ARTICLES

School Prayer and the Principle of Uncoerced Listening

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Introduction

The highly charged issue of school prayer returned to the Supreme Court in a somewhat unusual form during the 1984 Term.[1] The issue was whether an Alabama statute which authorized a one-minute period of silence in public schools "for meditation or voluntary prayer" was constitutionally valid. The Court's narrow holding, which set aside the statute on grounds related to Alabama's legislative purpose, was unremarkable except to those, on both sides, who demanded a more clear-cut vindication of their position.[2] But the Court's treatment of silent prayer has important implications, not only for religious exercises, but also for other government speech before unconsenting audiences.[3]

This Article explores some of those implications. The Article does not suggest that the Court intended or even focused on the consequences that appear to flow from its treatment of school prayer. What is set forth in these pages is admittedly a nontraditional view—or at least an extension of traditional views—of the Free Speech and Religion Clauses of the First Amendment. But it is hardly novel for unwitting implications of the Court's work to control future judicial results.[4] This Article therefore considers the meaning of the silent prayer decision, its historical antecedents, and finally, its broader implications for first amendment theory.

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1. Wallace v. Jaffree, 472 U.S. 38 (1985).

2. *See* N.Y. Times, June 25, 1985, at B5, col. 1; TIME, June 17, 1985, at 52.

3. *See infra* notes 117-143 and accompanying text.

4. For instance, Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955), originally calling for student "admission to the public schools . . . on a nonracial basis," eventually led to the invalidation of a statutory ban on racially based student assignments. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

The Article begins with an examination of the school prayer decisions and finds that they are grounded in "freedom of conscience and belief."[5] It is suggested that if freedom of belief is undermined when individuals are forced to listen to religious speech by government, it may be similarly undermined when one is required to listen to nonreligious speech by government.[6] This Article also examines earlier cases protecting freedom of conscience and explores the implications of those cases.[7] Finally, the Article discusses both the limitations on freedom of belief and the remedies that may be available for constitutional violations.[8]

I. The *Jaffree* Case: A Search for Meaning

In *Wallace v. Jaffree*,[9] the Court addressed the problem of state-sanctioned silent prayer in public schools. A parent in that case filed suit on behalf of his three school children, challenging the validity of an Alabama statute which authorized a one-minute period of silence "for meditation or voluntary prayer."[10] Justice Stevens, writing for five members of the Court, identified freedom of conscience and belief as "the central liberty that unifies the various clauses in the First Amendment."[11] He then applied the first prong of the three-part test of *Lemon v. Kurtzman*[12] and concluded that the "sole" purpose of the Alabama statute was to express "the State's endorsement of prayer activities" in the public schools.[13]

Although a finding of unconstitutionality was required by the Court's determination that the sole purpose of the statute was to endorse religious activity, a majority of the Court seemed prepared to uphold a "straightforward" moment-of-silence statute.[14] Three members of the Court argued that the Alabama provision should be upheld despite its

5. *See infra* notes 9-33 and accompanying text.

6. *See infra* notes 40-44, 117-143 and accompanying text.

7. *See infra* notes 45-92 and accompanying text.

8. *See infra* notes 144-164 and accompanying text.

9. 472 U.S. 38 (1985).

10. ALA. CODE § 16-1-20.1 (Supp. 1986). Two related statutes provided for vocal prayer, ALA. CODE § 16-1-20.2 (Supp. 1986), and for the observance of a moment of silence "for meditation." ALA. CODE § 16-1-20 (Supp. 1986).

11. *Jaffree*, 472 U.S. at 50.

12. 403 U.S. 602 (1971). The test provides that a statute must: (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not cause excessive entanglement between religion and government. *Id.* at 612-13.

13. *Jaffree*, 472 U.S. at 60. The Court, in reaching this conclusion, relied on admissions of a religious purpose by the statute's chief sponsor and on the fact that a pre-existing statute had already authorized meditation without mentioning voluntary prayer.

14. *See infra* notes 15-20 and accompanying text.

peculiar legislative history.[15] In addition, two other members would have held constitutionally valid a statute evincing a secular purpose.[16] Justice O'Connor believed that constitutional requirements would be satisfied by a "moment of silence law . . . drafted and implemented so as to permit prayer, meditation, and reflection . . . without endorsing one alternative over the others . . . ."[17] Justice Powell agreed that such laws "cannot be treated in the same manner as those providing for vocal prayer"[18] and said he "would vote to uphold the Alabama statute if it also had a clear secular purpose."[19] Even Justice Stevens' opinion acknowledged the distinctiveness of silent prayer and left open the possibility of "protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day."[20]

The emerging majority view would thus allow the states to set aside a moment of the regular school day "so as to permit prayer, meditation, and reflection . . . without endorsing one alternative over the others."[21] Under this approach, it seems clear that silent prayer can be brought into public school classrooms. Since the *Jaffree* Court unanimously rejected an attempt to reintroduce vocal prayer into Alabama schools,[22] the emerging majority view plainly invites attention to the distinction between vocal prayer and silent prayer.

In a concurring opinion in *Jaffree*, Justice O'Connor offered the following distinction between vocal prayers and state-sponsored moments of silence:

> First, a moment of silence is not inherently religious . . . . Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others.[23]

The first point is unpersuasive. The fact that a moment of silence is not "inherently" religious can hardly be dispositive. There is no reason to

15. 472 U.S. at 84, 90-91 (Burger, C.J., White & Rehnquist, JJ., dissenting).

16. *Id.* at 62 (Powell, J., concurring); *id.* at 67 (O'Connor, J., concurring).

17. *Id.* at 76 (O'Connor, J., concurring). According to Justice O'Connor, this rationale "suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray . . . over the child who chooses to meditate or reflect." *Id.*

18. *Id.* at 62 n.2 (Powell, J., concurring).

19. *Id.* at 66 (Powell, J., concurring). Justice Powell believed that "a straightforward moment-of-silence statute" would satisfy the second and third prongs of the *Lemon* test. *Id.*

20. *Id.* at 59.

21. *Id.* at 76 (O'Connor, J., concurring).

22. Wallace v. Jaffree, 472 U.S. 38 (1985) (affirming the invalidation of ALA. CODE § 16-1-20.2).

23. *Id.* at 72 (O'Connor, J., concurring).

doubt that in some classrooms the participation in prayer during official moments of silence will be just as great as the participation once was in vocal prayer. Furthermore, the students who pray may make their prayer known to classmates either by their actions during the moment of silence or by explicit statements afterwards.[24] Where such participation occurs, and is known to occur, it makes little sense to suggest that the moment of silence is nonreligious or arguably nonreligious.

Justice O'Connor's second point, regarding the beliefs of individual students, is more cogent. In the case of vocal prayer, students who choose not to participate are forced to listen to the prayer unless they remove themselves from the room. Since school attendance is required, withdrawal from the classroom during prayer is likely to be conspicuous; and some students may, for that reason, be coerced into listening to the prayer. When prayers are silent, on the other hand, neither those who pray nor those who decline will be forced to listen to any prayer which might offend their religious or nonreligious beliefs. What seems to distinguish silent from vocal prayer, therefore, is the noninfringement of the rights of listeners when no words are spoken.

An analysis of the vocal prayer cases supports the view that listener rights are of critical concern to the Court. In *Engel v. Vitale,*[25] the first of the school prayer cases, the Supreme Court set forth the rationale for finding a violation of the Establishment Clause. In that case, school principals were directed to require each class to read aloud a prayer, composed by the State Board of Regents, at the beginning of the school day.[26] In concluding that it was "no part of the business of government to compose official prayers for any group of the American people to recite,"[27] the Supreme Court relied on two basic principles. First, the Court emphasized the lack of state power "to prescribe by law any particular form of prayer" to be used "in carrying on any program of governmentally sponsored religious activity."[28] Second, the Court observed that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[29] This coercive pressure to conform is particularly troublesome

24. Even if overt religious behavior might invalidate an otherwise lawful meditation exercise, subsequent student admissions of silent prayer surely would not. *See supra* notes 15-20 and accompanying text.

25. 370 U.S. 421 (1962).

26. *Id.* at 422

27. *Id.* at 425.

28. *Id.* at 430.

29. *Id.* at 431.

in the context of a captive audience, and the Court recognized that problem in its next decision on school prayer.

Abington School District v. Schempp[30] dealt with government provisions which mandated Bible reading in public schools but permitted the excusal of students upon their parents' request. The Court noted that "[t]hese exercises are prescribed as part of the curricular activities of students who are required by law to attend school,"[31] and held that in light of *Engel* the excusal provision could not save the program.[32] Although *Schempp* did not involve a state-composed prayer, as the *Engel* case had, the official prescription of religious activity and pressure on a captive audience were sufficient to invalidate the program.[33]

Since *Engel* and *Schempp* involved both officially prescribed religious activity and pressure on a captive audience to conform, it was uncertain whether one of those elements standing alone would trigger a finding of unconstitutionality.[34] But later cases suggest that when the two elements are separated, state prescription of prayer, independent of coercive pressure, need not be constitutionally fatal.

Marsh v. Chambers[35] raised the question whether a state legislature's practice of opening each legislative day with the recitation of prayer violated the First Amendment.[36] The Court, in refusing to invalidate the practice, cited the long history of legislative prayer in the United States as evidence of the Framers' intent.[37] It also offered a policy basis for distinguishing legislative prayer from prayer in school: "Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' . . . or peer pressure . . . ."[38] Equally important, members of the legislature are frequently absent during floor activity, including the invocation, and their absence does not necessarily reflect their religious views. There was thus no captive audience problem in *Marsh* and little or no "indirect coercive pressure" to conform.[39]

30. 374 U.S. 203 (1963).

31. *Id.* at 223.

32. *Id.* at 224-25.

33. *Id.* at 223.

34. *See supra* notes 25-33 and accompanying text.

35. 463 U.S. 783 (1983).

36. The prayer exercise was conducted by a chaplain who was chosen biennially by the Executive Board of the Legislative Council and paid with public funds.

37. 463 U.S. at 786.

38. *Id.* at 792.

39. See also Lynch v. Donnelly, 465 U.S. 668, 677 (1984), noting that "Congress has directed the President to proclaim a National Day of Prayer each year" and that "Presidents have repeatedly issued such Proclamations." Justice O'Connor has observed that

Finally, *Valley Forge Christian College v. Americans United for Separation of Church and State*[40] further supports the view that pressure on a captive audience was a critical element in the school prayer cases. Addressing an issue of standing to sue, the Court in *Valley Forge* noted that the *Schempp* plaintiffs had standing because in that case "impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them."[41] Although the Court has not been consistent in its application of standing requirements to establishment clause cases,[42] *Valley Forge* confirms the importance of the captive audience in the school prayer cases.

The focus on the rights of listeners in *Jaffree* and other prayer cases has important first amendment implications. When the cases are viewed from the perspective of the listener's freedom of conscience, as *Jaffree* suggests, they appear to yield not only the anti-establishment clause rule for which they are usually cited, but also an implied principle of uncoerced listening. Of course, the cases dealt specifically with prayer and at a minimum protect against government imposition of certain religious speech on a captive audience. However, this protection is grounded upon freedom of belief, which *Jaffree* identified as "the central liberty that unifies the various clauses in the First Amendment."[43] It is precisely because freedom of belief can be compromised by forced listening that vocal prayer is treated differently from silent prayer. But while first amendment protection for freedom of conscience certainly embraces religious beliefs, it is not necessarily limited to such beliefs. The principle of uncoerced listening, therefore, cannot easily be confined to religious speech and may potentially protect against forced listening to various forms of ideological indoctrination by government.[44] Before addressing this issue further, it will be useful to examine the historical roots of the principle in order to understand better the scope of its potential application. An historical overview suggests a surprisingly broad degree of support for the principle of uncoerced listening.

"[p]residential proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination." *Jaffree*, 472 U.S. at 81 (O'Connor, J., concurring).

40. 454 U.S. 464 (1982).

41. *Id.* at 486-87 n.22.

42. *Compare* Doremus v. Board of Educ., 342 U.S. 429 (1952) *with* Walz v. Tax Comm'n, 397 U.S. 664 (1970).

43. *Jaffree*, 472 U.S. at 50.

44. *See infra* note 139 for examples of such indoctrination.

II. Roots of the Principle

A. The Early Case Law

West Virginia v. Barnette[45] imposed the first significant restrictions on officially mandated speech. *Barnette* involved a school board provision which required all students to participate in saluting the flag, and subjected them to expulsion for failure to comply.[46] Jehovah's Witnesses sought to enjoin enforcement of the provision because they believed the pledge would violate the biblical command against bowing before graven images. The Court held that individuals could not be required to salute the flag, but it expressly declined to limit its decision to claims based on religion.[47] Instead, the Court ruled that no person objecting to the flag salute, for either religious or nonreligious reasons, could be required to participate in the ceremony:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein . . . .
>
> We think the action of the local authorities in compelling the flag salute . . . 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.[48]

The *Barnette* decision clearly protects the right of individuals not to declare a political or religious belief. Whether it also protects their right not to listen to declarations of belief by the government is less certain. The opinion stated that no official can force a declaration of beliefs *or* "prescribe what shall be orthodox."[49] This dictum clearly supports the principle of uncoerced listening. However, the holding in *Barnette* was more narrow. The Court's judgment simply enjoined enforcement of provisions requiring "participation" in the flag salute,[50] and it is not clear whether coerced listening is a form of participation that was withdrawn from state authority.[51]

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45. 319 U.S. 624 (1943).

46. The provision stated that "all teachers . . . and pupils in [West Virginia Public Schools] . . . shall be required to participate in the salute honoring the nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly." *Id.* at 626 n.2.

47. *Id.* at 634.

48. *Id.* at 642 (citations omitted).

49. *Id.*

50. *See supra* note 46.

51. Lower federal courts have defined the right of nonparticipation to encompass more than a refusal to make a declaration of belief. *See, e.g.*, Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973) (ruling that students could remain seated during the flag salute). A broad definition

Coerced listening was more plainly a matter of concern in *Kovacs v. Cooper.*[52] *Kovacs* involved a municipal ordinance prohibiting the use on city streets of any sound truck or other amplifier emitting "loud and raucous noises." The Court concluded that "the need for reasonable protection . . . from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance."[53]

Although *Kovacs* emphasized the city's interest in maintaining community tranquility, the ordinance apparently did not regulate disturbing noises emanating from other sources. The Court, therefore, acknowledged a separate governmental interest in protecting captive auditors from speech they were unwilling to hear: "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference . . . except through the protection of the municipality."[54] *Kovacs* thus recognized the state's power not only to protect local tranquility but, more significantly for first amendment purposes, to protect captive auditors from coerced listening.

B. The Right to Receive

For many years freedom of speech was viewed almost exclusively from the perspective of those seeking to disseminate information or ideas. Speakers and distributors were protected, but little attention was paid at first to the rights of the listener.[55] Eventually, the Supreme Court came to view the First Amendment as protecting the entire communication, including the right to receive information and ideas.

The issue was squarely presented in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[56] In *Virginia Pharmacy*, a consumer group challenged a state law providing that pharmacists were guilty of unprofessional conduct if they advertised the price of prescription drugs. The Court held that prospective recipients of the information had standing to assert a first amendment interest in the

seems likely to embrace the right to resist forced listening, but the issue appears not to have been litigated. See Frain v. Baron, 307 F.Supp. 27 (E.D.N.Y. 1969), in which public schools voluntarily recognized such a right.

52. 336 U.S. 77 (1949).

53. *Id.* at 89.

54. *Id.* at 86-87.

55. *See generally* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1941). The work of Alexander Meiklejohn, published nearly 30 years after the Supreme Court's entry into the first amendment arena, was instrumental in focusing attention on the rights of listeners. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *reprinted in* A. MEIKLEJOHN, POLITICAL FREEDOM 3-89 (1965).

56. 425 U.S. 748 (1976).

dissemination of drug prices: "Freedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both."[57]

In *Board of Education v. Pico*,[58] a plurality of the Court applied the "right to receive"[59] to the removal of materials from a public school library. The school board in *Pico* had ordered the removal of certain books from the high school and junior high school libraries because the books were thought to be "anti-American, anti-Christian, anti-Semetic [sic], and just plain filthy."[60] A group of students brought suit, alleging that the Board's action violated their rights under the First Amendment. Although only a minority of the Supreme Court endorsed the right to receive material in school libraries, a majority of the Court agreed that the First Amendment imposes some limits on state power to remove books from public schools.[61] Justice Brennan, writing for four members of the Court, relied on *Barnette's* ban on the prescription of orthodoxy in concluding that a school board may not remove books for the purpose of suppressing ideas disfavored by board members:

> If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. . . . To permit such intentions [of denying access to disfavored ideas] would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*.[62]

Justice Rehnquist, although dissenting under the facts in *Pico*, acknowledged that he would "cheerfully concede"[63] that books could not be removed because they advocated racial equality or other ideas with which the school board disagreed.[64]

The recognition of the listener's first amendment rights in *Virginia Pharmacy* was an important step in the development of the principle of uncoerced listening. Acceptance of a constitutional right to receive in-

57. *Id.* at 756.

58. 457 U.S. 853 (1982).

59. Stanley v. Georgia, 394 U.S. 557, 564 (1969).

60. 457 U.S. at 857 (citing Pico v. Board of Ed., Island Trees Union Free School Dist., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

61. Not surprisingly, no agreement was reached on precisely what those limits are.

62. *Pico*, 457 U.S. at 870-71 (plurality opinion).

63. *Id.* at 907 (Rehnquist, J., dissenting).

64. Although Justice Brennan said that the school board "might" be able to defend a claim of unfettered discretion in matters of curriculum, it is highly unlikely that a curriculum decision based clearly on race or political party affiliation could survive constitutional attack. *See* Meyer v. Nebraska, 262 U.S. 390 (1923); *see also* Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976).

formation, although limited to cases involving a willing speaker, suggests that listeners rather than government should control their exposure to material in the public domain. Nevertheless, *Virginia Pharmacy* fell short of recognizing full autonomy for listeners. Because the litigants in that case did not seek protection *against* the speaker, the decision only guaranteed access to speech rather than a right to be insulated from it. The *Pico* case similarly addressed access to speech, but *Pico* is also significant for its apparent reaffirmation of *West Virginia v. Barnette*. *Pico*, like *Barnette*, reaches both religious and nonreligious claims, and strongly suggests that *Barnette*'s ban on the prescription of orthodoxy has far greater force than would be attributed to casual dictum.[65] *Pico* did not, however, address the difficult problems surrounding the application of the principle of uncoerced listening to public schools, since that case involved neither a willing speaker nor an unwilling listener.

C. Protecting Captive Auditors

The principle of uncoerced listening has been enforced in a number of cases upholding speech restrictions specifically designed to protect captive auditors. *Rowan v. Post Office Department*[66] presents a good example. In *Rowan*, the Court upheld a federal statute providing that persons who received mail which they deemed "sexually provocative" could have their names removed from the sender's mailing list and insulate themselves from future mailings.[67] In ruling that "no one has a right to press even 'good' ideas on an unwilling recipient,"[68] the Court relied explicitly on the interests of captive auditors: "Weighing the highly important right to communicate . . . against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."[69]

Two characteristics of *Rowan* made it a relatively easy case for protecting the rights of listeners. First, individual recipients could reject unwanted messages without interfering with the freedom of anyone else to receive those messages.[70] Second, the government made no distinction

65. *Pico*, 457 U.S. at 870-71 (plurality opinion).

66. 397 U.S. 728 (1970).

67. 39 U.S.C. § 4009 (1970).

68. 397 U.S. at 738.

69. *Id.* at 736-37.

70. Although the statute permitted parents to request removal of the names of minor children from a mailing list, the Court did not address "the right of older children to receive materials through the mail." *Id.* at 741 (Brennan, J., concurring).

between different types of speech; instead, it simply recognized the power of individuals to reject any message they deemed offensive.

More difficult questions arise when captive auditors are protected only from selected speech, or are protected at the expense of other listeners who wish to hear the speech.[71] Nevertheless, government power to protect a captive audience was sustained in *Lehman v. City of Shaker Heights*,[72] despite the absence of the *Rowan* characteristics. *Lehman* upheld a city's refusal to sell advertising space on municipal buses to political candidates, although the city sold space to commercial and public-service advertisers.[73] A four-member plurality of the Court justified the regulation on the basis of the city's interest in minimizing the "chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."[74] In a separate opinion, Justice Douglas argued that the Constitution not only permitted, but in fact required, the action taken by the city: "[T]he right of commuters to be free from forced intrusions on their privacy *precludes* the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience."[75]

Cases like *Lehman* and *Rowan*, which extend beyond religious speech and explicitly protect captive auditors, lend strong support to the principle of uncoerced listening. Although the *Lehman* dissenters objected to "the city's preference for bland commercialism and noncontroversial public service messages over 'uninhibited, robust, and wide-open' debate on public issues,"[76] a preference for noncontroversial speech is consistent with the aim of protecting captive auditors. In the context of a captive audience, blandness may be less objectionable than ideological force-feeding. The school prayer cases were based on that assumption, and *Lehman* applied the same reasoning to nonreligious speech. But while *Lehman* and *Rowan* gave legal status to the principle of uncoerced listening, these decisions did not infuse the principle with constitutional status. Instead, state and federal legislative power, not the First Amend-

71. *See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

72. 418 U.S. 298 (1974).

73. Lehman, a candidate for the Ohio General Assembly, sought declaratory and injunctive relief against the refusal of advertising space on the Shaker Heights Rapid Transit System. The advertising space was managed by Metromedia, Inc. which, pursuant to its contract with the City of Shaker Heights, did not accept any political advertising for placement in the transit cars.

74. 418 U.S. at 302-04 (plurality opinion).

75. *Id.* at 307 (Douglas, J., concurring) (emphasis added). Justice Douglas provided the fifth vote in support of the Court's judgment.

76. *Id.* at 315 (Brennan, J., dissenting) (footnote omitted).

ment, afforded the basis for protecting captive auditors.[77]

D. Releasing Students From Public School

In *Wisconsin v. Yoder*,[78] the Court recognized the constitutional status of the principle of uncoerced listening, but attempted to limit its decision to claims based on religion. The issue in *Yoder* was whether a state could enforce its compulsory school attendance laws against Amish children who, for religious reasons, refused to attend school beyond the eighth grade. The Court, noting that the values taught in high school were "in marked variance with Amish values,"[79] held that the First and Fourteenth Amendments barred the state from requiring Amish parents to enroll their children in high school.[80] However, the opinion sought to confine constitutional protection to listeners whose claims were grounded in religious belief: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[81]

The *Yoder* case clearly shows that value-based objections to coerced listening are cognizable under the First Amendment even when the speech, unlike that in the school prayer cases, is wholly secular in nature.[82] The opinion stated that the objections themselves must be rooted in religious belief;[83] yet what qualifies as religious belief for this purpose is far from self-evident.[84] Furthermore, *Yoder* says only that a "way of life" must be based on religious belief in order "to have the protection of the Religion Clauses."[85] However, a nonreligious claimant need not rely on a "way of life" and would not necessarily invoke "the protection of the Religion Clauses."[86] A claim could instead be grounded, as in *Barnette* and *Pico*, in other provisions of the First Amendment. *Pierce v. Society of Sisters*,[87] which recognized a constitutional right to withdraw from public schools, indicates that such a nonreligious claim might well

77. The same holds true for FCC v. Pacifica Found., 438 U.S. 726 (1978). *See also* Cohen v. California, 403 U.S. 15 (1971), and the opinion of Justice Douglas—approved by *Lehman*—in Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (1952).

78. 406 U.S. 205 (1972).

79. *Id.* at 211.

80. *Id.* at 234-36.

81. *Id.* at 215.

82. *Id.* at 210-11.

83. *Id.* at 215.

84. *See infra* notes 101-116 and accompanying text.

85. 406 U.S. at 215.

86. *Id.*

87. 268 U.S. 510 (1925).

be upheld.[88] Thus, the First Amendment protects against forced listening to religious speech,[89] or to secular speech that conflicts with religious belief,[90] and *permits* protection against forced listening to any speech.[91] Furthermore, as the *Pierce* case shows, no quantum leap is required to extend constitutional protection to cases of coerced listening to secular speech that conflicts with nonreligious beliefs.[92]

III. Implications of the Principle

The principle of uncoerced listening will have important implications even if the Court does not extend it beyond the contours of earlier decisions. The principle applies generally to government-mandated speech before a captive audience.[93] It is no accident, however, that most of the cases from *Barnette* to *Yoder* have involved a public school setting. Forced listening, whether to prayer or to political indoctrination, raises first amendment issues of the most delicate order in that context, and public schools are accordingly a primary focus of analysis in this Article. Nevertheless, the principle of uncoerced listening has potential application to a number of other state and federal institutions, including military installations, prisons and, in some instances, public hospitals.[94] Initially, three issues warrant discussion: (1) the applicability of the principle of uncoerced listening to nonreligious speech, (2) the limits governing the principle, and (3) the remedies available for violations of the principle.

It is important to distinguish the principle of uncoerced listening from general prohibitions on government speech. Some commentators have proposed a broad restriction on official communications, fearing

88. *Pierce* involved a military academy as well as parochial schools and rejected "any general power of the State to standardize its children by forcing them to accept instruction from public [school] teachers. . . ." *Id.* at 535. Although the opinion was laced with notions of substantive due process, it has been accepted by the Court more recently as a first amendment decision. *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965). However, *Pierce* left open two important questions: (1) whether parents who enroll their children in public school can continue to "direct" their education, and (2) whether private schools can be required to offer the same curriculum as public schools. *See* Runyon v. McCrary, 427 U.S. 160, 176 (1976) (assuming, without deciding, that the First Amendment protects the right of parents to enroll their children in private schools which teach views to which the parents adhere).

89. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

90. *See* Wisconsin v. Yoder, 406 U.S. 205 (1971).

91. *See* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Rowan v. Post Office Dept., 397 U.S. 728 (1970).

92. *See infra* notes 117-143 and accompanying text.

93. See *infra* text accompanying notes 99-143 for discussion of the kinds of speech governed by the principle.

94. *See infra* note 151.

that absent such a restriction the government might "drown out" private speech or "falsify consent" of private citizens.[95] These proposals impose much broader constraints than does the principle of uncoerced listening. When objections are based on the power to dominate the marketplace or on similar theories,[96] it is largely irrelevant whether the government speaks to a captive audience.[97] Under the principle of uncoerced listening, the element of captivity is always relevant and is usually crucial to the substantive rights of the listener.

The broader theories for restricting government speech also lead to different remedies when a constitutional violation occurs. Because under these theories it is the speech itself which is offensive rather than the conditions under which it is delivered, the logical remedy is to prohibit the communication. Ironically, this remedy would limit access to information and ideas and would thereby restrict the listener as well as the speaker. The principle of uncoerced listening, on the other hand, will generally call for a more narrowly focused remedy. Since the captive auditor's objection is to ideological force-feeding, the remedy should ordinarily be to eliminate the captivity rather than the speech.[98] This remedy would protect the right of listeners to resist ideological indoctrination, but would not interfere with the speech, which might serve an important governmental purpose, or with the rights of listeners who wish to hear it.

A. Applicability of the Principle

In addressing the implications of the principle of uncoerced listening, it is important to determine the kinds of speech that might trigger the principle. If all government speech came within the scope of the principle, some public institutions would be unable to perform their principal mission and might be unable to function at all. But while certain speech falls outside the scope of the principle of uncoerced listening, it is clear that decisions like *Jaffree* and *Engel*, which protect captive auditors from religious speech, extend beyond formal prayer exercises. At a mini-

95. *See* Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); *see also* M. YUDOF, WHEN GOVERNMENT SPEAKS (1983); Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

96. *See* M. YUDOF, *supra* note 95, at 199.

97. *But see* M. YUDOF, *supra* note 95, at 169 (presence of a captive audience may be "a factor").

98. *See infra* text accompanying notes 153-164. Exceptions can be found, as in Engel v. Vitale, 370 U.S. 421 (1962), where it is impossible to eliminate the captivity without stigmatizing the listener. The *Engel* case also states that in some circumstances, official prescription of prayer might violate the Establishment Clause even without a showing of "direct" pressure to conform. *Id.* at 430.

mum, such decisions reach various forms of religious advocacy and proselytizing.[99]

A more difficult question is whether the constitutional principle of uncoerced listening applies to wholly nonreligious speech.[100] Although *Wisconsin v. Yoder*[101] can be interpreted as confining first amendment protection of listeners to cases involving religious speech or speech that conflicts with religious belief,[102] the ultimate rule is likely to be more expansive than *Yoder* implies. First, even if protection were limited to religious speech, the Court would have to define "religion" in a way which did not produce discrimination against minority sects.[103] *United States v. Seeger*[104] illustrates the point. The *Seeger* case examined a section of the conscription laws which exempted from combat service those persons "who, by reason of religious training and belief, [were] conscientiously opposed to participation in war in any form."[105] The statute defined "religious training and belief" as an individual's "belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [excluding] essentially political, sociological, or philosophical views . . . ."[106] This definition raised serious constitutional questions since it appeared to discriminate in favor of some religions and against others.[107] The Court avoided the constitutional problem by giving the statute a sweeping interpretation which obliterated the apparent distinction between theistic and nontheistic beliefs:

> A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others . . . .[108]

In applying this "parallel place" test to the facts in *Seeger*, the Court

99. A statute which required the posting of the Ten Commandments on schoolroom walls was invalidated in Stone v. Graham, 449 U.S. 39 (1980). No doubt the same result would be reached if the government attempted to "preach the word of God" in the classroom in the way that private citizens are entitled to do on city streets. *See* Kunz v. New York, 340 U.S. 290, 292 (1951).

100. *See* Welsh v. United States, 398 U.S. 333 (1970).

101. 406 U.S. 205 (1972).

102. *Id.* at 215.

103. *See* United States v. Ballard, 322 U.S. 78, 86-87 (1943).

104. 380 U.S. 163 (1965).

105. 50 U.S.C. app. § 456(j) (Supp. V 1964).

106. *Id.*

107. *Cf.* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethnic Culture, Secular Humanism and others.").

108. 380 U.S. at 176.

quoted theologian Paul Tillich[109] for the proposition that if "that word [God] has not much meaning for you, translate it, and speak of the depths of your life, . . . of your ultimate concern, of what you take seriously without any reservation."[110]

The *Seeger* case illustrates the potential breadth of the principle of uncoerced listening even when confined to religious speech. Although *Seeger* involved statutory interpretation, the decision has strong constitutional overtones. Religion has traditionally been defined broadly,[111] because a narrow definition would create serious first amendment problems by discriminating against minority sects.[112] Although some commentators have suggested that a narrower definition be used for establishment clause cases than for free exercise cases,[113] the Court has not adopted such a dual approach.[114] Furthermore, the principle of uncoerced listening can be enforced through free exercise claims as easily as through anti-establishment claims.[115] But if religion is defined, as it was in *Seeger*, to embrace matters of "ultimate concern" or matters which occupy a "parallel place" to traditional theistic beliefs, the principle of uncoerced listening will offer captive auditors substantial protection against government speech which is arguably religious.[116] In short, a broad definition of religion is needed to avoid religious preferences, and a broad definition provides significant protection to captive auditors.

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109. *See* P. TILLICH, SYSTEMATIC THEOLOGY (1967).

110. 380 U.S.at 187 (quoting P. TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)) (emphasis omitted).

111. *See, e.g.*, Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813 (1964).

112. In the *Seeger* case, for instance, a literal reading of the statute would favor theistic beliefs over nontheistic beliefs. *See* Torcaso v. Watkins, 367 U.S. 488 (1961) (invalidating a state requirement that public officials declare their belief in the existence of God).

113. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 827-28 (1978); Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

114. A dual definition of religion is not easily reconciled with the language of the First Amendment, which proscribes laws "respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I. Proponents of this approach would apparently interpret the word "thereof" to refer to something different from the word "religion".

115. The principle was enforced through the Free Exercise Clause in *Yoder* and through the Establishment Clause in *Jaffree*. *Seeger* invoked both clauses.

116. See Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031, 1067 (1963), stating that it is not the function of public schools "to indoctrinate students in any system of beliefs and values that rests on a claim of insight into ultimate truth with respect to the meaning and purpose of life." See also Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE. L.J. 515, 536-38 (1978), contending that instruction in evolutionary theory, which arguably touches on matters of "ultimate concern," burdens the free exercise of religion in much the same way as does the high school instruction in *Wisconsin v. Yoder*.

But while the principle of uncoerced listening has important implications even when limited to religious speech, it is unlikely that the principle can be so narrowly confined. If *Seeger* calls for a broad definition of religion, *Welsh v. United States*[117] suggests an extension of protection beyond religious claims alone. In *Welsh*, as in *Seeger*, the Supreme Court ddressed the statutory exemption from combat service for persons conscietiously opposed to war "by reason of religious training and belief."[118] Faced with an individual who disavowed any reliance on religious beliefs,[119] a plurality of the Court said it was enough under the statute that opposition to war be held "with the strength of traditional religious convictions."[120] In so ruling, *Welsh* effectively eliminated the requirement of religious content for conscientious objector status: "If an individual deeply and sincerely holds beliefs that are *purely ethical or moral* in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy . . . 'a place parallel to that filled by . . . God' in traditionally religious persons."[121] As Justice Harlan emphasized in his concurring opinion, a contrary ruling would create serious constitutional difficulties by treating religious claims more favorably than nonreligious claims.[122]

Moreover, even apart from the constitutional problems raised by discriminating on the basis of religious content, the Court has found sufficient reason to protect individuals against coerced listening to government messages in a nonreligious context.[123] In *Thornburgh v. American College of Obstetricians and Gynecologists*,[124] a state statute required a woman seeking an abortion to receive certain information, including: (1) a description of the medical risks associated with the abortion procedure and with carrying the pregnancy to term, (2) the "fact that there may be detrimental physical and psychological effects which are not accurately

117. 398 U.S. 333 (1970).

118. 50 U.S.C. app. § 456(j) (1981).

119. 398 U.S. at 337.

120. *Id.* at 340 (plurality opinion). Four members of the Court joined in the plurality opinion, and Justice Harlan reached a similar conclusion through his reading of the First Amendment. *Id.* at 367 (Harlan, J., concurring).

121. *Id.* at 339-40 (emphasis added).

122. *Id.* at 345 (Harlan, J., concurring). See *Jaffree*, 472 U.S. at 3 n.37, reaffirming the principle that a preference for religion over nonreligion, like a preference for one sect over another, is unconstitutional. *See also* Widmar v. Vincent, 454 U.S. 263 (1981). *But cf.* Sherbert v. Verner, 374 U.S. 398 (1963) (invalidating the denial of unemployment benefits to a claimant who refused Saturday work because of religious beliefs).

123. Thornburgh v. American College of Obstetricians and Gynecologists, 106 S. Ct. 2169 (1986).

124. *Id.*

foreseeable," (3) the fact that medical benefits might be available to her, and (4) the fact that the father would be liable for child support.[125] While recognizing the propriety of a goal of informed consent, *Thornburgh* invalidated these provisions on the ground that "the State may not require the delivery of information designed 'to influence the woman's informed choice between abortion or childbirth.' "[126] The Court found that the "compelled information" was often irrelevant, might increase a woman's anxiety and contained "poorly disguised elements of discouragement for the abortion decision."[127] Although the Court relied on earlier abortion rulings rather than on the First Amendment, the *Thornburgh* case clearly enforced the principle of uncoerced listening. The thrust of the decision is that a woman seeking to terminate her pregnancy cannot be required to listen to the state's message about abortion because freedom of choice can be undermined by government speech, as well as by direct regulation. But if coerced listening threatens reproductive freedom, it can also threaten other constitutionally protected freedoms. *Thornburgh* plainly suggests that the principle of uncoerced listening is not limited to religious speech, and there is no plausible reason to confine the principle to religion and abortion.

Other considerations also support the application of the principle of uncoerced listening to nonreligious speech. First, it should be recalled that the origins of the principle are found in Supreme Court decisions which protect listener rights largely without regard to whether speech is religious or nonreligious.[128] The rulings in *Barnette*, *Kovacs*, *Lehman* and *Rowan* were all directed at nonreligious speech.[129] The cases dealing with the listener's "right to receive"[130] also concerned nonreligious speech. Even *Wisconsin v. Yoder*[131] provided protection against nonreligious governmental speech, albeit for the purpose of safeguarding religious values. This case law hardly suggests that the principle of uncoerced listening should be confined to religious speech.

Furthermore, the basic rationale for restricting religious speech by government is substantially applicable to cases of coerced listening to government ideology. One of the First Amendment's major functions is

125. *Id.* at 2178-79.

126. *Id.* at 2178 (quoting City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 443-44 (1983)).

127. *Id.* at 2180.

128. *See supra* notes 45-92 and accompanying text.

129. *See supra* notes 45-54, 66-77 and accompanying text.

130. *See supra* notes 56-65 and accompanying text.

131. 406 U.S. 205 (1972).

the protection of individual freedom of thought.[132] The First Amendment affords this protection in large part through the prohibition against abridging private communications. However, it is also possible for speech to abridge communication. No one would doubt, for example, that government use of loud speakers to drown out political opponents could constitute an abridgement within the meaning of the First Amendment. What the school prayer cases illustrate is that government speech at low decibel levels can also have an unconstitutional "abridging" effect when, though not literally drowning out private speech, it interferes with freedom of thought.[133] If freedom of thought is undermined by forced listening to the government's religious speech, it can be similarly undermined—as in the *Yoder* case—by forced listening to the government's nonreligious speech. To be sure, the Establishment Clause evinces a special concern for religious advocacy, but that is not the only concern of the First Amendment. Freedom of political thought is protected under the Speech and Press Clauses,[134] just as freedom of religious thought is protected under the Establishment and Free Exercise Clauses. It is not surprising, therefore, that the *Jaffree* case identified freedom of conscience as "the central liberty that unifies the *various* clauses in the First Amendment."[135] Freedom of conscience surely embraces religious belief, but as a concept unifying the "various" clauses in the amendment, it cannot easily be limited to religious belief.[136]

Admittedly, government speech can often be ignored or counteracted by numerous sources of private speech in the community.[137] However, the danger of government overreaching is much greater in the

132. *See Jaffree*, 472 U.S. at 52-55, and cases cited therein.

133. Professor Mark Howe assessed the cases as follows:

> In every case in which the Court has condemned voluntary religious exercises in the public schools, there has been . . . a sufficient element of social and psychological coercion to justify a finding that liberty and equality are endangered. In those cases in which the Court, by contrast, has tolerated a measure of public recognition of our religious traditions, there has been a less significant—and sometimes an almost wholly insignificant—impairment of liberty or dilution of equality.

M. HOWE, THE GARDEN AND THE WILDERNESS 173 (1965).

134. *See* Bork, *Neutral Principals and Some First Amendment Problems,* 47 IND. L.J. 1 (1971).

135. *Jaffree*, 472 U.S. at 50 (emphasis added).

136. See Bellotti v. Baird, 443 U.S. 622 (1979), in which Justice Powell, writing for a four-member plurality, stated that "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice." *Id.* at 638.

137. M. YUDOF, *supra* note 95, at 91-92.

context of a captive audience,[138] particularly when, as in the case of school children, the audience is young and impressionable.[139] In these circumstances, secular speech can undermine political and personal autonomy in much the same way that vocal school prayer was found to undermine religious autonomy.[140] At the core of both cases is the principle of freedom of thought, which is difficult to reconcile with coerced listening to official ideology.[141] Of course, the free expression clauses focus primarily on government restriction of speech, rather than on government exercise of speech. But one way to restrict speech, or at least the effectiveness of speech, is to condition listeners to reject officially disfavored views.[142] This is a threat which the Court has perceived in religious speech, and the same threat also exists in some nonreligious speech.[143]

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138. *Compare* Stone v. Graham, 449 U.S. 39 (1980) (posting of the Ten Commandments in classroom held invalid) *with* Lynch v. Donnelly, 465 U.S. 668 (1984) (display of Nativity scene in municipal shopping district upheld).

139. Examples of overreaching are plentiful. Professor Charles Lawrence recounts this experience:

> In the fourth grade I was one of two blacks in my class. Each week we began the school assembly by singing *Old Black Joe* and *The Caisson Song* . . . . Were the ritualistic singing of songs that demeaned my race and glorified the military any less acts of confession than the flag salute in *Barnette* or the Bible reading in *Schempp*?
>
> I survived these destructive socializing rituals and many others like them because I was fortunate enough to have parents who encouraged me to express my feelings of rage and humiliation and who taught me how to fight in effective but socially acceptable ways. Most children are not so lucky.

Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 328 n.64 (1980). Others have been exposed as children to efforts by their teachers to direct them into career patterns that conformed with racial or gender-based stereotypes. *See, e.g.*, THE AUTOBIOGRAPHY OF MALCOLM X 36-37 (1966).

140. *See supra* notes 25-33 and accompanying text.

141. At least two of the leading free speech theorists have recognized this problem and have sought shelter in the First Amendment, although they have not addressed the issue in detail. *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 710 (1970) ("[I]t is a cardinal principle of the system of freedom of expression that no person can be compelled to listen against his will"); Black, *He Cannot Choose But Hear: The Plight of The Captive Auditor*, 53 COLUM. L. REV. 960, 967 (1953) (forced listening destroys "that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms").

142. See M. YUDOF, *supra* note 95, at 157, urging that the First Amendment be read "to prevent the distortion of judgment of the people by government expression."

143. Although school children are captives for only part of the day, their parents often do not know exactly what has been said or done in class. For this reason, and because of the immaturity of children, rebuttal speech may not be a suitable remedy. The inadequacy of such a remedy was acknowledged in Pierce v. Society of Sisters, 268 U.S. 510 (1925). Nevertheless, the issue is complicated since a lack of education can also restrict freedom of thought. Thus, education is both a stimulant and, in some instances, an impediment to freedom of thought.

B. Limits and Remedies

The principle of uncoerced listening, even when applied to nonreligious speech, will not preclude government from addressing a captive audience. No one would suggest that a ninth-grader can resist instruction in mathematics simply by alleging that she is a captive auditor in an algebra class. The rights of listeners, like those of speakers, are subject to significant limitations.[144] The difficult problem, of course, is to define the limits on listener rights. As in defining a speaker's rights, the limits will be determined only after a considerable period of time. It is still too early to do more than outline some of the approaches available for setting limits on the principle of uncoerced listening and providing remedies for constitutional violations of the principle.

One approach to setting limits would be to distinguish between value inculcation, which the Supreme Court has tacitly approved,[145] and ideological indoctrination, which students might legitimately resist. However, a distinction of this sort would be elusive, and perhaps judicially unmanageable. The line between persuasion and coercion is difficult to discern when impressionable children are involved; and conclusory terms like "inculcation" and "indoctrination" are unlikely to aid analysis. Of course, if the distinction between ideological indoctrination and value inculcation is judicially unmanageable, both will be vulnerable to legal attack. This does not mean that value inculcation is illegitimate. It means only that, as *Barnette* and *Yoder* make clear, the First Amendment imposes limits on official prescription of values;[146] whether the prescription is labeled "inculcation" or "indoctrination" should be irrelevant.

An alternative, which would avoid such difficult line-drawing problems, would be to follow the approach of *Rowan v. Post Office Department*.[147] In *Rowan*, the Court recognized the unrestricted power of individual listeners to reject material they deemed offensive. In so doing, the Court avoided "the appearance . . . of governmental censorship"[148] and the need for tenuous line-drawing. But a policy of unrestricted lis-

144. It is important to recognize that the principle of uncoerced listening does not enhance government power to regulate *private* speech. First amendment principles, of course, do not apply to private intrusions upon listener freedom. Accordingly, the authority to regulate nongovernment speech continues to be governed by Cohen v. California, 403 U.S. 15, 21 (1971) (requiring proof that "substantial privacy interests are being invaded in an essentially intolerable manner").

145. Ambach v. Norwick, 441 U.S. 68 (1979) (dictum).

146. West Virginia v. Barnette, 319 U.S. 624, 637-42 (1943); Wisconsin v. Yoder, 406 U.S. 205, 234-36 (1971).

147. 397 U.S. 728 (1970).

148. *Id.* at 735.

tener autonomy, although easy to apply, seems incompatible with a sound system of public education. Unlike the mailings in *Rowan*, education in the public schools is essentially a group enterprise and cannot function if individual class members have an unqualified right to insulate themselves from all materials that offend their sensibilities. This is not to suggest that every student must participate in a particular program of instruction. But those who participate should ordinarily do so on a continuing basis and should not absent themselves whenever they disapprove of segments of the material under consideration.[149]

A third option would be to limit the listener's autonomy while invoking more familiar, and more manageable, judicial standards. This approach requires first, some definition of the area of legitimate listener objection and second, an application of traditional first amendment standards to the listener's claim. The listener's right should arguably be confined to good faith claims of conscientious objection to ideological speech.[150] As in other first amendment cases, these claims would then be measured against the state's interest in restricting individual freedom.[151] This approach, while protective of listeners, seems both judicially manageable and responsive to the needs of the educational system. Of course, difficult problems remain and may be especially acute when judicial intervention extends into the sensitive area of public classrooms. However, the risks of intervention are not substantially different from those already engaged under the *Barnette* and *Yoder* decisions.[152]

Once the Court adequately defines listener rights, it will be obliged to fashion appropriate remedies for violations of the principle of uncoerced listening. Arguably, this is the critical issue in the public school context, since *Pierce v. Society of Sisters*[153] recognized a constitutional right to withdraw to private schools, and thereby raised a question as to

149. *See infra* notes 161-164 and accompanying text.

150. Federal courts have frequently applied each of these terms, except the reference to "ideological speech." *See, e.g.*, Gillette v. U.S., 401 U.S. 437 (1971). The term "ideological" will require elaboration in future litigation but this task is no less manageable than that of defining religion. *See* United States v. Ballard, 322 U.S. 78 (1944).

151. Some commentators have suggested, for example, that training in democratic values and preparation for citizenship, which provided a major impetus for public education, serves overriding state interests. *See* Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 879 (1977). The same might be said of some government speech to prison inmates or military personnel since forced listening is relatively easy to justify when it is predicated on criminal convictions or on enlistment in the armed services. *See* Kamenshine, *supra* note 95, at 1138.

152. *See also* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Meyer v. Nebraska, 262 U.S. 390 (1923).

153. 268 U.S. 510 (1925).

whether less extreme remedies might be available.[154] Some commentators have proposed that public schools be required to give balanced treatment to controversial subjects.[155] Proper enforcement of such a requirement could alleviate the problem of coerced listening to ideological speech.

It is questionable, however, whether the concept of balanced treatment would be susceptible to judicial application. This concept serves as a useful pedagogical tool for those engaged in the day-to-day operations of the schools. But at least two major obstacles stand in the way of judicial enforcement of balanced treatment. First, a requirement of balanced treatment, like the distinction between inculcation and indoctrination, might prove to be judicially unmanageable. Judges can determine whether a Marxist view of history, or a feminist perspective, has been included or excluded from a course of instruction; but whether a teacher has properly balanced the treatment of the subject is a matter requiring delicate academic judgments which lie far outside the scope of judicial expertise.[156] Second, judicial enforcement of balanced treatment would draw federal and state courts deeply into the administration of academic programs. General oversight of the curriculum, and perhaps supervision of the classroom, would be needed to determine whether a proper balance was actually achieved. Aggressive oversight of this sort is fundamentally at odds with the judiciary's limited role in the educational process and with the long tradition of local control of public schools.[157]

A remedy that either prohibited the objectionable speech or excused objecting students would avoid excessive judicial entanglement.[158] However, a blanket prohibition on speech would raise serious questions of academic freedom[159] and, when the listener's objection is based on reli-

154. The *Pierce* remedy may be quite adequate for financially-able families in metropolitan areas. However, it is largely unavailable to the poor and to many families in rural areas.

155. *See* Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 527-28 (1960).

156. See M. YUDOF, *supra* note 95, at 294, stating: "Experience with the fairness doctrine is such that only the hopelessly optimistic would argue for its extension into other realms."

157. Judicial enforcement of a right of reply is beset with similar difficulties. *See* M. YUDOF, *supra* note 95, at 292-93.

158. In some cases it might be the students' parents who object. *See* Wisconsin v. Yoder, 406 U.S. 205, 229-30 (1972). The resolution of possible conflicts between parent and child is beyond the scope of this Article.

159. The applicability of academic freedom to primary and secondary education has been the subject of dispute. *Compare* M. YUDOF, *supra* note 95, at 215-18 *with* Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976). But even if the concept of academic freedom did not apply to grade school teachers, a blanket prohibition would interfere with the liberty of the students who wished to hear the school's message.

gion, could run afoul of *Epperson v. Arkansas*.[160] A remedy of excusal, on the other hand, does not present either of these difficulties. Academic freedom carries no entitlement to a captive audience.[161] And while *Epperson* bars curricular decisions motivated by conflict with religious values, the *Yoder* case *requires* the excusal of students on the basis of such conflicts.[162] Read together, the *Epperson* and *Yoder* cases point toward excusal as the appropriate remedy for a listener's religion-based claims, and the same remedy seems appropriate for claims arising out of coerced listening to secular ideologies. Indeed, this is the remedy which school boards have voluntarily provided in many situations involving controversial or highly sensitive subjects.[163] Excusal of a student under narrowly defined conditions should occasion no greater burden than that encountered in the discretionary excusal of students under current statutory or administrative provisions.[164]

Conclusion

In *Jaffree*, the Supreme Court reaffirmed the unconstitutionality of vocal prayer in public schools but indicated that nonvocal prayer during state-sponsored moments of silence is permissible, absent an official endorsement of religious activity. The Court apparently based its acquiescence in silent prayer on the fact that listener rights are unaffected when no words are spoken. However, the interest in protecting unwilling listeners is not confined to school prayer and may extend to a broad cate-

160. 393 U.S. 97 (1968).

161. At common law, parents were generally permitted to excuse their children from public school instruction so long as the efficiency of the school and the rights of other students were not threatened. *See, e.g*, Hardwick v. Board of School Trustees, 54 Cal. App. 696, 205 P. 49 (1921); School Bd. v. Thompson, 24 Okla. 1, 103 P. 578 (1909).

162. Of course, *Yoder* involved excusal from the entire secondary school program rather than from a portion of it. *See infra* notes 161-164 and accompanying text.

163. *See generally* L. KOTIN & W. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE (1980). To be sure, the excusal of students from *segments* of a course of instruction might create undue administrative burdens for the teacher or the school. But if instead students are permitted only to be excused from an entire course, and if the grounds for excusal are narrowly defined, no such burden should result. *See* Hirschoff, *supra* note 151, at 936-39.

164. Recently, a federal district court in Tennessee ordered the excusal of school children from a class in which they were required to read materials offensive to their religious convictions. Mozert v. Hawkins County School Dist., 647 F. Supp. 1194 (E.D.Tenn. 1986). That decision, which protected religious beliefs by applying the *Yoder* rule to an individual course of instruction, has received extensive press coverage, but not always much understanding. *See, e.g.*, Washington Post, Oct. 25, 1986, at 1, col. 8. This lack of understanding is due, not only to familiar shortcomings of press accounts, but also to the court's failure to explain fully the basis for its decision. Other cases, voicing similar objections to compulsory programs in the public schools, are now pending in lower federal courts. *See* NEWSWEEK, Oct. 27, 1986, at 96.

gory of government speech. The implications of protecting listener autonomy deserve close attention, but it is important to recognize that the protection will be limited and will not inhibit the essential communication between government and uncoerced members of the public.