Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997)

Paul Schenck is a Catholic priest who frequently led members of Operation Rescue, a very prominent pro-life group in the 1990s, in anti-abortion protests outside of abortion clinics in upstate New York. The Pro-Choice Network of Western New York filed a complaint against Schenck, claiming that he and his supporters were illegally blockading abortion clinics and harassing women seeking abortions. A federal district court issued a temporary restraining order (TRO), prohibiting Schenck and others from "demonstrating within 15 feet of any person" seeking to enter or leave an abortion clinic. After the Pro-Choice Network presented evidence that members of Operation Rescue frequently violated that TRO, the district court handed down a stronger permanent injunction. The new injunction prohibited all demonstrations fifteen feet from any clinic property (the fixed buffer zone) or "within fifteen feet of any person or vehicle seeking access to or leaving such facilities" (the floating buffer zone). The injunction did permit two persons from Operation Rescue to engage in sidewalk counseling, but required them to "cease and desist from such counseling" and remove themselves to a distance of fifteen feet whenever the object of their counseling indicated no interest. The Court of Appeals for the Second Circuit initially overturned that injunction, but the injunction was reinstated by an en banc decision of that court. Schenck appealed to the Supreme Court of the United States.

The Supreme Court unanimously declared the floating buffer zone unconstitutional, but by a 6–3 vote sustained both the fixed buffer zone and the "cease and desist" provision in the injunction. Chief Justice Rehnquist maintained that fixed buffer zones served the government interest in public safety, but that the floating buffer zone burdened more speech than was necessary to serve that interest. What standard did the chief justice employ to determine whether the injunction violated the First Amendment? Was that standard correct? If that standard was correct, was the standard applied correctly? Why did Justice Scalia dissent? Was he correct that the entire injunction prohibited constitutionally protected speech? As you look at the alignments in this case, to what extent do you believe Schenck *was a free speech case or an abortion case? What explains why the chief justice, an opponent of judicial protection for abortion rights, nevertheless sustained part of the injunction?*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We now apply *Madsen v. Women's Health Center, Inc.* (1994) to the challenged provisions of the injunction and ask whether they burden more speech than necessary to serve a significant governmental interest.

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. . . In making their First Amendment challenge, petitioners focus solely on the interests asserted by respondents in their complaint. But in assessing a First Amendment challenge, a court looks not only at the private claims asserted in the complaint, but also inquires into the governmental interests that are protected by the injunction, which may include an interest in public safety and order. Both the injunction in *Madsen* and the injunction here are supported by this governmental interest. . . . Here, the District Court cited public safety as one of the interests justifying the injunction—certainly a reasonable conclusion, if only because of the dangerous situation created by the interaction between cars and protesters and because of the fights that threatened to (and sometimes did) develop.

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Given the factual similarity between this case and *Madsen*, we conclude that the governmental interests underlying the injunction in *Madsen*—ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services,—also underlie the injunction here, and in combination are certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics.

We strike down the floating buffer zones around people entering and leaving the clinics because they burden more speech than is necessary to serve the relevant governmental interests. The floating buffer zones prevent defendants—except for two sidewalk counselors, while they are tolerated by the targeted individual—from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum. On the other hand, we have before us a record that shows physically 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. In some situations, a record of abusive conduct makes a prohibition on classic speech in limited parts of a public sidewalk permissible. We need not decide whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two. We hold here that because this broad prohibition on speech "floats," it cannot be sustained on this record.

Since the buffer zone floats, protesters on the public sidewalks who wish (i) to communicate their message to an incoming or outgoing patient or clinic employee and (ii) to remain as close as possible (while maintaining an acceptable conversational distance) to this individual, must move as the individual moves, maintaining 15 feet of separation. But this would be difficult to accomplish at, for instance, the GYN Womenservices clinic in Buffalo, one of the respondent clinics. The sidewalk outside the clinic is 17–feet wide. This means that protesters who wish to walk alongside an individual entering or leaving the clinic are pushed into the street, unless the individual walks a straight line on the outer edges of the sidewalk. Protesters could presumably walk 15 feet behind the individual, or 15 feet in front of the individual while walking backwards. But they 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. With clinic escorts leaving the clinic to pick up incoming patients and entering the clinic to drop them off, it would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits. That is, attempts to stand 15 feet from someone entering or leaving a clinic and to communicate a message—certainly protected on the face of the injunction—will be hazardous if one wishes to remain in compliance with the injunction. Since there may well be other ways to both effect such separation and yet provide certainty (so that speech protected by the injunction's terms is not burdened), we conclude that the floating buffer zones burden more speech than necessary to serve the relevant governmental interests. . . .

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We likewise strike down the floating buffer zones around vehicles. Nothing in the record or the District Court's opinion contradicts the commonsense notion that a more limited injunction—which keeps protesters away from driveways and parking lot entrances (as the fixed buffer zones do) and off the streets, for instance—would be sufficient to ensure that drivers are not confused about how to enter the clinic and are able to gain access to its driveways and parking lots safely and easily. In contrast, the 15-foot floating buffer zones would restrict the speech of those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully. We therefore conclude that the floating buffer zones around vehicles burden more speech than necessary to serve the relevant governmental interests.

We uphold the fixed buffer zones around the doorways, driveways, and driveway entrances. These buffer zones are necessary to ensure that people and vehicles trying to enter or exit the clinic

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property or clinic parking lots can do so. [T]he record shows that protesters purposefully or effectively blocked or hindered people from entering and exiting the clinic doorways, from driving up to and away from clinic entrances, and from driving in and out of clinic parking lots. Based on this conduct—both before and after the TRO issued—the District Court was entitled to conclude that the only way to ensure access was to move back the demonstrations away from the driveways and parking lot entrances. Similarly, sidewalk counselors—both before and after the TRO—followed and crowded people right up to the doorways of the clinics (and sometimes beyond) and then tended to stay in the doorways, shouting at the individuals who had managed to get inside. In addition, as the District Court found, defendants' harassment of the local police made it far from certain that the police would be able to quickly and effectively counteract protesters who blocked doorways or threatened the safety of entering patients and employees. Based on this conduct, the District Court was entitled to conclude that protesters who were allowed close to the entrances would continue right up to the entrance, and that the only way to ensure access was to move all protesters away from the doorways. Although one might quibble about whether 15 feet is too great or too small a distance if the goal is to ensure access, we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear.

. . . Based 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. And because defendants' harassment of police hampered the ability of the police to respond quickly to a problem, a prophylactic measure was even more appropriate. . . . The ban on "blocking, impeding, and obstructing access" was therefore insufficient by itself to solve the problem, and the fixed buffer zone was a necessary restriction on defendants' demonstrations.

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Petitioners and some of their amici attack the "cease and desist" provision accompanying the exception for sidewalk counselors as content based, because it allows a clinic patient to terminate a protester's right to speak based on, among other reasons, the patient's disagreement with the message being conveyed. But in Madsen we held that the injunction in that case was not content based, even though it was directed only at abortion protesters, because it was only abortion protesters who had done the acts which were being enjoined. Here, the District Court found that "[m]any of the 'sidewalk counselors' and other defendants ha[d] been arrested on more than one occasion for harassment, yet persist in harassing and intimidating patients, patient escorts and medical staff." These counselors remain free to espouse their message outside the 15-foot buffer zone, and the condition on their freedom to espouse it within the buffer zone is the result of their own previous harassment and intimidation of patients.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in part and dissenting in part.

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There is no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics. "As we said in *Madsen* '[a]s 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.'" But the District Court in this case (like the Court of Appeals) believed that there was such a right to be free of unwanted speech, and the validity of the District Court's action here under review cannot be assessed without taking that belief into account. That erroneous view of what constituted remediable harm shaped the District Court's injunction, and it is impossible to reverse on this central point yet maintain that the District Court framed its injunction to burden "no more speech than necessary" to protect legitimate governmental interests.

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The terms of the injunction's cease-and-desist provision make no attempt to conceal the fact that the supposed right to be left alone, and not the right of unobstructed access to clinics, was the basis for the provision:

[N]o one is required to accept or listen to sidewalk counseling, and . . . if anyone or any group of persons who is sought to be counseled wants not to have counseling, wants to leave, or walk away, they shall have the absolute right to do that, and in such event all persons seeking to counsel that person or group of persons shall cease and desist from such counseling, and shall thereafter be governed by the provisions of [the injunction] pertaining to not demonstrating within fifteen feet of persons seeking access to or leaving a facility.

It is difficult to imagine a provision more dependent upon the right to be free of unwanted speech that today's opinion rejects as applied to public streets. . . .

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The Court proceeds from there to make a much more significant point: An injunction on speech may be upheld even if not justified on the basis of the interests asserted by the plaintiff, as long as it serves "public safety." This is a wonderful expansion of judicial power. Rather than courts' being limited to according relief justified by the complaints brought before them, the Court today announces that a complaint gives them, in addition, ancillary power to decree what may be necessary to protect—not the plaintiff, but the public interest! Every private suit makes the district judge a sort of one-man Committee of Public Safety. There is no precedent for this novel and dangerous proposition. . . .

We have in our state and federal systems a specific entity charged with responsibility for initiating action to guard the public safety. It is called the Executive Branch. When the public safety is threatened, that branch is empowered, by invoking judicial action and by other means, to provide protection. But the Judicial Branch has hitherto been thought powerless to act except as invited by someone other than itself. That is one of the reasons it was thought to be "the least dangerous to the political rights of the [C]onstitution"—because it "can take no active resolution whatever" and "may truly be said to have neither FORCE nor WILL, but merely judgment." It is contrary to the most fundamental principles of separation of powers for the District Court to decree measures that would eliminate obstruction of traffic, in a lawsuit which has established nothing more than trespass.

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JUSTICE BREYER, concurring in part and dissenting in part.

[Justice Breyer's concurrence questioned whether the injunction had actually included a floating bubble.]

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