University of Missouri School of Law Scholarship Repository

Faculty Publications

Fall 1998

Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the Theoretical Abyss

Christina E. Wells
University of Missouri School of Law, wellsc@missouri.edu

Follow this and additional works at: http://scholarship.law.missouri.edu/facpubs

 Part of the Courts Commons, First Amendment Commons, and the Jurisprudence Commons

Recommended Citation
Christina E. Wells, Of Communists and Anti-Abortion Protestors: The Consequences of Falling into the Theoretical Abyss, 33 Ga. L. Rev. 1 (1998)

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

GEORGIA LAW REVIEW

VOLUME 33 FALL 1998 NUMBER 1

ARTICLES

OF COMMUNISTS AND ANTI-ABORTION PROTESTORS: THE CONSEQUENCES OF FALLING INTO THE THEORETICAL ABYSS

*Christina E. Wells**

In 1951, in the midst of the Red Scare and at the height of McCarthyism, the Supreme Court of the United States decided the fate of several American leaders of the Communist Party who were convicted under the Smith Act of conspiring to advocate forcible overthrow of the government.[1] In the years preceding *Dennis v.*

* Associate Professor, University of Missouri School of Law, B.A., University of Kansas, 1985; J.D., University of Chicago, 1988. I am grateful to Hank Chambers, Bill Fisch, Tracey George and Bob Pushaw for their valuable comments and criticisms on prior drafts of this paper. This article is based, in part, upon a paper presented at the 1997 Law & Society Annual Meeting. I want to thank my fellow panel members for their insightful comments, all of which vastly improved the final product. I also am indebted to Tracy Coyle, Mondi Ghasedi, Rikki Jones and Bob Reinhardt for their helpful research and editorial criticisms. Finally, I am grateful for the generous financial support provided by the University of Missouri Law School Foundation through the John K. Hulston Faculty Research Fellowship, the James C. Morrow Faculty Research Fellowship, the William F. Sutter Faculty Research Fellowship, and the Gary A. Tatlow Faculty Research Fellowship.

[1] Dennis v. United States, 341 U.S. 494 (1951) (plurality opinion). The Smith Act makes it a crime to "knowingly . . . advocate[], abet[], advise[] or teach[] the duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence . . . ." 18 U.S.C. § 2385 (1994). It

HeinOnline -- 33 Ga. L. Rev. 1 1998-1999

United States, the Court demonstrated an increased commitment to the protection of advocacy via the use of the "clear and present danger" test.[2] The *Dennis* Court, however, perverted that test, finding that the convictions did not violate the First Amendment, even though there were serious questions "as to whether sufficient—or, indeed, any—evidence of [criminal wrongdoing] had been introduced at the *Dennis* trial."[3] The public exalted the Court's decision.[4] Justice Black, however, deplored its political nature, commenting that

> [p]ublic opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[5]

Eventually, calmer times prevailed and the Supreme Court backed away from *Dennis*. Only six years after that decision, the Court in *Yates v. United States*[6] reversed the convictions of several Communist Party leaders even though the case involved issues almost identical to *Dennis*. The *Yates* Court arrived at its ruling "as a

---

further prohibits citizens from "organiz[ing] or help[ing] or attempt[ing] to organize" any group which engages in such advocacy. *Id.*

[2] The test was the modern Court's first attempt to determine when the First Amendment permitted punishment of speech. Specifically, it required the Court to ask "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919); *see also* HARRY KALVEN, JR., A WORTHY TRADITION 123-91 (1988) (discussing Court's application of test in different cases).

[3] Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 47-48 (1991); *see also* MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY AND AMERICAN CIVIL LIBERTIES 6 (1977) (noting that only way to uphold convictions was "by modifying the accepted interpretation of the First Amendment").

[4] *See, e.g.*, *Freedom With Security*, WASH. POST, June 6, 1951, at 12 ("The Supreme Court's decision upholding the conviction of the 11 Communist leaders is the most important reconciliation of liberty and security in our time."); *see also infra* notes 33-34 and accompanying text (describing public reaction).

[5] *Dennis*, 341 U.S. at 581 (Black, J., dissenting).

[6] 354 U.S. 298, 303 (1957), *overruled in part by* Burks v. United States, 437 U.S. 1 (1978).

HeinOnline -- 33 Ga. L. Rev. 2 1998-1999

matter of statutory interpretation, albeit with constitutional principles hovering closely above."[7] Thus, although the Court did not explicitly overrule the constitutional decision in *Dennis*, it nevertheless largely "eliminat[ed] the Smith Act as a weapon in the campaign against American Communism."[8]

The Court's free speech jurisprudence has evolved significantly since *Dennis* and *Yates*. The decade of the 1960s and the Warren Court era saw notable expansion and entrenchment of the First Amendment rights of political speakers.[9] The once malleable "clear and present danger" test evolved into far more rigid rules designed to protect speech from government censorship.[10] Moreover, the Court's rhetoric in this period further signified its strong commitment to free speech.[11] Thus, the First Amendment rights of political speakers are now firmly entrenched. The political persecution and manipulation of precedent that occurred in the earlier cases involving communists simply could not happen in this arena of rigidly protective rules. Or could it?

Two recent cases involving anti-abortion protestors, another unpopular group, arguably present a pattern similar to *Dennis* and *Yates*. The Court in *Madsen v. Women's Health Center, Inc.*[12] both

---

[7] Rohr, *supra* note 3, at 68.

[8] KALVEN, *supra* note 2, at 220.

[9] *See* Suzanna Sherry, *All the Supreme Court Really Needs to Know it Learned from the Warren Court*, 50 VAND. L. REV. 459, 468-72 (1997) (discussing Warren Court's free speech decisions); Nadine Strossen, *Freedom of Speech in the Warren Court*, *in* THE WARREN COURT: A RETROSPECTIVE 68, 68-81 (Bernard Schwartz ed., 1996) (discussing emergence of free speech tradition under Warren Court).

[10] The "clear and present danger" test eventually evolved into the relatively stringent test announced in *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969), which allows suppression of subversive advocacy only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Moreover, the Court in recent decades has adopted more explicit rules prohibiting, both directly and indirectly, government suppression of particular viewpoints. *See* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 173-75 (1997) (discussing Court's stringent review of content-based and viewpoint-based regulations of speech).

[11] For examples of the Court's more enduring rhetoric see *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), illustrating the Court's commitment "to the principle that debate on public issues should be uninhibited, robust, and wide-open," and *Texas v. Johnson*, 491 U.S. 397, 414 (1989), stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

[12] 512 U.S. 753 (1994).

HeinOnline -- 33 Ga. L. Rev. 3 1998-1999

upheld and struck down portions of an injunction restricting the speech of anti-abortion protestors. Those subject to the injunction and their supporters lambasted the decision to uphold it, arguing that the Court was motivated by anti-abortion protestor animus.[13] In addition, Justice Scalia accused the *Madsen* majority of ignoring past precedent and allowing the "ad hoc nullification machine" of abortion to override the Court's First Amendment jurisprudence.[14] Three years later, the Court again faced the constitutionality of injunctions restricting the speech of anti-abortion protestors. As in *Madsen*, the Court in *Schenck v. Pro-Choice Network*,[15] upheld and struck down portions of an injunction. The reaction to *Schenck*, however, differed from the reaction to *Madsen*. Focusing on the Court's decision to strike down portions of the injunction, the protestors lauded it as a recognition by the Court that its earlier decision unfairly restricted their First Amendment rights.[16] Even neutral observers characterized *Schenck* as a strong affirmation of the rights of speakers.[17]

Judging from the above reactions, *Madsen* and *Schenck* appear to parallel the pattern exhibited in *Dennis* and *Yates*. The protestors' response to *Madsen* intimates that the *Madsen* Court, like the *Dennis* Court before it, deviated from its previous staunch protection of political expression as a result of political opposition to abortion protestors. Similarly, protestor and public response to *Schenck* indicate parallels to *Yates* insofar as *Schenck* represents the Court's implicit acknowledgment that *Madsen* had gone too far. But a closer examination of *Madsen* and *Schenck* reveals that they are unlike *Dennis* and *Yates*. Though one might argue that the *Madsen* Court ultimately erred in upholding the injunction, given

---

[13] Craig Crawford, *A Victory for Abortion-Rights Activists*, ORLANDO SENTINEL, July 1, 1994, at A1 (noting that in *Madsen* "[t]he U.S. Supreme Court blunted the free speech claims of anti-abortion demonstrators").

[14] 512 U.S. at 784-85 (Scalia, J., concurring in the judgment in part and dissenting in part).

[15] 117 S. Ct. 855 (1997).

[16] *See, e.g.*, David G. Savage, *Justices Rule Abortion Protest Is Free Speech*, L.A. TIMES, Feb. 20, 1997, at A1 (quoting Jay Sekulow, attorney for protestors, as stating that Court had finally recognized that "the [First] Amendment applies to the pro-life message").

[17] *See, e.g.*, David G. Savage, *"In-Your-Face" Speech Wins in Supreme Court*, L.A. TIMES, Feb. 22, 1997, at A1 (characterizing Schenck as win for "[f]ree speech of the loud, aggressive, in-your-face variety").

HeinOnline -- 33 Ga. L. Rev. 4 1998-1999

the relative uniqueness of the issue facing that Court, it is difficult to say that past doctrine *compelled* a different result. Moreover, *Madsen* and *Schenck* are not inconsistent with one another. *Schenck* is essentially a straightforward application of the earlier decision.

Why, then, do the above-described reactions to *Madsen* and *Schenck* paint such a contrasting picture? Ironically, the answer is that the Court's opinions lend themselves to this kind of public manipulation. Though the Court has embraced doctrine and rhetoric regarding the protection of speech, it has never developed a coherent and explicit philosophical theory underlying its decisions.[18] As Professor Post noted, "contemporary First Amendment doctrine is . . . striking chiefly for its superficiality, its internal incoherence, its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech . . . . [It] has become increasingly a doctrine of words merely, and not of things."[19] Thus, the Court's decisions have evolved haphazardly and are empty and easily manipulable, as *Madsen* and *Schenck* aptly illustrate.[20] Both cases epitomize

---

[18] To be sure, the Court has announced "general principles" supporting protection of speech. For example, the Court often bases its decision to protect speech upon the notion that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). Similarly, the Court has intimated that the protection of speech is necessary to facilitate democratic self-governance. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 50-51 (1988). Finally, the Supreme Court sometimes notes that protection of speech is necessary to facilitate notions of personal autonomy and self-expression. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254, 269 (1964). But it has never attempted to explain when these different principles come into play or how they propel its doctrine. Moreover, the Court does not consistently describe even a single principle from opinion to opinion. *See* Wells, *supra* note 10, at 172 & nn.53-54 (citing cases in which Court has sometimes described its autonomy rationale as speaker's right of self-expression and at other times has characterized it as listener's right to receive information).

[19] Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1249-50 (1995).

[20] The abortion protest cases are by no means the only evidence of this emptiness. As another example, one need only look to the increasing fragmentation of the Court's recent free speech decisions which are often comprised of five-to-four or plurality opinions. *See, e.g.*, Glickman v. Wileman Bros. & Elliott, 117 S. Ct. 2130 (1997); Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727 (1996); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Florida Bar v. Went For It, 515 U.S. 618 (1995); Turner Broad. Sys., Inc. v. FCC, 512 U.S.

HeinOnline -- 33 Ga. L. Rev. 5 1998-1999

the Court's tendency to focus on minutiae rather than on the difficult philosophical and doctrinal issues raised in so many free speech cases. They further reflect the Court's habit, when it does discuss such questions, of supporting its decisions by simply citing to past precedent with little or no explanation. Moreover, that reliance on precedent is often selective and ignores (or only superficially attempts to reconcile) the numerous, potentially contradictory precedents that exist. The ultimate result of such actions is the public manipulation of Court decisions referred to above—a dangerous and, perhaps, increasingly common reaction given "the cynical view, already popular among [the Court's] critics, that constitutional law is only a matter of which president appointed the last few justices."[21]

Part I of this article briefly reviews the legal and social context of *Dennis* and *Yates*. Parts II and III similarly review *Madsen* and *Schenck* in order to show potential parallels to the earlier communist decisions. Part IV further examines both *Madsen* and *Schenck*, demonstrating that, from a doctrinal standpoint, they are far removed from the earlier communist cases. Finally, Part V explains how the Court in *Madsen* and *Schenck* actually contributed to misconceptions or manipulation of its opinions. Specifically, Part V examines the *Madsen* and *Schenck* Courts' approaches to three of the more difficult doctrinal issues facing them—prior restraint, the place of motive in content-discrimination, and regulation of offensive speech in the public forum—and concludes that the Court's tendency to rely blindly on rhetoric and precedent without further discussion leaves its decisions vulnerable to misconstruction and manipulation.

I. A BRIEF REVIEW OF *DENNIS* AND *YATES*

A. *DENNIS V. UNITED STATES*: A POLITICAL DECISION IN THE MAKING

In 1949, after a nine-month trial, a federal jury convicted eleven leaders of the Communist Party USA of conspiring "to advocate and

622 (1994); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Rust v. Sullivan, 500 U.S. 173 (1991).

[21] Ronald Dworkin, *The Great Abortion Case*, N.Y. REV. BOOKS, June 29, 1989, at 53.

HeinOnline -- 33 Ga. L. Rev. 6 1998-1999

teach the duty" of forcible overthrow of the government in violation of the Smith Act.[22] Significantly, the defendants were not charged with or convicted of attempting to overthrow the government or of actually advocating overthrow of the government.[23] Even the government attorneys were aware that no evidence existed to support either of those charges.[24] Instead, the defendants were charged with and convicted of a crime one step removed—*conspiring* to advocate the forcible overthrow of the government. The conviction rested on evidence showing that the defendants, in the course of organizing and advancing the Communist Party, did nothing more than distribute pamphlets and organize classes to teach Marxist-Leninist doctrine.[25] According to the courts and the government, however, such doctrine involved the teaching of forcible overthrow as a necessary aspect of the communist revolution. As Judge Hand described the evidence, Marxist-Leninist doctrine held that

> capitalism inescapably rests upon, and must perpetuate, the oppression of those who do not own the means of production; that to it in time there must

---

[22] Dennis v. United States, 341 U.S. 494, 497-98 (1951) (describing trial and convictions). For text of the Smith Act, see *supra* note 1.

[23] *Dennis*, 341 U.S. at 497.

[24] As one author noted, "[i]f the Justice Department had possessed evidence that the CPUSA was plotting a revolt, it could have prosecuted the organization's leaders for seditious conspiracy. 'However, it is highly doubtful—at least on the basis of presently available evidence— . . . that a case could be made out against such individuals.' " BELKNAP, *supra* note 3, at 80-81 (quoting unidentified government attorney); *see also* PETER L. STEINBERG, THE GREAT "RED MENACE": UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947-1952 166 (1984) (discussing testimony of Communist Party witnesses).

[25] *See* United States v. Dennis, 183 F.2d 201, 206 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951) (noting numerous pamphlets regarding Marxist-Leninist doctrine put forth as evidence at trial); United States v. Foster, 9 F.R.D. 367, 382 (S.D.N.Y. 1949) (referring to evidence of "an elaborate and far-reaching network of schools and classes established for the propagation of the Marxist-Leninist principles").

The grand jury indictment of the defendants set the stage for a conviction based on such evidence by grounding its allegations of a conspiracy on the facts that defendants "published and circulated books, articles, magazines and newspapers advocating the principles of Marxism-Leninism" and "conducted schools and classes for the study of the principles of Marxism-Leninism, in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence." Harold Faber, *400 Police on Duty as 12 Communists Go on Trial Today*, N.Y. TIMES, Jan. 17, 1949, at 1 (listing contents of indictments).

HeinOnline -- 33 Ga. L. Rev. 7 1998-1999

> succeed a "classless" society, which will finally make unnecessary most of the paraphernalia of government; but that there must be an intermediate and transitional period of the "dictatorship, of the proletariat," which can be *established only by the violent overthrow of any existing [capitalistic] government.*[26]

Thus, it was enough to sustain the Smith Act convictions that the defendants had formed a group to engage in advocacy of a doctrine favorably referring to the need for forcible overthrow at some undetermined point in the future.

Because the charges against the Dennis defendants essentially amounted to "organizing a group to commit a speech crime,"[27] the Supreme Court reviewed the convictions in order to evaluate their legitimacy under the First Amendment. By a six-to-two vote, the Court ruled that the convictions did not violate the defendants' free speech rights.[28] Chief Justice Vinson, writing for the plurality, ostensibly applied the "clear and present danger" test, which he believed originated in the Court's earlier decision in *Schenck v. United States*[29] and which had been applied in numerous subsequent decisions.[30] Drawing on Judge Hand's enunciation of the test below, Chief Justice Vinson noted that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[31] In this instance, the significant danger posed by the communist conspiracy far outweighed the lack of imminence with respect to potential overthrow of the government:

---

[26] *Dennis*, 183 F.2d at 206 (emphasis added) (summarizing evidence in support of Judge Hand's conclusion that it was sufficient to support convictions). Throughout their trial and appeals the defendants maintained that they did not teach forcible overthrow as a necessary aspect of their doctrine but rather that it was a possible result of the clash between the proletariat and ousted capitalistic rulers. *Id.*

[27] KALVEN, *supra* note 2, at 193.

[28] *Dennis*, 341 U.S. at 516.

[29] 249 U.S. 47 (1919).

[30] *Dennis*, 341 U.S. at 504 (citing Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1920); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919)).

[31] *Dennis*, 341 U.S. at 510 (quoting *Dennis*, 183 F.2d at 212).

HeinOnline -- 33 Ga. L. Rev. 8 1998-1999

> Obviously, the [clear and present danger test] cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed .... If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required....
>
> ....
>
> ... The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members ..., coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.[32]

The public strongly supported the Court's decision. Indeed, almost all major newspapers in the country lauded it,[33] claiming that "[t]he American people in overwhelming majority will rejoice in this judicial affirmation of the nation's right and power."[34] Such claims mirrored the response of the public to the earlier trial verdict, after which the trial judge "quickly became a national hero, reportedly receiving fifty thousand congratulatory letters within a week of the trial's end."[35] On the other hand, most contemporary legal commentators criticized the decision, claiming that the Court had perverted the "clear and present danger" test in order to uphold the convictions.[36] *Dennis* did have its supporters in the

---

[32] *Id.* at 509-11.

[33] *See* BELKNAP, *supra* note 3, at 141-42 (noting that such papers as *New York Times, Washington Post, Chicago Tribune, Los Angeles Times, Denver Post, San Francisco Chronicle,* and *New Orleans Times-Picayune* reacted favorably to decision). Public support was so strong that only five major newspapers dared to express opposition to the decision. *Id.* at 141.

[34] *Id.* (quoting *New Orleans Times-Picayune*).

[35] GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 608 (1994).

[36] *See, e.g.*, Chester James Antieau, Dennis v. United States—*Precedent, Principle or Perversion?*, 5 VAND. L. REV. 141, 146-47 (1952); Louis B. Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule*, 38 VA. L. REV. 143, 154-57 (1952); John A. Gorfinkel & Julian W. Mack, Jr., Dennis v. United States *and the Clear and Present Danger Rule*, 39 CAL. L. REV. 475, 488-96 (1951); Robert McCloskey, *Free Speech, Sedition and the*

HeinOnline -- 33 Ga. L. Rev. 9 1998-1999

legal arena, however.[37] And, at least superficially, the plurality opinion was not utterly inconsistent with prior decisions. After all, it was never clear that *Schenck*'s iteration of the "clear and present danger" test was especially speech-protective in the subversive advocacy context—especially given that early applications of the test in the subversive advocacy context almost always resulted in affirmation of convictions.[38] Furthermore, two of the Court's most significant cases in the subversive advocacy context did not even apply the test to statutes specifically criminalizing speech and advocacy, instead deferring to legislative determinations that the speech posed a danger necessitating prohibition.[39] In fact, the *Dennis* plurality was forced to overturn both cases in order to apply the test to the Smith Act.[40] Thus, the "clear and present danger" test had little actual content in terms of its application in this particular context and one could argue that Chief Justice Vinson

---

Constitution, 45 AM. POL. SCI. REV. 662, 667-69 (1951); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 217-23 (1952); Francis D. Wormuth, *Learned Legerdemain: A Grave But Implausible Hand*, 6 W. POL. Q. 543, 554 (1953).

[37] *See, e.g.*, Wallace Mendelson, *Clear and Present Danger—From* Schenck *to* Dennis, 52 COLUM. L. REV. 313, 330-31 (1952) (discussing *Dennis* and noting that Communist leaders "sought to bypass the democratic processes, not to use them").

[38] For examples of such affirmations, see Pierce v. United States, 252 U.S. 239 (1920); Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

[39] *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 670 (1925); Whitney v. California, 274 U.S. 357, 370 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969). The *Gitlow* Court acknowledged that the "clear and present danger" test was appropriate when evaluating whether speech could be punished under statutes making certain acts unlawful:

> [W]here the statute merely prohibits certain acts involving the danger of substantive evil, . . . if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech . . . , it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection.

268 U.S. at 670-71. In contrast, the Court believed that a legislative determination "that utterances advocating the [forcible] overthrow of organized government . . . involve such danger of substantive evil that they may be penalized in the exercise of its police power . . . must be given great weight." *Id.* at 668.

[40] *See* Dennis v. United States, 431 U.S. 494, 507 (1951) (noting that no case had expressly overruled *Gitlow* and *Whitney*, but emphasizing that subsequent opinions "inclined toward the Holmes-Brandeis rationale" in contrast to rationale of majority opinions in those two cases).

faithfully attempted to apply a relatively amorphous and standardless test.

But a closer examination of the broader legal and social contexts framing *Dennis* lends far more credence to the dissenting Justices' claim that "present pressures, passions and fears" infected the plurality's reasoning, causing it to alter the "clear and present danger" test for political reasons.[41] First, Chief Justice Vinson's application of that test, though giving a nod to Justices Holmes and Brandeis, the fathers of "clear and present danger," ignored their interpretation of that test. Justice Holmes, the author of *Schenck*, believed that "clear and present danger" required both imminence *and* a substantive evil.[42] Justice Brandeis similarly argued that "the necessity which is essential to a valid restriction [did] not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil."[43] Such iterations are quite different from Chief Justice Vinson's pliable test balancing danger against imminence.[44] Second, outside of the subversive advocacy context, the Court had applied a strict version of the test, as in *Bridges v. California* which held that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[45] In the decade prior to *Dennis*, such application increasingly resulted in significant protection of speech.[46] Thus, it was not as if Chief Justice Vinson

---

[41] *Id.* at 581 (Black, J., dissenting); *see also id.* at 589-90 (Douglas, J., dissenting) ("Neither prejudice nor hate nor senseless fear should be the basis of this solemn act. Free speech . . . should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent. On this record no one can say that petitioners . . . have even the slightest chance of achieving their aims.").

[42] *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting).

[43] *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

[44] Surely Chief Justice Vinson was correct in noting that "neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." *Dennis*, 341 U.S. at 508. There is, however, no evidence that either of them would have actually changed their announced rule on a case-by-case basis.

[45] 314 U.S. 252, 263 (1941).

[46] *See* Schneiderman v. United States, 320 U.S. 118, 157 (1943) ("There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite time. . . ."); Board of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943) (applying clear and present danger test to find compulsory flag salute and pledge unconstitutional); Taylor v.

HeinOnline -- 33 Ga. L. Rev. 11 1998-1999

lacked sources from which to draw to determine which version of the test to apply. His decision to pick a version that appeared *nowhere* in the Court's jurisprudence supports the notion that anti-communist sentiment infected the Court's decision—especially since such sentiment was unquestionably strong at that time.

Though communists enjoyed some measure of relief from public hostility during World War II while the United States was allied with the Soviet Union against Germany,[47] after the war U.S.-Soviet relations deteriorated rapidly, rekindling anti-communist sentiment.[48] Moreover, a series of local and world events in the years immediately preceding *Dennis* fueled anti-communist fervor. In 1948, the Soviet Union not only backed a coup that toppled Czechoslovakia's democratic government,[49] it also blockaded West Berlin.[50] In 1949, the Soviet Union detonated an atomic bomb, thus undoing "America's military advantage over the Soviet's [sic] larger army" and spurring rumors that Americans had provided them with the technology.[51] In that same year, Mao Zedong took over China.[52] In 1950 Ethel and Julius Rosenberg were accused

---

Mississippi, 319 U.S. 583, 589-90 (1943) (setting aside convictions under Mississippi statute making it a crime to teach disloyalty because no clear and present danger existed); Bridges v. California, 314 U.S. 252, 263 (1941) ("What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (reversing conviction for breach of peace because no clear and present danger existed and "[s]tate may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions"); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (holding that danger of injury to industrial concern is neither sufficiently serious nor imminent to pass clear and present danger test).

[47] *See* BELKNAP, *supra* note 3, at 35, 37-38 (discussing improved relations between Communists and United States government during World War II).

[48] *See id.* at 41, 42 (discussing relations between United States and Soviet Union after the War).

[49] Albion Ross, *Czech Reds Seizing Power, Occupy Some Ministries; Socialist Party Taken Over*, N.Y. TIMES, Feb. 25, 1948, at 1; *cf.* Drew Middleton, *Benes Bows to Communists, Gottwald Forms Cabinet; One Slain in Prague Protest*, N.Y. TIMES, Feb. 26, 1948, at 1 (mentioning coup in Czechoslovakia and shock to British).

[50] *See* Herbert L. Matthews, *Moscow Rejects Parley on Berlin to Break Impasse*, N.Y. TIMES, July 15, 1948, at 1 (discussing Soviet Union's rejection of demands to lift blockade on West Berlin); Drew Middleton, *Berlin Ban Stands as Russia Rebuffs Western Leaders*, N.Y. TIMES, July 4, 1948, at 1 (discussing Russia's refusal to reopen Berlin).

[51] ALBERT FRIED, MCCARTHYISM, THE GREAT AMERICAN RED SCARE: A DOCUMENTARY HISTORY 70 (1997).

[52] *Id.*

HeinOnline -- 33 Ga. L. Rev. 12 1998-1999

of spying for the Soviets.[53] The early 1950s also saw the beginning of the Korean War, which by 1951 was going quite badly for the United States.[54]

Political actions taken in the United States further exacerbated public fears caused by these events. During this period, the House Committee on Un-American Activities (HUAC) began full-blown and very public investigations of alleged communist sympathizers.[55] Among the most famous of these was the investigation of Alger Hiss, a former official of the Departments of State and Justice who was accused of spying for the Soviets, and later jailed.[56] President Truman issued an executive order establishing federal loyalty review boards which provided for the expulsion from federal jobs of anyone "disloyal" to the United States, and which victimized thousands of people during the boards' existence.[57] Congress also joined the action by enacting restrictive legislation aimed at communists.[58] And, of course, there was Senator Joseph McCarthy, whose famous "Wheeling" speech identifying "205 . . . [State Department employees known] to the Secretary of State as being members of the communist party,"[59] kicked off an era of anti-communist hysteria that eventually took his name.[60] Thus, by the time the Supreme Court considered *Dennis*, Americans bore

---

[53] *See* DAVID CAUTE, THE GREAT FEAR 62-69 (1978) (detailing Rosenberg trial).

[54] *See Truman Orders U.S. Air, Navy Units to Fight in Aid of Korea*, N.Y. TIMES, June 28, 1950, at 1 (reporting Truman's speech on Korean War); *War is Declared by North Koreans; Fighting on Border*, N.Y. TIMES, June 25, 1950, at 1 (discussing declaration of war by North Korea against South Korea); *see also* FRIED, *supra* note 51, at 71 (discussing war developments and state of conflict in 1951).

[55] *See* CAUTE, *supra* note 53, at 491-502 (addressing HUAC activities regarding film industry).

[56] *Id.* at 58-61; MILTON R. KONVITZ, EXPANDING LIBERTIES 114-15 (1966).

[57] Exec. Order No. 9,835, 3 C.F.R. 627 (1947). For a review of the results of the loyalty board implementations, see CAUTE, *supra* note 53, at 268-92; FRIED, *supra* note 51, at 31-37.

[58] *See generally* Rohr, *supra* note 3, at 10-17 (reviewing federal anti-communist legislation).

[59] JIM TUCK, MCCARTHYISM AND NEW YORK'S HEARST PRESS 69 (1995). Though it is unclear if McCarthy actually used the number "205" or the number "57" in his speech, see EDWIN R. BAYLEY, JOE MCCARTHY AND THE PRESS 20-21 (1981), it remains undisputed that he accused a substantial number of State Department employees of being communists.

[60] On the McCarthy era in general, see ROBERT GRIFFITH, THE POLITICS OF FEAR (1970); RICHARD M. FRIED, MEN AGAINST MCCARTHY (1976); RICHARD M. FREELAND, THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM (1972); JAMES RORTY & MOSHE DECTER, MCCARTHY AND THE COMMUNISTS (1954).

HeinOnline -- 33 Ga. L. Rev. 13 1998-1999

great antipathy to communists. A 1949 Gallup poll revealed that sixty-eight percent of Americans wanted to outlaw the Communist Party USA[61] and at least thirty-five percent feared that the Communist Party "controlled important segments of the economy and was getting stronger all the time."[62]

The events prior to *Dennis* and the overwhelming popular sentiment against the communists simply could not have gone unobserved by the Justices. The tone of the plurality arguably evidences its own anti-communist hysteria in its repeated references to petitioners' "highly organized conspiracy, with rigidly disciplined members subject to call,"[63] even though all indicators showed that the Communist Party had a relatively weak hold in the United States.[64] Such sentiment, combined with the plurality's perversion of the "clear and present danger" test and the surrounding social context, led scholars of the Court to agree with the dissenting Justices regarding the role of anti-communist hysteria in the decision. As one scholar noted,

> the history of the McCarthy period was part of the provenience of the decision in *Dennis v. United States*—as were also the investigations by the House

---

[61] GEORGE H. GALLUP, THE GALLUP POLL: PUBLIC OPINION 1935-71 873 (1972). Indeed, communists were so unpopular that the ACLU refused to follow through on a promise to defend the eleven *Dennis* defendants at trial and worked heartily to disassociate itself from them. BELKNAP, *supra* note 3, at 212. At least one member of the ACLU during this period claims that anti-communist sentiment caused the organization to "compromise[] on many basic issues and often [take] an apologetic attitude in defending the Bill of Rights." CORLISS LAMONT, YES TO LIFE 136-37 (1981).

[62] BELKNAP, *supra* note 3, at 44.

[63] Dennis v. United States, 341 U.S. 494, 511; *see also id.* at 509. Justice Frankfurter's calmer concurring opinion also referred to contemporaneous events in support of his claim that Congress was reasonable in finding the Communist Party to be a substantial threat. *Id.* at 547-48 (Frankfurter, J., concurring).

[64] Even President Truman, who issued the executive order regarding loyalty oaths, never believed that the Communist Party in the United States posed much of a threat, instead dismissing it as "a contemptible minority in a land of freedom." BELKNAP, *supra* note 3, at 44. However, he apparently encouraged "acceptance of the notion that American Communists must be extremely dangerous" in order to advance opposition to Soviet expansion elsewhere. *Id.* at 45; *see also Dennis*, 341 U.S. at 588 (Douglas, J., dissenting) ("If we are to take judicial notice of the threat of Communists within the nation, it should not be difficult to conclude that *as a political party* they are of little consequence." (emphasis in original)).

HeinOnline -- 33 Ga. L. Rev. 14 1998-1999

> Committee on Un-American Activities, the Chambers-Hiss drama and the conviction of Alger Hiss, and the tensions of the Cold War. It is difficult to believe that this complex of events had no bearing on how . . . Chief Justice Vinson resolved the issue of the clear-and-present-danger test.[65]

B. BACKING AWAY FROM *DENNIS*: *YATES V. UNITED STATES*

Justice Black, dissenting in *Dennis*, expressed the hope that "in calmer times, . . . this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society."[66] Such times did not come soon. After *Dennis*, the government prosecuted communists in earnest. Between 1951 and 1956, the Justice Department charged at least 126 communists with violations of the Smith Act.[67] Most defendants were convicted and their convictions were universally affirmed by appellate courts;[68] the Supreme Court essentially abstained from involvement in such cases.[69] Yet over the course of this period, many of the events that led to anti-communist hysteria in the early 1950s began to reverse themselves. In 1953 the Korean War ended after a lengthy negotiated settlement.[70] In that same year, tensions with the Soviet Union eased after the death of Joseph Stalin.[71]

---

[65] KONVITZ, *supra* note 56, at 122; *see also* KALVEN, *supra* note 2, at 190-91 (stating that the *Dennis* Court "acknowledge[d] clear and present danger as the constitutional measure of free speech, but in the process, to meet the political exigencies of the case, . . . officially adjust[ed] the test").

[66] *Dennis*, 341 U.S. at 581.

[67] BELKNAP, *supra* note 3, at 156-57.

[68] *Id.* at 158; Robert Mollan, *Smith Act Prosecutions: The Effect of the* Dennis *and* Yates *Decisions*, 26 U. PITT. L. REV. 705, 710-16, 723 (1965) (discussing specific convictions and subsequent history).

[69] Mollan, *supra* note 68, at 723 ("[I]n none of these cases did the Supreme Court, prior to *Yates*, seriously question the results reached by the lower courts as to first amendment claims.").

[70] Lindesay Parrott, *Ceremony is Brief: Halt in 3-Year Conflict for a Political Parley Due at 9 A.M. Today*, N.Y. TIMES, July 27, 1953, at 1; Lindesay Parrott, *Truce Unit Meets: Enemy Chiefs Complete Signing—Copies of Accord Exchanged*, N.Y. TIMES, July 28, 1953, at 1.

[71] *See* Harrison E. Salisbury, *Premier Ill 4 Days: Announcement of Death Made by Top Soviet and Party Chiefs*, N.Y. TIMES, Mar. 6, 1953, at 1; *see also* BELKNAP, *supra* note 3, at 213 ("On the Soviet side of the Iron Curtain, where Joseph Stalin had died a few months earlier, the new Russian leadership evidenced a belief in the possibility of peacefully

HeinOnline -- 33 Ga. L. Rev. 15 1998-1999

By 1955, the Soviets agreed to negotiate with the United States regarding ending the Cold War and further agreed to sign a peace treaty setting up such negotiations.[72] Perhaps most importantly, Senator McCarthy's influence began to wane. Once considered a national hero, a public confrontation with the Department of the Army in 1954[73] eventually "exposed him . . . as a crude and vicious demagogue."[74] In December of 1954, the Senate voted to censure McCarthy—an exceedingly rare action on its part.[75] McCarthy never recovered. His popularity, which reached an all-time high in 1953, eventually plummeted and McCarthyism gradually died out.[76]

It appears that Justice Black's "calmer times" were approaching as the decade of the 1950s passed. This is not to say that anti-communism was dead; in fact, much anti-communist sentiment existed well into the next decade. But the easing tensions and fall of McCarthyism apparently led to a decline in hysteria and a re-evaluation of subversive activity.[77] During this period, at least a few of the Justices expressed unhappiness with the government's pursuit of communists and lower court complicity therein.[78] Thus, in 1955 the Court agreed to hear *Yates v. United States*, and in

---

resolving that country's differences with the United States . . . .").

[72] BELKNAP, *supra* note 3, at 213-14.

[73] For a general description of such events see FRIED, *supra* note 51, at 178-81; TUCK, *supra* note 59, at 135-39. McCarthy's run-ins with the Army eventually sparked the Senate to hold hearings regarding his conduct. *See generally Special Senate Investigation on Charges and Countercharges Involving: Secretary of the Army Robert T. Stevens, John G. Adams, H. Struve Hensel, and Senator Joe McCarthy, Roy M. Cohn, and Francis P. Carr before the Special Subcomm. on Investigations of the Senate Comm. on Gov't Operations*, 83d Cong. (1954).

[74] BELKNAP, *supra* note 3, at 215.

[75] S. Res. 301, 83d Cong., 100 CONG. REC. 16392 (1954).

[76] In 1953, 50% of Americans held a favorable opinion of Senator McCarthy while only 29% held an unfavorable view of him. His popularity fell steadily so that by mid-1954 only 36% of the public reacted favorably to him while 51% viewed him unfavorably. *See* GALLUP, *supra* note 61, at 1201, 1220, 1225, 1237, 1241 and 1263.

[77] BELKNAP, *supra* note 3, at 215 ("The fall of McCarthy did not put an end to everything connoted by the term 'McCarthyism,' but it did indicate that the times were changing.").

[78] *Id.* at 245 (noting that Justices Harlan and Frankfurter and Chief Justice Warren were especially concerned with "the excesses of the anti-communist crusade"); KONVITZ, *supra* note 56, at 126 ("One can only conjecture as to why the Court acted as it did in the *Yates* case. [But after] an endless series of prosecutions of Communists . . . [it may have seen that the] clear and present danger was not the Communist conspiracy against the government, but the Communist conspiracy cases, in their threat to the integrity of the First Amendment.").

1957 the *Yates* Court issued a ruling that substantially curtailed *Dennis*'s reach.[79]

Yates presented the Court with a scenario almost identical to *Dennis*. Fourteen leaders of the Communist Party stood accused of conspiring to advocate the forcible overthrow of the government, with the conspiracy taking the form of "writ[ing] and publish[ing] . . . articles on the proscribed advocacy and teaching" and "conduct[ing] schools for the indoctrination of Party members in such advocacy and teaching."[80] In fact, the charges and evidence in both cases were so similar that Justice Clark characterized the *Yates* defendants as "engaged in this conspiracy with the [*Dennis*] defendants, . . . serv[ing] in the same army and engag[ing] in the same mission."[81] Nevertheless, the *Yates* Court reversed all of the defendants' convictions. It did so not by overruling the obviously applicable principles of *Dennis*; Justice Harlan's lead opinion never mentioned the "clear and present danger" test. Instead, Justice Harlan focused on the lower court's jury instruction,[82] holding, as a matter of statutory interpretation, that it did not comport with the requirements of the Smith Act. According to Justice Harlan, the instruction implied that the Act "prohibit[ed] advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, so long as such advocacy or teaching [was] engaged in with evil intent."[83] The instruction's failure to acknowledge that the Act required some form of *incitement to action* rendered it fatally flawed. Justice Harlan also reviewed the evidence supporting the conviction and pronounced that the record was insufficient to establish the required incitement; he further ordered the lower court to enter acquittals for five of the defendants and to grant new trials for the remaining nine defendants.[84]

---

[79] Yates v. United States, 354 U.S. 298 (1957); *overruled in part by* Bucks v. United States, 437 U.S. 1 (1978).

[80] *Id.* at 301-02 (citing to petitioners' indictment).

[81] *Id.* at 344-45 (Clark, J., dissenting). The *Dennis* defendants were named as unindicted co-conspirators in *Yates*. *Id.* at 344.

[82] *Id.* at 313-14 n.18 (setting forth relevant portions of trial court's jury instruction).

[83] *Id.* at 318. In explaining his distinction between advocacy of action and advocacy of doctrine, Justice Harlan noted that the Court "need not . . . decide the issue . . . in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so, we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked." *Id.* at 319.

[84] *Id.* at 327-35.

HeinOnline -- 33 Ga. L. Rev. 17 1998-1999

Justice Harlan's decision contrasts significantly with Chief Justice Vinson's opinion in *Dennis*. Vinson was never concerned with incitement to action; he instead found that the danger posed by a conspiracy to advocate the use of violence, even absent incitement, was sufficient to justify conviction of the defendants.[85] In addition, Chief Justice Vinson specifically refused to review any evidence, thereby rendering his decision relatively abstract.[86] Harlan's reading of the Smith Act, on the other hand, deliberately placed significant evidentiary hurdles in the prosecutor's path even though the evidence in both cases was essentially similar.[87] Justice Harlan's actions led most scholars to believe that he "effect[ed] a bloodless revolution" against *Dennis* without actually overruling it.[88] As Professor Gunther noted,

> Harlan found a way to curtail prosecutions under the Smith Act even though the constitutionality of the Act had been sustained in *Dennis*. He did it by . . . [reading] the statute in terms of constitutional presuppositions; and he strove to find standards "manageable" by judges and capable of curbing jury discretion. He insisted on strict statutory standards of proof emphasizing the actual speech of the [defendants] . . . . Harlan claimed to be interpreting *Dennis*. In fact, [*Yates*] represented doctrinal evolution in a new direction . . . .[89]

---

[85] *See* Dennis v. United States, 341 U.S. 494, 511 (1951) ("It is the existence of the conspiracy which creates the danger.").

[86] *Id.* at 497 (noting that "limited grant of the writ of certiorari has removed from our consideration any question as to the sufficiency of the evidence"); *see also* KALVEN, *supra* note 2, at 194 ("As a consequence of this move, the justices [were] cut off from the political realities of the speech they [were] adjudicating, and we get a curiously abstract discussion of the limits of political dissent.").

[87] As Professor Kalven noted, "[i]n view of the fact that the trial in *Dennis* was completed in 1949 and the indictment in *Yates* was handed down in 1951, it is difficult to believe that the prosecution in *Yates* did not have access to the *best* evidence used in *Dennis*. Accordingly, the Court's response to the quality of proof in *Yates* must also be read as a commentary on the quality of proof in *Dennis*." KALVEN, *supra* note 2, at 195.

[88] *Id.* at 214.

[89] Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 753 (1975); *see also* CAUTE, *supra* note 53, at 208 (noting that *Yates* "effectively revers[ed] the seminal ruling of the Vinson Court in the

The social and political context in which *Dennis* and *Yates* occurred are critical to understanding the outcome of each opinion and the claims of later scholars that the Court essentially engaged in political decisionmaking. The protestors in *Madsen* and *Schenck* make similar claims. Thus, the following sections review both *Madsen* and *Schenck*, as well as the political and social context in which they arose in order to examine the potential parallels to *Dennis* and *Yates*.

II. *MADSEN V. WOMEN'S HEALTH CENTER, INC.*

A. THE LEGAL FRAMEWORK

Madsen arose from the efforts of Operation Rescue to shut down the Women's Health Center in Melbourne, Florida.[90] As part of those efforts, members of Operation Rescue and their supporters demonstrated outside of the clinic and engaged in other conduct, including blocking access to the clinic, abusing persons entering and leaving the clinic, and trespassing on clinic grounds. As these activities became increasingly disruptive, the clinic sought and received a temporary injunction barring Operation Rescue's members from engaging in violent and intrusive conduct outside of the clinic.[91] After a lengthy hearing, the trial court concluded that its initial injunction proved insufficient "to protect the health, safety and rights of women . . . seeking access to [medical and counseling services]."[92] Specifically, the court found that the

---

Dennis case, which had opened the door to the legal persecution of the communist party"); KONVITZ, *supra* note 56, at 126 ("The Court could not, in 1957, overrule the Dennis decision . . . . [S]o it acted to leave the statute and its earlier decision intact but pulled their teeth.").

[90] During the course of the lawsuit, all parties agreed that Operation Rescue's "desire was to close down 'abortion mills' by various means" and specifically that it desired "to close down abortion clinics in the Central Florida area." Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 667 n.2 (Fla. 1993) (citing parties' stipulated facts), *aff'd in part, rev'd in part sub nom.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

[91] The Florida trial court enjoined Operation Rescue members from blocking access to the clinic, physically abusing persons entering, leaving or otherwise connected with the clinic, or inciting such actions by others. *Id.* at 667 n.4. The trial court's order also specifically noted that it "should [not] be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate" other provisions of the injunction. *Id.*

[92] *Id.* at 667.

HeinOnline -- 33 Ga. L. Rev. 19 1998-1999

protestors continued to block access to the clinic, continually jammed the telephone system of the clinic, provided literature identifying the staff of the clinic as "baby killers," followed doctors and pretended to shoot them from adjacent vehicles, stalked clinic staff, and forced those seeking the services of the clinic to "run a gauntlet" of protestors shouting epithets and personal abuse.[93] In light of the protestors' continued actions, the trial court amended its original injunction to include not only bans on certain conduct but on some expressive activity as well. The new injunction thus added provisions prohibiting Operation Rescue from (1) congregating or demonstrating within thirty-six feet of the property line of the clinic, (2) shouting, chanting, singing, or using noise amplification equipment or observable images within earshot of clinic patients during the clinic's surgical hours, (3) physically approaching, within 300 feet of the clinic, any person seeking the services of the clinic unless that person manifested consent to be approached, and (4) demonstrating, congregating, or using sound amplification equipment within 300 feet of the residence of any clinic employee.[94]

The amended injunction produced mixed results at the appellate level. The Supreme Court of Florida upheld the lower court's decision and found the injunction to be a neutral, necessary, and reasonably tailored regulation of speech.[95] Almost simultaneously, a federal appellate court, hearing a separate challenge to the same injunction, held that it was impermissibly viewpoint-based in violation of the First Amendment.[96] The United States Supreme Court granted Operation Rescue's petition for a writ of certiorari in order to resolve the conflict.

---

[93] *Id.* at 667-69.

[94] *Id.* at 669.

[95] *Id.* at 671-74.

[96] *See* Cheffer v. McGregor, 6 F.3d 705, 710-12 (11th Cir. 1993). The plaintiff in *Cheffer* sought an order in federal district court blocking enforcement of the state court injunction, claiming that it "acted as a prior restraint on her free speech rights, and that the threat of arrest chilled her ability to exercise those rights." *Id.* at 707-08. The federal district court refused to stay the state court order but the federal appellate court ordered the district court to reconsider its refusal and to examine further the constitutionality of the injunction. *Id.* at 712.

HeinOnline -- 33 Ga. L. Rev. 20 1998-1999

Before the Supreme Court, Operation Rescue attempted to cast the injunction as impermissibly viewpoint-based[97] and as a prior restraint,[98] characterizations that, if successful, almost certainly would have resulted in its demise.[99] The Court dismissed the prior restraint argument in a single footnote[100] but devoted some attention to the viewpoint-discrimination argument. While acknowledging that the injunction affected only anti-abortion protestors, the majority rejected the petitioners' argument that it was therefore *necessarily* viewpoint-based. Rather, because the injunction was issued as a result of "the group's past actions in the context of a specific dispute between real parties" and not with reference to the protestors' message, the Court ruled it to be content-neutral.[101] Recognizing, however, that even content-neutral injunctions "carry greater risks of censorship and discriminatory application than do general ordinances,"[102] the Court deemed it necessary to apply a new, slightly higher standard of review than it typically used for content-neutral regulations of speech. The majority thus held that such injunctions were constitutional only if they "burden[ed] no more speech than necessary to serve a significant government interest."[103]

The majority spent the remainder of its opinion applying this standard, with mixed results. It easily found the government

---

[97] Brief for Petitioners at 8-20, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (No. 93-880).

[98] *Id.* at 37-43.

[99] The Court views regulations which prohibit citizens from expressing a particular point of view with particular disfavor and rarely, if ever, upholds them. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992). The Court has an equal if not greater antipathy toward prior restraints (*i.e.*, government attempts to suppress expression prior to its dissemination). Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[100] Madsen v. Women's Health Ctr., Inc., 512 U.S. 756, 763 n.2 (1994). Although admitting that "[p]rior restraints do often take the form of injunctions," the majority refused to find that "all injunctions which may incidentally affect expression . . . are 'prior restraints.'" *Id.* Because the *Madsen* injunction was neither content-based nor wholly suppressive of speech, it did not fall into the prior restraint category. *Id.*

[101] *Id.* at 762-64.

[102] *Id.* at 764.

[103] *Id.* at 765. The Court judges content-neutral standards by asking if they "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, . . . and leave open ample alternatives for communication of information." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

HeinOnline -- 33 Ga. L. Rev. 21 1998-1999

interests—protecting women's freedom to seek lawful medical or counseling services regarding their pregnancies, ensuring public safety and order, and protecting medical privacy—to be significant.[104] The question for the Court then became simply whether the various provisions of the injunction were sufficiently tailored to meet those interests. The Court held that the thirty-six-foot buffer zone was constitutional,[105] noting that the protestors' repeated interference with access to the clinic left the lower court with few options regarding protection of its state interests.[106] That petitioners did not merely protest abortion but actually engaged in "focused picketing" aimed directly at clinic patients and staff further bolstered the majority's conclusion.[107] Presumably, such focused picketing was too intrusive on the privacy interests of unwilling listeners who were "captive" in the medical facility.[108] The privacy interests of patients also spurred the Court to uphold a provision of the injunction prohibiting high noise levels near the clinic.[109] On the other hand, the Court struck down the "images observable" portion of this provision, noting that the clinic could simply pull its curtains to keep such images out. Though potentially offensive, the images represented a much less significant invasion of privacy than high noise levels.[110] Finally, the Court found the 300-foot "no approach" zone unconstitutional. Although that provision was designed to prevent stalking and harassment, its prohibition on even "peaceful, uninvited approaches" violated

---

[104] *Madsen*, 512 U.S. at 767-68.

[105] *Id.* at 768-70. While upholding this provision as applied to public property, the Court struck down the buffer zone to the extent it entered private property, noting that there was insufficient evidence that the protestors used such property to express their message. *Id.* at 771.

[106] *Id.* at 769.

[107] *Id.*

[108] *Id.* The Court alluded to its decision in *Frisby v. Schultz*, 487 U.S. 474 (1988), where it upheld an ordinance banning focused picketing of residences based upon a strong interest in residential privacy. *Madsen*, 512 U.S. at 769. The *Madsen* Court struck down a provision of the injunction banning protestors from demonstrating within 300 feet of the residence of any clinic staff though the Court noted that it might have upheld a provision more directly aimed at preventing "focused picketing." *Id.* at 775. The size of the zone, however, precluded any conclusion that the provision applied only to focused picketing. *Id.*

[109] *Id.* at 772-73 (noting that "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests").

[110] *Id.* at 773.

HeinOnline -- 33 Ga. L. Rev. 22 1998-1999

the Court's longstanding principle that "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."[111] Absent evidence that speech was independently proscribable or suffused with violence (as opposed to merely offensive), the "no approach" zone was overly broad.[112]

The Court's decision was far from unanimous. Justice Stevens dissented, arguing that a content-neutral injunction should be reviewed under a more lenient standard than a content-neutral ordinance because such injunctions do not apply to the community as a whole but only to those engaged in wrongdoing.[113] In contrast, Justice Scalia, joined by Justices Kennedy and Thomas, argued that an injunction against a single group with shared views was at least as deserving of strict scrutiny as an explicitly content-based or viewpoint-based ordinance, primarily because such injunctions (1) readily lend themselves to suppression of particular ideas, (2) are the product of individual judges rather than legislatures, and (3) are a more powerful weapon than criminal penalties.[114] Arguing that "an injunction against speech [was] the very prototype of the greatest threat to First Amendment values, the prior restraint," Justice Scalia further chastised the majority for ignoring a substantial body of past precedent in which the Court "repeatedly struck down speech-restricting injunctions."[115] Indeed, Justice Scalia believed the majority's departure from First Amendment law to be so egregious that he flatly accused them of bowing to abortion politics:

---

[111] *Id.* at 774 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

[112] *Id.*

[113] *Id.* at 778 (Stevens, J., concurring in part and dissenting in part). Justice Stevens further would have upheld the 300-foot no approach zone as consistent with the First Amendment, primarily because the ban on "physically approaching" was at best a ban on mixed conduct and speech rather than pure speech. *Id.* at 780-82. Given earlier findings that protestors' conduct caused "higher levels of 'anxiety and hypertension' " in patients, thus increasing their medical risks, Justice Stevens found a ban on physical approaches imminently reasonable. *Id.* at 781.

[114] *Id.* at 792-96 (Scalia J., concurring in the judgment in part and dissenting in part). Justice Scalia argued that this particular injunction was actually aimed at suppressing a particular point of view. *Id.* at 792-93.

[115] *Id.* at 797 (citing this body of precedent).

HeinOnline -- 33 Ga. L. Rev. 23 1998-1999

> The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion . . . . Today the ad hoc nullification machine [of abortion] claims its latest, greatest, and most surprising victim: the First Amendment.[116]

B. PROTESTOR RESPONSE AND SOCIAL CONTEXT: PARALLELS TO *DENNIS*

Anti-abortion protestors and their supporters reacted to *Madsen* almost immediately. Prompted by the Court's new standard of review and its willingness to uphold any aspect of the injunction, the petitioners' attorney claimed that "[t]he court's decision today has retreated to the dark ages, when speech was permitted only at the discretion of government officials."[117] Echoing Justice Scalia's dissent, one of the petitioners declared that "[i]f I were pro-choice, I would be allowed to say anything, anywhere . . . . But as a pro-lifer, my rights have been trampled on."[118] Of course, such declarations are largely political tactics designed to arouse public sympathy.[119] They do not indicate that the Court *actually* acted based upon political motivations as it apparently did in *Dennis*. The danger in *Madsen*, however, is that the political and social context in which it arose lends an aura of credibility to the protestors' claims of political persecution.

---

[116] *Id.* at 785.

[117] Andrea D. Greene, *Local Clinics Applaud High Court's Ruling on Abortion Protests*, HOUS. CHRON., July 1, 1994, at 32 (quoting plaintiff's attorney, Mat Staver); *see also* Anthony Flint, *Some Say Law Too Harsh on Abortion Foes*, BOSTON GLOBE, Jan. 5, 1995, at 8 ("[C]hampions of free speech argue that abortion foes have been singled out for harsh legal treatment by liberals.").

[118] Crawford, *supra* note 13, at A1 (quoting petitioner Judy Madsen).

[119] As Professor Fish has noted, people frequently manipulate notions of free speech in order to advance political agendas:

> "Free speech" is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors *that* name when we can, when we have the power to do so, because in the rhetoric of American life, the label "free speech" is the one you want your favorites to wear. Free speech, in short, is not an independent value but a political prize.

STANLEY E. FISH, THERE'S NO SUCH THING AS FREE SPEECH 102 (1994).

HeinOnline -- 33 Ga. L. Rev. 24 1998-1999

As with the communists in *Dennis*, anti-abortion protestors were a largely unpopular group at the time of the *Madsen* decision—an unpopularity that was twenty years in the making. Galvanized by the Supreme Court's landmark 1973 decision constitutionalizing a woman's right to choose abortion,[120] anti-abortion forces mounted a huge campaign to reverse its effects.[121] The movement initially focused on public education and political channels, engaging in tactics such as deluging the Supreme Court with protest letters, persuading legislators to introduce human life amendments, calling for civil disobedience against the Court's decisions, and flooding the court system with litigation.[122] Despite their widespread political efforts, the anti-abortion movement in these early years was largely unsuccessful. Although some legislatures passed laws significantly restricting women's access to abortion, the Supreme Court struck down almost all of them.[123] Moreover, the movement was unsuc-

---

[120] Roe v. Wade, 410 U.S. 113 (1973).

[121] An organized anti-abortion movement appeared in the 1960s as states began to liberalize their laws restricting abortion. *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 127-37 (1984) (discussing anti-abortion movement prior to *Roe*). The rapid and significant change effected by *Roe* appears to have turned the nascent movement into a cohesive political force. *See* DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT 28 (1994) (noting that "[c]oncerted opposition to abortion beyond the state level did not develop until shortly after" *Roe*); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 143 (1990) ("*Roe* precipitated the real rise in the Catholic right-to-life movement.").

[122] BLANCHARD, *supra* note 121, at 32-33 (discussing letter-writing campaign and human rights amendments); DENNIS J. HORAN, ET AL., ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS 185-215 (1987) (generally discussing anti-abortion movement's use of litigation as strategic maneuver); TRIBE, *supra* note 121, at 143 (discussing call for civil disobedience and Catholic Church's pressure on members to oppose the abortion right).

[123] With the exceptions of restrictions on abortion funding, see, e.g., Maher v. Roe, 432 U.S. 464 (1977), and regulations regarding minors seeking to obtain abortions, see, e.g., H.L. v. Matheson, 450 U.S. 398 (1981), the Court struck down most regulations of abortion procedures as violative of a woman's due process right. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 748 (1986) (striking down as unconstitutional statutory provisions requiring that women be advised of available medical assistance and of the "detrimental physical and psychological effects" of abortion, and that father be held responsible for financial assistance), *overruled by* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 417 (1983) (striking down statutory provisions (1) making blanket determination that all minors under age of 15 are too immature to make abortion decision and (2) requiring provision of lengthy and inflexible list of information to abortion candidate), *overruled by Casey*, 505 U.S. 833; Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (holding unconstitutional a Missouri

HeinOnline -- 33 Ga. L. Rev. 25 1998-1999

cessful in reducing the number of abortions[124] or in significantly changing public opinion regarding the abortion right.[125]

Becoming increasingly frustrated with these failures, anti-abortion forces began to focus on picketing and demonstrations in order to influence public opinion. These early (and largely peaceful) picketing efforts were also seemingly unhelpful to the anti-abortion cause.[126] Thus, protestors increasingly relied upon disruptive and often violent tactics in order to discourage women from obtaining abortions. From 1977 to 1993, over 1000 acts of violence were committed against abortion clinics, including bombings and arsons, death threats and assaults, hundreds of clinic invasions,[127] and several murders or attempted murders.[128] In that same period, anti-abortion protestors engaged in at least 6000 clinic blockades and related disruptions.[129] The protests in

---

statute requiring abortion after 12 weeks of pregnancy to be performed in hospital); Planned Parenthood v. Danforth, 428 U.S. 52, 53 (1976) (holding "a blanket parental consent requirement" to be unconstitutional).

[124] BLANCHARD, *supra* note 121, at 54 ("Despite the efforts of [anti-abortion] groups, the number of abortions performed remained fairly constant at about 1.5 million per year.").

[125] *Id.* at 53; MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 41 (1987).

[126] BLANCHARD, *supra* note 121, at 53 ("As the picketing alone seemed to have little effect, many groups became more hostile and more assertive.").

[127] S. REP. NO. 103-117, at 3 (1993) (Senate Report from the Committee on Labor and Human Resources related to the Freedom of Access to Clinic Entrances Act (noting that 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, and 327 clinic invasions took place between 1977 and April 1993)); *see also* Tara K. Kelly, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in* Madsen v. Women's Health Center, 68 S. CAL. L. REV. 427, 434-37 (1995) (discussing violent tactics used by abortion protestors). As early as 1985, 88% of the non-hospital facilities performing at least 400 abortions per year (*i.e.*, facilities performing 75% of all abortions) experienced some type of harassment. Janice Mall, *About Women: Harassment of Abortion Clinics Growing*, L.A. TIMES, Apr. 26, 1987, pt. 6, at 8.

[128] In March of 1993, Dr. David Gunn, a physician who performed abortions, was shot and killed during an anti-abortion demonstration. S. REP. NO. 103-117, at 3 (1993). In August of that year, Rachelle Shannon attempted to kill an abortion physician in Wichita, Kansas. Robert Davis, *Suspect Praised Earlier Abortion Shooting*, USA TODAY, Aug. 23, 1993, at A3. Dr. George Patterson was killed in September, 1993 in Mobile, Alabama, and police suspected the culprit was a person opposed to his abortion work. *Id.* In the summer of 1994, Dr. John Bayard Britton and a volunteer escort were fatally shot by an abortion opponent in Pensacola, Florida. Henry Chu & Mike Clary, *Doctor, Volunteer Slain Outside Abortion Clinic*, L.A. TIMES, July 30, 1994, at A1. In December of 1994, John Salvi shot and killed two women in abortion clinics in Massachusetts. Elizabeth Mehren & John J. Goodman, *2 Killed, 5 Wounded in Shootings at 2 Abortion Clinics*, L.A. TIMES, Dec. 31, 1994, at A1.

[129] S. REP. NO. 103-117, at 3 (1993).

HeinOnline -- 33 Ga. L. Rev. 26 1998-1999

Madsen, then, were merely a small aspect of "a deliberate campaign to eliminate access [to abortion services] by closing clinics and intimidating doctors" across America.[130]

Given the breadth and increasingly violent nature of their activity, the backlash against the protestors was almost inevitable. The public increasingly decried the actions of anti-abortion "zealots" and accused the protestors of engaging in guerilla warfare.[131] Polls showed that the majority of people strongly disapproved of anti-abortion protestors' tactics[132] and also favored restrictions on their rights.[133] Law enforcement officials had similarly short fuses with the protestors. Thus, as one researcher notes, "[w]here activities such as those of Operation Rescue [were] prolonged and vituperative, there [was] a tendency for local law enforcement officials to grow weary and to escalate the punishments meted out."[134] Cities also enacted ordinances with heightened punishments for persons "trespassing on the grounds of medical facilities,"[135] ordinances specifically banning focused picketing,[136]

---

[130] *Id.* at 11.

[131] Newspapers in the period preceding *Madsen* were rife with anti-protestor editorials, including several references to protestors as "zealots," "fanatics," "militants," and "terrorists." *See, e.g., Abortion Clinics Need Protection*, SEATTLE POST-INTELLIGENCER, Nov. 24, 1993, at A10 (applauding federal law eliminating anti-abortion protest measures that amount to "raw intimidation of women"); *Abortion Fanatic Tactics are Turning Public against Pro-Life Protestors' Cause*, CINCINNATI ENQUIRER, July 13, 1993, at A6 (referring to anti-abortion protestors as "fanatics" and "zealots"); Brian L. Finkel, *"Bubble" Column Shows Myopia of a Zealot, Absolutism of a Despot*, ARIZ. REPUBLIC, Dec. 1, 1993, at B8 (referring to columnist who decried implementation of "safety zone" restriction as having the "myopia of a zealot"); *Fortify Abortion Rights—Enact U.S. Law Against Violence, Intimidation*, BUFF. NEWS, July 5, 1993, at B2 (referring to actions taken by Operation Rescue "zealots" in Buffalo and Amherst, Massachusetts); *Protect Access to Clinics*, USA TODAY, Nov. 18, 1993, at 14A (calling certain actions of anti-abortion protestors an "unbridled reign of terror").

[132] A 1991 Gallup poll taken during the blockade of clinics in Wichita, Kansas revealed that 77% of those polled disapproved of the anti-abortion protestors' tactics. Larry Hugick, *"Pro-Life" Wichita Demonstrations Fail to Change Opinion on Abortion*, THE GALLUP POLL MONTHLY, Sept. 1991, at 49.

[133] *See, e.g., Sound Off—Most Callers Favor Court Restricting Abortion Protesters*, ORLANDO SENTINEL, Feb. 1, 1994, at A9 (noting that 2,237 of 3,861 people responding to poll favored Supreme Court restrictions on abortion protestors).

[134] BLANCHARD, *supra* note 121, at 92.

[135] Planned Parenthood Federation of America, Public Affairs Action Letter 4 (June 5, 1992) (noting city of Cincinnati's enactment of mandatory jail sentences for such persons).

[136] In 1985, as a direct response to anti-abortion protests outside of an abortion provider's residence, the town of Brookfield, Wisconsin enacted an ordinance prohibiting all "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Frisby

HeinOnline -- 33 Ga. L. Rev. 27 1998-1999

and ordinances imposing criminal penalties upon protestors who refused to remain a certain distance away from clinics.[137] Even the federal government joined the rush to regulate abortion protestors, enacting the Freedom of Access to Clinic Entrances Act of 1993, which prohibits the use of force or threat of force to "intentionally injure[], intimidate[], or interfere[]" with a person attempting to obtain reproductive services.[138]

In addition, clinics and other abortion providers successfully enlisted the court system in their fight against the protestors' activities. Thus, clinics convinced some courts to impose massive fines against protestors under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), a federal statute designed to prevent patterns of racketeering activity.[139] Eventually, even the Supreme Court weighed in against the protestors by upholding the

---

v. Schultz, 487 U.S. 474, 477 (1987). The Supreme Court eventually upheld the constitutionality of the ordinance. *Id.* at 488.

[137] The city of Boulder, Colorado, for example, enacted an ordinance prohibiting anyone leafleting or protesting on public property within 100 feet of any health care facility from "approach[ing] closer than eight feet from [the person they sought to influence], unless such [person gave] express oral consent to do so." Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1857 n.12 (1988). The city of Phoenix, Arizona enacted a similar ordinance. *See* Sabelko v. City of Phoenix, 68 F.3d 1169, 1170 (9th Cir. 1995), *vacated*, 117 S. Ct. 1077 (1997) (mem.).

[138] 18 U.S.C. § 248(a)(1) (1994). Although the Act speaks broadly in terms of "reproductive services," there is no question that it is aimed primarily at reversing problems caused by anti-abortion protestors. *See, e.g.*, S. REP. NO. 103-117, at 3-33 (1993) (discussing Act's necessity in light of history of violence and disruption caused by anti-abortion protestors).

[139] *See* 18 U.S.C. §§ 1961-68 (1994). Abortion clinics and their supporters successfully argued that the anti-abortion protestors' disruptive actions were part of a "nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion" in violation of § 1962(c). National Org. for Women v. Scheidler, 510 U.S. 249, 253 (1994); *see also* Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989). According to the clinics, the protestors "conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." *Scheidler*, 510 U.S. at 253. As a result of such lawsuits, anti-abortion groups incurred massive fines, some totaling hundreds of thousands of dollars. *See* BLANCHARD, *supra* note 121, at 66, 94; Jan Crawford, *Abortion Protestors Hit Legal Roadblock*, CHI. TRIB., Jan. 25, 1994, at 1 (noting that fines in RICO lawsuit against protestors could exceed $1 million).

HeinOnline -- 33 Ga. L. Rev. 28 1998-1999

use of RICO against them,[140] although some of the justices expressed concern over the potential infringement on protestors' free speech rights.[141] In addition to seeking monetary awards, several clinics sought court orders enjoining protestors from engaging in violent and disruptive actions at clinics. Such lawsuits were largely successful in obtaining injunctions prohibiting violent and intimidating behavior and clinic blockades,[142] an unsurprising result given that invasive conduct such as trespass, vandalism and harassment are paradigm bases for injunctive relief. More importantly, however, clinics were able to persuade a number of courts to extend their injunctions to arguably peaceful anti-abortion protests, prohibiting, for example, even peaceful demonstrations or counseling within certain distances of clinic property.[143] As discussed above, *Madsen* fell into this category of cases.

Such was the position of the anti-abortion protestors as *Madsen* reached the Supreme Court. That is, at least one of the parties before the Court in *Madsen* was a very public organization against

---

[140] *Scheidler*, 510 U.S. at 262. In *Scheidler*, the Court ruled that no economic motive was required in order to use RICO against an organization otherwise falling within its parameters. *Id.* at 257. As a result, RICO remained available as a weapon against anti-abortion protestors even though they were political opponents, as opposed to commercial competitors, of the clinics. *Scheidler*'s impact in this area is unclear, however, because of anti-abortion organizations' tendency to hide assets in the personal accounts of their members, see Karen Tumulty & Lynn Smith, *Operation Rescue: Soldier in a "Holy War" on Abortion*, L.A. TIMES, Mar. 17, 1989, at 1, or to dissolve and reorganize as new groups, see BLANCHARD, *supra* note 121, at 66, making it difficult to enforce collection of the fines. Nevertheless, juries are still finding against protestors charged with RICO violations. *See* David E. Rovella, *NOW Abortion Victory Assailed*, NAT'L L.J., May 4, 1998, at A6 (noting recent jury verdict imposing RICO fines on abortion protestors).

[141] *See Scheidler*, 510 U.S. at 265 (Souter, J., concurring) ("I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake.").

[142] *See, e.g.*, New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1363-64 (2d Cir. 1989); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681, 684, 687 (9th Cir. 1988); Planned Parenthood Ass'n of San Mateo v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); Planned Parenthood League of Mass., Inc. v. Operation Rescue, 550 N.E.2d 1361 (Mass. 1990); Horizon Health Ctr. v. Felcissimo, 638 A.2d 1260 (N.J. 1994); Options v. Lawson, 670 A.2d 1081, 1082, 1087 (N.J. Super. Ct. App. Div. 1996).

[143] *See, e.g., Portland Feminist Women's Health Ctr.*, 859 F.2d at 684 (enjoining demonstrations and distribution of literature); *Holy Angels Catholic Church*, 765 F. Supp. at 626 (prohibiting protestors from counseling and distributing literature); *Horizon Health Ctr.*, 638 A.2d at 1264-65 (holding court had authority to enjoin "peaceful expressive activities"); *Options*, 670 A.2d at 1082, 1087 (same).

HeinOnline -- 33 Ga. L. Rev. 29 1998-1999

which there was substantial public outcry and antipathy and against which numerous legislatures and judges had acted. This did not mean that the protestors were wholly without support in their beliefs. During this period at least fourteen percent of Americans believed that abortion should be completely outlawed while another forty-nine percent believed that it should be restricted in certain circumstances.[144] Furthermore, during the 1980s the President of the United States maintained substantial support for the anti-abortion cause.[145] Although the Supreme Court never went as far as overruling *Roe*, its rulings in the late 1980s and early 1990s generally upheld significant restrictions on the abortion right.[146] Nevertheless, abortion protestors (as opposed to abortion policy) were under attack[147] by the early 1990s, thus fueling their outcry when the Court used an admittedly new standard to uphold the injunction against them.

---

[144] Hugick, *supra* note 132, at 49.

[145] *See* TRIBE, *supra* note 121, at 161 (stating that after election of Ronald Reagan in 1980 "the pro-life movement had an avowed believer in the White House"). George Bush, who was elected President in 1988, also advanced the pro-life agenda while in office, supporting, for example, restrictive regulations on abortion counseling by recipients of federal funds. *See* Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1727-28 (1995) (discussing federal regulations in force during Bush administration).

[146] In *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 517-18 (1989), a plurality of the Supreme Court argued that *Roe* should be overturned. In *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991), a majority of the Court upheld viewpoint-based restrictions on abortion counseling at clinics which received federal subsidies. And in its most recent decision, *Planned Parenthood v. Casey*, 505 U.S. 833, 846-53 (1992) (joint opinion), the Court, while reaffirming the "essential holding" of *Roe*, appears to have at least impliedly acknowledged that the abortion right no longer has fundamental status. *See also* Wells, *supra* note 145, at 1755-58 (discussing how *Casey* Court diminished status of abortion right).

[147] This aspect of the abortion protest cases differs somewhat from the communist cases. Popular opposition to communists in the early and mid-20th century was closely entwined with opposition to their message. In contrast, many people support the anti-abortion platform although they oppose the protestors. Hugick, *supra* note 132, at 49 (discussing 1991 Gallup poll that revealed that 57% of those persons who favored repealing *Roe* nevertheless condemned protestors' behavior). Such a response is due less to viewpoint discrimination than to the generally held view that "collective [protest] . . . behavior [is] irrational, fickle, violent, undirected, and contagious." C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 981 (1983); *see also* JEROME H. SKOLNICK, THE POLITICS OF PROTEST 14-15 (1969) (discussing unpopularity of various protest movements). Nevertheless, both the communist and anti-abortion decisions arose in the midst of great antipathy toward speakers involved in controversial issues, thus lending credence to the speakers' claims that they were sacrificed for political reasons.

HeinOnline -- 33 Ga. L. Rev. 30 1998-1999

Further aiding the protestors was the fact that the issue before the *Madsen* Court was not merely freedom of expression, but freedom of expression *about abortion*. As a citizenry, the abortion issue has consumed us: "We cannot stop legislating and adjudicating about it, or talking and writing about it, or imagining and even imaging it. Much like slavery before it, abortion has become an epic controversy in which the very soul of our disquiet republic seems capable of bursting."[148] To discuss "freedom of speech" in such a context is dangerous stuff, as evidenced by the frequency with which the abortion issue infected the discussion regarding protestors' rights. For example, those arguing in favor of injunctions frequently characterized the question as whether free speech rights or abortion rights should prevail,[149] even though the injunction in *Madsen* had implications well beyond the abortion context.[150] Such arguments could only fuel the *Madsen* protestors' claim that the emotional issue of abortion—as opposed to sound legal principles—was the real catalyst of the Court's decision. It may also have influenced even neutral observers' conclusions that *Madsen* somehow represented a loss of civil liberties.[151] In this sense, *Madsen* does parallel *Dennis* on at least some level. After *Madsen*, then, the logical question was whether the Court would stick by its new standard or would back away from its arguably political decision, just as the *Yates* Court eventually

---

[148] Jane Maslow Cohen, *Comparison-Shopping in the Marketplace of Rights*, 98 YALE L.J. 1235, 1236 (1989) (reviewing GLENDON, *supra* note 125).

[149] *See, e.g.*, 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, 1198-1200 (1996) (discussing difficulty of finding balance between free speech rights and abortion rights); Kelly, *supra* note 127, at 448-58 (same).

[150] At least some commentators noted that *Madsen*'s decision to uphold portions of the injunction had significant implications for all protestors. *See, e.g.*, Sean Patrick O'Rourke & Ron Manuto, *Buffer Zone Protects a Basic Right . . . But Does It Rob Us of Another One?*, CHI. TRIB., July 28, 1994, at 19 ("[T]he *Madsen* opinion may indicate a new willingness to limit the place and manner in which protest may occur."); Jerry Zremski, *High Court's Ruling Gives Judges More Power to Curb Protests*, BUFF. NEWS, July 1, 1994, at A9 (noting that *Madsen* may have effect on "labor unions, animal-rights demonstrators and anyone else who might ever want to protest"); *see also* Darrin Alan Hostetler, Comment, *Face-to-Face with the First Amendment:* Schenck v. Pro-Choice Network *and the Right to "Approach and Offer" in Abortion Clinic Protests*, 50 STAN. L. REV. 179, 181 (1997) (arguing that Supreme Court's approach to abortion clinic injunctions casts doubt on continuing validity of "important and time honored free speech and religion cases").

[151] *See* sources cited *supra* note 150.

HeinOnline -- 33 Ga. L. Rev. 31 1998-1999

backed away from *Dennis*. Only three years after *Madsen*, *Schenck* presented the Court with an opportunity to reconsider the issue.

III. *SCHENCK V. PRO-CHOICE NETWORK*

A. LEGAL BACKGROUND

As in *Madsen*, the original *Schenck* injunction banned only violent and disruptive conduct rather than expression.[152] Also as in *Madsen*, the original injunction proved ineffective in preventing "constructive blockades" by protestors[153] or the devolution of even peaceful counseling attempts into harassment when the counselors became angered.[154] Thus, the district court amended the injunction to include a ban on demonstrating within fifteen feet of entrances and driveways of the medical facilities or around any person or vehicle entering or leaving the clinics.[155] While the order excepted from the fifteen-foot buffer zone sidewalk counseling of a non-threatening nature by no more than two people, it provided that sidewalk counselors were to "cease and desist" upon a person's indication that she did not wish to be counseled.[156]

In a two-to-one decision, a three-judge panel of the Second Circuit reversed the injunction with respect to the fifteen-foot buffer zone and sidewalk counseling provisions, holding that they

---

[152] Pro-Choice Network v. Schenck, 67 F.3d 377, 382 (2d Cir. 1995) (en banc), *aff'd in part, rev'd in part*, 117 S. Ct. 855 (1997) (describing initial TRO as enjoining protestors from trespassing, blocking, or impeding access to clinic facilities, physically abusing or harassing people entering or leaving facilities, and making excessively loud noises which disturb, injure, or endanger the health of clinic patients and employees).

[153] Pro-Choice Network v. Project Rescue W. N.Y., 799 F. Supp. 1417, 1423-24 (W.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom.* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), *vacated in part en banc*, 67 F.3d 377 (2d Cir. 1995), *aff'd in part, rev'd in part*, 117 S. Ct. 855 (1997). According to the district court, the protestors, while not physically blockading the facilities, engaged in a "constructive blockade" by forcing patients and staff "to run a gauntlet of harassment and intimidation." *Id.* at 1424.

[154] *Id.* at 1425. The court noted that, while much of the counseling was peaceful, counselors often became angry and frustrated when patients nevertheless entered the clinics, and subsequently turned to "harassing, badgering, intimidating and yelling at the patients . . . even after the patients signal[led] their desire to be left alone. The 'sidewalk counselors' often crowd[ed] around patients, invade[d] their personal space and raise[d] their voices to a loud and disturbing level." *Id.*

[155] *Id.* at 1440 (paragraph 1(b) of preliminary injunction).

[156] *Id.* (paragraph 1(c) of preliminary injunction).

HeinOnline -- 33 Ga. L. Rev. 32 1998-1999

violated *Madsen's* requirement that injunctions "burden no more speech than necessary."[157] The Second Circuit then granted a rehearing en banc and reversed the panel in a 13-2 decision,[158] though the judges attacked the issue from different perspectives. Judge Oakes, writing for the majority, applied *Madsen* and found that the injunctive provisions were sufficiently narrowly tailored to meet the government's interest in securing access to clinics and the safe performance of abortions.[159] In contrast, Judge Winter, in a separate opinion that also garnered a majority of the justices, argued that the injunction was justified primarily because the protestors' expressive activities were coercive in such a way as to take them out of the purview of the First Amendment altogether.[160] Finally, the two dissenters reiterated the belief expressed in their earlier panel opinion that the injunction was an unconstitutional restriction on free speech.[161]

---

[157] *Schenck*, 67 F.3d at 370-71. According to the panel, the buffer zone was invalid because there was no evidence that protestors' attempts to block access to the clinics were pervasive or successful. *Id.* Relying on that portion of *Madsen* which found the "no approach" zone unconstitutional, the panel further argued that the "cease and desist" provision violated the notion that "in public debate, our citizens must tolerate insulting, and even outrageous speech." *Id.* at 371-72 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

[158] *Id.* at 377.

[159] *Id.* at 386-93. Judge Oakes noted that the "cease and desist" provision was also justified as necessary "to protect not only the right of access to abortions but, in effect, the physical well-being of women seeking such access and held captive by medical circumstance." *Id.* at 392 (internal quotation marks omitted). He further distinguished the "cease and desist" provision from the "no approach" provision in *Madsen* noting that the former was "far more solicitous of demonstrators' interests" because it allowed for face-to-face contact even without the express consent of the patient. *Id.* at 390-91.

[160] According to Judge Winter:

> [T]he First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs . . . . [T]here is no right to invade the personal space of individuals going about [their] lawful business, to dog their footsteps or chase them down a street, to scream and gesticulate in their faces, or to do anything else that cannot fairly be described as an attempt at peaceful persuasion.

Id. at 394-96 (Winter, J., concurring in the result). Characterizing the protest activities as coercive because they targeted specific individuals at certain difficult-to-leave locations, he would have ruled on that basis alone that the 15-foot buffer zone and "cease and desist" provisions were valid. *Id.* at 396-98.

[161] *Id.* at 401-03 (Meskill, J., dissenting). The dissenters especially eschewed the majority's use of privacy interests and the captive audience doctrine to support the "cease and desist" provision, noting that such interests rarely supported restrictions of speech in

HeinOnline -- 33 Ga. L. Rev. 33 1998-1999

The Supreme Court, like Judge Oakes, engaged in a straightforward application of the principles enunciated in *Madsen*, focusing primarily on whether the fifteen-foot buffer zone burdened more speech than necessary.[162] Initially, the Court characterized the buffer zone slightly differently than did the lower courts. According to the Court, the buffer zone had "fixed" and "floating" aspects.[163] To the extent that the fifteen-foot zone extended around entrances and driveways, it was fixed (*i.e.*, did not move), but to the extent that the fifteen-foot zone extended around people or vehicles seeking access to or leaving clinics, it floated (*i.e.*, the zone actually moved with the persons or vehicles as they moved).[164] The Court concluded that these different aspects of the buffer zone required separate analysis.

The Court acknowledged the protestors' history of "abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct."[165] The majority nevertheless struck the floating buffer zone, fearing that its fluid nature would render protestors unable to comply without risking their safety.[166] It also noted the difficulty, if not impossibility, of compliance when several people simultaneously sought to enter or leave the clinics—a phenomenon that would render the floating zones completely amorphous.[167] The lack of certainty in terms of compliance led "to a substantial risk that much more speech [would] be burdened than the injunction by its terms prohib-

---

the public forum, and certainly did not support the provision in this instance. *Id.* at 405-06.

[162] The Court noted that the government interests at stake were essentially the same as those in *Madsen*—ensuring public order, promoting the free flow of traffic, protecting property rights, and protecting a woman's right to terminate her pregnancy. *Schenck*, 117 S. Ct. at 866. Given that such interests were "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics," *id.*, the only question was whether the injunction was appropriately tailored.

[163] *Id.* at 862.

[164] *Id.* at 864.

[165] *Id.* at 867.

[166] *Id.* The Court noted that the buffer zones might force protestors into the street in order for them to walk alongside a person while maintaining a fifteen-foot buffer. *Id.*

[167] *Id.* According to the Court, protestors wishing to move in concert with an individual "are then faced with the problem of watching out for other individuals entering or leaving the clinic who are heading the opposite way from the individual they have targeted." *Id.*

HeinOnline -- 33 Ga. L. Rev. 34 1998-1999

it[ed]."[168] The Court did not, however, rule out all future attempts to separate protestors and others. Instead it emphasized that while the floating zone was unconstitutional, "some sort of zone of separation" between protestors and individuals seeking access to or leaving clinics might have been appropriate.[169]

In contrast to the floating buffer zones, the fixed buffer zones around clinic entrances survived scrutiny under *Madsen* because they were "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots [could] do so."[170] Specifically, the majority held that

> [b]ased on defendants' past conduct, the District Court was entitled to conclude that some of the defendants who were allowed within 5 to 10 feet of clinic entrances would not merely engage in stationary, nonobstructive demonstrations but would continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars.[171]

Moreover, the fixed zone carried with it none of the uncertainty that accompanied the floating buffer zones. Thus, the injunctive provision allowing fixed buffer zones burdened no more speech than necessary to ensure access to clinics.

The majority further found that the "cease and desist" provision survived constitutional scrutiny—at least insofar as it existed within the fixed buffer zones.[172] Though initially questioning the district court's basis for the provision (*i.e.*, to protect the right of

---

[168] *Id.*

[169] *See id.* (stating that, because the zone could not be sustained on the record, its appropriateness in other circumstances need not be decided).

[170] *Id.* at 868.

[171] *Id.* at 869.

[172] *See id.* at 870 (holding that "cease and desist" exception for sidewalk counselors enhanced, rather than abridged free speech rights). The majority refused to comment on the constitutionality of the "cease and desist" provision insofar as it related to floating buffer zones because it found such zones to be unconstitutional. *Id.* at 868.

HeinOnline -- 33 Ga. L. Rev. 35 1998-1999

people seeking access to the facilities to be left alone),[173] the majority nonetheless upheld it as "an effort to enhance petitioners' speech rights" by allowing some protestors access to the buffer zone in order to express their message peacefully.[174] The Court further rejected petitioners' argument that the "cease and desist" provision was an illegitimate content-based regulation, noting that "counselors remain[ed] free to espouse their message outside the fifteen-foot buffer zone, and the condition on their freedom to espouse it within the buffer zone [was] the result of their own previous harassment and intimidation of patients."[175]

As in *Madsen*, Justice Scalia, joined by Justices Kennedy and Thomas, vigorously dissented. According to Justice Scalia, "no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics" existed and an injunction based solely upon this interest was illegitimate.[176] He also took his colleagues to task for upholding the injunction even while recognizing that the "right to be left alone" was inconsistent with First Amendment principles,[177] characterizing the majority's actions as an illegitimate exercise of government power.[178] Such a substitution of government interests by a higher court was especially problematic in his view because the case involved a "trial court[] order imposing a prior restraint upon speech."[179]

B. PROTESTOR RESPONSE AND SOCIAL CONTEXT: PARALLELS TO *YATES*

Protestor response to *Schenck* was quite different than the response to *Madsen*. Rather than denounce the Court's decision to

---

[173] *Id.* at 870. According to the Court, no such generalized right to privacy exists on public streets or sidewalks. *Id.*

[174] *Id.*

[175] *Id.*

[176] *Id.* at 871 (Scalia, J., concurring in part and dissenting in part). Justice Scalia believed that the buffer zone and "cease and desist" provisions were both based upon such a right. *Id.* at 871-72. He admitted, however, that the creation of buffer zones might have been constitutional absent the "cease and desist" provision because the district court had pointed partly to access problems to justify such zones. *Id.* at 871, 875.

[177] *Id.* at 872.

[178] *Id.* at 871-73.

[179] *Id.* at 873.

HeinOnline -- 33 Ga. L. Rev. 36 1998-1999

uphold portions of the injunction, protestors and their supporters lauded the Court's willingness to strike down the floating buffer zone as a recognition that "the 1st Amendment applies to the pro-life message, and [that] there is no longer an exception to the free-speech clause when the issue deals with abortion."[180] Some went as far as expressly characterizing the decision as a "change of heart" by the Court.[181] Even neutral observers, including free speech scholars, characterized *Schenck* as a strong affirmation of the rights of speakers to engage in "free speech of the loud, aggressive in-your-face variety"[182]—a far cry from earlier characterizations of *Madsen* as "a loss for civil liberties . . . [giving] protestors a relatively low level of constitutional protection from injunctions."[183]

One could conclude that the *Schenck* Court, like the *Yates* Court before it, rectified an earlier, bad decision and restored the protestors' free speech rights. After all, though the *Schenck* Court purported to apply *Madsen's* principles, it struck down the floating buffer zone—easily the most restrictive portion of the injunction against the protestors.[184] Perhaps this was the *Schenck* Court's way of gutting *Madsen* without actually overruling it, just as *Yates* did to *Dennis*. The social context in which *Schenck* was decided lends support to this characterization of the case. By the time the Court decided *Schenck*, violent and disruptive actions on the part of anti-abortion protestors apparently fell dramatically from all-

---

[180] Savage, *supra* note 16, at A1 (quoting Jay Sekulow, attorney for the protestors); *see also A Better Balance on Protest Reversed an Earlier Restriction on Anti-abortion Protestors*, FRESNO BEE, Feb. 25, 1997, at B4 (noting that the *Schenck* Court "righted the delicate balance that must be maintained at the abortion clinic door").

[181] *The Right to Protest*, INDIANAPOLIS STAR, Mar. 2, 1997, at C2.

[182] Savage, *supra* note 17, at A1; *see also id.* (quoting University of Southern California Law Professor Erwin Chemerinsky as stating "[t]his case establishes a strong [First] Amendment right to speak, even when the people say they don't want to be spoken to"); *id.* (quoting Professor Rodney Smolla of William and Mary Law School as noting that *Schenck* was a "strong affirmation of the in-your-face view of the [First] Amendment").

[183] William H. Freivogel, *Center Court Four Justices Largely Shaped Decisions of Supreme Court During Its Recent Term*, ST. LOUIS POST-DISPATCH, July 3, 1994, at B1; *see also* sources cited *supra* note 150.

[184] The floating buffer zone was more restrictive than the fixed buffer zone because, being tied to mobile persons, it potentially suppressed speech in a large area around the clinic. After *Schenck*, however, protestors were prohibited only from protesting within fifteen feet of clinic entrances and driveways, but they were allowed to approach anyone outside of those clearly defined areas.

HeinOnline -- 33 Ga. L. Rev. 37 1998-1999

time highs in 1992 and 1993, the years immediately preceding *Madsen*.[185] Moreover, anti-abortion forces made a conscious effort to mainstream themselves, publicly turning away from unpopular mass demonstrations and toward more traditional efforts, such as filling state and federal legislative positions with anti-abortion advocates.[186] By 1997, the public spotlight focused far less on abortion protestors than on a more traditional debate regarding abortion policy.[187] Just as anti-communist hysteria began to wane by the time of *Yates*, one could say that *Schenck* was decided in calmer times when the Court could see the error of its ways.

IV. THE ABORTION PROTEST CASES IN THE CONTEXT OF PAST DOCTRINE

The social context of *Madsen* and *Schenck* certainly lends some support to the protestors' claims. But what about the legal context?

---

[185] According to the National Abortion Federation, violent acts by abortion protestors fell from an all-time high of 437 incidents in 1993 to 111 incidents in 1996. National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers, 1998* (visited Sept. 22, 1998) <http://www.prochoice.org/violence/98vd.html>. Interestingly, although incidents of disruption declined in 1993-95 from an all-time 1992 high, they more than doubled in 1996. *Id.* Few newspapers reported this latter fact, *cf.* David J. Garrow, *When 'Compromise' Means Caving In*, WASH. POST, June 1, 1997, at C3 (discussing attacks on abortion clinics in 1997 and lack of newspaper coverage), choosing instead to focus on the decline in violent activities. *See, e.g.*, Emily Bazar, *Foes of Abortion Intend to Widen Their Audience*, SACRAMENTO BEE, Aug. 8, 1997, at A1; Julie Tamaki & Martha L. Willman, *Abortion Clinic is Firebombed*, L.A. TIMES, Mar. 8, 1997, at B1 (Valley Edition). This tendency by reporters to focus only on declining violence lent some credence to the protestors' claims that legislative action (primarily the Freedom of Access to Clinic Entrances Act of 1993) forced them to abandon much of their protest activity. Tamaki & Willman, *supra* (noting protestors' attribution of the decline in their activity to the 1993 Act).

[186] *See* Carey Goldberg, *How Political Theater Lost Its Audience*, N.Y. TIMES, Sept. 21, 1997, § 4, at 6 (discussing Operation Rescue's "new tactic" of fielding seven candidates for congressional office). The protestors also planned to employ more peaceful, economic boycotts of corporations donating money to organizations such as Planned Parenthood. Bazar, *supra* note 185, at A1.

[187] In contrast to hearings regarding abortion violence held in 1993, *see generally* S. REP. NO. 103-117, *supra* note 127, the legislative battleground in 1997 focused on partial-birth abortion and international funding issues. *See, e.g.*, Garrow, *supra* note 185, at C3 (discussing various federal legislative proposals regarding "partial-birth" abortion ban); John M. Goshko, *Dispute Stalls U.S. Plan to Cut Its U.N. Dues*, WASH. POST, Nov. 28, 1997, at A17 (discussing House of Representatives' refusal to approve bill providing funds for past U.N. dues because of dispute over funding for international family planning agencies who perform abortions or promote liberalized abortion laws).

HeinOnline -- 33 Ga. L. Rev. 38 1998-1999

From a doctrinal standpoint do *Madsen* and *Schenck* parallel the *Dennis/Yates* pattern? In order to live up to such a claim, two issues are critical: First, *Madsen* must be inconsistent with past doctrine such that we view it as a political decision rather than a product of judicial reasoning. Second, *Schenck* must be inconsistent with *Madsen* in order to support the claim that it represents the Court's return to sound First Amendment principles. Ultimately, neither of these facts is true.

A. PLACING *MADSEN* IN THE FIRST AMENDMENT FRAMEWORK

In upholding the convictions of the communist defendants, the *Dennis* plurality purported to apply past precedent, noting that the "clear and present danger" test had been applied to subversive advocacy cases since its 1919 decision in *Schenck v. United States*. Yet Chief Justice Vinson did not apply that test in any recognizable manner. Rather, he transformed a relatively strict test into a malleable balancing test and applied it in a manner to suit the "political exigencies" of the case. *Madsen* does not appear to follow such a pattern. While *Dennis* involved a scenario (criminal punishment of subversive advocacy) and a test that had been before the Court many times, the situation presented to the *Madsen* Court was relatively unique. The Court has previously faced both injunctions against speech and time, place, and manner regulations of speech. But prior to *Madsen*, it never faced an injunction placing a time, place, and manner restriction on speech. In light of this unique situation, the *Madsen* Court quite candidly announced a new standard. Though one may disagree with the standard applied in *Madsen*, the Court's approach is not the obvious manipulation of an existing standard as in *Dennis*.

There is also nothing in the Court's past doctrine regarding prior restraints, protestors, or content discrimination that necessitates a different result. Despite the protestors' intimations,[188] the Court's antipathy to prior restraints (*i.e.*, those regulations that

[188] The protestors' claim that *Madsen* signaled a retreat "to the dark ages when speech was permitted only at the discretion of government officials," Greene, *supra* note 117, at 32, intimates that *Madsen* somehow deviated from the Court's past prior restraint precedents.

HeinOnline -- 33 Ga. L. Rev. 39 1998-1999

attempt to suppress expression in advance of publication)[189] does not compel a different outcome in *Madsen*. To be sure, the Court has found injunctions to be prior restraints.[190] Indeed, so many of the Court's significant prior restraint decisions involve injunctions that Professor Jeffries has noted that "despite its original reference to official licensing, the doctrine of prior restraint today is understood by many people to mean chiefly a rule of special hostility to injunctions."[191] But any notion that all injunctions amount to prior restraints is purely a popular one. The Court has *never* issued such a broad ruling. On at least one occasion, it explicitly debunked such a notion.[192] Occasionally, the Court has

---

[189] *See, e.g.*, Alexander v. United States, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' " (quoting MELVILLE NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, at 4-14 (1984))). As Professor Emerson has noted, the primary importance of the prior restraint category is its distinction from subsequent punishment: "[A] system of prior restraint would prevent communication from occurring at all; a system of subsequent punishment allows the communication but imposes a penalty after the event." Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648 (1955).

The Court has repeatedly stated that "[a]ny system of prior restraint of expression . . . bear[s] a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Although the Court has stated that its hostility toward prior restraints "is not an absolute prohibition in all circumstances," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976), its presumption against such restraints thus far has been insurmountable. *See* Marin Scordato, *Distinction without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989) ("So strict is the scrutiny applied under the doctrine that the Supreme Court has never upheld a law that it has characterized as a prior restraint on pure speech.").

[190] *See Nebraska Press*, 427 U.S. at 539 (characterizing injunction prohibiting press from publishing inculpatory evidence pertaining to criminal defendant prior to jury impanelment as prior restraint); New York Times v. United States, 403 U.S. 713 (1971) (characterizing injunction against newspaper's publication of historical information pertaining to Vietnam War as prior restraint); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (characterizing injunction against distribution of leaflets in particular community as prior restraint); Near v. Minnesota, 283 U.S. 697 (1931) (characterizing as prior restraint statute which allowed permanent injunction banning distribution of literature).

[191] John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 426 (1983). The Court itself has referred to injunctions as "classic examples of prior restraints." *Alexander*, 509 U.S. at 550; Smith v. Daily Mail Pub'g Co., 443 U.S. 97, 103 (1979) (characterizing pretrial order barring publication of crime victim's name as "classic prior restraint").

[192] Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (noting that the Court "has never held that all injunctions are impermissible"); *see also Keefe*, 402 U.S. at 418-19 (implying that an injunction designed to remedy private wrongs rather than to suppress speech would have been permissible).

HeinOnline -- 33 Ga. L. Rev. 40 1998-1999

even upheld the use of injunctions against expression.[193] Moreover, to the extent that the Court characterizes injunctions as prior restraints, it tends to do so because they involve *bans* on dissemination of information[194] or protest activity.[195] Given the Court's clear statement that "informed public opinion is the most potent of all restraints upon misgovernment,"[196] suppression of information, even temporarily,[197] is something about which the Court is especially concerned. But *Madsen* involved a time, place, and manner regulation of protestors that still permitted them to speak within reasonably close proximity to their intended recipients.[198] The *Madsen* majority reasonably could have seen a difference between that regulation and previous injunctions. Finally, prior restraints are often disfavored because they require judges and administrators to assess the potential harm of speech prior to dissemination, thus allowing them potentially to overemphasize the risks of speech.[199] But the *Madsen* injunction issued after a history of (and as an attempt to prevent future) violence, disruption

---

[193] *See, e.g., Pittsburgh Press*, 413 U.S. at 390; Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); National Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679 (1978).

[194] In *New York Times*, for example, the Court found unconstitutional a permanent ban on dissemination of the Pentagon Papers by the *New York Times* and the *Washington Post*. 403 U.S. at 713; *see also Nebraska Press*, 427 U.S. at 543 (overturning trial court order banning publication of defendant's confession until jury was empaneled); *Keefe*, 402 U.S. at 415 (reversing trial court order banning distribution of leaflets within city limits).

[195] *See* Carroll v. President and Comm'rs. of Princess Anne, 393 U.S. 175 (1968) (addressing ex parte order forbidding white supremacist organization from holding any rallies in the county for at least 10 days); National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) (addressing order that prohibited National Socialist Party of America from marching, parading or distributing any materials designed to incite or promote hatred against persons of the Jewish faith anywhere within village of Skokie, Illinois).

[196] Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

[197] As the Court has noted, the "element of time is not unimportant" to the effective dissemination of information. *Nebraska Press*, 427 U.S. at 561; *see also Carroll*, 393 U.S. at 182 (noting particular importance of timeliness in context of political rally).

[198] *See* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 770 (1994) (noting that protestors could be "seen and heard" from abortion clinic parking lot).

[199] *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."); Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 52-53 (1981) (discussing administrators' tendency to exaggerate risks of harm prior to occurrence of speech).

HeinOnline -- 33 Ga. L. Rev. 41 1998-1999

and harassment, making it far less likely that the trial court would exaggerate the risks involved—a factor the Court has previously noted in upholding some injunctions against expression.[200] Though one may disagree with the ultimate treatment of the injunction in *Madsen*, the Court's prior cases do not preclude the result.

Public response implying that *Madsen* somehow retreated from the Court's previous strong protection of protest activity similarly misses the mark.[201] Certainly, the Court has derailed numerous government attempts to suppress mass protests,[202] emphatically stating that they are "an exercise of . . . basic constitutional rights in their most pristine and classic form."[203] But the Court's primary concern in those decisions was the arbitrary use of a largely vague statute to suppress unpopular First Amendment activity.[204] It never implied that appropriate regulation of

---

[200] *See Pittsburgh Press*, 413 U.S. at 390 ("Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication."); *see also* Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941) (upholding injunction of peaceful picketing because it was "enmeshed with contemporaneously violent conduct").

[201] *See supra* notes 117-118 and accompanying text (discussing public response to *Madsen*).

[202] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (reversing criminal convictions of nonviolent civil rights protestors); Gregory v. City of Chicago, 394 U.S. 111 (1969) (same); Cox v. Louisiana, 379 U.S. 536 (1965) (same); Edwards v. South Carolina, 372 U.S. 229 (1963) (same).

[203] *Edwards*, 372 U.S. at 235.

[204] The Court's earlier protest decisions arose out of mass demonstrations during the civil rights era and largely involved convictions of peaceful protestors under breach of the peace or disorderly conduct statutes. Such statutes were frequently written in broad terms, prohibiting "a violation of public order, [or] a disturbance of the public tranquility, by any act or conduct inciting to violence." *Edwards*, 372 U.S. at 234 (describing South Carolina breach of peace law); *see also Cox*, 379 U.S. at 544 (citing Louisiana law). Convictions under such statutes raised the specter that the protestors were punished for expressing unpopular views. For example, the *Edwards* Court stated:

> These petitioners were convicted of an offense so generalized as to be . . . "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.

372 U.S. at 237 (quoting Edwards v. State, 123 S.E.2d 247, 249 (S.C. 1961) *rev'd sub nom* Edwards v. South Carolina, 372 U.S. 229 (1963)); *see also Cox*, 379 U.S. at 551 (stating that evidence indicated only that student protestor views were opposed to the majority).

HeinOnline -- 33 Ga. L. Rev. 42 1998-1999

protestors was unacceptable. Rather, it explicitly noted that narrowly drawn statutes regulating protest activity were constitutionally permissible,[205] a notion that the Court's subsequent cases reinforce.[206] On the whole, the *Madsen* injunction's prohibitions were quite specific—to the point of giving exact distances regarding protest activity.[207] They thus gave little discretion to public officials while still allowing anti-abortion protestors to speak. The *Madsen* Court's willingness to uphold those aspects of the injunction is not clearly inconsistent with its past precedent regarding protestors. Moreover, to the extent that an injunctive provision apparently regulated protestors based on the offensiveness of their speech,[208] the *Madsen* majority struck it down—an action quite

---

Claiborne Hardware involved the imposition of civil damages and an injunction on civil rights protestors because of alleged violations of state common law. 458 U.S. at 890-92. Though recognizing that some of the protestors engaged in acts of violence, the Court ultimately overturned the trial court's verdict, noting that the evidence was "inadequate to assure the 'precision of regulation' demanded by [the First Amendment]." *Id.* at 921. In effect, the Court found that the lower court's findings were too ambiguous to ensure that only non-protected activity was affected—much like the flaw in the criminal statutes discussed above. Justice Scalia's cries notwithstanding, see Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 798 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part), *Claiborne Hardware* does not stand for the proposition that all injunctions against protestors are subject to strict scrutiny. Rather, the decision focused on the appropriateness of civil penalties based upon ambiguous evidence. The Court did ultimately strike down the injunction as well but almost as an afterthought. *Claiborne Hardware*, 458 U.S. at 924 n.67.

[205] *See, e.g., Edwards*, 372 U.S. at 236 ("We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they violated a law regulating traffic, or disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.").

[206] United States v. Grace, 461 U.S. 171, 177 (1983) (concluding that "the government may enforce reasonable time, place, and manner regulations" on protests); Grayned v. City of Rockford, 408 U.S. 104, 119-20 (1972) (upholding regulation of protestors because it was "narrowly tailored . . . [a]nd . . . [gave] no license to punish anyone because of what he is saying").

[207] For example, the trial court's final order in *Madsen* prohibited demonstrating within 36 feet of clinic property as well as any unwanted approaches of persons seeking clinic services within 300 feet of clinic property. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 669 (Fla. 1993) *aff'd in part, rev'd in part sub nom.* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

[208] *See* 512 U.S. at 773-74 (striking down 300-foot "no approach" zone as violating Court's oft-stated belief that "in public debate our own citizens must tolerate insulting, and even outrageous speech" (citation omitted)).

HeinOnline -- 33 Ga. L. Rev. 43 1998-1999

consistent with the Court's earlier concern regarding suppression of unpopular speech. *Madsen* is therefore not utterly out-of-line with the Court's past doctrine.

Finally, the Court's past doctrine does not compel application of a different standard of review than that applied in *Madsen*. Typically, the Court distinguishes between content-based regulations (*i.e.*, regulations that "limit communication because of the message it conveys")[209] and content-neutral regulations (*i.e.*, regulations that affect speech but are not aimed at its content).[210] The Court sustains the former only if they survive strict scrutiny—the regulation must be narrowly drawn to serve a compelling state interest.[211] In contrast, the Court judges the latter under a more lenient, intermediate standard, sustaining such regulations if they "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information."[212] Importantly, the Court's two-tiered approach evolved in cases where it considered the constitutionality of a generally applicable statute or ordinance. In such cases the Court could determine relatively easily the nature of the statute and apply the requisite standard of review.[213] *Madsen*, however, was the Court's first opportunity to

---

[209] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 (1987).

[210] Two primary forms of such restrictions exist. First, laws may aim at expression, but may do so in a way that has nothing to do with the message conveyed (for example, a law banning the use of amplified sound trucks in private residential areas). Kovacs v. Cooper, 336 U.S. 77, 89 (1949). Second, laws may aim at regulating conduct but may have an incidental effect on expression (for example, a law banning the burning of draft cards). United States v. O'Brien, 391 U.S. 367, 370, 386 (1968).

[211] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (holding that ordinance prohibiting display of symbols known to "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was unnecessary for protection of state's interest); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (holding that interest of New York's victims could not justify state's overly broad "Son of Sam" law).

[212] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

[213] Generally, the Court has looked to the face of the statute or to objectively determinable justifications for the statute in order to determine whether it is content-based or content-neutral. *See O'Brien*, 391 U.S. at 375 (finding that statute prohibiting burning of draft cards "does not abridge free speech on its face"); Police Dep't v. Mosley, 408 U.S. 92 (1972) (holding unconstitutional a city ordinance prohibiting all picketing within 150 feet of school except peaceful labor picketing). Occasionally, however, the Court finds it difficult to distinguish

HeinOnline -- 33 Ga. L. Rev. 44 1998-1999

apply content-discrimination principles to an injunction.[214] As the *Madsen* Court noted, the injunction before it was a bit of a hybrid—content-neutral but posing some danger of government abuse, a concern with content-based statutes.[215] To that extent, the Court decided to apply a hybridized standard somewhere between intermediate and strict scrutiny.[216] Such an application is far more honest than the *Dennis* Court's covert creation of a new standard.

One could argue that the Court should view an injunction which impacts only speakers with a particular viewpoint as content-based or viewpoint-based rather than content-neutral. Such an argument finds support in the Court's antipathy toward suppression of particular viewpoints. But the *Madsen* Court's refusal to take such a view also has support in the Court's past doctrine. The *Madsen* injunction was *facially* content-neutral, regulating only the procedural aspects of the expression rather than its content. The Court frequently concludes that a regulation is content-neutral and subject to lesser scrutiny on the basis of such facial neutrality.[217] Occasionally, the Court closely scrutinizes and strikes facially content-neutral regulations having a severely disparate impact on speakers.[218] Using lesser scrutiny, however, the Court often upholds content-neutral laws that admittedly have a disparate impact on speakers but that leave open opportunities to communi-

---

between such statutes; *see, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (determining that facially content-based statute was content-neutral); *see also infra* notes 248-272 and accompanying text (discussing doctrinal inconsistencies in Court's approach to content-based and content-neutral statutes).

[214] Though the content-based/content-neutral distinction is one of the major organizing principles of the Court's current jurisprudence, see generally Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615 (1991), it evolved only in recent decades, essentially stemming from *Mosley*. Most of the Court's injunction cases were decided prior to the full establishment of this approach and were considered under either the prior restraint doctrine or other principles.

[215] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764-65 (1994).

[216] *See id.* (finding that content-neutral injunction warrants more rigorous analysis than standard time, place, and manner analysis).

[217] *See, e.g.*, *O'Brien*, 391 U.S. at 382 (finding that regulation prohibiting the burning of draft cards was content-neutral).

[218] *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (striking down municipal ban on distribution of door-to-door circulars because method of distribution severely impacted poorly financed and unpopular causes).

HeinOnline -- 33 Ga. L. Rev. 45 1998-1999

cate.[219] Thus, the *Madsen* Court's refusal to strictly scrutinize the injunction simply because it had a disparate impact on protestors is not wholly inconsistent with past doctrine, especially given that the protestors were able to convey their message within reasonable proximity to their intended recipients.

B. PLACING *SCHENCK* IN THE *MADSEN* FRAMEWORK

Just as *Madsen* does not parallel *Dennis*, *Schenck* does not parallel *Yates*. The Court in *Yates* faced a scenario so close to *Dennis* that one of the Justices described the defendants as "engaged in this conspiracy with the [*Dennis*] defendants," and as "serv[ing] in the same army and engag[ing] in the same mission."[220] The *Yates* Court nevertheless reversed all of the defendants' convictions, but did not overrule *Dennis*. Rather, the *Yates* Court managed to gut the Court's earlier holding while purporting to apply its principles. *Schenck* simply does not follow this pattern.

Schenck and *Madsen* did involve similarly situated petitioners. Clearly, the protestors in both cases worked toward the same goal—the eradication of abortion services—and they used similar disruptive tactics to further that goal. In this sense, the *Schenck* and *Madsen* petitioners were "serving in the same army and engaging in the same mission" much like the communist defendants. But the *Schenck* Court's willingness to uphold portions of the injunction after applying *Madsen*'s principles does not mean that the *Schenck* Court gutted the earlier decision. First, *Madsen* upheld a thirty-six-foot buffer zone while the *Schenck* Court refused to uphold a smaller, fifteen-foot buffer zone. But unlike the floating buffer zone struck down in *Schenck*, the *Madsen* thirty-six-foot buffer zone was fixed and did not pose the same problems with

---

[219] *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654-55 (1981) (upholding restrictions on leafleting in walking areas of state fair); *O'Brien*, 391 U.S. at 389 (upholding restriction on knowingly destroying draft cards and finding that defendant could have conveyed message through alternative means).

[220] Yates v. United States, 354 U.S. 298, 344-45 (1957) (Clark J., dissenting).

HeinOnline -- 33 Ga. L. Rev. 46 1998-1999

compliance or potential chilling of speech.[221] Second, in refusing to uphold the fifteen-foot floating buffer zone, the *Schenck* Court relied solely on the difficulty of compliance with that injunctive provision, finding that such difficulty violated *Madsen's* requirement that the injunction burden no more speech than necessary to serve a significant government interest.[222] The Court did not hold that protestors had a right to engage in aggressive or face-to-face protests. In fact, the Court suggested that a more narrowly tailored injunction creating "some sort of zone of separation" between protestors and individuals seeking access or egress from the clinic might have been appropriate.[223] Thus, to say that *Schenck* represents a retreat from *Madsen* is to ignore the facts in *Schenck* as well as what the *Schenck* Court said.

Finally, though the *Yates* Court purported to apply the earlier principles announced in *Dennis*, it did no such thing. Rather it manipulated the earlier test in *Dennis*, which focused on the gravity of the evil presented by a communist conspiracy, into a test that focused mainly on whether the communist defendants had expressly advocated the violent overthrow of the government. That is, *Yates* obviously changed the focus of the *Dennis* test though it refused to admit to doing so. Instead of changing the focus of *Madsen*, *Schenck* examined and applied *Madsen*'s principles in excruciating detail. In fact, the *Schenck* Court was willing to uphold most of the challenged portions of the injunction after an application of the earlier decision. Thus, it is difficult to conclude that *Schenck* somehow diminished the *Madsen* standard. This is especially true when one considers the *Schenck* Court's willingness to uphold the "cease and desist" provision when the *Madsen* Court struck a similar provision.[224] If anything, the *Schenck* Court went further than *Madsen* in upholding restrictions against speech.

---

[221] The *Madsen* buffer zone was tied to the property line surrounding the clinic, *Madsen*, 512 U.S. at 771, while the floating buffer zone in *Schenck* was tied to persons who were continually entering and leaving the clinics. Schenck v. Pro-Choice Network, 117 S. Ct. 855, 866-67 (1997). Moreover, the *Schenck* Court upheld a fixed buffer zone much like the one in *Madsen*. 117 S. Ct. at 868.

[222] *See supra* notes 166-168 and accompanying text (explaining the *Schenck* Court's reasons for striking down floating buffer zone).

[223] *Schenck*, 117 S. Ct. at 867.

[224] *Madsen* struck down the 300-foot "no approach" zone, claiming it violated the Court's previous decisions refusing to protect people from offensive speech. 512 U.S. at 774.

HeinOnline -- 33 Ga. L. Rev. 47 1998-1999

V. SUPREME COURT COMPLICITY IN PROTESTOR MISCHARACTERIZATIONS

Though *Madsen* and *Schenck* do not parallel the doctrinal aspects of the earlier communist decisions, the Court is not wholly without fault regarding protestor manipulation of the abortion protest decisions. Indeed, the majority opinions[225] in *Madsen* and *Schenck* are spectacular examples of the Court's tendency to ignore theoretical principles and to default to supportive rhetoric or precedent while ignoring contradictory or ambiguous language and decisions. Such a tactic allowed the dissenting Justices and the protestors to accuse those in the majority of manipulation, thus detracting from the legitimacy of its decisions. Nowhere is this manner of response more evident than in *Madsen*'s discussion of the prior restraint doctrine and the problem of motive in content-discrimination, and *Schenck*'s discussion of the "cease and desist" provision.

A. PRIOR RESTRAINT

Given the popular association of injunctions and prior restraints,[226] the *Madsen* petitioners' attempt to cast the injunction as a prior restraint was, if not a winning argument, certainly a logical one. Yet, the *Madsen* Court's response to that argument was so minimal—a single footnote—as to imply that it was almost frivolous. While acknowledging that "[p]rior restraints do often take the form of injunctions," citing *New York Times v. United States*[227] and *Vance v. Universal Amusement Co.*,[228] the *Madsen* majority ruled that this particular injunction was not a prior restraint, noting that "[n]ot all injunctions which may incidentally affect expression . . . are 'prior restraints' as that term was used in

---

[225] This is not to say that the dissenting opinions are models of theoretical reasoning. They are not. In fact, both dissents engage in many of the same tactics and rhetorical devices as the majority opinions. This discussion focuses on the majority opinions, however, because those are the opinions to which the public responded.

[226] *See supra* note 191 and accompanying text (discussing popular understanding that doctrine of prior restraint is largely aimed at eradicating injunctions against speech).

[227] 403 U.S. 713 (1971) (per curiam).

[228] 445 U.S. 308 (1980).

HeinOnline -- 33 Ga. L. Rev. 48 1998-1999

New York Times Co. or *Vance*."[229] The Court further bolstered its rejection of the protestors' argument by briefly pointing out that the injunction was not content-based and that the petitioners were still free to disseminate their message outside of the thirty-six-foot buffer zone.[230]

Unfortunately, the majority's terse discussion raised more questions than it answered. Its allusion to *New York Times* and *Vance* was at the very least unhelpful and, more probably, confusing. The per curiam opinion in *New York Times* consisted of barely ten sentences, simply stating in relevant part:

> We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."
>
> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." . . . [The District Courts] held that the Government had not met that burden. We agree.[231]

The opinion contained absolutely no jurisprudential discussion of the factors necessary to make injunctions into prior restraints. The actual analysis in *New York Times* was so thin, it prompted one commentator to note that it did "not make any law at all, good or bad" and that on the issue of "whether injunctions against the press are permissible, . . . [*New York Times*] can supply no precedent."[232] *Vance* similarly sheds no light on the subject. It, like *New York Times*, contains little discussion of the characteris-

---

[229] *Madsen*, 512 U.S. at 763 n.2.

[230] *Id.*

[231] *New York Times*, 403 U.S. at 714 (citations omitted).

[232] Peter Junger, *Down Memory Lane: The Case of the Pentagon Papers*, 23 CASE W. RES. L. REV. 3, 4-5 (1971).

HeinOnline -- 33 Ga. L. Rev. 49 1998-1999

tics of injunctions warranting the "prior restraint" label.[233] Moreover, *Vance* involved an injunction against the publication of obscenity, a situation in which the Court takes a particularly unique approach.[234] In fact, both cases reflect a broader problem with the Court's jurisprudence regarding prior restraints: rather than engage in meaningful analysis, the Court has more or less simply concluded that a particular judicial order was or was not a prior restraint without discussing the factors supporting its determination.[235] Thus, if the *Madsen* majority expected its reference to *New York Times* and *Vance* to explain its decision, it failed miserably. If anything, *Madsen* simply furthers the incoherence already associated with the prior restraint doctrine.

The *Madsen* Court's reference to the injunction's content-neutrality and limited nature, while apparently an attempt to

---

[233] In *Vance*, a Texas statute allowed judges to issue injunctions barring all future displays of obscenity based upon a showing that obscene films were exhibited in the past. 445 U.S. at 311. According to the Court, the statutory scheme was invalid because it "authorize[d] prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene." *Id.* at 316. This statement does not clarify whether the injunction was a prior restraint *because* of its perpetual nature and imposition in advance of an obscenity determination or whether the injunction is a prior restraint that also *happens to have* those characteristics.

[234] *Id.* at 315-17. The Court has generally upheld injunctions against exhibition of obscene motion pictures as long as the government employs "a constitutionally acceptable standard for determining what is unprotected by the First Amendment" and "impose[s] no restraint . . . until after a full adversary proceeding and final judicial determination . . . that the materials were constitutionally unprotected." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973). Much of the Court's reasoning in such cases stems from the fact that obscenity has no First Amendment value. Outside of the obscenity context, however, that certain speech may enjoy no First Amendment protection does not support the use of a prior restraint. Near v. Minnesota, 283 U.S. 697, 714 (1931) (holding that prior restraints are invalid even where speech regulated may be criminally punished); Jeffries, *supra* note 191, at 410 ("[S]peech that validly could be controlled by subsequent punishment nevertheless would be immune from regulation by prior restraint.").

[235] Professor Jeffries eloquently notes this failure in his statement that "the Court has yet to explain (at least in terms that I understand) what it is about an injunction that justifies this independent rule of constitutional disfavor." Jeffries, *supra* note 191, at 417. Other scholars also generally question the Court's determination that injunctions are prior restraints. *See, e.g.*, William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 253 (1982) (arguing that prompt judicial review removes injunction from prior restraint doctrine); Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 90 (1984) (arguing that injunctions pose no greater harm to First Amendment interests than does subsequent punishment); Scordato, *supra* note 189, at 15 (same).

HeinOnline -- 33 Ga. L. Rev. 50 1998-1999

explain when injunctions amount to prior restraints, is similarly problematic. To be sure, some of the Court's most significant cases overturning court orders under the prior restraint doctrine have involved content-based restrictions of speech.[236] But this does not clearly dispose of the issue. Prior to *Madsen*, the Court never *explicitly required* content discrimination as a predicate for a finding of prior restraint (which may explain the *Madsen* Court's failure to cite any precedent supporting this proposition). In fact, the Court occasionally has upheld content-based injunctions, sometimes without even discussing the prior restraint issue.[237] It also has found at least one facially content-neutral injunction to be invalid.[238] That the Court has not required content-discrimination as a basis for finding an injunction invalid does not mean that the *Madsen* majority could not reconcile its remark with earlier decisions, but it certainly did not.

The *Madsen* Court's simple citation to past precedent with no explanation or attempt at reconciliation gave Justice Scalia, who believed that the injunction was obviously a prior restraint,[239] ample ammunition to support his claim that the majority allowed political issues to cloud its judgment regarding the injunction's

---

[236] *See, e.g., New York Times*, 403 U.S. 713 (order prohibiting publication of information regarding Vietnam War); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (order prohibiting publication of inculpatory information pertaining to criminal defendant).

[237] *See, e.g.*, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (dismissing argument that order forbidding newspaper from classifying ads by reference to sex was prior restraint); National Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679 (1978) (upholding, without discussion of prior restraint issue, an injunction prohibiting professional society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding among engineers was unethical). *See generally The Supreme Court, 1993 Term—Leading Cases*, 108 HARV. L. REV. 139, 276 n.44 (1994) (commenting that *Madsen*'s standard of review for content-neutral injunction was actually far more rigorous than standard applied to content-based injunction in *Professional Engineers*).

[238] In *Keefe*, one of the Court's most frequently cited prior restraint cases, the injunction at issue was facially content-neutral, simply forbidding certain persons "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City of Westchester, Illinois." Organization for a Better Austin v. Keefe, 402 U.S. 415, 417 (1971). Nevertheless, the Court had no trouble finding that the injunction "so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." *Id.* at 418.

[239] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 797 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[A]n injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint.").

HeinOnline -- 33 Ga. L. Rev. 51 1998-1999

constitutionality.[240] Justice Scalia's analysis was as thin as (if not thinner than) the majority's[241] but his long string citation to cases in which the Court previously struck down injunctions as prior restraints[242]—cases that are not even mentioned by the majority—certainly gives one pause regarding the majority opinion's legitimacy on this point. Justice Scalia's pointed (and technically valid) comment noting that there was "no antecedent in [the Court's] cases" for the majority's distinction between content-based and content-neutral injunctions[243] further bolsters the sense that the majority engaged in sleight of hand in order to reach a politically popular decision. After all of this, is it any wonder that the protestors and others responded to *Madsen* as they did?

B. THE ISSUE OF MOTIVE IN CONTENT-DISCRIMINATION

In contrast to its discussion of the prior restraint argument, the *Madsen* majority engaged in a reasonably lengthy analysis of the protestors' argument that the injunction was impermissibly viewpoint-based. Ultimately, however, the majority's analysis of this issue suffered from a defect similar to its prior restraint analysis—a refusal to recognize or reconcile potentially conflicting precedents. Though acknowledging that the injunction *affected* only anti-abortion protestors, the *Madsen* majority rejected the petitioners' argument that it was *necessarily* viewpoint-based and, thus, deserving of strict scrutiny. Instead, viewing the lower court's "purpose as the threshold consideration," the majority concluded that the injunction was content-neutral because it was

---

[240] *Id.* at 784-85.

[241] Aside from his long citation to certain cases, Justice Scalia did little more than parrot rhetoric regarding the Court's antipathy toward prior restraints. *Id.* at 797-98. With the exception of Milkwagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), he also ignored other cases in which the Court upheld injunctions against speech. Moreover, Justice Scalia miscited at least one case, characterizing it as a prior restraint case when it was decided under preemption principles. *Madsen*, 512 U.S. at 799 (citing Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957)).

[242] *Madsen*, 512 U.S. at 798 (Scalia, J., concurring in the judgment in part and dissenting in part).

[243] *Id.* at 797-98 n.3 ("[T]hat injunctions are not prior restraints (or at least not the nasty kind) if they restrain only speech in a certain area, or if the basis for their issuance is not content but prior unlawful conduct . . . has no antecedent in our cases.").

HeinOnline -- 33 Ga. L. Rev. 52 1998-1999

issued as a result of petitioners' past violent conduct rather than their message.[244] Recognizing, however, that even content-neutral injunctions carry greater risks of censorship and abuse than generally applicable ordinances, the majority created a new, slightly higher standard of review than that used for typical content-neutral restrictions.[245]

Justice Scalia attacked the Court's new standard, arguing that the majority should have reviewed the injunction under strict scrutiny, the standard used for content-based restrictions. He primarily disagreed with the majority's inquiry into the lower court's purpose in determining that the injunction was content-neutral and subject to lesser scrutiny:

> "Our cases have consistently held that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." The vice of content-based legislation—what renders it deserving of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.[246]

Because an "injunction, [even if content-neutral, lent] itself just as readily to the targeted suppression of particular ideas" as a content-based statute, Justice Scalia concluded that strict scrutiny was warranted.[247]

There is much in the Court's prior jurisprudence to support Justice Scalia's criticism. Some of the Court's seminal decisions refused to inquire into governmental purpose when determining a regulation's constitutionality. In *Police Department v. Mosely*,[248] the Court struck down as content-based an ordinance prohibiting all picketing except labor picketing near a school despite the city's admittedly neutral purpose of preventing violence by non-labor

---

[244] *Id.* at 763-64.

[245] *Id.* at 764-65 (asking whether "challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest").

[246] *Id.* at 794 (Scalia, J., concurring in the judgment in part and dissenting in part (quoting Simon & Schuster v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 117 (1991)).

[247] *Id.* at 793.

[248] 408 U.S. 92 (1972).

HeinOnline -- 33 Ga. L. Rev. 53 1998-1999

picketers.[249] Similarly, the Court in *United States v. O'Brien*[250] emphatically declared legislative motive irrelevant and refused to apply a heightened standard of review to a facially content-neutral statute, even though the petitioner claimed that the statute was prompted by the legislature's desire to suppress anti-Vietnam protest.[251] Government purpose was not wholly irrelevant to the Court in these cases. In fact, the Court's treatment of content-neutral and content-based regulations is apparently a device with which it ferrets out illicit government purpose via the use of objective tests:[252] content-based laws, which are more likely to be based on an illicit government purpose such as censorship, are subject to strict scrutiny; in contrast, content-neutral laws, which generally have more neutral motives, are subject to lesser scrutiny.[253] Thus, government purpose is important to the Court. But rather than inquire into its actual existence, the Court more or less presumes that purpose depending upon the nature of the regulation and its potential for censorship.

The *Madsen* majority's statement that "purpose is the threshold consideration" is seemingly at odds with the Court's seminal decisions in this area. And the majority's willingness to examine the injunction under a lesser standard, despite its recognition that injunctions against protestors carry heightened risks of censorship and abuse, appears to conflict with its past approach. In this sense, the *Madsen* Court's treatment of the viewpoint-discrimina-

---

[249] *Id.* at 101-02.

[250] 391 U.S. 367 (1968).

[251] *Id.* at 382.

[252] *See* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 362 (1997) (noting Court's concern with ferreting out improper motivation); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (same); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227 (1983) (same); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 127 (same).

[253] *See* Kagan, *supra* note 252, at 451-56 (discussing function of Court's content-based/content-neutral distinction in ferreting out illicit motive); Stone, *supra* note 252, at 230 ("[T]he probability that an improper motivation has tainted a decision to restrict expression is far greater when the restriction is directed at a particular idea, viewpoint, or item of information than when it is content-neutral."); Wells, *supra* note 10, at 175 n.67 ("[While] the government obviously does not enact all content-based laws with improper motives, . . . the likelihood of such motives has led the Court to require compelling justifications for all content-based regulations.").

HeinOnline -- 33 Ga. L. Rev. 54 1998-1999

tion issue may lend itself to claims that the Court bowed to politics and engaged in result-oriented decision-making.

The *Madsen* majority's approach, however, is not wholly without support. Though the Court's approach to governmental purpose is largely as described above, there exist cases, stemming mainly from the Court's decision in *Renton v. Playtime Theatres, Inc.*,[254] in which the Court has inquired into governmental purpose.[255] In *Renton*, the Court found a facially content-based ordinance regulating the location of certain adult movie theaters[256] to be content-neutral because it was not prompted by the government's desire to regulate a particular message but by its desire to regulate certain "secondary effects" of the expression, such as crime or decreased property values.[257] In effect, the *Renton* Court inquired into the purpose underlying the statute rather than looking to its face to determine whether it was content-based or content-neutral. Once the *Renton* Court determined the statute to be content-neutral, it effortlessly upheld it under intermediate scrutiny.[258] *Renton* thus provides some support for the *Madsen* Court's decision to look to government purpose in determining the content-neutrality of the injunction.

Unfortunately, reliance on *Renton* to explain the *Madsen* Court's actions may simply exacerbate the problems in the latter opinion. Numerous scholars argued that *Renton*'s inquiry into governmental purpose was highly inconsistent with the Court's previous method of determining content-neutral and content-based regulations.[259]

---

[254] 475 U.S. 41 (1986).

[255] *Id.* at 54.

[256] The ordinance prohibited any adult motion picture theater (defined as any theater emphasizing sexually explicit material) from locating within 1000 feet of any residential zone, church, or school. *Id.* at 44.

[257] *Id.* at 48-50. The ordinance apparently was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of the [the city's] neighborhoods, commercial districts, and the quality of urban life.' " *Id.* at 48 (quoting ordinance).

[258] *Id.* at 50-54.

[259] *See* Marc Rohr, *Freedom of Speech After Justice Brennan*, 23 GOLDEN GATE U. L. REV. 413, 452 (1993) (asserting that *Renton* is a "wholly unprecedented approach to the understanding of content-neutrality"); Stone, *supra* note 209, at 115 (noting that prior to *Renton*, the Court "in such circumstances ha[d] always invoked the stringent standards of content-based review"); Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904, 1908 (1989) ("*Renton* substantially revises first amendment

HeinOnline -- 33 Ga. L. Rev. 55 1998-1999

They further expressed the fear that *Renton* ultimately would result in the demise of the Court's stringent review of content-based regulations[260] and would "allow an easy path to censorship."[261] The Court's decision is also controversial among its own members. The Court has rarely relied on the secondary effects doctrine to support a decision.[262] More often, it finds a way to avoid using such reasoning.[263] Also, any time the majority discusses the doctrine as even potentially applicable, it does so over the strenuous objections of other Justices who argue that its "broad application may encourage widespread official censorship."[264] *Renton* is thus something of a pariah in terms of Supreme Court doctrine. To the extent that the *Madsen* majority relied on the protestors' violent conduct rather than on the terms of the injunction itself as proof of content-neutrality, its reasoning is similar to *Renton* and also may be suspect.[265]

---

doctrine."); *see also Renton*, 475 U.S. at 56-57 (Brennan, J., dissenting) ("The fact that adult movie theaters may cause harmful 'secondary' land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral.").

[260] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-19, at 952 (2d ed. 1988) ("Carried to its logical conclusion, [the *Renton*] doctrine could gravely erode the first amendment's protections."); Stone, *supra* note 209, at 115-16 (describing decision as "disturbing, incoherent, and unsettling" and as threatening "to erode the coherence and predictability of first amendment doctrine"); Williams, *supra* note 214, at 631-35 (describing *Renton* as narrowing Court's focus regarding content discrimination).

[261] David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55, 93 (1997).

[262] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing *Renton* to support proposition that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral").

[263] *See, e.g.*, Reno v. ACLU, 117 S. Ct. 2327, 2342 (1997) (holding that purpose of Communications Decency Act of 1996 was to protect against primary, rather than secondary, effects of speech); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430 (1993) (asserting that ban on distribution of commercial hand-bills on public sidewalks was not enacted to prevent secondary effects); R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992) (stating that ordinance prohibiting placement of burning cross on property as expression of fighting words "is not directed to secondary effects within the meaning of *Renton*"); Boos v. Barry, 485 U.S. 312, 320-21 (1988) (holding that law prohibiting display of signs at foreign embassy focuses on "direct impact speech has on its listeners," and not on secondary effects).

[264] *Ward*, 491 U.S. at 804 n.1 (Marshall, J., dissenting); *see Boos*, 485 U.S. at 336 (Brennan, J., concurring) (arguing that the doctrine "certainly exacerbates the risk that many laws designed to suppress disfavored speech will go undetected").

[265] Though *Madsen* did not discuss the secondary effects doctrine explicitly, the *Madsen* respondents—various abortion clinics—urged the Court to rely on the rationale in order to uphold the injunction. Brief for Respondents at 28-30, Madsen v. Women's Health Ctr., Inc. 512 U.S. 753 (1994) (No. 93-880). In light of such urging, the majority's use of similar

HeinOnline -- 33 Ga. L. Rev. 56 1998-1999

To say that *Renton* is rarely invoked, however, is not to say that it did not have a lasting effect on the Court's doctrine. If anything, *Renton* created a doctrinal incoherence that likely led to the debate between the *Madsen* majority and dissent. While the *Renton* Court itself looked to the purpose underlying an ordinance, it also specifically chastised the lower court for doing so. The lower court ruled the ordinance unconstitutional because it found that a desire to restrict the theaters' exercise of their First Amendment rights was "a motivating factor" behind the ordinance.[266] The *Renton* Court found the lower court's imputation of illicit motive unwarranted, observing that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[267]

To be sure, there is a difference between the purpose inquiries by the *Renton* Court and the lower court. The lower court essentially engaged in conjecture regarding the potential illicit motive behind the ordinance. The difficulty in ferreting out such conjecture is precisely what the *O'Brien* Court was trying to avoid.[268] The *Renton* majority, on the other hand, merely looked to the reasons proffered by the city in order to determine the nature of the statute, thus avoiding such prophesizing.[269] Unfortunately, though this distinction may have been important to the *Renton* Court, it did not explicitly say so. The *Renton* Court's unwillingness to explain its distinction has further confused later doctrine. As Professor Post notes:

---

reasoning without an explicit discussion of *Renton* may further exacerbate illusions of political decision making.

[266] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

[267] *Id.* at 48 (quoting United States v. O'Brien, 391 U.S. 366, 383 (1968)).

[268] *O'Brien*, 391 U.S. at 383-84; *see also* Post, *supra* note 19, at 1269 ("The project of assessing the blameworthiness of government purposes is afflicted with notorious difficulties. Courts tend to be skittish of the project because they are reluctant to point fingers of accusation. Problems of evidence and interpretation abound.") (citation omitted).

[269] According to the Court, the "ordinance *by its terms* [was] designed" to prevent certain secondary effects rather than to suppress speech. 475 U.S. at 48 (emphasis added). After the initial lawsuit in *Renton* was commenced, the city amended the ordinance to add an explanatory provision regarding the city's intent. 475 U.S. at 61 n.5 (Brennan, J., dissenting).

HeinOnline -- 33 Ga. L. Rev. 57 1998-1999

> There is a pervasive ambiguity as to whether courts are to assess the *justification* for a regulation (the reasons that can be adduced for its passage) or the *motivation* for a regulation (the actual psychological intentions of those who enacted it). These are very different inquiries, and yet the Court has persistently equivocated as to which it means to require.[270]

Not knowing exactly what to do, subsequent decisions both use and eschew purpose analysis. Thus, purpose terminology occasionally creeps into the Court's free speech decisions—especially when the Court wants to uphold a content-neutral law.[271] Simultaneously, the Court has reiterated its belief that governmental purpose is irrelevant to determining a law's legitimacy—especially when it wants to strike down a law that discriminates against certain speech.[272] The ultimate fallout of such schizophrenia is *Madsen*, where both the majority and the dissent cite seemingly relevant precedents in order to support their arguments, thus making the decision seem completely political.

---

[270] Post, *supra* note 19, at 1268 (emphasis in original).

[271] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994) (noting that challenged provisions of Cable Television Consumer Protection and Competition Act were content-neutral because their "design and operation . . . confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech"); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration.").

[272] *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (rejecting petitioners' argument that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas" and noting that past cases "have consistently held that illicit legislative intent is not the *sine qua non* of a violation of the First Amendment" (internal quotation marks omitted)); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (holding law unconstitutional even absent "evidence of an improper censorial motive").

HeinOnline -- 33 Ga. L. Rev. 58 1998-1999

C. IGNORING THE CEASE AND DESIST PROVISION IN *SCHENCK*—FOCUSING ON MINUTIAE AT THE EXPENSE OF SERIOUS DISCUSSION OF OFFENSIVE SPEECH IN THE PUBLIC FORUM

Protestors and neutral observers characterized *Schenck* as a victory for aggressive, "in-your-face" speech[273] even though the *Schenck* Court made no such pronouncement. That characterization of the Court's decision may simply be a wilful misunderstanding—a case of people hearing what they want to hear. But the *Schenck* majority's focus on minutiae likely facilitated such manipulation. Out of roughly twelve pages, the majority opinion spent almost five pages discussing the facts and lower court opinions,[274] one page discussing *Madsen* and its test,[275] almost five pages analyzing the *Schenck* buffer zones under *Madsen*,[276] and barely one page discussing why the "cease and desist" provision survived constitutional scrutiny.[277] Thus, the bulk of the Court's analysis focuses on an explication of *Madsen* and its application to the buffer zones, of which almost two pages explain in detail the problems with the floating buffer zone and its resulting unconstitutionality.[278] In contrast, the *Schenck* majority "quickly refuted" the petitioners' challenge to the "cease and desist" provision, noting that it "was an effort to enhance petitioners' speech rights."[279] Given the *Schenck* majority's focus on the buffer zones, along with its relative dismissal of the challenge to the "cease and desist" provision, it is unsurprising that protestors looked upon the Court's decision to strike the most physically restrictive provision of the injunction as momentous.

Ironically, the Court's discussion of the floating buffer zones was simply a straightforward application of *Madsen's* requirement that a content-neutral injunction "burden no more speech than necessary to serve a significant government interest."[280] That aspect

---

[273] *See supra* notes 180-183 and accompanying text (discussing reaction to *Schenck*).
[274] Schenck v. Pro-Choice Network, 117 S. Ct. 855, 859-64 (1997).
[275] *Id.* at 864-65.
[276] *Id.* at 865-69.
[277] *Id.* at 869-70.
[278] *Id.* at 866-68.
[279] *Id.* at 870.
[280] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

HeinOnline -- 33 Ga. L. Rev. 59 1998-1999

of the decision broke no new ground—other than to say that buffer zones cannot float. Indeed, it was relatively pedestrian. On the other hand, the *Schenck* Court's decision to uphold the "cease and desist" provision was momentous. Had the majority even minimally discussed that issue, the protestors and others might have realized what they potentially lost.

The Court has long held that certain public property, like the streets and sidewalks used by the anti-abortion protestors, must be held open for speech purposes.[281] The government cannot shut off communicative activity altogether in such fora and the Court will strictly scrutinize content-based restrictions in them.[282] A fundamental aspect of the Court's jurisprudence in this area involves the notion that the government cannot regulate speech in the public forum simply because some people take offense to it: "[I]n 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.' "[283] One could argue that the "cease and desist" provision violated these doctrinal tenets. The district court's order allowed persons entering or leaving the clinic to terminate even peaceful counseling sessions by indicating a desire for the counselors to leave the fifteen-foot buffer zone.[284] It is not unlikely that many of those entering or leaving the clinic would simply silence a counselor because they did not

---

[281] *See* Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality decision) ("Wherever the title of streets and parks may rest, 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 thought between citizens and discussing public questions.").

[282] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (discussing standards of review to be applied to restrictions of speech in a public forum). A city may regulate speech in a public forum for content-neutral reasons, such as to keep public order. The Court reviews such restrictions of speech under intermediate scrutiny. *Id.*

[283] Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1987)); *see also* Texas v. Johnson, 491 U.S. 397 (1989) (holding that public display cannot be prohibited simply because society finds actions offensive); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) (finding that constitutional test for protected speech is not whether it is "sufficiently offensive to require protection for the unwilling listener"); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that criminal punishment of public display of four-letter expletive based upon its offensiveness was unconstitutional).

[284] Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1440 (citing paragraph 1(c) of the *Schenck* injunction), *aff'd in part, rev'd in part sub nom.* Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), *vacated in part en banc*, 67 F.3d 377 (2d Cir. 1995), *aff'd in part, rev'd in part*, 117 S. Ct. 855 (1997).

HeinOnline -- 33 Ga. L. Rev. 60 1998-1999

agree with or were offended by their anti-abortion message.[285] The district court's grounding of the provision partly in the right of persons entering and leaving the clinic to be free from unwanted speech further bolsters this conclusion.[286] In this light, the *Schenck* Court's refusal to examine the "cease and desist" provision in depth is odd—especially given its acknowledgment that the lower court's basis for the injunction was faulty.[287] Adding to the almost surreal nature of the *Schenck* Court's treatment of the "cease and desist" provision is the fact that *Madsen* struck down a similar provision prohibiting all uninvited approaches within 300 feet of the abortion clinic, primarily because it suppressed speech based upon its offensiveness.[288] Yet the *Schenck* Court barely attempted to reconcile its decision with *Madsen*.[289]

The *Schenck* Court's blithe treatment of the "cease and desist" provision raises two significant dangers. First, by giving that provision short shrift, the opinion gives a far greater sense of

---

[285] Petitioners made this exact argument regarding the "cease and desist" provision. Brief for Petitioners at 38-44, Schenck v. Pro-Choice Network, 117 S. Ct. 855 (1997) (No. 95-1065). *See also* Pro-Choice Network v. Schenck, 67 F.3d 359, 371-72 (2d Cir. 1994) (striking down "cease and desist" order).

[286] *Project Rescue*, 799 F. Supp. at 1435-36.

[287] *See Schenck*, 117 S. Ct. at 870 ("We doubt that the District Court's reason for including that provision—'to protect the right of people approaching and entering the facilities to be left alone'—accurately reflects our First Amendment jurisprudence in this area.").

[288] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773 (1994).

[289] The Court made a rather feeble attempt to reconcile its decision upholding the "cease and desist" provision with its decision in *Madsen* to strike down the "no approach" zone, noting that the injunctive provision in *Madsen* created a much larger zone than the fifteen-foot zone in *Schenck* and, thus, was far broader than necessary to ensure access to the clinic. *Schenck*, 117 S. Ct. at 870 n.12. That attempt, however, ignored that the *Madsen* Court found the access concerns intermixed with the issue of regulating offensive speech. *Madsen*, 512 U.S. at 774. The *Madsen* Court noted that

> it is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful that contact may be .... "As a general matter, we have indicated that 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.' " ... The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). To say that the *Schenck* zone is constitutional merely because it is smaller is to ignore the offensive speech issue raised by the earlier decision.

HeinOnline -- 33 Ga. L. Rev. 61 1998-1999

importance to the opinion's buffer zone analysis than it deserves. In this instance, public manipulation of the opinion by protestors and others was the ultimate result. Second, by upholding the "cease and desist" provision without engaging in any serious discussion of its potential inconsistency with past cases, the opinion opens itself up to future criticism that it ignored jurisprudential principles to reach a particular result.[290] Justice Scalia's outraged comment that "[t]he most important holding in today's opinion is tucked away in the seeming detail of the 'cease and desist' discussion in the penultimate paragraph of analysis"[291] portends such future censure. In either situation, the legitimacy of the Court's decision is undermined.

CONCLUSION

In fifty years will we look back on *Madsen* and *Schenck* as political decisions just as we do *Dennis* and *Yates*? Though the former cases do not fit the pattern of manipulation of the earlier communist decisions, the Court's willingness to default to convenient rhetoric and precedent in the abortion protest cases may ultimately cause just such a cynical response. Certainly, the protestors' comments regarding the cases have already started down that path. But more is at stake here than the ultimate viability of *Madsen* and *Schenck*. The Court's apparent inconsistency in decision-making undermines its legitimacy as an institution. As Professor Dworkin has noted:

> Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation . . . . [J]udges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one . . . .

---

[290] *See, e.g.*, Sean Gillen, Case Note, *The Supreme Court Drops the Buffered Ball and Ceases and Desists from a Tradition of Stare Decisis in* Schenck v. Pro-Choice Network, 31 CREIGHTON L. REV. 953, 995-96 (1998) (arguing that abortion politics caused Court to ignore jurisprudential principles in upholding "cease and desist" provision).

[291] *Schenck*, 117 S. Ct. at 871 (Scalia, J., concurring in part and dissenting in part).

HeinOnline -- 33 Ga. L. Rev. 62 1998-1999

> [They must form] some coherent principle whose influence then extends to the natural limits of its authority.[292]

The need for coherence and legitimacy would seem to be especially true in the area of freedom of speech, one of our most celebrated liberties. Yet, to date, the Court has not explicitly "plunge[d into its First Amendment decisions] at the level of principle."[293] It is time that it did so. Though it likely will prove difficult to engage in such a task, it is not impossible.[294] As I have argued elsewhere, the overall structure of the Court's free speech jurisprudence—as opposed to its rhetoric—is already consistent with a philosophy of autonomy based upon the works of Immanuel Kant.[295] An *explicit* adoption of Kantian principles and further explication regarding how they propel current and future doctrine might allow the Court to climb out of its theoretical abyss.[296] In

---

[292] ROBERT DWORKIN, LAW'S EMPIRE 167, 169, 219 (1986); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 69 (2d ed. 1986) ("[T]he Court must act rigorously on principle, else it undermines the justification for its power.").

[293] KALVEN, *supra* note 2, at 3.

[294] For years, numerous theorists have proposed authoritative bases that they believe should or do govern the Court's First Amendment jurisprudence. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); ROBERT POST, CONSTITUTIONAL DOMAINS (1995); C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979 (1997); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

[295] *See* Wells, *supra* note 10.

[296] Not all scholars agree that use of foundational principles to decide cases is necessary or even good. Professor Sunstein, for example, argues that "incompletely theorized agreements"—those in which people agree on a particular rule or outcome but disagree regarding its background justification—are a positive aspect of judicial decision-making. CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35-44 (1996). While there may be advantages to such agreements in certain circumstances, problems arise in those instances in which we do not agree on a particular rule or outcome, as demonstrated in the communist and abortion protest cases. In the absence of agreement on the rule, lack of a coherent theory simply exacerbates public perception regarding the political nature of the Court's action. As Professor Fallon has noted:

> Despite the possibility of reasonable disagreement in constitutional law, we trust the Supreme Court to decide contested issues, largely on the ground that the Court's decisions will at least be disciplined by the demands of principle and by the requirement of articulate reason giving. . . . For the most part, it may be fair for the Court simply to presume that prior decisions have established doctrine that reasonably imple-

HeinOnline -- 33 Ga. L. Rev. 63 1998-1999

turn, explicit application of such principles may explain and legitimize the Court's actions in *Madsen* and *Schenck*, including its decision to uphold the controversial "cease and desist" provision.[297] The manner in which the Court communicates and supports its decisions matters. Protestor response to *Madsen* and *Schenck* are but a preview of the future consequences of the Court's failure to realize this fact.

> ments constitutional principles. But when the Court's majority declines a dissenting opinion's express challenge to justify its decision at a deeper level, it refuses to accept the full discipline of articulate justification that helps to support the legitimacy of judicial review.

Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 117 (1997).

[297] *See generally* Christina E. Wells, Bringing Coherence to the Law of Injunctions Against Expression (1998) (unpublished manuscript, on file with author).

HeinOnline -- 33 Ga. L. Rev. 64 1998-1999