North Dakota Law Review

Volume 71 | Number 4 Article 6

1995

Constitutional Law - First Amendment - Abortion: Modifying the Time, Place, and Manner Analysis for Free Speech Injunction Cases: The United States Supreme Court Creates a Heightened Scrutiny to Review Content Neutral Injunctions Imposed against Antiabortion Protest

Alana K. Bassin

CONSTITUTIONAL LAW—FIRST AMENDMENT—ABORTION: MODIFYING THE TIME, PLACE, AND MANNER ANALYSIS FOR FREE SPEECH INJUNCTION CASES: THE UNITED STATES SUPREME COURT CREATES A HEIGHTENED SCRUTINY TO REVIEW CONTENT NEUTRAL INJUNCTIONS IMPOSED AGAINST ANTIABORTION PROTEST

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

I. FACTS

Operation Rescue is a national antiabortion organization active in trying to close down abortion clinics.[1] In 1992, Women's Health Center filed suit against Operation Rescue, and named Respondents[2] for their repeated interference in the daily operations of the Aware Women Center for Choice [hereinafter the Center] in Melbourne, Florida.[3] The state trial court issued a permanent injunction enjoining antiabortion demonstrators from trespassing on or obstructing access to the Center.[4]

---

1. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 667 n.3 (Fla. 1993).

2. The named Respondents included Judy Madsen, Ed Martin, and Shirley Hobbs, who had been identified for their involvement in the release of flyers in Central Florida encouraging efforts to close down abortion clinics. *Operation Rescue*, 626 So. 2d at 666 n.2. It is unclear whether the named Respondents were actual members of "Operation Rescue." Madsen, Martin, and Hobbs asserted in their appeal to the Supreme Court that "Operation Rescue America" did not exist, and that Madsen, Martin, and Hobbs were members of "Rescue America," a distinct group from "Operation Rescue." Reply Brief for Petitioners at 6, Madsen v. Women's Health Center, Inc., 626 So. 2d 664 (Fla. 1993) (No. 93-880). However, the Florida Supreme Court found that Madsen, Martin, and Hobbs had stipulated to being members of "Operation Rescue America" and had acted in concert with a nationwide antiabortion campaign called "Operation Rescue." *Operation Rescue*, 626 So. 2d at 666 n.2-3.

3. *Operation Rescue*, 626 So. 2d at 666. Antiabortion protest activity included, but was not limited to: jamming the clinic's telephone lines, hindering the Center's ability to seek emergency help; marching, standing, or kneeling in front of the driveways and entrances, congesting traffic and hindering ingress to the clinic; threatening, harassing, and stocking the clinic's patients and staff leaving the clinic; and demonstrating in front of staff and patient's private homes, identifying clinic users as "baby killers" to neighbors and children. *Id.* at 667-68.

4. *Id.* at 666. The injunction stated the following:

> 1. All Respondents, the officers, directors, agents, representatives of Respondents, and all other persons, known and unknown, acting on behalf of any Respondents, or in concert with them, in any manner or by any means, are hereby enjoined and restrained from:
>
> a) trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;
>
> b) physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;
>
> c) attempting or directing others to take any of the actions described in paragraphs a) and b).

Approximately six months later, the Center returned to court claiming that the injunction did not provide sufficient protection.[5] The Center asserted that antiabortion activity continued to hinder access to the clinic, create excessive noise, congest traffic in the area, and disturb the clinic's patients and staff in their homes.[6] The trial court judge accepted the Center's arguments and expanded the injunction by creating two successive zones.[7] The inner zone prohibited antiabortion protesters from picketing within 36 feet of the clinic and the outer zone allowed only invited antiabortion protesters within 300 feet of the clinic.[8] The injunction further prohibited antiabortion protesters from making noise and

---

2. Nothing in this Court's Order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, praying, in a manner which does not violate a), b) and c) above. . . .

Id.

5. *Id.* at 667.

6. *Id.* at 667-68.

7. *Id.* at 669. The amended injunction prohibited the following "Operation Rescue" activity:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice . . .

(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.

(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. . . An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east. . . The respondents must remain at least five (5) feet from the Clinic's east line.

(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.

(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. . .

(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 concert 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 streets 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.

Id.

8. *See supra* note 7 (pertaining to the amended injunction section (3) and section (5)).

displaying images during surgery hours, and banned antiabortion picketers from demonstrating within 300 feet from the residences of clinic staff and patients.[9]

Operation Rescue challenged the constitutionality of the injunction, arguing that the injunction violated freedom of speech, freedom of association, equal protection, and the free exercise of religion.[10] The Florida Supreme Court rejected Operation Rescue's arguments and ruled that the injunction was a valid time, place, and manner regulation.[11] The court reasoned that because the restrictions regulated only "when, where, and how Operation Rescue may speak [and] not what it may say" the injunction was content neutral.[12] Furthermore, the court determined that the restrictions were narrowly tailored to serve significant government interests while leaving open alternative channels.[13]

Simultaneous to Operation Rescue's appeal in state court, a separate suit was brought in federal court challenging the same injunction.[14] Unlike the Florida Supreme Court, the United States Court of Appeals for the Eleventh Circuit ruled that the injunction was content based, reasoning that the practical effect of the injunction was to assure that "pro-life" demonstrators would be arrested while "pro-choice" demonstrators would not.[15] Finding that no compelling interest existed and that the injunction was not narrowly tailored, the Eleventh Circuit Court of Appeals struck down the injunction as unconstitutional.[16]

---

9. *See supra* note 7 (pertaining to the amended injunction section (4) and section (6)).

10. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 669 (Fla. 1993).

11. *Id.* at 675. A time, place, and manner regulation is a regulation not directed at the content of the speech but rather directed at the time, place, and manner in which the speech is communicated. When courts review a time, place, and manner regulation, they employ an intermediate level of scrutiny. *See infra* note 39 and accompanying text (explaining the language for intermediate scrutiny).

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

13. *Id.* at 672-73. The Florida Supreme Court found that the government's interest in ensuring a woman's freedom to seek lawful medical services in connection with her pregnancy, the free flow of traffic, and residential privacy were all significant governmental interests. *Id.* at 672. The court emphasized that protesting to patients or staff outside the clinic or in their homes is not equivalent to general picketing, but is especially offensive since it intrudes upon the targeted unwilling listener. *Id.* at 673. Furthermore, the Florida Supreme Court noted that the restriction left ample alternative means of communication since the injunction allows an unrestricted number of picketers with an unrestricted volume except during surgery hours, as well as invited sidewalk counseling. *Id.* at 673. The court gave little acknowledgment to the petitioners' claim that the statute was vague or overbroad because the language was clear to give adequate notice and would not be applied to people who were not "in active concert" with Operation Rescue. *Id.* at 674-75.

14. Cheffer v. McGregor, 6 F.3d 705, 707-08 (11th Cir. 1993). Myrna Cheffer, who was not a party to the state suit, challenged the injunction in federal court because she alleged that the injunction would chill free speech. *Id.*

15. *Id.* at 711. Content based regulations are subject to strict scrutiny where the State must prove that the regulation is narrowly tailored to serve a compelling state interest. *See infra* note 43 and accompanying text (comparing content neutral and content based regulation).

16. *Cheffer*, 6 F.3d at 711.

The United States Supreme Court granted certiorari[17] to resolve the conflict between the Florida Supreme Court and the United States Court of Appeals.[18] On review, the United States Supreme Court *held* that the injunction was content neutral, serving significant government interests and sustained part of the 36-foot buffer zone and the noise restriction as constitutional.[19] However, the Court determined that the 36-foot buffer zone on the back and side of the clinic, the restriction on "images observable," and the 300-foot zones around the clinic and residences burdened more speech than necessary and were therefore unconstitutional.[20]

II. LEGAL HISTORY

The First Amendment to the United States Constitution guarantees individuals the right to free speech.[21] This safeguard restricts the government from proscribing speech[22] or expressive conduct[23] because of its disapproval of the ideas expressed. Only in limited areas where the Supreme Court has found that society's interest in order and morality outweighs the content value of the speech, has the Supreme Court allowed restrictions in speech.[24] Specifically, speech in the categories of obsceni-

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

18. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523 (1994).

19. *Id.* at 2524, 2526-28. *See supra* note 7 (pertaining to the amended injunction section (3) and section (4)).

20. *Madsen*, 114 S. Ct. at 2528-30. *See supra* note 7 (pertaining to the amended injunction sections (3), (4), (5), and (6)).

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

22. In *Cantwell v. Connecticut*, Cantwell was charged for publicly playing a message that attacked organized religion. Cantwell v. Connecticut, 310 U.S. 296 (1940). The United States Supreme Court ruled that religious speech, regardless of how provocative it may be, cannot be prohibited unless it raises a clear and present danger to a substantial state interest. *Id.* at 309-311.

23. In *Texas v. Johnson*, the Supreme Court ruled that burning a flag at a protest rally is expressive conduct and protected by the First Amendment. Texas v. Johnson, 491 U.S. 397, 406, 408, 413-14 (1989).

24. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (upholding an ordinance which would prohibit a person from publicly offending or annoying another).

ty,[25] fighting words,[26] and child pornography[27] have been found wholly unprotected because of their proscribable content.[28]

Nonetheless, there is no absolute right to express one's views at any time or place and, in certain instances, even protected speech can be limited.[29] To determine the limits which can be placed on protected speech, courts focus on the place, or forum, where the speech occurs.[30] Public property can be divided into three types of First Amendment forums: the traditional public forum,[31] the limited public forum,[32] and the nonpublic forum.[33] Among them, the traditional public forum is the most difficult to regulate as it has historically been the essence of public debate and discussion.[34]

In *Madsen*, the injunction regulated speech on public streets and sidewalks[35] which are defined as "traditional public fora."[36] Ordinarily, such restrictions are subjected to strict scrutiny,[37] where the government must prove that the restriction is narrowly drawn to effectuate a compelling state interest.[38] However, the State need only satisfy an intermediate level of scrutiny for a traditional public forum when the regulation is

---

25. In *Roth v. United States*, the Supreme Court found that Roth, who had circulated obscene advertisements in the mail soliciting sales for his business, violated the federal obscenity statute. Roth v. United States, 354 U.S. 476 (1957). The ruling established that "obscenities" are not within the area of protected speech. *Id.* at 485.

26. In *Chaplinsky*, the Supreme Court concluded that calling a state official a "fascist" may be a "fighting word" which could inflict injury or incite the immediate breach of peace. *Chaplinsky*, 315 U.S. at 573. Fighting words, which could inflict injury or incite the immediate breach of peace, were determined as proscribable and not protected under the First Amendment. *Id.*

27. In *New York v. Ferber*, the Supreme Court ruled that New York's child pornography law was constitutional. New York v. Ferber, 485 U.S. 747, 763 (1982). The opinion established that "child pornography" is not within the area of protected expression. *Id.*

28. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992) (determining that an ordinance which prohibited fighting words based on race, color, creed, religion, or gender to be content based).

29. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (finding it constitutional to restrict interest group solicitation to a confined area on a fairground because the restriction was not related to the content of the message).

30. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

31. *Id.* Streets and parks were the first established traditional public forums, setting a precedent that public forums are required to have: (1) a long tradition of public use, and (2) a history of "promoting the free exchange of ideas." International Soc'y For Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2706 (1992) (finding that an airport terminal is not a public forum).

32. A limited public forum consists of public property which the state has opened for expressive activity. *Perry*, 460 U.S. at 45. *See* Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) (finding university meeting facilities to be a limited public forum).

33. A nonpublic forum consists of public property which is not by tradition a forum for public communication. *Perry*, 460 U.S. at 46 (finding a school's intermail facilities a nonpublic forum and differential access to the system was reasonable).

34. *See id.* at 45 (recognizing that the state's right to limit expressive activity in public forums is "sharply circumscribed").

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

36. *See* Frisby v. Schultz, 487 U.S. 474, 479 (1988) (upholding a ban on picketing directly in front of a residential home).

37. *Id.* ("subject[ing] restrictions on public issue picketing to careful scrutiny").

38. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

aimed at the time, place, and manner of the expression.[39] In a time, place, and manner regulation, the government must satisfy three elements.[40] The government must show that their restriction is: (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) adequately permissive to leave open alternative channels of communication.[41]

To satisfy the content neutral requirement, the state must prove that the regulation is not related to the message being expressed.[42] The key factor to consider here is the state's purpose for controlling the speech.[43] The state may not regulate the speech because of "hostility" or "favoritism" toward the underlying message.[44] Alternatively, a regulation may also sustain a content neutral characterization, even if it is content selective, as long as it is intended to regulate the secondary effects of the speech.[45] In *City of Renton v. Playtime Theatres, Inc.*,[46] the Supreme Court upheld a zoning regulation which applied only to adult movie theaters because of certain secondary attributes, such as crime activity, which were affiliated with these types of theaters.[47] In *Boos v. Barry*,[48] the Court noted several other secondary effects of speech that would support a content neutral regulation including congestion, interference with the ingress or egress of a building, and visual clutter.[49]

Once the state has established the regulation as content neutral, the state then has the burden of proving that the regulation is narrowly tailored to serve a significant interest.[50] In *Ward v. Rock against Racism*,[51] the Court defined this burden by explaining that the state does not need

---

39. *Id.* The Supreme Court has found regulations to serve a compelling state interest only in extremely rare cases. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (sustaining a military order for national security reasons, excluding Japanese Americans from designated West Coast areas during World War II).

40. *Perry*, 460 U.S. at 45.

41. *Id.*

42. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (upholding a city ordinance which allowed the city to control the music board at a park bandshell).

43. *Id. Compare* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981) (finding that a restriction which regulated solicitation from organizations on a fairground was content neutral because the purpose of the restriction was to promote safety and crowd control and was not related to the message of the speech); *with* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2547 (1992) (determining that an ordinance which prohibited fighting words based on race, color, creed, religion, or gender to be content based because the purpose of the restriction was to prohibit only those speakers who expressed views of disfavored subjects).

44. *R.A.V.*, 112 S. Ct. at 2544.

45. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

46. *Playtime Theatres*, 475 U.S. at 48.

47. 475 U.S. at 48 (1986).

48. 485 U.S. 312 (1988).

49. Boos v. Barry, 485 U.S. 312, 321 (1988) (concluding that a regulation prohibiting signs near an embassy to safeguard ambassadors from their offensive content was unconstitutional).

50. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

51. 491 U.S. 781 (1989).

to prove that the regulation is the "least restrictive."[52] Rather, the state need only show that the restriction "promotes a substantial government interest that would be achieved less effectively absent the regulation."[53] Generally, states seeking to enforce public policy interests have been successful in satisfying this standard of review.[54]

However, unlike other public policy matters, issues concerning abortion are not quite as emphatic. Since 1973, when abortion was recognized as a fundamental right,[55] the abortion topic has become one of the most divisive issues in the United States. Contention over the matter has lead to the continued escalation of protest activity with 1994 being one of the most violent and disruptive years.[56] Consequently in May of 1994, Congress passed the Freedom of Access to Clinic Entrances Act (FACE),[57] making it a federal crime to blockade abortion facilities. Also in 1994, the Supreme Court ruled that abortion facilities had standing under the Racketeer Influenced and Corrupt Organizations Act (RICO),[58] making it possible to prosecute organizations who conspired to shut down abortion clinics.[59] Nevertheless, abortion protest activity which is not prohibited under FACE or RICO, that which may harass or annoy clinic users but is not per se illegal, continues to interfere with women's abilities to access abortion facilities. Although the United States Supreme Court has not ruled specifically on such abortion protest activity (until *Madsen*), it has enforced other injunctions pertaining to protest activity to avoid the recurrence of unlawful conduct.[60]

---

52. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

53. *Id.* at 799.

54. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 650 (1981) (deciding that the government's interest in safe crowd control at a fair was significant); *Ward*, 491 U.S. at 791 (finding that a city's interest in regulating the music performances at a park to ensure surrounding residences were not disturbed was significant); Frisby v. Schultz, 487 U.S. 474, 484 (1988) (determining that the state's interest in protecting the privacy of the home was significant).

55. Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that a woman's freedom to seek lawful medical services in connection with her pregnancy is a clear personal right).

56. *Summary of Extreme Violence Against Abortion Providers as of December 31, 1994*, NATIONAL ABORTION FED'N (Nat'l Abortion Fed'n News Release, Wash. D.C.), Dec. 31, 1994. Since 1973 there have been over 1,700 accounts of violence against abortion providers (including murder, bombing, arson, vandalism, assault and battery, stalking, among other activity), 9,661 disruptions (including hate mail, bomb threats and picketing), and 633 clinic blockades. *Id.* From 1973-1993 only one murder resulted from abortion protest activity; in 1994 four murders resulted from protest activity. *Id.*

57. *See generally* 18 U.S.C. § 248 (Supp. 1995).

58. *See generally* 18 U.S.C. §§ 1961 to 1968 (1991).

59. National Org. for Women, Inc., v. Scheidler, 114 S. Ct. 798, 806 (1994) (ruling that abortion clinics had standing under RICO).

60. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (restraining only unlawful conduct performed by civil rights protest group against white store owners); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 697-98 (1978) (finding that it was appropriate to restrain future activities of the association of professional engineers to avoid the recurrence of a violation of the Sherman Act); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968) (overruling an injunction which restrained members of a political party from holding a rally

III. LEGAL ANALYSIS

In *Madsen*, to resolve whether the injunction was constitutional, the United States Supreme Court divided its analysis into three parts. The Court considered: (1) whether the injunction was content neutral or content based; (2) what level of scrutiny should apply to a court ordered injunction; and (3) whether the individual restrictions in the injunction survived the appropriate level of scrutiny.[61]

In determining whether the restrictions were content based or content neutral, the Court examined whether the regulation was adopted without reference to the content of the speech.[62] The Court concluded that the amended injunction was not directed at the antiabortion message, but rather was aimed at curbing antiabortion conduct that deprived citizens of certain rights delineated in the state court's original order.[63] Because only antiabortion protesters violated the original injunction, the Court found it was constitutional to direct the amended injunction only toward their activity.[64] Thus, the Court determined that the injunction was content neutral.[65]

Once concluding that the injunction was content neutral, the Court discussed the level of scrutiny suitable for the time, place, and manner regulation.[66] Rather than applying the ordinary intermediate level of scrutiny,[67] the Court determined that a more stringent standard of review

---

who had not been violent); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 731-32 (1966) (overruling an injunction which prohibited peaceful picketing in a labor dispute because there was no violence); Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139-40 (1957) (refusing to allow an injunction which prohibited peaceful picketing in a labor dispute because no pattern of violence existed with protesting); Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, 312 U.S. 287, 294 (1941) (allowing a sweeping injunction barring all future picketing in labor dispute, even if peaceful, because of the extreme and repeated acts of violence accompanying picketing).

61. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523-30 (1994).

62. *Id.* at 2523 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

63. *Id.* at 2523-24. Justice Scalia writing separately, joined by Justice Kennedy and Justice Thomas [hereinafter Justice Scalia], argued that the injunction was content based. *Id.* at 2539 (Scalia, J., Kennedy, J., Thomas, J., concurring in part and dissenting in part). Although by definition the injunction only limited the speech of people *acting* "in concert" with Operation Rescue, Justice Scalia noted that the injunction was enforced against anyone "who merely entertained the same beliefs and wished to express the same view as the named defendants." *Id.* at 2539-40.

64. *Id.* at 2524. The Court makes no reference that its decision was based on the secondary effects of protest activity. *Id.* at 2516. However, it is possible to argue that the injunction, although facially discriminatory, is content neutral because its purpose is not to stifle antiabortion speech, but to prevent certain secondary effects associated with antiabortion activity, i.e., the congestion of traffic flow or the impediment of access to the clinic. *Id.* at 2521.

65. *Id.* at 2524.

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

67. *See supra* notes 39-41 and accompanying text (explaining the language for intermediate scrutiny).

should be applied.[68] The case was distinguished because it pertained to an injunction, and not a generally applicable ordinance.[69] The Court reasoned that an injunction should be scrutinized more rigorously because it is a remedy imposed by a single judge and could be applied in a discriminatory or arbitrary manner.[70] The Court concluded that an appropriate test would be whether the injunction "burden[ed] no more speech than necessary to achieve a significant government interest."[71]

After determining the level of scrutiny, the Court then examined the injunction to verify that it served a significant governmental interest.[72] The Court agreed with the Florida Supreme Court and found that the combined governmental interests to protect a pregnant woman's right to seek medical advice regarding her pregnancy, ensure public safety and order, promote the free flow of traffic, and assure residential privacy were significant goals[73] and therefore sufficient to satisfy the level of scrutiny.[74]

---

68. *Madsen*, 114 S. Ct. at 2524. Justice Stevens argued that a restriction created by the court (an injunction) rather than the legislature (an ordinance) should have a more lenient standard of review because injunctions are not imposed on the general public, but only imposed on groups who have engaged in illegal activity. *Id.* at 2531 (Stevens, J., concurring in part and dissenting in part). Justice Stevens reasoned that a judicial deprivation of certain liberties is justified in consideration of the group's illegal conduct. *Id.* By contrast, Justice Scalia argued that an injunction should be measured with strict scrutiny. *Id.* at 2538 (Scalia, J., Kennedy, J., Thomas, J., concurring in part and dissenting in part). He warned that because injunctions are: (1) targeted at particular ideas and could be designed to suppress an entire view point; (2) created by judges who may be chagrined by the disobedience to their previous orders; (3) procedurally more difficult to challenge than a statute; and (4) impose prior restraints on speech, they should be carefully scrutinized. *Id.* at 2538-39, 2541.

69. *Id.* at 2524.

70. *Id.*

71. *Id.* at 2525. In determining the language "burden no more speech than necessary," the majority in *Madsen* relied on language used in past injunction cases which it characterized as intermediate scrutiny language. *Id.* (relying on NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) and Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968)). However, Justice Scalia argued that the language the Court referred to did not qualify as intermediate scrutiny language, but was rather strict scrutiny. *Id.* at 2542. Regarding *Claiborne*, Justice Scalia insisted that the language "precision of regulation" meant that a strict and precise investigation was needed (to ensure that only those who had intended to conduct unlawful activity were restricted by the regulation). *Madsen*, 114 S. Ct. at 2543-44 (citing *Claiborne*, 458 U.S. at 916). And regarding *Carroll*, Justice Scalia argued that the phrase "[f]irst Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order," did not imply intermediate scrutiny, but rather implied strict scrutiny. *Madsen*, 114 S. Ct. at 2542 (citing *Carroll*, 393 U.S. at 183) (Scalia, J., Kennedy, J., Thomas, J., concurring in part and dissenting in part).

72. *Id.* at 2526.

73. The governmental interests supporting the injunction were reflected in case law and Florida statutory law. In *Roe v. Wade*, the United States Supreme Court found that a woman has the personal right to seek lawful medical services in connection with her pregnancy. Roe v. Wade, 410 U.S. 113, 153 (1973). In *Frisby v. Schultz*, the Court upheld an ordinance restricting picketing in a residential area because "the protection of residential privacy" constitutes "a significant government interest." Frisby v. Schultz, 487 U.S. 474, 484 (1988). And, with the interest to preserve the public safety and order, Florida law protects the free flow of traffic. FLA. STAT. § 316.2045 (1991) (protecting the obstruction of public streets, highways, and roads).

74. *Madsen*, 114 S. Ct. at 2530. Justice Scalia questioned the Court's rationale in concluding

In its final stage of analysis, the Court assessed the injunction to see if the provisions "burdened no more speech than necessary."[75] Specifically, the Court assessed the 36-foot buffer zone, the noise restriction, the "images observable" provision, the 300-foot buffer zone around the clinic, and the 300-foot prohibition of picketing around the residences of clinic patients and staff.[76]

Examining the 36-foot buffer zone, which prohibited Operation Rescue from congregating, picketing, patrolling, demonstrating, or entering within 36 feet of the property line, the Court granted deference to the state court's familiarity with the situation and upheld the restriction to ensure unfettered ingress to and egress from the clinic.[77] However, the Court found that the buffer zone applying to the private property to the back and side of the property was unnecessary because patients do not have to cross this property and there was no evidence protesters obstructed access or traffic in this area.[78]

The Court also upheld as constitutional the noise restriction, which prohibited Operation Rescue from "singing, chanting, whistling, shouting, using bullhorns, auto horns, sound amplification equipment or other sounds" within earshot of the patients during surgical procedures.[79] The Court noted that in *Grayned v. City of Rockford*, a similar noise restriction was upheld around a school because "the nature of a place, the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable."[80] In consideration of the serious nature of hospitals and that the noise restriction was only in effect during specific times,

---

whether significant government interests existed. *Id.* at 2544, 2546-47 (Scalia, J., Kennedy, J., Thomas, J., concurring in part and dissenting in part). He argued that to enforce an injunction there must be a showing that the defendant violated and could likely again violate statutory or common law. Yet, Justice Scalia noted that no laws had been violated. *Id.* Although protesters may have momentarily blocked access to the clinic, Justice Scalia insisted that such behavior is normal protest activity. *Id.* at 2546-47. The original injunction which prohibited (long term) blocking access to the clinic, trespassing and abusing persons, Justice Scalia argued had never been violated. *Id.* at 2544, 2546-47. Justice Scalia found that no nexus existed between protest activity and the violation of any law and there was no legal basis for the amended injunction. *Id.* at 2547.

75. *Id.* at 2526-27.

76. *See supra* note 7 (pertaining to the amended injunction sections (3), (4), (5), and (6)).

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

78. *Id.* at 2528. In his dissent, Justice Stevens argued that the Court had no right to modify the 36-foot injunction because it was only challenged as being content based and not that it was a valid time, place, and manner restriction. *Id.* at 2533-34 (Stevens, J., concurring in part and dissenting in part). He further stated that the Court had no right to scrutinize the noise restriction or the "images observable" provision for the same reason. *Id.*

79. *Id.* at 2528.

80. *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)) (finding an ordinance which limited noiseful picketing within 100 feet of a school constitutional).

the Court concluded the restriction burdened no more speech than necessary.[81]

In contrast to the noise restriction, the provision which prohibited "images observable" the Court held unconstitutional.[82] Although the Court agreed that certain signs could be threatening and stressful to patients and staff, the Court concluded a complete ban on "images observable" was too broad.[83] Recognizing that the clinic could avoid disagreeable images by pulling the curtains, the Court concluded that the restriction limited more speech than necessary.[84]

The Court also held that the 300-foot buffer zone prohibiting petitioners from approaching any person seeking medical services unless invited burdened more speech than necessary.[85] The Court concluded that it could not justify a prohibition on all uninvited speech for no other reason than to prevent patients and staff from feeling intimidated.[86] Without evidence proving that protesters used proscribable words such as "fighting words" or threats, the Court decided that a restriction would compromise the notion of free speech.[87]

Finally, the Court determined that the 300-foot zone which prohibited Operation Rescue from picketing, demonstrating, using sound amplification, or impeding street access around the residences of clinic staff was too broad.[88] The Court noted that the State has an interest in protecting the privacy and tranquillity of a person in their home, but a 300-foot blanket ban would limit antiabortion protesters from walking in

---

81. *Id.* Justice Scalia disagreed that the Court had a right to uphold the noise restriction. *Id.* at 2547 (Scalia, J., Kennedy, J., Thomas, J., concurring in part and dissenting in part). Although he agreed that patients in a hospital should not be subjected to excessive noise, evidence revealed that pro-choice demonstrators were as loud (or louder) than antiabortion demonstrators. *Id.* Justice Scalia argued that restricting only antiabortion demonstrators because of their message is a content based regulation. *Id.* Rather, he asserted that the injunction should apply to all noise and not only pro-life noise. *Id.*

82. *Madsen*, 114 S. Ct. at 2529.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994). Justice Stevens disagreed with the Majority that the 300-foot ban would burden more speech than necessary. Rather, Justice Stevens insisted that the 300-foot ban was not targeted to prohibit speech but to limit conduct. *Id.* at 2532 (Stevens, J., concurring in part and dissenting in part). Justice Stevens reasoned that the injunction allowed petitioners to express whatever they wanted as long as they did not accompany, encircle, surround, harass, threaten, or physically or verbally abuse a person walking to or from the clinic. *Id.* Furthermore, Justice Stevens noted that any speech the injunction may curtail would not be general communicative statements spoken to the public at large, but speech targeted at a captive and unwilling listener. *Id.* at 2533. The First Amendment permits the government to prohibit speech when the "captive" audience cannot avoid the objectionable speech. Frisby v. Schultz, 487 U.S. 474, 484 (1988). Considering that the "unwilling listener" in *Madsen* is a patient, Justice Stevens insisted that the judiciary was permitted to regulate objectionable speech. *Madsen*, 114 S. Ct. at 2533.

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

front of an entire block of houses.[89] In *Frisby v. Schultz*, the Court approved a restriction on residential picketing, but it was limited to "focused picketing taking place solely in front of a particular residence."[90] The Court suggested that a limitation on the time, the duration, or the number of picketers in a smaller zone could be constitutional.[91]

Justice Stevens agreed with the Majority's disposition of the case, but wrote separately, concurring in part and dissenting in part, to express somewhat different views of the issues.[92] His most notable objection concerned the Majority's decision to apply a heightened standard of review to a judge-created restriction.[93] Justice Stevens believed that the level of scrutiny for an injunction should be less stringent than that applied to an ordinary time, place, and manner regulation.[94] Justice Stevens' rationale was based on the notion that injunctions are enforced against people who had engaged in illegal activity.[95] Because the people had participated in unlawful conduct, Justice Stevens argued that it was reasonable to judicially deprive them of certain liberties.[96]

Similar to Justice Stevens, Justice Scalia, joined by Justice Kennedy and Justice Thomas, also concurred in part and dissented in part.[97] However, unlike Justice Stevens, Justice Scalia adamantly objected to the Court's finding that the injunction was content neutral.[98] Although the

---

89. *Id.*

90. *Id.* (citing *Frisby*, 487 U.S. at 483).

91. *Id.* at 2530. The Court also rejected Petitioners' challenge that the phrase "in concert" was vague and overbroad or violated their freedom of association. *Id.* The Court found that Petitioners themselves were parties in the suit and thus lacked standing to challenge the order for others. *Id.* Furthermore, the Court found that Petitioners were not enjoined from associating with each other, only from participating in certain activity. *Id.*

92. *Id.* at 2531-34. *See supra* note 68 (summarizing Justice Stevens' argument that a judge-created restriction should be scrutinized more leniently than a legislatively imposed restriction); *supra* note 78 (explaining Justice Stevens opinion that the Court had no right to modify or scrutinize the injunction since Petitioners were only challenging the injunction for being content based); *supra* note 87 (outlining Justice Stevens explanation that the 300-foot regulation did not limit speech but rather harassing conduct).

93. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2531 (1994). *See supra* note 68 (summarizing Justice Stevens argument that the injunction should be scrutinized with a more lenient level of scrutiny).

94. *Madsen*, 114 S. Ct. at 2531.

95. *Id.*

96. *Id.*

97. *Id.* at 2534-51. *See supra* note 63 (summarizing Justice Scalia's explanation that the injunction was not content neutral); *supra* note 68 (describing Justice Scalia's argument that the level of scrutiny for a judge-created restriction should be more stringent than an ordinary time, place, and manner regulation); *supra* note 71 (explaining Justice Scalia's argument that the language "burden no more speech than necessary" was actually strict scrutiny language); *supra* note 74 (explaining Justice Scalia's rationale that there were no significant government interests supporting the injunction); *supra* note 81 (pertaining to Justice Scalia's opinion that the noise restriction was content based since it only restricted antiabortion protesters).

98. *Madsen*, 114 S. Ct. at 2539-40. *See supra* note 63 (describing Justice Scalia's argument that the injunction was not content neutral).

language of the injunction limited the speech of persons *acting* "in concert" with Operation Rescue, Justice Scalia argued that the injunction was construed to include people who not only *acted* "in concert" with Operation Rescue but who expressed the same views.[99] Hence, Justice Scalia insisted that the injunction was content based.[100]

Also of significance in this separate opinion, was Justice Scalia's disagreement with the standard of review that the Majority applied to the injunction.[101] The injunction was created by a single judge and only applied to certain members of the public.[102] Because such a restriction is subject to abuse and bias, procedurally hard to challenge, and imposes a prior restraint on speech, Justice Scalia believed that strict scrutiny should apply.[103]

In a strong conclusion, Justice Scalia scorned at the impact that *Madsen* will have on future "free-speech injunction" cases.[104] Referring to *Madsen* as a loaded weapon, he warned of the possible consequences of the Court's judgment, foreshadowing that: (1) the Court's standard of review will be indistinguishable from an ordinary time, place, and manner regulation and no heightened scrutiny will be applied; (2) courts will no longer look to see if an injunction is closely tied to a violation of law, only a sound policy; and (3) appellate courts will no longer feel compelled to investigate the lower courts' findings of fact.[105]

IV. IMPACT

The Supreme Court's ruling in *Madsen* resolves a previously ill-defined area of the law and establishes a new standard of scrutiny to be used when examining injunctions. Of special importance is the impact this decision will have on abortion protesting cases. Currently, throughout the United States, numerous injunctions limiting antiabortion protesting around clinics[106] and residences[107] reign. Those which were found

---

99. *Id.*

100. *Id.*

101. *Id.* at 2538-39. *See supra* note 68 (summarizing Justice Scalia's argument that strict scrutiny should apply to a judge-created restriction).

102. *Madsen*, 114 S. Ct. at 2538-39.

103. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2539-40 (1994).

104. *Id.* at 2549-50.

105. *Id.*

106. *See, e.g.*, Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57, 64 (3d Cir. 1991) (allowing a restriction which limits peaceful picketing within 500 feet of the center, to six persons on a designated side); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681, 684 (9th Cir. 1988) (prohibiting demonstrations and leafletting from the center of the front door to the curb and 12 1/2 feet on either side of this line and limiting noise from interfering with medical services); Pro-Choice Network v. Project Rescue Western N.Y., 799 F. Supp. 1417, 1434-35 (W.D.N.Y. 1992) (prohibiting demonstrators from coming within 15 feet of the clinic's entrances and 15 feet from persons and vehicles approaching the clinic, with the exception of two sidewalk counselors if "invit

to be content neutral, because they were directed at protesters' actions and not their message, have now been validated as constitutional under the Supreme Court's holding in *Madsen*.[108] However, because the Court applied a more stringent standard, the constitutionality of the provisions within the injunction may have to be reexamined to ensure their regulations burden no more speech than necessary.[109]

North Dakota may have to reexamine and modify its holding in this area. In 1992, the North Dakota Supreme Court examined an anti-

---

ed"); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617, 626 (N.D. Cal. 1991) (prohibiting demonstrations, picketing, leafletting or counseling within 25 feet of any clinic entrance); Horizon Health Ctr. v. Felicissimo, 622 A.2d 891, 896 (N.J. Super. Ct. App. Div.) (limiting demonstrators to the sidewalk on the western side of the street opposite the center), *cert. granted*, 634 A.2d 527 (1993); Bering v. SHARE, 721 P.2d 918, 929 (Wash. 1986) (restraining picketers' activities "to Stevens Avenue, away from the [medical] building's entrance and the sidewalk fronting the building"), *cert. dismissed*, 479 U.S. 1050 (1987).

107. *See, e.g., Northeast Women's Ctr.*, 939 F.2d at 67, 68 n.16 (holding that the 2,500 foot prohibition on use of sound amplification equipment was constitutional and remanding the 2,500 foot prohibition on residential picketing for possible modification because record did not support a need for a restriction greater than 500 feet); Kaplan v. Prolife Action League, 431 S.E.2d 828, 846 (N.C. Ct. App. 1993) (holding that a restriction which banned "picketing, parading, marching or demonstrating" within 300 feet of center line of physician's street was constitutional); Murray v. Lawson, 624 A.2d 3, 13 (N.J. Super. Ct. App. Div.) (prohibiting demonstrations within 300 feet of physician's residence), *cert. granted*, 627 A.2d 1149 (1993); Dayton Women's Health Ctr. v. Enix, 589 N.E.2d 121, 124 (Ohio Ct. App. 1991) (prohibiting picketing within the viewing distance of the homes of the workers and the patients of the clinic), *appeal dismissed*, 583 N.E.2d 971 (1992), *cert. denied sub nom.*, Sorrell v. Dayton Women's Health Ctr., Inc., 112 S. Ct. 3033 (1992).

108. *See* Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524 (1994).

109. *Id.* at 2525. From *Madsen*, it is apparent that any lower court injunction which limits picketing directly in front of the clinic's entrance or which limits noise level directly outside of a surgery area, would be constitutional. *Id.* at 2527-28. However, injunctions which prohibit signs or ban demonstrations entirely in an area away from the entrance to a clinic, would likely burden more speech than necessary and not be constitutional under the new ruling. *Id.* at 2529. In addition, injunctions limiting residential picketing will now have to be very narrowly tailored. *Id.* at 2530. Under *Madsen*, most standing antiabortion injunctions which limit residential picketing would likely be ruled as unconstitutional. *Id.* at 2530; *see supra* note 107 (citing examples of lower court residential injunctions). Unless the restriction is a very small zone (directly in front of the residence as in *Frisby*), or only limits the number of picketers or the time of demonstration and is not a complete ban, the restriction would probably be found to burden more speech than necessary. *Id.*

Since the *Madsen* decision, various courts have applied the new standard—"burden no more speech than necessary." However, despite the expectation that fewer injunctions would be ruled constitutional because of the heightened level of scrutiny, there has not been a significant change in outcomes compared to previous holdings. *See , e.g.*, Pro Choice Network v. Schenck, 34 F.3d 130 (2d Cir. 1994), *withdrawn*, 1994 WL 480642 (finding that a bubble zone which prohibited antiabortion protesters from being within 15 feet of the clinic's entrance, driveway, and people entering the clinic burdened more speech than necessary); National Org. For Women v. Operation Rescue, 37 F.3d 646, 654-55 (D.C. Cir. 1994) (finding that an injunction which prohibited Operation Rescue from blockading an abortion clinic and aiding, abetting, and directing others to blockade the clinic was constitutional under *Madsen*).

abortion injunction issued by a district court.[110] The court found that the injunction was content neutral under a time, place, and manner restriction and examined the injunction to determine whether it was narrowly tailored to balance free speech rights, abortion rights, and the public interest in peace and order.[111] After investigating the physical layout of the clinic area, the North Dakota Supreme Court ruled that the provision which limited picketing to two people within 100-feet of the clinic during business hours was constitutional.[112] The court also upheld provisions which enjoined protesters from following, harassing, physically abusing, photographing, videotaping, or intimidating people connected with the clinic[113] and which restricted the noise level outside of the clinic.[114] However, the court refused to uphold the provisions which limited protesters from speaking to staff or patients who did not indicate they wished to be spoken to, or which prohibited protesters from distributing literature, as enforcing either of these restrictions would affront the First Amendment.[115]

Under the *Madsen* standard,[116] it is unclear whether the provisions upheld in the North Dakota ruling would be constitutional. Although the 100-foot restriction around the clinic is larger than the 36-foot zone upheld in *Madsen*, the North Dakota Supreme Court had extensive evidence which showed the 100-foot injunction to be a necessity.[117]

---

110. Fargo Women's Health Org., Inc. v. Lambs of Christ, 488 N.W.2d 401, 407 (N.D. 1992). The restrictions challenged were:

> (b) harassing, intimidating or physically abusing persons entering, leaving or working at FWHO facilities, and the spouses and family members of those persons entering, leaving or working at FHWO;
> (c) obstructing the work of the persons located at FWHO facilities by any means—including singing, chanting, yelling, shouting, or screaming—that substantially interferes with the provision of medical services including counseling, with such facility;
> (d) going within 100 feet of the property line of FWHO during such times as they are open for business, Monday through Saturday, from 7:30 a.m. until 6:00 p.m., except that two people may quietly and peacefully picket such facility, so long as said people do not interfere with the operations of said facility, or individuals seeking to enter or leave FWHO as provided herein;
> (e) following, harassing, photographing, videotaping, and intimidating, or speaking to staff and patients of FWHO who indicate that they do not wish to be spoken to; and
> (f) distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature.

Id.

111. *Id.* at 407, 408.

112. Fargo Women's Health Org., Inc. v. Lambs of Christ, 502 N.W.2d 536, 538 (N.D. 1993).

113. *Fargo Women's Health Org.*, 488 N.W.2d at 410-11. The trial court had determined that protesters' conduct was so outrageous that it was unlawful and exemplified intentional infliction of emotional distress. *Id.* at 410.

114. *Id.* The Court found that the noise problem was analogous to that in Grayned v. City of Rockford, 408 U.S. 104 (1972), where excessive noise was found to be a nuisance. *Id.*

115. *Id.* at 411.

116. *See supra* part III (defining the *Madsen* standard).

117. Fargo Women's Health Org. v. Lambs of Christ, 502 N.W.2d 536, 537 (N.D. 1993). Pro

Furthermore, the injunction was not a blanket ban as it allowed two demonstrators.[118] Likewise, the constitutionality of the provision which enjoined protesters from harassing, photographing, videotaping and intimidating staff and patients[119] is questionable. The provision was interpreted by the North Dakota Supreme Court to imply photographing and videotaping, without consent and with the intent to harass.[120] *Madsen* inferred that almost any conduct is constitutional unless "independently proscribable."[121] Therefore, if physically approaching someone without consent and with the intent to harass can be viewed as threatening or physically dangerous, the provision would be constitutional, otherwise it would likely fail.[122]

The Supreme Court's ruling in *Madsen* will likely have a significant influence on all future "free speech" and "free-speech injunction" cases. The Court endorsed a speaker-specific regulation by declaring that a restriction aimed at the speech of a specific party, and not the general public, is content neutral.[123] Restrictions on protesting in the past had always been a general law, applicable to all people, rather than a law restricting specific speech.[124] Furthermore, the Court created a new remedy with injunctive relief by allowing an injunction to limit lawful, peaceful picketing aimed at the time, place, and manner of the speech, rather than only limiting unlawful conduct.[125] Until *Madsen*, ordinances restricting legal activity had been upheld because of the time, place, and manner of the speech but injunctive remedies had only limited unlawful

---

testers around the Fargo clinic were extremely aggressive and hostile, impeding access to the clinic, and committing other criminal acts such as climbing on the hoods of cars, following and harassing staff members while they were off duty, vandalizing staff members homes, and storming the clinic in an attempt to occupy the rooms. *Fargo Women's Health Org.*, 488 N.W.2d at 404-05.

118. *See supra* note 110 (pertaining to the North Dakota injunction provision (d)).

119. *See supra* note 110 (pertaining to the North Dakota injunction provision (e)).

120. *Fargo Women's Health Org.*, 488 N.W.2d at 411.

121. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994).

122. *Id.*

123. Two opposing protest movements demonstrated simultaneously outside the abortion clinic in *Madsen*. Yet, the Supreme Court endorsed a speaker-specific injunction (which only limited the speech of one movement and not all people) as content neutral. Kathleen M. Sullivan, *Constitutional Law Scholars Assess Impact of Supreme Court's 1993-94 Term*, 63 U.S.L.W. 2217, 2240 (Oct. 18, 1994).

124. *See, e.g, Rock Against Racism*, 491 U.S. 781 (regulating all music played in the park); *Grayned*, 408 U.S. 104 (banning all protesting near the school); *Frisby*, 487 U.S. 474 (banning all picketing in front of the residence).

125. *Madsen*, 114 S.Ct. at 2526.

activity (except in cases of extreme violence).[126] Finally, the *Madsen* ruling created a heightened scrutiny for "free-speech" injunctions.[127] Rather than using the intermediate scrutiny standard, the Supreme Court created a type of "intermediate scrutiny with a bite" for injunctive relief aimed at the time, place, and manner of the speech.[128]

With *Madsen*, the United States Supreme Court has balanced the constitutional right to free speech with the constitutional right to obtain medical services regarding an abortion. While ensuring the preservation of the First Amendment by creating a heightened scrutiny, it has made it clear that speaker-specific injunctions can be upheld as constitutional, safeguarding women's rights to obtain abortion services.

Alana K. Bassin

126. *See supra* note 60 (citing examples of previous United States Supreme Court injunction cases).

127. The "intermediate scrutiny with a bite" level of scrutiny is a compromise between the strict scrutiny standard used in a content based regulation where the government rarely wins, and the intermediate scrutiny standard used in a time, place, and manner restriction where the government almost always wins. Sullivan, *supra* note 123, at 2240.

128. *Id.*