

March 2014

The Occupy Wall Street Movement and the Constitution: Protestors Preoccupied with the First Amendment

Christine Verbitsky

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Verbitsky, Christine (2014) "The Occupy Wall Street Movement and the Constitution: Protestors Preoccupied with the First Amendment," *Touro Law Review*. Vol. 29: No. 4, Article 6.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol29/iss4/6>

This Article is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

The Occupy Wall Street Movement and the Constitution: Protestors Preoccupied with the First Amendment

Cover Page Footnote

29-4

**THE OCCUPY WALL STREET MOVEMENT AND THE
CONSTITUTION: PROTESTERS PREOCCUPIED WITH THE
FIRST AMENDMENT**

**CRIMINAL COURT OF NEW YORK
NEW YORK CITY**

People v. Nunez¹
(decided April 6, 2012)

I. INTRODUCTION

Defendant Ronnie Nunez was arrested and charged with “[t]respass, [d]isorderly conduct, and [o]bstructing [g]overnmental [a]dministration in the [s]econd [d]egree.”² Although the defendant moved to have the accusatory instrument against him suppressed and all charges dismissed, his motion was denied and the case went to trial.³ The charges against the defendant were the result of his active participation in the Occupy Wall Street protests⁴ that took place with-

¹ 943 N.Y.S.2d 857 (Crim. Ct. 2012).

² *Id.* at 859 (citations omitted). The defendant was charged with trespass for remaining inside Zuccotti Park after his legal right to be on the premises had been revoked. *Id.* at 866. The defendant was charged with disorderly conduct due to his linking arms with other protestors in an attempt to actively resist being removed from the park. *Id.* The defendant’s obstruction of governmental administration charges stemmed from his actively hindering the job of the NYPD in removing all protestors from Zuccotti Park. *Id.* at 866-67.

³ *Nunez*, 943 N.Y.S.2d at 859, 867 (“An accusatory instrument upon which the defendant may be held for trial must allege facts of an evidentiary character.” (internal quotation marks omitted) (citing N.Y. CRIM. PROC. LAW §100.15(3))). The accusatory instrument in the case at hand stated that “deponent observed the defendant knowingly and unlawfully remain inside [Zuccotti Park] with a crowd of people after deponent observed and heard a NYPD Captain advise the group that they must leave the premises via bull-horn.” *Id.* at 860 (alteration in original). “As of [November 15, 2011 at or about 5:30 a.m.] permission and authority for any individual to remain at the location was withdrawn.” *Id.* (alteration in original).

⁴ The Occupy Wall Street protests officially began Saturday, September 17, 2011, taking over parts of Wall Street in New York City. Colin Moynihan, *Wall Street Protest Begins, With Demonstrators Blocked*, N.Y. TIMES, Sept. 17, 2011, <http://cityroom.blogs.nytimes.com/2011/09/17/wall-street-protest-begins-with-demonstrators-blocked/> [hereinafter Moynihan, *Wall Street Protest Begins*]. Those who participated in the protests believed that the existence of wealthy individuals and corporations within the United States undermined the democratic theory of government, and called for income equality. Colin Moynihan, *Wall Street*

in Zuccotti Park.⁵ “The park is a Privately Owned Public Space (“POPS”) presently owned by Brookfield Properties (“Brookfield”) and is open for public use.”⁶ However, by mid-September of 2011, the park had become a base camp for the Occupy Wall Street protestors, with individuals, including the defendant, going as far as erecting “tents and other structures in the park.”⁷ In response to this, Brookfield instituted rules in an attempt to maintain order inside Zuccotti Park.⁸

The defendant argued that his First Amendment⁹ rights were violated by Brookfield’s enactment of the rules and regulations governing Zuccotti Park, which among other things prohibited him from erecting tents within the park.¹⁰ The court held that owners of privately owned public spaces have the authority and right to establish rules and regulations for their property, so long as the restrictions of use are reasonable and intended to address a condition that would interfere with the property’s intended use.¹¹ Because the rules instituted by Brookfield were formulated only to guarantee both that Zuccotti Park was used in its intended manner, and to “prevent the existence of unlawful conditions,”¹² the court ruled that these rules were reasonable.¹³ Due to this finding, the court ultimately rejected the defendant’s First Amendment argument.¹⁴

This Note will review the Criminal Court of the City of New York’s analysis of the First Amendment in regards to the Free Speech Clause of the United States Constitution.

Protests Continue, With at Least 6 Arrested, N.Y. TIMES, Sept. 19, 2011, <http://cityroom.blogs.nytimes.com/2011/09/19/wall-street-protests-continue-with-at-least-5-arrested/> [hereinafter Moynihan, *Wall Street Protests Continue*].

⁵ *Nunez*, 943 N.Y.S.2d at 859.

⁶ *Id.* at 861.

⁷ *Id.*

⁸ *Id.* at 862.

⁹ U.S. CONST. amend. I (“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 to the Government for a redress of grievances.”).

¹⁰ *Nunez*, 943 N.Y.S.2d at 864.

¹¹ *Id.* at 863-64.

¹² *Id.* at 864.

¹³ *Id.* at 865.

¹⁴ *Id.* at 864.

II. *PEOPLE V. NUNEZ*

In late 2011, the Occupy Wall Street movement began and protestors established a base camp inside lower Manhattan's Zuccotti Park.¹⁵ The park was built in 1968 with the intent that it would remain open twenty-four hours a day for its users to participate in and enjoy passive recreational activities.¹⁶ Aside from subjecting the owners of the park to liability, the Occupy Wall Street protest movement severely hindered the ability of other users to enjoy Zuccotti Park in its intended manner.¹⁷

After taking notice of the unsafe and unsanitary conditions that existed inside Zuccotti Park, the owner "promulgated rules of conduct"¹⁸ which were intended to ensure that lawful users could enjoy the park and diminish the chance that Brookfield would be subject to liability.¹⁹ These rules prohibited:

[C]amping and the erection of tents and other structures[,] . . . lying down on the ground . . . or benches[] . . . in a manner that unreasonably interferes with the use of benches, sitting areas or walkways by others[] . . . the placement of tarps or sleeping bags[,] . . . and . . . the storage or placement of personal property . . . in a manner that unreasonably interferes with the use of such areas by others.²⁰

Despite Brookfield's best efforts, these regulations proved to be unsuccessful in aiding Brookfield in its attempts to reduce the interference caused by the Occupy Wall Street protestors.²¹ This posed a great problem to Brookfield, because as private owners of public space, Brookfield was required follow all obligations set forth by the City Planning Commission.²² In this specific instance, the City Plan-

¹⁵ *Nunez*, 943 N.Y.S.2d at 861.

¹⁶ *Id.*

¹⁷ *Id.* at 862. Zuccotti Park's intended purpose was for that of passive recreation, and the conditions that had developed inside the park due to the Occupy Wall Street protestors hindered this purpose. *Id.* at 861-62. The park had become a city within itself, containing a library, medical area, kitchen, and sanitation area. *Id.* at 861.

¹⁸ *Nunez*, 943 N.Y.S.2d at 862.

¹⁹ *Id.*

²⁰ *Id.* at 864.

²¹ *Id.* at 862.

²² *Id.* at 863.

ning Commission required Zuccotti Park to remain “open and available for public use 365 days per year.”²³ With conditions as they were inside Zuccotti Park, Brookfield was unable to guarantee that the park would be fit for the public to use safely year round.²⁴ Upon the request of Brookfield, officers of the New York City Police Department entered Zuccotti Park in November of 2011 with orders to temporarily evacuate all individuals that were inside so Brookfield could clean and maintain the property.²⁵ Via flyers and megaphone announcements made by the NYPD, all individuals inside Zuccotti Park were directed to vacate the premises; the defendant, among other protestors, actively refused to leave although he was given several hours to do so.²⁶

Although the defendant argued otherwise, the court held that “[privately owned public space] owners may establish rules of conduct, so long as these restrictions on the use of [a privately owned public space] are reasonable and designed to address nuisance or other conditions that would interfere with or are inconsistent with the intended use of the [space] by the general public.”²⁷ Owners of these spaces assume complete responsibility for any fines or injuries that occur on their property.²⁸ As a result of this, Brookfield had absolute authority to enact regulations that prohibited the erection of tents and structures, lying on the ground or benches in a manner that interfered with the use of those benches for others to sit, unfolding sleeping bags, or storing personal property within the park.²⁹ Because the reg-

²³ *Nunez*, 943 N.Y.S.2d at 863.

²⁴ *Id.* at 862. In late October of 2011, the New York City Fire Department issued Brookfield a Violation Order after determining that the conditions within the park presented a fire hazard, as there was no clear exit if there were to be an emergency. *Id.*

²⁵ *Id.*

²⁶ *Id.* (“[M]any people, including the defendant, remained inside the park. . . . [A] significant number of those arrested, including the defendant, sat on the ground inside the park, linked arms with each other, and actively resisted the efforts of the police to separate and remove them.”).

²⁷ *Nunez*, 943 N.Y.S.2d at 863 (internal quotation marks omitted). The court specifically referenced temporary closings of a privately owned public space when making this determination. *Id.* at 863-64.

²⁸ *Id.* at 863.

²⁹ *Id.* New York City Zoning resolutions allowed for signs to be posted within Zuccotti Park informing its users that those activities inconsistent with the park’s normal use were prohibited:

[T]o ensure a safe and comfortable environment for all public plaza users, a maximum of one prohibition sign or Rules of Conduct sign may be

ulations enacted by Brookfield prohibited only those activities that unreasonably interfered with the intended use of Zuccotti Park, the court held that the regulations were not in violation of the defendant's First Amendment rights.³⁰

III. FIRST AMENDMENT ANALYTICAL FRAMEWORK

A. Does the Conduct Communicate: The Threshold First Amendment Question

The central First Amendment issue in *Nunez* was whether the defendant's erection of tents and other structures was expressive conduct classified as speech for First Amendment purposes.³¹ While the text of the First Amendment only refers explicitly to speech, it has been recognized that its protections are broad and encompass conduct that communicates.³²

However, not all conduct can be classified as expressive for First Amendment purposes.³³ The leading case on this subject, and one which the court in *Nunez* relied heavily, is *Spence v. Washington*.³⁴ In *Spence*, the appellant was arrested after he hung the United States flag upside down, adorned with a peace symbol made from black tape, out of the window of his Seattle apartment.³⁵ The appellant was charged under a Washington statute that prohibited individuals from displaying flags containing any type of words, markings, or drawings.³⁶ The peace symbol-adorned flag had a specific purpose: it was created in order to protest the recent Kent State University kill-

located within the public plaza . . . such signs shall not prohibit behaviors that are consistent with the normal public use of the plaza such as lingering, eating, drinking of non alcoholic beverages or gathering in small groups.

Id. at 864 (alteration in original) (quoting N.Y. ZONING RES. § 37-50).

³⁰ *Nunez*, 943 N.Y.S.2d at 864, 866.

³¹ *Id.* at 864 (“The defendant claim[ed] that he and others were exercising their first amendment right by setting up the tents and tarps.”).

³² *See Spence v. Washington*, 418 U.S. 405, 409 (1974) (recognizing that conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments”).

³³ *Nunez*, 943 N.Y.S.2d at 865.

³⁴ 418 U.S. 405 (1974).

³⁵ *Id.* at 406.

³⁶ *Id.* at 406-07.

ings and the American invasion of Cambodia.³⁷ Faced with the issue of determining what types of expressive conduct would fall within the parameters of the First Amendment, the Court developed a two-prong test: first, there must be the intent to convey a particularized message, and second, when considering the surrounding circumstances, there must be a great likelihood that the message would be understood by those who viewed it.³⁸ The Court stressed the importance of the context surrounding the questioned conduct, which means that conduct could be constitutionally protected in some instances, while that same conduct could be denied those protections in others.³⁹

B. Is the Restriction Targeted at the Message Being Conveyed?

I. *United States v. O'Brien*

Once the conduct is determined to be expressive, the next question that must be asked is whether the restriction is targeted at the message. If the answer to this question is no, the proper analytical framework is that which was set forth in *United States v. O'Brien*.⁴⁰ For a regulation to withstand the *O'Brien* test, the government must have a “sufficiently important governmental interest in regulating . . . [that can] justify incidental limitations on First Amendment freedoms.”⁴¹ In *O'Brien*, the Court was faced with the

³⁷ *Id.* at 408. The defendant took the stand and testified in his own defense stating, “I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace.” *Id.* (internal quotation marks omitted).

³⁸ *Spence*, 418 U.S. at 409-12.

³⁹ *Id.* at 410.

In this case, appellant’s activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant’s point at the time he made it.

Id. (citation omitted).

⁴⁰ 391 U.S. 367 (1968).

⁴¹ *Id.* at 376.

issue of an individual having been arrested under a newly amended federal statute that imposed criminal liability if anyone knowingly destroyed, altered, or forged his or her Selective Service registration certificate.⁴² In violation of this statute, the defendant publicly burned his Selective Service registration in front of a large crowd on the steps of the South Boston Courthouse.⁴³ While O'Brien conceded the fact that he had burned his registration card, he claimed his conduct was protected under the First Amendment, arguing that his actions were done with a communicative purpose: to cause others to follow his antiwar beliefs.⁴⁴ Even though the Court assumed that O'Brien's conduct was sufficiently expressive to bring the First Amendment into play, it upheld O'Brien's conviction because the government demonstrated a substantial interest, the statute was a narrow means to protect that interest, and the non-communicative aspect of O'Brien's conduct frustrated the government's interest.⁴⁵

The Court rejected the respondent's argument that the purpose of the statute was to restrict free speech.⁴⁶ It concluded that the statute was content neutral, did not attempt to distinguish between conduct that occurred in private or public forums, and more importantly, it did not "punish only destruction engaged in for the purpose of expressing views."⁴⁷ When analyzing regulations placed upon communicative conduct which are not directed at the message, the government must be able to point to a "sufficiently important governmental interest in regulating the nonspeech element"⁴⁸ that is within its control and distinct from "the suppression of free expression."⁴⁹ Regard-

⁴² *Id.* at 369-70. These Selective Service registration certificates served an important purpose at the time of this case: to provide the government, pursuant to the Universal Military Training and Service Act, with pertinent draft information. *Id.* at 372-73. The registration cards contained the individual's name, the date he or she registered for the draft, his or her birth date, address, and a physical description, among other important identifying information. *Id.* at 373.

⁴³ *O'Brien*, 391 U.S. at 369. The conduct that the statute prohibited did not necessarily have any connection with speech. *Id.* at 375.

⁴⁴ *Id.* at 370 ("[O'Brien] stated in argument . . . that he burned the certificate publicly to influence others . . . 'so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.'").

⁴⁵ *Id.* at 376-77.

⁴⁶ *Id.* at 376-77.

⁴⁷ *O'Brien*, 391 U.S. at 375-76, 383.

⁴⁸ *Id.* at 376.

⁴⁹ *Id.* at 377.

less of the government's cited interest, if the restriction impedes upon First Amendment freedoms any more than is necessary to further that interest, it will be not upheld.⁵⁰ Therefore, *O'Brien* established a two-part test for evaluating restrictions based on symbolic conduct or speech: (1) the government must have an important purpose in regulating the speech that is not related to the message, and (2) the impact on the communication can be no greater than is necessary to achieve the government's purpose.⁵¹

The Court in *O'Brien* upheld the statute, noting that Congress had pointed to several justifications for enacting it, including that the certificates proved the individual was registered for the draft and that the certificates allowed the draft system to run more efficiently since individuals always had their pertinent information on hand.⁵² These justifications were unrelated to the suppression of expression; in other words, *O'Brien* was not punished for the communicative nature of his conduct.⁵³ When the restriction is not targeted at the message being conveyed, the courts will analyze it using these less stringent standards than if the restriction were targeted at the message.⁵⁴

2. *Texas v. Johnson*

In instances where the restriction is targeted at the message being conveyed, a more exacting standard of strict scrutiny is applied.⁵⁵ In *Texas v. Johnson*,⁵⁶ the Court was presented with another issue of communicative conduct and the First Amendment.⁵⁷ *Johnson* was a member of a political demonstration that took place during the Republican National Convention in Dallas in 1984.⁵⁸ Although

⁵⁰ *Id.*

⁵¹ *See generally id.* 391 U.S. 367.

⁵² *O'Brien*, 391 U.S. at 378-80 (stating that Congress had "establish[ed] beyond doubt" that it had a legitimate interest in preventing the destruction of the Selective Service registration certificates).

⁵³ *Id.* at 382.

⁵⁴ *Id.* The Court compared the case at hand to one in which the statute at issue intended to punish those "who expressed their 'opposition to organized government[,]'" which in other words, established the fact that the restriction was targeted at the message being conveyed. *Id.*

⁵⁵ *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

⁵⁶ 491 U.S. 397 (1989).

⁵⁷ *Id.* at 406.

⁵⁸ *Id.* at 399.

the respondent's role in the protest was minimal, at one point he "unfurled [an] American flag, doused it with kerosene, and set it on fire."⁵⁹ While the flag burned, the respondent chanted "America, the red, white, and blue, we spit on you."⁶⁰ Johnson was convicted under a Texas statute that made it a criminal offense to desecrate the American flag, which the State justified by its interest in preserving the flag as a national symbol of unity and peace.⁶¹ However, the Court concluded that the less stringent *O'Brien* standard did not apply because the State had not asserted an interest that was unrelated to the suppression of expression.⁶²

The Court rejected the State's argument that the statute furthered its interest in preserving the "physical integrity of the flag."⁶³ Because the text of the statute itself stated that burning was the preferred method of disposal for a flag that is no longer fit for display, this allowed the Court to conclude that the statute was not punishing the general act of flag burning.⁶⁴ Rather, the statute intended to punish those who burned the flag as a means of conveying a particular message.⁶⁵ Thus, the regulation was content-based and subject to the rigorous standard of strict scrutiny, described by the Court as "the most exacting scrutiny."⁶⁶ Pursuant to this test, "[a] law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."⁶⁷

⁵⁹ *Id.* Other protestors engaged in activities such as spray-painting, overturning plants, and staging "die-ins" to highlight the costs of nuclear warfare. *Id.* Johnson played no role in these activities. *Johnson*, 491 U.S. at 399.

⁶⁰ *Id.* at 399 (internal quotation marks omitted). There was little to no discussion by the Court of whether or not Johnson's conduct was communicative in nature for First Amendment purposes; it accepted the lower courts' determination that it was based on the two-prong test developed by the Court in *Spence*. *Id.* at 405-06.

⁶¹ *Id.* at 400.

⁶² *Id.* at 407 ("If we find that an interested asserted by the State simply is not implicated on the facts before us, we need not ask whether *O'Brien's* test applies .").

⁶³ *Johnson*, 491 U.S. at 411.

⁶⁴ *Id.*

⁶⁵ *Id.* at 411-12.

⁶⁶ *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 485 (1988) (internal quotation marks omitted)).

⁶⁷ *Id.* at 406 (internal quotation marks omitted) (quoting *Cmty. for Creative Non-Violence v. Watts*, 703 F.2d 586, 622 (1983)).

C. Time, Place, or Manner Restrictions

When the challenged restriction is not targeted at the message being conveyed, it must be analyzed under the standard for evaluating time, place, or manner restrictions.⁶⁸ These time, place, or manner restrictions must be content-neutral, narrowly tailored, and leave open ample alternative channels for communication.⁶⁹ This test is the functional equivalent of the *O'Brien* test previously described.⁷⁰

I. Content-Neutrality

In *Clark v. Community for Creative Non-Violence*,⁷¹ the Court upheld a regulation enacted by the National Park Service that prohibited camping in parks, unless done in specified campground areas.⁷² The regulation itself stated that whether an activity constituted camping would be determined objectively, and therefore the intent of the individuals engaging in the activity was irrelevant.⁷³ Respondent was the organizer of a demonstration that was to take place within two parks that were under the regulation of the National Park Service, which would highlight the “plight of the homeless.”⁷⁴ The respondent requested permission for the demonstrators to sleep in the tents they planned to erect, but the Park Service denied the requested, referring

⁶⁸ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

⁶⁹ *Id.*

⁷⁰ *Compare id.* at 298 (“[T]he four factor standard of *United States v. O’Brien* for validating a regulation of expressive conduct, . . . is little, if any, different from the standard applied to time, place, or manner restrictions.”), with *O’Brien*, 391 U.S. at 377 (“[A] government regulation is sufficiently justified if it . . . furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”).

⁷¹ 468 U.S. 288 (1984).

⁷² *Id.* at 289-90. For these purposes, camping was defined as “the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep . . . or using any tents or . . . other structure . . . for sleeping.” *Id.* at 290-91. The government cited its substantial interest in maintaining the capitol’s parks in an attractive and safe condition for all that wished to use them as its purpose in enacting the regulation. *Id.* at 296.

⁷³ *Id.* at 291. Had the intent of the individuals been relevant to making a determination of whether there was a violation of the statute, the regulation would likely have been classified much differently, perhaps as one that was aimed at the suppression of speech, and would have been analyzed under strict scrutiny, instead of the less stringent *O’Brien* time, place, and manner standards, which are more akin to intermediate scrutiny. See *Johnson*, 491 U.S. at 407.

⁷⁴ *Clark*, 468 U.S. at 291-92.

to the regulations that prohibited camping within National Park grounds.⁷⁵ While the Court conceded that sleeping in the tents was communicative in nature when considered as a whole with the rest of the demonstration, it declared that the First Amendment is not an avenue that individuals may use to express views without limitation.⁷⁶ Concluding that the ban on camping was not related to the suppression of speech, the Court analyzed it under the reasonable time, place, or manner restriction standards.⁷⁷ The National Park Service regulation was upheld as satisfying all three requirements: there was no issue as to the neutrality of the regulation; the demonstrators were still permitted to carry on with their demonstration in its intended form less the sleeping (which enabled them to convey their intended message); and the regulation was narrowly tailored to serve the government's interest, as it permitted the demonstrators to sleep inside the specified campground areas.⁷⁸

2. *Narrowly Tailored*

In addition to being content neutral, time, place, or manner restrictions must also be narrowly tailored. In *Frisby v. Schultz*,⁷⁹ the Court definitively stated that regulations would be considered “narrowly tailored if [they] target[] and eliminate[] no more than the exact source of the ‘evil’ [they] seek[] to remedy.”⁸⁰ Appellees were individuals who opposed abortion and had organized a group of picketers to convey this message in front of the homes of two doctors who performed such procedures.⁸¹ In response to residents who had been disturbed by the picketing, the Town of Brookfield, Wisconsin,

⁷⁵ *Id.* at 292.

⁷⁶ *Id.* at 293, 296 (“[W]e seriously doubt that the First Amendment requires the Park Service to permit a demonstration [in the parks] involving a 24-hour vigil.”).

⁷⁷ *Id.* at 294. The Court expressly rejected that argument that expressive conduct could not be regulated through time, place, or manner restrictions, and stated that the fact that conduct was intended to convey a message had no impact on the validity of such First Amendment restrictions. *Id.* at 294-95; see generally *Matter of Waller v. City of New York*, 933 N.Y.S.2d 541 (Sup. Ct. 2011) (holding that the questioned restrictions were content neutral, and therefore valid as time, place, or manner restrictions even though they were enacted after the proposed communicative activity began).

⁷⁸ *Clark*, 468 U.S. at 295-96.

⁷⁹ 487 U.S. 474 (1988).

⁸⁰ *Id.* at 485.

⁸¹ *Id.* at 476.

subsequently implemented a ban on residential picketing that was intended to protect and preserve the privacy and tranquility of the home.⁸² The Court upheld the ban as being narrowly tailored, and therefore a valid time, place, or manner restriction.⁸³ The Court adopted a limited reading of the ordinance, finding that it applied only to picketing in front of a single residence or dwelling.⁸⁴ Adopting this limited reading permitted the Court to further conclude that individuals who wished to picket had sufficient alternative channels in which to do so.⁸⁵ These alternative channels of communication included picketing on a marked route through the residential neighborhood, going door-to-door, or even contacting residents of the town by regular mail or telephone.⁸⁶

While the time, place, or manner restrictions must be narrowly tailored, there is no requirement that they be the least restrictive means available.⁸⁷ In *United States v. Albertini*,⁸⁸ the respondent was convicted under a federal statute that made it unlawful for any individual who had previously been barred from a military base by its commanding officer to reenter.⁸⁹ The respondent had received a “bar letter” after he committed acts of vandalism on Hickam Air Base (“Hickam”).⁹⁰ He had entered the base under the pretense of delivering a letter, but actually intended to destroy secret documents by dousing them in animal blood.⁹¹ Some years later, during an open house at Hickam that was advertised as permitting public access to the base, the respondent entered with the intent to engage in a demonstration against the “nuclear arms race.”⁹² Based on these ac-

⁸² *Id.* at 476-77. The picketing ban read in pertinent part: “It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.” *Id.* at 477 (quotation marks omitted). Additionally, the ban’s purpose was included in its text, which left no room for interpretation as to the town’s intentions. *Frisby*, 487 U.S. at 477.

⁸³ *Id.* at 483.

⁸⁴ *Id.* The Court was also influenced by the statements of a town representative, who declared that the view of picketing they adopted in terms of the ban was one in which the “picketing [was] directed at a single residence.” *Id.*

⁸⁵ *Id.* at 483-84.

⁸⁶ *Frisby*, 487 U.S. at 484.

⁸⁷ *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90 (1989).

⁸⁸ 472 U.S. 675 (1985).

⁸⁹ *Id.* at 677.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 678.

tions, respondent was charged with violating the above-mentioned statute.⁹³

The respondent argued that his exclusion from Hickam under the statute violated his First Amendment rights.⁹⁴ The Court rejected this argument.⁹⁵ First, the Court concluded that the statute properly furthered the government's substantial interest in ensuring the security of military bases by preventing the entry of individuals who had previously demonstrated that they posed a risk to security.⁹⁶ The narrowness of the statute was debated, as the respondent argued that a policy of general exclusion of those whom had received bar letters was "greater than [was] essential to the furtherance of Government interests in the security of military installations."⁹⁷ However, the Court rejected this argument as well, stating that "[t]he First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests."⁹⁸ Therefore, the narrowness of blanket time, place, or manner regulations must be analyzed in regard to the regulation's general applicability.⁹⁹ Most importantly, these types of restrictions are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech."¹⁰⁰ Therefore, the only consideration taken into account when determining the narrow tailoring of the regulation is whether or not it "promotes a substantial government interest that would be achieved less effectively absent the regulation."¹⁰¹

Similarly, in *Ward v. Rock Against Racism*¹⁰² the Supreme Court expressly rejected the contention that time, place, or manner restrictions have to be the least restrictive means to be declared valid.¹⁰³ After fielding a number of complaints from unhappy residents

⁹³ *Albertini*, 472 U.S. at 679.

⁹⁴ *Id.* at 677.

⁹⁵ *Id.* at 688-89.

⁹⁶ *Id.* at 689.

⁹⁷ *Id.* at 688.

⁹⁸ *Albertini*, 472 U.S. at 688.

⁹⁹ *Id.* at 688-89.

¹⁰⁰ *Id.* at 689.

¹⁰¹ *Id.*

¹⁰² 491 U.S. 781 (1989).

¹⁰³ *Id.* at 798.

nearby due to an on-going excessive sound problem from a concert venue, the City of New York decided to invoke a self-regulated monitoring system.¹⁰⁴ Under this system, the City would monitor the sound being emitted from the theater during concerts and other events.¹⁰⁵ The respondent, Rock Against Racism, was the sponsor of a series of rock concerts that were held in the theater within Central Park, and was denied permits due to its prior history of excessive noise.¹⁰⁶ Citing its interest in controlling noise levels in order to avoid intrusion onto the surrounding residential areas, the City agreed to supply equipment and hire a sound technician to monitor the sound levels at all events.¹⁰⁷

Of the three elements of the standard for evaluating time, place, or manner restrictions, the one at issue in *Ward* was whether or not the regulation was narrowly tailored to serve an important governmental interest.¹⁰⁸ It was not the City's interest in maintaining reasonable sound levels that was challenged, but rather its method of doing so.¹⁰⁹ The Court articulated its faith in governments enacting these time, place, or manner restrictions, and allowed for deference to be granted to them.¹¹⁰ While regulations cannot be enacted without regard to First Amendment rights, once a manner of promoting an acknowledged substantial governmental interest has been endorsed, the Court will be reluctant to overstep this determination, even if it finds that the interest could be promoted in an alternative, or even less constricting way.¹¹¹

¹⁰⁴ *Id.* at 785.

¹⁰⁵ *Id.* at 785. If the City determined that the sound being emitted from the theater was excessive, the permit to use the theater would be revoked. *Id.*

¹⁰⁶ *Ward*, 491 U.S. at 784-85 (“[T]he city declined to grant an event permit, citing its problems with noise and crowd control at RAR’s previous concerts. The city suggested some other city-owned facilities as alternative sites for the concert.”).

¹⁰⁷ *Id.* at 787, 792.

¹⁰⁸ *Id.* at 796. The Court quickly accepted the fact that the regulation was content-neutral, as the government’s purpose of controlling sound to maintain peacefulness was not related “to the content of expression.” *Id.* at 791.

¹⁰⁹ *Id.* at 797.

¹¹⁰ *Ward*, 491 U.S. at 800 (“The validity of [time, place, or manner] regulations does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.” (alteration in original) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985))).

¹¹¹ *Id.* at 800.

3. *Strength of the Government's Interest*

Maintaining areas that are used by the public in a safe and accessible manner has generally been accepted as a substantial governmental interest.¹¹² For example, in *Thomas v. Chicago Park District*,¹¹³ the Court upheld a Chicago Park District (“Park District”) ordinance that required those wishing to assemble, picnic, conduct a parade, or engage in any other type of activity with greater than fifty individuals inside the parks to obtain permits.¹¹⁴ Petitioners had applied for multiple permits, some of which were granted and some of which were denied, to hold rallies inside the Park District’s parks to vocalize their beliefs that marijuana should be legalized.¹¹⁵ The ordinance was uniformly applied to all individuals seeking to obtain permits to gather inside the parks, which left no question as to whether or not it was related to the expression of suppression.¹¹⁶ Additionally, the Park District’s goals in enacting the ordinance were not related to the communicative nature of the conduct; rather, it wanted the ability to maintain its facilities in a manner that best suited the general public and other users.¹¹⁷ Similar to the Court’s rationale in *Clark*, the Court in *Thomas* refused to invalidate the ordinance based upon this one individual instance of the Park District denying a permit.¹¹⁸ Rather, the Court took into account the generalized effect the ordinance had on permitting the Park District to further its governmental interest, along with the rights of others who wished to use the parks.¹¹⁹

¹¹² See *Clark*, 468 U.S. at 299.

¹¹³ 534 U.S. 316.

¹¹⁴ *Id.* at 318. The Chicago Park District was in charge of operating the public parks, and was vested with the authority to promulgate all necessary rules and regulations to do so. *Id.*

¹¹⁵ *Id.* at 319-20.

¹¹⁶ *Id.* at 322 (“Indeed, the ordinance . . . is not even directed to communicative activity . . . but rather to *all* activity conducted in a public park. The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit . . .”).

¹¹⁷ *Id.*

¹¹⁸ *Thomas*, 534 U.S. at 322; see *Clark*, 468 U.S. at 297 (“If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.”).

¹¹⁹ *Thomas*, 534 U.S. at 324-25. Important to the Court’s determination was the fact that the ordinance was also geared toward granting all individuals a fair opportunity to hold their parade, picnic, etc., it was essentially a first come, first served operation. *Id.* at 324.

4. *Governmental Discretion*

Another important requirement of time, place, or manner restrictions that was highlighted by the Court in *Thomas* is that they must “contain adequate standards to guide the official’s decision and render it subject to effective judicial review.”¹²⁰ The Park District’s ordinance in *Thomas* contained various reasons that must be established before denying a permit, including whether the proposed use presented a danger to employees or if the individual had violated a previously issued permit.¹²¹ This element of the ordinance played an important role in the Court’s determination to uphold it, as it eliminated concerns that permits could be denied based solely upon the requested use or beliefs of the individual or organization.¹²² These types of guidelines present in time, place, or manner restrictions do not necessarily require steadfast adherence so long as the departure from the system is only for the purposes of furthering the cited governmental interest.¹²³

5. *Tying It All Together*

In *Lubavitch Chabad House, Inc. v. Chicago*,¹²⁴ the United States Court of Appeals for the Seventh Circuit dismissed Lubavitch Chabad House’s claim that under the First Amendment it was entitled to display a structure of a Chanukah menorah in a public space.¹²⁵ City regulations prohibited both private and public actors of all religious denominations from erecting structures in public areas to prevent the disruption of the flow of pedestrian traffic.¹²⁶ These regulations were upheld as reasonable time, place, or manner restrictions.¹²⁷ All of the requirements for a valid time, place, or manner restriction were present.¹²⁸ First, the regulation was content neutral: it prohibit-

¹²⁰ *Id.* at 323.

¹²¹ *Id.* at 324.

¹²² *Id.* (“These grounds are reasonably specific and objective, and do not leave the decision ‘to the whim of the administrator.’” (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992))).

¹²³ *Thomas*, 534 U.S. at 325.

¹²⁴ 917 F.2d 341 (7th Cir. 1990).

¹²⁵ *Id.* at 342-43.

¹²⁶ *Id.* at 342.

¹²⁷ *Id.* at 346.

¹²⁸ *Id.* at 346-47.

ed the erection of all structures in public areas by any group, religious or not; it did not just single out those of the Jewish faith.¹²⁹ Second, the regulation was designed to prevent the obstruction of pedestrian traffic and use of the airport; by prohibiting the erection of structures that would impede traffic, this problem was remedied, which showed that the regulation was narrowly tailored.¹³⁰ Finally, individuals were left with alternatives through which they could communicate their beliefs, such as passing out pamphlets or placing signs in areas of the airport that would not interfere with pedestrians.¹³¹ The court also declared there was no constitutional right to “erect . . . structure[s] on public property.”¹³² The court stated that the “Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.”¹³³ To recognize the erection of structures as “speech” protected by the First Amendment would produce congestion and disorder among public places, because allowing one group of individuals to erect a structure would necessarily follow that all others must be permitted to do so as well.¹³⁴

IV. APPLICATION TO *NUNEZ*

A. Does the Conduct Communicate?

The Criminal Court of the City of New York in *Nunez* held that the erection of tents and camping inside Zuccotti Park could not be considered sufficiently expressive for the purposes of the First Amendment.¹³⁵ While the court relied upon *Spence* in making its determination, there is room for argument that the outcome should have been otherwise.¹³⁶ As noted, the two-prong *Spence* test requires that there be intent to convey a particular message, and a great likelihood

¹²⁹ *Lubavitch*, 917 F.2d at 342.

¹³⁰ *Id.* at 346. The court also rejected the argument that the regulations had to be the least restrictive means available. *Id.*

¹³¹ *Id.* at 342-43.

¹³² *Id.* at 347.

¹³³ *Lubavitch*, 917 F.2d at 347.

¹³⁴ *Id.*

¹³⁵ *Nunez*, 943 N.Y.S.2d at 865.

¹³⁶ *Id.*

that those who view the conduct would understand the message.¹³⁷ Those involved with the Occupy Wall Street protest certainly had the intent to convey a message with their actions, and satisfied the first prong of the *Spence* test, as the foundation of the protest was to highlight their beliefs regarding income inequality in America.¹³⁸ As of September 2011, the month the Occupy Wall Street protests began, the national unemployment rate was 9.0%, which of the State of New York was 8.3%, and New York City was above the national average, with a rate of 9.1%.¹³⁹ These statistics help bolster the argument that the second prong of the *Spence* test, which requires that there be a strong likelihood that the message would be perceived by those who viewed it, was also satisfied by the protestors setting up tents within Zuccotti Park.¹⁴⁰ Using a totality of the circumstances approach, it would seem highly likely that residents of a city that maintained an unemployment rate higher than that of the national average would easily correlate individuals sleeping in tents to homelessness and therefore the country's income gap.¹⁴¹ While the court rejected the assertion that the erection of tents and camping within the park was communicative conduct and therefore afforded First Amendment protections, it did not articulate its rationale in making this determination, but merely concluded that under the *Spence* test, "erecting tents and other structures in Zuccotti Park did not qualify as protected speech and there is no reason to conclude that camping in [the park] conveyed any particular message."¹⁴²

B. Is the Restriction Targeted at the Message Being Conveyed?

Irrespective of the court's determination that the questioned conduct was not communicative, it seems as though the court properly held that Brookfield's rules and regulations were valid as time, place, and manner restrictions.¹⁴³ As required under this standard, the

¹³⁷ *Spence*, 418 U.S. at 410-11.

¹³⁸ Moynihan, *Wall Street Protest Begins*, *supra* note 4.

¹³⁹ N.Y.S. DEP'T OF LABOR: PRESS RELEASE ARCHIVE (2012).

¹⁴⁰ *Spence*, 418 U.S. at 410-11; *Nunez*, 943 N.Y.S.2d at 861.

¹⁴¹ *Spence*, 418 U.S. at 410.

¹⁴² *Nunez*, 943 N.Y.S.2d at 865.

¹⁴³ *Id.* at 865.

regulations were not related to the suppression of expression.¹⁴⁴

I. Content Neutrality

Arguably, a fact that may weaken the argument that the court in *Nunez* made a proper determination regarding the intent of the restriction is the recognition that the restrictions were enacted after the Occupy Wall Street protests began, and there was no mention of any other individuals pitching tents in the park during this time period.¹⁴⁵ This could mean that the restriction was indeed targeted at the message the protestors intended to convey.¹⁴⁶ If this determination were made, Brookfield's restrictions would not be analyzed under the standard for time, place, or manner restrictions, but rather, under the strict scrutiny standards set forth by the Court in *Johnson* for content-based restrictions.¹⁴⁷ However, this argument was expressly rejected in *Matter of Waller v. City of New York*.¹⁴⁸ The facts of *Matter of Waller* stem from the same Occupy Wall Street protest and Zuccotti Park situation as do those of *Nunez*.¹⁴⁹ In *Waller*, the court concluded that the mere fact that the regulations were enacted after the conduct occurred is not conclusive that they were directed at the suppression of expression; so long as there is a legitimate state or governmental interest to support the regulations, they will generally be upheld as valid time, place, or manner restrictions.¹⁵⁰

Furthermore, as long as there is a sufficient governmental interest, subsequently enacted time, place, or manner restrictions can be content-neutral.¹⁵¹ This was satisfied in *Nunez*, as Brookfield's restrictions prohibited *any* individuals from erecting tents, sleeping in the park, or lying across the park benches, contrary to having prohibited only members of the Occupy Wall Street protest.¹⁵²

¹⁴⁴ *Clark*, 468 U.S. at 295; *Nunez*, 943 N.Y.S.2d at 864 (“There exists no basis to conclude that Brookfield’s prohibitions were applied to the defendant and other members of Occupy Wall Street because of any disagreement with their message.”).

¹⁴⁵ *See generally Nunez*, 943 N.Y.S.2d 857.

¹⁴⁶ *Id.*

¹⁴⁷ *Johnson*, 491 U.S. at 412, 414.

¹⁴⁸ 933 N.Y.S.2d 541 (Sup. Ct. 2011).

¹⁴⁹ *See supra* text accompanying note 4.

¹⁵⁰ *Waller*, 933 N.Y.S.2d at 544-54.

¹⁵¹ *Id.* at 544.

¹⁵² *Nunez*, 943 N.Y.S.2d at 864-66.

2. *Narrow Tailoring*

Time, place, and manner restrictions also require that the regulation be narrowly tailored, which can be satisfied by ensuring that it eliminates only the conduct or speech that is obstructing the governmental interest.¹⁵³ In *Nunez* it was easy to see how Brookfield's regulations achieved this. To establish its important governmental interest, Brookfield cited its responsibility in maintaining its property and keeping the park in a condition safe for others to use.¹⁵⁴ There was no question as to whether this was a sufficient governmental interest, as the same purpose was accepted by the Supreme Court in *Clark*.¹⁵⁵ The Court in *Clark* recognized that the government does in fact have a legitimate interest in protecting National Parks.¹⁵⁶ Although the park in *Nunez* was not a national park, the same rationale for allowing Brookfield to protect private property applies: the parks are intended for use by the general public, and the public has a right to use the property in safe and unharzardous conditions.¹⁵⁷

Further, the evacuation order in *Nunez* was only temporary; once Brookfield had returned its property to a safe and accessible condition, those who wished to use the park in its intended use would immediately be permitted to re-enter.¹⁵⁸ Even though the prohibition against camping and tents inside the park was permanent, this easily furthered Brookfield's interest in maintaining its property in a way that prevented unsafe conditions.¹⁵⁹ Brookfield had allowed the use of tents, camping, and lying on benches inside its property until it discovered that permitting these activities posed a great risk of danger to other uses of the park, and even to those engaging in the subsequently prohibited activities.¹⁶⁰ Once it was determined that these activities impeded Brookfield's ability to promote its interest, the challenged regulations were enacted.¹⁶¹ This is in compliance with the

¹⁵³ *Frisby*, 487 U.S. at 485.

¹⁵⁴ *Nunez*, 943 N.Y.S.2d at 864.

¹⁵⁵ *Clark*, 468 U.S. at 296.

¹⁵⁶ *Id.* at 297.

¹⁵⁷ *Nunez*, 943 N.Y.S.2d at 864.

¹⁵⁸ *Id.* at 863.

¹⁵⁹ *Id.* at 865-66.

¹⁶⁰ *Id.* at 861-864.

¹⁶¹ *Id.* at 863. Previously, camping and setting up tents had been permitted inside Zuccotti Park; it was not until after Brookfield saw the dangerous conditions inside its property, and the FDNY and NYPD declared that these conditions represented a fire hazard, a danger to

requirement from the Court in *Albertini* that the regulations must be found to promote a substantial government interest that would not be achieved as effectively without the regulation.¹⁶² Brookfield was unable to promote its interest absent the regulations.¹⁶³

3. *Alternative Channels of Communication*

Although the court in *Nunez* did not suggest any alternative methods for the protestors to convey their message, Brookfield's restrictions did leave the defendant and the others with other means to do so.¹⁶⁴ The defendant could have, for example, distributed fliers containing his message to other individuals using the park, or he himself could have remained in the park, even sitting on the benches with a sign, so long as he did not interfere with Zuccotti Park's intended use.¹⁶⁵

V. CONCLUSION

While First Amendment freedoms are tremendously important to the history of American society, the rights conferred by the First Amendment are not absolute.¹⁶⁶ As the foregoing discussion illustrates, the rights protected by the First Amendment need to be harmonized with the government's interest in performing its duties. The tests developed by the Supreme Court to analyze speech restrictions seem to have struck the right balance. The government cannot restrict an individual's First Amendment rights to stifle an intended message; rather it must pass the rigorous standards of strict scrutiny to do so.¹⁶⁷ Even when dealing with restrictions on speech or expressive conduct that are not targeted at the message, the government still must express a sufficiently important interest in suppressing that

life, and a general barrier to maintaining its property in a safe manner did Brookfield enact a regulation to prohibit them. *Nunez*, 943 N.Y.S.2d at 862.

¹⁶² *Albertini*, 472 U.S. at 689.

¹⁶³ *Nunez*, 943 N.Y.S.2d at 862.

¹⁶⁴ *Frisby*, 487 U.S. at 484.

¹⁶⁵ *Nunez*, 943 N.Y.S.2d at 864.

¹⁶⁶ *See Thomas*, 534 U.S. at 320. The First Amendment was enacted after the implementation of the Printing Act by the English monarch. *Id.* The Printing Act prohibited who could publish books and what they could publish. *Id.* Although the Printing Act was short-lived, the founders of the United States were intent on avoiding a similar situation. *Id.*

¹⁶⁷ *See, e.g., Johnson*, 491 U.S. 397.

speech, ensure that the regulation is narrowly tailored, and leave individuals with alternative channels of communication.¹⁶⁸ Hence, the balance: an individual's constitutional right to freedom of speech can be outweighed if the government can point to a sufficiently important interest in doing so.

*Christine Verbitsky**

¹⁶⁸ See *O'Brien*, 391 U.S. 367.

*J.D. Candidate 2014, Touro College Jacob D. Fuchsberg Law Center; B.A. 2011, University at Albany, State University of New York. Special Thanks: Especially to Professor Kaufman for her guidance, support, and for helping to turn nothing into something. To Bailey Ince for his time and patience in dealing with this case note. To my dearest friends, Molly Orth, Briana Puncar, and Jana Meyers, who have continuously understood “no” when they would have rather heard “yes.” To my grandmother, for reminding me that it will all be worth it in the end. To Bryan, the best little brother I could ever ask for, for being so proud of me, while it is he I am most proud of. To Kevin Ryan, for transforming my world with his love, pushing me forward, and staying always. And most importantly, to my wonderful parents, for showing me the true meaning of love, and that with it, all things are possible; I would not have seen this day without them.