THE RIGHT OF ACCESS TO PUBLIC FORUMS: DOES A FAILURE TO REQUIRE THE LEAST RESTRICTIVE ALTERNATIVE RESULT IN A FAILURE TO COMMUNICATE?

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I. INTRODUCTION

The United States of America offers its citizens broad protections for speech.[1] Of the rights enumerated in the Bill of Rights, free speech is one of our most important.[2] Extensive scholarship offers four main theories justifying the right of free speech.[3]

First, free speech is necessary for self-government and democracy.[4] It is vital to our ability to self-govern, because this freedom allows the dissemination of information about politics and policies among voters.[5] In order for voters to arrive at the correct public policy and ultimately choose the correct candidate, the free exchange of ideas is vital.[6] Some scholars have argued that in order for a democ-

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[1] U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[2] *See* Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 742 (2004) (citing the Free Speech Clause as one of the most important provisions of the Constitution).

[3] Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130–55 (1989) (categorizing, explaining and challenging the accuracy and value of each of the different justifications).

[4] *Id.* at 148 ("No doubt valid consent to something can often be based on less than full information, but a problem arises when the authority that seeks consent also controls available information. If someone asks my agreement to a course of action and then actively conceals much relevant information that would affect my judgment, my 'consent' is of lessened or no effect.").

[5] *Id.*

[6] *Id.*

racy to function and for self-government to be effective, there can be no restrictions on the right of free speech.[7]

A second justification advanced for the protection of speech is that the free exchange of ideas allows the truth to emerge.[8] In his dissent in *Abrams v. United States*,[9] Justice Holmes coined the term "marketplace of ideas," arguing that the ultimate test of an idea, regardless of whether it was right or true, was whether it was accepted above other ideas, which had an equal right to be heard.[10] Thus, many consider free speech vital to the discovery of truth, and philosophers as well as legal scholars embrace this idea.[11]

A third justification for free speech is that it is necessary for autonomy.[12] Allowing people to freely express themselves allows them to define themselves, which in and of itself has value.[13] Finally, scholars argue that the First Amendment right to freedom of speech promotes tolerance.[14] Permitting citizens to engage in the speech of their choice encourages tolerance of diverse viewpoints.[15]

Although these theories overlap in some areas, most scholars agree on the importance of free speech to self-government.[16] Thus,

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[7] *See, e.g.*, Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (arguing that there should be no limits on the First Amendment, even on private speech such as art and literature, because although such speech does not develop political knowledge, it helps voters acquire intelligence).

[8] Greenawalt, *supra* note 3, at 130.

[9] 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[10] *Id.* at 630 (arguing "that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

[11] *See* JOHN STUART MILL, ON LIBERTY 76 (Gertrude Himmelfarb ed., Penguin Books 1982) (1859) (arguing that suppressing speech deprives men of the truth of an idea, or if the idea is false, the ability to compare this false idea with the truth in order to gain perception).

[12] Greenawalt, *supra* note 3, at 143 ("By affording people an opportunity to hear and digest competing positions and to explore options in conversations with others, freedom of discussion is thought to promote independent judgment and considerate decision, what might be characterized as autonomy.").

[13] *See generally* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (arguing that the sole value of the First Amendment is its role in self-realization, a process by which an individual realizes his potential or commands his destiny).

[14] Greenawalt, *supra* note 3, at 146–47 ("The basic idea is that if we are forced to acknowledge the right of detested groups to speak, we are taught the lesson that we should be tolerant of the opinions and behavior of those who are not like us.").

[15] *Id.*

[16] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.2 (2d ed. 2002).

political speech is generally accorded the greatest protection possible under the First Amendment.[17]

Nevertheless, courts have recognized some restrictions on the right of free speech, even political speech.[18] First Amendment jurisprudence struggles with drawing appropriate lines as to which speech is protected and which is not.[19] As security concerns have increased in the last decade, the desire to feel safe has led to the sacrifice of some First Amendment protections. Federal courts have repeatedly confronted the issue of balancing the right of free speech with providing a safe environment in the last two decades.[20] This conflict has arisen pursuant to protests of many issues, including abortion, war, and our current president.[21]

This Comment focuses on the extent to which security concerns have limited the free access to public forums for speech and altered judicial standards for restrictions on speech. Part II presents the current law on the right of access in public forums, and Part III explores the causes for increasing concerns for security. In Part IV, this Comment describes the approach taken to protect abortion clinics, while still allowing for maximum protection of protesters' First Amendment freedoms. Part V explores the recent problems stemming from the application of the current standard to First Amendment challenges for political speech in public forums. Part VI applies the standard set forth in First Amendment challenges by protesters at abortion clinics to recent case law and determines the difference in outcome that a more protective standard produces. Part VII concludes by urging the implementation of a standard that is more protective of speech than current law by requiring the government to justify the restrictions it places on access to public forums by demonstrating that it has chosen the least restrictive alternative to advance its security concern.

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[17] Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 313–15 (1992) ("The belief that politics lies at the core of the amendment is an outgrowth of the more general structural commitment to deliberative democracy. The concern for ensuring the preconditions for deliberation among the citizenry is closely associated with this commitment.").

[18] *See infra* notes 31–34 and accompanying text.

[19] *See infra* notes 36–38 and accompanying text.

[20] *See infra* notes 124–81 and accompanying text.

[21] *Id.*

II. THE DEVELOPMENT OF JURISPRUDENCE RESTRICTING ACCESS TO PUBLIC FORUMS—THE "TIME, PLACE AND MANNER" STANDARD

Supreme Court opinions that deal with the issue of access to public forums underscore the notion that this right is necessary to facilitate effective self-government.[22] Earlier opinions reflected the notion that free access to public forums was a basic right of citizenship.[23] In *Hague v. Committee for Industrial Organization*,[24] the Court declared unconstitutional a New Jersey statute that required the approval of a local police chief for leasing any hall or space.[25] The government enforced this law to prevent members of the Communist party from holding meetings.[26] Justice Roberts wrote a plurality opinion and invalidated the law, writing that places such as halls and parks should belong to the people:

> 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 thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[27]

The Court recognized the importance of the right of free assembly in public places, but also acknowledged that the right of such assembly could be limited at times.[28] Later Supreme Court decisions would struggle with the appropriate limits to place on this freedom.[29]

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[22] *See infra* notes 23–41 and accompanying text.

[23] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 501 (1939) (addressing the constitutionality of a New Jersey statute that prohibited citizens from meeting in public spaces without the permission of the local government).

[24] 307 U.S. 496 (1939).

[25] *Id.* at 516.

[26] *Id.* at 501.

[27] *Id.* at 515.

[28] *Id.* at 516.

[29] *See infra* notes 31–41 and accompanying text.

In 1941, only two years after the *Hague* decision, the Supreme Court in *Cox v. New Hampshire*[30] upheld a statute challenged by a group of Jehovah's Witnesses wishing to hold a parade and pass out materials.[31] The Court enunciated the standard by which constitutional challenges to restrictions on access to public forums would be measured:

> If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.[32]

Thus, the *Cox* Court crafted the standard that restrictions on speech in public places were constitutional as long as the restrictions were reasonable with regard to time, place, and manner.[33] Once the Court determined that the ability to regulate the use of places such as streets, parks, and other public forums was properly within the State's power, it adopted a deferential standard to the State's judgment in such matters.[34]

The Supreme Court refined the test over the years, but even with the refinements the Court remained deferential to restrictions on the use of parks and other public forums. In *Clark v. Community for Creative Non-Violence*,[35] the Court upheld the National Park Service's decision to prohibit protestors from sleeping in parts of Lafayette Park, as a demonstration against the plight of the homeless.[36] The majority opinion, authored by Justice White, reiterated the standard for restrictions on speech.[37] The Court reaffirmed that reasonable time, place, and manner restrictions were proper.[38] The Court, however, clarified the additional requirements that the regulations of speech could not be content-based, that they must be narrowly tailored to serve a significant governmental interest and that there be

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[30] 312 U.S. 569 (1941).
[31] *Id.* at 570–71.
[32] *Id.* at 576.
[33] *Id.*
[34] *Id.*
[35] 468 U.S. 288 (1984).
[36] *Id.* at 289.
[37] *Id.* at 293.
[38] *Id.*

alternative channels for communication of the information.[39] While this could be viewed as an expansion in speech protection, Justices Brennan and Marshall pointed out, in dissent, the inadequacy of this protection.[40] The Justices argued that once a regulation is found to be content-neutral, the level of scrutiny is minimal, offering little protection for important forms of speech.[41]

While the Court's constitutional standard for permit and guideline schemes looks at whether the regulation is narrowly tailored, under current authority the State does not need to employ the least restrictive alternative to advance its legitimate concerns.[42] In fact, the Court expressly stated that it does not require such a showing for a regulation to pass constitutional muster.[43] In *Ward v. Rock Against Racism*, an association, Rock Against Racism (RAR), dedicated to the promotion of anti-racist views, challenged a New York City guideline that controlled the volume of sound amplification at public events.[44] Due to problems with excessive noise in the past, the City's guidelines controlled sound amplification for events at Naumberg Bandshell, where the RAR event was to take place.[45] RAR sought an injunction that would permit it to use its own equipment and technician.[46] In prior years, the City permitted RAR this autonomy.[47] The district court denied the injunction, but the Second Circuit reversed.[48]

Although the guideline was content-neutral, served a significant governmental interest, and left open ample alternative channels of communication, the Second Circuit struck down the guideline because the City had not used the least restrictive alternative for controlling the sound volume at the event.[49] In reversing the Second

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[39] *Id.*

[40] *See id.* at 301 (Marshall, J., dissenting).

[41] *Clark*, 468 U.S. at 313 (Marshall, J., dissenting) (arguing that "[b]y narrowly limiting its concern to whether a given regulation creates a content-based distinction, the Court has seemingly overlooked the fact that content-neutral restrictions are also capable of unnecessarily restricting protected expressive activity").

[42] *See* Ward v. Rock Against Racism, 491 U.S. 781 (1989).

[43] *Id.* at 782.

[44] *Id.* at 787.

[45] *Id.* at 785. The guideline provided that the "Department of Parks and Recreation is to be the sole and only provider of sound amplification, including though not limited to amplifiers, speakers, monitors, microphones, and processors." *Id.* at 788.

[46] *Id.* at 787–88.

[47] *Ward*, 491 U.S. at 787.

[48] Rock Against Racism v. Ward, 848 F.2d 367, 372 (2d Cir. 1988).

[49] *Id.* at 370 (holding that the guideline "must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation" and offering several less restrictive methods of achieving the City's goal).

Circuit's decision, the Supreme Court held that its test did not require use of the least restrictive alternative when regulating speech in public forums:

> The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest. If these standards are met, courts should defer to the government's reasonable determination.[50]

Thus, the Court held that when hearing challenges based on access to public forums, courts need not inquire whether the government's objective could be accomplished in a less restrictive manner.[51]

In dissent, Justice Marshall argued that the Court had significantly lessened the constitutional protection for speech.[52] Justice Marshall was concerned that the majority's opinion articulated a new standard for the protection of speech that replaced scrutiny with "mandatory deference."[53] Furthermore, he reasoned that if the lower courts should no longer inquire whether the goals of the regulation could be achieved in a less intrusive manner, they would be unable to determine whether the government had adopted a regulation that burdened more speech than necessary.[54]

Thus, the "time, place, and manner" standard does not require strict scrutiny by the courts.[55] Only when there are no standards for issuing permits for public forums and the permit scheme is left fully to the discretion of a public official should a court apply strict scrutiny to a restriction on speech.[56] This additional requirement of actual, set standards for the issuance of permits affords more protection for speech, but after *Ward*, there is no requirement that the government employ the least restrictive alternative to achieve its objectives.

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[50] *Ward*, 491 U.S. at 782–83 (syllabus).

[51] *Id.*

[52] *Id.* at 803 (Marshall, J., dissenting).

[53] *Id.*

[54] *Id.* at 807.

[55] *Id.* at 800 (majority opinion).

[56] Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969) ("Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community.").

III. THE RISE OF SECURITY CONCERNS

In *Ward*, the Supreme Court left no doubt that lower courts need not require use of the least restrictive alternative in order to uphold a government restriction of free access to a public forum.[57] More recent events have generated an increase in anxiety over large protests, leading to a heightened desire to control or prevent such demonstrations from taking place.[58]

Although many cite the events of September 11, 2001 (9/11) as the cause of increased security concerns regarding access to public forums for demonstrations and protests, anxiety about safety predated 9/11.[59] More than any other event in the last half-century, or quite likely any event in the history of this nation, however, the events of 9/11 have increased the cause for security concerns. These events have dominated discussions of safety, and prevention of another terrorist attack is paramount in any regulation or restriction on access to a public forum. Still, 9/11 brought a climax to the already growing anxiety over safety.

For example, in Seattle, Washington in late 1999, the protests against the World Trade Organization (WTO)[60] summit threw the city into chaos.[61] The protest drew together many different organizations and constituencies to demonstrate and disrupt the meetings of the world's most influential trade-governing bodies.[62]

The WTO summit in Seattle began on November 29, 1999, and the protests began that same day.[63] Over 1400 organizations joined the protests, viewing the talks as a tool for the wealthy to eliminate jobs.[64] The protests lasted for five full days and eventually disrupted the summit on December 3, 1999. The protests closed the central business district of Seattle and effected a great deal of damage and

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[57] *Ward*, 491 U.S. at 782.

[58] *See infra* notes 59–77 and accompanying text.

[59] *See infra* notes 60–77 and accompanying text.

[60] The World Trade Organization is an international body that promulgates rules dealing with trade among nations. World Trade Organization, What is the WTO?, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Dec. 21, 2005).

[61] The WTO History Project, WTO History Project, http://depts.washington.edu/wtohist/index.htm (last visited Dec. 21, 2005).

[62] The WTO History Project, Day One: November 29, 1999, http://depts.washington.edu/wtohist/day1.htm (last visited Dec. 21, 2005)

[63] The WTO History Project, About the Project, http://depts.washington.edu/wtohist/about_project.htm (last visited Dec. 21, 2005).

[64] The WTO History Project, Introduction to the Protests, http://depts.washington.edu/wtohist/intro.htm (last visited Dec. 21, 2005).

destruction on the city.[65] The protests also exposed the Seattle police force's lack of adequate preparation for managing the planned demonstration.[66] There was also massive public outrage at the tactics the police used to control the protesters, which included clearing crowds with tear gas.[67] These tactics elicited increasingly violent and destructive responses from the protesters.[68] As the days passed, the police arrested growing numbers of protesters, until nearly 600 people were jailed.[69] The summit was eventually cancelled, due to the destruction and violence in the city, compounded by the Seattle Police Department's inability to protect the WTO dignitaries' safety.[70]

Also prior to 9/11, increasing concern for security arose in reaction to the continued violence at abortion clinics. Although clinics are more physically permanent targets than the WTO summit, the continuing incidents of violence involving them underscore concerns for safety.[71] Abortion has been a major political issue since 1973, when the Supreme Court determined that abortion was a fundamental right in *Roe v. Wade*.[72] Since the *Roe* decision, opposition to abortion has grown more zealous causing increased incidents of violence on abortion clinics,[73] including bombings and fires.[74]

In other instances, abortion protesters were able to "blockade" the clinics by having enough demonstrators present at the clinic to completely prevent access to it.[75] In Cherry Hill, New Jersey, a blockade of this nature was successful in overwhelming police and other law enforcement officials and shutting the clinic down for a day.[76] These violent and zealous demonstrations are not only intimidating and disruptive, but they are expensive as well.[77] Situations such as

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[65] The WTO History Project, Repercussions, http://depts.washington.edu/wtohist/Repercussions.htm (last visited Dec. 21, 2005).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] The WTO History Project, Day Five: December 3, 1999, http://depts.washington.edu/wtohist/day5.htm (last visited Dec. 21, 2005).

[70] *Id.*

[71] *See infra* notes 73–77 and accompanying text.

[72] 410 U.S. 113 (1973).

[73] Stephen J. Hedges et al., *Abortion: Who's Behind the Violence?*, U.S. NEWS & WORLD REP., Nov. 14, 1994, at 50.

[74] *Id.*

[75] Fay Clayton & Sara N. Love, NOW v. Scheidler*: Protecting Women's Access to Reproductive Health Services*, 62 ALB. L. REV. 967, 977 (1999).

[76] *Id.* at 987.

[77] *See, e.g.*, Hedges et. al., *supra* note 73, at 55 (documenting the cost of each bombing or other violent act against a clinic, the minimum of which is $300,000 and in some instances may exceed $1 million).

these caused many states to begin enacting "buffer zones" around clinics to help ensure the safety of clinic personnel and patients. These zones were soon challenged as violations of First Amendment freedoms.[78]

IV. THE JUDICIAL RESPONSE TO THE SECURITY ISSUES AT ABORTION CLINICS

Due to the concern about increasing incidents of violence at abortion clinics, Congress enacted the Freedom of Access to Clinic Entrances Act (FACE).[79] States also enacted legislation and utilized other tools to offer protection to abortion clinics and patients seeking services at these facilities.[80] Abortion protesters challenged the limits placed on demonstrations outside clinics as violative of their First Amendment rights.

A. The Madsen *Test*

When anti-abortion demonstrations outside clinics continued to have a negative effect on the clinics and the women trying to access them, a Florida court issued an injunction that established a thirty-six-foot buffer zone around the clinic, enjoining demonstrators from coming within a certain distance of the clinics.[81] The injunction, which was later broadened to provide more protection for the clinics,[82] was challenged in *Madsen v. Women's Health Center, Inc.* as a violation of the demonstrators' rights under the First Amendment.[83] The Court first noted that its traditional time, place, and manner test for restrictions on speech would not provide the scrutiny this case required because the restriction challenged was an injunction, rather than an ordinance.[84] Chief Justice Rehnquist, writing for the majority, reasoned that an injunction differs from a statute or ordinance and therefore carries a greater risk of censorship.[85] First, unlike an

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[78] *See infra* notes 79–117 and accompanying text.

[79] 18 U.S.C. § 248 (2000) (providing penalties for anyone who attempts to threaten or intimidate an individual who endeavors to procure reproductive services).

[80] For example, Colorado passed legislation protecting access to clinics, which was later challenged. *See infra* notes 112–17.

[81] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 757 (1994).

[82] *Id.* at 758.

[83] *Id.* at 753.

[84] *Id.* at 765 ("Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous.").

[85] *Id.* at 764.

ordinance, an injunction is a judicial decree and not a reflection of a policy choice by the legislature.[86] Next, because a judge crafts an injunction, there is a greater risk of discriminatory enforcement.[87] Because of this increased risk of censorship, the Court applied a more stringent analysis to the injunction, and it inquired "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[88]

In the Court's analysis of the injunction, this heightened scrutiny played a critical role in the Court's decision to strike down portions of the injunction, while upholding others.[89] First, the Court addressed the thirty-six-foot buffer zone around the clinic, an area within which protesters were prohibited from protesting and picketing.[90] The Court upheld this portion of the injunction while noting that the protesters would still be seen and heard from areas outside the buffer zone.[91] Because the protesters still had the ability to make their message heard, Chief Justice Rehnquist concluded that this aspect of the injunction burdened no more speech than necessary to achieve the government's interest.[92] The majority also upheld the Florida court's ban on sound amplification devices, as well as chanting and other such forms of protest to prevent noise-levels around the clinic from getting too high.[93] The Court again determined that these restrictions burdened no more speech than was necessary to achieve the government's objective of ensuring the health and safety of the clinic's patients.[94]

Under this heightened standard of review, however, the majority also found that certain portions of the injunction burdened more speech than was necessary to achieve the government's objectives.[95] The Florida state court placed a ban on all "images observable" outside the clinic in order to stop threats to patients and their families.[96] The Supreme Court, however, determined that the state court could

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[86] *Id.*

[87] *Madsen*, 512 U.S. at 764.

[88] *Id.* at 765.

[89] *Id.* at 768–76.

[90] *Id.* at 768.

[91] *Id.* at 770 ("Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots.").

[92] *Id.*

[93] *Madsen*, 512 U.S. at 772.

[94] *Id.*

[95] *Id.* at 773.

[96] *Id.*

have prohibited threats, rather than all such images.[97] Thus, the Court found this provision to burden more speech than necessary.[98]

The *Madsen* Court also struck down a provision of the injunction that prohibited protesters from physically approaching any person entering the clinic unless such person initiated an interaction or showed a desire to interact first.[99] Again, the majority held that such a prohibition was too broad a measure to prevent intimidation and that the same end could be achieved through narrower and less restrictive means.[100] Finally, under this standard of review, the Court struck down a prohibition on protesting and demonstrating within 300 feet of the clinic staff's homes.[101] The majority once again determined that there was a narrower way of accomplishing the stated goal of achieving tranquility and peace at the homes of these individuals.[102]

Only under this heightened level of scrutiny does the Court determine whether the government's objectives could be accomplished in a less restrictive manner. The Court applied this more rigorous test due to the dangers of an injunction burdening more speech than necessary. The Court found that these dangers were greater in the context of an injunction, rather than an ordinance.[103] If the Court simply used the "time, place, and manner" standard, the only question for the Court would have been whether the restriction was reasonable and would have scrutinized the restriction only under its rational basis review. Under a more traditional analysis, once a court concludes that the restriction was reasonable and the government's objective important, it should look no further to see if the goal could be accomplished through less restrictive means.

B. After Madsen

The constitutionality of placing limits on protesters' ability to demonstrate outside of abortion clinics was revisited by the Supreme

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[97] *Id.*

[98] *Id.*

[99] *Madsen*, 512 U.S. at 773.

[100] *Id.* at 774 (holding that "[a]bsent evidence that the protesters' speech is independently proscribable (*i.e.,* 'fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, this provision cannot stand").

[101] *Id.* at 775.

[102] *Id.* (offering some examples of narrower bans which would accomplish the same or similar result, such as limitations on time and duration of picketing, as well as the number of picketers).

[103] *See supra* notes 85–101.

Court in *Schenck v. Pro-Choice Network of Western New York*.[104] Chief Justice Rehnquist, again writing for the majority, reaffirmed the *Madsen* test[105] and upheld the implementation of a fixed buffer zone around clinics, while striking down a floating buffer zone.[106] In its decision that a floating, rather than a fixed, buffer zone was unconstitutional, the Court determined that the uncertainty of where the zone reached and extended was likely to burden more speech than necessary to achieve the government's interest.[107]

Furthermore, the Court offered greater flexibility for the *Madsen* test. The petitioners also challenged the injunction issued by the district court because the court did not attempt to issue a "non speech-restrictive" injunction first, as the state court did in *Madsen*.[108] The Court, however, explicitly said that it was not necessary to attempt a "non-speech-restrictive" remedy before issuing a "speech-restrictive" one.[109] This flexibility in issuing an injunction or crafting a remedy is important in providing a balance between protecting First Amendment freedoms and offering increased security. The Court attempted to offer the government a variety of remedies to ensure safety, as long as it utilized the least restrictive one. This effort is revealed by the Court's decision not to limit governments by requiring them to first attempt the use of a "non-speech-restrictive" limitation before using a "speech-restrictive" one.[110]

In *Hill v. Colorado*,[111] the Court addressed another First Amendment challenge that limited protesters' access to public forums when the forum they sought was an area outside of an abortion clinic.[112] In this case, however, the restriction challenged was a Colorado statute,

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[104] 519 U.S. 357 (1997).

[105] *Id.* at 370–71. The Court reaffirmed that the test in this context was not the typical "time, place, and manner" test when the challenged restriction was an injunction. *Id.* "The test instead, we held, is 'whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.'" *Id.* at 371 (quoting *Madsen*, 512 U.S. at 765).

[106] *Id.* at 379. The floating buffer zone was a zone around any person entering or exiting the clinic that any uninvited person was prohibited from entering. *Id.* at 378.

[107] *Schenck*, 519 U.S. at 379. The Court cited a lack of certainty on the part of the protesters about whether they were in compliance with the injunction or not. *Id.* at 378. "This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.*

[108] *Id.* at 382.

[109] *Id.* at 382–83.

[110] *Id.* at 382.

[111] 530 U.S. 703 (2000).

[112] *Id.* at 707–08.

rather than an injunction like in *Madsen* and *Schenck*.[113] Justice Stevens, writing for the majority, upheld the constitutionality of the statute.[114] In doing so, he declined to extend *Madsen*'s requirement of the least restrictive alternative outside the context of an injunction.[115]

Although the Court declined to use the standard set forth in *Madsen* as the test in *Hill*, its analysis indicated that the statute would pass constitutional muster if viewed under a more scrutinizing lens. For example, the majority mentioned restrictions that were upheld in *Madsen* under its stricter test that were not present before the Court in *Hill*, such as limitations on the number of speakers or sound amplification devices.[116] In fact, the majority even suggested that the statute facilitated communication of the protesters' message, rather than hindering it, because it forced those protesters, whose aggressive tactics discouraged thoughtful discussion, to tone down their efforts.[117] Thus, although the Court declined to extend the more rigorous standard set forth in *Madsen*, there is some evidence that the statute would pass muster under the stricter level of scrutiny and still allow the government to achieve the same end. The difference in the application of tests may not affect the outcome in this case; however, the Court's decision in *Hill*, declining to extend the applicability of *Madsen*, could have a bearing on future cases involving First Amendment challenges.

V. THE RESULT OF A FAILURE TO REQUIRE THE LEAST RESTRICTIVE ALTERNATIVE

Clearly, security concerns are very real. Because access to public forums and the right of free speech are so fundamental to our ability

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[113] *Id.* at 707 ("The specific section of the statute that is challenged, COLO. REV. STAT. § 18-9-122(3) (1999), makes it unlawful within the regulated areas for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person . . . .'").

[114] *Id.* at 714.

[115] *Id.* at 731 (holding "[i]t is precisely because the Colorado Legislature made a general policy choice that the statute is assessed under the constitutional standard set forth in *Ward*, . . . rather than a more strict standard" and citing *Madsen* as the guide for this stricter standard).

[116] *Id.* at 726–27 (citing the fact that the statute does not include the use of the "floating buffer zones" the Court rejected in *Schenck*, as well as the inclusion of a mens rea component for any protester who invades the space of a person seeking treatment or care at the clinic).

[117] *Id.* at 727.

to self-govern, however, security concerns need to be tempered with the ability to disseminate knowledge. The Supreme Court's decision in *Ward* did not require the use of the least restrictive alternative with regard to limits on access to public forums;[118] thus, current doctrine does not provide a strong counter-balancing interest to such restrictions. With increasing safety concerns, many more restrictions on valuable speech will become reasonable "time, place, and manner" restrictions. Without a least restrictive alternative requirement, these reasonable "time, place, and manner" restrictions could result in swallowing valuable speech that should be protected by the First Amendment.

Indeed, the concerns of the dissenting Justices in *Clark*[119] and *Ward*[120] have played out to some extent in later case law.[121] The dissenting Justices in both cases feared that the constitutional standard for judging these restrictions was too deferential to the government.[122]

> It will be enough, therefore, that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus. Despite its protestations to the contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase.[123]

The fact that the Court no longer required that the restrictions on access to public forums be narrowly tailored makes it much easier for the government to justify such regulations.

A. United for Peace and Justice v. City of New York[124]

Prior to the invasion of Iraq in 2003, a coalition of local and national organizations wished to demonstrate against the war in front of the United Nations in New York City.[125] When the City declined to

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[118] *See* Ward v. Rock Against Racism, 491 U.S. 781, 782 (1989).

[119] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 301–16 (1984) (Marshall, J., dissenting).

[120] *Ward*, 491 U.S. at 803–12 (Marshall, J., dissenting).

[121] *See infra* notes 125–81 and accompanying text.

[122] *See Clark*, 468 U.S. at 301 (Marshall, J., dissenting); *see also Ward*, 491 U.S. at 803 (Marshall, J., dissenting) (arguing that the majority opinions in both cases significantly lowered the protection for important speech and fearing that the decisions would result in the suppression of valuable speech).

[123] *Ward*, 491 U.S. at 806 (Marshall, J., dissenting).

[124] 243 F. Supp. 2d 19 (S.D.N.Y. 2003).

[125] James Barron, *Critical of Judge's Ruling, Antiwar Protesters Brace for Rally*, N.Y. TIMES, Feb. 15, 2003, at B1.

issue a permit for this demonstration, the coalition challenged that action as a violation of their First Amendment freedoms.[126] The district court denied the plaintiff's motion for a preliminary injunction, holding that the City's action—preventing the demonstration at that time and place—did not violate United for Peace and Justice's First Amendment rights.[127] In determining whether the City's denial of a permit infringed upon the group's constitutional freedoms, the court first noted the heightened awareness of security in Manhattan, and specifically around the United Nations building, since 9/11.[128] When assessing whether the City's restriction left open ample alternatives for communication, the court pointed out different alternatives for United for Peace and Justice,[129] some of which were *visible* from the United Nations Building.[130] Nevertheless, the court had little sympathy for the anti-war demonstration's desire to be heard in front of the building.[131] Indeed, as an anti-war protest, a march in front of the United Nations building would have provided the demonstrators a unique opportunity to communicate the group's message, and the court did not acknowledge the inadequacy of other possible forums.[132] The court assessed the City's stationary rally alternative and deemed that alternative to be an adequate substitute for the proposed march.[133] Furthermore, after examining the alternative modes of communication, the court deemed them acceptable.[134] In concluding its opinion, the court cited to *Ward*, and used the Supreme Court's language for support that the alternative modes of communication need not be "the least restrictive alternative."[135]

The Court of Appeals for the Second Circuit affirmed the district court's decision.[136] The Second Circuit determined that while the right to engage in political protest is protected, there are limits on this right.[137] When the court determined that the City's offer of

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[126] *United for Peace and Justice*, 243 F. Supp. 2d at 21.

[127] *Id.* at 31.

[128] *Id.* at 24.

[129] *Id.* at 25.

[130] *Id.*

[131] *Id.*

[132] *See generally*, Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. (forthcoming 2006) (discussing how confining protesters in certain spaces has damaging effects on expressive conduct).

[133] *United for Peace and Justice*, 243 F. Supp. 2d at 29.

[134] *Id.*

[135] *Id.* at 32 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 782 (1989)).

[136] United for Peace and Justice v. City of New York, 323 F.3d 175, 176 (2d Cir. 2003).

[137] *Id.* at 176.

the stationary rally was appropriate the court also concluded that it was narrowly tailored, albeit not the least restrictive alternative.[138] The Second Circuit also cited *Ward* for support in its decision that while the City's restrictions needed to be narrowly tailored, "they 'need not be the least restrictive or least intrusive means' of regulating speech."[139] The court also agreed with the district court's conclusion that the City's decision to prohibit a march in favor of the stationary rally was proper.[140] The Second Circuit defended the decision:

> This case, and the district court's decision, are not as unusual or as unprecedented as some have suggested. . . . We are ever mindful of our role in the preservation of our system of ordered liberty, especially in times of war. Not every regulation or governmental action designed to protect the public safety will necessarily win the imprimatur of the courts.[141]

Although the court attempted to reassure itself and others that there will still be adequate protection for fundamental First Amendment freedoms, such as the right of political protest, the ultimate outcome of the case is unsettling. The court's decision gives reason for apprehension because it illustrates the ability of security concerns to squelch potentially valuable political speech, without even an investigation into how such speech could be conveyed in a safe manner.

Although both courts cited to other First Amendment decisions by the Supreme Court, the decision in *Ward* validated the district court and the Second Circuit's less rigorous inquiries into the alternatives the City offered to the protesters.[142] This sort of repression is particularly troubling in a time leading up to our decision to invade another country, and could potentially infringe upon our ability to self-govern.[143]

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[138] *Id.* at 177.

[139] *Id.* (quoting *Ward*, 491 U.S. at 798)

[140] *Id.*

[141] *Id.* at 177–78.

[142] United for Peace and Justice v. City of New York, 243 F. Supp. 2d 19, 32 (S.D.N.Y. 2003).

[143] *See* Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005) (addressing the inadequacy of the time, place, and manner standard in protecting protests); *see also* Hon. Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 795 (2004) (arguing that the courts should not immediately defer to other branches of government during times of war).

B. National Council of Arab Americans v. City of New York[144]

The Republican National Convention generated another example of the tension between the concerns for security and the right of access to public forums. Before the convention, demonstrators protested the Bush Administration and its policies.[145] For example, prior to the convention, the police in New York arrested more than one hundred protesters on bicycles who were riding to express disapproval of the Administration's treatment of the environment.[146] The National Council of Arab Americans and United for Peace and Justice both sought large venues for demonstrations in Central Park held on consecutive days.[147] The New York City Parks Department denied each of their requests for a permit, as well as the respective appeals.[148] United for Peace and Justice initially accepted the West Side Highway as an alternate site for its march, but then rejected the alternative when the City refused to supply certain amenities like water and shuttle buses.[149]

The media followed the struggle between the City and the protest groups. Two general opinions emerged. One point of view was that the City was trying to manage the protests too closely, and by limiting them to such a great degree, removed the power of the protest.[150] Others, however, felt that the protesters had their day in court[151] and that the rights of the protesters must not outweigh the rights of other citizens.[152] Thus, it was up to the courts to determine whether to allow the protests to take place.[153]

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[144] 331 F. Supp. 2d 258 (S.D.N.Y. 2004).

[145] *See infra* notes 146–52 and accompanying text.

[146] Randal C. Archibold, *100 Cyclists Are Arrested as Thousands Ride in Protest*, N.Y. TIMES, Aug. 28, 2004, at B1.

[147] *Id.*

[148] Susan Saulny, *Judge Bars Big Rally in Park, but Protest March Is Still Set*, N.Y. TIMES, Aug. 26, 2004, at B1.

[149] *Id.*

[150] Michael Slackman, *If a Protest Is Planned to a T, Is It a Protest?*, N.Y. TIMES, Aug. 22, 2004, at 4.1 ("But for the protest groups, Mayor Michael R. Bloomberg might as well be Mayor Richard J. Daley of Chicago in 1968. Billyclub or no billyclub, they claim, his aim is to block dissent, to sanitize and strip it of all meaning.").

[151] Editorial, *Sunday in the Park*, N.Y. TIMES, Aug. 27, 2004, at A20 (cautioning demonstrators that frustration over the courts' rulings were not an excuse for lawlessness).

[152] Slackman, *supra* note 150, at 4.1 ("The city takes the view that it is simply trying to accommodate the protesters while at the same time safeguarding everyone else. The New York Police Department said it thought that it had achieved a reasonable compromise in allowing protesters to march past Madison Square Garden and still gather in large numbers in the street.").

[153] *See infra* notes 154–81.

Two groups of protesters filed a motion for preliminary injunction to enjoin enforcement of the park's permit scheme, and the district court consolidated the complaints into a single action by both National Council of Arab Americans and Act Now to Stop War and End Racism (ANSWER).[154]

The formal grounds for the Parks Department's denial of the National Council of Arab Americans' permit request was that the Great Lawn in Central Park had just been restored, and the space was not large enough to hold all of the protesters.[155] The plaintiffs countered by stressing the unique significance of demonstrating on the Great Lawn on August 28, 2004.[156] First, the coincidence of the demonstrations in time and space with the Republican National Convention would make the protest more powerful at the desired location than at another location.[157] Second, the date marked the forty-first anniversary of Dr. Martin Luther King, Jr.'s march on Washington, D.C.[158] Finally, the forum had a history of protest without violence, and the Great Lawn was a historic place for people seeking justice in a non-violent fashion.[159]

Some of the alternative sites that the Parks Department offered included forums outside Manhattan, such as in Queens or the Bronx.[160] The plaintiffs argued that the Great Lawn, if available, was the "only appropriate place" for the demonstration.[161] The Department did offer another venue within Central Park, but one that could accommodate no more than 50,000 people, a number much smaller than the plaintiffs' anticipated turnout.[162] In response to this offer, the plaintiffs again argued that the only location that was proper for their rally was the Great Lawn: "Plaintiffs argue that assembly on the Great Lawn is part of their political message, namely acceptance and equality of Arab Americans."[163] While the court noted this part of the Council's argument, it placed little emphasis on it in reaching a final conclusion.[164]

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[154] Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 260, 262 (S.D.N.Y. 2004).

[155] *Id.* at 261.

[156] *Id.* at 262–63.

[157] *Id.*

[158] *Id.* at 262.

[159] *Id.* at 263.

[160] *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 263.

[161] *Id.*

[162] *Id.* at 262, 264.

[163] *Id.* at 263.

[164] *Id.* at 265–73.

The Parks Department also advanced justifications for refusing the Council's use of the Great Lawn.[165] Most importantly, the Department cited concern for damage to the newly restored ground.[166] The defendants also hinted at concern over security as a justification for denying the permit, but did not clearly state it as a reason for the denial.[167] The fact that the mere "allusion" to security concerns offers a significant justification for denial of the plaintiff's permit underscores the power of such a justification in the "time, place, and manner" restrictions on speech.

The district court concluded that the Parks Department's restriction on speech was narrowly tailored: "The Parks Department's determination is not unconstitutional simply because this Court might have promoted the governmental interest in a different manner or can conceive of some 'less-speech-restrictive alternative.'"[168] Thus, the court decided it was not responsible for finding a way to allow this speech to take place at a venue the plaintiffs deemed uniquely appropriate for their event. *National Council of Arab Americans* shows how the protection for speech becomes more limited when the court does not require the government to employ the least restrictive alternative in its restriction of access to public forums.

A parallel state court case was decided just after *National Council of Arab Americans*. In *United for Peace and Justice v. Bloomberg*,[169] a New York state court also denied the plaintiff's application for a preliminary injunction.[170] In its decision, the court followed some of the same reasoning of *National Council of Arab Americans*, but also seemed frustrated with United for Peace and Justice's delay in filing its suit, accusing the plaintiff of coming to the court with "unclean hands."[171] In addressing the plaintiff's First Amendment claims, the court, citing *Ward*, found that the permit guidelines did not unnecessarily burden the plaintiff's right to speech.[172]

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[165] *Id.* at 261.

[166] *Nat'l Council of Arab Ams.*, 331 F. Supp. 2d at 261.

[167] *Id.* at 265 ("Defendants also have alluded to certain security concerns over having the Great Lawn used for demonstrations.").

[168] *Id.* at 270 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799–800 (1989)).

[169] 783 N.Y.S.2d 255 (N.Y. Sup. Ct. 2004).

[170] *Id.* at 257.

[171] *Id.* at 259 ("Although plaintiff comes to court seeking equity, the above chronology establishes plaintiff does not come to court with 'clean hands,' because plaintiff is guilty of inexcusable and inequitable delay.").

[172] *Id.* at 262.

The *Bloomberg* court further addressed United for Peace and Justice's complaints about the alternate location of West Street for its rally.[173] The plaintiff argued that the line of sight would be poor from this venue, resulting in its message not being adequately conveyed.[174] Although the court recognized this problem, it gave little weight to it.[175] The court determined that these problems would exist even if United for Peace and Justice received a permit for their desired three sites in Central Park.[176] The *Bloomberg* court, however, simply did not accord special significance to the fact that the main portion of the rally would still occur on the Great Lawn, which had special import for conveying the plaintiff's message.[177] When first employing the *Madsen* test, the United States Supreme Court gave significantly more weight to whether the protesters at abortion clinics could effectively communicate their message than the New York court gave to the plaintiff's claims in *Bloomberg*.[178] For example, the *Bloomberg* court determined it had no obligation to ensure that the plaintiff maximized the number of participants, its audience or its media exposure by attempting to accommodate the plaintiff at the desired site.[179] By contrast, the *Madsen* court gave these objectives more serious consideration and attention.[180]

The *Bloomberg* court repeatedly expressed frustration at the plaintiff's delay in seeking judicial relief in its opinion, denying United for Peace and Justice's request for a preliminary injunction. When reprimanding the plaintiff for its delay, however, the court stated that the plaintiff's desire for a rally in Central Park could have been accommodated if United for Peace and Justice had promptly sought judicial intervention.[181] Although the court faulted the plaintiff for waiting to bring the action, its admission of the likelihood that

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[173] *Id.* at 262–63.

[174] *Id.* at 263.

[175] *Bloomberg*, 783 N.Y.S.2d at 263.

[176] *Id.* (noting that "[c]ertainly, the problems plaintiff suggests with the line of sight along West Street are no greater than those presented by plaintiff's proposed event on three Central Park sites, two of which are separated from the Great Lawn by approximately one mile (and the Central Park Reservoir)").

[177] *Id.*

[178] *See supra* notes 81–98 and accompanying text.

[179] *Bloomberg*, 783 N.Y.S.2d at 263.

[180] *See supra* notes 81–102 and accompanying text.

[181] *Bloomberg*, 783 N.Y.S.2d at 259 ("Indeed, it is this Court's opinion that if plaintiff had filed the instant application in a timely fashion, operational plans could have been implemented to accommodate plaintiff's desire for a rally in Central Park, with adequate protection for the public and preserving the integrity of the park lands.").

the plaintiff's event could be accommodated supports the conclusion that there is a less burdensome alternative than the current method.

VI. THE APPLICATION OF THE *MADSEN* TEST BEYOND THE REALM OF INJUNCTIONS AND THE ABORTION CLINIC PROBLEM

The City of New York has struggled with the appropriate way to accommodate protests because of the tension between allowing people to be heard and keeping the city safe and functioning.[182] As previously discussed, prior to the Republican National Convention, the City was confronted with another protest in which the petitioners wished to march past the United Nations building in opposition to the pending war in Iraq.[183] In looking to potential alternatives, the City flatly refused to consider a march in any area of the city, in spite of the petitioner's offer to consider alternate routes for the march.[184] The City also denied this option in spite of the fact that it allowed other parades and marches to continue in the city.[185] When it denied United for Peace and Justice's request, the City cited a lack of adequate preparation time and distinguished the protest from annual parade events for which the City claimed were easier to plan.[186]

Had the district court applied the *Madsen* test to the City's denial of the petitioner's permit request and evaluated whether the regulation or guideline "burdened no more speech than necessary to serve a significant government interest," the court would likely have arrived at a different result than it did utilizing the more deferential standard set forth in *Ward*. First, the court would engage in an analysis of whether the least restrictive alternative had been applied, rather than simply citing to *Ward* when it determined that the regulation left open ample alternative channels for communication.[187] For example, in evaluating the proposed alternative of a stationary rally, the district court concluded that it was enough that the protesters would still be

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[182] *See supra* Part V and accompanying text for a discussion of the City's attempts to balance these interests.

[183] *See supra* notes 124–43 and accompanying text.

[184] United for Peace and Justice v. City of New York, 243 F. Supp. 2d 19, 21 (S.D.N.Y. 2003) ("While Plaintiff has not specifically offered to forego its march past the United Nations, as late as the evening of February 7, after an evidentiary hearing, Plaintiff was willing to discuss alternate march routes. The City, however, was then and remains unequivocal in its position that it will not permit a march past the United Nations—or a march anywhere in Manhattan—in connection with the event, principally because of safety and security considerations.").

[185] *Id.* at 26. The City continued to allow events such as the Dominican Day parade, the Saint Patrick's Day Parade, and the Puerto Rican Day Parade. *Id.*

[186] *Id.* at 26–27.

[187] *Id.* at 30.

visible from the United Nations building.[188] The *Madsen* court, however, when reviewing the constitutionality of the buffer zones outside of abortion clinics, paid special attention to the fact that the protesters could still be seen *and* heard from outside the buffer zone.[189] Under the more deferential standard, there is no real concern for the fact that United for Peace and Justice's message could only be observed, rather than actually heard.

Furthermore, in assessing the potential viability of certain alternatives, the court made a very cursory inquiry. When it addressed the possibility of a buffer zone, the court took the police chief's word that it would be difficult for such a buffer zone to be effective.[190] Although the buffer zones at abortion clinics sought to contain smaller crowds than the march proposed by United for Peace and Justice, there was little investigation as to how the six-lane road outside the United Nations building could be used to effectively secure the building while still allowing the protesters their fullest opportunity for demonstration.

In addition, the City refused to allow any sort of parade or march in the city, although it granted such permits to other groups for cultural events.[191] While the City explained that these events differed because they were annual and allowed it more time to prepare,[192] the fact that it regularly allows such events underscores the fact that the City and its police force are capable of controlling large, moving events, and therefore have mechanisms in place for these types of events. This evidence supports the notion that there could be another, less restrictive alternative available for United for Peace and Justice rather than a total ban on the march or any sort of mobile demonstration. Not only could the City attempt to use these mechanisms outside the context of parades related to cultural events and holidays, but it could also adopt a "facilitation" approach to demonstration. This approach allows demonstrators to protest relatively undisturbed unless they break laws, and has been used in San Francisco with positive results.[193]

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[188] *See supra* notes 127–35 and accompanying text.

[189] *See supra* notes 91–92 and accompanying text.

[190] *United for Peace and Justice*, 243 F. Supp. 2d at 25.

[191] *Id.* at 25–26.

[192] *Id.* at 26.

[193] NEW YORK CITY COUNCIL, COMM. ON GOVERNMENTAL OPERATIONS, RES. CALLING UPON GOVERNMENT OFFICIALS TO PROTECT AND UPHOLD FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH, ASSOCIATION AND ASSEMBLY (2004), *available at* http://webdocs.nyccouncil.info/attachments/61403.htm.

The application of the *Madsen* test to *National Council of Arab Americans* would also likely produce a different result. If the district court applied the *Madsen* test to the Council's petition for a preliminary injunction, the court would ask whether the Parks Department's permit scheme burdened more speech than necessary to achieve the government's objective.[194] Because the Parks Department refused to grant a permit, the court would inquire whether the City's stated objectives, preserving the Great Lawn and providing security, could be accomplished in another way.[195]

The City repeatedly stated its concern for weather conditions during the rally and the impact of a large assemblage of people on the Great Lawn if the weather was bad.[196] Although the Council and the other groups that joined in the action could not practically have a rain date for their demonstration, the Parks Department gave no consideration to a conditional permit and offered the petitioners a rain site, rather than a rain date. Furthermore, the sites the Parks Department did offer as alternatives were inadequate substitutes and would not pass under the *Madsen* test because the alternative sites gave little consideration to whether the protesters' ideas and message would still be heard.[197] The alternate sites the City proffered to the protesters included Flushing Meadow Park in Queens and Van Cortlandt Park in the Bronx.[198] The offer of alternative sites outside Manhattan showed little sensitivity to the petitioners' desire to be seen and heard in the center of the city. Placing the site outside of the city tucks away the protesters and their message, an effect the *Madsen* test attempts to prevent.

VII. CONCLUSION

Since the *Ward* decision and other decisions that preceded it, such as *Clark v. Community for Creative Non-Violence*, there has been concern about the application of a standard that does not require the least restrictive alternative when suppressing speech in public forums. Some scholars have advocated a required use of the least restrictive alternative for all forms of speech, whether they are political or not.[199]

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[194] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

[195] Nat'l Council of Arab Ams. v. City of New York, 331 F. Supp. 2d 258, 261 (S.D.N.Y. 2004).

[196] *Id.* at 261, 263–64.

[197] *See supra* notes 91–92 and accompanying text.

[198] *Nat'l Council for Arab Ams.*, 331 F. Supp. 2d at 262.

[199] *See generally* Paul A. Blechner, *First Amendment: Supreme Court Rejection of the Least Restrictive Alternative Test*, 1990 ANN. SURV. AM. L. 331, 356–57 (arguing for more protection for First Amendment freedoms: "Such a large measure of trust accorded to

Such a requirement, however, fails to take into account the important security concerns that exist today. Thus, a standard that would account for the type of speech, as well as the government's regulation of it, would be most appropriate.[200] Because the self-government justification for First Amendment rights is the most widely agreed upon,[201] the court should scrutinize the regulation of such speech in public forums most carefully and require that the government burden no more speech than necessary in order to accomplish its objective.[202] The free exchange of ideas and information is vital to the legitimate functioning of democracy, and therefore any interference with such communication deserves careful scrutiny. This standard was used in the challenges at abortion clinics. In applying such a standard, there would be the hope that the Court's vision of public forums as articulated in *Hague*, that the parks and streets of this country are still held in trust by the people for their use,[203] would still be a viable goal. The inadequacy of the current standard was revealed in the *United for Peace and Justice* and *National Council of Arab Americans* decisions when potentially valuable political speech was suppressed during tumultuous times. The court's lack of inquiry into potentially less restrictive alternatives exposed the insufficiency of this standard. Offering this enhanced protection for political speech would potentially strike a balance between enhancing the nation's safety and still preserving its citizens' liberty.

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legislators cannot be justified when [F]irst [A]mendment rights are at stake. Where speech is of any protected category, the [F]irst [A]mendment requires that the legislative branch be held to a more stringent standard. The judiciary must protect this level of protection by acting as an anti-majoritarian body.").

[200] *But see id.* at 360 (arguing that "[e]ven though requiring an equal nexus between regulation and interest may appear to be an overly broad prophylactic measure, providing protection for lesser protected speech is nevertheless necessary because (1) lesser types of speech are still protected speech, and (2) a weaker nexus creates opportunities for content-based regulations to be hidden under the guise of content-neutral regulations").

[201] *See supra* notes 16–17 and accompanying text.

[202] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

[203] Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).