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Madsen v. Women's Health Center, Inc.: Striking an Unequal Balance Between the Right of Women to Obtain an Abortion and the Right of Pro-Life Groups to Freedom of Expression

Keli N. Osaki

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I. INTRODUCTION

In recent years, certain pro-life organizations have been engaging in increasingly more aggressive tactics[1] to promote their anti-abortion message.[2] As a result, the media has portrayed anti-abortion protesters as a whole as overzealous, fanatic individuals who chain themselves to the doors of abortion clinics, stalk abortion clinic doctors and staff members, and harass potential and current patients of abortion clinics by engaging in "sidewalk counseling"[3] and distributing graphic litera-

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1. A great number of abortion clinics have recently been besieged with firebombs, death threats, and shootings. A survey by a Washington feminist group reported that more than half of all abortion clinics in the nation encountered at least one act of violence during 1994. Rene Sanchez, *From Year of Promise to Year of Violence; Abortion Rights Advocates Decry Trend Toward Militant Opposition*, WASH. POST, Dec. 31, 1994, at A14. Some examples of these violent acts include John C. Salvi III, who the police arrested for the killing of two abortion clinic workers and wounding of five other people in Massachusetts. Eric L. Wee, *Clinic Slaying Suspect Caught Shooting at Norfolk Abortion Center Tied to Massachusetts Attacks*, WASH. POST, Jan. 1, 1995, at A1. Paul Hill, a former preacher, murdered a doctor and the doctor's unarmed escort at an abortion clinic in Pensacola, Florida. William Booth, *Abortion Clinic Slayer Is Sentenced to Death*, WASH. POST, Dec. 7, 1994, at A1. At an abortion clinic in South Bend, Indiana, a perpetrator damaged the roof with an ax, shattered windows with gunfire, and sent numerous death threats to a clinic doctor. Laurie Goodstein & Pierre Thomas, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1. That same clinic was shut down for seven and one-half weeks when someone flooded the clinic's entryway with water and poured in butyric acid, creating a smell of vomit and feces. *Id.*

2. The Court established the right to have an abortion in Roe v. Wade, 410 U.S. 113 (1973). The holding in *Roe* evolved from the Supreme Court's decisions in Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that "the right of privacy . . . is a legitimate one"), and Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child").

3. Sidewalk counseling usually involves an anti-abortion protester approaching

ture.[4] Notwithstanding the media's portrayal of pro-life groups, and regardless of how wrong anti-abortion views may seem to the majority of the population, anti-abortionists still possess the fundamental right to freedom of speech and expression protected by the First Amendment to the United States Constitution.[5]

The Supreme Court's recent decision in *Madsen v. Women's Health Center, Inc.*[6] has limited, however, this fundamental right by imposing a thirty-six foot buffer zone.[7] In the past, the Supreme Court has stated that "public-issue picketing [is] 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' [and] has always rested on the highest rung of the hierarchy of First Amendment values."[8] Furthermore, the Court has emphasized that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[9] Yet the Supreme Court in *Madsen* seems to have forgotten these propositions it stated so eloquently in *Carey v. Brown*,[10] *Edward v. South Carolina*,[11] and *Stromberg v. California*.[12]

This Note examines the Supreme Court's decision in *Madsen* and suggests that the Court employed the wrong standard to determine the constitutionality of the permanent injunction at issue in *Madsen*, and

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individual women seeking to enter a clinic and attempting to dissuade them from keeping their medical appointments. *See* Armes v. City of Philadelphia, 706 F. Supp. 1156, 1159 (E.D. Pa. 1989) (involving similar activity by abortion protesters).

4. One major newspaper reporter compared anti-abortion protesters to members of the Ku Klux Klan stating "[t]hey once came in the night, wearing white hooded robes and brandishing fiery crosses, proclaiming that God was pro-white and on their side. Now they come in the morning, wearing suits and carrying incendiary posters, proclaiming that God is pro-life and on their side." Constance A. Morella, *Clinics Under Siege*, WASH. POST, Mar. 23, 1993, at A21.

5. This Note in no way attempts to condone or minimize the violent acts that have occurred against abortion clinics and individuals associated with abortion clinics. Rather, this Note focuses on the rights of individuals who lawfully wish to spread their pro-life viewpoint. The Supreme Court, in Texas v. Johnson, 491 U.S. 397 (1989), suggested that the "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

6. 114 S. Ct. 2516 (1994).

7. *Id.* at 2520.

8. Carey v. Brown, 447 U.S. 455, 466-67 (1980) (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

9. *Id.* at 467 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).

10. 447 U.S. 455 (1980).

11. 372 U.S. 229 (1963).

12. 283 U.S. 359 (1931).

that the entire injunction should have been struck down as violative of the First Amendment. Part II of this Note surveys the historical development of First Amendment standards created by the Court in determining the constitutionality of restrictions placed on speech.[13] Part III discusses both the historical and procedural facts of *Madsen*.[14] Part IV analyzes the majority opinion by Chief Justice Rehnquist,[15] the concurring opinion by Justice Souter,[16] the concurring and dissenting opinion by Justice Stevens,[17] and the concurring and dissenting opinion by Justice Scalia.[18] Part V, focusing on the public's reaction, explores the impact of the decision.[19] Finally, Part VI argues that the majority's decision in *Madsen* was flawed because it applied the wrong standard in upholding two provisions of the injunction.[20]

II. HISTORICAL BACKGROUND

The First Amendment to the United States Constitution provides in part that "Congress shall make no law . . . 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."[21] The First Amendment has never been interpreted, however, to provide an absolute ban against governmental intervention on the right to speak.[22] On the contrary, the United States Supreme Court has traditionally maintained that certain categories of speech deserve little or no First Amendment protection.[23] In addition, the Supreme Court has held that

13. *See infra* notes 21-58 and accompanying text.
14. *See infra* notes 59-88 and accompanying text.
15. *See infra* notes 89-171 and accompanying text.
16. *See infra* notes 172-76 and accompanying text.
17. *See infra* notes 177-203 and accompanying text.
18. *See infra* notes 204-61 and accompanying text.
19. *See infra* notes 262-72 and accompanying text.
20. *See infra* notes 273-78 and accompanying text.
21. U.S. CONST. amend. I.
22. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.7(b), at 942-43 (4th ed. 1991).
23. The Court in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), stated that restrictions upon the content of speech have been permitted in a few limited areas which "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 572 (discussing restrictions on "fighting words"); *see, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation); Roth v. United States, 354 U.S. 476 (1957) (obscenity).

certain well-defined and narrowly tailored restrictions may be placed on speech.[24]

Generally, when the government restricts freedom of expression, the speech it limits can be placed into two broad categories.[25] First, the government restricts the speech because of its content or general subject matter.[26] Second, the government restricts the speech only as an incidental effect of avoiding some evil connected with the content of the speech.[27] The government will generally implement this second type of restriction either by (1) placing restrictions on an activity which may convey information or ideas,[28] or (2) establishing and enforcing rules which disrupt the flow of information or ideas.[29]

The appropriate level of scrutiny to be applied by the Court to speech restrictions depends on whether Congress aimed the regulation directly at the content of the speech (a content-based restriction) or indirectly at the incidental effect of the speech (a content-neutral regulation).[30] The Supreme Court developed this content distinction over the years as a result of an overabundance of First Amendment challenges.[31]

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24. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (upholding municipal noise regulation requiring bandshell performers to use city-provided sound amplification equipment); Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding ordinance prohibiting picketing in front of residences); Grayned v. Rockford, 408 U.S. 104, 107-08 (1972) (upholding ordinance prohibiting an individual, while on grounds adjacent to an in-session school, from willfully making a disturbing noise or diversion).

25. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 789 (2d ed. 1988). This Note's section on First Amendment standards speaks in very general terms and does not purport to discuss every level of analysis the Court has used to determine the constitutionality of restrictions on speech. For a complete discussion of First Amendment standards, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) and Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

26. TRIBE, *supra* note 25, § 12-2, at 789-90. See *infra* notes 32-45 and accompanying text for a discussion of content-based restrictions.

27. TRIBE, *supra* note 25, § 12-2, at 789-90. See *infra* notes 46-50 and accompanying text for a discussion of content-neutral restrictions.

28. TRIBE, *supra* note 25, § 12-2, at 789-90; *see* Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (upholding a prohibition on the use of loudspeakers in residential areas).

29. TRIBE, *supra* note 25, § 12-2, at 790; *see* Buckley v. Valeo, 424 U.S. 1, 143-44 (1976) (upholding a ceiling on campaign contributions).

30. TRIBE, *supra* note 25, § 12-2, at 791-92.

31. The Supreme Court's large body of opinions discussing content-based and content-neutral distinctions have been the topic of numerous law review articles. *See, e.g.*, Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422 (1980); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Geoffrey R. Stone, *Content Regulation and*

A. *First Amendment Standards for Content-based Restrictions*

A content-based restriction, as the name indicates, focuses directly at the subject matter of the speech.[32] The Court applies the highest level of First Amendment scrutiny to this type of restriction because the government is restricting the speech based solely on what the speaker is communicating.[33] The Court has labeled this analysis the "compelling state interest test."[34] In order to satisfy this test, the government must show that regulation is necessary to serve a compelling state interest, and that it is narrowly drawn to achieve that end; otherwise, the regulation is unconstitutional.[35]

For instance, in *Police Department of Chicago v. Mosley*,[36] the Court addressed whether a city ordinance that prohibited picketing within 150 feet of a school, except for peaceful picketing of any school involved in a labor dispute, could withstand constitutional scrutiny.[37] Supporters of the city ordinance asserted it was a valid time, place, and manner restriction.[38] The Court rejected this argument, however, and explained

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the First Amendment, 25 WM. & MARY L. REV. 189 (1983).

32. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 380-81 (1992) (addressing ordinance which differentiated between racially based fighting words and fighting words based on other topics); Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105, 108 (1991) (dealing with statute that required accused or convicted criminals' income derived from works describing their crimes be made available to the victims of the crime); Boos v. Barry, 485 U.S. 312, 315 (1988) (addressing statute which prohibited signs or displays critical of foreign governments within 500 feet of embassies).

33. The Court in Carey v. Brown, 447 U.S. 455 (1980), stated that the Equal Protection Clause and the First Amendment prohibit the government from selectively allowing the use of a forum only by individuals with views it finds acceptable. *Id.* at 463. Moreover, in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), the Court emphasized that "[t]o permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control." *Id.* at 95-96.

34. The compelling state interest test is also known as strict scrutiny. *See, e.g.*, *Boos*, 485 U.S. at 321-22; Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 572-73 (1987); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 800 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

35. *Perry*, 460 U.S. at 45. Stated in another manner, the Court in *Carey* expressed that content-based legislation must be "finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey*, 447 U.S. at 461-62.

36. 408 U.S. 92 (1972).

37. *Id.* at 92-93.

38. *Id.* at 99. Despite the provision in the statute that permitted labor picketing

that because the ordinance permitted labor related speech but prohibited all other types of speech, the regulation was content-based.[39] Therefore, because the government failed to demonstrate a compelling state interest to support a distinction between labor picketing and other types of speech,[40] the Court held that the ordinance was unconstitutional.[41] In striking down the ordinance as in violation of the First Amendment, the Court in *Mosley* stated that "[t]he central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. . . . Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say."[42]

When using the compelling state interest test to determine the constitutionality of restrictions on freedom of speech, the Court withholds a presumption of constitutionality.[43] Thus, the state bears the burden of proving that the regulation serves a compelling state interest, and that it is the least restrictive means available to promote the state's interest.[44] This stringent test reflects the Court's disfavor of governmental regulations that suppress certain types of speech without restricting others and that could lead to a distortion of the content of public debate and a destruction of society's thought processes.[45]

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within 150 feet of an in-session school involved in a labor dispute, the city argued that the ordinance was "not improper content censorship, but rather a device for preventing disruption of the school." *Id.*

39. *Id.*

40. The city argued that "it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing." *Id.* at 100.

41. *Id.* at 102. The Court emphasized that their holding in *Mosley* did not stand for the proposition that a state could never regulate picketing based on content; rather, the Court stated that the "justifications for selective exclusions from a public forum must be carefully scrutinized." *Id.* at 98-99.

42. *Id.* at 95-96.

43. *See, e.g.*, Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); *Mosley*, 408 U.S. at 92.

44. First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978).

45. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that restrictions placed on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

B. First Amendment Standards for Content-neutral Time, Place, and Manner Restrictions

While the compelling state interest test is generally applied to content-based restrictions, the Court usually applies lower levels of judicial scrutiny to content-neutral time, place, and manner restrictions.[46] The Court employs a lower standard of scrutiny for content-neutral time, place, and manner restrictions because of the generally accepted proposition that the government does not intend to restrict the speaker's ideas; rather, it only intends to restrict the manner in which such ideas may be expressed.[47] Thus, content-neutral government restrictions are less likely than content-based restrictions to damage the thought processes within the community or affect the content of public discussion.

The Court has generally used two judicially created standards when analyzing content-neutral restrictions: the time, place, and manner test and the incidental regulation test.[48] The time, place, and manner test is usually stated as a three-part test: (1) the restriction must be content-neutral; (2) the regulation must be narrowly tailored to "serve a significant governmental interest"; and (3) the regulation must "leave open ample alternative channels for communication of the information."[49] The incidental regulation test is a less rigid, general principle test. Under the incidental regulation test, a content-neutral regulation will be upheld if

> it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is 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.[50]

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46. *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984) (ban prohibiting sleeping in public parks); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 131 & n.7 (1981) (statute forbidding depositing unstamped materials in home mailboxes); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647-48 (1981) (regulation providing that anyone who wished to sell or distribute merchandise (including literature) or solicit funds on local state fairgrounds must do so only from an assigned booth).

47. *See* United States v. Albertini, 472 U.S. 675, 688-89 (1985); TRIBE, *supra* note 25, § 12-2, at 791.

48. *See generally* NOWAK & ROTUNDA, *supra* note 22, § 16.47, at 1087 (outlining the methods used by the Court in content-neutral scenarios).

49. Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

50. United States v. O'Brien, 391 U.S. 367, 377 (1968).

Under either test, it is important to note that the Court must make an additional inquiry as to whether the purportedly content-neutral regulation is not in reality an effort to suppress speech based on its content. For instance, in *Tinker v. Des Moines Independent Community School District*,[51] the trial court upheld the constitutionality of a school regulation that forbade students from wearing armbands.[52] In upholding the regulation, the lower court reasoned that the school policy was a valid time, place, and manner restriction, and the court of appeals affirmed.[53]

Nevertheless, the Supreme Court overturned the lower court's decision stating that the school regulation prohibiting the wearing of armbands was actually a pretext for restricting the content of student speech.[54] The Court pointed out that the students who wore armbands in violation of the school's regulation did so to show their opposition to the United States involvement in the Vietnam War.[55] Furthermore, the school district had previously permitted students to wear political insignia.[56] Thus, the Court concluded the regulation was not consistent with the school's stated interest in avoiding aggressive or disruptive actions; rather, the school officials wanted to punish petitioners for expressing a silent, passive opinion regarding the conflict in Vietnam.[57] Hence, the Court held that the regulation was invalid because it acted as an unconstitutional restraint upon the students' right to engage in personal intercommunication regarding matters of political importance.[58]

III. STATEMENT OF THE CASE

In *Madsen v. Women's Health Center, Inc.*, a Florida state court, at the request of operators of abortion clinics located in central Florida, issued a permanent injunction prohibiting several anti-abortion groups "from blocking or interfering with" access to a Florida health clinic.[59] The trial

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51. 393 U.S. 503 (1969).

52. *Id.* at 504-05.

53. *Id.* at 505. The court of appeals affirmed the trial court's decision without issuing an opinion. *Id.* The trial court upheld the school's regulation prohibiting armbands, stating that it was reasonable in order to prevent disturbance of school discipline. Tinker v. Des Moines School Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966).

54. *Tinker*, 393 U.S. at 510-14.

55. *Id.* at 510. The Court reasoned that the students' wearing of the armbands was "closely akin to 'pure speech'" which the Court has continuously held "is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06.

56. *Id.* at 510. The record demonstrated that the school had previously permitted students to wear buttons supporting various national political campaigns and even the Iron Cross, a Nazi symbol. *Id.*

57. *Id.* at 514.

58. *Id.* at 513-14.

59. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2521 (1994).

court subsequently issued a broader injunction enjoining petitioners from an extensive range of expressive activities including: blocking public access to abortion clinics; singing, chanting or yelling "within earshot of the patients inside the Clinic"; approaching patients within 300 feet of the entrance to the clinic; and protesting outside the homes of the owners and employees of the abortion clinic.[60]

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60. *Id.* at 2521-22. Specifically, the amended injunction prohibited petitioners from engaging in the following activities:

> (1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic [hereinafter Clinic] located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.
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> (2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.
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> (3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way . . . .
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> (4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.
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> (5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. In the event of such invitation, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the respondents shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.
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> (6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff owners or agents. The respondents and those acting in con-

The trial court issued this amended permanent injunction after it found that access to the abortion clinic, where petitioners regularly demonstrated, was still being impeded despite the grant of the initial injunction.[61] Specifically, the court determined that anti-abortion protesters continued to block access to the clinic by gathering on the street in front of the clinic and congregating at the edge of the clinic's driveway.[62] In addition, the court discovered that anti-abortion activists would endeavor to "sidewalk counsel[]" occupants of the cars that were forced to slow down to permit the protesters to move away from the clinic's entrance.[63]

The effects of the daily protests, the court found, were extremely detrimental to the well-being of the clinic's patients and staff.[64] The court heard testimony from a doctor employed at the abortion clinic which revealed that patients were being subjected to higher health risks because of the added stress associated with the protesters' activities.[65] The

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cert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic. . . .

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

(9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 679-80 (Fla. 1993), *aff'd in part, rev'd in part, Madsen*, 114 S. Ct. at 2516.

61. *Madsen*, 114 S. Ct. at 2521. The initial permanent injunction forbade petitioners, and those acting in concert with them, from the following:

1. [T]respassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida; 2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and, 3. attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

Operation Rescue, 626 So. 2d at 667 n.4.

62. *Madsen*, 114 S. Ct. at 2521.

63. *Id.* The number of protesters gathering at the clinic on any given day varied from just a few to 400. *Id.*

64. *Id.*

65. *Id.* The doctor stated that the patients "manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo

patients had to deal with not only the stress of the medical procedure itself, but also with the protesters outside singing and chanting.[66]

Following a trial court hearing, the Florida Supreme Court upheld the amended injunction.[67] The First Amendment standard used by the court was whether the restrictions were "'narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication.'"[68] In adopting this mid-level standard of review, the court rejected petitioners' argument that because the injunction[69] was aimed at suppressing a specific type of message, pro-life speech, a higher level of review should be applied.[70]

The Florida Supreme Court conceded that the injunction "operate[d] at the core of the First Amendment" because it prohibited protest activities concerning matters of public interest.[71] The court further recognized that the forum involved in this case, "public streets, sidewalks, and rights-of-way," were areas considered to be "traditional public forum."[72]

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the surgical procedures, thereby increasing the risk associated with such procedures." *Id.* (quoting Appellant's Brief at 54).

66. *Id.* Even clinic employees could not escape the protesters' activities. For instance, the pro-life advocates frequently demonstrated outside the homes of clinic workers, ringing the doorbells of neighbors, distributing literature and labeling the clinic employees as murderers. *Id.*

67. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 675 (Fla. 1993), *aff'd in part, rev'd in part, Madsen*, 114 S. Ct. at 2516. Petitioners challenged the amended injunction on the grounds it violated their rights to freedom of speech, freedom of association, equal protection, and free exercise of religion. *Id.* at 669.

68. *Id.* at 671-72 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

69. Hereinafter, "the injunction" or "the amended injunction" refers to the court order at issue in *Madsen*. The original permanent injunction issued by the Florida state court will hereinafter be referred to as "the initial injunction."

70. *Operation Rescue*, 626 So. 2d at 670.

71. *Id.* at 671.

72. *Id.* Aside from determining whether the restriction on speech is content-based or content-neutral, an additional factor courts will consider in determining the appropriate level of analysis is where the speech the government is attempting to restrict takes place. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 480-81 (1988) (holding that streets are public fora, so strict scrutiny applies); Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 814 (1984) (holding that public property is not necessarily a public fora); *Perry*, 460 U.S. at 46 (1983) (holding that a lower level of scrutiny applies where public property is a non-public forum). Traditionally, the Supreme Court has classified the place of expression into two broad categories: public and non-public forums. A public forum is public property that has historically been used as a gathering spot for purposes of expressive activity. *Perry*, 460 U.S. at 45-46 (citing streets and parks as time-honored examples of public fora). A non-public forum, on the

Nevertheless, the court determined that the injunction should be analyzed under an intermediate standard because the injunction was content-neutral.[73] In supporting this decision, the court noted that the prohibitions mandated by the injunction did not even mention the topic of abortion; rather, they only addressed the harassing manner petitioners chose to convey their message.[74]

Applying the intermediate First Amendment standard, the state court determined that Florida had significant interests in protecting a woman's constitutional right to seek an abortion,[75] in "ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting property rights of all Florida's citizens."[76]

Next, the court addressed whether the injunction was narrowly tailored to serve these significant government interests.[77] The court noted that the trial court found each provision of the injunction "necessary to counteract specific abuses Operation Rescue fomented after entry of the permanent injunction nearly six months earlier."[78] In addition, the court distinguished the type of communication that petitioners engaged in, targeted picketing aimed at particular individuals, from the more general type of communication "that cannot be completely banned in public places, such as distributing handbills and soliciting."[79] Finally, the court acknowledged that the buffer zone around the clinic and workers' residences could have been "slightly narrower."[80] Nevertheless, the court emphasized that it would not "sit as trier-of-fact and make incremental changes in the trial court's order."[81] Accordingly, the court held the amended injunction was "sufficiently narrowly tailored to protect significant government interests."[82]

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other hand, is public property not particularly linked to expression. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2706-08 (1992) (holding that airports are non-public fora, as they have neither traditionally been an area for public discussion and debate, nor have they been opened by the government to the public for this purpose).

73. *Operation Rescue*, 626 So. 2d at 671.

74. *Id.* The court stated the restrictions "address[ed] only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity." *Id.*

75. *Id.* at 672. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding the constitutional right to privacy encompasses a woman's abortion decision).

76. *Operation Rescue*, 626 So. 2d at 672.

77. *Id.* at 672-73.

78. *Id.* at 672.

79. *Id.* at 672-73. The court noted that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Id.* at 673 (citing Frisby v. Schultz, 487 U.S. 474, 487 (1988)).

80. *Operation Rescue*, 626 So. 2d at 673.

81. *Id.*

82. *Id.*

Shortly before the Florida Supreme Court's opinion was handed down, the United States Court of Appeals for the Eleventh Circuit heard a separate challenge to the same injunction.[83] The court of appeals refused to uphold the injunction,[84] emphasizing that the dispute was a clash "between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights."[85] In direct contradiction to the Florida state court, the Eleventh Circuit stated that the restrictions outlined in the injunction were content-based, and thus, were subject to strict scrutiny analysis.[86] The court asserted that the restriction directed against petitioners, all pro-life supporters, was "no more viewpoint-neutral than one restricting the speech of 'the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them or on their behalf.'"[87] In light of the conflict between the Florida Supreme Court and the Eleventh Circuit, the United States Supreme Court granted certiorari in order to determine whether protestors demonstrating within a certain proximity to an abortion clinic violates the First Amendment.[88]

IV. ANALYSIS OF THE COURT'S OPINION

A. *Chief Justice Rehnquist's Majority Opinion*

In a 6-3 decision,[89] the majority of the Court upheld two of the provisions of the amended injunction: the buffer zone of thirty-six feet and the restrictions against loud noises during operating hours.[90] The Court stated that these provisions did not violate the First Amendment rights of

83. Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993).

84. *Id.* at 715.

85. *Id.* at 711.

86. *Id.* at 710.

87. *Id.* at 711. The court deduced that the "acting in concert" provision would result in arrests of only pro-life activists. *Id.* The injunction did not restrict the manner in which pro-choice activists could protest. *Id.*

88. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 907 (1994).

89. Chief Justice Rehnquist wrote the majority opinion in which Justices Blackmun, O'Connor, Souter, and Ginsburg joined, and Justice Stevens joined in part. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2520 (1994). Justice Souter filed a concurring opinion. *Id.* at 2530 (Souter, J., concurring). Justice Stevens filed an opinion concurring and dissenting in part. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part). Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, joined by Justices Kennedy and Thomas. *Id.* at 2534 (Scalia, J., concurring in the judgment in part and dissenting in part).

90. *Id.* at 2527-30.

anti-abortion protesters.[91] The remaining restrictions, however, were struck down by the Court as violating the First Amendment.[92]

The majority began its analysis by addressing petitioners' argument that the constitutionality of the injunction should be analyzed under a strict scrutiny standard.[93] Petitioners asserted that because the injunction only prohibited activities of protestors who shared the pro-life viewpoint, it was content-based, and thus, should be subject to the highest level of scrutiny.[94] Respondents, on the other hand, argued that the constitutionality of the injunction should be determined under the intermediate scrutiny standard, a standard that is generally applied to content-neutral time, place, and manner restrictions on speech.[95] The Chief Justice quickly dismissed both petitioners' and respondents' assertions regarding the proper First Amendment standard of review.[96]

The Court explained that if it were to agree with petitioners' assertion that the injunction was content-based simply because it was directed at individuals who share the same anti-abortion viewpoint, "virtually every injunction [would be classified] as content or viewpoint based."[97] To the contrary, the majority stated that not all injunctions are content-based; rather, injunctions are inherently applicable to only a particular group or individual, and are issued to regulate the group's speech or activities or both.[98] The Court asserted that the reason the injunction focused only on those parties who shared an anti-abortion viewpoint was because of a lack of activity by other protest groups, such as pro-choice organiza-

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91. *Id.* at 2530.

92. *Id.* The Court found these remaining provisions too expansive to affect the purpose of the injunction. *Id.*

93. *Id.* at 2523. For a discussion of the strict scrutiny standard see *supra* notes 33-45 and accompanying text.

94. *Madsen*, 114 S. Ct. at 2523. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (stating that "[f]or the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

95. *Madsen*, 114 S. Ct. at 2537-38 (Scalia, J., concurring in the judgment in part and dissenting in part). For a discussion of content-neutral standards see *supra* notes 46-58 and accompanying text.

96. *Madsen*, 114 S. Ct. at 2523-24.

97. *Id.* at 2523.

98. *Id.* The Court explained injunctions are based on the group's past behavior in the context of the conflict between the parties. *Id.* Thus, the courts' obligation is to issue injunctions to devise a remedy for a specific deprivation, not to draft a statute addressed to the general public. *Id.*

tions.[99] Accordingly, the majority concluded that the injunction was content-neutral.[100]

The majority next considered whether the content-neutral injunction could be analyzed under an intermediate standard of review as urged by respondents.[101] The Court stated that if the injunction issued against petitioners was instead a content-neutral statute, then the intermediate standard of review would be appropriate.[102] The majority emphasized that content-neutral injunctions, however, are not comparable to content-neutral statutes.[103] The Court noted that while ordinances are drafted by the legislature and aimed at society in general in order to promote

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99. *Id.* The Court emphasized that there was nothing in the record indicating that similar conduct aimed at activity unrelated to abortion would receive less restrictive treatment under Florida law. *Id.*

The Court further commented that although the petitioners all shared the same beliefs regarding abortion, this was not determinative that "some invidious content or view-point based purpose motivated the issuance of the order." *Id.* at 2524. The Court reasoned that an injunction is not conclusively content-based merely because it addresses particular individuals with the same beliefs. *Madsen*, 114 S. Ct. at 2524 (citing Boos v. Barry, 485 U.S. 312 (1988)).

100. *Id.* In reaching its decision that the injunction was content-neutral, the Court also relied on various well-settled First Amendment principles. For instance, in Ward v. Rock Against Racism, 491 U.S. 781 (1989), the Court stated that the main focus in ascertaining content-neutrality is whether a state has imposed a restriction on speech without regard to the content of the restricted speech. *Id.* at 791. The Court in *Ward* emphasized that in order for a regulation to be considered content-neutral, the government must not have imposed the regulation for the purpose of suppressing unpopular speech. *Id.*

In applying the principle stated in *Ward* to the present case, the *Madsen* Court reasoned that the lower court imposed restrictions on petitioners' activities, not because of their anti-abortion message, but rather because petitioners continuously refused to comply with the original order issued by the court. *Madsen*, 114 S. Ct. at 2523-24. *But see id.* at 2537, 2545-48 (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that there was no evidence presented to the trial court demonstrating petitioners had failed to comply with the original order).

101. *Madsen*, 114 S. Ct. at 2524.

102. *Id.*; *see Ward*, 491 U.S. at 791. The Court stated

> [o]ur cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward, 491 U.S. at 791 (quoting Clark v. Community for Creative Non-Violence, 486 U.S. 288, 293 (1984)).

103. *Id.* at 2524.

particular public interests, injunctions are issued by a court against specific groups or an individual in direct response to "violations or (threatened violations) of a legislative or judicial decree."[104] In addition, the Court emphasized that injunctions are subject to "greater risks of censorship and discriminatory application" than ordinances.[105]

Because of these stated differences existing between statutes and injunctions, the Court concluded that a "somewhat more stringent" First Amendment standard must be applied to content-neutral injunctions.[106] In examining past cases involving speech-restricting injunctions,[107] the majority stated that the Court had been particularly careful to ensure that the intended effect of the injunction and the prohibitions the injunction placed upon speech were constructed in a manner consistent with the general rule "'that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs.'"[108] Thus, the standard intermediate level of analysis generally used for content-neutral *regulations* was not stringent enough to determine the constitutionality of content-neutral *injunctions*.[109] Rather, the relevant inquiry in determining the constitutionality of a content-neutral injunction, and thus the relevant inquiry in this case, was "whether the

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104. *Id.*; *see* United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (outlining the basic rationale and purpose of an injunction).

105. *Madsen*, 114 S. Ct. at 2524. The Court in Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949), stated:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Id. at 112-13.

Despite the potential dangers of injunctions, the Court stated that injunctions do possess some advantages over ordinances. *Madsen*, 114 S. Ct. at 2524. For instance, injunctions, as opposed to ordinances, sometimes provide a more appropriate remedy because they are more narrowly tailored to the violation of the law, which more often than not has already occurred. *Id.* (citing United States v. Paradise, 480 U.S. 149 (1987)).

106. *Madsen*, 114 S. Ct. at 2524.

107. The cases cited by the Court included: NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968); NAACP v. Button, 371 U.S. 415 (1963); and Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

108. *Madsen*, 114 S. Ct. at 2525 (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

109. *Id.*

challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[110]

Having determined the applicable First Amendment standard, the Court next considered the lower court's findings that the injunction advanced important government interests.[111] First, the majority agreed with the lower court "that the State has a strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy."[112] Second, the Court concurred that "[t]he State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens."[113] Finally, the Court agreed that "the State's strong interest in residential privacy, acknowledged in *Frisby v. Schultz*, applied by analogy to medical privacy."[114] Thus, the Court was in accord with the lower court's finding that the provisions of the injunction protected significant government interests.

Having determined the appropriate standard of review and approved the State's asserted interests, the majority then considered each provision of the injunction to determine whether the provision burdened no more speech than necessary to serve these significant government interests.[115]

1. The Thirty-Six-Foot Buffer Zone

In order to ensure access to the clinic, the state court forbid petitioners from "congregating, picketing, patrolling, demonstrating or entering" within thirty-six feet of the clinic's property line.[116] The state court ordered this thirty-six-foot buffer zone after determining that the petitioners were continuing to impede access to the clinic despite the initial injunction.[117] The speech-free buffer zone forced petitioners to move their protest activities away from the driveway of the clinic, where the lower court determined the protest activities often blocked patients' and employees' access to the clinic.[118] The buffer zone also prohibited peti-

110. *Id.* Hereinafter, the standard the majority used to analyze speech-restricting injunctions will be called the heightened intermediate standard of review.
111. *Id.* at 2526.
112. *Id.* (citing Roe v. Wade, 410 U.S. 113 (1973)).
113. *Id.*
114. *Id.* (citation omitted).
115. *Id.*
116. *Id.*
117. *Id.* The initial injunction, however, contained no such buffer zone. *Id.* at 2527.
118. *Id.* at 2526; *see* Cameron v. Johnson, 390 U.S. 611, 617 (1968) (upholding stat-

tioners from invading private property located to the north and west of the clinic.[119]

In determining whether the provision requiring the thirty-six foot buffer zone burdened more speech than necessary to accomplish its goal, the Court first noted a distinction between the type of "focused picketing" engaged in by petitioners, aimed primarily at the patients and staff of the clinic, and the more general type of communication that can never be completely prohibited in public places, such as distributing leaflets and soliciting.[120] The majority stated that the speech-free buffer zone surrounding the entrances and the parking lot ensured unfettered access to the clinic.[121] Moreover, the Court reasoned that after the initial injunction failed to achieve the desired degree of access to the clinic, the state court was left with little choice but to order the speech-free buffer zone.[122]

Nevertheless, the majority questioned the necessity of having a complete buffer zone surrounding the entrances and driveway of the clinic.[123] Notwithstanding the supposedly heightened standard of review, the majority quickly reasoned that the court below must be given some deference because of its familiarity with the factual background of the conflict.[124] In addition, the Court noted that, during the evidentiary hearing before the state court, a petitioner's witness admitted that the thirty-six foot buffer zone was not overly broad; rather, the buffer zone permitted anti-abortion protesters to stand approximately ten to twelve feet from vehicles entering and exiting the clinic property.[125] On bal-

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ute which forbid picketing that blocked or unreasonably interfered with access to or from public buildings, including courthouses, and with traffic on the adjacent sidewalks).

119. *Madsen*, 114 S. Ct. at 2527.

120. *Id.*; *see* Frisby v. Schultz, 487 U.S. 474 (1988) (distinguishing focused picketing from more generally directed means of communication).

121. *Madsen*, 114 S. Ct. at 2527.

122. *Id.* The majority noted that the failure of the initial order could be a factor taken into consideration in determining the constitutionality of the broader order. *Id.*; *see* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697-98 (1978) (stating that "[h]aving found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences").

123. *Madsen*, 114 S. Ct. at 2527.

124. *Id.*; *see* Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294 (1941) (stating "it is not for us to make an independent valuation of the testimony before the master").

125. *Madsen*, 114 S. Ct. at 2527.

ance, the Court determined that the thirty-six foot buffer zone surrounding the clinic entrances and driveway burdened no more speech than necessary to satisfy the stated governmental interests.[126]

The Court next considered the portion of the buffer zone provision that prohibited protesters from entering the private property in the back and on the side of the clinic.[127] The Court struck down this portion, concluding that it burdened more speech than necessary to accomplish the state's interest in ensuring unimpeded access to the clinic.[128] This portion of the injunction failed to satisfy the heightened level of scrutiny because there was no evidence presented to the state court which demonstrated that by standing on the adjacent property petitioners were impeding access to the clinic.[129]

2. Restriction on Noise Levels Outside of the Clinic

The injunction prohibited petitioners, between 7:30 a.m. and 12:00 noon on Mondays through Saturdays, from "'singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.'"[130] In examining this provision of the injunction, the Court emphasized that the location where the regulations are applied must be taken into account in ascertaining whether the regulations burden more speech than necessary.[131] The majority relied on *Grayned v. City of Rockford*,[132] which considered similar noise restrictions. In *Grayned*, the Court upheld an ordinance prohibiting persons from willfully making noise while on grounds adjacent to a school that was in session.[133]

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126. *Id.* In upholding this provision, the majority reasoned that despite the restrictions created by the buffer zone, the petitioners' message of pro-life could still be seen and heard from the parking lots of the clinic. *Id.*

127. *Id.* at 2528.

128. *Id.* The majority stated that access to the clinic could be obtained without having to enter either the back or side. *Id.*

129. *Id.*

130. *Id.* at 2522 (quoting Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 679 (Fla. 1993), *aff'd in part, rev'd in part, Madsen*, 114 S. Ct. at 2516 (1994)).

131. *Id.* at 2528.

132. 408 U.S. 104 (1972).

133. *Id.* at 119. The Court in *Grayned* stated that "the nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable.'" *Id.* at 116 (citation omitted).

In *Madsen*, the Court reasoned that noise control around hospitals and other medical buildings was especially important during surgery and recovery periods.[134] The majority emphasized that the "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[135] Accordingly, the majority held that this provision of the injunction did not burden more speech than necessary to serve the significant government interest in the "health and well-being of the patients at the clinic."[136]

3. Restriction on Images Observable Outside of the Clinic

The "images observable" provision of the injunction did not garner much discussion from the Court.[137] The majority struck down the broad provision banning all images observable from inside the clinic, stating that it burdened more speech than necessary even when balanced against the state's strong interest in reducing the number of threats received by patients and their families.[138] The Court reasoned that even if the state's interest was to lower the degree of anxiety and hypertension experienced by the patients inside the clinic, the broad blanket ban against all observable images would still not pass the heightened intermediate standard of review.[139]

The majority reasoned that this provision could have been more narrowly tailored, such as by prohibiting only those observable images that "could be interpreted as threats or veiled threats."[140] Further, the Court added that the only valid reason images would bother a person inside the clinic would be if the images were offensive to that person.[141] Rather than suppressing all offensive images, the Court stated it would be easier

134. *Madsen*, 114 S. Ct. at 2528; *see* NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783-84 n.12 (1979) (emphasizing that hospitals are places "'where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere'") (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring)).

135. *Madsen*, 114 S. Ct. at 2528. The Court cited its decision in *Grayned* which asserted: "'[I]f overamplified loudspeakers assault the citizenry, government may turn them down.'" *Id.* (quoting *Grayned*, 408 U.S. at 116).

136. *Id.*

137. *Id.* at 2528-29.

138. *Id.* at 2529.

139. *Id.*

140. *Id.* The Court stated threats made to patients or their families are certainly forbidden under the First Amendment. *Id.*

141. *Id.*

for the patients and staff to simply close their curtains.[142] Thus, the majority concluded that this provision of the injunction violated the First Amendment.[143]

4. Three-Hundred-Foot Restriction on Petitioners from Physically Approaching Individuals Seeking to Gain Access to the Clinic

The state's interest in enacting this provision was to protect individuals seeking the services of the clinic from being "stalked" or "shadowed."[144] The majority did not agree, however, that the state court's justification of the total ban on individuals approaching within 300 feet of the clinic entrances was justified.[145] Rather, the Court stated that without any evidence demonstrating that petitioners' speech is "independently proscribable"[146] or "is so infused with violence as to be indistinguishable from a threat of physical harm," the provision burdened more speech than necessary to protect the state's interest.[147] In concluding that this provision did not withstand First Amendment scrutiny, the Court added that generally "'in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'"[148]

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142. *Id.*

143. *Id.*

144. *Id.*; *see* International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2708 (1992) ("[F]ace-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation.").

145. *Madsen*, 114 S. Ct. at 2529. The Chief Justice stated "it is difficult . . . to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.*

146. *Id.* The Court cited "fighting words" as an example. *Id.*

147. *Id.*; *see* Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292-93 (1941) (upholding a speech-restricting injunction on the basis the protesters engaged in coercive speech infused with violence).

148. *Madsen*, 114 S. Ct. at 2529 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988) (internal quotations marks omitted in original)).

5. Prohibition Against Picketing, Demonstrating, or Using Sound Amplification Equipment Within 300 Feet from the Homes of the Clinic's Staff[149]

In analyzing this particular provision of the injunction, the Court noted that the same analysis it applied to sound amplification at the clinic should be used here as well.[150] The majority relied on *Frisby v. Schultz*,[151] which upheld an ordinance prohibiting targeted picketing in residential areas based on the proposition that the home is "'the last citadel of the tired, the weary, and the sick.'"[152]

Despite the decisions upholding similar regulations prohibiting targeted residential picketing, the Court in the present case struck down the 300-foot buffer zone provision.[153] The majority commented that this provision was much too broad and that a similar, narrower provision could have achieved the same effect.[154] Because the evidence presented to the state court could not justify a ban on general picketing through a residential neighborhood,[155] the Court determined a 300-foot buffer zone surrounding the residences of the clinic's staff members burdened more speech than necessary to satisfy the State's interest.[156]

6. Petitioners' Vagueness and Overbreadth Challenges

After analyzing each provision of the injunction separately, the Court addressed petitioners' final two arguments.[157] First, petitioners asserted

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149. This restriction also prohibited blocking access to streets that provided the only means of entry to the streets where the clinic's staff lived. *Id.* at 2529.

150. *Id.*; *see supra* notes 130-36 and accompanying text (discussing restriction on noise levels). The Court, relying on Grayned v. City of Rockford, 408 U.S. 104, 116 (1972), stated that the government may require that protesters lower the volume if the noise from their protests overwhelms the neighborhood. *Madsen*, 114 S. Ct. at 2529.

151. 487 U.S. 474 (1988).

152. *Id.* at 484 (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

153. *Madsen*, 114 S. Ct. at 2529-30.

154. *Id.* at 2530.

155. *Id.* The court compared this broad provision with the narrower ordinance at issue in Frisby v. Schultz, 487 U.S. 474 (1988), and determined that the former could not stand. *Madsen*, 114 S. Ct. at 2530. The ordinance in *Frisby* only prohibited protesters from "engag[ing] in picketing before or about the residence or dwelling of any individual." *Frisby*, 487 U.S. at 477. The relevant provision in *Madsen*, on the other hand, forbid protesters from even walking through the residential neighborhoods where any member of the clinic's staff resided. *Madsen*, 114 S. Ct. at 2530.

156. *Madsen*, 114 S. Ct. at 2530. The Court suggested that a limit on the "time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Id.*

157. *Id.*

that the injunction issued by the state court was vague and overbroad.[158] Specifically, petitioners objected to the vague wording of the injunction making it applicable to the individuals acting "in concert" with the named parties in the order.[159] The Court concluded that because petitioners consisted of the parties named in the injunction, petitioners lacked standing to challenge the portion of the injunction applying to persons who were not parties.[160]

The Court determined that petitioners' overbreadth argument failed as well because the challenged statement did not actually regulate any conduct; rather, it merely applied to unnamed individuals who may be found in the future "to be acting 'in concert' with the named parties."[161] Thus, the Court stated that its previous holding in *Regal Knitwear Co. v. NLRB*[162] was applicable to the instant case.[163] In *Regal Knitwear*, the named party challenged a provision of an injunction directed at the "successors and assigns" of the enjoined party.[164] The Court in *Regal Knitwear* held that because the party asserting the claim was not a successor or assign, the argument was invalid and "an abstract controversy over the use of these words."[165]

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158. *Id.* Commonly parties raise overbreadth and vagueness arguments to challenge the constitutionality of a statute. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352 (1983) (striking down a statute requiring citizens to furnish police with "credible" identification); Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (negating an antisolicitation ordinance); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (upholding restrictions on political activity by state employees); NAACP v. Button, 371 U.S. 415 (1963) (rejecting law aimed at attorney solicitation). A court will consider a statute overly broad if, in addition to proscribing activities that may constitutionally be forbidden, it also restricts speech or conduct that the court has protected by the guarantees of free speech or free association. Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (invalidating antilabor statute). A statute will be declared void for vagueness when, as a matter of due process, persons "of common intelligence must necessarily guess at [the statute's] meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391, 393-95 (1926) (addressing indefinite and obscure wage law).

For a thorough discussion of the overbreadth and vagueness doctrines see NOWAK & ROTUNDA, *supra* note 22, §§ 16.8-16.9, at 944-52.

159. *Madsen*, 114 S. Ct. at 2530.

160. *Id.*

161. *Id.*

162. 324 U.S. 9, 14 (1945).

163. *Madsen*, 114 S. Ct. at 2530.

164. *Regal Knitwear*, 324 U.S. at 14.

165. *Id.* at 15.

Second, petitioners argued that the acting in concert provision of the injunction violated the First Amendment because it impeded their freedom of association.[166] The Court rejected this contention, reasoning that the injunction did not prohibit petitioners from gathering or associating with others in order to communicate a particular point of view.[167] The injunction instead only regulated the manner in which petitioners conducted their protest activity.[168] Moreover, the majority emphasized that "joining with others for the purpose of depriving third parties of their lawful rights" is not protected by the First Amendment guarantee of freedom of association.[169]

In conclusion, the Court summarized its findings. The noise restrictions and the thirty-six-foot speech-free buffer zone surrounding the clinic's property were valid "because they burden[ed] no more speech than necessary to eliminate the unlawful conduct targeted by the state court's injunction."[170] On the other hand, the thirty-six-foot buffer zone as applied to the private property to the north and west of the clinic, the images observable provision, the 300-foot no approach zone around the clinic, and the 300-foot buffer zone around the residences were struck down because they were "broad[er] than necessary to accomplish the permissible goals of the injunction."[171]

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166. *Madsen*, 114 S. Ct. at 2530. Although the First Amendment does not expressly mention the freedom of association, the Supreme Court has held that the freedom derives by implication from the explicitly stated right of speech, press, assembly, and petition. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 991 (1982) (holding that a boycott of white merchants by several hundred black people involved the constitutionally protected activities of speech, assembly, association, and petition contained in the First Amendment); Buckley v. Valeo, 424 U.S. 1, 44 (1976) (holding a provision of the Federal Election Campaign Act of 1971 invalid because it imposed impermissible restraint on the basic freedoms of speech and association protected by the First Amendment); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 221-22 (1967) (holding the "freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments" allows the Union "to hire attorneys on a salary basis to assist its members in the assertion of their legal rights"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (noting that freedom of association is an "inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech"). In order to restrict freedom of association, the government must demonstrate that the governmental interest being pursued is a compelling one, and that such an interest cannot be achieved by means less restrictive of the freedom of association. *See generally Alabama ex rel. Patterson*, 357 U.S. at 460-63 (1958) (explaining need for overriding state interest). For a thorough discussion of the freedom of association see NOWAK & ROTUNDA, *supra* note 22, § 16.41, at 1062-69.

167. *Madsen*, 114 S. Ct. at 2530.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

B. Justice Souter's Concurring Opinion

In his concurrence, Justice Souter wrote separately to clarify two aspects of the record.[172] First, Justice Souter disagreed with the majority's discussion of the acting in concert provision of the injunction.[173] The majority stated that the individuals subject to the injunction's restrictions were those individuals that happened to share the same viewpoint regarding abortion.[174] Justice Souter asserted, on the other hand, that the trial court judge had made it clear that the determination of who would be considered as acting in concert with the named defendants would be decided on a case-by-case basis rather than on the basis of the individual's viewpoints.[175]

Second, Justice Souter noted that petitioners had conceded that Florida law recognizes the state's interests in protecting public safety, unimpeded flow of traffic, and property rights.[176]

C. Justice Stevens' Concurring and Dissenting Opinion

Justice Stevens agreed with the majority's determination that the injunction was a "content-based restriction on free speech."[177] Furthermore, Justice Stevens agreed with the majority's dismissal of the vagueness and overbreadth arguments regarding the acting in concert provision of the injunction.[178] Nevertheless, Justice Stevens parted with the majority regarding the appropriate standard under which the Court should analyze content-neutral injunctions.[179]

According to Justice Stevens, injunctions, as opposed to generally applicable legislation, should be analyzed under "a more lenient standard" than employed by the majority.[180] Justice Stevens, like the majori-

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172. *Id.* (Souter, J., concurring).
173. *Id.* (Souter, J., concurring).
174. *Id.* (Souter, J., concurring).
175. *Id.* (Souter, J., concurring). *But see id.* at 2539-40 (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing the amended injunction restrained petitioners based on their "proscribable views").
176. *Id.* at 2530-31 (Souter, J., concurring) (citing Brief for Petitioners at 17 & n.7 (citing FLA. STAT. ANN. §§ 870.041-.047 (West 1991) (public peace); FLA. STAT. ANN. § 316.2045 (West 1991) (obstruction of public streets, highways, and roads))). The majority did not comment on whether petitioners had conceded this point.
177. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part).
178. *Id.* (Stevens, J., concurring in part and dissenting in part).
179. *Id.* (Stevens, J., concurring in part and dissenting in part).
180. *Id.* (Stevens, J., concurring in part and dissenting in part). The majority adopt-

ty, discussed the differences existing between statutes and injunctions that support a lower standard of review.[181] He stated two distinct qualities of injunctions, not applicable to statutes, governing the standard used in analyzing injunctions.[182] First, he noted the traditional requirement that injunctions "should be no more burdensome than necessary to provide complete relief."[183] According to Justice Stevens, "[I]n a First Amendment context . . . the property of the [injunctive] remedy depends almost entirely on the character of the violation and the likelihood of its recurrence."[184] Thus, the constitutionality of an injunction should not be evaluated under the same standards as those employed to analyze statutes.[185]

Second, "even if an injunction impinges on a constitutional right," it still may be necessary to forbid more than the enjoined parties' conduct.[186] Justice Stevens observed that remedies provided by injunctions frequently "include commands that the law does not impose on the community at large."[187] Thus, "repeated violations [of a court order] may justify sanctions that might be invalid if applied to a first offender or if enacted by the legislature."[188] Because a trial court is more familiar

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ed a "somewhat more stringent" First Amendment standard of review than typically used for determining the constitutionality of content-neutral statutes. *Id.* at 2524. The standard articulated by the majority focused on "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant interest." *Id.* at 2525.

181. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part). Justice Stevens reiterated the majority's assertion that the one major difference between statutes and injunctions is that the courts indiscriminately aim the former at the entire community, while the courts impose the latter specifically on an individual or a narrow group of individuals who have been denied a liberty by the court as a result of some involvement in illegal acts. *Id.* (Stevens, J., concurring in part and dissenting in part).

182. *Id.* (Stevens, J., concurring in part and dissenting in part).

183. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing Califano v. Yamasaki, 422 U.S. 682, 702 (1979)).

184. *Id.* (Stevens, J., concurring in part and dissenting in part).

185. *Id.* (Stevens, J., concurring in part and dissenting in part).

186. *Id.* (Stevens, J., concurring in part and dissenting in part). The remedy that an injunction provides "must include appropriate restraints on 'future activities both to avoid a recurrence of the violation and to eliminate its consequences.'" *Id.* (Stevens, J., concurring in part and dissenting in part) (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697-98 (1978)).

187. *Id.* at 2531-32 (Stevens, J., concurring in part and dissenting in part) (quoting Teachers v. Hudson, 475 U.S. 292, 309-10 & n.22 (1986)).

188. *Id.* at 2532 (Stevens, J., concurring in part and dissenting in part) (citing United States v. Paradise, 480 U.S. 149 (1987)). Justice Stevens noted that the trial court, after hearing three days of testimony, determined that petitioners had committed tortious acts and continuously violated the initial injunction. *Id.* (Stevens, J., concurring in part and dissenting in part). Hence, the trial court issued the injunction

with the facts justifying an injunction and in a better position to determine its scope, Justice Stevens reasoned that injunctions should be analyzed under a "standard that gives appropriate deference to the judge's unique familiarity with the facts."[189]

After concluding that injunctions should be analyzed under a more lenient standard than statutes, Justice Stevens went on to address the three issues presented by petitioners.[190] First, Justice Stevens concurred with the majority that the thirty-six-foot speech-free buffer zone did not violate the First Amendment.[191] Focusing on the noted differences between statutes and injunctions,[192] Justice Stevens reasoned that *legislation* forbidding protesters from demonstrating within thirty-six feet of a clinic would most likely violate the First Amendment.[193] On the other hand, an *injunction* prohibiting speech within that same zone and aimed at particular individuals "who have engaged in unlawful conduct in a similar zone" in the past would probably withstand First Amendment scrutiny.[194]

Second, Justice Stevens addressed "whether the 'consent requirement before speech is permitted' within a 300-foot buffer zone around the clinic unconstitutionally infringes on free speech."[195] He argued that both petitioners and the majority misinterpreted the meaning of this part of the injunction.[196]

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based on the court's factual findings of petitioners' repeated violations. *Id.* (Stevens, J., concurring in part and dissenting in part).

189. *Id.* (Stevens, J., concurring in part and dissenting in part).

190. *Id.* at 2533 (Stevens, J., concurring in part and dissenting in part). Justice Stevens asserted that the majority erred in analyzing provisions of the injunction not challenged by petitioners. *Id.* (Stevens, J., concurring in part and dissenting in part). He argued that petitioners only attacked the constitutionality of three issues: (1) the 36-foot buffer zone; (2) the consent requirement before speech is permitted within a 300-foot buffer zone; and (3) the acting in concert provision. *Id.* at 2531-33 (Stevens, J., concurring in part and dissenting in part). Justice Stevens believed the majority should not have considered the remaining provisions of the injunction because the petitioners did not raise them in their briefs. *Id.* at 2531, 2533 (Stevens, J., concurring in part and dissenting in part).

191. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part); *see supra* notes 116-29 and accompanying text (discussing the majority's analysis of speech-free buffer zone provision).

192. *See supra* note 181 (explaining similar difference noted by the majority and Justice Stevens).

193. *Madsen*, 114 S. Ct. at 2531 (Stevens, J., concurring in part and dissenting in part).

194. *Id.* (Stevens, J., concurring in part and dissenting in part).

195. *Id.* at 2532 (Stevens, J., concurring in part and dissenting in part).

196. *Id.* (Stevens, J., concurring in part and dissenting in part). See *supra* note 60

Justice Stevens interpreted this provision as only prohibiting petitioners from "physically approaching" an individual entering the clinic unless she "indicates a desire to communicate."[197] Even if the individual expressed no such inclination to communicate, as long as petitioners did "not accompany . . . encircle, surround, harass, threaten or physically or verbally abuse" the individual, then petitioners were still permitted to communicate with the individual and could even sidewalk counsel potential patients by offering oral or written advice.[198]

Thus, Justice Stevens argued that the majority erred in holding that the 300-foot buffer zone provision was too broad to withstand the heightened level of intermediate scrutiny.[199] He maintained that the "physically approaching" provision, as stated in the injunction, was no broader than

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for the text of paragraph five of the injunction. Justice Stevens stated that petitioners read the injunction as forbidding *any* speech within 300 feet of the clinic unless the listener demonstrated an interest in what they had to say. *Id.* at 2532 (Stevens, J., concurring in part and dissenting in part). The majority interpreted this consent requirement as unconstitutional even if drafted in a more narrow manner. *Id.* (Stevens, J., concurring in part and dissenting in part) (citing *id.* at 2529). For a discussion of the majority's reasoning regarding the rejection of the 300-foot consent requirement provision, see *supra* notes 144-48 and accompanying text.

197. *Madsen*, 114 S. Ct. at 2532 (Stevens, J., concurring in part and dissenting in part).

198. *Id.* (Stevens, J., concurring in part and dissenting in part). Justice Stevens reasoned that sidewalk counseling is comparable to labor picketing in that both are a "mixture of conduct and communication." *Id.* (Stevens, J., concurring in part and dissenting in part). He noted that sidewalk counseling, like labor picketing, is a much more persuasive form of expression than simply distributing handbills, because the latter depends largely on the "persuasive force of the idea." *Id.* at 2532-33 (Stevens, J., concurring in part and dissenting in part) (quoting NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607, 619 (1980) (Stevens, J., concurring in part and concurring in result)).

In *Retail Store Employees*, the Court stated that "[i]n the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment." *Retail Store Employees*, 447 U.S. at 619 (Stevens, J., concurring in part and concurring in result). Justice Stevens, in *Madsen*, conceded that the First Amendment protects a protester's right to sidewalk counsel passersby; however, he emphasized that the protection "does not encompass attempts to abuse an unreceptive or captive audience." *Madsen*, 114 S. Ct. at 2533 (Stevens, J., concurring in part and dissenting in part). He pointed out that "[o]ne may register a public protest by placing a vulgar message on his jacket and, in so doing, expose unwilling viewers." *Madsen*, 114 S. Ct. at 2533 (Stevens, J., concurring in part and dissenting in part) (citing Cohen v. California, 403 U.S. 15, 21-22 (1971)). But, it does not follow that the protester has an "unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services." *Madsen*, 114 S. Ct. at 2533 (Stevens, J., concurring in part and dissenting in part) (citing Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)).

199. *Madsen*, 114 S. Ct. at 2532-33 (Stevens, J., concurring in part and dissenting in part).

necessary to afford relief to respondents for the violations found by the trial court.[200] Justice Stevens noted that the trial court judge issued this particular provision because the evidence demonstrated that it was required to protect patients and employees from petitioners' "'uninvited contacts, shadowing and stalking.'"[201] Accordingly, Justice Stevens dissented from the majority's conclusion that the 300-foot buffer zone burdened more speech than necessary to serve a significant government interest.[202]

In concluding his opinion, Justice Stevens stated that he would not consider the other provisions of the injunction as discussed by the majority because petitioners failed to raise them on appeal.[203]

D. Justice Scalia's Concurring and Dissenting Opinion

Although concurring in the judgment in part, Justice Scalia, joined by Justices Kennedy and Thomas, strongly dissented from the majority's decision.[204] Justice Scalia characterized the majority's opinion as having "an appearance of moderation and Solomonic wisdom," which upheld certain portions of the injunction while striking others as unconstitutional.[205] Justice Scalia branded this appearance as misleading because the "entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal."[206] The dissent believed that a

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200. *Id.* at 2533 (Stevens, J., concurring in part and dissenting in part).

201. *Id.* (Stevens, J., concurring in part and dissenting in part) (citation omitted). In upholding this provision of the injunction, the Florida Supreme Court emphasized:

> While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard—while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled.

Id. (Stevens, J., concurring in part and dissenting in part) (quoting Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 675 (Fla. 1993) *aff'd in part, rev'd in part, Madsen*, 114 S. Ct. at 2516).

202. *Id.* (Stevens, J., concurring in part and dissenting in part).

203. *Id.* at 2533-34 (Stevens, J., concurring in part and dissenting in part).

204. *Id.* at 2534-50 (Scalia, J., concurring in the judgment in part and dissenting in part).

205. *Id.* at 2534 (Scalia, J., concurring in the judgment in part and dissenting in part).

206. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

major reason the Court was willing to uphold portions of the injunction was because the case involved abortion.[207]

Justice Scalia's view of the facts presented at the state court level varied greatly from that of the majority.[208] He argued there was no evidence presented to the state court which demonstrated that petitioners' activities at the clinic constituted unlawful conduct.[209] Thus, the dissent reasoned that because petitioners did not break any laws, the provisions of the injunction which the majority upheld, i.e., the thirty-six-foot buffer zone and the noise restrictions, were in clear violation of the First Amendment.[210]

In support of its assertion that there was a lack of evidence demonstrating that petitioners had engaged in unlawful conduct, the dissent focused on the videotape presented by respondents at the state court proceedings.[211] After describing the video in great detail, the dissent

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207. *Id.* at 2534-35 (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent referred to a passage in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), *overruled by* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), where Justice O'Connor stated:

> "This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, *but—except when it comes to abortion*—the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it."

Madsen, 114 S. Ct. at 2535 (quoting *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting) (citations omitted in original) (emphasis added)).

208. *Compare Madsen*, 114 S. Ct. at 2537 (Scalia, J., concurring in the judgment in part and dissenting in part) (finding protesters left access to the clinic unimpeded in exercising their First Amendment rights), *with id.* at 2521 (finding protesters impeded access to the clinic and caused patients stress).

209. *Madsen*, 114 S. Ct. at 2535-37 (Scalia, J., concurring in the judgment in part and dissenting in part). The majority asserted that Justice Scalia only considered the videotape presented by respondents, and failed to acknowledge the three days of testimony by respondents' witnesses presented at the trial court. *Id.* at 2527. The dissent did not rely only on the videotape as suggested by the majority, however; it also examined the trial court's record and findings. *See id.* at 2537, 2545-47 (Scalia, J., concurring in the judgment in part and dissenting in part).

210. *Id.* at 2535 (Scalia, J., concurring in the judgment in part and dissenting in part).

211. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent noted that the videotape was shot by respondents, who then edited the tape from approximately eight hours of footage to half an hour. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). Accordingly, the footage remaining after the editing showed arguably the worst activities engaged in by petitioners, be-

characterized petitioners' activities as mild compared to typical labor or social protest picketing.[212] The dissent also carefully pointed out portions of the videotape evidencing that petitioners activities were far from illegal or even improper, and, thus were not in violation of the initial injunction.[213] For instance, although petitioners approached vehicles and distributed literature to the cars' occupants, they in no way attempted to block the vehicles from entering the clinic property.[214] The dissenters also noted that the one act shown on the videotape which could be characterized as illegal could not be conclusively linked to petitioners.[215]

1. First Amendment Standard

The dissent argued that the majority applied the wrong First Amendment standard in determining the constitutionality of the injunction.[216] Agreeing with petitioners, the dissent asserted that the injunction deserved a strict scrutiny level of analysis.[217] In addition, it questioned the

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cause respondents were attempting to demonstrate that petitioners continued to violate the terms of the initial injunction. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

212. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). For instance, the dissent noted that the videotape showed petitioners "singing, chanting, praying, shouting, playing music, . . . [giving] speeches, peaceful[ly] picketing," distributing handbills, and engaging in interviews with the press. *Id.* at 2537 (Scalia, J., concurring in the judgment in part and dissenting in part). *But cf.* Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 291-92 (1941) (involving protesters engaging in more than 50 instances of violence including window smashing, setting off explosive bombs, setting fire to numerous vehicles, shootings, and beatings).

213. *Madsen*, 114 S. Ct. at 2535-37 (Scalia, J., concurring in the judgment in part and dissenting in part).

214. *Id.* at 2536 (Scalia, J., concurring in the judgment in part and dissenting in part). In another scene from the videotape, pro-choice supporters exchanged words with pro-life activists, but at no point were there any acts of violence or physical contact between the groups, despite their close proximity and the hostile environment. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

215. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The videotape shows a potato jammed into the tailpipe of a parked car; however, the tape failed to capture the person or persons responsible for the act. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

216. *Id.* at 2537 (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent labeled the First Amendment standard adopted by the majority intermediate-intermediate scrutiny. *Id.* at 2538 (Scalia, J., concurring in the judgment in part and dissenting in part).

217. *Id.* at 2538 (Scalia, J., concurring in the judgment in part and dissenting in

majority's reasoning in deciding upon the heightened intermediate standard of review.[218] The dissent observed that there was no recognizable difference between the standard used by the majority in the present case and the intermediate scrutiny standard generally used for analyzing content-neutral ordinances.[219] Furthermore, it criticized the majority for failing to even consider the strict scrutiny standard.[220]

The dissent further explained that the injunction directed at petitioners was content-based.[221] It rejected the majority's claim that the injunction was content-neutral because the Court pointed it solely at those individuals who violated the earlier injunction, not at those who merely espoused anti-abortion beliefs.[222] If the majority's assertion was true, then the individuals included in the acting in concert provision did not encompass those who merely possess similar anti-abortion beliefs.[223] In direct contradiction to the majority's claim, the dissent noted that the state court judge issuing the injunction interpreted the acting in concert provision as including "all those who wish to express the same views as the named defendants."[224]

The dissent quoted several exchanges that took place between the state court judge and the individuals arrested because they were found to be acting in concert with the named defendants.[225] These exchanges demonstrated that, contrary to the majority's opinion, the state court judge aimed the injunction only at those who espoused the anti-abortion viewpoint.[226]

> Mr. Lacy: I was wondering . . . why we were arrested and confined as being in concert with these people that we don't know, when other people weren't, that were in that same buffer zone, and it was kind of selective as to who was picked

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part).

218. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

219. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

220. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent argued the majority should have, at a minimum, commented on the argument that an injunction restricting speech, whether content-based or content-neutral, deserved this strict scrutiny level of review. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

221. *Id.* at 2539 (Scalia, J., concurring in the judgment in part and dissenting in part).

222. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

223. *Id.* at 2539-40 (Scalia, J., concurring in the judgment in part and dissenting in part).

224. *Id.* at 2540 (Scalia, J., concurring in the judgment in part and dissenting in part). Despite this interpretation by the state court, the majority determined that the injunction did not apply to individuals who espoused anti-abortion beliefs, but rather to those who had violated the initial injunction. *Id.* at 2523.

225. *Id.* at 2540 (Scalia, J., concurring in the judgment in part and dissenting in part).

226. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

> and who was arrested and who was obtained for the same buffer zone in the same public injunction.
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> The Court: Mr. Lacy, I understand that those on the other side of the issue [abortion-rights supporters] were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because *the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of the selection . . . .*[227]

2. Rationale for Asserting that the Speech-restricting Injunction Demanded Strict Scrutiny

The dissent emphasized that even assuming the injunction was not "technically content based," it still demanded strict scrutiny because of the dangers involved with all speech-restricting injunctions.[228] The dissent listed several rationales for why strict scrutiny was the proper standard to determine the constitutionality of the injunction.[229] First, the general concern that content-based statutes and speech-restricting injunctions are invidiously enacted to suppress certain undesirable views.[230] Second, injunctions are at least as deserving of strict scrutiny as content-based statutes because individual judges, not legislatures, are charged with drafting injunctions.[231] Finally, an "injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards."[232]

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227. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting Transcript of Appearance Hearings at 104-05 (Apr. 12, 1993) (alteration in original)).

228. *Id.* at 2539 (Scalia, J., concurring in the judgment in part and dissenting in part).

229. *Id.* at 2538-39 (Scalia, J., concurring in the judgment in part and dissenting in part).

230. *Id.* at 2538 (Scalia, J., concurring in the judgment in part and dissenting in part).

231. *Id.* at 2539 (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent suggested that in some cases, the issuing judge may be biased against the party because the party has disobeyed the judge's prior orders. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

232. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent explained that in a contempt proceeding for disobeying an injunction, factual innocence is the only defense available. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). Thus, even if the injunction is later found to be unconstitutional, the named party must still obey. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). *See* Walker v. City of Birmingham, 388 U.S. 307

The dissent rejected the majority's attempt "to minimize the similarit[ies] between speech-restricting injunctions and content-based statut[es]."[233] The majority asserted that just because an injunction is issued against a group of individuals sharing the same beliefs, this does not mean the Court issued it based on a wrongful motive to silence the group's point of view.[234] This distinction, the dissent argued, missed the point that a content-based statute demands strict scrutiny not because of a possible discriminatory motive of silencing certain ideas, but rather because the legislation "*lends itself* to use for those purposes."[235]

In further support of the assertion that all speech-restricting injunctions deserve strict scrutiny, the dissent enunciated "reasons of precedence."[236] First, an injunction that regulates speech is a form of prior restraint, the archenemy of the First Amendment.[237] Thus, the dissent stated that the rationale behind prior restraint cases also applies to speech-restricting injunctions.[238] Historically, the Court has stated that prior restraint of expressive activity should be avoided at almost all costs and that prior restraint carries with it a "'heavy presumption'" of uncon-

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(1967) (removing unconstitutionality as a defense to injunctions). Therefore, individuals silenced by an injunction who cannot afford to file an appeal are confronted with a "Hobson's choice: they must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings." *Madsen*, 114 S. Ct. at 2539 (Scalia, J., concurring in the judgment in part and dissenting in part).

233. *Madsen*, 114 S. Ct. at 2539 (Scalia, J., concurring in the judgment in part and dissenting in part).

234. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

235. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added). The dissent noted that the Court has "consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part) (alteration in original) (quoting Simon & Schuster v. New York Crime Victims, 502 U.S. 105 (1991)).

236. *Id.* at 2541 (Scalia, J., concurring in the judgment in part and dissenting in part).

237. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent relied on Alexander v. United States, 113 S. Ct. 2766 (1993), for this proposition. *Madsen*, 114 S. Ct. at 2541 (Scalia, J., concurring in the judgment in part and dissenting in part). In *Alexander*, Chief Justice Rehnquist emphasized that "[t]he term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'. . . [P]ermanent injunctions, i.e.,—court orders that actually forbid speech activities—are classic examples of prior restraints." *Id.* at 2771 (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 4.03, at 4-14 (1984) (emphasis omitted)).

238. *Madsen*, 114 S. Ct. at 2541 (Scalia, J., concurring in the judgment in part and dissenting in part).

stitutionality.[239] In addition, the dissent noted that the Court has "repeatedly struck down speech-restricting injunctions."[240]

Moreover, the dissent noted that respondents, as well as *amicus* of respondents, failed to cite any speech-restricting injunction cases which employed an intermediate standard of review.[241] On the contrary, speech-restricting injunction cases have "affirmed both requirements that characterize *strict scrutiny*: compelling public need and surgical precision of restraint," even when the case involved activities outside the protection of the First Amendment, such as violent conduct.[242] Accordingly, the dissent concluded speech-restricting injunctions should be analyzed under a strict scrutiny standard.[243]

3. Review of the Majority's Analysis

After discussing why the majority used the wrong First Amendment standard, the dissent turned to the majority's application of this interme-

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239. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (quoting Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 181, (1968)) (internal quotation marks omitted)).

240. *Madsen*, 114 S. Ct. at 2541. *See, e.g.*, National Socialist Party of Am. v. Skokie, 432 U.S. 43 (1977) (requiring state court to impose a stay in the absence of immediate appellate review); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (striking down restrictions placed on press during a murder trial); New York Times Co. v. United States, 403 U.S. 713 (1971) (upholding the First Amendment rights in light of government's strong interest in preventing the general dissemination of classified materials); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (striking down an injunction preventing the distribution of critical literature); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (upholding an injunction provision prohibiting the intimidation or obstruction of a business, while striking down a provision prohibiting "picketing or patrolling" of a business).

241. *Madsen*, 114 S. Ct. at 2541 (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent regarded the intermediate standard, generally used in analyzing content-neutral statutes, and the heightened intermediate standard, used by the majority in the present case, as practically indistinguishable. *Id.* at 2538 (Scalia, J., concurring in the judgment in part and dissenting in part).

242. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added). *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (stating that although violence is not protected by the First Amendment, when violent conduct giving rise to tort liability "occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded") (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

243. *Madsen*, 114 S. Ct. at 2537-38 (Scalia, J., concurring in the judgment in part and dissenting in part).

diate-intermediate standard of review to the speech-restricting injunction.[244] First, the dissent criticized the majority's acceptance of the government's interests as significant without independently considering whether petitioners violated the terms of the original injunction.[245] The dissent went on to criticize the majority for taking the trial court's findings that petitioners violated the original injunction "on faith."[246] It suggested that these findings were suspect because the lower court also upheld provisions that the majority struck down as having no basis.[247] Moreover, the dissent noted that with First Amendment cases, the Court generally requires a close review of the facts before reaching a conclusion.[248]

Next, the dissent addressed whether the majority's application of the restrictions imposed by the injunction burdened "no more speech than necessary" to serve significant state interests.[249] It concluded that the provision regarding the noise restriction passed this part of the test because the injunction only forbade noise that would reach patients inside the clinic.[250] Thus, it agreed with the majority that the anti-noise provision burdened no more speech than necessary.[251] Nonetheless, the dissenting Justices asserted that the noise restriction should be held invalid

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244. *Id.* at 2544 (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent commented that even under the heightened intermediate standard, the majority erred in upholding the provisions. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

245. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent stated that the government's interest must be one "whose impairment was a violation of Florida law or of a Florida-court injunction" in order to be considered significant. *Id.* at 2548 (Scalia, J., concurring in the judgment in part and dissenting in part).

246. *Id.* at 2545 (Scalia, J., concurring in the judgment in part and dissenting in part). The dissent noted the only activity that could remotely be considered a violation of the initial injunction was petitioners' impeding access to the clinic. *Id.* at 2545-46 (Scalia, J., concurring in the judgment in part and dissenting in part). Any disruption of access into the clinic, however, was only the incidental result of demonstrators marching in a picket line and distributing anti-abortion literature on public property, and not the result of any intentional desire by petitioners to impede access to and from the clinic. *Id.* at 2546 (Scalia, J., concurring in the judgment in part and dissenting in part).

247. *Id.* at 2545 (Scalia, J., concurring in the judgment in part and dissenting in part).

248. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915-16 n.50 (1982); Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Fiske v. Kansas, 274 U.S. 380, 385-86 (1927)).

249. *Id.* at 2548 (Scalia, J., concurring in the judgment in part and dissenting in part).

250. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

251. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

for other reasons as well.[252] Neither the Florida Supreme Court nor the majority even attempted to connect the noise restriction provision with any previous violations of the law by petitioners.[253] Moreover, the noise restriction did not satisfy the state's interest in reducing the noise level outside the clinic, as pro-choice demonstrators could "continue to shout their chants at their opponents *exiled across the street* to their hearts' content."[254]

Turning to the thirty-six-foot buffer zone provision, the dissent strongly disagreed with the majority's conclusion that the provision burdened no more speech than was necessary.[255] The dissent stated that the restriction could have been more narrowly drawn to satisfy the state's interests in keeping the protesters "off the paved portion of Dixie Way" and allowing unimpeded access to the clinic's driveways.[256] For instance, the provision could have prohibited petitioners from gathering in the street or reduced the number of protestors allowed on the paved portion of Dixie Way, either of which would have more narrowly satisfied the state's interests.[257]

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252. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

253. *Id.* at 2547 (Scalia, J., concurring in the judgment in part and dissenting in part). In countering the majority's reasoning that "hospital patients should not have to be bothered with noise from political protests," the dissent argued that an injunction imposing a noise restriction against a party who has not committed any prior violations of the law is an impermissible manner of forbidding the noise. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

254. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added).

255. *Id.* at 2548 (Scalia, J., concurring in the judgment in part and dissenting in part).

256. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

257. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The majority responded to these options by noting that "[t]he state court was convinced that [they would not work] in view of the failure of the first injunction to protect access." *Id.* at 2527. The dissent criticized the majority for accepting the trial court's position so readily, however, before determining for itself whether the 36-foot buffer zone burdened more speech than necessary to serve a significant governmental interest. *Id.* at 2548-49 (Scalia, J., concurring in the judgment in part and dissenting in part).

The dissent questioned the amount of deference given to the trial court by the majority and commented that the application of the majority's heightened intermediate standard transformed the "burden no more speech than is necessary" test into an "*arguably* burden no more speech than is necessary test." *Id.* at 2549 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added).

In conclusion, the dissent summarized its grave concerns with the majority's decision to uphold the thirty-six-foot buffer zone and the noise restriction provisions.[258] The dissenting Justices regretted that although the decision in *Madsen* will be labeled by the media as an abortion case, it will be cited in legal texts and commentaries "as a free-speech injunction case."[259] As a result, the "novel principles" produced by the majority in *Madsen* will further erode the protection guaranteed by the First Amendment.[260] Thus, the dissent warned that "these latest by-products of our abortion jurisprudence ought to give all friends of liberty great concern."[261]

V. IMPACT OF THE *MADSEN* DECISION

United States Supreme Court cases dealing with abortion and the First Amendment impact all Americans, regardless of their personal stance on the issues.[262] Accordingly, the decision in *Madsen* has garnered a significant response.[263] Although the decision will have a direct impact only

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258. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The dissenting opinion discusses only the two provisions of the injunction that were upheld by the majority. *Id.* at 2549-50 (Scalia, J., concurring in the judgment in part and dissenting in part).

259. *Id.* at 2549 (Scalia, J., concurring in the judgment in part and dissenting in part).

260. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part). The novel principles included "the proposition that injunctions against speech are subject to a standard indistinguishable from . . . the 'intermediate scrutiny' standard . . . used for 'time, place, and manner' legislative restrictions; the notion that injunctions against speech need not be closely tied to any violation of law, but may simply implement sound social policy; and the practice of accepting trial-court conclusions permitting injunctions without considering whether those conclusions are supported by any findings of fact." *Id.* at 2549-50 (Scalia, J., concurring in the judgment in part and dissenting in part).

261. *Id.* at 2550 (Scalia, J., concurring in the judgment in part and dissenting in part).

262. Chief Justice Tjoflat, who sat on the federal appeals court that heard the separate challenge to the *Madsen* injunction, noted:

> [F]ew Americans are content with the current legal status of abortion in America. Many see a woman's ability to choose abortion as a part of her fundamental constitutional right of self-determination that is ill-protected by the wavering jurisprudence of the Supreme Court. Many others see the 1.4 million abortions each year as an American Holocaust permitted by the moral vacillation of the government.

Cheffer v. McGregor, 6 F.3d 705, 706 (11th Cir.), *vacated*, 41 F.3d 1421 (11th Cir. 1993).

263. One author feared the decision in *Madsen*, by restricting the free speech rights of pro-life protesters, might lead to more violence because "[i]n order for pro-lifers to work within the system, they must believe that their views can somehow . . . have an impact." Richard Stith, *A Pro-Life Strategy*, WASH. POST, Dec. 2, 1994, at A31. The

on the minority of Americans who actually participate in organized protest activities, it has the potential to have a significant indirect effect on a much larger group. For instance, the opinion will discourage law abiding anti-abortion protesters from participating in demonstrations for fear of getting arrested at a clinic where an injunction has been issued.[264] This fear may reduce the amount of lawful anti-abortion expression disseminated to the public, thereby preventing some individuals from forming their opinions regarding abortion.[265]

A "chilling effect" occurs when a court suppresses a protected legal activity due to a fear of its legal or nonlegal consequences.[266] Injunctions such as the one partially upheld in *Madsen* will undoubtedly have this chilling effect on the speech of anti-abortion protesters.[267] Judy Madsen,[268] a fifty-eight-year-old volunteer sidewalk counselor at abortion clinics, stated that "the injunction presents an immediate challenge to any pro-lifer trying to speak outside an abortion clinic."[269] Be-

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decision extremely angered pro-life supporters. Joan Biskupic, *Court Allows Abortion Clinic Buffer Zone: Scalia Sees Threat to Free Speech Rights*, WASH. POST, July 1, 1994, at A1. Mathew Staver, an attorney who has represented anti-abortion protesters in the past, stated that "[y]ou can't give people your message when you have to stay 36 feet away." *Id.* Pro-choice supporters, on the other hand, were pleased with the decision. *Id.* Eleanor Smeal, president of the Feminist Majority Foundation, declared that the decision was "a good omen for the 40 other local and state injunctions in place" at abortion clinics all over the country. *Id.*

264. Even law abiding pro-life demonstrators could be arrested merely through guilt by association. *Madsen*, 114 S. Ct. at 2539-40 (Scalia, J., concurring in the judgment in part and dissenting in part). Judge McGregor, who issued the injunction in *Madsen*, told individuals who had been arrested for violating the injunction that the police arrested them because they expressed a pro-life viewpoint, and were thus found to be acting in concert with other pro-life protesters. *Id.* at 2540 (Scalia, J., concurring in the judgment in part and dissenting in part).

265. Justice Holmes, in Abrams v. United States, 250 U.S. 616 (1919), articulated the "marketplace of ideas" theory. Holmes advocated that there should be "free trade in ideas," and reasoned that the importance of allowing ideas to compete with each other in the public forum is so great that even opinions society loathes should not be suppressed. *Id.* at 630 (Holmes, J., dissenting).

266. *See generally* Alexander v. United States, 509 U.S. 544, 555-56 (1993) (examining chilling effect of federal legislation); Wisconsin v. Mitchell, 508 U.S. 476, 488-89 (1993) (rejecting argument that chilling effect would occur under criminal penalty enhancement statute); Younger v. Harris, 401 U.S. 37, 50-52 (1971) (discussing role of chilling effect on availability of injunctions).

267. *See Madsen*, 114 S. Ct. at 2523.

268. Madsen was one of the original pro-life protesters named in the injunction issued by the Florida state court. *Id.* at 2521.

269. John W. Kennedy, *Buffer-Zone Case Tests Free Speech;* Madsen v. Women's

cause a speech-restricting injunction eliminates not only the undesirable behavior which the injunction targets, but also peaceful protest lying at the heart of the First Amendment, a speech-restricting injunction deserves a stricter standard of review than that employed by the majority in *Madsen*.[270]

The Supreme Court and supporters of the *Madsen* decision argue that the thirty-six-foot buffer zone does not prevent pro-life groups from disseminating their message to the public.[271] Although it is true that anti-abortion advocates may still peacefully protest beyond the thirty-six-foot buffer zone, it undoubtedly hinders the effectiveness of such a protest, for the buffer zone affects both the message and the manner of communication.[272]

VI. CONCLUSION

A court can protect the First Amendment rights of anti-abortion protesters and a woman's right to an abortion without compromise.[273] In order to stop the senseless violence that sometimes accompanies expression by anti-abortion protesters, an aggrieved party can utilize one of several statutes available to victims of anti-abortion violence.[274] These statutes punish the wrongdoers for engaging in violence, yet permit law abiding pro-life activists to exercise their freedom of speech.[275]

When a court attempts to silence speech, it should be careful in issuing or upholding a speech-restricting injunction because of its dangerous implications.[276] Unfortunately, the Court in *Madsen* adopted a standard

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Health Center *Abortion Protest Case*, CHRISTIANITY TODAY, June 1994, at 48.

270. *See Madsen*, 114 S. Ct. at 2538-39 (Scalia, J., concurring in the judgment in part and dissenting in part). In addition to producing the chilling effect, a speech-restricting injunction is a powerful weapon in the hands of judges who may want to suppress a particular viewpoint either because of their own beliefs or because of the unpopularity of the targeted group's views. *Id.* (Scalia, J., concurring in the judgment in part and dissenting in part).

271. *Id.* at 2527. One author claimed that the *Madsen* decision infringes only on the manner in which pro-life groups may demonstrate, not their message. Fay Clayton & Frona C. Daskal, *Buffer Zone Protects a Basic Right . . . But Does It Rob Us of Another One?*, CHICAGO TRIB., July 28, 1994, at 19.

272. *See supra* notes 266-70 (discussing the chilling effect of suppressing legal protests).

273. *See* Joy Hollingsworth McMurtry & Patti S. Pennock, *Ending the Violence: Applying the Ku Klux Klan Act, RICO, and FACE to the Abortion Controversy*, 30 LAND & WATER L. REV. 203, 229 (1995).

274. *Id.* at 207-08. Federal legislation such as the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Freedom of Access to Clinic Entrances Act (FACE) has been employed in attempting to reduce the spread of violence at abortion clinics. *Id.* at 211-13.

275. *See generally id.* at 211-13.

276. *See Madsen*, 114 S. Ct. at 2538-39 (Scalia, J., concurring in the judgment in

that it claims is somewhat stricter than intermediate scrutiny, but when applied does not differ significantly from the intermediate standard used in analyzing content-neutral statutes.[277] The decision in *Madsen* has given judges great leeway in restricting free speech.

As the Framers of the Constitution anticipated, individuals need a mechanism to build coalitions and effect change, even when voicing unpopular opinions.[278] The Court, with its decision in *Madsen*, has determined that if conduct during a protest crosses legal boundaries, protesters may have their First Amendment rights permanently impaired in related future acts of protest, expression, and speech.

KELI N. OSAKI

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part and dissenting in part).

277. *See id.* at 2544-49 (Scalia, J., concurring in the judgment in part and dissenting in part).

278. TRIBE, *supra* note 25, § 12-2, at 788 (citing Whitney v. California, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring) (stating that freedom of speech is a "means indispensable to the discovery and spread of political truth" and "political change")).