile license case in which the appellees - husband and wife - are Jehovah Witnesses who object on moral and religious grounds to the New Hampshire motto "Live Free or Die" stamped on noncommercial automobile plates.

A New Hampshire statute makes it a misdemeanor knowingly to "obscure . . . the figures or letters on any number plate attached to any motor vehicle . . . ." Appellees persisted in masking the motto with reflective red tape. In addition, appellee Maynard later cut out the words "or Die" on all four license plates on appellees' two cars. Prosecutions followed. Maynard, just the husband, was charged and found guilty by the Lebanon district court on December 6, 1974. He was fined $25, but the fine was suspended. Maynard did not appeal. He was charged with a second violation, again convicted, fined $50, and sentenced to six months - with the imprisonment suspended. Maynard again did not appeal, advising the Court that because of religious beliefs he would not pay the fine. Thereupon, Maynard served 15 days of his sentence and was released. Thereafter, he was charged for a third violation, found guilty by the District Court on the same date of his

second conviction. Sentencing was deferred, apparently pending the outcome of the second sentence. Again, no appeal.

On March 4, 1975, about two weeks about being released from his 15 days in jail, appellees filed this suit in the U.S. District Court seeking declaratory and injunctive relief, asserting First and Fourteenth Amendment violations. A three judge court was convened, and after an evidentiary hearing (together with a stipulation of some facts), the DC declined to abstain on Younger or Huffman grounds. It therefore reached the merits of the constitutional issue and decided in favor of appellees on the ground that they had engaged merely in protected symbolic speech.

The Younger/Huffman issue

As noted below, I agree with the District Court on the merits. I have serious doubt, however, as to whether the District Court correctly applied our decisions with respect to abstention or equitable restraint with respect to a pending state proceedings.

I would like for my clerk to focus primarily on this question.

At the threshold, it is important to ascertain exactly what issues were involved in the state misdemeanor trials, and what state remedies were available to appellees.

The District Court relying primarily of Steffel and Doran v. Salem Inn, 422 U.S. 922 (1975), thought that

appellees were not seeking to enjoin a pending criminal prosecution; rather, their "primary objective [was] to obtain declaratory and injunctive relief against future arrests and prosecutions." The DC distinguished both Younger and Huffman, putting the latter aside in a single sentence:

> "Huffman, like Younger was a case in which granting the requested injunctive relief would have interfered with the processes of the state court by nullifying prior or pending state court proceedings. Here, no such interference can suit. Plaintiffs are not collaterally attacking Mr. Maynard's state court convictions. The relief they seek is purely prospective."

Perhaps all of this is true, and yet New Hampshire makes a nonfrivolous argument to the contrary.

The state's brief describes the New Hampshire remedies that were available to appellee Maynard. He was convicted in a district court. He was entitled, as a matter of right, to appeal and trial de novo by jury in the state superior court. The constitutional issue, which the state asserts Maynard did raise in his own defense, could have been "reserved and transferred without ruling [directly] to the New Hampshire Supreme Court. Rather than pursuing any of these remedies, Maynard - joined by his wife - sought federal relief.

In footnote 6 of its opinion, the DC recognized that a "plausible" argument could have been made by Maynard to the effect that his state convictions bar litigation of the federal constitutional issues. But the DC went on to say that in the First Circuit "a state criminal conviction will have a preclusive effect in a federal civil rights action only with respect to matters actually litigated and decided at the state criminal trial." The DC's opinion (in note 6) continued:

> "Since the constitutionality of the state statutes was not litigated by Mr. Maynard in the state misdemeanor proceedings, collateral estoppel principles do not preclude this Court from considering this issue." (JS p. 28)

The New Hampshire Attorney disputes the foregoing:

> "At the time of appellee Maynard's first appearance before the District Court, he raised a first amendment defense. (App. 30-32, Exhibit No. 3). He likewise raised a similar defense when appearing before the District Court to answer the second and third criminal complaints. (App. 30-32, 21 and 22). However, during the course of each trial Maynard elected neither to request the reservation and transfer of constitutional issues directly to the New Hampshire Supreme Court nor to appeal his convictions to the Superior Court. Instead, he filed [this suit] with the U.S. District Court. . . ." (Appellant's brief p. 7).

I am dictating this at home, where I do not have the U.S. Reports. The New Hampshire brief quotes extensively from Bill Rehnquist's opinion in Huffman, and I must say that some of the quoted language appears strongly to support New Hampshire's position that federal intervention was inappropriate. (See 420 U.S., at 607-609, quoted in brief at p. 11, 12).

Quite apart from what was said in Huffman, it seems to me that the principles of comity and equitable restraint should apply in the circumstances of this case. Maynard has multiple state remedies available to him that he ignored. To be sure Monroe v. Pape - and its dubious progeny - state that exhaustion is not a prerequisite to a 1983 action. But Pape was not addressing a Younger or a Huffman situation where a state criminal or quasicriminal proceeding was actually in process. The doctrine of these cases can be too easily evaded if the criminal defendant need only fail to appeal before moving into a federal court. I have no read my dissent in Ellis v. Dyson, but certainly its rationale is relevant here.

The DC did note that Mrs. Maynard, not a party to the misdemeanor prosecutions, was in a different situation from her husband as she was threatened with prosecution. I would like for my clerk to investigate the correctness and soundness of this "fall back" position.

Merits

If we reach the merits, I am presently inclined - rather strongly - to agree with the District Court that the compulsion to advertise a state slogan with which appellees profoundly disagreed was violative of First Amendment rights. The DC viewed this slogan as having "political" as well as religious overtones, and the case was decided solely on the first basis, i.e., appellees conduct was a symbolic manifestation of his

disagreement with the state's political views. The DC declined to reach the interference with religion issue.

Although this seems to me to be an easy case, in view of some of the slogans on automobile licenses, some rather interesting cases may arise. What if Virginia put "Virginia is for Lovers" on its license plates.

L.F.P., Jr.

ss

November 22, 1976

No. 75-1453 Wooley v. Maynard

Dear Mike:

Please take a look at the state's brief (appellants) in the above case, and see whether you think the printing complies with our Rules.

The type may possibly be in compliance, but I doubt that the "leading" between lines meets our requirements. I am dictating this note at home and do not have a copy of the Rules before me. But my recollection is that the pages of a brief must be properly leaded.

I think you will agree that the solid pages of type in this brief are quite forbidding.

New Hampshire, which is hardly impoverished, also filed a typewritten jurisdictional statement, which includes a single spacing of the District Court's opinion.

Sincerely,

Mr. Michael Rodak, Jr.

lfp/ss

cc: The Chief Justice

Chief: I hope we will enlarge your crusade against excessively long briefs to apply our Rules more strictly with respect to compliance with printing requirements.

BOBTAIL BENCH MEMO

To: Justice Powell

From: Tyler Baker

Re: Wooley v. Maynard, No. 75-1453

I. The Applicability of Younger v. Harris and related doctrines.

App'ees argue that analysis is advanced if two questions are separated: 1) the appropriateness of federal intervention and 2) the equitable remedy to be used in the intervention, if it occurs. As the cases have evolved, I think that this approach is probably preferable

The appropriateness of intervention. It seems to me that the issue here is whether this case is closer to Steffel v. Thompson, 415 U.S. 452 (1974), or to Huffman v. Pursue, 420 U.S. 592 (1975). Steffel held that intervention was appropriate (by way of a declaratory judgment) when no state prosecution was pending. Huffman held that federal intervention was inappropriate even in a civil proceeding (with criminal overtones) and eventhough the trial phase of the state proceeding was over, when the federal intervention was designed to "annul the results of a state trial." 420 U.S., at 609. In the case before the Court three prior criminal prosecutions have been held, and those convictions are final. No appeals were taken. The Younger concerns are only faintly present here. True, the state appellate courts did not have a chance to rule on the claim made here, but the federal action was not brought in such a way as to substitute the federal DC for the state appellate courts, as was true in Huffman. Mr. Maynard is in the same position that he would have been

in had the previous prosecutions not occurred. He still must choose between flouting state law or foregoing activity he believes to be constitutionally protected. Steffel, 415 U.S., at 462. Although appellants constantly speak of the federal intervention annulling the effects of the state prosecutions, there is no such effect. In all three prosecutions, the state had the opportunity to bring its criminal justice apparatus to bear on app'ee Mr. Maynard. The state policies were presumably enforced and vindicated by the sentences imposed. The federal action was not designed to affect the previous prosecutions. There may be a hint of denigrating the ability of the state appellate judges to enforce the constitutional rights of app'ees, but, in the main, the app'ants' argument here is an argument against the fact that there are parallel court systems enforcing those rights. The arguments have almost as much bite against Steffel v. Thompson as against the present case.

Assuming that Mr. Maynard cannot invoke federal relief because of the Younger doctrine, Mrs. Maynard can. App'ants clearly have the better of the argument here. They pleaded for declaratory relief so the standard of the Federal Declaratory Judgment Act applies. There is a real controversy between app'ees and Mrs. Maynard. One difficulty here is that Mr. Maynard, if barred by Younger, would not be able to share in any relief that Mrs. Maynard obtained. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). In a case of this type, involving two individuals with personal beliefs, the suggestion from Doran that legally distinct parties might be so closely related as to require the second to be barred by the Younger problems of the first is not applicable. My reading of Doran on that point is that the reference is to legally separate, but jointly owned corporations.

Mixed with the arguments based on Younger and its progeny,

~~app'ants argue~~ are arguments that Mr. Maynard is barred from litigating the constitutional question because of res judicata and collateral estoppel. Res judicata was apparently not raised as an affirmative defense and therefore was waived. Collateral estoppel was raised by motion and denied by the single DJ. See app'ees' Brief at 39-40 & n.25. App'ees argue with some force that the question was not raised below. ~~CA1~~ The 3JC speaks of the issue, but appears to believe that it was not presented by the app'ants. JS, App. at 28 n.6. The question was not presented as a question for review in the JS. I would recommend that the Court not address the question here. If it were addressed, I would agree with the CA that the constitutional question was not litigated below. JS, App., at 28 n.6. Even if collateral estoppel were appropriate in a case of this type, I would require a strong showing that it had actually been litigated. I don't think that Mr. Maynard's uneducated references to his religious beliefs equals litigation.

Waived?

A much more difficult question is the appropriateness of the DC issuing a permanent injunction against the enforcement of the statute against app'ees. This is the question left unanswered in Steffel. The hard question is whether the question is before the Court. The question may not have been presented below. ~~CA1~~ The 3JC states as follows:

> "Defendants do not dispute that the Younger doctrine permits federal injunctive relief against threatened arrests and prosecutions. Rather, they contend that Mr. Maynard is barred by his failure to appeal any of his three state convictions." J.S., App. at 27.

The Questions Presented refer only to the question of federal intervention where a defendant has not exhausted his state appellate remedies. If app'ants had contested the use of injunctive relief below, I would say that the question was naturally included in a J.S. dealing with the appropriateness of federal inter-

vention. Under these circumstances, I do not think that the question is before the Court, unless it can be characterized as jurisdictional. My own reading of the cases is that the doctrine of equitable restraint, including the question of enjoining state proceedings, is a doctrine of restraint rather than jurisdiction. In Huffman Justice Brennan expressed the same understanding, but noted that the Court addressed the Younger question, although it had not been pled in the DC, an action suggesting that it is jurisdictional.

If the injunction issue is decided, the resolution depends on an evaluation of the abrasiveness for purposes of comity of a limited injunction as opposed to a declaratory judgment. This evaluation in turn depends on a consideration that the Court has not squarely addressed to my knowledge, that is, just how strong is a declaratory judgment in this situation. Does it have res judicata binding effect, or is it little more than an advisory judgment. If the declaratory judgment is fairly strong, then the difference in abrasiveness may not be very significant. Steffel indicates, on the other hand, that one of the purposes of Declaratory Judgment Act was to avoid the friction caused by injunctions. It is possible to argue that an as-applied injunction is less abrasive and therefore acceptable. It is not necessary here to decide the question of an injunction barring all prosecutions.

II. The constitutional merits.

To the extent that conduct has to clear a hurdle to qualify as symbolic speech, this conduct has cleared it. It was intended as a communication, and undoubtedly was understood as a communication. This is especially so here where the conduct was the obscuring of words. Although the words are not completely unambiguous, the process of obscuring them quite clearly communicates disagreement with their message. I find it rather easy to give content to the message and the obscuring of the message: "Political freedom is more important than life itself" and "Political freedom is not more important than life itself." The fact that the message being communicated by app'ees is not a current subject of widespread attention is irrelevant to 1st Amendment analysis. When one considers this conduct in the context of New Hampshire, it undoubtedly conveyed a clearer meaning to those who saw the license plates than it does to us. One case involving a similar objection to the motto had been decided by the state supreme court, and the legislature had expressly considered the possibility of removing the motto. I think that the message was sufficiently particularized to qualify for protectic

This case is not quite like any of the other cases involving symbolic speech in that the defendants here were, in a sense, "counter-punching" against a message being put out by the state. I do not think that this case falls squarely under Board of Education v. Barnette, 319 U.S. 624 (1943). The level of affirmation of belief in ~~using~~ being required to use license plates is quite different from that in being required to salute a flag and recite a pledge. At the same time, there is an element of affirmation here, and it cannot be ignored. Although I am not sure how to fit it into the analysis, the element of affirmation adds a weight to the side of the defendants. This difference undercuts Justice Rehnquist's "time, place, and manner" analysis, which

might be more persuasive if ordinary license plates (without a message) were the target of symbolic speech because, for example, the "speaker" hated the Dept. of Motor Vehicles.

New Hampshire achieves its first goal of promoting history, state pride, individualism, and tourism by putting a philosophical/political message on the license plates. The only way that this could serve the stated purpose is by communicating something about the values of the state and her people. Interests of that kind were not sufficient in Barnette. As Judge Coffin recognizes they were not sufficient in Spence v. Washington, 405 U.S. (1974), either. A flag communicates by non-verbal symbols certain values. Spence was not prevented from the using the flag to communicate his contrary opinions. See JS, App., at 36. Comparing this case to United States v. O'Brien, 391 U.S. 367 (1968), I think it is fair to say that this governmental interest is not unrelated to the suppression of free speech. This may just be a backward way of recognizing the impact of the affirmation of belief element here.

The second goal of facilitating vehicle identification does not have the affirmation of belief problem, but, as Judge Coffin notes, it is quite easy to think of alternatives that do not involve the use of messages of this type. Short of going to a system that does not have the present problem, the burden is on the state to adjust to 1st Amendment problems. I again agree with Judge Coffin that the state failed the O'Brien test in that the incidental restriction of 1st Amendment freedoms is greater than essential to the furtherance of the interest. Even when one focuses on the problems caused by the tape at the present time, the state loses, in my view. In Tinker v. Des Moines School Dist., 393 U.S. 503 (1969), a case decided after O'Brien, the Court recognized that the symbolic speech

at issue there [illegible] (black arm bands) might cause some discipline [illegible] problems. The Court [illegible] held that, short of a finding of material and substantial interference with the requirement of appropriate discipline, the prohibition on the arm bands could not be sustained. 393 U.S., at 509. [illegible] Although there may be some minor problems of identifying the category of [illegible] license plate here, I do not think that it rises to the level of justifying prosecution in this setting.

The problem with currency is distinguishable, I think. There may be some difference in that money is not required to be displayed. Given the vast amounts on money in circulation, alternatives are not possible. And, most important, the impact of [illegible] defacing money goes far beyond the defacer, unlike the situation [illegible] with the license plates, and may adversely affect confidence in the currency. The [illegible] government interest is quite different with [illegible] respect to money.

Tyler

75-1453 WOOLEY v. MAYNARD Argued 11/29/76

appeal from 3 J/Ct in N.H.
("Live Free or Die" case)

Two issues raised in juris. statement:

1. A Younger/Huffman claim that Fed Ct should have abstained: Also raised - but not pressed - a res judicata (+ equitable estoppel issue).

appellees sought only prospective relief (injunction vs future prosecutions)

~~1st Amend issue~~.

2. First Amend Issue

Clear example of symbolic case.

Johnson (ast AG of N. H.)

Not enlightening.

Kohn (for appellee)

~~Pa~~

There appellees do not attack or grant. the prior convictions (no expungment requested as in Dyson).

The res judicata & collateral estoppel issues were waived. As affirmative defense, state had burden to raise issue & failed to do so. (Reluctant said DC nevertheless addressed the issue & therefore we may consider it.)

Stevens says ~~no~~ since there is no attack on convictions there is no res judicata issue. But if court issue was raised & decided vs appellee, why don't collateral estoppel

Kohn (cont.)

J Stewart says there are several 1st Amend issues:

1. Is this symbolic speech

2. Can a person be compelled to advertise a view with which he disagrees.

3. Does fact that appellees had religious convictions, do they have a stronger case.

x x x

Steven asked – what if words "In God we Trust" were cut out of currency. Kohn ~~gave no short answer~~. responded that one who desecrated could cover-up the words, but said could not "deface" the bill (as by cutting.) (appellees did not mutilate – merely covered up.)

State must show a compelling interest."

No. 75-1453, Wooley v. Maynard, Conf. 12/1/76

Reverse 7-2
Affirm

The Chief Justice Affirm

Not sure whether case is properly here - there are Younger/Huffman issues. Failure to exhaust state remedies

Not just symbolic speech here. A license plate may be somewhat different from compelling "speech" in other ways. But the objection here is based on religious grounds & state can't compel this.

Stevens, Douglas, J. Affirm

We are not foreclosing "God we Trust" issue. State interest much stronger there.

Brennan, J. Affirm

Easy case.

Op should be written on religious issue to avoid problems with other license slogans.

Stewart, J. Affirm

The juris. issues are not insubstantial but concluder merits are before us.

On merits, a clear affirmance.

White, J.

Affirm

Marshall, J.

Affirm

Blackmun, J. Reverse

State interest overcomes any 1st amend interest.

O'Brien supports his view. [redacted]

Can't prosecute "In God we Trust"

Powell, J. Affirm

The juris issues are, as Potter says, not insubstantial.

I think I can, however, reach merits — & would affirm.

(Ackerman Harry is right that "In God we Trust"

Rehnquist, J. Reverse

No attack on prior convictions, & if [redacted] appellee were prosecuted again he could still litigate const. issue.

Merits are hard — & would Reverse

Joins
Stevens
Stewart (all but Part 4 as to symbolic speech)

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAR 10 1977

Recirculated: _____

1st DRAFT

Renewed
3/10

Included to join, also 9 Nicks Part 4 is unnecessary dicta

SUPREME COURT OF THE UNITED STATES

No. 75–1453

Neal R. Wooley, etc., et al., Appellants, *v.* George Maynard et ux. | On Appeal from the United States District Court for the District of New Hampshire.

[March —, 1977]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether the State of New Hampshire may constitutionally prohibit covering of the motto "Live Free or Die" on passenger vehicle license plates by individual licensees who find that motto repugnant to their moral and religious beliefs.

(1)

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die."[1] N. H. Rev. Stat. Ann. § 263:1. Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure] . . . the figures or letters on any number plate." N. H. Rev. Stat. Ann. § 262:27–c (Supp. 1973). The term "letters" in this section has been interpreted by the State's highest court to include the state motto. *State* v. *Hoskin*, 112 N. H. 332, 295 A. 2d 454 (1972).

Appellees George Maynard and his wife Maxine are fol-

[1] License plates are issued without the state motto for trailers, agricultural vehicles, car dealers, antique automobiles, the Governor of New Hampshire, its Congressional Representatives, its Attorney General, Justices of the State Supreme Court, veterans, chaplains of the State Legislature, sheriffs and others.

lowers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire state motto to be repugnant to their moral, religious, and political beliefs,[2] and therefore find it objectionable to disseminate this message by displaying it on their automobiles.[3] Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates.[4]

On November 27, 1974, Mr. Maynard was issued a citation for violating N. H. Rev. Stat. Ann. § 262:27–c. On December 6, 1974, he appeared *pro se* in Lebanon, N. H. District Court to answer the charge. After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objections to the motto. The state trial judge expressed sympathy for appellee's situation, but considered himself bound by the authority of *State* v. *Hoskin*, *supra*, to hold Maynard guilty. A $25 fine was imposed, but execution was suspended during "good behavior."

On December 28, 1974, Mr. Maynard was again charged with violating § 262:27–c. He appeared in court on Janu-

[2] Mr. Maynard described his objection to the state motto:

"[B]y religious training and belief, I believe my 'government'—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.

". . . I also disagree with the motto on political grounds. I believe that life is more precious than freedom."

Affidavit of George Maynard, App., at 3.

[3] At the time this suit was commenced appellees owned two automobiles, a Toyota Corolla and a Plymouth station wagon. Both automobiles were registered in New Hampshire where the Maynards are domiciled.

[4] In May or June 1974 Mr. Maynard actually snipped the words "or Die" off the license plates, and then covered the resulting hole, as well as the words "Live Free," with tape. This was done, according to Mr. Maynard, because neighborhood children kept removing the tape. The Maynards have since been issued new license plates, and have disavowed any intention of physically mutilating them.

ary 31, 1975, and again chose to represent himself; he was found guilty, fined $50 and sentenced for six months to the Grafton County House of Corrections. The court suspended this jail sentence but ordered Mr. Maynard to also pay the $25 fine for the first offense. Maynard informed the court that, as a matter of conscience, he refused to pay the two fines. The court thereupon sentenced appellee to jail for a period of 15 days. Appellee has served the full sentence.

Prior to trial on the second offense Mr. Maynard was charged with yet a third violation of § 262:27–c on January 3, 1975. He appeared on this complaint on the same day as for the second offense, and was, again, found guilty. This conviction was "continued for sentence" so that Maynard received no punishment in addition to the 15 days.

(2)

On March 4, 1975, appellees brought the present action pursuant to 42 U. S. C. § 1983 in the United States District Court for the District of New Hampshire. They sought injunctive and declaratory relief against enforcement of N. H. Rev. Stat. Ann. §§ 262:27–c, 263:1, insofar as these required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto.[5] On March 11, 1975, the single District Judge issued a temporary restraining order against further arrests and prosecutions of the Maynards. 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. Following a hearing on the merits,[6] the

[5] Appellants sought (a) injunctions against future criminal prosecutions for violation of the statutes and (b) an injunction requiring that in future years they be issued license plates that do not bear the state motto.

[6] Several months elapsed between the issuance of the temporary restraining order and the hearing on the merits. This delay was occasioned by the request of the State pending consideration of a bill in the New Hampshire Legislature that would have made inclusion of the state motto

District Court entered an order enjoining the State "from arresting and prosecuting [the Maynards] at any time in the future for covering over that portion of their license plates that contains the motto 'Live Free or Die.'" [7] *Maynard* v. *Wooley*, 406 F. Supp. 1381 (NH 1976). We noted probable jurisdiction of the appeal. 426 U. S. 946 (1976).

(3)

Appellants argue that the District Court was precluded from exercising jurisdiction in this case by the principles of equitable restraint enunciated in *Younger* v. *Harris*, 401 U. S. 37 (1971). We reject this contention and hold that the District Court was not barred from enjoining further state prosecutions against either Mr. or Mrs. Maynard. In *Younger* v. *Harris* the Court recognized that principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. 401 U. S., at 43–44. However, we have repeatedly held that "relevant principles of equity, comity, and federalism 'have little force in the absence of a pending state proceeding.'" *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974), quoting, *Lake Carriers Association* v. *MacMullan*, 406 U. S. 498, 509 (1972). Where no state prosecution is in progress but where a genuine threat exists, the Court has sanctioned the granting of both declaratory and injunctive relief "without regard to *Younger* restrictions." See *Steffel* v. *Thompson*, *supra*; *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–931 (1975).

We have held that, *Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under

on passenger vehicle license plates optional with the car owner. The bill failed to gain enactment.

[7] The District Court refused to order the State of New Hampshire to issue the Maynards license plates without the state motto, although it noted that there was evidence on the record that New Hampshire could easily do so. 406 F. Supp., at 1389. See n. 1, *supra*.

42 U. S. C. § 1983 for an alleged deprivation of federal rights. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 609–610, n. 21 (1975). Mr. Maynard now finds himself placed "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 [another] criminal proceeding." *Steffel* v. *Thompson*, *supra*, 415 U. S., at 462. Under these circumstances he cannot be denied consideration of a federal remedy.

Appellants point out that Maynard failed to seek review of his criminal convictions and cite *Huffman* v. *Pursue, Ltd.*, *supra*, for the propositions that "a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies, before seeking relief in the District Court," 420 U. S., at 608, and that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies," *id.*, at 609. *Huffman*, however, is inapposite. There the appellee was seeking to prevent, by means of federal intervention, enforcement of a state court judgment declaring its theater a nuisance. We held that appellee's failure to exhaust its state appeals barred federal intervention under the principles of *Younger*: "Federal 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." 420 U. S., at 609 (emphasis added). Here, however, the suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate Maynard's constitutional rights. He has already sustained convictions and has served a sentence of imprisonment for his prior offenses.[8] He does

[8] As to the offense which was "continued for sentencing," see p. 3, *supra*.

not seek to have his record expunged, nor to annul any collateral effects those convictions may have, *e. g.*, upon his driving privileges. The Maynards seek only to enjoin the State from prosecuting and sentencing either of them for future violations of the same statutes. *Younger* does not bar federal jurisdiction.

We also reject appellants' arguments as to Mrs. Maynard. It cannot be seriously contended that as joint owner of the family automobiles she is any less likely than her husband to be subjected to state prosecution.[9] The District Court therefore properly exercised its equitable jurisdiction as to her also. Having determined that the District Court was not required to stay its hand as to either appellee, we turn to the merits of the Maynards' claim.

(4)

The District Court held that by covering up the state motto "Live Free or Die" on his automobile license plate, Mr. Maynard was engaging in symbolic speech and that "New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on [appellees'] constitutionally protected expression." 406 F. Supp., at 1389. We do not view Mr. Maynard's conduct as symbolic speech and we see more appropriate grounds to affirm the judgment of the District Court.

---

the District Court found that "[n]o collateral consequences will attach as a result of it unless Mr. Maynard is arrested and prosecuted for violation of NHRSA 262:27–c at some time in the future." 406 F. Supp., at 1384.

[9] We note that if the totality of the State's arguments were accepted, a § 1983 action could never be brought to enjoin state criminal prosecutions. According to the State, *Younger* principles bar Mr. Maynard from seeking an injunction because he has already been subjected to prosecution. As to Mrs. Maynard, the State argues, in effect, that the action is premature because no such prosecution has been instituted. Since the two spouses were similarly situated but for the fact that one has been prosecuted and one has not, we fail to see where the State's argument would ever leave room for federal intervention under § 1983.

In *United States* v. *O'Brien,* 391 U. S. 367 (1968), the Court observed that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U. S., at 367. To constitute symbolic speech, conduct must not only be intended to communicate, it must also be capable of conveying the intended message to a substantial portion of those observing the conduct. In short it must be recognizable by the viewers as a form of expression.

It is clear from our cases that both the subjective and the objective elements of expression must be present to trigger First Amendment protections. For example, in *Spence* v. *Washington,* 418 U. S. 405, 410–411 (1974) the Court stated:

> "In *Tinker* [v. *Des Moines School District,* 393 U. S. 503 (1969)] the wearing of black armbands in a school environment conveyed an *unmistakable* message about a contemporaneous issue of intense public concern—the Vietnam hostilities. *Id.,* at 505–514. In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. [Citation] 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.*" (Emphasis added.)

Covering the state motto on a vehicle license plate with tape is not within the range of the types of conduct the Court held to be symbolic expression in *Tinker* and *Spence.* Unlike

the prominently displayed flag in *Spence* and the conspicuous black armband in *Tinker*, it is doubtful that the strip of tape placed on the license plate would attract significant notice. Even if noticed, the tape is hardly an unambiguous communicative symbol; it could well be viewed as a safety measure or possibly as a colorful ornament. Even if some people were aware that a message was intended, it would be difficult indeed to understand "the drift of [appellees'] point." 418 U. S., at 410.

Unlike *Spence* and *Tinker*, there was no ongoing public controversy which would have helped make appellees' meaning clear. While there were differences of opinion in the State as to whether the motto should be required on vehicle license plates, it does not appear from this record that appellees' point of view was one shared by any significant number of others or even among Jehovah's Witnesses. Significantly, when Mr. Maynard was asked why he covered the state motto on his license plate, he responded:

> "A: The reason for it is that people will recognize what I am doing which is effective. A lot of people stop me. And one person says 'You can't do that. That's against the law.' I says 'Fortunately, I was given permission by the Federal Court in a temporary injunction against the State.' And here I was able to converse with him and express my beliefs and my reason for doing so. And, so, therefore, I was able to bear witness to the truth of God's kingdom." App., at 29 (emphasis added).

This suggests that the act of covering the motto was not itself intended to communicate, but rather was designed to attract attention of passers-by so that Mr. Maynard could then express his point of view. The symbolic speech doctrine does not reach so far. Under that rationale virtually any bizzare or illegal conduct would be deemed symbolic speech so long as it were likely to stimulate interest or inquiry.

The claim of symbolic expression is also weakened by appellees' prayer in the District Court for issuance of special license plates not bearing the state motto. See n. 5, *supra*. This is hardly consistent with the stated intent to communicate affirmative opposition to the motto. Display of such "expurgated" plates would be substantially less communicative even than Maynard's present practice of covering the motto with tape.

(5)

We turn now to what we view as the essence of appellees' objection to the requirement that they display the motto "Live Free or Die" on their automobile license plates. This is succinctly summarized in the following statement by Mr. Maynard in his affidavit filed with the District Court:

> "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically religiously and politically abhorrent." App., at 5.

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not.

A

We begin with the proposition that the right of freedom of thought protected by First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633–634, 645 (1943). A system which secures to all the right to proselytize religious, political, and ideological causes must also guarantee to each the concomitant right to decline to advocate such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "in-

dividual freedom of mind." *Id.*, at 637. This is illustrated by the recent case of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit:

> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right to access inescapably 'dampens the vigor and limits the variety of public debate.' *New York Times Co.* v. *Sullivan*, 376 U. S., at 279." *Id.*, at 457.

The Court in *Barnette, supra,* was faced with a state statute which required public school students to participate in daily "patriotic" ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." 319 U. S., at 636. 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. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for advocating public adherence to an ideological point of

view he finds unacceptable.[10] In doing so, the State "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." *Id.*, at 342.

New Hampshire's statute in effect requires that ~~appellants~~ appellees use their private property as a "mobile billboard" for the State's ideological message—or suffer a penalty, as Maynard already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day.[11] The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea that they find morally objectionable.

B

Identifying the Maynards' rights as ones protected by the First Amendment does not, however, end our inquiry. Even First Amendment rights may be limited where other compelling interests are at stake. See, *e. g.*, *O'Brien*, *supra*, 391 U. S., at 376–377. We therefore proceed to examine the State's interest in requiring display of the state motto to

[10] It is argued that the Maynards could simply display a large bumper sticker on their car voicing their distaste for the motto. This, however, would not alter the fact that they would continue to disseminate the point of view which they abhor. More pointedly, any such attempt at disagreement would likely attract added attention to the message they find distasteful.

[11] Some States require that certain documents bear the seal of the State or some other official stamp for purposes of recordation. Such seal might contain, albeit obscurely, a symbol or motto having political or philosophical implications. The purpose of such seal, however, is not to advertise the message it bears but simply to authenticate the document by showing the authority of its origin.

determine whether that interest is sufficiently compelling to justify infringement of appellees' First Amendment rights. The two interests advanced by the state are that display of the motto (1) facilitates the identification of passenger vehicles,[12] and (2) promotes appreciation of history, individualism and state pride.

The State first points out that only passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to state motto.[13] Even were we to credit the State's reasons and "even though the governmental 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. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960) (footnote omitted).

The State's second claimed interest is not ideologically neu-

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[12] The Chief of Police of Lebanon, N. H., testified that "enforcement of the motor vehicle laws is facilitated by the State Motto appearing on noncommercial license plates, the benefits being the case of distinguishing New Hampshire license plates from those of similar colors of other States and the case of discovering misuse of license plates, for instance, the use of a 'trailer' license plate on a noncommercial vehicle." Appellant's Brief at 20.

[13] New Hampshire passenger vehicle license plates generally consist of two letters followed by four numbers. No other license plate category displays this combination, and no other category bears the state motto. See n. 1, *supra*. However, of the approximately 325,000 passenger plates in New Hampshire, 9,999 do not follow the regular pattern, displaying numbers only, preceded by no letters. App., at 50–53.

tral. The State is seeking to communicate to others an official view as to proper "appreciation of history, state pride, [and] individualism." Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate on ideology, however acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.[14] This is not a case where the State has no reasonable alternate means for disseminating its message. There is almost an infinite variety of ways the State can employ to proclaim its heritage of freedom and foster local pride. Nor is this a case involving a philosophically neutral message informing of a State's products or its tourist attractions or of the desirability of driving safely. Such messages would hardly raise comparable First Amendment concerns.

We conclude that the State of New Hampshire may not require appellees to display the state motto[15] upon their vehicle license plates, and accordingly, we affirm the judgment of the District Court.

Affirmed.

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[14] The State does not explain why advocacy of these values is enhanced by display on private citizens' cars but are not placed on the cars of the State officials—the Governor, Supreme Court Justices, Members of Congress, sheriffs, etc. See n. 1, *supra*.

[15] 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. 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.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1977

Re: 75-1453 - Wooley v. Maynard

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 10, 1977

Re: No. 75-1453, Wooley v. Maynard

Dear Chief,

I should appreciate your adding the following at the foot of your opinion for the Court:

> Mr. Justice Stewart concurs in the judgment of the Court and joins in all but part (4) of its opinion.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 11, 1977

RE: No. 75-1453 Wooley v. Maynard

Dear Chief:

I too have difficulty with Part (4) although otherwise am glad to join your opinion. Part 4's discussion of symbolic speech seems to me to be unnecessary to the resolution of the case since in any event, as you quite rightly point out in section (5), Maynard cannot be compelled by the state to disseminate a message with which he disagrees. Moreover, I don't think I could agree with the resolution of the symbolic speech issue on the facts of this case; I would think that it is probably fairly clear to most people that Maynard's covering up the "Live Free or Die" slogan is his way of communicating his disagreement with the slogan. Accordingly, I'll join Potter's statement at the foot of the opinion if you feel that you prefer not to delete Part 4.

Sincerely,

Bill

The Chief Justice

cc: The Conference

March 11, 1977

No. 75-1453 Wooley v. Maynard

Dear Chief:

Although I do not disagree with what you say in Part (4) of your opinion, I agree with the view expressed by two or three of our Brothers that this part is unnecessary dicta.

Putting it differently, it seems to me that you would have quite an excellent opinion if Part (4) were omitted, or if you simply dropped a footnote to the effect that in view of the disposition of the case on conventional First Amendment grounds, there is no occasion to reach the argument as to symbolic speech.

I think your Part (5) is especially good.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 11, 1977

Re: No. 75-1453, Wooley v. Maynard

Dear Chief:

I, too, cannot join your Part (4).

I also have some doubts about (5)(B).

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Chief:

In due course, I anticipate circulating a dissent from Part 5 of your circulating draft.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 14, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Chief:

I am considering a partial dissent along the lines of the enclosed.

Also, I have not come to rest with respect to Part (4) of your draft.

Sincerely,

Byron

The Chief Justice

Copies to the Conference

No. 75-1453 - Wooley v. Maynard

Mr. Justice White, concurring in part and dissenting in part.

Absent some explanation as to why an injunction as well as a declaratory judgment was necessary in this case, I cannot join Part (3) of the Court's opinion and hence dissent from the judgment insofar as it affirms the issuance of the injunction.

Steffel v. Thompson, 415 U.S. 452 (1974), held that when state proceedings are not pending, but only threatened, a declaratory judgment may be entered with respect to the state statute at issue without regard to the strictures of Younger v. Harris, 401 U.S. 37 (1971). But Steffel left open whether an injunction should also issue in such circumstances. 415 U.S., at 463. Then, Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), approved issuance by a federal court of a preliminary injunction against a threatened state prosecution, but only pending decision on the declaratory judgment and only then subject to "stringent" standards which should cause the District Court to "weigh carefully the interests on both sides," since prohibiting the enforcement of the State's criminal law against the federal plaintiff, even pending final resolution of his case, "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of Younger." 422 U.S., at 931. Although finding the issuance of a preliminary injunction not an abuse of discretion in that case, the Court also distinguished between a preliminary injunction pendente lite and a permanent injunction at the successful conclusion of the federal case; for "a District Court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." Id.

Doran v. Salem Inn thus did not decide the present injunction issue which the Court now disposes of in a sentence or two. Doran was true to the teachings of Douglas v. Jeannette, 319 U.S. 157 (1943), where the Court held that an injunction against threatened state criminal prosecutions should not issue even though the underlying state statute had already been invalidated, relying on the established rule "that courts of equity do not ordinarily restrain criminal prosecutions." 319 U.S., at 163. A threatened prosecution,

"even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief . . . ." Id. An injunction should issue only upon a showing that the danger of irreparable injury is both "great and immediate," citing the same authorities to this effect that this Court relied on in Younger v. Harris. In each of the cited cases--and these do not exhaust the authorities to the same effect--criminal prosecutions were not pending when this Court ruled that a federal equity court should not enter the injunction. "The general rule is that equity will not interfere to prevent reenforcement of a criminal statute even though unconstitutional . . . to justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." Spielman Motor Co. v. Dodge, 295 U.S. 89, 95 (1935).

Under our cases, therefore, more is required to be shown than the Court's opinion reveals to affirm the issuance of the injunction. To that extent I therefore dissent.

March 14, 1977

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1977

Re: 75-1453 - Wooley v. Maynard

Dear Byron:

I have your note of March 14 and the proposed partial dissent.

I had thought that three arrests and one 15 day jail term showed that there was really more than a "threatened" prosecution. Here the state has shown an adamant attitude to punish "dissidents" and make an example of this fellow. I had not thought more than a recital of the bare facts was needed to show this. In this respect, the case is distinguishable from those where the prospect of further prosecution was speculative. Alternatively, I would be willing to consider affirming only as to the declaratory judgment since that will give him his relief, Doran v. Salem Inn, 422 U.S., at 931, provided this will satisfy you and not "frighten" off other votes.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1977

Re: No. 75-1453 Wooley v. Maynard

Dear Byron:

Please join me in your partial dissent in this case.

Sincerely,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 15, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Chief:

I shall wait on Bill Rehnquist's dissent mentioned in his note of March 14.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

March 15, 1977

No. 75-1453 Wooley v. Maynard

Dear Chief:

Referring to the exchange of correspondence between you and Byron, I agree with you that the prospect of further prosecution was not speculative, and would prefer to affirm both with respect to the injunction and declaratory judgment.

If, however, you need my vote for a Court to affirm only as to the declaratory judgment, I would not be inclined to dissent.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 15, 1977

Re: 75-1453 - Wooley v. Maynard

Dear Chief:

For the reasons you stated in response to Byron's proposed partial dissent, I agree that the prospect of further prosecution is not speculative and that it was not error for the District Court to enter an injunction. Indeed, if you decide to reverse the injunction, you will "frighten" off my vote.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Sally - Write C. J.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

If Omission of Part 4, with a statement (Note) that it was unnecessary to address the symbolic speech issue, is fine with me. If your proposed Note on Steffel also is agreeable.

March 16, 1977

Re: 75-1453 Wooley v. Maynard

MEMORANDUM TO THE CONFERENCE:

We are experiencing the usual diversity of views in First Amendment cases.

Sincerely,

I have been awaiting the "lineup," and it now appears that the maximum "solidarity" can be achieved by deleting Part 4. Those to whom that part appeals may want to say something separately.

I, therefore, call for a "show of hands" on deleting Part 4 and adding the following as Note 9 page 8, line 5.

> In Steffel v. Thompson, 415 U.S. 452, 463 & n. 12 (1974) we reserved the question of when a permanent injunction may be granted in addition to declaratory relief. We conclude that such injunction was proper against the background of three prosecutions. The prosecutions enjoined here are for future, not past conduct. The rights implicated are protected by the First Amendment, and future prosecutions, even if unsuccessful, will have the effect of seriously interfering with appellees' freedom to drive their automobile. Three separate prosecutions of Mr. Maynard within the span of five weeks evidences sufficiently the State's determination to engage in vigorous enforcement of the statute--amounting virtually to harassment, cf. Dombrowski v. Pfister, 380 U.S. 479 (1965). On this record the threat of additional future prosecutions is not speculative.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 16, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Chief:

Since I am on the dissenting side on the merits of the First Amendment issue in this case, my views on the Steffel issue may not be of great interest to you. I do, however, feel that your response to Byron's draft dissent on the point is less than convincing, and I will therefore remain with Byron there. In the event that you go through with your announced plan to delete Part 4, I will in my dissent on the merits point out the fact that the Court's opinion has entirely omitted to pass on the First Amendment issue which the District Court decided, and gone on to decide the case on a First Amendment issue which the District Court never considered.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 16, 1977

Re: No. 75-1453 -- Wooley v. Maynard

Dear Chief,

In response to your letter of today, I vote as follows:

(1) In favor of deleting Part 4.

(2) In favor of adding the proposed Note 9, except that I would eliminate the phrase "amounting virtually to harassment." I think it is inaccurate so to characterize the enforcement of the New Hampshire law, when the validity of the law had been explicitly upheld by the New Hampshire Supreme Court.

Sincerely yours,

P.S.
1.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 16, 1977

RE: No. 75-1453 Wooley v. Maynard

Dear Chief:

I "show my hand" both for deleting Part 4 and adding your suggested Note 9.

Sincerely,

Bill

The Chief Justice

cc: The Conference

March 17, 1977

No. 75-1453 Wooley v. Maynard

Dear Chief:

Omission of Part 4, with a statement (Note) that it was unnecessary to address the symbolic speech issue is fine with me.

Your proposed Note on Steffel also is agreeable.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 17, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Chief:

I vote to delete Part 4 and add Note 9.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 17, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Chief:

Absent a remand to determine whether an injunction as well as a declaratory judgment is necessary in this case, I shall remain in partial dissent.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 17, 1977

Re: 75-1453 - Wooley v. Maynard

Dear Chief:

Please add my name to those who favor deleting Part 4 and adding the new footnote 9. Like Potter, I have a slight preference for omitting the word "harassment" but it is merely a preference.

Respectfully,

John

The Chief Justice

Copies to the Conference

pp 4-7, 9, 11
old § (4) 2)

"Symbolic speech" portion eliminated.

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: MAR 23 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1453

Neal R. Wooley, etc., et al., Appellants, *v.* George Maynard et ux. | On Appeal from the United States District Court for the District of New Hampshire.

[March —, 1977]

Reviewed Joint W.J.B. 3/24

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The issue on appeal is whether the State of New Hampshire may constitutionally prohibit covering of the motto "Live Free or Die" on passenger vehicle license plates by individual licensees who find that motto repugnant to their moral and religious beliefs.

(1)

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die."[1] N. H. Rev. Stat. Ann. § 263:1. Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure] . . . the figures or letters on any number plate." N. H. Rev. Stat. Ann. § 262:27–c (Supp. 1973). The term "letters" in this section has been interpreted by the State's highest court to include the state motto. *State* v. *Hoskin*, 112 N. H. 332, 295 A. 2d 454 (1972).

Appellees George Maynard and his wife Maxine are fol-

[1] License plates are issued without the state motto for trailers, agricultural vehicles, car dealers, antique automobiles, the Governor of New Hampshire, its Congressional Representatives, its Attorney General, Justices of the State Supreme Court, veterans, chaplains of the State Legislature, sheriffs and others.

lowers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire state motto to be repugnant to their moral, religious, and political beliefs,[2] and therefore find it objectionable to disseminate this message by displaying it on their automobiles.[3] Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates.[4]

On November 27, 1974, Mr. Maynard was issued a citation for violating N. H. Rev. Stat. Ann. § 262:27–c. On December 6, 1974, he appeared *pro se* in Lebanon, New Hampshire District Court to answer the charge. After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objections to the motto. The state trial judge expressed sympathy for appellee's situation, but considered himself bound by the authority of *State* v. *Hoskin, supra,* to hold Maynard guilty. A $25 fine was imposed, but execution was suspended during "good behavior."

On December 28, 1974, Mr. Maynard was again charged with violating § 262:27–c. He appeared in court on Janu-

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[2] Mr. Maynard described his objection to the state motto:

"[B]y religious training and belief, I believe my 'government'—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.

". . . I also disagree with the motto on political grounds. I believe that life is more precious than freedom."

Affidavit of George Maynard, App., at 3.

[3] At the time this suit was commenced appellees owned two automobiles, a Toyota Corolla and a Plymouth station wagon. Both automobiles were registered in New Hampshire where the Maynards are domiciled.

[4] In May or June 1974 Mr. Maynard actually snipped the words "or Die" off the license plates, and then covered the resulting hole, as well as the words "Live Free," with tape. This was done, according to Mr. Maynard, because neighborhood children kept removing the tape. The Maynards have since been issued new license plates, and have disavowed any intention of physically mutilating them.

ary 31, 1975, and again chose to represent himself; he was found guilty, fined $50 and sentenced for six months to the Grafton County House of Corrections. The court suspended this jail sentence but ordered Mr. Maynard to also pay the $25 fine for the first offense. Maynard informed the court that, as a matter of conscience, he refused to pay the two fines. The court thereupon sentenced appellee to jail for a period of 15 days. Appellee has served the full sentence.

Prior to trial on the second offense Mr. Maynard was charged with yet a third violation of § 262:27–c on January 3, 1975. He appeared on this complaint on the same day as for the second offense, and was, again, found guilty. This conviction was "continued for sentence" so that Maynard received no punishment in addition to the 15 days.

(2)

On March 4, 1975, appellees brought the present action pursuant to 42 U. S. C. § 1983 in the United States District Court for the District of New Hampshire. They sought injunctive and declaratory relief against enforcement of N. H. Rev. Stat. Ann. §§ 262:27–c, 263:1, insofar as these required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto.[5] On March 11, 1975, the single District Judge issued a temporary restraining order against further arrests and prosecutions of the Maynards. 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. Following a hearing on the merits,[6] the

[5] Appellants sought (a) injunctions against future criminal prosecutions for violation of the statutes and (b) an injunction requiring that in future years they be issued license plates that do not bear the state motto.

[6] Several months elapsed between the issuance of the temporary restraining order and the hearing on the merits. This delay was occasioned by the request of the State pending consideration of a bill in the New Hampshire Legislature that would have made inclusion of the state motto

District Court entered an order enjoining the State "from arresting and prosecuting [the Maynards] at any time in the future for covering over that portion of their license plates that contains the motto 'Live Free or Die.'" [7] *Maynard* v. *Wooley*, 406 F. Supp. 1381 (NH 1976). We noted probable jurisdiction of the appeal. 426 U. S. 946 (1976).

(3)

Appellants argue that the District Court was precluded from exercising jurisdiction in this case by the principles of equitable restraint enunciated in *Younger* v. *Harris*, 401 U. S. 37 (1971). In *Younger* the Court recognized that principles of judicial economy, as well as proper state-federal relations, preclude federal courts from exercising equitable jurisdiction to enjoin ongoing state prosecutions. 401 U. S., at 43–44. However, when a genuine threat of prosecution exists, a litigant is entitled to resort to a federal forum to seek redress for an alleged deprivation of federal rights. See *Steffel* v. *Thompson*, *supra*; *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 930–931 (1975). *Younger* principles aside, a litigant is entitled to resort to a federal forum in seeking redress under 42 U. S. C. § 1983 for an alleged deprivation of federal rights. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 609–610, n. 21 (1975). Mr. Maynard now finds himself placed "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 [another] criminal

on passenger vehicle license plates optional with the car owner. The bill failed to gain enactment.

[7] The District Court refused to order the State of New Hampshire to issue the Maynards license plates without the state motto, although it noted that there was evidence on the record that New Hampshire could easily do so. 406 F. Supp., at 1389. See n. 1, *supra*.

proceeding." *Steffel* v. *Thompson, supra,* 415 U. S., at 462. Mrs. Maynard, as joint owner of the family automobiles is no less likely than her husband to be subjected to state prosecution. Under these circumstances he cannot be denied consideration of a federal remedy.

Appellants, however, point out that Maynard failed to seek review of his criminal convictions and cite *Huffman* v. *Pursue, Ltd., supra,* for the propositions that "a necessary concomitant of *Younger* is that a party in appellee's posture must exhaust his state appellate remedies, before seeking relief in the District Court," 420 U. S., at 608, and that "*Younger* standards must be met to justify federal intervention in a state judicial proceeding as to which a losing litigant has not exhausted his state appellate remedies," *id.,* at 609. *Huffman,* however, is inapposite. There the appellee was seeking to prevent, by means of federal intervention, enforcement of a state court judgment declaring its theater a nuisance. We held that appellee's failure to exhaust its state appeals barred federal intervention under the principles of *Younger:* "Federal 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." 420 U. S., at 609 (emphasis added).

Here, however, the suit is in no way "designed to annul the results of a state trial" since the relief sought is wholly prospective, to preclude further prosecution under a statute alleged to violate Maynard's constitutional rights. He has already sustained convictions and has served a sentence of imprisonment for his prior offenses.[8] He does not seek to have

[8] As to the offense which was "continued for sentencing," see p. 3, *supra,* the District Court found that "[n]o collateral consequences will attach as

his record expunged, nor to annul any collateral effects those convictions may have, *e. g.*, upon his driving privileges. The Maynards seek only to be free from prosecutions for future violations of the same statutes. *Younger* does not bar federal jurisdiction.

In their complaint, the Maynards sought both declaratory and injunctive relief against the enforcement of the New Hampshire statute. We have recognized that although "'[o]rdinarily . . . the practical effect of [injunctive and declaratory] relief will be virtually identical,'" *Doran* v. *Salem Inn, supra,* 422 U. S., at 931, quoting *Samuels* v. *Mackell,* 401 U. S. 66, 73 (1971), a "district court can generally protect the interests of a federal plaintiff by entering a declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Doran, supra,* at 931. It is correct that generally a court will not "enjoin the enforcement of a criminal statute even though unconstitutional," *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 95 (1935), since "[s]uch a result seriously impairs the state's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*," *Doran, supra,* 422 U. S., at 931. But this is not an absolute policy and in some circumstances injunctive relief may be appropriate. "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Co., supra,* 295 U. S., at 95.

We have such a situation here for as we have noted, three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. The threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an auto-

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a result of it unless Mr. Maynard is arrested and prosecuted for violation of NHRSA 262:27–c at some time in the future." 406 F. Supp., at 1384.

mobile, is sufficient to justify injunctive relief. Compare *Douglas* v. *City of Jeannette,* 319 U. S. 157 (1943). We are therefore unwilling to say that the District Court was limited to granting declaratory relief. Having determined that the District Court was not required to stay its hand as to either appellee [9] we turn to the merits of the Maynard's claim.

(4)

The District Court held that by covering up the state motto "Live Free or Die" on his automobile license plate, Mr. Maynard was engaging in symbolic speech and that "New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on [appellees'] constitutionally protected expression." 406 F. Supp., at 1389. We find it unnecessary to pass on the symbolic expression issue, for we find more appropriate First Amendment grounds for affirming the judgment of the District Court.[10] We turn instead to what in our view is the essence of appellees' objection to the requirement that they display the motto

[9] We note that if the totality of the State's arguments were accepted, a § 1983 action could never be brought to enjoin state criminal prosecutions. According to the State, *Younger* principles bar Mr. Maynard from seeking an injunction because he has already been subjected to prosecution. As to Mrs. Maynard, the State argues, in effect, that the action is premature because no such prosecution has been instituted. Since the two spouses were similarly situated but for the fact that one has been prosecuted and one has not, we fail to see where the State's argument would ever leave room for federal intervention under § 1983.

[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. See n. 5, *supra.* This is hardly consistent with the stated intent to communicate affirmative opposition to the motto. Whether or not we view appellee's present practice of covering the motto with tape as sufficiently communicative to sustain a claim of symbolic expression, display of the "expurgated" plates requested by appellees would surely not satisfy that standard. See n. 1, *supra; Spence* v. *Washington,* 418 U. S. 405, 410–411 (1974), *United States* v. *O'Brien,* 391 U. S. 367, 376 (1968).

"Live Free or Die" on their automobile license plates. This is succinctly summarized in the following statement by Mr. Maynard in his affidavit filed with the District Court:

> "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent." App., at 5.

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not.

A

We begin with the proposition that the right of freedom of thought protected by First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 633–634, 645 (1943). A system which secures to all the right to proselytize religious, political, and ideological causes must also guarantee to each the concomitant right to decline to advocate 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." *Id.*, at 637. This is illustrated by the recent case of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized. We concluded that such a requirement deprived a newspaper of the fundamental right to decide what to print or omit:

> "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid con-

troversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right to access inescapably 'dampens the vigor and limits the variety of public debate.' *New York Times Co.* v. *Sullivan*, 376 U. S., at 279." *Id.*, at 457.

The Court in *Barnette*, *supra*, was faced with a state statute which required public school students to participate in daily "patriotic" ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." 319 U. S., at 636. 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 not significant in terms of communication of the State's message. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for advocating public adherence to an ideological point of view he finds unacceptable. In doing so, the State "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." *Id.*, at 342.

New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message—or suffer a penalty, as Maynard already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display "Live Free or Die" to hundreds of people each day.[11] The

[11] Some States require that certain documents bear the seal of the State

fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea that they find morally objectionable.

B

Identifying the Maynards' rights as protected by the First Amendment does not end our inquiry however. Even First Amendment rights may be limited where other compelling interests are at stake. See, *e. g.*, *O'Brien*, *supra*, 391 U. S., at 376–377. We therefore proceed to examine the State's interest in requiring display of the state motto to determine whether that interest is sufficiently compelling to justify infringement of appellees' First Amendment rights. The two interests advanced by the state are that display of the motto (1) facilitates the identification of passenger vehicles,[12] and (2) promotes appreciation of history, individualism and state pride.

The State first points out that only passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates. However the record here reveals that New Hampshire passenger license plates

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or some other official stamp for purposes of recordation. Such seal might contain, albeit obscurely, a symbol or motto having political or philosophical implications. The purpose of such seal, however, is not to advertise the message it bears but simply to authenticate the document by showing the authority of its origin.

[12] The Chief of Police of Lebanon, N. H., testified that "enforcement of the motor vehicle laws is facilitated by the State Motto appearing on noncommercial license plates, the benefits being the ease of distinguishing New Hampshire license plates from those of similar colors of other States and the ease of discovering misuse of license plates, for instance, the use of a 'trailer' license plate on a noncommercial vehicle." Appellant's Brief at 20.

normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to state motto.[13] Even were we to credit the State's reasons and "even though the governmental 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. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960) (footnote omitted).

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper "appreciation of history, state pride, [and] individualism." Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, however acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.[14]

We conclude that the State of New Hampshire may not require appellees to display the state motto[15] upon their ve-

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[13] New Hampshire passenger vehicle license plates generally consist of two letters followed by four numbers. No other license plate category displays this combination, and no other category bears the state motto. See n. 1, *supra*. However, of the approximately 325,000 passenger plates in New Hampshire, 9,999 do not follow the regular pattern, displaying numbers only, preceded by no letters. App., at 50–53.

[14] The State does not explain why advocacy of these values is enhanced by display on private citizens' cars but not on the cars of the State officials—the Governor, Supreme Court Justices, Members of Congress, sheriffs, etc. See n. 1, *supra*.

[15] 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.

hicle license plates, and accordingly, we affirm the judgment of the District Court.

Affirmed.

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.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 24, 1977

Re: 75-1453 - Wooley v. Maynard

Dear Chief:

I reconfirm my join.

Respectfully,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1977

Re: 75-1453 Wooley v. Maynard

MEMORANDUM TO THE CONFERENCE:

Enclosed is what I hope is the final draft of the opinion in this "sticky" little case. It is not feasible to meet every nuance of each of nine conceptions of the First Amendment but I have now tried to accommodate all the "accommodatable" views.

Regards,

WEB

March 24, 1977

No. 75-1453 Wooley v. Maynard

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 28, 1977

Re: No. 75-1453, Wooley v. Maynard

Dear Chief:

Please show me as concurring in the judgment.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 3-30-77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–1453

Neal R. Wooley, etc., et al., Appellants, *v.* George Maynard et ux. | On Appeal from the United States District Court for the District of New Hampshire.

[April —, 1977]

MR. JUSTICE WHITE, concurring in part and dissenting in part.

Steffel v. *Thompson*, 415 U. S. 452 (1974), held that when state proceedings are not pending, but only threatened, a declaratory judgment may be entered with respect to the state statute at issue without regard to the strictures of *Younger* v. *Harris*, 401 U. S. 37 (1971). But *Steffel* left open whether an injunction should also issue in such circumstances. 415 U. S., at 463. Then, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922 (1975), approved issuance by a federal court of a preliminary injunction against a threatened state prosecution, but only pending decision on the declaratory judgment and only then subject to "stringent" standards which should cause the District Court to "weigh carefully the interests on both sides," since prohibiting the enforcement of the State's criminal law against the federal plaintiff, even pending final resolution of his case, "seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism which lie at the heart of *Younger*." 422 U. S., at 931. Although finding the issuance of a preliminary injunction not an abuse of discretion in that case, the Court also distinguished between a preliminary injunction *pendente lite* and a permanent injunction at the successful conclusion of the federal case; for "a District Court can generally protect the interests of a federal plaintiff by entering a

declaratory judgment, and therefore the stronger injunctive medicine will be unnecessary." *Ibid.*

Doran was thus true to the teachings of *Douglas* v. *Jeannette,* 319 U. S. 157 (1943), where the Court held that an injunction against threatened state criminal prosecutions should not issue even though the underlying state statute had already been invalidated, relying on the established rule "that courts of equity do not ordinarily restrain criminal prosecutions." 319 U. S., at 163. A threatened prosecution "even though alleged to be in violation of constitutional guarantees, is not a ground for equity relief . . . ." *Ibid.* An injunction should issue only upon a showing that the danger of irreparable injury is both "great and immediate," citing the same authorities to this effect that this Court relied on in *Younger* v. *Harris.* In each of the cited cases—and they do not exhaust the authorities to the same effect—criminal prosecutions were not pending when this Court ruled that a federal equity court should not enter the injunction. "The general rule is that equity will not interfere to prevent enforcement of a criminal statute even though unconstitutional . . . to justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights." *Spielman Motor Co.* v. *Dodge,* 295 U. S. 89, 95 (1935).

The Court has plainly departed from the teaching of these cases. The whole point of *Douglas* v. *Jeannette's* admonition against injunctive relief was that once a declaratory judgment had issued, further equitable relief would depend on the existence of unusual circumstances thereafter. Here the State's enforcement of its statute prior to the declaration of unconstitutionality by the federal court would appear to be no more than the performance of their duty by the State's law enforcement officers. If doing this much prior to the declaration of unconstitutionality amounts to unusual cir-

cumstances sufficient to warrant an injunction, the standard is obviously seriously eroded.

Under our cases, therefore, more is required to be shown than the Court's opinion reveals to affirm the issuance of the injunction. To that extent I dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 1, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Chief:

With your permission, I will withdraw my concurring in the result to please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 30, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Byron:

Please join me in your separate opinion circulated March 30th. I am also preparing a separate dissent on the merits, which I hope to have in circulation early next week.

Sincerely,

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: APR 6 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1453

Neal R. Wooley, etc., et al., Appellants, *v.* George Maynard et ux. | On Appeal from the United States District Court for the District of New Hampshire.

[April —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

The Court holds that a State is barred by the Federal Constitution from displaying the state motto on a state license plate. The path that the Court travels to reach this result demonstrates the difficulty in supporting it. The Court holds that the required display of the motto is an unconstitutional "required affirmation of belief." The District Court, however, expressly refused to consider this contention, and noted that, in an analogous case, a decision of the Supreme Court of New Hampshire had reached precisely the opposite result. See *State v. Hoskin*, 112 N. H. 332, 295 A. 2d 454 (1972). The District Court found for appellees on the ground that the obscuring of the motto was protected "symbolic speech." This Court, in relying upon a ground expressly avoided by the District Court, appears to disagree with the ground adopted by the District Court; indeed it points out that appellees' claim of symbolic expression has been "substantially undermined" by their very complaint in this action. *Ante*, at 7 n. 10.

I not only agree with the Court's implicit recognition that there is no protected "symbolic speech" in this case, but I think that that conclusion goes far to undermine the Court's ultimate holding that there is an element of protected expression here. 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. The State has simply required that *all*[1] noncommercial automobiles bear license tags with the state motto, "Live Free or Die." Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes.

In Part (4) A, the Court relies almost solely on *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624 (1943). The Court cites *Barnette* for the proposition that there is a constitutional right, in some cases, to "refrain from speaking." *Ante,* at 8. What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case. The majority also relies upon the "right to decline to advocate [religious, political, and idealogical] concepts." *Ibid.* But such a statement begs the question. The issue, unconfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be "advocating" political or idealogical views.

The Court recognizes, as it must, that this case substantially differs from *Barnette,* in which school children were forced to speak the pledge of allegiance while giving the flag salute. *Ante,* at 9. However, the majority states "the difference is not significant in terms of the communication of the State's message." *Ibid.* Certainly this cannot be the test. Were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "communicated" in the sense described by the majority,

[1] See *ante,* at 1 n. 1 for *de minimis* exceptions.

and just as clearly the individual citizen-taxpayers would be "instruments," see *ibid.*, in that communication. However, in that case, as in this case, there is no *affirmation* of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of, or of appearing to, "assert as true" the message. This was the focus of *Barnette,* and clearly distinguishes this case from that one.

In holding that the New Hampshire statute does not run afoul of our holding in *Barnette,* the New Hampshire Supreme Court in *Hoskin, supra,* 295 A. 2d, at 457, aptly articulated why there is no required affirmation of belief in this case:

> "The defendants' membership in a class of persons required to display plates bearing the State motto carries no implication and is subject to no requirement that they indorse that motto or profess to adopt it as a matter of belief."

As found by the New Hampshire Supreme Court in *Hoskin,* there is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto "Live Free or Die" and that they violently disagree with the connotations of that motto. Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto.

The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottos "In God We Trust" and "E pluribus unum" appear on the coin and currency of the United States. I cannot imagine that the statutes, see 18 U. S. C. §§ 331 and 333, proscribing defacement of U. S. currency impinge upon the First Amend-

ment rights of an atheist. The fact that an atheist carries[2] and uses U. S. currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved with the display of state license tags upon the private automobiles involved here.

I would reverse the judgment of the District Court.

[2] Of course it is true that an atheist is not required to carry or use U. S. currency; barter, for example, is an alternative. Similarly, and with no less inconvenience, the appellees may seek other modes of transportation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 6, 1977

Re: No. 75-1453 - Wooley v. Maynard

Dear Byron:

I think Harry's letter to you of April 6th is probably a sounder analysis of our relationship, as dissenters on the merits, to your partial dissent, than was my simple "join" letter to you earlier. It would please me, too, therefore, if you could make the change which Harry suggests in his letter of April 6th.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 14, 1977

Re: 75-1453 - Wooley v. Maynard

Dear Potter:

I have your note of earlier today.

It seems to me there are no differences but only semantical variations. I am quite willing to modify the first 8 lines of part B, page 10, to read:

"B

"Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's interest is sufficiently compelling to justify requiring that appellees display the State motto on their license plates. See, e.g., O'Brien, supra, 391 U.S., at 376-377."

I assume this will meet your problem and I hardly think the change will disturb any of the "joins."

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 14, 1977

75-1453 -- Wooley v. Maynard

Dear Chief,

I cannot agree that any state or federal interest could ever justify "infringement" of First Amendment rights. For this reason I am not able to join your proposed opinion as recirculated April 13, with the additional sentence in the first full paragraph under "B" on page 10. John Harlan and I for many years carried on a continuing off-the-record dialogue on this subject. While he thought, probably quite rightly, that my view was no more than semantic and probably circular, he nonetheless came to agree with it. In short, this view is simply that sometimes interests in free expression must be subordinated to strong societal policies, but that in such situations there is no infringement of First Amendment rights. Because of this view, I also have trouble with the first two sentences of the paragraph in question, because of their use of the word "rights."

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 15, 1977

75-1453 - Wooley v. Maynard

Dear Chief,

The changes in language suggested in your letter of April 14 serve to meet my problem. If these changes are made, I shall be glad to join your opinion for the Court.

Sincerely yours,

P.S.
I.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 18, 1977

MEMORANDUM TO THE CONFERENCE:

Re: 75-1453 Wooley v. Maynard

I can have Wooley ready for Wednesday, since Bill Rehnquist has adjusted his dissent to my language changes.

We have so few cases this week I suggest that any one "dissent" will lead me to lay it over.

Regards,

WEB

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
12/13/76								
1st draft 3/16/77 2nd draft 3/23/77 3rd draft 4/13/77 4th draft 4/19/77		Concurs in judgment & joins all but Part 4 join C J 4/15/77	Partial dissent typed draft 3/14/77 Concurring in part & dissenting in part 1st draft 3/30/77 2nd draft dissenting in part 4/7/77	Cannot join Part 4 Concurs in judgment 3/28/77 Join C J 4/1/77	await dissent 3/15/77 Join WHR 4/6/77 Join BRW 4/6/77	Join C J 3/22/74	will dissent 3/14/77 join BRW 3/14/77 Join March 30 version of BRW 4/30/77 1st draft 4/6/77 2nd draft 4/18/77 3rd draft 4/19/77	Join C J 3/10/77
				75-1453 Wooley v. Maynard				