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Free Speech v. Abortion: Has the First Amendment Been Expanded, Limited, or Blurred

William C. Plouffe Jr.

FREE SPEECH v. ABORTION: HAS THE FIRST AMENDMENT BEEN EXPANDED, LIMITED, OR BLURRED?

I. INTRODUCTION

In the United States today, the issues of the legality and morality of abortion have sparked widespread controversy.[1] This controversy has inflamed the passions of many otherwise reasonable persons[2] and caused them to take extraordinary actions[3] which, in some instances, have yielded fatal consequences.[4] The situation has deteriorated such that federal law enforcement officials have been called upon to protect some abortion clinics,[5] and federal, state, and municipal governments have considered enacting laws specifically for the protection of abortion clinics.[6] The strength of belief on both sides of this controversy is reminiscent of the commitment of the Founding Fathers to the cause of freedom when they wrote the Declaration of Independence. Ironically, these passionate beliefs have forced the First Amendment right of free speech[7] into a direct confrontation with a woman's right to abortion.[8]

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1. *See, e.g.*, David Ellison, *Pro-Choice, Anti-Abortion Forces Gather To Make Their Cases*, HOUS. POST, Aug. 18, 1992, at A12; Jacquelynn Boyle, *Abortion Wars Battlefront Michigan*, DET. FREE PRESS, May 10, 1992, at F1.

2. *See, e.g.*, Jim Naughton, *The Faces of 2 Antiabortionists, 'A Pretty Normal' Life Contrasts With Confrontational Stand*, WASH. POST, Dec. 3, 1991, at D1.

3. *See* Ana Puga, *Half of Abortion Clinics in Survey Report Hostile Acts*, BOSTON GLOBE, Nov. 5, 1993, at 6; BettiJane Levine, *The Torching of Bakersfield's Only Abortion Clinic Leaves City With Fewer Options, Greater Fears*, L.A. TIMES, Oct. 11, 1993, at E1.

4. Judy Mann, *Terrorism at the Clinics*, WASH. POST, Mar. 12, 1993, at E3 (discussing the murder of abortion clinic physician David Gunn); Mark Silva, Tim Nickens, & Joanne Cavanaugh, *From Gables Oddity to Pensacola Infamy Paul Hill Life of Extremes*, MIAMI HERALD, July 31, 1994, at A1 (discussing the murder of abortion clinic physician John Britton).

5. *See* Mimi Hall & Steve Wieberg, *US Joins Wichita Abortion Fray: Kansas Town "Tied Up" By Fierce Debate*, USA TODAY, Aug. 7, 1991, at A1.

6. *See, e.g.*, Michael Isikoff, *Administration Will Attempt to Make Obstructing Abortion Clinics a Felony*, WASH. POST, Mar. 24, 1993, at A13; Peggy Lee, *City To Draft Law To Restrict Protesters at Clinics*, L.A. TIMES, Dec. 1, 1993, at B6.

7. U.S. CONST. amend. I.

8. "[C]lash . . . between constitutional rights defined by the Supreme Court: an old one tracing its roots to the speech clause of the First Amendment and before, and a new one stemming from Roe v. Wade." Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993) (quoting Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 791 (5th Cir. 1989)), *overruled by* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994). *See also Abortion Clinics: Access and Speech*, WASH. POST, Mar. 29, 1993, at A18; Sandra Boodman, *Abortion Foes Strike At Doctors'*

Recently, a group known as Operation Rescue has been actively pursuing its stated goal of stopping abortions from being performed in the United States.[9] In 1991, in Melbourne, Florida, the Aware Woman Center for Choice, a clinic which performs abortions, was targeted by Operation Rescue.[10]

Prompted by the actions of Operation Rescue and others, Women's Health Center, Inc.,[11] operator of the Aware Woman Center for Choice, obtained injunctions restraining certain activities.[12] Arguably, these injunctions affected the right of free speech[13] and were subsequently appealed by two different parties in separate courts.[14] Because of these almost concurrent appeals, an uncommon situation arose where two appellate courts, one federal and one state, almost simultaneously rendered opposing decisions on the same issue.[15] To settle the differences between the decisions of the Eleventh Circuit Court of Appeals and the Florida Supreme Court, the United States Supreme Court agreed to hear the matter.[16]

Although this case, *Madsen v. Women's Health Center,*[17] is one of free speech, its underlying connection to the issue of abortion only

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Home Lives, Illegal Intimidation or Protected Protest?, WASH. POST, Apr. 8, 1993, at A1. For a discussion of the rights of abortion protestors and their victims, see Kelly L. Faglioni, *Balancing First Amendment Rights of Abortion Protestors With The Rights Of Their 'Victims,'* 48 WASH. & LEE L. REV. 347 (1991).

9. Operation Rescue America, Ed Martin, Judy Madsen . . . are active in an organization known as "Operation Rescue America." In other areas of the United States, this effort has been directed towards closing down abortion clinics throughout the country . . . . Ed Martin has stated . . . he would love to shut down all abortion clinics.

Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 666 n.2 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2416 (1994).

10. *See Operation Rescue*, 626 So. 2d at 667-70.

11. Women's Health Center operates a number of abortion clinics throughout central Florida, one of which is The Aware Woman Center for Choice. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2521 (1994).

12. A temporary injunction was granted on October 25, 1991. *Operation Rescue*, 626 So. 2d at 666. A permanent injunction was granted on September 30, 1992. *Id.* An amended permanent injunction was granted on April 8, 1993. *Id.* at 667.

13. "Operation Rescue challenges the propriety of only the amended injunction, raising numerous issues under the United States Constitution: . . . freedom of speech . . . ." *Id.* at 669. "Cheffer claimed that the injunction acted as a prior restraint on her free speech rights . . . ." Cheffer v. McGregor, 6 F.3d 705, 707 (11th Cir. 1993), *overruled by* Madsen v. Women's Health Ctr., 114 S.Ct. 2516 (1994).

14. *See infra* part II.A.

15. *See* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664 (Fla. 1993) (approving the amended permanent injunction on October 28, 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994); Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993) (ruling on October 20, 1993 that Cheffer is entitled to a prohibition of enforcement of the amended permanent injunction), *overruled by* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

16. *Madsen*, 114 S. Ct. at 2516.

17. 114 S. Ct. 2516 (1994).

fuels the controversy.[18] Justice Scalia filed a strong dissent (concurring in part) to the Court's decision,[19] indicating that the matter may not have been fully resolved.[20] Considering the intensity of Justice Scalia's dissent and the concurrence of two other Justices,[21] this note will examine the status of the First Amendment's Free Speech Clause in light of this decision. This note will also show that the Supreme Court failed to make the clear statement needed to effectively resolve the issue.

II. STATEMENT OF THE CASE

A. *The Facts*

During 1991, Operation Rescue and others engaged in demonstrations and other related activities in front of the Aware Woman Center for Choice in Melbourne, Florida, where abortions were performed.[22] Judy Madsen was one of the pro-life participants in the demonstrations.[23] In response to these actions, Women's Health Center applied for an injunction.[24] On October 25, 1991, the Eighteenth Judicial Circuit Court of Seminole County, Florida, granted a temporary injunction[25] imposing a number of restrictions on Operation Rescue and others.[26] On September 30, 1992, the court entered a

18. "[F]ew Americans are content with the current legal status of abortion . . . ." Cheffer v. McGregor, 3 F.3d 705, 706 (11th Cir. 1993), *overruled by* Madsen v. Women's Health Ctr., 114 S.Ct. 2516 (1994). "The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion." *Madsen*, 114 S. Ct. at 2534 (Scalia, J., dissenting).

19. *Madsen*, 114 S. Ct. at 2534-50 (Scalia, J., dissenting).

20. *See* discussion *infra* part IV.

21. Justice Souter filed a concurring opinion. *Madsen*, 114 S. Ct. at 2530-31 (Souter, J. concurring). Justice Stevens filed an opinion dissenting in part and concurring in part. *Id.* at 2531-34 (Stevens, J., concurring in part, dissenting in part). These opinions will not be addressed in this note.

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

23. *See id.*

24. *See* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 666 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

25. *Operation Rescue*, 626 So. 2d at 666.

26. The court enjoined any person or persons from: trespassing on, sitting on, or blocking or obstructing the entrance or exit, or any person seeking access to or leaving any facility where abortions or family planning services were being performed in Seminole, Brevard, and surrounding counties in the state of Florida; physically abusing persons entering, leaving, working at or using such facilities; and from directing or attempting to direct others to take any such actions. *Id.* at 666 n.1.

permanent injunction[27] based on certain findings of fact.[28] The permanent injunction imposed a number of restrictions, mirroring those of the temporary injunction.[29]

As a result of the continuing and expanding activities of Operation Rescue and others and the lack of protection provided by the permanent injunction, Women's Health Center applied for sanctions and modification of the permanent injunction.[30] After three days of hearings and the presentation of evidence,[31] the court made a number of findings[32] and conclusions.[33] On April 8, 1993, the court amended the permanent injunction and significantly expanded its scope.[34] The

27. *Id.* at 666.

28. The court found that the respondents were individuals and organizations, acting in concert, who planned a nationwide campaign called "Operation Rescue," which was directed towards closing down abortion clinics and providers nationwide. *Id.* at 666 n.3. The court further found that the respondents' intention was to close down "abortion mills" by encircling them with large numbers of protestors and blocking access to the facilities. *Id.* In addition, the court found that some of the respondents had been involved in such activities in other parts of the country, that they intended to conduct these actvities in Florida, and that their members should ignore state laws and police officers. *Id.*

29. *Operation Rescue*, 626 So. 2d at 667 n.4. *See also supra* text accompanying note 27.

30. *Id.* at 676.

31. *Id.*

32. Some of the court's findings were: 1) there had been interference with access to the Aware Woman's Clinic and vehicular traffic in the area had been interrupted by a crowd of up to 400 persons; 2) some of the crowd were members of Operation Rescue; 3) noise from the crowd, including shouting, yelling, and the use of sound amplification equipment, could be heard inside the clinic and caused stress to patients; 4) the crowd remained primarily in the public right of way, but approached vehicles turning into the clinic driveway and pushed literature through the windows of the vehicles; 5) respondents followed patients and staff of the clinic, and contacted them and their minor children at their residences, as well as contacting neighbors and passing out literature describing the staff and patients as "baby killers;" 6) a staff physician was followed by an associate of respondents who pretended to shoot at the physician, causing the physician to terminate his employment with the clinic; 7) multiple telephone calls were made to the clinic, jamming the phone lines and preventing their use for emergencies; and 8) the crowd caused some patients to turn away from the clinic. *Id.* at 676-78.

33. These conclusions included: 1) that respondents and those in concert continued to impede access to the clinic and that the public right-of-way must be kept open; 2) that noise from the crowd should be limited and restrained; 3) that respondents' actions at the residences of the clinic staff was impermissible and should be limited and restrained; 4) that interfering in the telephone service of the clinic is impermissible and should be restrained; 5) that the following of the clinic staff and patients by the respondents was impermissible conduct and should be restrained; and 6) that respondents' rights to demonstrate and speak freely should be recognized and protected. *Id.* at 678-79.

34. Respondents were permanently enjoined from: 1) entering the premises and property of the clinic; 2) blocking, impeding, inhibiting, obstructing or interfering with ingress or egress to the clinic; 3) congregating, picketing, patrolling, demonstrating or entering the public right-of-way or private property within a thirty-six-foot radius of the property line of the clinic, with certain exceptions; 4) singing, chanting, whistling, shouting, yelling, and using bullhorns, auto horns, sound amplification equipment, or other sounds or images observable to or within earshot of persons inside the clinic during the hours of 7:30 a.m. through noon on Mondays through Saturdays (surgical and recovery periods); 5) within 300 feet of the clinic, physically approaching any person seeking the clinic's services, unless such approach is invited, in which case the communication must be non-threatening and cannot be within the thirty-six-foot buffer zone; 6) at all

major provisions of this modified permanent injunction, which were subsequently addressed by the United States Supreme Court, included: 1) a prohibition against noise near the clinic; 2) a thirty-six-foot buffer zone around the clinic encompassing both public and private property; 3) a three-hundred-foot no-approach zone around the clinic prohibiting protestors from approaching clinic patients; 4) a three-hundred-foot zone around the residences of clinic employees where protesting and demonstrations were prohibited; and 5) a prohibition against objectionable images observable around the clinic.[35]

Operation Rescue appealed the amended permanent injunction to Florida's Fifth District Court of Appeal, which certified the cause to the Florida Supreme Court, and review was granted.[36] The appeal raised, *inter alia*, the allegation that the amended permanent injunction violated the Free Speech Clause of the First Amendment of the United States Constitution.[37] The Florida Supreme Court, acknowledging the great public importance of the issue and the need for immediate resolution,[38] heard the appeal and upheld the amended permanent injunction by order dated October 28, 1993.[39]

During the same time period, Myrna Cheffer, a pro-life activist, filed a separate application in United States District Court to enjoin enforcement of the amended permanent injunction, claiming that the injunction restrained her right to free speech.[40] Cheffer claimed that she had not been working in concert with Operation Rescue, although she was apparently present during at least one of Operation Rescue's demonstrations in front of the clinic.[41] Her application was denied by

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times, approaching, congregating, picketing, patrolling, demonstrating or using sound amplification equipment within 300 feet of the residences of clinic staff and employees and blocking, inhibiting, or impeding access to the driveways or streets where the residences are located; 7) at all times, physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding, or assaulting persons entering or leaving the clinic or homes of the staff, employees, or patients of the clinic; 8) at all times, harassing, intimidating, physically abusing, assaulting, or threatening any present or former staff member or employees; and 9) at all times, encouraging, inciting, or securing others to perform these prohibited acts. *Id.* at 679-81.

35. *Id. at* 679-80.

36. Operation Rescue v. Women's Health Ctr., 621 So. 2d 1066 (Fla. 1993).

37. Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 669 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

38. *Id.* at 666.

39. *Id.* at 664.

40. Cheffer v. McGregor, 6 F.3d 705, 707 (11th Cir. 1993), *overruled by* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

41. "On April 11, 1993, approximately 50 apparently 'pro-life' individuals were arrested for entering the buffer zone. Myrna Cheffer was not among them." *Id.* The case does not explicitly state whether Cheffer was ever present during the demonstrations. *See id.* at 708.

the district court.[42] Cheffer subsequently appealed the denial to the Eleventh Circuit Court of Appeals, which vacated the district court's order and remanded the matter for further consideration by order dated October 20, 1993, eight days before the order of the Florida Supreme Court.[43]

To resolve the conflict between the decisions of the Eleventh Circuit Court of Appeals and the Florida Supreme Court concerning the constitutionality of the amended permanent injunction, the United States Supreme Court granted certiorari.[44]

B. *Issues Presented*

For the purposes of this note, there were two issues presented to the United States Supreme Court in *Madsen v. Women's Health Center*.[45] The first was the constitutionality of the amended permanent injunction ordered by the Florida Circuit Court, particularly regarding the Free Speech Clause of the First Amendment.[46] The second was the resolution of the differences between the decisions of the Eleventh Circuit Court of Appeals and the Florida Supreme Court regarding that injunction.[47]

C. *The Holding*

The Supreme Court affirmed in part and reversed in part the decision of the Florida Supreme Court which upheld the amended permanent injunction.[48] The noise restrictions and the thirty-six-foot buffer zone on public property of the injunction were upheld.[49] The thirty-six-foot buffer zone on private property, the three-hundred-foot no-approach zone, and the three-hundred-foot residential buffer zone were struck down.[50] By its decision, the Supreme Court overruled the Eleventh Circuit Court of Appeals, which had ordered the district court to reconsider its refusal to overturn the injunction.[51]

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42. *Id.* at 708.
43. *Id.* at 712.
44. Madsen v. Women's Health Ctr., 114 S. Ct. 907 (1994).
45. 114 S. Ct. 2516 (1994).
46. *See* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 666 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).
47. *See* Cheffer v. McGregor, 6 F.3d 705, 707 (11th Cir. 1993), *overruled by* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994); *Operation Rescue*, 626 So. 2d at 664.
48. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2522 (1994), *aff'g in part* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664 (Fla. 1993).
49. *Id.* at 2530.
50. *Id.*
51. *Id.* at 2523.

III. THE DECISION

The decision in *Madsen v. Women's Health Center* was, for the most part, in accordance with established law.[52] However, the Court appeared timid in upholding the injunction by failing to uphold certain portions of the injunction which protected abortion rights.[53] Was this due to the complexity of the issue or the Court's reluctance to address abortion rights? In practicality, the Supreme Court had to accept the case because of the nearly simultaneous conflicting decisions of the Eleventh Circuit and the Florida Supreme Court.[54] Although the Court claimed to have presented a "new" test to evaluate injunctions in the context of the First Amendment, Justice Scalia's dissent accurately criticizes the lack of "new" aspects in this test.[55]

A. *The Majority Opinion*

The Supreme Court rejected the Petitioners' claim that, because the injunction restricted only the speech of the anti-abortion protesters, it was content-based and should be subjected to the strictest scrutiny.[56] Content-neutrality of a regulation, stated the Court, is judged according to the *content* of the regulated speech.[57] Content-based regulations have been defined as regulations which "restrict expression because of its message, its ideas, its subject matter, or its content . . . ." Because the injunction was directed against the Petitioners' conduct (which included repeated violations of the original injunction), and not the content of their message, the injunction was content-neutral.[58] The mere fact that all those affected by the injunction held similar views was insufficient to invalidate the injunction.[59] Had this matter involved a content-neutral statute, given that the location was a traditional public forum (a public sidewalk),[60] the Court stated that, in such a situation, it would use the standard of regulation of time, place,

52. The Court did not create new law in *Madsen*, in spite of the "new" test presented. *See* discussion *infra* parts III.A., IV.

53. *See generally infra* part III.A.

54. Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993), *overruled by* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994); Operation Rescue v. Women's Health Ctr., 626 So. 2d 664 (Fla. 1994), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

55. *See generally*, Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2534 (1994) (Scalia, J., concurring in part, dissenting in part).

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

57. *Id.* (citing R.A.V. v. St. Paul, 112 S. Ct. 2538 (1992) and Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

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

59. *Id.* at 2524 (citing Boos v. Barry, 485 U.S. 312 (1988)).

60. *Id.* (citing Frisby v. Schultz, 487 U.S. 474, 480 (1988)).

and manner "narrowly tailored to serve a significant governmental interest."[61]

As is evident from their lack of logic, improperly equating the chance circumstance of similar beliefs with intentional actions on their parts, the Petitioners' argument was invalid. The Court appropriately rejected this part of their claim.[62] Although it may be argued that the Court's justification is merely a "cover" for ruling against the protestors' speech content, the decision does not reflect any particular prohibition of the message itself. Thus, the Petitioners' argument does not appear to have merit in fact or in logic. Indeed, given the conservative bent to the Court,[63] it would seem that the Court might be expected to favor the protestors.

However, the Court did acknowledge that there are obvious differences between an injunction and a statute.[64] Although injunctions carry a greater risk of censorship and discrimination than statutes,[65] injunctions have the advantage of providing precise relief where a violation has already occurred.[66]

The Court has stated in the past that it has been content to rely on general principles to ensure that an injunction was not overly broad[67] and that injunctive relief was "no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs."[68] Because of the differences between an injunction and a statute, the Court stated that the standard time, place, and manner analysis[69] was insufficient when evaluating content-neutral injunctions in the context of the First Amendment.[70] This indicates that precision

61. *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) and Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

62. *Id.* at 2523.

63. *See generally* W. John Moore, *High Court's Conservatives are in Charge*, NAT'L J., July 8, 1995, at 1772; Jeffrey Rosen, *The Color-Blind Court; Conservative United States Supreme Court*, NEW REPUBLIC, July 31, 1995, at 19.

64. A statute represents a legislative choice of interests and an injunction is a remedy for an actual or threatened violation of a legislative or judicial decree. *Madsen*, 114 S. Ct. at 2524 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953)).

65. *Id.*

66. *Id.* (citing United States v. Paradise, 480 U.S. 149 (1987)).

67. *Id.* at 2524-25 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968); and Milk Wagon Drivers Union of Chicago Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941)).

68. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2525 (1994) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

69. *See* United States v. Grace, 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

70. *Madsen*, 114 S. Ct. at 2525.

of regulation is demanded.[71] Instead of the previous standard for injunctions, the Court presented a new standard in this context, requiring: 1) a significant government interest and 2) that speech is burdened no more than necessary.[72]

A close examination of this new standard will show no significant differences between it and the time, place, and manner standard presented in *United States v. Grace*.[73] Although *Grace* does not specifically incorporate the "speech is burdened no more than necessary" aspect, this part is implicitly addressed in the other parts of the *Grace* test.[74] So why the new standard? And why was the time, place, and manner standard not sufficiently precise? Thus, in this author's opinion, the Court does not present a valid justification for this conclusion.

Under the first part of this new standard, the Court reiterated the significant government interests stated by the Florida Supreme Court protecting: 1) a woman's freedom to seek lawful medical assistance regarding pregnancy;[75] 2) public safety, order, the free flow of traffic, and property rights;[76] 3) residential privacy;[77] and 4) medical privacy.[78] The Court found these interests sufficient to justify the injunction;[79] however, the Court may have understated their importance. Privacy rights should be, and are, considered to be fundamental.[80] Therefore, these government interests should merit classification as compelling, and not just significant, government interests. It appears that the Court was laying the foundation for its half-hearted affirmation of the injunction by its demeaning classification of these rights.

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71. *Id.* (referring to NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (requiring "precision of regulation")).

72. *Id.* at 2525. Further, the Court stated that "a standard requiring that an injunction 'burden no more speech than necessary' exemplifies 'precision of regulation.'" *Id.*

73. 461 U.S. 171, 177 (1983) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). *See also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

74. In *Grace*, the Court stated that under the First Amendment, regulations are subject to "reasonable time, place, and manner restrictions...." *Grace*, 461 U.S. at 183-84. The Court was urged to consider the regulation at issue a reasonable place restriction "having only a minimal impact on expressive activity," but ultimately held that the regulation was not a reasonable place restriction because it had an "insufficient nexus with any of the public interests...." *Id.* at 180-81.

75. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2526 (1994) (citing Roe v. Wade, 410 U.S. 113 (1973)).

76. *Id.*

77. *Id.* (citing Frisby v. Schultz, 487 U.S. 474 (1988)).

78. *Id.*

79. *Id.*

80. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); THE RIGHT OF PRIVACY (Leonard W. Levy et al. eds., 1971).

Under the second element of this new test, the Court found the thirty-six-foot buffer zone around the public property the injunction encompassed to be constitutional.[81] Although the Court acknowledged that the need for a complete buffer zone was debatable, the Court deferred to the state court.[82] Because the Court addressed almost every other aspect of the matter, it appears that it sidestepped this issue to prevent additional controversy being raised over an already difficult decision.

Further, the Court acknowledged that the failure of a first injunction can be considered when evaluating the constitutionality of a broader order.[83] However, because the purposes of the injunction were, *inter alia*, to protect access to the clinic and the orderly flow of traffic,[84] and because neither purpose was disturbed by activity on the private property encompassed by the injunction, that portion of the injunction was found more burdensome than necessary and invalidated.[85]

Regarding the public property, the decision was sound because there is an obligation on the part of the government to protect the public and the rights of its citizens on public property. However, the decision appears faulty concerning the private property. Although the Court acknowledged the purposes of access and order, it conveniently ignored the rights under *Roe v. Wade*,[86] which were apparently still being violated on private property by the protestors.[87] Thus, this decision, in addition to *Casey v. Planned Parenthood*,[88] could be construed to be a veiled attempt to further limit the holdings of *Roe*.

The Court found that the noise restrictions required by the injunction were constitutional in that they burdened "no more speech than necessary to ensure the health and well-being of the patients at the clinic."[89] The Court noted that, even under the previous standard,

81. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2526-27 (1994) (citing Cameron v. Johnson, 390 U.S. 611 (1968) (upholding a statute which prohibited picketing which obstructed access/egress to/from public buildings)).

82. *Id.* at 2527.

83. *Id.* (citing National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 697-98 (1978)).

84. Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 666 (Fla. 1993), *aff'd in part sub nom.*, Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

85. *Madsen*, 114 S. Ct. at 2528.

86. 410 U.S. 113 (1973).

87. *See supra* notes 32-33 and accompanying text.

88. 112 S. Ct. 2791 (1992).

89. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2528 (1994).

similar noise restrictions had been upheld.[90] However, the "images observable" part of the injunction was held invalid because the clinic curtains could easily be drawn to avoid the disagreeable signs and placards.[91]

Past rulings acknowledge the legitimacy of noise restrictions.[92] This part of the Court's decision exonerates the part which refused to extend the buffer zone to private property.[93] As long as the persons on the private property are quiet, whatever is done on that private property is acceptable. Thus, the private property owners' rights are protected and, as the Court stated, the clinic can merely draw the curtains to prevent disagreeable images from being seen.[94] The Court's invalidation of the "images observable" part of the injunction was appropriate.

Concerning the three-hundred-foot no-approach zone, the Court recognized that protecting people from being "stalked" or "shadowed" was legitimate.[95] However, prohibiting all uninvited approaches of persons going to and from the clinic, no matter how peaceful, was difficult to justify unless the speech was "so infused with violence as to be indistinguishable from a threat of physical harm."[96] As the evidence at the hearings (the video-tape of the protestors[97]) apparently indicated, there was not a significant amount of violence involving the protestors in front of the clinic.[98] Thus, the Court was justified in rejecting the part of the injunction banning all approaches to persons using the clinic.[99] The invalidation[100] of this portion of the injunction is further supported by the Court's past rulings that persons may have to tolerate insulting and outrageous speech,[101] and that, to ban all speech, the speech must be "so infused with violence as to be

90. *Id.* The Court has upheld similar injunctions around schools and hospitals. *See, e.g.*, NLRB v. Baptist Hosp., 442 U.S. 773, 783-84 n.12 (1979) (quoting Beth Israel Hosp. v. NLRB, 437 U.S. 438, 509 (1978) (Blackmun, J., concurring)); Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

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

92. *See Baptist Hospital*, 442 U.S. at 783-84, n.12 (1979); *Grayned*, 408 U.S. at 116 (1972).

93. *See supra* text accompanying note 86.

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

95. *Madsen*, 114 S. Ct. at 2529 (referring to International Soc'y for Krishna Consciousness v. Lee, 112 S. Ct. 2701, 2708 (1992) (indicating that "face-to-face solicitation presents risks of duress that are an appropriate target of regulation")).

96. *Id.* at 2529.

97. *See id.* at 2527.

98. *Id.* at 2537.

99. *See id.* at 2529.

100. "[I]t burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." *Id.*

101. *Id.* (quoting Boos v. Berry, 485 U.S. 312, 322 (1988)).

indistinguishable from a threat of physical harm."[102] Such was presumably not the case in *Madsen*. The Court could have, but apparently did not, use the overbreadth doctrine to overturn this part of the injunction.[103]

Regarding the three-hundred-foot zone prohibition against picketing in the residential areas of the clinic employees, the Court stated that the ban was too broad.[104] The Court noted that the sanctity of the home had been recognized in a previous case[105] but that the ban upon residential picketing was limited to that "focused . . . solely in front of a particular residence."[106] The picketing was not so focused in *Madsen*,[107] thus, the Court properly ruled in accordance with established law by denying this portion of the injunction. However, because of the Court's previous recognition of the sanctity of the home, the Respondents might have success reapplying for a more limited restriction for just the residences of the clinic employees.

Even so, accepting that the decision of the Court was within the boundaries of established law regarding the three-hundred-foot no-approach zone, was the decision correct? Since the activities of the protestors actually prevented some people from going to the clinic, and because of the expected emotional turmoil and physical problems women will likely have when seeking an abortion, it is apparent that women deserve more protection than the Court provided. The Court could have just as easily upheld the three-hundred-foot no-approach zone without infringing upon the First Amendment rights of the protestors. Any person approaching the clinic would, no doubt, have seen the pro-life picketers and clearly understood their message, whether the picketers were thirty feet away or three hundred feet away.

The Court rejected the Petitioners' claims of vagueness and overbreadth of the injunction as applicable to those "acting in concert," because the Petitioners were named parties and did not have standing

102. *Id.* (citing Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941)).

103. The overbreadth doctrine is succinctly stated as: "[O]ne that is designed to burden or punish activities which are not constitutionally protected, but [that] includes within its scope activities which are protected by the First Amendment." Hill v. City of Houston, 764 F.2d 1156, 1161 (5th Cir. 1985) (quoting JOHN NOWAK ET AL., HANDBOOK ON CONSTITUTIONAL LAW 722 (1978)).

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

105. "[T]he unique nature of the home, as 'the last citadel of the tired, the weary, and the sick.'" *Id.* at 2529 (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988)).

106. *Id.* at 2530 (quoting *Frisby*, 487 U.S. at 483).

107. *Id.*

to challenge an order inapplicable to them.[108] Citing *Regal Knitwear Co. v. NLRB*,[109] the Court dismissed the Petitioners' claims as being "an abstract controversy over the use of these words."[110] However, the Court apparently erred in this matter by failing to acknowledge the authority cited by the Eleventh Circuit which indicated that litigants may challenge regulations which do not violate their own rights of freedom of expression.[111] Indeed, the Court did not present any authority which countered that cited by the Eleventh Circuit.[112]

In summary, the majority: 1) upheld the noise restrictions; 2) upheld the thirty-six-foot buffer zone on public property; 3) struck down the thirty-six-foot buffer zone on private property; 4) struck down the three-hundred-foot no-approach zone; and 5) struck down the three-hundred-foot buffer zone around the residences.[113] One major problem with this decision is the Court's failure to acknowledge that certain rights, such as the right to privacy[114] and a woman's rights concerning medical care during pregnancy,[115] may be protected more appropriately by an injunction.[116] This is not to say that these rights are superior to the right of free speech, but the Court could have given additional, deserved consideration of them in its balancing of competing interests.[117] There is little doubt that the pro-life movement will use this apparent flaw in the decision as ammunition in its future attacks upon the pro-choice movement.

B. *Justice Scalia's Dissent*[118]

Justice Scalia may have been correct when he noted that the decision would have been different if the subject had been anything but

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108. *Id.*

109. 324 U.S. 9 (1945).

110. *Madsen*, 114 S. Ct. at 2530 (quoting *Regal Knitwear*, 324 U.S. at 14-15).

111. *See* Cheffer v. McGregor, 6 F.3d 705, 708-09 (11th Cir. 1993), (citing Virginia v. American Booksellers Assoc., 484 U.S. 383 (1988)), *overruled by* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

112. The Court did cite *Regal Knitwear*. However, it can be argued that *Regal Knitwear* is not applicable to *Madsen* and does not sufficiently counter the argument of the 11th Circuit because the case cited by the 11th Circuit, Virginia v. American Booksellers Assoc., 484 U.S. 383 (1988), was more recent and directly applicable to the First Amendment.

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

114. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); THE RIGHT OF PRIVACY (Leonard W. Levy et al. eds., 1971).

115. *See* Roe v. Wade, 410 U.S. 113 (1973).

116. Where a statute mandating such limits would likely be struck down as overbroad, an injunction can be used for specific unique circumstances such as those in this matter.

117. *See supra* text accompanying notes 76-79.

118. Justice Scalia concurred in part and dissented in part to the *Madsen* judgment. Madsen v. Women's Health Ctr., 114 S. Ct 2516, 2550 (1994) (Scalia, J., concurring in part, dissenting in

abortion.[119] However, he was incorrect in that the difference would likely have been that the majority would have ruled more strongly in favor of the injunction, protecting violated rights, instead of upholding only portions of it.[120]

Justice Scalia's first criticism of the ruling, stating that the differences between a statute and an injunction should be grounds for strict scrutiny,[121] appears to have some merit because of the fundamental nature of the rights of the patients which were being protected.[122] Any prohibition of fundamental rights should be subjected to strict scrutiny.[123] However, the first reason he presented to justify this position is questionable. Justice Scalia stated that the same dangers present with content-based speech-restricting statutes are invariably present with speech-restricting injunctions (whether content-based or content-neutral).[124] He argued that, because an injunction lends itself to the suppression of particular ideas and frequently suppresses a particular view, injunctions are invariably speech restricting.[125]

Justice Scalia's logic appears faulty for the following reasons. First, just because injunctions generally lend themselves to abuse does not mean that all injunctions deserve strict scrutiny.[126] Second, Justice Scalia claimed that injunctions may be used as readily as statutes to suppress particular views.[127] This claim is inaccurate. When injunctions are properly executed for proper purposes, the speech is almost never suppressed, but is usually controlled according to certain established principles, such as restrictions on time, place, and manner of expression.[128] Third, Justice Scalia's first reason is illogical because

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part). However, his concurrence was restricted to the parts of the injunction which were struck down; he dissented to "that portion of the judgment upholding parts of the injunction." *Id.* Because he was opposed to upholding any part of the injunction, this note will refer to his opinion only as a dissent.

119. "[I]n any other context [this case] would have been regarded as a candidate for summary reversal." *Madsen*, 114 S. Ct. at 2534.

120. *See id.*

121. *Id.* at 2538.

122. *See supra* notes 32-33 and accompanying text.

123. 2 RONALD ROTUNDA & JOHN NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.7 (1986).

124. *Madsen*, 114 S. Ct. at 2538 (Scalia, J., dissenting).

125. *Id.*

126. Using the same logic, it can be argued that because governments lend themselves to tyranny, all governments should be subject to strict scrutiny. It is unlikely that the government or Justice Scalia would tolerate such an idea.

127. *Madsen*, 114 S. Ct. at 2538 (Scalia, J., dissenting).

128. *See supra* text accompanying notes 61-62.

his premises are possibilities, yet his conclusion is an absolute.[129] Further, Justice Scalia failed to consider the substantial overbreadth doctrine as stated in *Broadrick v. Oklahoma*,[130] which held that where a statute is merely susceptible of application to protected speech it may be constitutional unless it substantially interferes with a protected right.[131] Justice Scalia failed to demonstrate in his argument any substantial interference with free speech.

The second reason offered by Justice Scalia, the potential abuse by a single judge,[132] appears facially valid; however, Justice Scalia failed to consider two facts. First, the ruling of a judge is almost always subject to the appellate procedure,[133] as has been shown in this case. Any improper injunction would be subject to review and reversal by an impartial appellate court which would not be affected, as may be the granting judge, by disobedience to the first order. Second, judges are presumed to be impartial,[134] yet Justice Scalia's argument indicates that he would presume the judge to be biased.[135] Further, Justice Scalia, in another section of his dissent, noted that judges are granted significant leeway, yet apparently he does not acknowledge judicial leeway in this part of his dissent.[136] It is illogical to argue a point both ways and expect to win both arguments.

Although Justice Scalia argued that legislation is subject to strict scrutiny because it lends itself to suppressing ideas, he cites no authority directly stating this proposition.[137] A more realistic appraisal of the reasons legislation is subject to strict scrutiny indicates that: 1) compared to injunctions, legislation is relatively permanent and more difficult to overturn, and 2) legislation affects the entire population

129. Justice Scalia used the word "invariably," which logically leaves no possibility for another result. Such an absolute conclusion cannot be logically drawn from premises presenting mere possibilities.

130. 413 U.S. 601 (1973).

131. *Id.* at 615.

132. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2539 (1994) (Scalia, J., dissenting).

133. *See, e.g.*, Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993), *overruled by* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

134. *See* 28 U.S.C. § 455(a) (1988) (requiring that a judge disqualify himself when impartiality can be reasonably questioned).

135. *See Madsen*, 114 S. Ct. at 2539.

136. *See id.* at 2539-40.

137. A close reading of this section of Justice Scalia's dissent seems to indicate that he is improperly linking the legislative "intent" referred to in the cases he cites to the "possibility" of idea suppression. *See id.* at 2539.

whereas an injunction only affects a particular person or group, for which there is usually just cause to regulate.[138]

Justice Scalia's claim that the injunction was content-based because of its residual coverage of those acting in concert with the named parties[139] is fallacious. He stated that if the injunction was directed at just "those who *did* certain things . . . then the injunction's residual coverage of 'all persons acting in concert or participation with' [the named individuals and organizations], . . . would not include those who merely entertained the same beliefs and wished to express the same views . . . ."[140] Justice Scalia failed to point out that the terms of the injunction included those persons "acting in concert."[141] The key word is "acting." The injunction did not mandate the arrest of those with similar beliefs as Justice Scalia would have readers believe.[142] It addressed *only* those who acted in certain ways prohibited by the injunction.[143]

The three samples from the hearings, selected by Justice Scalia to support his position, were misleading. The first presented a man complaining that his arrest for being in the thirty-six-foot buffer zone in violation of the injunction was selective.[144] The judge explained that he was arrested for being in concert.[145] The judge did not say he was arrested for his beliefs.[146] The terms of the injunction applied to those acting in concert with the named parties.[147] Apparently, Justice Scalia considered the judge's explanation of the man's arrest an explanation of the judge's construction of the injunction. A comparison of the judge's order, which acknowledges the free speech rights of the named parties,[148] to this sample[149] will illustrate that this sample was interpreted out of context.

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138. *Madsen*, 114 S. Ct. at 2524 (referring to United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953)).

139. *Id.* at 2539 (Scalia, J., dissenting).

140. *Id.* at 2539-40.

141. *See supra* notes 32-34 and accompanying text.

142. *See* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 679-81 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

143. *Id.* (emphasis added).

144. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2540 (1994) (Scalia, J., dissenting).

145. *Id.*

146. *See id.*

147. *See* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 666 n.1 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).

148. "[R]espondents shall have the right to congregate, demonstrate and freely express themselves . . . ." *Id.* at 681.

149. *Madsen*, 114 S. Ct. at 2540 (Scalia, J., dissenting).

The second sample presented by Justice Scalia[150] was also misleading. The person speaking with the judge, John Doe #16, stated "the reason why I was arrested was because I acted in concert with those who were demonstrating pro-life."[151] Note that the acknowledged reason for Doe's arrest was that he was *acting*,[152] not what he believed or what he spoke. In the same sample, the judge acknowledged that the injunction would only apply to those who were pro-life.[153] This merely repeated the essence of the injunction.[154] What is not presented with this sample is the acknowledgement that the only persons who were violating the injunction (i.e., acting in violation) were those who were pro-life; the pro-choice people were not acting in such a manner as to merit an injunction.[155] This sample does not support Justice Scalia's position that the injunction was content-based.[156]

The third sample presented John Doe #31 questioning the court about his arrest.[157] The judge responded by stating "[t]hey observed your activities and determined in their minds *whether or not what you were doing was in concert with* . . . named Defendants."[158] The key word is *doing*. The police observed John Doe #31's *activities*, not what he believed and not what he spoke. Therefore, Justice Scalia's position that the injunction was content-based is not supported by this example; in fact, all three of these samples actually support the majority opinion.

Regarding the heavy presumption against injunctions restricting free speech as prior restraints,[159] Justice Scalia quoted *Organization for a Better Austin v. Keefe*[160] to illustrate the injunction's invalidity.[161] In *Keefe*, the injunction was vacated, due in part to the *lack* of any

150. *Id.*
151. *Id.*
152. *See id.*
153. *Id.*
154. *See* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 666 n.6 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).
155. *See generally id.* at 676-78.
156. *See Madsen*, 114 S. Ct. at 2539 (Scalia, J., dissenting).
157. *Id.* at 2540.
158. *Id.*
159. "*Any* system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." Vance v. Universal Amusement Co., 445 U.S. 308, 317 (1980) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)). *See also* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976); New York Times v. United States, 403 U.S. 713, 714 (1971).
160. 402 U.S. 415 (1971).
161. *Madsen*, 114 S. Ct. at 2541 (Scalia, J., dissenting).

privacy rights.[162] However, in *Madsen* the majority cites the presence of, *inter alia*, privacy rights.[163] This fact invalidates Justice Scalia's argument.

Justice Scalia presented a series of cases which he stated have struck down injunctions where the burden has not been met.[164] However, in *Youngdahl v. Rainfair, Inc.*,[165] one of the cases presented, the injunction was not entirely vacated.[166] The part that was upheld involved the prohibition of obstruction, provocation, and violence.[167] The part that was vacated prohibited peaceful activities unconnected to the violence.[168] In *National Socialist Party of America v. Village of Skokie*,[169] the issue before the Supreme Court was not an injunction, but the denial of a stay pending appeal of the injunction.[170] The Court ruled that the Illinois Supreme Court must provide immediate appellate review; it did *not* overturn the injunction.[171] In *Nebraska Press Association v. Stuart*,[172] at issue was a prohibition of reporting certain aspects of a criminal trial.[173] The entire injunction was not, in principle, struck down.[174] The only part that was invalidated was information which could be gained from public hearings and other sources.[175] In *Vance v. Universal Amusement Co.*,[176] the injunction was struck down not because of failure to meet the heavy burden to support it, but because the statute authorizing the injunction failed to provide adequate safeguards for entry and review of such orders.[177] Justice

162. *See Keefe*, 402 U.S. at 418-20.
163. *Madsen*, 114 S. Ct. at 2523-24.
164. *Id.* at 2541 (Scalia, J., dissenting).
165. 355 U.S. 131 (1957).
166. "Accordingly, insofar as the injunction before us prohibits . . . it is affirmed." *Id.* at 139.
167. "[P]rohibits petitioners and others cooperating with them from threatening violence against, or provoking violence on the part of, . . . prohibits them from obstructing or attempting to obstruct the free use of the streets . . . ." *Id.*
168. "On the other hand, to the extent the injunction prohibits all other picketing and patrolling of respondent's premises and in particular prohibits peaceful picketing, it is set aside." *Id.* at 139-40.
169. 432 U.S. 43 (1977).
170. *Id.* at 44.
171. *Id.*
172. 427 U.S. 539 (1971).
173. *Id.* at 541.
174. The Supreme Court overturned the injunction only in regards to reporting on public hearings and material gained from other sources. *Id.* at 570. The Court used the terms "To the extent," indicating that some aspects of the order were *not* overturned. *Id.*
175. *Id.*
176. 445 U.S. 308 (1980).
177. Accordingly, we agree with the Court of Appeals' conclusion that the absence of any special safeguards governing the entry and review of orders restraining the exhibition of named or unnamed motion pictures, . . . precludes the enforcement of these nuisance statutes . . . . [T]he Court of Appeals did not hold that there can never be a

Scalia's use of these cases to attack the injunction is questionable. In the instant case, as in each of these cases cited, part of the injunction has been struck down.[178] Is it Justice Scalia's intent that the instant injunction should be entirely struck down because a portion of it is invalid? These cases support the majority's decision upholding part and striking part of the injunction and do not support Justice Scalia's dissent.

Justice Scalia's criticism that there was not sufficient accompanying violence[179] is questionable. He cited *Youngdahl v. Rainfair, Inc.* to justify his position.[180] However, the *Youngdahl* decision, which overturned the part of the injunction prohibiting peaceful picketing,[181] noted that the State had entered the pre-empted federal domain of the National Labor Relations Board,[182] which constitutes independent grounds for overturning a State decision. Although the *Youngdahl* decision indicated that the nature of some of the speech was likely to provoke violence,[183] the Court found that the peaceful picketing was not sufficiently connected to the violence.[184] The often close connection between speech and intimidation, provocation, and violence, applied to the facts of *Madsen*, where clinic employees were stalked, shadowed, threatened, and subsequently fearful, indicates that Justice Scalia's criticism concerning the lack of violence is invalid.

Justice Scalia claimed that the case presented by the majority, *Carroll v. President & Commissioner of Princess Anne*,[185] did not support the majority opinion because it presented the standard of strict scrutiny.[186] This claim is in error. Apparently, Justice Scalia relied on the presence of the word "narrowest" in the *Carroll* decision to justify his interpretation of the *Carroll* standard as strict scrutiny.[187] However, *Perry Education Association v. Perry Local Educators' Association*,[188] shows that the word "narrowly" is used in both the content-

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valid prior restraint . . . [but] simply held that these Texas statutes were procedurally deficient . . . .

Vance, 445 U.S. at 317.

178. Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).
179. *Id.* at 2541-42 (Scalia, J., dissenting).
180. *Id.* (citing Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957)).
181. *Youngdahl*, 355 U.S. at 139-40.
182. *Id.* at 139.
183. *See Id.* at 138-39.
184. *Id.* at 139.
185. 393 U.S. 175 (1968).
186. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2542 (1994) (Scalia, J., dissenting).
187. "An order issued in the area of First Amendment rights must be couched in the narrowest terms . . . ." *Id.*
188. 460 U.S. 37 (1983).

based test (strict scrutiny) and the content-neutral test.[189] This invalidates Justice Scalia's criticism. Further, Justice Scalia apparently failed to consider that a new constitutional test will usually not be completely and specifically stated by previous authorities; that is why it is a "new" test.

Justice Scalia's attempt to demonstrate the invalidity of the majority's new test by employing it[190] was unconvincing. He cited portions of Parts A, E, and I of the amended permanent injunction to illustrate that there was no intentional or purposeful obstruction by the Petitioners.[191] However, he failed to mention Part D, which stated that on at least one occasion the police had to barricade one lane of traffic because of the number of people.[192] He failed to mention Part H, which stated that a doctor from the clinic was delayed by the Petitioners at his residence.[193] He failed to mention Part J, which stated that a doctor from the clinic was not just delayed by the Petitioners' actions, but left employment with the clinic.[194] He failed to mention the last portion of Part I, which stated that patients had turned away from the clinic because of the actions of the Petitioners.[195] Finally, although presented, he failed to acknowledge the portion of Part A which stated that the Petitioners were traversing the driveway entrances and forcing traffic to stop.[196] Since intent is an element whose presence can be inferred[197] and since these facts show a foundation for such an inference, Justice Scalia's attempt to show lack of intent fails.

Justice Scalia's characterization of the Petitioners' actions as "mild interference" is amazing.[198] Would Justice Scalia be so cavalier if one of his fellow Justices had recently been murdered by protestors[199] and another protestor subsequently approached him and mimed shooting him?[200]

189. *Id.* at 45.
190. *Madsen*, 114 S. Ct. at 2544-48 (Scalia, J., dissenting).
191. *Id.* at 2545.
192. Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 677 (Fla. 1993), *aff'd in part sub nom.* Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994).
193. *Id.* at 677-78.
194. *Id.* at 678.
195. *Id.*
196. *Id.* at 676-77.
197. Zilg v. Prentice-Hall, Inc., 515 F. Supp. 716, 719 (S.D.N.Y. 1981).
198. *See* Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2547 (1994) (Scalia, J., dissenting).
199. *See supra* note 4 and accompanying text.
200. *See supra* note 32 and accompanying text.

Justice Scalia criticized the decision concerning noise restriction as ineffective[201] because the majority's cited case, *NLRB v. Baptist Hospital*,[202] concerned a hospital regulation as opposed to an injunction.[203] However, ignoring the inaccurate statement in the opinion referring to *Baptist Hospital* as concerning an injunction,[204] the Court's argument is still valid. Where *Grayned v. City of Rockford*[205] allowed noise restrictions to be based upon a place's normal activities,[206] *Baptist Hospital* established that noise restrictions around a medical facility are proper.[207] Analogizing this argument to *Madsen*, the argument is sound and Justice Scalia's criticism is wasted.

Justice Scalia concluded his attempt to invalidate the first part of the majority's new test by positing that, because no Florida law or injunction was violated, no significant government interest was present.[208] With this conclusion, he apparently suggests that the rights guaranteed by the Constitution and federal case law[209] are not worthy of protection by an injunction.

Concerning the second part of the majority's new test regarding the thirty-six-foot buffer zone, Justice Scalia correctly observed that there were other options which would have been less burdensome to speech.[210] He did, however, fail to consider *National Society of Professional Engineers v. United States*.[211] This case indicates that previous violations are properly considered when fashioning an injunctive remedy and that the curtailing of other liberties by the resulting injunction may be a necessary result of such previous violations.[212] Therefore, although Justice Scalia's criticism has some merit, it fails to properly consider the previous violations of the Petitioners and, consequently, appears to be invalid.

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201. Justice Scalia indicated that the cite to *Grayned* was improper because *Grayned* concerned a statute and not an injunction. *Madsen*, 114 S. Ct. at 2547 (Scalia, J., dissenting) (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)). Justice Scalia criticized the majority's cite to NLRB v. Baptist Hosp., 442 U.S. 773 (1979), claiming it did not concern any violation of free speech. *Id.*

202. 442 U.S. 773 (1979).

203. *Madsen*, 114 S. Ct. at 2547.

204. *Id.* at 2528. An examination of NLRB v. Baptist Hosp., 442 U.S. 773 (1979), shows that Justice Scalia is correct in his observation.

205. 408 U.S. 104 (1972).

206. *Id.* at 116.

207. *See* NLRB v. Baptist Hospital, 442 U.S. 773, 783-84 (1979).

208. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2548 (1994) (Scalia, J., dissenting).

209. *See, e.g.*, U.S. CONST. amend. I.; Roe v. Wade, 410 U.S. 113 (1973).

210. Justice Scalia suggested that the Court could have forbidden the picketers from walking on the street or could have limited the number of protesters. *Madsen*, 114 S. Ct. at 2548.

211. 435 U.S. 679 (1978).

212. *Id.* at 697.

Justice Scalia's final criticisms of the majority's decision include a blanket critique of all place restrictions upon free speech[213] and an attempt to equate the instant matter with the unconstitutional internment of Japanese-Americans in World War II.[214] The first criticism is invalid, as demonstrated by the significant number of cases which recognize the validity of such restrictions.[215] The second is an obvious attempt to play upon the reader's emotions concerning the past illegal acts of the government of the United States. Because of the innumerable differences between the facts in *Madsen* and circumstances surrounding events during World War II, such a comparison is simply impossible.

For some reason, Justice Scalia did not attack the majority decision regarding the thirty-six-foot buffer zone on public property as violative of symbolic speech.[216] Given that demonstrations, absent other factors, have been considered protected by the First Amendment,[217] this may have been a more effective criticism.

The intensity of Justice Scalia's dissent also presents problems. The fact that Justice Scalia is acknowledged as an intelligent and accomplished jurist[218] will lend credibility to his dissent despite its obvious flaws in logic and authority.[219] Since *Madsen* was decided with just five Justices completely concurring,[220] with two other Justices joining Justice Scalia,[221] and another Justice dissenting on other grounds,[222] the authority of the decision is further diminished.

IV. CONCLUSION

In the introduction to this note, it was stated: "This note will examine the status of the First Amendment's Free Speech Clause in light of this decision." In fact, *Madsen* will have little effect on the First

213. *Madsen*, 114 S. Ct. at 2549 (Scalia, J., dissenting).

214. *Id.*

215. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1988); United States v. Grace, 461 U.S. 171 (1983); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

216. Peaceful picketing is protected by the First Amendment. Brown v. Louisiana, 383 U.S. 131, 142 (1966). But it cannot block access to buildings. Cameron v. Johnson, 390 U.S. 611, 617 (1968).

217. *See Brown*, 383 U.S. at 142; *Cameron*, 390 U.S. at 617.

218. *See* William W. Fisher III, *The Trouble With Lucas*, 45 STAN. L. REV. 1393, 1393 (1993) (referring to Justice Scalia as "[T]he intellectual leader of the conservative wing of the Supreme Court").

219. *See supra* part III.B.

220. Madsen v. Women's Health Ctr., 114 S. Ct. 2516, 2520 (1994).

221. Justice Kennedy and Justice Thomas joined with Justice Scalia, concurring in part and dissenting in part to the judgment. *Id.* at 2534.

222. *Id.* at 2531 (Stevens, J., concurring in part, dissenting in part).

Amendment. However, the effects of this decision will implicitly weigh against the right to an abortion.

Given the outcry against the recent half-hearted following of *Roe v. Wade* in *Casey v. Planned Parenthood*, and given this weak decision by the Court "protecting" women seeking abortions, *Madsen* will likely be viewed as an additional indication that support for a woman's right to an abortion is eroding. Justice Scalia was correct in his statement and resulting implication that since abortion is the background of this case only problems, and not solutions, will result.

One of the implications of Justice Scalia's dissent is that it will possibly lead to a further erosion of a woman's right to abortion. As Professor Nadine Strossen recently observed at the *Warren Court Conference*,[223] even though the right of free speech has been on paper since 1791, it required a Court of Justices to breath life into it. The corollary to this statement is that it will require a Court of Justices to destroy it. *Madsen* did not destroy the right to abortion, but dissents such as this, hiding behind the rubric of preserving other rights, from a Justice of Scalia's stature, will never preserve a right.

Given that the Supreme Court is clearly moving in a conservative direction and accepting that Justice Scalia is the Apostle-Apparent of the conservative voice on the Court, Justice Scalia's dissent is likely a harbinger of decisions to come. Even though Justice Scalia "lost" this round, the next round may yet see the complete reversal of *Roe v. Wade*. Justice Scalia's dissent may well be the voice of Cassandra prophesizing defeat.[224] But will anyone listen?

The new test presented by the Supreme Court is not really a new test nor is it a significant change in the law. It is a conglomeration of several old tests. It borrows one part - burdens no more speech than necessary - from the test previously used for injunctions as specified in *Califano v. Yamasaki*.[225] This part can also be considered merely a restatement of the overbroadness doctrine and/or the least restrictive means test. It borrows the second part - serves a significant government interest - from *Perry Education Association v. Perry Local Educators' Association*, which defined free speech analysis in the context of time, place, and manner.

223. Professor Nadine Strossen, Address at *The University of Tulsa College of Law* Warren Court Conference (Oct. 17, 1994) (transcript available in The University of Tulsa College of Law Library).

224. In ancient Greek mythology, Cassandra was a prophetess fated by the Gods never to be believed. WEBSTER'S NEW COLLEGIATE DICTIONARY 212 (9th ed. 1991).

225. 442 U.S. 682 (1979).

This decision does serve a significant function in that it formalizes the procedure to be used when evaluating injunctions in the context of free speech. However, because the Court failed to present a large majority and because the Court did not protect all the rights that should have been protected, doubt and uncertainty will reign whenever a controversial issue such as abortion is presented for review in the context of free speech and injunctions.

William C. Plouffe, Jr.