Mercer Law Review

Volume 46
Number 3 *Leads Edition - Religious Speech in the Public Schools*

Article 9

5-1995

First Amendment Facelift?: Rehnquist Court Crafts New Scrutiny Level for Content- Neutral, Speech Restricting Injunctions in *Madsen v. Women's Health Center*

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First Amendment Facelift?: Rehnquist Court Crafts New Scrutiny Level for Content-Neutral, Speech Restricting Injunctions in *Madsen v. Women's Health Center*

Recently, in *Madsen v. Women's Health Center*,[1] the United States Supreme Court evaluated the constitutionality of an injunction that had completely prohibited antiabortion protestors from coming within a thirty-six foot "speech-free" buffer zone around an abortion clinic.[2] Petitioners, Judy Madsen[3], Ed Martin, and Shirley Hobbs, are officers of Rescue America[4] and members of Operation Rescue.[5] The predominant goal of these two antiabortion, activist organizations is to shut down abortion clinics throughout the country.[6] Respondents, Women's Health Center, Inc., Aware Woman Center for Choice, Inc., EPOC Clinic, Inc., and Central Florida Women's Health Organization, Inc., operate abortion clinics throughout central Florida.[7] The crusade against the Aware Woman Center for Choice, Inc. ("Aware Women") of Melbourne, Florida and numerous other abortion clinics in central Florida was

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1. 114 S. Ct. 2516 (1994).

2. The trial court's modified injunction prohibited the petitioners in Madsen from engaging in the following acts: "(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of the public right-of-way or private property within [36] feet of the property line of the clinic . . . ." *Madsen*, 114 S. Ct. at 2522.

3. Shortly before the Court handed down the decision, Judy Madsen said that "she has God on her side," and "[n]ow she wants the justices of the U.S. Supreme Court in her corner, too." Elsa C. Arnett, *Abortion Clinic War: Free Speech vs. Access*, ARIZONA REPUBLIC, Apr. 25, 1994, at A1.

4. Brief for Respondents at 1, Madsen v. Women's Health Center, 114 S. Ct. 2516 (No. 93-880).

5. Respondents Brief at 2 n.2, *Madsen* (No. 93-880).

6. Indeed, the Florida trial court that issued the later September 30, 1992 permanent injunction, *see infra* note 12 and accompanying text, made a factual finding that petitioner's propaganda specifically declared that their intention was to "'[p]hysically close down abortion mills' by encircling them with thousands of protestors and blocking access to [abortion] facilities." Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 667 n.3 (Fla. 1993).

7. 114 S. Ct. at 2521.

mounted by Operation Rescue in 1991[8] shortly after the arrival of Operation Rescue's newest office in central Florida.[9] Picketing and demonstrating by antiabortion protestors led Women's Health Center to ask a Florida state court to enjoin Operation Rescue and others from engaging in certain activities against Aware Women, its patients and staff.[10] On October 25, 1991, the court entered a temporary injunction.[11] Women's Health Center requested and received long-term relief in the form of a permanent injunction almost a year later, on September 30, 1992.[12] Despite the permanent injunction, protestors continued to impede access to the clinic by congregating on the street leading up to the clinic and marching in front of the clinic's driveways.[13] Roughly six months later, after scores of complaints by Women's Health Center and extensive evidentiary hearings, Robert B. McGregor, a Seminole County trial judge, amended the inadequate permanent injunction. He concluded that prior orders had "proved insufficient 'to protect the health, safety and rights of women in Brevard and Seminole County, Florida, and surrounding counties seeking access to [medical and counseling] services.'"[14] This modified injunction prohibited a broader array of antiabortion protest activities[15] and, consequently, drew

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8. Respondent's Brief at 1, *Madsen* (No. 93-880).

9. *Id.* Incidentally, Petitioners Madsen, Martin and Hobbs were identified in the antiabortion literature as the persons to telephone or contact for information regarding Operation Rescue's activities in Florida. *Id.*

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

11. *Id.* This rather narrow temporary injunction imposed restrictions including no obstruction of the entrance or exit from any abortion clinic in Brevard and Seminole County and no physical abuse of any person entering or leaving an abortion clinic. *Id.* at 667 n.1.

12. *Id.* at 666-67. The permanent injunction encompassed virtually the identical language of the earlier temporary order of October 25, 1991. *Id.* at 667 n.4.

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

14. *Id.* (quoting Operation Rescue, 626 So. 2d at 667 (citations omitted)).

15. *Madsen*, 114 S. Ct. at 2521 n.1. In addition to petitioners Madsen, Martin and Hobbs, the amended injunction was directed at "Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees, and servants, and . . . Bruce Cadle, Pat Mahoney, Randall Terry, . . . and all persons acting in concert or participation with them, or on their behalf." *Id.*

The April 8, 1993 amended order had nine sections that banned specific activities. *Id.* at 2522 n.1 (citing *Operation Rescue*, 626 So. 2d at 669). Section one prohibited these groups from entering the premises and property of Aware Woman at all times. *Id.* Section two prohibited these groups from obstructing or interfering with access to, entrance and exit from any building or parking lot of Aware Woman at all times. *Id.* Section three forbid these particular persons at all times from "congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [36] feet of the property line" of Aware Woman. *Id.* Section four imposed noise restrictions, including but limited to no singing, chanting or use of sound amplification

significant from Operation Rescue.[16] The Florida Supreme Court heard Operation Rescue's challenge in *Operation Rescue v. Women's Health Center*,[17] found the injunction content-neutral, applied intermediate scrutiny, and upheld the amended injunction.[18] The United States Court of Appeals for the Eleventh Circuit heard a separate challenge for the same injunction in *Cheffer v. McGregor*[19] shortly before the Florida Supreme Court announced its decision in *Operation Rescue*. The Court of Appeals, however, found the injunction content-based, applied heightened scrutiny, and struck down the injunction.[20] The United States Supreme Court granted certiorari to resolve the tension between the Florida Supreme Court and the United States Court of Appeals over the appropriateness of Judge McGregor's amended state court injunction.

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equipment, during surgical procedures, recovery periods, and during the hours of 7:30 a.m. through noon, on Mondays through Saturdays. 626 So. 2d at 669. Section five prohibited these groups, within an area of 300 feet of Aware Woman, from physically approaching any persons seeking services of Aware Woman unless they consented. *Id.* Section six, aimed toward protecting the homes of the clinic's employees, prohibited these groups at all times from "congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence[s] of any of the [respondents'] employees . . ." *Id.* Section seven prohibited them at all times from "physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using the services at the [respondents'] Clinic . . . ." *Id.* Section eight prohibited them at all times 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 [Aware Woman] clinic." 626 So. 2d at 669. Finally, Section nine, a no instigation vehicle, prohibited them at all times from "encouraging, inciting, or securing other persons to commit any of the prohibited acts" contained in the amended injunction. *Id.*

Petitioners did not challenge provisions one, two, seven, eight and nine of Judge McGregor's amended injunction. Madsen, 114 S. Ct. at 2526 n.5.

Of the remaining four challenged provisions, only Section three regarding the 36 foot "speech-free" buffer zone will be discussed in this note with limited reference to the additional contested provisions.

16. Operation Rescue believed Judge McGregor's amended order raised several issues under the United States Constitution and claimed that sections 3 through 6, *see* note 15 and accompanying text, violated thier right to freedom of speech, freedom of association, equal protection, and the free exercise of religion. Operation Rescue, 626 So. 2d at 669.

17. 626 So. 2d 664 (Fla. 1993).

18. *Id.* at 675-76. Florida's Supreme Court applied the classic time, place, and manner restriction analysis from Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), and concluded that the amended injunction passed muster. *Id.* at 673. *See also* Ward v. Rock Against Racism, 491 U.S. 781 (1989); United States Postal Serv. v. Council of Greenburgh, 453 U.S. 114 (1981); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); Grayned v. City of Rockford, 408 U.S. 104 (1972); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. New Jersey, 308 U.S. 147 (1939).

19. 6 F.3d 705 (11th Cir. 1993).

20. *Id.* at 712.

Chief Justice Rehnquist, writing for a majority of the Court, upheld the establishment of a thirty-six foot "speech-free" buffer zone around the public property portions of Aware Woman.[21]

Since the adoption of the Bill of Rights, First Amendment rights, while technically guaranteed, have been balanced the rival interests of states. Consequently, freedom of speech, while secured by the Constitution, does not confer an absolute right to speak. The State may punish those who abuse this freedom by speaking. For example, in 1878, in *Reynolds v. United States*,[22] the Supreme Court cautioned that the guarantees of the First Amendment remain subject to regulation for the protection of society.[23] With foundations like these in place, the Court was braced for a future of resolving clashes between these two competing institutions. In 1939, in *Schneider v. New Jersey*,[24] the Court dealt with ordinances from four separate municipalities that banned or greatly restricted the dissemination of handbills.[25] In invalidating the regulations, the Court insisted that when a government violation of rights is asserted, the courts must look closely toward the effect of the challenged legislation and must assess the substance of the reasons offered for the legislation.[26] A year later, in *Cantwell v. Connecticut*,[27] the Court, relying on *Reynolds*, demanded that the power to regulate must be exercised in a way that does not unduly infringe First Amendment freedoms.[28] Broad guidelines, like those set forth in *Schneider* and *Cantwell*, were finally given in *Shelton v. Tucker*.[29] Reenlarging constitutional safeguards, the Court in *Shelton* maintained that, even though government interests may be significant, those interests could not be "pursued by means that broadly stifle fundamental personal liberties when the end [could] be more narrowly achieved."[30] The Court in *Shelton* essentially instructed future courts to pay closer attention to the fit between the objectives of a regulation and the restrictions

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21. *Madsen*, 114 S. Ct at 2527.
22. 98 U.S. 145 (1878).
23. *Id.* at 164-66.
24. 308 U.S. 147 (1939).
25. *Id.* at 154-58.
26. *Id.* at 161.
27. 310 U.S. 296 (1940).
28. *Id.* at 304. *Cantwell* and *Schneider* also form the beginning of the modern time, place and manner of regulations analysis. This note will also demonstrate that Justice Rehnquist's new standard for speech-restricting injunctions, *see* note 89 and accompanying text, evolved from this same line of cases. Many courts in the modern era continue to apply time, place, and manner analysis even to injunctions.
29. 364 U.S. 479 (1960).
30. *Id.* at 488 (alteration in original).

imposed by it. The refinement and restatement of tenets applicable to injunctive relief ran a parallel course to the establishment of general principles guiding the confrontation between protected personal rights and state interests. In 1928, the Court in *Swift & Co. v. United States*[31] explained that an action for an injunction dealt primarily with future violations rather than past violations.[32] In 1953, modest gloss was added to *Swift & Co.* by *United States v. W.T. Grant Co.*[33] when the Court held that a court should only issue an injunction if there is a cognizable danger of recurrent violation.[34] Major developments in this area, that eventually spawned the standard for *Madsen*, continued in a series of decisions focussed on civil rights. In 1956, the Virginia Legislature amended several state statutes to make the activities of the National Association for the Advancement of Colored People ("NAACP") fall within the definition of improper solicitation of legal business under Virginia law.[35] Fiery complaints by the NAACP were heard in the Supreme Court in *NAACP v. Button*.[36] Justice Brennan, writing for a majority of the Court, held the Virginia statutes unconstitutional, noting that the activities of the NAACP were protected by the First Amendment.[37] Importantly, the Court noted that Virginia's statutes failed to advance any significant state interests and maintained, relying in part on *Shelton* and *Schneider*, that "[b]road prophylactic rules in the area of free expression are suspect."[38] Rather, according to the Court, "*[p]recision of regulation* must be the touchstone in an area so closely touching our most precious freedoms."[39] In *Keyishian v. Board of Regents of the University of New York*,[40] teachers challenged the constitutionality of New York's anticommunism statutes in 1967. In this case, the Court embraced *Button*'s "precision of regulation" requirement and declared that since "First Amendment freedoms need breathing space, government [could] regulate in the area only with narrow specificity."[41] The language of *Button* and its progeny later proved to be the harbinger for

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31. 276 U.S. 311 (1928).

32. *Id.* at 326 (citing Vicksburg Waterworks Co. v. Mayor and Alderman of Vicksburg, 185 U.S. 65, 82 (1902)). This is not to say that past violations are irrelevant. Their importance in *Madsen* is undoubted.

33. 345 U.S. 629 (1953).

34. *Id.* at 633.

35. NAACP v. Button, 371 U.S. 415, 422-24 (1963).

36. 371 U.S. 415 (1963).

37. *Id.* at 444. The Fourteenth Amendment also protected the NAACP's activities. *Id.*

38. *Id.* at 438 (citing Shelton v. Tucker, 364 U.S. 479 (1960)).

39. *Id.* (emphasis added).

40. 385 U.S. 589 (1967).

41. *Id.* at 603 (quoting *Button*, 371 U.S. at 438).

Madsen's novel approach. While past decisions which narrowed the breach of state interest-based regulation in the protected rights arena dealt predominately with ordinances, in 1968, *Carroll v. President & Commissioners of Princess Anne*[42] added injunctive relief to the kettle. Petitioners in *Carroll* were identified a white supremacist organization[43] which hosted rallies, amplified by a public address system, in the township of Princess Anne, Maryland.[44] Speeches at these rallies were militantly racist, targeting primarily African-Americans and Jewish-Americans with language that was insulting, threatening and derogatory.[45] Officials of the county and township sought injunctive relief.[46] Justice Fortas, further tightening past precedent, declared that an "order issued in the area of First 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."[47] Reiterating *Shelton*'s requirement, the Court in *Carroll* maintained that the State could not regulate in ways that broadly quelled personal liberties when the end could be more narrowly achieved.[48] Some form of narrow tailoring was thus demanded in this context. In 1979, the Court in *Califano v. Yamasaki*,[49] laying more groundwork for *Madsen*, reiterated the general rule, independent from First Amendment considerations, that "injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs."[50] The stage was thus set for *NAACP v. Claiborne Hardware Co.*[51] In 1966, a local branch of the NAACP launched a boycott of white merchants in Claiborne County, Mississippi.[52] The NAACP wanted civic and business leaders to comply with an extensive list of demands for racial justice and equality.[53] The merchants filed an action for damages and sought to enjoin any future boycotts.[54] The Mississippi Supreme Court found the boycott illegal

42. 393 U.S. 175 (1968).
43. *Id.* at 176. They were formally called the National States Rights Party. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 177.
47. *Id.* at 183.
48. *Id.* at 183-84 (citing *Shelton*, 364 U.S. at 488).
49. 442 U.S. 682 (1979).
50. *Id.* at 702.
51. 458 U.S. 886 (1982).
52. *Id.* at 889.
53. *Id.*
54. *Id.*

because of the presence of force, violence, and threats.[55] The merchants' action eventually reached the United States Supreme Court which found the nonviolent elements of the NAACP's activities entitled to protection.[56] The Court, however, held that the First Amendment has no refuge for violence.[57] Justice Stevens, relying on *Button*, *Carroll*, and *Keyishian*, wrote that when sanctionable conduct[58] "occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded."[59] Curiously, evolvement of the constitutional framework that formed the background of the Court's unprecedented decision in *Madsen* essentially ended with Justice Stevens's majority opinion in *Claiborne Hardware Co.*

In *Madsen*, the Supreme Court was presented, in addition to those series of decisions concerning speech-restricting injunctions, with two established legal standards applicable to restrictions on protected speech. On the one hand, the Court of Appeals in *Cheffer* maintained that Judge McGregor's "viewpoint-specific restriction"[60] demanded "strict scrutiny" and was neither necessary to serve a compelling state interest nor narrowly drawn to achieve that end.[61] On the other hand, the Florida Supreme Court in *Operation Rescue* found Judge McGregor's amended injunction a content-neutral restriction, opted for "intermediate scrutiny," and applied a classic time, place, and manner analysis to the modified order.[62] The Supreme Court, however, adopted neither of

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55. *Id.* at 894.

56. *Id.* at 916 (citing Samuels v. Mackell, 401 U.S. 66 (1971)).

57. *Id.*

58. Justice Stevens's point is that violent conduct is not protected but with other implicitly nonviolent conduct subject to sanction, precision of regulation is necessary.

59. *Id.* (quoting *Button*, 371 U.S. at 438).

60. The court in *Cheffer* used this term. Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993).

61. The Eleventh Circuit took the "strict scrutiny" route. *Id.* This standard, applicable to content-based restrictions, requires that the restriction be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983); *see also* Carey v. Brown, 447 U.S. 455 (1980).

Petitioners in *Madsen* also argued that the amended injunction was content-based but did not specifically ask for the heightened scrutiny of *Perry Local Educator's Ass'n*. *See* Petitioners' Brief at 3, *Madsen* (No. 93-880). Rather, petitioners, in addition to arguing that the injunction was a prior restraint, contended that the injunction was not "couched in the narrowest terms that [would] accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." Petitioners' Brief at 2, *Madsen* (No. 93-880) (alteration in original). *See* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).

62. Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 671-73 (Fla. 1993). *See also supra* note 18 and accompanying text.

these traditional First Amendment scrutiny tests. The Court in *Madsen*, after apparently acceding to the Florida Supreme Court's determination that the area outside Aware Woman was a public forum,[63] began its analysis in the same fashion as required by either of the two standards. The Court, as a threshold matter, looked first to the trial court's purpose in promulgating the amended injunction[64] to determine if the restrictions the order imposed were content-neutral.[65] A regulation is neutral when its objectives are unrelated to the content of expression, even if incidental effects are felt by some but not others.[66] Petitioners vehemently maintained that the state court's order was viewpoint based since it was an injunction, and not an ordinance, that only restricted the

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Support for the Florida Supreme Court's decision in *Operation Rescue* included: Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance imposed complete ban on targeted residential picketing was appropriate where abortion opponents demonstrated outside doctor's home); Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57 (3rd Cir. 1991) (injunction constitutional where read as creating 500 foot buffer zone around clinic and workers' homes); Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989) (ordinance banning bullhorns and loudspeakers within 150 feet of abortion clinic upheld); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988) (injunction limiting picketing outside abortion clinic upheld); Hirsh v. City of Atlanta, 261 Ga. 22, 401 S.E.2d 530 (1991) (injunction limiting demonstrations outside abortion clinic upheld).

Respondents in *Madsen* argued that Judge McGregor's amended injunction was a legitimate time, place and manner regulation of Petitioners' activities. *See* Respondents' Brief at 14-37, *Madsen* (No. 93-880).

63. Historically, the starting point for any curtailment of protected speech or conduct under the First Amendment is to characterize the forum in which expressive activity takes place. Perry Educ. Ass'n, 460 U.S. 37, 45 (1983). *See* Hague v. CIO, 307 U.S. 496 (1939) (defining public forums as those places immemorially held in trust for the public); Widmar v. Vincent, 454 U.S. 263 (1981) (defining limited public forums as those that state has opened for expressive activity); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (defining non-public forums as those not traditionally open for communicative activity).

Justice Rehnquist's majority opinion never specifically reasoned that the arena used by the protestors was a public forum. Instead, the Chief Justice laconically noted the Florida Supreme Court's finding that "the forum at issue, which consist[ed] of public streets, sidewalks, and rights-of-way, [was] a traditional public forum." Madsen, 114 S. Ct. at 2522 (citing *Operation Rescue*, 626 So. 2d at 671). *See also* Frisby v. Schultz, 487 U.S. 474, 480 (1988); United States v. Grace, 461 U.S. 171, 177 (1983); Perry Educ. Ass'n, 460 U.S. at 45-46; *Hague*, 307 U.S. at 515.

64. The dominating consideration is the government's objective in enforcing the regulation. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

65. *Id.* at 791.

66. *Id.* "The government may not regulate [speech] based on hostility - or favoritism - towards the underlying message expressed." R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992). *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Regan v. Time, Inc., 468 U.S. 641 (1984); Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (plurality opinion); Carey v. Brown, 447 U.S. 455 (1980).

speech of antiabortion protestors.[67] In rejecting this contention, the Court reasoned that accepting petitioners' claim would result in pigeonholing essentially every injunction as content-based. Rather, the very nature of injunctions is that they apply only to particular groups, their activities and even their speech.[68] Accordingly, injunctions regulate speech of a particular group not because of that group's beliefs or opinions but rather because of their previous actions in a dispute between parties.[69] Chief Justice Rehnquist explained that the state court did not levy restrictions on petitioners because of their antiabortion message but because they had repeatedly violated the court's original order.[70] Accordingly, the Court maintained the content-neutral status of the order and denied application of heightened scrutiny.[71] The chief justice then quietly and expeditiously dismissed petitioners' steadfast contention that prior restraint analysis should be adopted.[72] Interestingly, the Court then commented hypothetically that if this were a content-neutral ordinance, instead of an injunctive order, then courts would assess its constitutionality under the time, place and manner criteria.[73] Their hypothetical appraisal went no further and the Court summarily declined adoption of intermediate scrutiny[74] similar to its

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67. Petitioners's Brief at 28, *Madsen* (No. 93-880); *Madsen*, 114 S. Ct. at 2523.

68. *Madsen*, 114 S. Ct. at 2523.

69. *Id.* Generally, parties that seek injunctions are asserting a violation of their rights and the courts are responsible for "fashioning a remedy for [that] specific deprivation." *Id.* (alteration in original).

70. *Id.* at 2523-24. For further justification, the Court, relying on *Boos v. Barry*, 485 U.S. 312 (1988), noted that simply because the amended injunction encompassed a group with a particular viewpoint did not itself render the order viewpoint based. 114 S. Ct. at 2524.

71. *Madsen*, 114 S. Ct. at 2523-24. *See also Perry Educ. Ass'n*, 460 U.S. at 45.

72. *Madsen*, 114 S. Ct. at 2524 n.2. The chief justice reasoned that petitioners were not completely prevented from expressing their message but, instead, only "prohibited from expressing it within the [thirty-six] foot buffer zone." *Id.* (alteration in original). He acknowledged that prior restraints do often take the form of injunction but that "[n]ot all injunctions which may incidentally affect expression, however, are 'prior restraints'" as the term has been used in previous decisions. *Id.* (citing Vance v. Universal Amusement Co., 445 U.S. 308 (1980)); *see also* New York Times Co. v. United States, 403 U.S. 713 (1971).

For more information on injunctions restricting speech as prior restraints, *see* Bering v. Share, 721 P.2d 918, 942 (Wash. 1986) (Dore, J., dissenting) *cert. dismissed* 479 U.S. 1050 (1987) (characterizing injunction that prevents picketing outside abortion clinic as prior restraints); Harvard Law Review Association, Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1873 (1988). *See generally* M. NIMMER, NIMMER ON FREEDOM OF SPEECH §§ 4.03-4.04, at 4-14-4-25 (student ed. 1984); *see also* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 558 (1975).

73. *Madsen*, 114 S. Ct. at 2524. *See Rock Against Racism*, 491 U.S. at 791.

74. *Madsen*, 114 S. Ct. at 2524-25.

denial to implement a strict scrutiny standard.[75] Before announcing any standard, the Court engaged in a brief litany concerning three critical differences between injunctions and ordinances.[76] First, relying on *United States v. W.T. Grant Co.*,[77] the Court explained that ordinances illustrate legislative preferences for championing particular societal interests.[78] Injunctions, on the other hand, are remedies for past and threatened violations of judicial or legislative orders.[79] Second, the Court deduced that injunctions carried greater risks of discriminatory application and censorship than common ordinances.[80] Third, the Court reasoned that injunctions have an obvious advantage over ordinances since they can be narrowly tailored by a judge to provide more precise relief than a statute.[81] Keeping these three distinctions in mind, the Court remarked that the *Madsen* injunction "require[d] a somewhat more stringent application of general First Amendment principles"[82] than an ordinance.[83] In fact, Chief Justice Rehnquist asserted that a "standard time, place, and manner analysis [was] *not sufficiently rigorous*."[84] A trail was thus blazed for the Court to fashion a novel standard for content-neutral injunctions that restrict protected speech. Relying on *NAACP v. Claiborne Hardware Co.*[85] and *Carroll v. President & Commissioners of Princess Anne*,[86] twelve and sixteen year old decisions respectfully, the Court forged a new criterion[87] which

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75. *Id.* at 2524.

76. *Id.*

77. 345 U.S. 629 (1953).

78. *Madsen*, 114 S. Ct. at 2524 (citing *W.T. Grant Co.*, 345 U.S. at 632-33).

79. *Id.*

80. *Madsen*, 114 S. Ct. at 2524. "[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." *Id.* (quoting Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949)).

81. *Madsen*, 114 S. Ct. at 2524 (citing United States v. Paradise, 480 U.S. 149 (1987)). It is important to note that Judge McGregor found that petitioners had violated both of the previous injunctions before he issued the September 30, 1992 amended permanent injunction. Operation Rescue, 626 So. 2d at 667-68.

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

83. Further distinguishing an injunction from an ordinance, the Court, summoning general equity principles, stated Webster's that "an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'" *Id.* at 2525 n.3 (quoting *W.T. Grant Co.*, 345 U.S. at 633).

84. *Id.* (alteration in original) (emphasis added).

85. 458 U.S. 886 (1982).

86. 393 U.S. 175 (1968).

87. Justice Scalia, in his dissent, asserting that the majority manufactured a new rule without giving it a name, called the new standard intermediate-intermediate scrutiny,

requires the challenged provisions of a content-neutral, speech-restricting injunction to burden no more speech than is necessary to serve a significant government interest.[88] In justifying this rule, the Court followed *Claiborne Hardware's* that when sanctionable "conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded."[89] The corollary, according to the Court, is a standard, one that requires an injunction to burden no more speech than necessary, that equates with or rather exemplifies precision of regulation.[90] After revealing the applicable standard, the Court examined the state's interests protected by the injunction to determine whether they were significant.[91] Once again, the Supreme Court deferred to the Florida Supreme Court's three-fold determination that state interests were sufficient to warrant the injunction.[92] First, the Florida Supreme Court, relying on *Roe v. Wade*,[93] noted that Florida had a keen interest in protecting a woman's freedom to seek medical services in connection with her pregnancy.[94] Second, the Florida Supreme Court concluded that Florida had 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."[95] Third, the Florida Supreme Court held that a state's strong interest in

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implying that this standard lay somewhere in between intermediate scrutiny and heightened scrutiny. *Madsen*, 114 S. Ct. at 2538 (Scalia, J., dissenting).

88. Madsen, 114 S. Ct. at 2525 (citing Claiborne Hardware Co., 458 U.S. at 916). The Court relies on both *Claiborne Hardware Co.* and *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), for the universal notion that courts should ensure that injunctions are not broader than necessary to achieve their desired goals. *Madsen*, 114 S. Ct. at 2525; Claiborne Hardware Co., 458 U.S. at 912 n.47; *see also Carroll*, 393 U.S. at 183-84.

89. *Madsen*, 114 S. Ct. at 2525 (quoting *Claiborne Hardware Co.*, 458 U.S. at 916 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)); *see also* Carroll, 393 U.S. at 184; Keyishian v. Board of Regents of Univ. of New York, 385 U.S. 589, 604 (1967).

The Supreme Court essentially grafted the rule that "precision of regulation" is needed when an injunction is violated in the context of a constitutionally protected activity, e.g. free speech, onto the general rule for injunctions that the "injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs." *Madsen*, 114 S. Ct. at 2525 (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)); *see also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 418-20 (1977).

The result of this amalgamation is the new standard.

90. *Madsen*, 114 S. Ct. at 2525-26.

91. *Id.* at 2526.

92. *Id.*

93. 410 U.S. 113 (1973).

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

95. *Id.* (citing *Operation Rescue*, 626 So. 2d at 672).

residential privacy, recognized in *Frisby v. Schultz*,[96] applied by analogy to medical privacy.[97] After sustaining these conclusions of the Florida Supreme Court,[98] Chief Justice Rehnquist then turned to the injunction itself to analyze the challenged provisions under the Court's new standard.[99] The Court first explained the need for establishing a thirty-six foot zone was to protect access to the clinic and ensure that petitioners did not block traffic on the public street in front of Aware Woman.[100] Other options were not available given the narrow confines of the clinic.[101] Allowing protestors to stand in the middle of the street would obviously block traffic.[102] Allowing protestors to remain on Aware Woman's sidewalks and driveway would be similarly ineffective, given the failure of the first order to protect access.[103] The Court, relying on *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*,[104] then gave deference to the state court's familiarity with the facts and background of the dispute and held, in somewhat cryptic fashion, that the thirty-six foot buffer zone around the clinic entrances and driveway burdened no more speech than necessary to accomplish Florida's legitimate interests.[105] In reaching its holding, the Court used *National Society of Professional Engineers v. United States*[106] for the proposition that failure of the previous orders to accomplish their goals could be considered when evaluating the constitutionality of the amended injunction.[107]

Apart from the apparent juxtapositioning of prior standards and fusion of obscure rules, the Court's decision in *Madsen* does present a new criterion uniquely applicable to situations where the government seeks to enjoin, not regulate, the activities of antiabortion protestors. Whether this new standard proves to be workable remains to be seen. Perhaps the future disposition of the Supreme Court will determine the stability or infirmity of *Madsen*'s ultimate holding. Regardless, several ramifica-

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96. 487 U.S. 474 (1988).
97. *Madsen*, 114 S. Ct. at 2526 (citing *Operation Rescue*, 626 So. 2d at 672).
98. *Id.*
99. *Id.*
100. *Id.* at 2527.
101. *Id.*
102. *Id.*
103. *Id.*
104. 312 U.S. 287 (1941).
105. *Madsen*, 114 S. Ct. at 2527. The Court later struck down the portion of the zone that encompassed private property to the north and the west of the clinic because it burdened more speech than necessary to protect access to the clinic. *Id.* at 2528.
106. 435 U.S. 679 (1978).
107. *Madsen*, 114 S. Ct. at 2527 (citing *National Soc'y of Professional Eng'rs*, 435 U.S. at 697-98).

tions will remain interminable. Prochoice groups and their supporters will be immensely pleased with *Madsen*[108] and prolife organizations and their sympathizers will not.[109] While the issue of abortion will be the focal point of any debate over *Madsen*, it is not an abortion case. This decision does not affect the legality of a woman's right to have an abortion and does not strip away any tax-exempt status currently enjoyed by abortion facilities. *Madsen* involves First Amendment jurisprudence and concerns the ability of the government to enjoin those seeking to exercise protected freedoms in the face of competing, profound state interests. Aside from such generalities, what does this case *really* mean, in practical terms? First and foremost, when the curtailment of First Amendment freedoms is sought through injunctive relief, as opposed to legislative, the time-honored time, place and manner analysis will no longer be applicable. In one, intermediate scrutiny is gone. From now on, injunctions like these will require either of two forms of heightened scrutiny. Second, the communicative impact of the injunction must still be closely examined to determine if the order is content-neutral or content-based. If a court decides the injunction is content-based, then it will apply a strict or heightened scrutiny analysis. If, on other hand, a court decides the injunction is content-neutral, the Court will apply the new intermediate-intermediate scrutiny,[110] as Justice Scalia calls it, will be called upon and precision of regulation will be looked for. Third, the State must still present cognizable, legitimate, significant interests which are threatened by the activities of those exercising their protected rights. Scholars will debate whether the Court constructed its new standard from antiquated, grave-ridden rules, whether the Court improperly consolidated and restructured unsuitable precedents, whether the Court let the emotional juggernaut that is

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108. Eleanor Smeal, president of the Feminist Majority Foundation said the decision was "a good omen for the 40 other local and state injunctions in place" and "[h]aving Chief Justice Rehnquist hand down the decision makes it stronger."

Laurence Gold, an attorney for the AFL-CIO, who filed an amicus brief in *Madsen*, called the majority opinion "sound and reasonable." Mr. Gold did not want the Court to inhibit labor and other picketing. Joan Biskupic, *Court Allows Abortion Clinic Buffer Zones, Scalia Sees Threat To Free Speech Rights*, THE WASHINGTON POST, July 1, 1994, at A1.

109. Before the Court handed down the ruling, Jay Sekulow, chief counsel for Pat Robertson's American Center for Law and Justice, stated "You cannot silence robust, provocative, debate-producing speech just because you don't like it." In a similar vein, Steven McFarland, director for the Center for Law and Religious Freedom, proclaimed "This is a frontal assault on perhaps the last place where citizens can express themselves - the public sidewalk." Elsa C. Arnett, *Abortion-Clinic War: Free Speech vs. Free Access*, ARIZONA REPUBLIC, April 25, 1994, at A1.

110. *Madsen*, 114 S. Ct. at 2538 (Scalia, J., dissenting) and *see supra* note 87 and accompanying text.

abortion in modern America get in the way of otherwise sound legal reasoning, or whether the Court adopted a sensible, workable standard for a presently recurring dilemma. Regardless, the Court did established a benchmark, unique for injunctions, by which to measure court orders that attempt to quell the First Amendment freedoms of American citizens.

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