University of Richmond Law Review

Volume 32 | Issue 1 Article 7

1998

The Collapse and Fall of Floating Buffer Zones: The Court Clarifies Analysis for Reviewing Speech-Restrictive Injunctions in Schenk v. Pro-Choice Network

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THE COLLAPSE AND FALL OF FLOATING BUFFER ZONES: THE COURT CLARIFIES ANALYSIS FOR REVIEWING SPEECH-RESTRICTIVE INJUNCTIONS IN *SCHENCK V. PRO-CHOICE NETWORK*

I. INTRODUCTION

The freedom of speech, although a predominant First Amendment principle, does not create an absolute right and remains subject to limitations for appropriate reasons, such as when the exercise of free speech encroaches upon the rights of others.[1] Particularly sensitive situations arise when courts impose restrictions upon anti-abortion protestors in an attempt to protect the rights of patients and providers at abortion clinics. Indeed, despite a woman's long established right to obtain an abortion,[2] emotionally charged demonstrations and recurrent anti-choice violence persist outside abortion clinics around the nation.[3] Given that such practices induce stress and other health risks to women seeking an abortion,[4] courts have issued injunctions which place restrictions, such as buffer zones, on anti-choice activity.[5] Most recently, in *Schenck v. Pro-Choice Network*,[6] the Supreme Court clarified the constitutionality of such restrictions and upheld a "fixed" fifteen-foot buffer zone and cease-and-desist order, but struck down a "floating" fifteen-foot buffer zone.[7]

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1. *See* Elrod v. Burns, 427 U.S. 347, 360 (1976).

2. *See* Roe v. Wade, 410 U.S. 113 (1973); *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

3. *See* David E. Rovella, *Abortion Clinic Act Gutted by Unexpected Ruling*, NAT'L L.J., Feb. 3, 1997, at A6 (reporting National Abortion Federation statistics of a 21% drop in violence at abortion clinics nationwide in 1996, but a 137% increase in "hate mail" and harassing calls, and a 189% jump in picketing).

4. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992).

5. *See* Tara K. Kelly, Note, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in* Madsen v. Women's Health Center, Inc., 68 S. CAL. L. REV. 427, 431-32 (1995).

6. 117 S. Ct. 855 (1997).

7. *See id.* at 859.

The Court assumed a strong posture in *Schenck* in order to provide clear guidance to future courts in drafting and reviewing content-neutral injunctions. But the Court garnered its strength by supplanting the district court's reasoning with more appropriate justifications for its holdings, and by identifying and striking down a floating bubble concept not clearly addressed by the trial court. While the Court's blatant interjection of new reasoning draws curious attention, its analysis is nevertheless legally sound and provides a practical roadmap to guide courts in assessing content-neutral injunctions.

Part II of this casenote summarizes the backdrop of traditional and changing legal concepts against which *Schenck* originated and developed. Part III provides a detailed exposition of *Schenck*, including the separate opinions of the Justices. Part IV analyzes the legitimacy of the Court's reasoning, with an assessment of the decision's practical implications, and a projection of how *Schenck's* principles will guide future courts in drafting and reviewing injunctions. Finally, Part V concludes that despite the Court's creative review of the lower court's holdings, the Court's decision provides important guidance for courts in issuing and reviewing injunctions.

II. BACKGROUND

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech."[8] Although the literal language places no conditions on this freedom, the Supreme Court has nevertheless upheld laws which impose restrictions on speech. Indeed, the Court considers some forms of expression, which may harm others or debase community moral standards, as entirely outside the scope of First Amendment protections. The distribution and use of obscenity, for example, may be regulated by the government in a public forum with very deferential, minimal review by the courts.[9] Also, fighting

8. U.S. CONST. amend. I.

9. *See* Roth v. United States, 354 U.S. 476 (1957); Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973). Expressive materials are not considered legally obscene unless they fit the definition posited by the *Miller* test, which differentiates between unprotected obscenity and protected materials which are simply sexually explicit. *See* Miller v. California, 413 U.S. 15, 25-26 (1973).

words,[10] defamation,[11] and false or misleading commercial speech[12] receive little, if any, constitutional protection.

But beyond these extreme forms of speech, the Supreme Court has also recognized that the government generally has a limited right to regulate the freedom of expression when there are important policies served by the regulation. Indeed, the right of women to seek abortions has repeatedly clashed with the free speech rights of abortion protestors outside abortion clinics. This section traces the factual and legal developments that occurred prior to and during the *Schenck* controversy.

A. *The Abortion Controversy*

Since the legalization of abortion in 1973,[13] various anti-abortion groups have resorted to disturbances, acts of violence, and volatile demonstrations to stop abortion clinics from providing medical and counseling services to women. The most recent reports show that violence has abated somewhat in the last couple of years, with 30% of clinics reporting anti-abortion violence in 1996, compared with 39% in 1995, and 52% in 1994.[14]

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10. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). Before speech may be categorized as fighting words, however, the speech must pose a "clear and present danger" as defined in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which refers to speech "directed to inciting or producing imminent lawless action, and is likely to incite or produce such action." *Id.* at 447.

11. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Before a public official may recover damages from defamation relating to his official conduct, he must "prove that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not . . . ." *Id.* at 279-80. The Supreme Court has also determined that other factors come into play, such as whether the statement is a matter of private or public concern, and whether the plaintiff is a private or public figure. *See generally* Dunn v. Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

12. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). On the other hand, commercial speech is protected if it meets the four-pronged test established by *Central Hudson*: (1) the commercial speech must concern lawful activity and not be misleading; (2) the asserted government interest must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation may not be more extensive than is necessary to serve that interest. *See id.* at 566.

13. *See* Roe v. Wade, 410 U.S. 113 (1973); *see also* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

14. *See* Angie Cannon, *Violence Has Decreased, But the Threat Continues*, THE

But considerable violence nevertheless persists, including death threats, stalkings, bombings, arson, and blockades.[15] Moreover, if the term "violence" were expanded to include other activities, such as gunfire, home picketing, and vandalism, the rate in 1996 has actually increased to 46%.[16]

Although acts of violence surely inhibit or prevent many women from receiving medical or counseling assistance, even the more peaceful exercises by demonstrators such as "sidewalk counseling"[17] and blockades can cause severe stress in women seeking an abortion.[18] Such activities may not be intended as threatening in nature, but it has been shown that because of the highly emotional nature of the abortion issue, and the privacy concerns of the patients, emotions can erupt into harassing and intimidating situations.[19] In fact, a woman can even suffer increased medical risks with her abortion as a result of the stress and anxiety, including elevated blood pressure and hyperventilation.[20] Such conditions can subsequently cause patients to cancel their appointments or try to reschedule, which may not always be possible.[21] Thus, even semi-peaceful activities associated with anti-abortion protestors' free speech rights have posed a difficult problem for the legislature and the courts.

REC. N. NEW JERSEY, Jan. 17, 1997, at A14 (citing the 1997 annual report on clinic violence from the National Abortion Federation).

15. *See id.*

16. *See id.*

17. "Sidewalk counseling" occurs when demonstrators offer reading materials to women entering abortion clinics and attempt to convince them not to undergo an abortion. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992).

18. *See id.* at 1427.

19. *See id.* at 1425.

20. *See id.* at 1427.

21. *See id.* Also, there are some abortion procedures that take place over multiple appointments, such as the insertion of laminaria to dilate the cervix overnight, and there is a risk of complication if a woman cannot attend her follow-up appointment. *See id.; see also* Arianne K. Tepper, Note, *In Your F.A.C.E.: Federal Enforcement of the Freedom of Access to Clinic Entrances Act of 1993*, 17 PACE L. REV. 489, 517 (1997).

B. *Common Law and Legislative Developments*

Prior to 1994, women seeking legal protections from anti-abortion speech and speech-related conduct were severely limited. Some women applied for an injunction under 42 U.S.C. § 1985(3),[22] which provides a federal cause of action to those deprived of their constitutional rights against persons conspiring to deprive any person of the equal protection of the laws.[23] But the most recent abortion-related case tried under this law, *Bray v. Alexandria Women's Health Clinic*,[24] held that abortion-rights organizations could not effectively apply for an injunction under this statute.[25] The majority stated that for a private conspiracy to violate this section, a plaintiff must prove two elements: (1) a "class-based, invidiously discriminatory animus;"[26] and (2) a showing of clear violation of protected rights.[27] The Court held that the abortion clinics did not meet the first requirement because women wishing to terminate a pregnancy are not considered within the class the legislation intended to protect.[28] Also, the second element was not met because the two rights cited by the abortion clinics—right to interstate travel and right to an abortion—were only incidentally affected.[29] Thus, by refusing abortion-rights organizations any injunctive relief under section 1985(3), the Court shifted the problem to the legislative branch.[30]

In reaction to *Bray* and the increasing abortion-related violence around the country, Congress enacted the Freedom of

22. 42 U.S.C. § 1985(3) (1994).

23. *Id.* This Act is also known as the Ku Klux Klan Act or the Ku Klux Act of 1871 because it was enacted in response to "massive, organized lawlessness that infected our Southern States during the post-Civil War era." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 307 (1993) (Stevens, J., dissenting).

24. 506 U.S. 263 (1993).

25. *See id.*

26. *Id.* at 268-69.

27. *See id.* at 274.

28. *See id.* at 269-70.

29. *See id.* at 274-75.

30. *See* Helen R. Franco, *Freedom of Access to Clinic Entrances Act of 1994: The Face of Things to Come?*, 19 NOVA L. REV. 1083, 1096 (1995).

Access to Clinic Entrances Act of 1994 (FACE)[31] to prohibit the use of force, threat of force, or physical obstruction to injure, intimidate, or interfere with the provision of reproductive health care services.[32] This new law is significant because previously, Congress had adopted a conservative stance regarding abortion rights, acting mainly to place limits on abortion funding.[33] The FACE Act, however, specifically recognizes and outlaws violence and the threat of violence at abortion clinic entrances, which demonstrates Congress's intent that a woman should be free from physical intimidation when asserting her right to end a pregnancy.[34] Importantly, this Act allows injunctive relief as a civil penalty,[35] a vitally essential mechanism for abortion-rights organizations, since court-issued injunctions are usually the most effective means to restrict anti-abortion activity.[36]

C. *Distinction Between Content-Neutral and Content-Based Regulations*

In controversies where abortion protestors seek to challenge the constitutionality of speech-restricting regulation, the Supreme Court has developed a complex analysis that includes several factors. For example, the Court adjusts the level of scrutiny to be applied to the regulation depending on whether the restrictions on speech are content-neutral or content-based. The fundamental distinction between content-based and content-neutral regulation of speech turns on whether the re-

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31. 18 U.S.C. § 248 (1994). One of the more extreme acts included throwing plastic likenesses of fetuses at the women approaching the clinic. *See* Tepper, *supra* note 21, at 490 (citing LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1992)).

32. *See* 18 U.S.C. § 248.

33. *See* Franco, *supra* note 30, at 1097. Indeed, the word "abortion" is stated only a single time in the statute, in an apparent compromise between the two houses of Congress. *See id.* at 1108.

34. *See id.* at 1097.

35. *See* 18 U.S.C. § 248(c)(1)(B).

36. *See* Joanne Neilson, Note, Madsen v. Women's Health Center, Inc.: *Protectionism Against Antiabortionist Terrorism*, 16 PACE L. REV. 325, 339 (1996). Besides providing a basis for injunctions, the final version of the statute differentiates between nonviolent and violent activities by establishing a hierarchy of criminal fines and prison terms, and specifically exempts routine picketing from punishment. *See* Franco, *supra* note 30.

striction is based on the subject of the speech, or simply on the speech itself. A pertinent inquiry asks: is the government's purpose for the law grounded in objection with the message the speech conveys?[37] If so, the law is content-based.

Because a content-based regulation is predicated upon the subject matter of the speech, it receives strict scrutiny by the Court and will be upheld only if the state can show that the restriction is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[38] The government has the burden of proving that the law is necessary, and courts will always consider whether less-burdensome means for accomplishing the governmental objective are available.[39] Such regulations are almost always struck down, because it is presumptively unconstitutional for the government to place burdens on speech because of its content.[40]

On the other hand, content-neutral regulations are crafted without reference to the message the expression conveys,[41] and usually apply to cases like *Schenck* where the injunction or ordinance restricts the activities of the speakers, not the subject matter. Such regulations are often termed "time, place, and manner" restrictions because the government in effect regulates the speech-related conduct, as opposed to the content speech.[42] The Court has traditionally upheld content-neutral time, place, and manner regulations if they meet an intermediate level of scrutiny. Indeed, in 1990 when the *Schenck* case originated, a content-neutral restriction in a public forum[43] was upheld if it

37. *See* 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 3:3 (1997).

38. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 115-118 (1991).

39. *See id.*

40. *See* SMOLLA, *supra* note 37, § 3:1 (citing Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991); Regan v. Time, Inc., 468 U.S. 641 (1984)).

41. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

42. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512 (1981).

43. A public forum is generally considered to be the streets, sidewalks, and parks because they "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

was "narrowly tailored to serve a significant governmental interest, and . . . [left] open ample alternative channels for communication of the information."[44]

Summarizing the two tests then, the government's interest in content-neutral regulations need only be significant (or important), whereas the government interest in content-based regulations must be compelling (or overriding). And, while both content-neutral and content-based regulations must be narrowly tailored to fit the problem area, the content-based regulation will usually be struck down if there are any other less burdensome methods by which the government can accomplish its objective. Because most regulations governing abortion protestors' activities attempt only to restrict the time, place, and manner of speech-related conduct, and not the actual message the protestors convey, the regulations are typically content-neutral and receive the intermediate level of scrutiny.

D. *Distinction Between Injunctions and Ordinances*

Another wrinkle in the Court's analysis recently developed, however, specifically concerning content-neutral injunctions. In 1994, the Supreme Court differentiated between the proper analysis to utilize in content-neutral ordinances and content-neutral injunctions in *Madsen v. Women's Health Center, Inc.*[45] In that case, operators of abortion clinics sought to broaden an already standing content-neutral injunction against anti-abortion protestors, complaining that protestors persisted in impeding access to the clinic, and that their activities caused damaging effects.[46]

The *Madsen* Court altered its traditional test for content-neutral regulation (the regulation is upheld if it is "narrowly

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44. *Clark*, 468 U.S. at 293. Note that a slight variation to the intermediate test applies if the content-neutral speech occurs in a non-public forum: the government restriction will be upheld only if it is reasonably related to a legitimate government purpose. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

45. 512 U.S. 753 (1994).

46. *See id.* at 757-59.

drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech")[47] and posited a new test especially designed for content-neutral injunctions: the injunction would be upheld if its challenged provision "burden[ed] no more speech than necessary to serve a significant government interest."[48] Thus, the Court retained the "ends" portion of the analysis by requiring a significant (or important) government interest, but it strengthened the "means" segment of the test by heightening the standard from "narrowly tailored" to "burden no more speech than necessary," the latter of which is more indicative of strict scrutiny. This analysis currently stands midway between the strict scrutiny test for content-based regulation of speech, and the intermediate time, place, and manner test normally utilized for content-neutral injunctions.[49]

It also appears that the *Madsen* majority reached a compromise between Justice Stevens, who endorsed a less rigorous standard for injunctions, and Justices Scalia, Kennedy, and Thomas, who advocated strict scrutiny.[50] Indeed, in their argument for strict scrutiny, the three dissenting Justices claimed that the majority opinion clouded the traditional notion that a state-issued injunction is a prior restraint, which usually receives strict scrutiny.[51]

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47. *Clark*, 468 U.S. at 293.

48. *Madsen*, 512 U.S. at 765.

49. *See* SMOLLA, *supra* note 37, § 15:53. Ironically, it might be noted that the new test bears a resemblance to the "undue burden" test established in the abortion case of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In that case, the Court held that a state may regulate abortion if the regulation does not pose an undue burden. *See id.; see also* Jennifer J. Seibring, *If It's Not Too Much to Ask, Could You Please Shut Up?*, 20 S. ILL. U. L.J. 205, 218 (1995).

50. *See* Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors' First Amendment Rights in* Schenck v. Pro-Choice Network 62 BROOK. L. REV. 547, 558 n.62 (1996).

51. *See Madsen*, 512 U.S. at 797-98. The term "prior restraint" refers to court orders which proscribe speech even before it occurs, as opposed to subsequent punishment after the speech takes place. *See* SMOLLA, *supra* note 37, § 15:1. Prior restraints have been understood to include mechanisms such as gag orders and court-issued injunctions and, when challenged, the Court typically applies heightened scrutiny because prior restraints are considered more serious infringements on constitutional freedoms. *See generally* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. United States, 403 U.S. 713 (1971).

In a footnote to the opinion, however, the Court asserted that all injunctions are not prior restraints, although prior restraints can and often do take the form of injunctions.[52] The Court explained that the injunction in this case was not a prior restraint because the protestors were not prevented from expressing their message through alternative methods; they were only prohibited from conveying their message within a thirty-six-foot buffer zone.[53] Moreover, the injunction was issued *because* of their prior unlawful conduct.[54]

In further justifying the different analyses for ordinances and injunctions, the *Madsen* Court noted that ordinances and injunctions are developed for very different reasons to govern distinct types of situations. On the one hand, "[o]rdinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree."[55] Therefore, "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances."[56] Also, the Court justified more stringent scrutiny of injunctions because injunctions are more tailored by the court than general statutes, to afford more specific relief where the law has already been violated.[57]

With its new analysis in place, the Court in *Madsen* upheld a thirty-six-foot buffer zone around the clinic entrances and driveway, finding that the zone burdened no more speech than necessary to achieve the governmental interests of protecting access to the clinic and orderly traffic flow in the street.[58] The Court also found constitutional certain restrictions on noise, as the limitations burdened no more speech than necessary to ensure the health and well-being of the patients.[59] The Court

52. *See Madsen*, 512 U.S. at 764 n.2.
53. *See id.*
54. *See id.* This proclamation, however, received adamant opposition from Justices Scalia, Kennedy, and Thomas. *See id.* at 797-98.
55. *Id.* at 764.
56. *Id.*
57. *See id.* at 765 (citing United States v. Paradise, 480 U.S. 149 (1987)).
58. *See id.* at 768-70.
59. *See id.* at 772.

noted that "noise control is particularly important around hospitals and medical facilities during surgery and recovery periods."[60]

The Court, however, struck down a thirty-six-foot buffer zone around private property surrounding the clinic, noting that the zone burdened more speech than necessary since patients and staff wishing to reach the clinic were not forced to cross that particular property.[61] The Court also struck down a 300-foot zone around the staff residences, explaining that the zone covered more broadly than necessary to protect the tranquility and privacy of the home since "a limitation on the time duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result."[62] Another mechanism deemed unconstitutional was the blanket ban on "images observable" around the clinic.[63] The Court reasoned that the ban extended more broadly than necessary to attain the goals of reducing verbal threats to clinic patients or their families, as well as alleviating the patients' anxiety levels once they were inside the clinic.[64] The Court explained that alternative means were available. Prohibiting the display of signs that could be interpreted as threats or veiled threats, for example, would satisfy the first goal, while a clinic could simply pull its curtains to protect a patient bothered by a disagreeable placard.[65]

Thus, the Court in *Madsen* not only clarified the proper test regarding content-neutral injunctions; it also demonstrated that within the abortion controversy, mechanisms such as reasonable buffer zones and noise restrictions, which support FACE's discouragement of physical intimidation and obstruction to clinic access, are likely to be upheld under the First Amendment.[66]

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60. *Id.*
61. *See id.* at 771, 774-75.
62. *Id.* at 775.
63. *See id.* at 773.
64. *See id.*
65. *See id.*
66. *See* SMOLLA, *supra* note 37, § 15:53. But note that *Madsen* is not applicable to violations of FACE, since FACE is a statute. The Court differentiated between an injunction and a statute in determining which level of scrutiny should apply. *See* Franco, *supra* note 30, at 1118. Indeed, *Madsen* applies to injunctions banning all protest conduct within a limited buffer zone, while FACE more narrowly forbids physical obstruction of clinic entranceways. *See id.* n.245 (citing 140 CONG. REC. S5596 (daily ed. May 12, 1994)).

But attempts to shield women from the realistic and possibly painful message which anti-abortion demonstrators convey will generally be considered an infringement upon free speech rights of the protestors.[67]

III. STATEMENT OF THE CASE

A. *Factual and Procedural History*

Against the backdrop of the Court's evolving analysis regarding content-neutral regulation, coupled with the revived attention by Congress to the abortion controversy, the *Schenck* case emerged. The following subsections trace the case's birth and development over the last seven years as the courts struggled with unresolved issues within a volatile political environment. This section culminates with the Supreme Court's final decision and governing rules in this area.

1. Temporary Restraining Order

The *Schenck* case originated in September 1990 when Pro-Choice of Western New York, an organization promoting safe and legal access to family planning and abortion services, joined various clinics and doctors in suing several anti-choice organizations and individuals in order to enjoin a planned "blockade" of an abortion clinic.[68] This clinic, along with other reproductive health care centers, had been the target of massive demonstrations and heated confrontations by abortion protestors.[69] The Western District Court of New York issued a temporary restraining order (TRO) on September 27, 1990, with three relevant provisions to this case.[70] First, there was a general prohibition from "trespassing on, sitting in, blocking, impeding or obstructing access to" any abortion clinic in the district.[71] Sec-

67. *See* Franco, *supra* note 30, at 1118.

68. *See* Pro-Choice Network v. Project Rescue, Civ. 90 No. 1004A (W.D.N.Y. 1990).

69. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1424-27 (W.D.N.Y. 1992).

70. *See Pro-Choice Network*, Civ. 90 No. 1004A.

71. *Id.* at 1(a)

ond, the order established a buffer zone which banned demonstrations "within fifteen feet from any person seeking access to or leaving [clinics]."[72] Finally, the TRO exempted "sidewalk counseling, a conversation of a nonthreatening nature by not more than two people,"[73] from the prohibitions, provided that once the audience denoted her wish not to be counseled, "the protestors must cease and desist from such counseling."[74] Although the defendants abstained from their planned blockade, the demonstrations continued, including harassing and intimidating behavior.[75]

2. Preliminary Injunction

On February 14, 1992, the district court granted the plaintiffs' motion to convert the TRO into a preliminary injunction.[76] The court followed the controlling test for content-neutral injunctions that was in place at that time (prior to *Madsen*)[77] and determined that the injunction was indeed narrowly tailored to serve a significant government interest and left open ample alternative channels for communication of the information.[78] The court identified three significant government interests: safe abortions, public safety, and "ensuring 'that the constitutional rights of one group are not sacrificed in the interest of the constitutional rights of another.'"[79] The court further

72. *Id.* at 1(b).

73. *Id.* at 1(c).

74. *Id.*

75. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1423-27 (W.D.N.Y. 1992).

76. *See id.* at 1423. In seeking a preliminary injunction, the plaintiffs claimed conspiracy to infringe on the constitutional rights of women seeking abortion under 42 U.S.C. § 1985(3) (1984), as well as six additional state law claims. *See id.*

77. *See* Section II.C., discussed *supra.*

78. *See Pro-Choice Network*, 799 F. Supp. at 1433, 1437. The court also followed the guidance steps established by the United States Court of Appeals for the Second Circuit for granting preliminary injunctions: the health care providers established irreparable harm from patients' delayed access to clinics, as well as a likelihood of success on the merits of the federal claim so as to be entitled to a preliminary injunction. *See id.* at 1428-29.

79. *Id.* at 1433 (citations omitted).

reasoned that the injunction was narrowly tailored because specific provisions of the injunction met the needs established by the evidence.[80] Specifically, the court justified the cease-and-desist provision by determining that a woman entering the clinic was a "captive audience" for the protestors' message, and that the defendants' own activities precluded any practical means of escape.[81] The district court, therefore, premised its holding concerning this provision on the principle that a woman has the right to be left alone.[82] Finally, the court determined that the injunction still left open ample alternative channels for communication of defendants' message, such as assembly outside the clear zones, picketing, and the use of sidewalk counselors.[83] The resulting injunction mirrored most of the relevant provisions of the TRO with a few exceptions. One change expanded the fifteen-foot buffer zone around persons seeking access to or leaving clinics to include vehicles.[84] Also, the injunction added a fifteen-foot buffer zone around clinic entrances or driveways.[85]

3. District Court Denies Motion to Vacate

In 1993, the defendants moved the district court to dismiss the plaintiffs' complaint regarding the federal cause of action (conspiracy to deprive a woman of interstate travel to seek an abortion)[86] in light of the Supreme Court's recent holding in *Bray v. Alexandria Women's Health Clinic*.[87] The defendants argued that the invalidity of this claim denied the court jurisdiction over the pendent state law claims.[88] But the district

80. *See id.*

81. *See id.* at 1435-37. The captive audience doctrine states that when someone cannot, as a practical matter, escape from unwarranted intrusion, the speaker's expressive activity can be restricted. *See* Frisby v. Schultz, 487 U.S. 474, 487-88 (1988). Previously, the Court had not included the defendant's own conduct as an additional factor in applying the captive audience doctrine. *See* Ellis & Wu, *supra* note 50, at 581.

82. *See Pro-Choice Network*, 799 F. Supp. at 1435.

83. *See id.* at 1437.

84. *See id.* at 1440.

85. *See id.*

86. *See* 42 U.S.C. § 1985(3) (1994).

87. *See* Pro-Choice Network v. Project Rescue, 828 F. Supp. 1018 (W.D.N.Y. 1993).

88. *See id.* at 1020.

court denied the motion, maintaining jurisdiction over the pendent law claims and allowing the plaintiffs to amend their complaint.[89] Thus, the plaintiffs were permitted to continue their action under two state law claims, New York Civil Rights Law § 40-c[90] and New York State trespass law.[91]

4. Review by the United States Court of Appeals for the Second Circuit

Defendants appealed the injunction to the United States Court of Appeals for the Second Circuit in 1994,[92] subsequent to the Supreme Court's decision in *Madsen*. The court of appeals found that the interests identified by the district court still qualified as significant governmental interests,[93] but in applying the new *Madsen* test of whether the restrictions "burdened no more speech than necessary," the court found two provisions of the injunction unconstitutional: the fifteen-foot buffer zone and the cease-and-desist order.[94] The court held that prohibiting obstruction of access adequately served the needs established by the record without an additional surrounding buffer zone.[95] The court also determined that the cease-and-desist provision burdened more speech than necessary because "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"[96] Judge Oakes dissented.[97]

89. *See id.* at 1032.
90. N.Y. CIV. RIGHTS LAW § 40-c(2) (Consol. 1982 & Supp. 1997).
91. *See Pro-Choice Network*, at 1018.
92. *See* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994).
93. *See id.* at 369.
94. *See id.* at 369-72.
95. *See id.* at 370-71.
96. *Id.* at 372 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).
97. Judge Oakes claimed that both the 15-foot buffer zone and cease-and-desist provision were necessary to ensure the health and safety of the patients receiving abortions at the clinics. *Id.* at 374 (Oakes, J., dissenting).

5. En Banc Review

In September of 1995, the court of appeals granted an en banc hearing to reconsider the constitutionality of the two stricken provisions.[98] This time, however, the court more carefully scrutinized the injunction's provisions and determined that the injunction's language contained both a fifteen-foot floating zone (moving with people and vehicles) and fifteen-foot fixed zone (surrounding the doors and access ways).[99] Comparing the *Schenck* and *Madsen* records, the plurality determined that both types of zones were constitutionally permissible.[100] The *Madsen* Court had upheld a thirty-six-foot fixed buffer zone,[101] which the *Schenck* court considered more restrictive in distance, but less restrictive in type because it did not "float."[102] Thus, the court of appeals reasoned, the cases were sufficiently similar overall to uphold the two types of smaller zones in *Schenck*.[103] Another factor the court considered in upholding the zones included the emotionally charged and disruptive demonstration, justifying the need for such protected areas.[104] Although one point of contention was whether the defendants' few violations of the original TRO constituted a failure of the TRO, the en banc court reasoned that the ineffectiveness of a TRO was only one of several factors considered in imposing a broader injunction.[105] Also, the court deferred to the district court's judgment that the length of the fifteen-foot buffer zone was a reasonable distance.[106]

98. *See* Pro-Choice Network v. Schenck, 67 F.3d 377 (1995).
99. *See id.* at 387-90.
100. *See id.*
101. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 770 (1994).
102. *See Pro-Choice Network*, 67 F.3d at 388.
103. *See id.*
104. *See id.* at 389.
105. *See id.* at 386-88.
106. *See id.* at 390. The court relied on *Madsen*'s statement that, "'some deference must be given to the [trial] court's familiarity with the facts and the background of the dispute between the parties even under our heightened review.'" *Id.* (alteration in original) (quoting *Madsen*, 512 U.S. at 769-70).

Finally, the court upheld the cease-and-desist provision by contrasting the clause with a provision which was struck down in *Madsen*.[107] The *Madsen* injunction prohibited demonstrators from approaching any person within 300 feet of the clinic "unless such person indicate[d] a desire to communicate."[108] The court considered *Schenck*'s comparatively proactive provision, with its sidewalk counselor exemption, as more mindful of the demonstrators' interest.[109] Also, the court determined that women confronted with sidewalk counselors were essentially a captive audience, further justifying the need for the cease-and desist-provision if the women wished to curtail the sidewalk counselor's message.[110]

The divided en banc court issued several separate opinions, including strong dissents by Judges Meskill and Altimari.[111] Since the theories behind these separate opinions seem to have affected the Supreme Court's subsequent decision in this case, a short summary is provided here. Judge Winter concurred in the result, but argued that the decision should have been grounded in the broader government interests of protecting individuals from coercive or obstructionist conduct, especially where targeted listeners are concerned.[112] In a separate concurring opinion, Judge Jacobs agreed with Judge Winters and added that the court should have also relied upon the government interests identified in *Madsen*: public safety, free flow of traffic, and property rights of citizens.[113]

Judge Meskill adamantly dissented, arguing that the *Schenck* and *Madsen* records were sufficiently dissimilar such that the buffer zone and cease-and-desist provisions failed the *Madsen* test.[114] Contrasting *Schenck's* more routine demonstrations and general compliance with the TRO with *Madsen*'s massive crowds and occasions of violence, Judge Meskill argued that the *Schenck* record did not support the injunction's provisions.[115]

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107. *See id.* at 390-91.
108. *Madsen*, 512 U.S. at 773.
109. *See Pro-Choice Network*, 67 F.3d at 390-91.
110. *See id.* at 392.
111. *See id.* at 399-411.
112. *See id.* at 394-98 (Winter, J., concurring).
113. *See id.* at 398-99 (Jacobs, J., concurring).
114. *See id.* at 399-409 (Meskill, J., dissenting).
115. *See id.*

Judge Meskill also considered the cease-and-desist provision unconstitutional because "[w]hile counselors may cause distress to those attempting to enter the clinics, such offense is an inevitable cost of free expression under the First Amendment."[116]

Judge Altimari penned a separate dissent, agreeing with Judge Meskill that since the TRO was generally obeyed, the injunction was not justified.[117] Judge Altimari also criticized the court's assessment of the cease-and-desist provision within the context of the captive audience doctrine, asserting that the provision should be upheld instead because public streets are traditional fora for exercising First Amendment rights.[118]

B. *United States Supreme Court Majority Opinion*

On February 19, 1997, the United States Supreme Court handed down the final decision in *Schenck v. Pro-Choice Network*.[119] The Court began its analysis by summarizing the currently operative test from *Madsen* for content-neutral injunctions: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[120] The Court then applied *Madsen* to the challenged provisions of the *Schenck* injunction: the floating fifteen-foot buffer zones around people and vehicles seeking access to the clinics, the fixed fifteen-foot buffer zones around the clinic driveways and parking lot entrances, and the cease-and-desist provision that forced sidewalk counselors who are inside the buffer zones to retreat fifteen feet from the person being counseled once the person indicated a desire not to be counseled.[121]

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116. *Id.*
117. *See id.* at 409-11 (Altimari, J., dissenting).
118. *See id.*
119. 117 S. Ct. 855 (1997).
120. *Id.* at 864 (quoting Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994)).
121. *See id.*

1. Governmental Interests

The Court recognized four significant governmental interests: (1) ensuring public safety and order; (2) promoting free flow of traffic; (3) protecting property rights; and (4) protecting women's freedom to seek pregnancy-related services.[122] The first interest of public safety was identified by the district court in evaluating the injunction, and was also recognized in *Madsen*, but never stated in the plaintiff's complaint in *Schenck*.[123] The Court nevertheless justified this interest by explaining that in assessing a First Amendment challenge, a court should examine not only the private claims named in the complaint, but also probe into possible governmental interests advanced by the injunction.[124] The Court also extracted the other interests from *Madsen*, noting that the interests identified in *Madsen* permissibly extended to *Schenck*, given the similar factual records of the two cases, and that collectively, the interests were important enough to "justify an appropriately tailored injunction to secure unimpeded physical access to the clinics."[125]

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122. *See id.* at 866. Petitioners had argued that no significant governmental interests remained to support the injunction because only one of the seven causes of action in the plaintiffs' original complaint remained—trespass—and a trespass could justify only an injunction that prohibited trespass. *See id.* at 865. But the Court rejected this argument, explaining that the elements of the original § 1985(3) complaint also complied with a § 40-c claim under state law. And even though *Bray* forced the § 1985(3) claim to be dismissed, the state law claims survived. *See id.*

123. *See id.* at 866. Note that the plaintiffs in *Madsen* also did not identify a public safety interest in their complaint. The *Schenck* majority acknowledged that this was understandable since a plaintiff "customarily alleges violations of private rights, while 'public safety' expresses a public right enforced by the government through its criminal laws and otherwise." *Id.*

124. *See id.* The Court also noted that the district court had recognized public safety as a valid interest. In his dissent, Justice Scalia argued that the district court's identification of this interest was inappropriate because only the government may seek an injunction with this interest. *See id.* at 874-75 (Scalia, J., dissenting). But the majority said that the district court's reliance on this interest was not to buttress support for the injunction, but to utilize it as a justification for rejecting petitioner's challenge to the injunction. *See id.* at 866 n.7.

125. *Id.* at 866.

2. Floating Buffer Zone

With these interests established, the Court then struck down the fifteen-foot floating buffer zones around people and vehicles because they "burden[ed] more speech than is necessary to serve the relevant government interests."[126] First, the Court explained that the floating zone was inappropriate because of the type of speech prohibited. Demonstrators would be prevented from distributing informational literature or talking to the women from a normal conversational distance, which countered traditional forms of expression: "[l]eafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment . . . ."[127]

Second, the nature of the location was an important issue in striking down the floating zone. Because such a zone would tread far beyond the clinic and with the moving individual or vehicle as it traveled, the Court reasoned, the traditional fora for public speech—the sidewalks and streets—would be unnecessarily affected.[128] Also, the Court considered the floating concept difficult to enforce since the sidewalk was only seventeen feet, and it would be logistically awkward for both a protestor and his audience to communicate on the sidewalk.[129] The uncertainty involved in enforcing the injunction, the Court explained, would pose a "substantial risk that much more speech will be burdened than the injunction by its terms prohibits."[130] The Court concluded its comments on the floating buffer zones by noting that, with respect to vehicles, a narrower injunction to keep protestors away from driveways and parking lot entrances, such as the fixed buffer zone, was adequate to enable drivers to enter and exit the clinic parking lots safely and easily.[131]

126. *Id.* at 866-67.
127. *Id.* at 867 (citing Boos v. Barry, 485 U.S. 312, 322 (1988)).
128. *See id.* at 866-67.
129. *See id.*
130. *Id.* at 867.
131. *See id.* at 868.

3. Fixed Buffer Zone

Accordingly, the Court then upheld the fifteen-foot fixed buffer zones around the doorways, driveways, and driveway entrances as necessary to ensure that individuals and automobiles were able to access the clinic.[132] Noting the similarities between the *Schenck* and *Madsen* records of repeated blockages of entrances and hindering individuals accessing the clinic, the Court concluded that the district court correctly banned demonstrators from the entranceways.[133] The Court also deferred to the district court's judgment that fifteen feet was an appropriate distance.[134] Finally, in a significant footnote to this section of the opinion, the Court noted that since the injunction allowed two sidewalk counselors into the fixed buffer zones, the district court had "ben[t] over backwards to 'accommodate' defendants' free speech rights" with respect to establishing a proper fixed buffer zone.[135]

In upholding the fixed buffer zone, the Court rejected several of petitioners' arguments. First, petitioners contended that other existing injunction provisions, such as restrictions on trespassing noise and blocking access, were sufficient to ensure access without the additional fixed buffer zone.[136] But the Court pointed to the record where the petitioners' persistence in past activities, such as aggressively following individuals up to the entrance, and loitering in the parking lot to block vehicles, properly led the district court to assume that such activities

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132. *See id.* at 868-69.

133. *See id.*

134. *See id.* (citing Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769-70 (1992)).

135. *Id.* at 868 n.11 (citing Pro-Choice Network v. Project Reserve, 799 F. Supp. 1417, 1434 (W.D.N.Y. 1992)).

136. *See id.* at 869.

would continue.[137] Thus, "a prophylactic measure was even more appropriate."[138]

Petitioners also argued that the district court should have first attempted a "non-speech-restrictive" injunction, as the trial court imposed in *Madsen,* before establishing a "speech-restrictive" injunction.[139] The Court, however, explained that the failure of an injunction to achieve its objective "*may* be taken into consideration"[140] in assessing the constitutionality of the subsequent injunction.[141] Thus, the "speech-restrictive" provision in the original TRO did not preclude the validity of the following injunction.[142]

Finally, the Court rejected petitioners' arguments contending that there was "no extraordinary record of pervasive lawlessness"[143] to justify the buffer zones, and that the term "demonstrating" was too ambiguous.[144] Pointing to the record, the Court found that the demonstrators' conduct was indeed extraordinary enough to justify the district court's holding.[145] Also, the Court explained, the injunction, when read in its entirety, would clearly indicate to "people 'of ordinary intelligence . . . a reasonable opportunity to know what is prohibited.'"[146]

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137. *See id.* Indeed, "[p]ost-injury remedies are frequently an ineffective and inadequate measure of protection, especially in light of the physical harm that can result to clinic patients from protestors' tactics." *The Supreme Court, 1996 Term—Leading Cases: Constitutional Law*, 111 HARV. L. REV. 339, 345 (1997) (referring to H.R. REP. NO. 103-306, at 707 (1994) and Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests—Section II,* 29 U.C. DAVIS L. REV. 1163, 1192-95 (1996)).

138. *Schenck*, 117 S. Ct. at 869.

139. *Id.*

140. *Id.* (emphasis added).

141. *Id.* (quoting *Madsen*, 512 U.S. at 770).

142. *See id.*

143. *Id.* (quoting Brief for Petitioners 45).

144. *See id.*

145. *See id.*

146. *Id.* at 869-70 (citing Grayned v. City of Rockford, 408 U.S. 104, 108, 110 (1972)).

4. Cease-and-Desist Provision

The Court also upheld the cease-and-desist provisions (that forced sidewalk counselors inside the buffer zones to retreat fifteen feet from the person being counseled once the person indicated a desire not be counseled), but on different grounds from the district court's reasoning.[147] The Court criticized the district court's captive audience justification for including the provision—to protect the right of the people approaching and entering the facilities to be left alone. It further stated that such a principle was not legally sound given *Madsen*'s insistence on tolerating such speech in order to accommodate freedoms protected by the First Amendment.[148] The Court nevertheless upheld the provision stating that the entire exception for sidewalk counselors was the district court's justiciable effort to enhance petitioners' free speech rights.[149] The Court rejected the petitioners' contention that the cease-and-desist provision was content-based—restricting counselors' speech based on the individual's disagreement with the speech conveyed—because the restriction was directed only to demonstrators who had done the prohibited acts.[150] Moreover, the Court explained, counselors remained able to communicate outside the fifteen-foot zone and the restriction was only the result of their own previous harassment and intimidation activities.[151]

C. *Justice Scalia, Concurring in Part and Dissenting in Part*

Justice Scalia, joined by Justices Kennedy and Thomas, wrote separately, concurring in part and dissenting in part with the majority opinion. Justice Scalia was primarily concerned with the Court's upholding of the injunction upon justifications other

147. *See id.* at 870.

148. *See id.* The Court noted that current case law does not recognize any sweeping right to be left alone because "'in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" *Id.* (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

149. *See id.*

150. *See id* at 869.

151. *See id.*

than those prompting its issuance,[152] as discussed in Section III.B.4., *supra*. Focusing on the district court's illegitimate basis for the cease-and-desist order—that people have a general right to be left alone—Justice Scalia insisted that it was illogical to reverse this justification while simultaneously sustaining the injunction as burdening no more speech than necessary.[153] Justice Scalia claimed that this maneuver by the Court was "contrary to the settled practice governing appellate review of injunctions, and indeed of all actions committed by law to the initial factfinding, predictive and policy judgment of an entity other than the appellate court."[154]

More specifically, Justice Scalia explained that when the district court justified both the fixed buffer provision and the cease-and-desist order on grounds that an individual has a right to be left alone, the court based that justification on repeated evidence that intimidation of women was the real factual problem, not obstructed access.[155] Thus, in upholding the fixed buffer zone because of repeated instances of obstructing access, Justice Scalia contended, the Supreme Court supplanted not only a new legal justification for the zone, but a factual one as well.[156] Justice Scalia pointed to pieces of the Supreme Court's opinion which he termed "carefully selected words"[157] to disguise the factual manipulation, such as, "[t]he District Court *was entitled to conclude on this record* that the only feasible way to shield individuals within the fixed buffer zone from unprotected conduct . . . would have been to keep the entire area clear of defendant protestors."[158] Also "[b]ased on the [defendants'] conduct, the District Court *was entitled to conclude* . . . that the only way to ensure access was to move *all* protestors away from the doorways."[159] Thus, Justice Scalia asserted that the Supreme Court conjured up conclusions that

152. *See id.* at 871.
153. *See id.* at 871 (Scalia, J., dissenting).
154. *Id.*
155. *See id.* at 871-72.
156. *See id.* at 872.
157. *Id.*
158. *Id.* (emphasis in original).
159. *Id.* (emphasis in original).

the trial court *could* have reached based on factual issues, but did not, and then upheld the decision on those grounds.[160]

Related to this point, Justice Scalia took issue with the Court's characterization of the sidewalk counselors inside the buffer zone as "an effort to bend over backwards to 'accommodate' defendants' speech rights."[161] Criticizing the Court's depiction of the district court's allowance of sidewalk counselors as a charitable benefaction by the Court, Justice Scalia countered that the situation actually necessitated allowing selected representatives in the zone.[162] Berating the Court, Justice Scalia wrote, "[t]he Court's effort to recharacterize this responsibility of special care imposed by the First Amendment as some sort of judicial gratuity is perhaps the most alarming concept . . . ."[163]

Finally, Justice Scalia chastised the Court for relying on the public safety interest to uphold the injunction even though public safety was not listed anywhere on the original complaint.[164] Justice Scalia claimed that this departed from the traditional separation of powers of the Executive and Judicial Branches, as it was inappropriate for the district court to "decree measures that would eliminate obstruction of traffic, in a lawsuit which ha[d] established nothing more than trespass."[165] Thus, Justice Scalia asserted, the Court assumed the authority to "decree what may be necessary to protect—not the plaintiff, but *the public interest*!"[166]

D. *Justice Breyer, Concurring in Part and Dissenting in Part*

Justice Breyer criticized the Court for even recognizing a floating buffer concept from the record and, by using transcripts from the lower courts, argued there was no intention in the

160. *See id.*
161. *Id.* at 873.
162. *See id.* at 873. "Thus, if the situation confronting the District Court *permitted* 'accommodation' of petitioners' free speech rights, it *demanded* it." *Id.* (emphasis in original).
163. *Id.*
164. *See id.* at 871.
165. *Id.* at 875.
166. *Id.* at 874 (emphasis in original).

original injunction to create such a mechanism.[167] He showed that the floating buffer concept was not necessarily created by the original TRO's words "trespassing on, sitting in, blocking, impeding or obstructing access to, ingress into or egress from any facility at which abortions are performed . . . including demonstrating *within [fifteen] feet of any person seeking access to or leaving such facilities.*"[168] Pointing to the district court transcript, Justice Breyer showed that the lower court actually clarified orally that the TRO did *not* imply a floating concept.[169] However, the identical language (with the added words "or vehicle") then found its way into the preliminary injunction, along with some rearranging and relettering of paragraphs.[170] Thus, Justice Breyer surmised, there was no justification to believe that the district court meant to give the key language a significantly different meaning or a new purpose other than its original purpose.[171]

Justice Breyer reinforced his point by referring to the oral argument before the court of appeals panel where even the petitioners' counsel confirmed there was no intention to create a floating buffer zone.[172] Later, however, at the en banc hearing, the court of appeals recognized that the ambiguity of the language might indeed create such a concept and deferred to the district court to resolve the matter.[173] Thus, Justice Breyer asserted, since the question still remained, the Supreme Court should have deferred to the district court to resolve any linguistic ambiguity, just as the court of appeals did.[174] He concluded

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167. *See id.* at 875-77 (Breyer, J., dissenting).

168. *Id.* at 876 (citing Appendix) (emphasis in original).

169. *See id.* Here the Court responded to Reverend Schenck's question as to whether this portion of the TRO would create a floating bubble. The Court responded, "We're talking fifteen feet from [e.g., a doorway] . . . to go right out to where ever you're going . . . [M]y gosh, you would never be able . . . to deal with that if it was a moving length." *Id.* (quoting excerpts from the Appendix to Reply Brief for Petitioner A-2 to A-3).

170. *See id.* at 875.

171. *See id.* at 876.

172. *See id.* at 877. Here, counsel for petitioners responded to the appeals court question as to whether an individual can "leave" and still be subject to the injunction. The attorney responded, "Maybe I just didn't see the full implications of the injunction, but I never considered that beyond the 15-foot bubble zone there would be this same restriction. Even I'm not arguing that the injunction goes that far." *Id.*

173. *See id.*

174. *See id.*

his opinion by stating, "[a]nd I see no special need here for the Court to make an apparently general statement about the law of 'floating bubbles,' which later developments may show to have been unnecessary or unwise."[175]

IV. ANALYSIS AND IMPLICATIONS OF *SCHENCK*

The Court's conspicuous manipulation of the district court's reasoning in order to justify the holdings, and its insistence on identifying a floating buffer zone in order to strike it down, indicate the Court's determined effort to clarify which injunction elements will satisfy the *Madsen* "burdens" test. The Court seemed to say that if justified by certain government interests and supported by the record, appropriately designed fixed buffer zones are constitutional, whereas floating buffer zones are not.[176] Although the Court accomplished its objective through a curious maneuver of reasoning, it did so in a legally appropriate fashion and, as a result, established a workable framework for courts to assess the constitutionality of similar injunctions. The next subsections analyze the Court's reasoning, discuss the implications of the fixed and floating buffer zones, and summarize a survey of lower court holdings subsequent to the *Schenck* decision.

A. *Appropriateness of Substituting the District Court's Reasoning*

The Court noticeably supplanted the district court's reasoning with more appropriate bases for upholding the lower court's findings, which deserves some further attention. One instance was the Court's recognition of significant government interests different from those identified by the district court and the original complaint.[177] The Court claimed that it is appropriate

175. *Id.* at 878.

176. The Court avoided stating this conclusively, but nevertheless implied that broad prohibitions that travel with an individual must be struck down. The Court stated, "We need not decide whether the governmental interests involved would ever justify some sort of zone of separation between individuals . . . measured by the distance between the two. We hold here that because this broad prohibition on speech 'floats,' it cannot be sustained on this record." *Id.* at 867.

177. *See id.* at 865-66.

for a court to examine not only the private claims asserted in the complaint, but also the government interests protected by the injunction.[178] The other circumstance was the Court's upholding of the cease-and-desist provision on contrary grounds to the lower court's justification. The Court rejected the district court's justification that a person has the right to be left alone, but nevertheless upheld the cease-and-desist provision, noting that "the entire exception for sidewalk counselors was an effort to enhance petitioners' [free] speech rights . . . ."[179]

Both the majority and Justice Scalia relied on *SEC v. Chenery Corp.*[180] in defending their positions, a case which lends more support to the majority. In *Chenery*, the Court recognized that if an *administrative agency* bases a determination upon a misconception of the law, then the order may not stand. The decision of a *trial court*, however, must be affirmed if the result is correct, even if the court relied upon a wrong reason.[181] In other words, *Chenery* distinguishes between the more narrow power of judicial review of agency administrative decisions and the power of appellate review within the federal court system. In addressing the broader scope of appellate review of a court decision, the *Chenery* Court explained:

> It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury.[182]

It would appear, therefore, that the *Schenck* majority appropriately substituted different reasoning in upholding the district

178. See *id.* at 866.

179. *Id.* at 870.

180. 318 U.S. 80 (1943). The majority also relied on *Rutan v. Republican Party*, 497 U.S. 62, 76 (1990), and *Smith v. Phillips*, 455 U.S. 209, 215 (1982), but *Chenery* elaborates most directly regarding the powers of appellate review.

181. *See Chenery*, 318 U.S. at 88, 94.

182. *Id.* at 88.

court's decision—only if the factors underlying the lower court's decision could have been made without a jury determination.

Here is where Justice Scalia's dissent specifically took issue with the Court's actions. As described in Section III.B., *supra*, Justice Scalia contended that in upholding the fixed buffer zones, the Court found that obstructed access to clinics served as the real justification, not intimidation of women.[183] A closer look at the wording of the district court, however, indicates that the Supreme Court did not take literary license with the factual record, as Justice Scalia insisted. In its findings of fact, the district court found that defendants engaged in physically blockading entrance to and exit from the abortion clinics, which included sitting or lying on the clinic property, locking arms to prevent access, and effectively halting complete operation of the clinic.[184] Although the physical blockades apparently stopped after the issuance of the TRO,[185] constructive blockading continued in full force including demonstrating and picketing around the clinics, harassing individuals around the clinic entrances, and congregating in or near driveway entrances to impede or obstruct access to the facilities.[186] The activities even caused some individuals attempting to enter the driveway or doorway to leave the area because of confusion or intimidation.[187] Although the district court erroneously concentrated on "a person's right to be left alone,"[188] the district court could have relied easily on the constructive blockading activities obviously existent in the record to justify the fifteen-foot fixed buffer zone around the entrances without a jury determination of those same facts.[189]

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183. *See Schenck*, 117 S. Ct. at 871-72 (Scalia, J., concurring in part and dissenting in part).

184. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1424 (W.D.N.Y. 1992).

185. *See id.* at 1424 n.5.

186. *See id.* at 1424.

187. *See id.*

188. *Id.* at 1435.

189. In addition to establishing rules regarding content-neutral injunctions, *Schenck* also appears to be confirming the power of appellate courts to substitute reasoning of lower court decisions. One author quotes *Schenck* directly regarding this principle: "It is a fundamental principle of appellate jurisprudence that an appeals court has both the power and the duty to affirm on any grounds that are obviously suggested by the record, even when no party has raised that alternative basis for affirmance." James

The *Schenck* Court's upholding of the cease-and-desist order also passes the *Chenery* test. Here, more appropriate legal reasoning was substituted in a situation where the factual record was not even an issue. As discussed in Section III.B. *supra*, Justice Scalia harshly criticized the Court for postulating reasons that the district court might have used and took issue with the Court's characterization of the sidewalk counselor exemption as a "judicial gratuity,"[190] arguing that the circumstances necessitated the provision since courts have an affirmative duty to cultivate speech rights.[191] The *Schenck* Court's characterization of the sidewalk counseling provision as "an effort to bend over backwards"[192] may be an exaggeration, but the district court nevertheless exceeded necessity. Indeed, the *Madsen* Court demonstrated that a similar fact situation did not require a sidewalk counseling provision; a thirty-six-foot buffer zone was upheld in *Madsen* with no exceptions for sidewalk counselors[193] Therefore, it would seem there was no obligation for the district court in *Schenck* to include such an exemption. In addressing the sidewalk provision, the only reason the district court articulated was "an attempt to accommodate fully defendants' First Amendment rights . . . ."[194] An assumption by the *Schenck* Court that the lower court meant "accommodate fully" as a gratuitous gesture was reasonable, especially in light of the minimal distance of the fixed buffer zone and the allowance of alternative communications, such as picketing and leafleting near the zone. Thus, in keeping with *Chenery*, the *Schenck* Court justifiably rejected the lower court's reliance on the captive audience doctrine while respecting the district

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Joseph Duane, *The Trouble with* United States v. Tellier: *The Dangers of Hunting for Bootstrappers and Other Mythical Monsters*, 24 AM. J. CRIM. L. 215, 257 (1997) (citing *Schenck*, 117 S. Ct. at 870 n.12, as well as several other lower federal court cases that upheld the principle of appellate review, even when determination of jury facts could be an issue, such as *United States v. Gordon*, 78 F.3d 781, 786 (2d Cir. 1996), *Aetna Casualty & Surety Co. v. United States*, 71 F.3d 475, 477 (2d Cir. 1995), *United States v. Cruz*, 797 F.2d 90, 97 (2d Cir. 1986), and *Taylor v. Kinsella*, 742 F.2d 709, 712 (2d Cir. 1984)).

190. *Schenck*, 117 S. Ct. at 873.

191. *See id.*

192. *Id.* at 869 n.11.

193. *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769-70 (1994).

194. Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1434 (W.D.N.Y. 1992).

court's intent to cancel the sidewalk counseling privilege if abused or rejected by the audience.

B. *The Buffer Zones—Message to the Courts*

Assuming that the Court's reasoning was sound, the Court's message from *Schenck* and *Madsen* appears clear: a record showing continuous harassment, intimidation, and constructive blockading that prevent or impede access to clinics will support a reasonably drawn fixed buffer zone around the entranceways in order to ensure access.[195] This should not only provide welcome guidance to the courts, but assist in decreasing violence around abortion clinics as well.[196] Indeed, recent studies have found that "one-third of clinics with buffer zones, a [ten] to [thirty]-foot protected area around clinics, had greater decreases in violence than those without buffer-zone protection."[197]

1. Fixed Buffer Zones—Application by Lower Courts

Only a few courts to date have employed the holding of *Schenck* concerning fixed buffer zones. In March of 1997, a Massachusetts state court correctly followed *Schenck* in *Planned Parenthood League v. Bell*,[198] where a woman appealed a preliminary injunction prohibiting her from entering within fifty feet of an abortion clinic.[199] The woman had previously worn garments which falsely represented her as a clinic escort, shouted loudly around the clinic, and blocked, harassed, and intimidated patients who attempted to enter the clinic.[200] The court

195. *See generally Schenck*, 117 S. Ct. 855.

196. Note that since *Schenck*'s guidance steps rely excessively on facts, there may remain a need to provide better direction to lower courts regarding how to interpret the facts. This area of ambiguity may pose a "risk that courts will grant either too much or too little protection to women seeking reproductive health services." *The Supreme Court, 1996 Term—Leading Cases: Constitutional Law*, 111 HARV. L. REV. 197, 347 (1997).

197. *See* Cannon, *supra* note 14. Indeed, since previous law enforcement tactics have proven ineffective, the Court "correctly concluded that fixed buffer zones were necessary to provide adequate protection to clinic patients and staff." *The Supreme Court, 1996 Term, supra* note 199, at 346.

198. 677 N.E.2d 204 (Mass. 1997).

199. *See id.*

200. *See id.* at 206-07.

correctly considered such factors as violations of previous court orders, continuous obstructive activity, and the practicality of the measured distance in upholding a fifty-foot fixed buffer zone around the clinic.[201]

Likewise, in *Lucero v. Trosch*,[202] an Eleventh Circuit case, where defendants deliberately delayed patients and vehicles as they attempted to access the clinic,[203] the *Madsen* burdens test was correctly applied to two types of fixed buffer zones. The governmental interests identified were a woman's freedom to seek abortion counseling and services, public safety, free flow of traffic, and the property rights of citizens.[204] The court found that a twenty-five-foot buffer zone around the clinic burdened no more speech than necessary, since the defendants could still express their message outside of the zone, and thus deferred to the lower court's judgment that the distance was reasonable.[205]

But a provision enjoining protestors from picketing, demonstrating, or using sound equipment within 200 feet of staff residences was found in violation of the First Amendment.[206] The court compared the buffer zone to a similar 300-foot buffer zone in *Madsen* that was struck down as overbroad.[207] The court explained that "the 200-foot no approach residential buffer zone does not simply proscribe activities directly in front of the staff residences, but rather operates as a generalized restriction on protesting and thus is unconstitutional."[208] Time will tell if other courts will appropriately assess fixed buffer zones, but *Schenck*'s clear holding should ensure success.

2. Floating Buffer Zones—Recognition of New Concept

The Court continued its outlay of guidance steps in its treatment of the floating buffer zones. Given that the *Schenck* dis-

201. *See id.* at 211-12.
202. 121 F.3d 591 (1997).
203. *See id.* at 594-95.
204. *See id.* at 605.
205. *See id.* at 606.
206. *See id.*
207. *See id.*
208. *Id.*

trict court never directly addressed floating buffer zones in its opinion, the Court could have referred the matter to the district court to clarify the ambiguity.[209] But since the Court chose instead to identify the floating buffer zone and further strike it down, it is questioned whether the majority incorrectly interpreted the meaning of a floating buffer zone as it was meant by the lower court, as Justice Breyer insisted in his dissent.[210] Contending that the court of appeals took creative license with the preliminary injunction's language to engender two types of buffer zones, floating and fixed, Justice Breyer drew largely upon transcripts from the district court level, discussed in Section III.D., *supra*, to show there was no intention to devise a traveling buffer zone, and that even the petitioners at the court of appeals level seemed unaware of such a concept.[211]

However, one of the preliminary injunction's key revisions to the TRO was a prohibition of demonstrating within fifteen feet of clinic entrances or driveways, in addition to people and vehicles, probably indicating the district court's intent to impose both types of protective zones.[212] Also, contempt violations at the district court level were imposed upon defendants who came within fifteen feet of an individual, even though they were more than fifteen feet from the clinic entrance.[213] Also, as the Court noted in its opinion, "no judge of the en banc court of appeals expressed doubt that the injunction included floating buffer zones . . . and . . . none of the parties before us has suggested that the injunction does not provide for such zones."[214] Thus, the Court reasonably acknowledged a floating buffer zone from the record.

Since the Court took pains to justify its recognition of the floating buffer zone—before striking it down—the Court plainly wanted to show that such concepts are unconstitutional in similar situations. Although it refrained from holding floating buffer

209. *See* Schenck v. Pro-Choice Network, 117 S. Ct. 855, 877 (1997) (Breyer, J., dissenting).

210. *See id.* at 875-77.

211. *See id.* at 876.

212. *See* Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1440 (W.D.N.Y. 1992); *see also Schenck*, 117 S. Ct. at 867 n.10.

213. *See Schenck*, 117 S. Ct. at 867 n.10.

214. *Id.*

zones as presumptively unconstitutional, the Court did note, "[w]e need not decide whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protestors, measured by the distance between the two. We hold here that because this broad prohibition on speech 'floats,' it cannot be sustained on the record."[215] Aside from a brief reference to the impracticality of such a concept, the Court justified its holding with traditional concepts of preserving the public sidewalks for classic forms of free speech.[216] Even a cursory reading of *Schenck* should dissuade any future court from upholding a floating buffer zone.[217]

3. Floating Buffer Zones—Application by Lower Courts

The application of *Schenck* to floating buffer zones has, however, proved to be a problem with the lower courts. Already, at least one court has perhaps incorrectly applied *Schenck*'s holding. In *United States v. Scott*,[218] the United States filed suit against a single protestor under FACE, and a federal district court in Connecticut upheld an injunction which created a "zone of separation between individuals entering the clinics and [demonstrators], measured by the distance between the two."[219] The lower court attempted to distinguish this zone from the floating buffer concept by pointing to the *Schenck* Court's statement that it, "did need not decide 'whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protestors, measured by the distance between the two . . . .'"[220] But the court in *Scott* seemed to misunderstand the *Schenck* holding because the very definition of a floating buffer zone in *Schenck*

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215. *Id.* at 867.

216. *See id.*

217. *See* Kathryn D. Piele, Sabelko v. City of Phoenix: *Ninth Circuit Refuses to Burst "Bubble" Protecting Women Entering Health Care Facilities*, 75 OR. L. REV. 1297, 1330 (1996). The author notes that *Schenck's* holding pertaining to floating buffer zones in injunctions may also extend to ordinances because "the Court seemed to have a particular distaste for floating buffer zones." *Id.*

218. 958 F. Supp. 761 (1997), *aff'd*, 975 F. Supp. 428 (1997).

219. *Id.* at 781.

220. *Id.* (quoting *Schenck*, 117 S. Ct. at 867).

is indeed the distance between "any person or vehicle seeking access to or leaving such facilities."[221]

In a Ruling on Defendant Scott's Motion for Reconsideration,[222] the court upheld the floating buffer zone, clarifying several points. First, the court pointed to *Schenck*'s statement, "We need not decide whether the governmental interests involved would ever justify some sort of zone of separation between individuals . . . ,"[223] as an opening for when governmental interests *would* be justified. As such, the court claimed that the separation was "necessary and justified based on Scott's repeated and consistent violations of FACE by force, threat of force, and physical obstruction, and his frequent nose-to-nose confrontations with patients and escorts."[224] Second, the court pointed out that the floating buffer zone was only five feet, and not fifteen as proposed in *Schenck*.[225] Third, the restriction enjoined only one person, not a group of demonstrators.[226] Finally, the floating buffer zone was limited to the streets and parking lot.[227] The court concluded that overall, where the *Schenck* Court found that the problem established by the record could be solved by a fixed buffer zone, the record in *Scott* could not.[228] Whether the *Schenck* Court intended for "special circumstances" to allow for floating buffer zones is questionable, although an injunction against one person certainly departs from the factual record before *Schenck*. This decision may be further modified if appealed.

Another area of unresolved concern is whether *Schenck*'s strong message pertaining to floating buffer zones in injunctions should also pertain to general ordinances.[229] Although the Su-

221. *Schenck*, 117 S. Ct. at 862.

222. United States v. Scott, 975 F. Supp. 428 (1997).

223. *Id.* at 431 (quoting *Schenck*, 117 S. Ct. at 867).

224. *Id.*

225. *See id.*

226. *See id.*

227. *See id.* "Thus, the court has created a small and bounded zone, not the type of floating zone invalidated by *Schenck*." *Id.* at 431-32. Also, the court further differentiated *Scott* from *Schenck* by explaining that *Scott* was predicated upon a violation of FACE, a statute which states that activities protected by the First Amendment do not violate FACE. "Thus, by ruling that *Scott* violated FACE on numerous occasions, the court already addressed many of the First Amendment concerns typically raised in response to a motion [filed for an injunction]." *Id.* at 432 n.2.

228. *See id.* at 432.

229. "While some courts . . . have correctly refused to apply *Madsen* to ordinances,

preme Court seemed to disfavor the nature of floating buffer zones in *Schenck* in general, *Madsen* determined that less scrutiny is applied to ordinances as opposed to injunctions and are upheld if they are "narrowly tailored to serve a significant governmental interest, and . . . [left] open ample alternative channels for communication of the information."[230] Thus, it is not clear if a floating buffer zone could survive in an ordinance.

This unresolved issue arose in *Hill v. City of Lakewood*,[231] a Colorado state court of appeals case in which a statute required a protestor to remain at least eight feet from any person who was within 100 feet of an abortion clinic, unless the other person consented.[232] The legislature had adopted the statute out of concern for public safety issues presented by problems caused by demonstrators outside of abortion clinics, and especially to assist persons with disabilities to access the clinic.[233] The court of appeals had originally found that the statute, which was content-neutral, was supported by valid government interests and narrowly tailored to serve that interest.[234] The Supreme Court, however, granted certiorari and remanded the case in light of *Schenck*.[235] The state court of appeals affirmed its original decision, emphasizing that lesser scrutiny applied to the floating buffer zone since it was a generally applicable ordinance instead of an injunction.[236] The court also justified the zone because it extended only eight feet, instead of fifteen feet as in *Schenck*, and extended even less than eight feet if permitted by the individual counseled.[237] Furthermore, the court noted that there were ample alternative channels for communication available within 100 feet of the entrance, such as displaying placards and other visual items.[238] Finally, the court re-

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other courts have erroneously applied *Madsen*'s injunction test to ordinances, thus obscuring the previously clear test for ordinances. The Supreme Court may clarify this issue in *Schenck* . . . ." Ellis & Wu, *supra* note 50, at 563-64.

230. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (citing City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)).

231. 949 P.2d 107 (Colo. Ct. App. 1997).

232. *See id.* at 107.

233. *See id.* at 108.

234. *See* Hill v. Lakewood, 911 P.2d 670 (Colo. Ct. App. 1995).

235. *See* Hill v. Colorado, 117 S. Ct. 1077 (1997).

236. *See Hill*, 949 P.2d at 109-110.

237. *See id.* at 110.

238. *See id.*

jected the argument that it would be difficult for a demonstrator to ascertain an eight-foot distance, stating that the statute only prohibited a person who "knowingly" approached an individual within that distance.[239]

Despite the state court of appeals' superficially correct reliance on *Madsen*, this case will likely be reversed. Although the court is correct that the *Madsen* "burdens" test does not apply to generally applicable ordinances, the Supreme Court in *Schenck* emphasized that *any* floating buffer zone establishes a broad prohibition on speech that affects traditional types of speech, such as leafleting and commenting, as well as traditional areas of speech, such as public sidewalks.[240] Also, the ordinance may not be narrowly tailored if only select individuals caused the problem, and the ordinance, with more general application, affects everyone within its scope. Finally, whether someone "knowingly" approaches another within eight feet would be considerably difficult to determine.

The federal courts, on the other hand, seem to heed *Schenck*'s message concerning floating buffer zones by discouraging them even in ordinances. In *Sabelko v. City of Phoenix*,[241] for example, anti-abortion sidewalk counselors brought an action challenging an ordinance that made it unlawful for a person to fail to withdraw, upon a clearly communicated request to do so, to a distance of at least eight feet away from any person who so requested.[242] Like *Hill v. City of Lakewood*,[243] this case was granted certiorari by the United States Supreme Court, and remanded for consideration in light of *Schenck*.[244] But in applying even the *Madsen* intermediate test for ordinances, this court found the statute unconstitutional because it contained the same basic defects as *Schenck*. First, the court found that the floating buffer zone established a broad prohibition of speech with which it was difficult to comply without risking a violation of the ordinance.[245] Also, an

239. *See id.*
240. *See* Schenck v. Pro-Choice Network, 117 S. Ct. 855, 867 (1997).
241. 120 F.3d 161 (1997).
242. *See id.*
243. 949 P.2d 107 (Colo. Ct. App. 1997).
244. 117 S. Ct. 1077 (1997).
245. *See Sabelko*, 120 F.3d at 165.

individual within the access area to a clinic could invoke the eight-foot floating buffer zone, effectively preventing the handbilling and normal conversation.[246] Furthermore, the problem of determining distance and uncertainty concerning compliance established a substantial risk that more speech would be eliminated than the ordinance itself prohibits.[247] Thus, the court reasoned, it lacked the narrow tailoring necessary to survive even the intermediate scrutiny applicable to ordinances.[248]

V. CONCLUSION

Given the delicate balancing courts perform when restricting the activities of anti-abortion demonstrators, the *Schenck* decision provides welcome guidance for developing and reviewing injunctions within the *Madsen* "burdens" test. Although the Court's reasoning superimposes the district court's justification for issuing the injunction, the Court's analytical framework was legally appropriate and provides a practical directive. Although it appears there remains some ambiguity regarding whether floating buffer zones can survive in ordinances, *Schenck*'s strong message should discourage these mechanisms. Consequently, future court assessments of content neutral injunctions and ordinances that correctly follow *Schenck* and *Madsen* should uphold fixed buffer zones if designed in a reasonable manner and necessitated by the record, and invalidate floating buffer zones.

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246. *See id.*
247. *See id.*
248. *See id.*