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Constitutional Law—When Rights Collide: Buffer Zones and Abortion Clinics—
Madsen v. Women's Health Center, 114 S. Ct. 2516 (1994)

John W. Bencivenga
I. INTRODUCTION

On April 8, 1993 the Honorable Robert McGregor, Circuit Judge for the Eighteenth Judicial Circuit of Florida, amended a September 30, 1992 permanent injunction1 which enjoined pro-life dem-

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1. See infra notes 73-81 and accompanying text.
onstrators from embarking on a calculated siege of various Florida abortion clinics. The mission of the pro-life demonstrators was simple: shut down the abortion clinics. Their tactics ranged from physical intimidation of clinic doctors and employees to non-violent picketing on the sidewalk and street immediately adjacent to the clinics. Judge McGregor's April 8 injunction established two buffer zones around the Aware Woman Center for Choice located in Melbourne, Florida, and one buffer zone around the homes of the clinic's workers and owners.

Members of Operation Rescue, other associated organizations, and all persons acting in concert with them, were enjoined from engaging in specific disruptive activities near the clinic and near the homes of clinic employees. Specifically, the amended injunction established a thirty-six foot buffer zone around the clinic's property line, and a 300-foot zone around the residences of the clinic's employees, staff, owners, or agents, which effectively banned communication by Operation Rescue within these zones. The injunction also created a 300-foot zone around the clinic which prohibited Operation Rescue volunteers from physically approaching any person seeking its services unless such people indicated a desire to communicate.

2. See infra Part III(A-B); see infra note 4.
4. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 676-82 (Fla. 1993). The amended injunction is set forth in an appendix to the Florida Supreme Court's decision.
5. Operation Rescue was founded by Randall Terry in the mid-1980's. Among other activities, this and other related organizations physically blocked access to abortion clinics to prevent entrance by patients and medical staff. Operation Rescue members, who directly model their tactics after those used in the 1960's civil-rights movement, use sit-ins, picketing, and sometimes illegal harassment. Members believe it is important to "rescue" fetuses and structure their activities to promote this objective.

In 1990, faced with escalating legal debts and a large monetary judicial judgment against his organization, Terry closed the national headquarters. However, the 125 local affiliates continued their efforts to shut down abortion clinics. Today, the organized abortion movement is orchestrated through a decentralized network of regional organizations. Operation Rescue National, Operation Rescue America, the Pro-Life Coalition, the Pro-Life Action League, and the American Life League represent a small portion of anti-abortion groups active in the United States today. These smaller decentralized organizations, with minimal assets, may limit the effectiveness of recent federal and state abortion clinic protection laws. Designed to fine the organizations responsible for clinic harassment, such laws may prove to be ineffective against an organization without assets. See, e.g., Joan Biskupie, High Court Rules U.S. Civil Rights Law Cannot Bar Antiabortion Blockades, Wash. Post, Jan. 14, 1993, at A1; Charles E. Shepard, Operation Rescue's Mission to Save Itself Legal Challenges, Leadership Changes Reshape Militant Antiabortion Force, Wash. Post, Nov. 24, 1991, at A1; John Kendall, Debt Forcing Operation Rescue to Close National Office, Leader Says, L.A. Times, Feb. 1, 1990, at B9.
6. See Women's Health Ctr., Inc., 626 So. 2d at 676-82.
7. Id. at 679.
8. Id.
This Note will examine this injunction and the conflict it sought to resolve between a woman's constitutional right to choose abortion and the First Amendment right to free speech. This Note also will review and analyze the recent United States Supreme Court decision, *Madsen v. Women's Health Center, Inc.*, and compare it with the conflicting decisions of the Supreme Court of Florida and the U.S. Court of Appeals for the Eleventh Circuit.

Before beginning this analysis, a note of introduction. In our nation today, few issues are as divisive as abortion. Everyone has an opinion, but no one has yet offered the nation a solution that is acceptable to a majority of the people. This problem is magnified by the various leaders who parade before the media in an attempt to gain exposure and support for their position. Patricia Ireland, President of the National Organization for Women, labels Operation Rescue leaders as terrorists. In contrast, Randall Terry, founder of Operation Rescue, labels doctors who perform abortions as baby killers. This Note attempts to rise above the fray, if possible, and analyze the merits of issues presented in this interesting case where the right of free speech and the right of privacy collide.

II. CONSTITUTIONAL ISSUES

The United States Supreme Court has recognized that free speech is essential to the continued vitality of a nation. Our nation has recognized the usefulness of the "marketplace of ideas," where good and bad thoughts are exposed so that they may stand on their strengths

10. Even Justice Clarence Thomas, who gained fame at his nomination hearing by professing to have no opinion on this subject, has formed an opinion on the abortion debate. His view on abortion closely parallels Justice Scalia’s opinions in such noted abortion cases as Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791 (1992) and Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).
and fall on their weaknesses.\textsuperscript{15} Because one purpose of free speech is to invite dispute,\textsuperscript{16} any action limiting this exchange of ideas may be viewed with suspicion as it might work to "chill" free expression. A system of prior restraint of expression bears a heavy presumption against its constitutionality, and places a substantial burden on the government to justify the imposition of such restraint.\textsuperscript{17}

Courts have held that prior restraints on speech are the most serious and least tolerated infringements on First Amendment rights.\textsuperscript{18} Operation Rescue has maintained that the pro-life movement's actions are a form of political speech protected by the First Amendment;\textsuperscript{19} asserting that members should be allowed to exercise their First Amendment free speech rights first and then be punished second for any illegal acts according to the criminal laws of a particular state.\textsuperscript{20} The organization also contends that its members should not be presumptively barred from a particular area, especially when this area is a traditional public forum with a heavy concentration of the people they view as their intended audience.\textsuperscript{21} Thus, Operation Rescue believes these buffer zone injunctions, and the injunction as applied to the Aware Woman Center for Choice, constitute an unconstitutional infringement on free speech rights.\textsuperscript{22}

The United States Supreme Court also has recognized that, under the United States Constitution, the right to choose abortion is a fundamental and constitutionally protected right.\textsuperscript{23} While some may debate just how fundamental this right is, especially in the aftermath of the \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey} deci-

\textsuperscript{15} The concept that the First Amendment protects this nation's "marketplace of ideas" has been used to argue and support conduct ranging from flag burning, \textit{Texas v. Johnson}, 491 U.S. 397, 418 (1989), to the use of "dirty" words on the radio, \textit{FCC v. Pacifica Found.}, 438 U.S. 726, 745-46 (1978).
\textsuperscript{16} \textit{Terminiello v. City of Chicago}, 337 U.S. 1, 4 (1948).
\textsuperscript{19} \textit{N.Y. State Nat'l Org. for Women v. Terry}, 886 F.2d 1339, 1362-63 (2d Cir. 1989) (stating that some actions of Randall Terry and other pro-life activists are "clearly . . . a form of political speech protected by the First Amendment").
\textsuperscript{20} \textit{See id.}
\textsuperscript{21} \textit{Id.}
\textsuperscript{22} \textit{See Martin v. Struthers}, 319 U.S. 141 (1943). In \textit{Martin}, a municipal ordinance forbidding any person to knock on doors, ring doorbells, or summon the occupants of a residence for the purpose of distributing handbills was held invalid under the Constitution. The ordinance, which applied to a person distributing advertisements for a religious meeting, denied this person both the freedom of speech and press. \textit{Id.} at 142, 149. \textit{Madsen} and \textit{Operation Rescue} make a similar argument in this case. \textit{See infra Part V(E)}.
sion, it nonetheless does have constitutional protection. The Supreme Court of Florida has also held that, under the state constitution, the right to choose abortion is a fundamental right. States have a significant interest in ensuring that the constitutional rights of one group are not sacrificed to promote the constitutional rights of another. Therefore, when sufficient proof at a judicial hearing demonstrates that the rights of one group (in this case the patients and employees of the Aware Woman Center for Choice) are being flagrantly abused by the harassing and intimidating means of another group (the pro-life movement), constitutional restrictions on their freedom to speak are permissible.

Thus, the lines were drawn in this conflict, and both sides began to "dig in" and prepare for a battle in the courts. Soldiers of the pro-life movement began to dig their foxholes with a copy of the First Amendment in their back pocket. They premised their argument on the long history of First Amendment jurisprudence while attempting to avoid the specific factual evidence at hand, which all agreed demonstrated harassing tactics. Warriors of the pro-choice camp began to dig their trench line armed with a copy of *Roe v. Wade* and *Casey* and a woman’s constitutional guarantee to choose an abortion. Realizing that they must tread lightly through the First Amendment traditions of public forums and prior restraints on speech, the pro-choice camp supported its position with cannon-barrels full of specific facts whose purpose was to blow holes through the pro-life First Amendment position. Because the facts of this case were so important to the pro-choice position, a detailed review is necessary.

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24. The *Casey* decision, 112 S. Ct. 2971 (1992), rambles for 94 pages. The decision affirmed in part, reversed in part, and remanded a Third Circuit decision. Essentially, *Casey* holds that the doctrine of stare decisis requires reaffirmation of the essential holding from *Roe* that a woman has a right to choose, without undue interference from the state, to have an abortion prior to fetus viability. *Id.* at 2804. Additionally, the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. *Id.*


27. *See Operation Rescue v. Women’s Health Ctr., Inc.*, 626 So. 2d 664 (1993) (“While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon to jeopardize the health, safety, and rights of others.”).

28. Neither side of this conflict disputes that the conduct of the pro-life demonstrators is harassing. Their differences revolve around whether the injunction constitutionally limits this conduct or unconstitutionally restricts content-specific speech.


III. FACTUAL BACKGROUND

A. Pre-Injunction and Early Injunction History

The abortion debate has long plagued the Central Florida and Melbourne area. Patricia Baird-Windle, founder of the Aware Woman Center for Choice, has been the target of pro-life supporters since 1977. In fact, the Aware Woman Center for Choice had been picketed by pro-life activists, numbering from several up to hundreds, before its Cocoa Beach opening in September 1977. After the opening of the Melbourne clinic—and the two other clinics that Baird-Windle owns—staff reported harassing phone calls, multiple fake phone calls, fake appointments, and mass protest calls which tied up the clinics' phone lines. In late 1984, the Melbourne clinic staff reported several bomb threats that required building evacuation and inspection, and the evacuation to an adjacent parking lot of several patients undergoing surgery. The harassment techniques continued throughout the 1980s, and in the spring of 1989 more than 300 pro-life activists trespassed onto the clinic's property and blockaded the clinic doors. The blockade lasted three to four hours and resulted in the arrest of 143 demonstrators.

In late 1990, Bruce Cadle of Palm Bay, Florida announced the formation of Operation Goliath, whose stated intent was to close the Aware Woman Center for Choice in Melbourne. This event represented a turning point in the abortion battle in the Melbourne area. What previously had been a few significant protests each year was soon to become an intense effort to shut down this and other Central Florida clinics.

Members of Operation Goliath began photographing and videotaping patients as they entered and exited the Aware Woman Center for Choice. They then obtained the addresses of these people from the Department of Highway Safety & Motor Vehicles and mailed them pro-life literature. In February 1991, Operation Goliath members be-

33. Id.
34. Id.
35. Id. at 102.
36. Id.
37. Id.
38. Id.
39. Id.
40. Id.
gan to picket the homes of Edward Windle and Dr. Carlos Arrogante, a physician employed by the clinic.41 Despite a May 1991 ordinance prohibiting residential picketing, this form of protest continued for more than two years.42 In March 1991, sixteen adults and two juveniles used bicycle locks to attach themselves in groups to the doors of the clinic, preventing egress from and ingress into the clinic for three to four hours.43 During 1990 and 1991, pro-life demonstrations ranged in size from one person to a group of twenty.44 Demonstrators, or “sidewalk counselors,” normally positioned themselves in the middle of the parking lot entrance to slow entering vehicles to a speed at which written and verbal information could be passed through car window openings.45

In the fall of 1991, the abortion battle in Central Florida began to attract national attention. After a six week Operation Rescue campaign in Wichita dubbed the “Summer of Mercy,” the national leaders of Operation Rescue turned their focus to Central Florida.46 On October 6, 1991, more than 10,000 people demonstrated in a peaceful protest against abortion in Orlando.47 After helping orchestrate the Wichita protests, Operation Rescue leader and Boca Raton resident Reverend Pat Mahoney returned to Florida and began speaking at local churches.48 More than 20,000 pro-life fliers, stating “the spirit of Wichita comes to Florida,” and announcing meetings and upcoming demonstrations, were distributed in the local communities.49 These fliers made specific references to conducting an October 26 abortion clinic demonstration, labeled a “rescue.”50 Patricia Baird-Windle and other abortion clinic owners responded to these fliers by filing suit against Operation Rescue, Operation Rescue America, Operation Goliath, and their individual leaders, seeking an injunction to prohibit these organizations from engaging in certain activities against local

41. Id. at 103.
42. Id.
43. Id.
44. Id. at 104.
45. Id.
47. Id. at B5.
48. Id. at B1.
49. Appendix to Appellee's Initial Brief at 15-16, Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993) (No. 81,905). This appendix contains examples of two fliers that were distributed in the Central Florida community.
50. Id. at 15-16, 24. Included in the advertisements were letters sent to local radio stations announcing meeting and protest times.
abortion clinics, their patients and employees. On October 25, 1991, the circuit court entered an order granting a temporary injunction that imposed a number of restrictions on the demonstrators. While no one violated the October 25 temporary injunction, the Women's Health Center filed suit seeking a permanent injunction.

National newspapers covered the harassment activities at the Melbourne clinic, using it as an example of the nationwide Operation Rescue goal to deter doctors from performing abortion services. In one article, Dr. Frank Snydle, who performed abortions at the Melbourne clinic, claimed that members of Operation Goliath punctured his tires, poured barbecue sauce on his car, called his 80 year-old mother to tell her that her son is a murderer, smashed windows in his girlfriend's car, and picketed his home. As a result of this type of behavior, four doctors in Melbourne stopped performing abortions during 1991. It soon became apparent that the strategy of frightening doctors away from performing abortions, which of course would eliminate a wom-

51. Appendix to Appellant's Brief at 26, Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993) (No. 81,905). Copies of the verified motion for a temporary restraining order, the temporary restraining order, and the amended permanent restraining order are on file at the Supreme Court of Florida.

52. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 666 n.1 (Fla. 1993). The temporary restraining order placed the following restrictions on Operation Rescue, Operation Rescue America, Operation Goliath, and individually named leaders:

1. All Respondents, the officers, directors, agents, representatives of Respondents, and all other persons, known and unknown, acting on behalf of any Respondents, or in concert with them, in any manner or by any means, are hereby enjoined and restrained from:
   a. trespassing on, sitting on, blocking, or obstructing ingress into or egress from any facility in which abortions are performed or family planning services are provided in the County of Brevard and Seminole, and surrounding counties, State of Florida, of any person seeking access to or leaving those facilities;
   b. physically abusing persons entering, leaving, working at or using any services at any facility in which abortions are performed or family planning services are provided, in the County of Brevard and Seminole, and surrounding counties, State of Florida;
   c. attempting or directing others to take any of the actions described in paragraphs a) and b);
2. Nothing in this court's order should be construed to limit Respondents' exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate a), b) and c) above.


55. Id.

56. Id.
an’s ability to terminate her pregnancy safely, was having a significant impact on the pro-choice movement. 57

As a result of the continual and escalating harassment in and around the Aware Woman Center for Choice and other abortion clinics, Circuit Court Judge Wallace H. Hall granted the clinic long-term relief on September 30, 1992. This initial permanent injunction was based on findings of facts, 58 and imposed several general restrictions on Operation Rescue and their associates. 59

This permanent injunction, however, failed to produce the results hoped for by Patricia Baird-Windle and the other abortion clinic owners. Beginning in January 1993, the national leaders of Operation Res-

57. Id. Bruce Cadle, a leader in the anti-abortion movement and an individual named in the injunction is quoted as saying “No doctors, no industry.”

58. Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664, 666 n.3 (Fla. 1993).

The trial court made the following findings of facts:

2. Respondents are individuals and organizations, acting in concert, who have planned a nationwide campaign, which they call “Operation Rescue” (hereinafter, “OPERATION”), directed towards closing down abortion clinics and providers throughout the country. Respondents’ own literature states that their intention is to “Physically close down abortion mills” by encircling them with thousands of protesters and blocking access to the facilities. Operation Goliath is dedicated to similar principles.

5. Ed Martin and Pat Mahoney have stated an intent to prevent persons from obtaining abortions in the Brevard and Seminole County area by blocking access to clinics.

6. Respondents have passed out flyers in the Central Florida area stating an intent to close down abortion clinics in this area.

7. Respondent, Pat Mahoney, was a leader in the Wichita, Kansas protests. Respondents, Ed Martin and Pat Mahoney, have made statements that there will be or may be a blocking of the entrance to an abortion clinic in the Central Florida area. Pat Mahoney and Martin have stated to members of the press that they intend to shut down a clinic, and have issued a press release which states that “the spirit of Wichita comes to Florida.” The press release also contained information that the Reverend Ed Martin of Ocala announces an “Operation Rescue” for Central Florida.

8. Literature obtained from Rescue America states that their members should ignore the law of the State and the police officers who remove them from their blockading positions.

59. Id. at n.4. The permanent injunction contained the following general restrictions:

A. Respondents, OPERATION RESCUE . . . are hereby enjoined from:

1. trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County, Florida;

2. physically abusing persons entering, leaving, working or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and,

3. attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above.

B. Nothing in this Court’s order should be construed to limit Respondents’ exercise of their legitimate First Amendment rights, such as, but not limited to, carrying signs, singing, and praying, in a manner which does not violate [paragraphs] 1, 2, and 3 above.
cue escalated their demonstrations in the Central Florida area, placing the Melbourne clinic at the top of their protest list. A pro-life training program was instituted in Melbourne at a time roughly coinciding with the twentieth anniversary of the *Roe v. Wade* decision, and with the inauguration of President Clinton, a pro-choice supporter. The training classes, which one newspaper labeled "fundamentalist boot camp," combined Bible study with lessons in nonviolent confrontation. Hosted by several local churches, the school—called the Institute of Mobilized Prophetic Activated Christian Training (IMPACT)—instructed its students in topics ranging from the use of scriptures to persuade abortion seekers to deliver their babies, to the proper methods of being arrested in their efforts to stop abortions.

While the IMPACT classes drew only twenty-two students, ranging in age from sixteen to sixty-seven, the psychological effect on abortion clinic owners was great. In February, IMPACT students blocked the driveway of a staff physician's home with a pickup truck. The doctor was forced to drive across a neighbor's lawn to get to the street, where he was followed to his office and picketed. Operation Rescue then purchased the property across from the Aware Woman Center for Choice and christened it their area headquarters and counseling center. The harassment continued when someone sprayed butyric acid through the clinic's door seals and through the window seals of a doctor's car. Thus, despite the original permanent injunction, the pro-life movement's harassment not only continued but intensified during the early part of 1992.

Nearly six months after the September 30 injunction, the circuit court held a three-day evidentiary hearing to determine if its prior restrictions sufficiently protected the health, safety, and ability of women in Brevard and Seminole County to seek and receive abortion services. On April 8, 1993, the circuit court amended its prior order,
concluding that Operation Rescue was engaged in actions that "impede and obstruct both staff and patients from entering the clinic." 72

B. The Amended Permanent Injunction

The amended permanent injunction prohibited Operation Rescue, other similar organizations, named individuals, and all those acting in concert with these organizations, from conducting general interference with the daily activities of the Aware Woman Center for Choice. 73 It also imposed general limitations on demonstrations and activities directed at the clinic's employees, particularly around their homes. 74 The court order reiterated the language of the previous injunction, which prohibited the named demonstrators from entering the premises and interfering with the ingress into and egress from the building and parking lot. 75

More significantly, however, the amended permanent injunction established a thirty-six foot buffer zone around the area immediately adjacent to the Aware Woman Center for Choice. 76 On the east side of the clinic, which abuts highway U.S. 1, this zone was reduced to five feet and effectively placed any potential demonstrator on the other side of the highway. 77 The amended permanent injunction also placed a 300-foot buffer zone around the clinic, which prohibited the named demonstrators from physically approaching, without consent, any person seeking the clinic's services. 78 Another 300-foot buffer zone was placed around the residences of the clinic's employees, staff, and owners. 79 Within the thirty-six-foot zone, the demonstrators, and those acting in concert with the demonstrators, could not picket, congregate, or use any sound amplification equipment. 80 The amended injunction also prohibited singing, whistling, and other loud noises within earshot or sight of the Aware Woman Center for Choice from 7:30 a.m. through noon, Mondays through Saturdays, this being the period when the clinic performed most of its abortions. 81

72. Id. at 678. The complete text of the Amended Permanent Injunction (No. 91-2811-CA-16-K), dated April 8, 1993, is appended to the Florida Supreme Court's decision.
73. Id.
74. Id.
75. Compare text of Amended Permanent Injunction, Operation Rescue, 626 So. 2d at 678-682, with text of original Permanent Injunction, Id. at 667.
77. Id. at 679.
78. Id. at 679-80.
79. Id.
80. Id. at 679.
81. Id.
C. Florida Supreme Court Decision

Operation Rescue and the other named parties in the amended injunction appealed Judge McGregor's court order in both federal and state court. The Florida Fifth District Court of Appeal certified the trial court's order as a matter of great public importance requiring immediate resolution, and forwarded the case to the Supreme Court of Florida. On October 28, 1993, the Supreme Court approved Judge McGregor's amended injunction.

In approving the order, the Supreme Court rejected Operation Rescue's claims that the amended injunction violated freedom of speech, freedom of association, equal protection, and the free exercise of religion. In rejecting these claims, the court found that the amended injunction was carefully tailored to constitute "the least intrusive remedy that will still be effective." The court also held that the time, place, and manner restrictions at issue were not content-based since "the restrictions make no mention whatsoever of abortion or any other political or social issue; the restrictions address only the volume, timing, location, and violent or harassing nature of Operation Rescue's expressive activity." Since the court held that the restrictions were content-neutral, the doctrine of prior restraint was not applicable. This finding eliminated one of Operation Rescue's major arguments.

Finally, the court rejected Operation Rescue's argument that the injunction was unconstitutionally vague because it did not clearly delineate the line between lawful and unlawful conduct. The court concluded that the injunction's language was "sufficiently specific to put Operation Rescue on notice that loud noises may not be made and signs depicting patients' names or other images may not be displayed . . . in such a manner that they would be observable to patients within the clinic during surgery and recovery periods."
D. The Federal Decision

In a footnote at the end of its decision, the Supreme Court of Florida recognized that eight days before its ruling, the United States Court of Appeals for the Eleventh Circuit had ruled that a federal district court erred in denying an abortion opponent's request for relief from the amended injunction. In *Cheffer v. McGregor*, Judge Tjoﬂat, Chief Judge for the Eleventh Circuit, vacated and remanded a district court ruling which denied Cheffer's motion for a preliminary injunction against the McGregor order. While the Eleventh Circuit panel did not rule on the constitutionality of the amended injunction, the judges did hold that the injunction restricted anti-abortion speech in the vicinity of the abortion clinic. The *Cheffer* court concluded that the injunction represented an unconstitutional prior restraint on Ms. Cheffer's free speech rights and, thus, she had standing to challenge the injunction in federal court.

The Eleventh Circuit ruled that the injunction must be analyzed as a viewpoint-specific restriction in a traditional public forum. The Eleventh Circuit did not find per se that the state circuit court's injunction was unconstitutional; but, by defining on remand the logic and method to be used by the federal district court, it nearly guaranteed a favorable ruling for the pro-life movement.

The United States Supreme Court denied certiorari for *Cheffer* on the same day it granted certiorari for *Madsen v. Women's Health Center, Inc.*; thus, the *Cheffer* decision was not properly before the Court in the *Madsen* decision. However, the conflicting holdings, especially on the content-neutral and prior restraint issues, set the scene for the United States Supreme Court decision.

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91. *Id.* at 676 n.10.
92. 6 F.3d 705 (11th Cir. 1993).
93. *Id.* at 712.
94. *See id.* at 710-11.
95. It is interesting to note that the federal court had to overcome a series of jurisdictional and procedural issues before handing down its opinion. Whether Cheffer had standing and whether the question was ripe for federal jurisdiction were two hurdles that the case had to leap. The federal court had to distinguish Cheffer's case from a number of other cases to avoid a problem with *Younger* abstention. *Younger v. Harris*, 401 U.S. 37 (1971), prohibits federal courts from interfering in state court proceedings, "when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Id.* at 43-44. Here, the court felt that Cheffer had no remedy in state court "except to subject herself to a criminal contempt citation." *Cheffer v. McGregor*, 6 F.3d 705, 709 (11th Cir. 1993). This is a unique and rather narrow interpretation of the *Younger* abstention doctrine considering the fact that a state supreme court decision from this same injunction was pending when the Eleventh Circuit released its decision.
96. *Cheffer*, 6 F.3d at 710.
IV. THE MADSEN OPINION

A. The Issues Presented

During the last week of January 1994, roughly two years after Operation Rescue began its IMPACT classes in the Melbourne area, the United States Supreme Court granted review of the Florida Supreme Court ruling in Operation Rescue v. Women's Health Center, Inc.\(^8\) The questions presented for review centered around the three buffer zones.\(^9\) Additionally, the named petitioners presented a First Amendment freedom of association question reflecting their opinion that the injunction's language prohibited them, and those acting "in concert" with them, from freely associating with others.\(^10\)

Interestingly, the petition for writ of certiorari was filed under the names of Judy Madsen, Ed Martin, and Shirley Hobbs, and not under "Operation Rescue, et. al."\(^11\) This apparently was an attempt by the petitioners to distance themselves from Operation Rescue, Operation Goliath, and other organizations which the record indicated were involved in an organized effort to shut down the abortion clinics.\(^12\) Specifically, Madsen and the others presented three questions for review: (1) Whether the state court injunction, placing a thirty-six foot buffer zone around the abortion clinic that prohibited peaceful pro-life speech in a traditional public forum, was an unconstitutional content-based restriction on free speech and association; (2) Whether the state court injunction, creating a consent requirement before speech was permitted within the 300-foot buffer zone around the abortion clinic and in the residential areas, was a reasonable time, place, and manner restriction or was an unconstitutional prior restraint on free speech; and (3) Whether a state court injunction prohibiting the named demonstrators and those acting "in concert" from expressing peaceful speech within several designated buffer zones violated the First Amendment's protection of freedom of speech and association.\(^13\)

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\(^10\) Id.

\(^11\) Id.

\(^12\) See Operation Rescue, 626 So. 2d at 666-69.

B. The Supreme Court's Ruling

On June 30, 1994, the Supreme Court announced its Madsen decision. In a 6-3 ruling, the Court held that judges may prevent demonstrators from closely approaching abortion clinics to ensure access without violating the demonstrators' First Amendment rights. The majority opinion, delivered by Chief Justice Rehnquist, affirmed the portion of the amended injunction dealing with the thirty-six foot buffer zone immediately surrounding the Aware Woman Center for Choice on Dixie Way. However, the Court reversed the Florida Supreme Court's decision on the constitutionality of the larger 300-foot "no approach" buffer zone which surrounded the clinic, as well as the 300-foot buffer zone surrounding the homes of the clinic's employees. The relatively short majority opinion was followed by a scathing and lengthy dissent by Justice Scalia, who attacked the wisdom of the Court's apparent compromise. Concluding that the case established a bad precedent, Justice Scalia stated that "the Court has left a powerful loaded weapon lying about," which, given the proper circumstances, could be used to limit free speech and liberty in future cases.

V. The Majority Opinion

The Madsen majority held that a thirty-six foot buffer zone on a public street which prohibited certain demonstrations was acceptable under the First Amendment. However, other provisions of the amended permanent injunction, chiefly the 300-foot zones, burdened more speech than necessary and, thus, violated the protestors' First Amendment rights. In upholding the thirty-six foot buffer zone established in the injunction, the Court affirmed the Florida Supreme Court's judgment that the injunction was content neutral, and rejected the pro-life's contention that a strict scrutiny standard was applicable.

The Court began its analysis of the issues in Madsen by determining the threshold question of whether the injunction was content neutral or content based. Realizing the importance of this issue, both the

105. Id. at 2521.
106. Id.
107. Id. at 2529.
108. Id. at 2534-50.
109. Id. at 2549.
110. Id. at 2521.
111. Id. at 2529.
112. Id. at 2523-24.
113. Id.
pro-life movement and the pro-choice movement presented strong arguments supporting their respective positions.\textsuperscript{114}

A. Madsen’s Content-Based Argument

Speech that is popular or pleasant has less need for constitutional protection.\textsuperscript{115} When a citizen exercises the right to freedom of speech, that citizen is exercising a right which the Supreme Court has characterized as lying at the foundation of a free government by free people.\textsuperscript{116} The First Amendment is intended to “remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us.”\textsuperscript{117} The pro-life movement asserted that the injunction directly violated First Amendment principles since it banned all religious and pro-life speech in a traditional public forum.\textsuperscript{118} Under the injunction, a pro-life speaker could never enter the public sidewalk adjacent to the clinic for peaceful speech activities and is banned from being on Dixie Way, the public road in front of the clinic.\textsuperscript{119} Thus, this individual cannot exercise his constitutionally guaranteed free speech rights. This ban, in the view of the pro-life movement, was unconstitutional.

The area within the thirty-six foot buffer zone included a public street and sidewalk. In determining the nature of a public forum, the Supreme Court has consistently held that public sidewalks and streets “have immemorially been held in trust for the use of the public . . . and are properly considered traditional public fora.”\textsuperscript{120} In Madsen’s opinion, prohibiting the pro-life movement “[a]t all times on all days”\textsuperscript{121} from engaging in pro-life speech in this traditional public forum violated her freedom of speech. The amended injunction prohibited a peace march along Dixie Way, prohibited a few pro-life individuals from conversing in public on the sidewalk in front of the clinic, and subjected them to arrest. In fact, if two individuals identified in the injunction were walking through the residential area that surrounded the clinic, they would be forced to detour around the buf-

\textsuperscript{114} See generally Appellant’s and Appellee’s Briefs, Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993) (No. 81,905).


\textsuperscript{116} Schneider v. State, 308 U.S. 147, 161 (1939).


\textsuperscript{118} Operation Rescue, 626 So. 2d at 670.

\textsuperscript{119} Cheffer v. McGregor, 6 F.3d 705, 707 (11th Cir. 1993).

\textsuperscript{120} Frisby v. Schultz, 487 U.S. 474, 481 (1988); see also Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983).

\textsuperscript{121} Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664, 680 (Fla. 1993).
fer zone. To take this scenario one step further, if one of these individuals was a pro-choice advocate and the other a pro-life advocate, who was identified as “acting in concert” with the named petitioners, the pro-life advocate could be arrested by the police as the pro-choice individual continued on his or her way.

While this scenario may appear unrealistic, Madsen pointed out in her brief that pro-life picketers and demonstrators protesting the Melbourne clinic were arrested for violating the injunction, while pro-choice picketers and demonstrators, engaged in identical activity, were not arrested. Madsen argued that this disparate treatment resulted from the content of pro-life and pro-choice speech, and indicated that the amended injunction was tailored to limit only pro-life speech.

Madsen asserted that the amended injunction represented a content specific governmental interference with her freedom of speech. As such, it acted as a prior restraint on the First Amendment rights of her and others. Statutes, ordinances, and regulations restricting speech trigger the traditional “time, place, and manner” analysis, but injunctions trigger the much stricter doctrine of prior restraint. The United States Supreme Court has consistently held that prior restraints are presumptively unconstitutional. When dealing with expressive activities such as picketing, singing, and other forms of verbal communicating, a court may “restrain only unlawful conduct and the

122. Id. at 679.
123. See Appellant’s Appendix to Initial Brief Part 2 at 104-05, Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993) (No. 81,905). The circuit court indicated that the intent of the order was to prohibit picketing and demonstrations by all persons who identified themselves as having pro-life beliefs. The circuit court judge also stated that those people having pro-choice beliefs were free to be on the public sidewalk without being in violation of the order.

Also, see the transcript of record for the hearing of April 12, 1993, where Judge McGregor, the same judge who entered the order, stated that the order applies only to individuals with a pro-life view. He also stated that all those with a pro-life view are automatically considered to be acting in concert with those named in the order and therefore are subject to its restrictions. Appellant’s Appendix to Initial Brief at 105, 107, 116, 148.

127. Carroll, 393 U.S. at 181; Keefe, 402 U.S. at 419.
persons responsible for conduct of that character." Accordingly, Madsen concluded that if injunctive remedies restricting peaceful expression in a traditional public forum also violated the doctrine of prior restraint, these injunctions were constitutionally impermissible. Instead of limiting the injunction to unlawful activities such as blockading an entrance way, the injunction went further and banned a broad range of peaceful expressive activity.

B. The Women's Health Center's Content-Neutral Position

While the Women's Health Center agreed that public sidewalks and rights of way are traditional public fora, they rejected the notion that the amended injunction was content-based. Furthermore, the Center asserted that substantial First Amendment precedent supported its position that the injunction was a valid governmental attempt to protect the ability of abortion clinics to provide medical services to women in an environment free from interferences that endanger the health and safety of their patients. The Center also pointed to the fact that the Supreme Court has held that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."

The Center also contended that the amended injunction did not prohibit speech, as Operation Rescue stated, but instead provided reasonable time, place, and manner restrictions specific to the situation. Under traditional First Amendment analysis, even public fora may be subjected to reasonable time, place, and manner restrictions provided the restrictions are: (1) content neutral; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels of communication.

The Women's Health Center argued that nothing in the state court's order limited the subject of pro-life speech nor regulated the

130. See Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988); Hirsh v. City of Atlanta, 401 S.E.2d 530, 533 (Ga.) (state has significant interest in protecting health of its citizens and their right to medical services), cert. denied, 112 S. Ct. 75 (1991); O.B.G.Y.N. Ass'n v. Birthright of Brooklyn & Queens, Inc., 407 N.Y.S.2d 903 (1978) (injunction against protestors furthers substantial governmental interest in the "health or safety of any patient of the medical clinic").
substance of its message. As support for this position, the Center compared its situation to other abortion clinics where similar injunctions recently had been upheld. In *Bering v. SHARE*, the Washington Supreme Court, faced with a similar issue, found the following:

Although only anti-abortion picketers are bound by the geographical restriction of picketing to Stevens Avenue [well away from the entrance to the clinic building], that in itself cannot be viewed as content regulation. The trial court imposed the place restriction in order to regulate the conduct of a particular group of persons before the court.

In federal court, the U.S. Court of Appeals for the Ninth Circuit approved an injunction which enjoined pro-life demonstrators from protesting within twelve and one-half feet of the entrance area to an abortion clinic, and from “producing noise by any . . . means, in a volume that substantially interferes with the provision of medical services within the Center.” The Ninth Circuit continued: “The preliminary injunction is not a content-based restriction of expression. It refers not at all to the specific viewpoints that the advocates express . . . . Rather, it focuses exclusively on the location and manner of expression. It protects the clinic from loudness and physical intimidation, not from content of speech.”

To further support its position that the amended permanent injunction was content neutral, the Women’s Health Center pointed to the fact that the order regulated only the method by which demonstrators conveyed their message, not the pro-life message itself. First, the order placed a restriction on the permissible noise level during certain hours when surgical procedures, including abortions, were performed at the Melbourne clinic. The order constitutionally regulated the place where protestors could demonstrate, but was silent on the specific content of their message. Finally, the order constitutionally

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135. Id. at 32.
137. Id. at 925.
139. Id. at 686.
141. Cheffer v. McGregor, 6 F.3d 705, 707 (11th Cir. 1993).
regulated the manner in which the pro-life message is communicated by limiting the degree of very loud noise, which carried from the street to the Aware Woman Center's interior. Since nothing in the amended injunction limited the specific content of the pro-life message, it was a content-neutral remedy and did not act as a prior restraint on Operation Rescue's First Amendment freedoms.

The Women's Health Center additionally argued that the injunction sought to regulate the secondary effects of pro-life speech. Under the secondary effects rationale, the Supreme Court has held that regulations curtailing certain speech and conduct may be constitutional if the regulations do not regulate content. In Boos v. Barry, the Supreme Court struck down a District of Columbia ordinance prohibiting the placing of certain signs within 500 feet of an embassy. Justice O'Connor's opinion, however, contained language suggesting several content-neutral secondary effects which might justify regulation. Regulations on movement, such as crowd control, ingress and egress, and site security, are permissible. For example, Justice O'Connor suggested that it would be constitutional to prevent a demonstrator from blocking the door and security camera by standing directly in front of an embassy entrance. This is the type of content-neutral secondary effect that Judge McGregor attempted to address in his amended injunction. Accordingly, the Women's Health Center contended that the injunction did not prohibit pro-life demonstrators from protesting; rather, it was specifically tailored to ensure that women who desired to use the Melbourne clinic's services could do so in a safe, secure and easily accessible manner.

C. The Court's Content-Neutral Decision

In rejecting the logic behind the pro-life's position that the injunction was content-based, the Court stated that "[t]o accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based." As Madsen properly pointed out, this injunction

143. Id.
147. Id. at 320-33.
149. Id.
150. Id.
applied only to a particular group and regulated this group's activities and, to a certain degree, the group's speech. The Court was quick to point out, however, that this alone would not invalidate an injunction; in fact, this is the purpose of most injunctions. Here, only after the Women's Health Center asserted a violation of rights and the court held a hearing was a remedy fashioned for a "specific deprivation" of certain activities of specific groups. Reviewing the record, the Court concluded that "none of the restrictions imposed by the court were directed at the contents of petitioner's message."

In determining the content neutrality of the injunction, the Court applied the standard recently set forth in *Ward v. Rock Against Racism*. If the government has adopted a regulation of speech "without reference to the content of the regulated speech," it will be deemed permissible. The threshold consideration when determining the neutrality of the regulation is the government's purpose for the restriction. In Madsen's case, the amended injunction was imposed only after repeated violations of previous injunctive remedies. The Court also concluded that, while only those with a certain view of abortion appeared to be effected by the injunction, this alone did not render the injunction viewpoint based. Because the injunction did not restrict what the pro-life movement could say, but only regulated conduct, the Court concluded that the injunction did not warrant a heightened scrutiny analysis.

**D. The Standard of Review for Injunctive Remedies**

After it rejected the strict scrutiny standard and concluded that the amended injunction was not content or viewpoint based, it appeared the Court would apply the intermediate level analysis. This test, determining whether the time, place, and manner restrictions are "narrowly tailored to serve a significant governmental interest," is an unofficial standard which the Court would be expected to apply. In
Madsen, however, the restrictions were in place through the judicial remedy of injunctive relief and not through a local ordinance or legislative act. Thus, while legislative restrictions on First Amendment principles must meet the standard time, place, and manner analysis, the Court indicated that judicial restrictions require a different standard. Before analyzing the Court's standard, a review of the competing positions is helpful.

1. Madsen's Time, Place, Manner Argument

The state may impose reasonable time, place and manner restrictions on expression if such restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Paragraph five of the injunction forbade, within 300 feet of the Aware Woman Center for Choice, "physically approaching any person seeking the services of the clinic unless such person indicates a desire to communicate by approaching or by [inquiry] of the respondents." Pro-life advocates argued that this paragraph was not a reasonable time, place and manner restriction because it was vague, overbroad, and not narrowly tailored.

First, Madsen claimed that it would be impossible to identify with any certainty those "persons seeking the services" of the Aware Woman Center for Choice. The only way of ensuring that the injunction was not violated would be to refrain from communication with anyone, effectively "chilling" speech. Second, Madsen argued that there was no reliable method to determine what the amended injunction meant by the phrase "approaching or by inquiry." Because these terms were subject to differing interpretations, all pro-life demonstrators peacefully protesting outside the thirty-six foot buffer zone, but within the 300-foot buffer zone, must avoid contact with any individual or risk violating the court injunction and potential arrest.

Finally, Madsen asserted that the amended injunction did not leave open alternative channels of communication and was not narrowly

164. See supra Part II(A-B).
165. Madsen, 114 S. Ct. at 2524-25.
169. Initial Brief for Appellants at 34, Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993).
170. Id. at 35.
tailored to achieve the government’s interest. The least restrictive means to achieve the government’s goal of affording clinic access to those who desired it would have been to prohibit people from entering onto the private property of the clinic or the private parking lot of the clinic, and would have restricted assaults on patients or workers. Instead, the amended injunction left no alternative means of communicating within the thirty-six foot buffer zone because it permanently enjoined any pro-life demonstrator acting in concert with one of the named parties from entering this area. Unlike other ordinances, which restricted the pro-life demonstrators but permitted a limited number of protesters in the vicinity of a clinic, this order prohibited all pro-life speech within a traditional public forum.

2. The Women’s Health Center’s View

In its response to Madsen’s claim that the injunction was not a proper time, place, and manner restriction, the Women’s Health Center relied on the facts of this case. The Center argued that the prohibitions contained in the amended injunction addressed specific, recurring incidents and were appropriate to protect a significant government interest. The order was entered after pro-life demonstrators continued to interfere with ingress and egress at the Aware Woman Center for Choice and engaged in other activities designed to drive clinic patients and employees away. In sum, the amended injunction moved protestors from the clinic’s entrance, driveway, and parking lot, and relocated them directly across the street. It did not bar the protestors from demonstrating, but only prevented them from demonstrating in a manner which conflicted with the clinic’s ability to function properly.

The Women’s Health Center asserted that the injunction protected significant governmental interests. First, of course, the injunction safeguarded a woman’s right to choose, a right interpreted into the

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171. Initial Brief of Appellants at 28, Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993) (No. 81,905).
172. Id. at 29-30.
173. Id. at 28.
175. Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516, 2523 (1994); Operation Rescue, 626 So. 2d 664 (Fla. 1993) (both decisions contain descriptions of the events); see also supra Part III(A).
177. Madsen, 114 S. Ct. at 2521-23.
United States Constitution\textsuperscript{179} and the Florida Constitution.\textsuperscript{180} Because the Aware Woman Center for Choice was the only clinic in Brevard County that performed abortions, its continued operation was vital to ensuring woman’s right to obtain an abortion.\textsuperscript{181}

The right of a business owner to be free from harassing and intimidating activities was a second governmental interest.\textsuperscript{182} The state has a valid interest in ensuring that the legal and governmental regulated commerce in their community is free to conduct business.\textsuperscript{183} This is even more important when the health and welfare of the community is at stake.\textsuperscript{184}

A third government interest is public safety.\textsuperscript{185} Regulating the manner in which the pro-life demonstrators protest ensures their safety as a group. The pro-life activities of marching in the street and attempting to stop vehicles by throwing themselves down as "human speed bumps" were not consistent with public safety,\textsuperscript{186} especially where, as here, a clinic’s property borders a federal highway (U.S. 1).\textsuperscript{187}

The Women’s Health Center answered pro-life concerns regarding the 300-foot buffer zone by arguing that the demonstrators were free to speak, but not free to engage in harassing conduct.\textsuperscript{188} People came to the Melbourne clinic by car.\textsuperscript{189} This mitigated pro-life concerns regarding whom they could address. In a real world sense, the buffer zone merely prevented pro-life demonstrators from attempting to stop vehicles as they turned off U.S. 1 and onto Dixie Way to enter the clinic’s parking lot.

3. \textit{The Standard: "Burdening No More Speech Than Necessary"}

The Court’s standard requires that content-neutral injunctive remedies that restrict speech must "burden no more speech than necessary

\begin{itemize}
\item \textsuperscript{179} Roe v. Wade, 410 U.S. 113 (1973).
\item \textsuperscript{180} In re T.W., 551 So. 2d 1186 (Fla. 1989).
\item \textsuperscript{181} Brief for Respondents at 1, Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516 (1994) (No. 93-880).
\item \textsuperscript{182} Id. at 4, 36-37.
\item \textsuperscript{183} Id. at 15, 18.
\item \textsuperscript{184} Id. at 33, 35-38.
\item \textsuperscript{185} See, e.g., Heffron v. International Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 650 (1981) (the government has an interest in public safety and order sufficient to justify restricting distribution of literature to an assigned location).
\item \textsuperscript{186} Brief for Respondents at 8, 27, Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516 (1994) (No. 93-880).
\item \textsuperscript{187} Operation Rescue v. Women’s Health Ctr., Inc., 626 So. 2d 664, 667 (Fla. 1993).
\item \textsuperscript{188} Brief for Respondents at 15-21, Madsen v. Women’s Health Ctr., Inc., 114 S. Ct. 2516 (1994).
\item \textsuperscript{189} Id. at 4.
\end{itemize}
to serve a significant governmental interest."190 This standard apparently lies between the intermediate and strict scrutiny standards.191 The Court reasoned that the inherent difference between injunctions and legislative ordinances justified the application of a stricter standard for judicial remedies.192 Injunctions carry a greater risk of censorship and discriminatory application than general ordinances, and may lack the general consensus that is normally associated with legislative acts.193 Thus, a "closer fit" test is required when conducting a constitutional review of a court's injunction. Any restriction which proves to be too burdensome on the pro-life movement would be an unconstitutional infringement on their First Amendment rights.194 If, however, the injunction restricts the pro-life movement's ability only to a degree that will ensure a significant governmental interest, there would be no constitutional violation.

The Court applied this standard to the specific sections of the injunction.195 First, it addressed the thirty-six foot buffer zone, which prohibited protestors from entering any portion of the public right of way within thirty-six feet of the clinic's property line. Here, the Court reviewed the failed attempts at prior injunctive relief, specific portions of the Florida Supreme Court's analysis, and earlier cases supporting the expansion of an injunctive remedy when previous court action has failed.196 The Court concluded that the thirty-six foot buffer zone around the "clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake."197 However, under a similar analysis regarding the rear and side of the clinic, the Court concluded that the thirty-six foot buffer zone burdened more speech than was necessary to protect access to the clinic, which the Court found to be a significant governmental interest.198

191. The Court normally applies a heightened or strict scrutiny test to a content-based exclusion. To pass this test, a state must demonstrate that its regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that end. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
193. Id.
194. "Too burdensome" would be defined under this standard as burdening more speech than necessary to serve a significant governmental interest.
196. Id. at 2526-27.
197. Id. at 2527.
198. Id. at 2528.
Thus, in a clarification of its standard for deciding the constitutionality of injunctive free speech restraints, the Court divided the thirty-six foot buffer zone in two, upholding only the portion where the record indicated that the protestors had obstructed access to the clinic.\footnote{199} Because the rear and side areas of the buffer zone contained no record of access denial, the restriction went too far in burdening the protestors' First Amendment rights.

The Court's analysis of the noise level and "images observable" provision of the injunction also demonstrated its attempt to apply a higher, very precise level of scrutiny to analyze injunctive orders that restrict First Amendment rights. The Court affirmed the noise level restriction that restrained protestors from "singing, chanting, whistling, shouting, [and] yelling" during the mornings when abortions are being performed.\footnote{200} However, the Court struck down the portion of the injunction which restricted the pro-life movement from displaying "images observable" inside the clinic.\footnote{201} The Court held that the clinic could simply put up curtains to avoid seeing the images that the pro-life movement attempted to force on the clinic's staff and patients.\footnote{202} However, this solution, or least-restrictive remedy, could not address the problem of noise level. Since noise control is particularly important to hospitals and medical facilities during surgical procedures, the restrictions served an important governmental interest of ensuring safe medical assistance.\footnote{203} Thus, during these periods, the injunction's limitation on noise burdened "no more speech than necessary to ensure the health and well-being of the patients at the clinic."\footnote{204} In reaching this conclusion, the Court once again offered an interesting comparison, concluding that one portion of the injunction was valid while another, relatively similar portion, burdened more speech than was necessary. While sight and sound restrictions would appear to be closely related in terms of human senses, the Court, in an apparent demonstration on exactly how precise these speech-restricting injunctions must be, distinguished the two.

The Court next addressed the 300-foot buffer zones surrounding both the Aware Woman Center for Choice and the homes of the clinic's employees.\footnote{205} Here, the Court ruled that these two zones failed to meet the requisite higher level of scrutiny since they burdened more
speech than was necessary. Based on the evidence presented in the record, the Court found insufficient justification for the broad ban on picketing around the homes of the clinic employees. Similarly, the "consent" requirement which prohibited pro-life individuals from approaching persons seeking the services of the clinic was too broad. As a result, it burdened more speech than was necessary to ensure access to the clinic.

E. The "In Concert" With and Vagueness Questions

The final question presented for review before the Supreme Court dealt specifically with the "in concert" with phrase of the amended injunction. Related to this question was the issue of whether the amended injunction was vague or overbroad.

1. Madsen's View

Madsen and the pro-life movement contended that the amended injunction conflicted with the principles of free speech and the freedom to associate established by the Supreme Court. Prohibiting demonstrations of an entire group because selective members within this group act in an illegal manner has in many instances been struck down by the Court. As stated in *NAACP v. Claiborne Hardware Co.*, "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." The injunction prohibited any demonstrations within the designated buffer zones, including peaceful picketing and speeches by individuals acting in concert with those named in the injunction. Because the Court has pronounced that a "blanket prohibition of association with a group having both legal and illegal aims [would present] a real danger that legitimate political expression or association would be impaired," Madsen argued that the injunction's provisions violated the First Amendment.

206. *Id.* at 2530.
207. *Id.* at 2529.
208. *Id.*
209. *Id.* at 2530.
210. *Id.*
211. *Id.*
The pro-life litigants attempted to drive home the point that the "in concert" provision was unconstitutional by filing the writ for petition of certiorari using Judy Madsen, Ed Martin, and Shirley Hobbs as the Petitioners instead of Operation Rescue. While these individuals were specifically named in the amended injunction, they claimed that no evidence was ever presented linking them with Operation Rescue, Operation Rescue National, IMPACT, Rescue America or the other Central Florida pro-life organizations. Thus, since no evidence linked them to the illegal activities conducted by the organized pro-life groups, trespassing, vandalism, etc., they were simply individuals expressing their views in a traditional public forum.

Comments made by Judge McGregor after the arrest of a number of individuals further supported Madsen's objection to the "in concert" phrase of the injunction. At a hearing the Judge stated:

The [term] in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of that selection.

Thus, the protestors' took the position that the "in concert" provision did not pertain to conduct or acts. Rather, it restrained individuals who held certain views, and was a viewpoint specific restriction of their First Amendment rights.

2. The Women's Health Center View

The Women's Health Center's defense of the "in concert" provision began with the purpose of the injunction, which was to protect an individual's right to enter or work at the Aware Woman Center for Choice by limiting the ability of demonstrators to harass or block these individuals. Using the same transcripts that Madsen cited, pro-choice advocates noted that at a number of demonstrations and "rescues" before the injunctive relief was granted arrested pro-life individuals would not state their given names and used the name John or

218. Id.
220. Madsen, 114 S. Ct. at 2530.
Jane Doe instead.\(^{222}\) Given this reality, the "in concert" provision was necessary because, without it, all demonstrators would claim the injunctive measures were inapplicable because they were not specifically named. This would eviscerate the injunctive remedy and provide no relief for the Melbourne clinic.

Additionally, the Women's Health Center emphasized that the amended permanent injunction was not vague or overbroad simply because it extended to those individuals acting in concert with the named organizations. A vague law is constitutionally offensive because it "may trap the innocent by not providing fair warning."\(^{223}\) Given the facts of this case, the injunction was precisely tailored to include those unidentifiable individuals who made the monthly or weekly pilgrimage to the clinic to attempt to shut down its operation.

In the Center's view, the injunction did not encourage arbitrary enforcement. The standard for injunctive enforcement is not whether there appears to be some discretion, since enforcement always "requires the exercise of some degree of police judgment. . . ."\(^{224}\) Instead, the appropriate measure is whether the local law enforcement's discretion has been adequately confined given the facts and history of the specific injunction.\(^{225}\)

The Women's Health Center's final contention was that the entire question of the "in concert" provision was not properly before the Court.\(^{226}\) Because the three named petitioners, Judy Madsen, Ed Martin and Shirley Hobbs, were specifically identified in the amended injunction, they had no standing to question the impact or validity of the "in concert" provision.\(^{227}\) Under similar circumstances, the Court has reached such a conclusion and has declined to adjudicate the issue of the precise reach of an injunctive order against nonparties. In Regal Knitwear v. NLRB\(^ {228}\) the Court declined to entertain an "abstract controversy" dealing with any nonparty potentially affected by the injunction.\(^ {229}\) Thus, the Center asserted, since all three of these individuals were named in the amended injunction, it specifically applied to them and the acting "in concert" with provision was irrelevant.

\(^{224}\) Id. at 114.
\(^{226}\) Id. at 43.
\(^{227}\) Id.
\(^{228}\) 324 U.S. 9 (1945).
\(^{229}\) Regal Knitwear v. NLRB, 324 U.S. 9, 15 (1945).
3. Issue Not Properly Before the Court

The Court agreed with the Women's Health Center's position that the three petitioners were procedurally barred from raising an "in concert" claim because all three were specifically named in the injunction. Because all the petitioners were named, their claim was nothing more than "an abstract controversy" over the use of the words in the injunction and was not an issue properly before the Court. Thus, the Court found that Madsen and the other pro-life petitioners lacked standing and briefly declined to analyze the abstract arguments.

The Court also rejected petitioner's vague and overbroad based arguments on similar grounds. Because Madsen was a named party in the amended injunction, she lacked standing to argue that the injunction was unconstitutionally vague or overbroad. Furthermore, the Court held that the "in concert" with provision did not prohibit any conduct, but "[was] simply directed at unnamed parties who might later be found to be acting 'in concert' with the named parties." So, in relatively brief fashion, the Court disposed of a rather lengthy substantive pro-life First Amendment argument on procedural grounds.

VI. The Madsen Dissent

In a scathing dissent, Justice Scalia, joined by Justices Kennedy and Thomas, rebutted the analysis and logic of the majority's opinion. Justice Scalia was highly critical of the Court's decision to apply a "new" level of analysis to injunctive remedies. Justice Scalia also disagreed with the majority that the core issue in this case was whether the amended injunction was content based. Concluding that the injunction applied only to the views of one particular group, Justice Scalia found this viewpoint-specific injunction unconstitutional. Yet, Justice Scalia asserted that because this First Amendment restriction applied to a "disfavored class" of pro-life supporters instead of, say, the NAACP, the Court invented a way to legitimize the injunction. Justice Scalia began and concluded his dissent by stating that

231. Id.
232. Id.
233. Id.
234. Id.
235. Id.
236. Id. at 2534-50.
237. Id. at 2535, 2537-38.
238. Id. at 2539.
239. Id. at 2540.
240. Id. at 2535.
the Court's effort at moderation in this case represented unprincipled, shallow law—a dangerous tool which, given the right situation, could be used to restrict the First Amendment rights of a disfavored group.\textsuperscript{241}

At the beginning of his dissent, Justice Scalia described a clinic videotape submitted by the pro-choice groups to support their contention that the demonstrators were violating the rights of certain individuals.\textsuperscript{242} Justice Scalia suggested that the demonstrators' conduct was neither violent nor violated any persons' rights.\textsuperscript{243} He seemed to adopt a "it's not as bad they say," perspective which permitted his conclusion that the injunction was overly broad and prohibited more speech than necessary.

Justice Scalia indicated three instances when speech-restricting injunctions might deserve strict scrutiny instead of a lesser form of constitutional review.\textsuperscript{244} First, Justice Scalia proposed that when one group's ideas are suppressed as a result of judicial demand by an opposing group, regardless of whether the suppression is content or action based, the judicial action requires strict scrutiny.\textsuperscript{245} Second, Justice Scalia argued that speech-restrictive injunctions made by a single judge rather than a legislative body warrant strict scrutiny.\textsuperscript{246}

Finally, Justice Scalia pointed to precedent to support his belief that speech-restrictive injunctions should be subjected to a much stricter analysis than the Court applied in \textit{Madsen}.\textsuperscript{247} Justice Scalia concluded that the Court applied a more stringent analysis in \textit{NAACP v. Claiborne Hardware Co.}\textsuperscript{248} and \textit{Carroll v. President & Commissioners of Princess Anne},\textsuperscript{249} two prior cases addressing speech restrictions.\textsuperscript{250} Further, he contended the text of \textit{Carroll} contradicts the Court's \textit{Madsen} decision.\textsuperscript{251}

Justice Scalia concluded his dissent by quoting Justice Jackson in his \textit{Korematsu v. United States}\textsuperscript{252} dissent.\textsuperscript{253} By citing \textit{Korematsu}, Justice Scalia indicated that \textit{Madsen} represents dangerous precedent.

\begin{itemize}
\item \textsuperscript{241} \textit{Id.} at 2535, 2549-50.
\item \textsuperscript{242} \textit{Id.} at 2535-37.
\item \textsuperscript{243} \textit{Id.}
\item \textsuperscript{244} \textit{Id.} at 2538-41.
\item \textsuperscript{245} \textit{Id.} at 2538-39.
\item \textsuperscript{246} \textit{Id.} at 2539.
\item \textsuperscript{247} \textit{Id.} at 2541.
\item \textsuperscript{248} 458 U.S. 886 (1982).
\item \textsuperscript{249} 393 U.S. 175 (1968).
\item \textsuperscript{250} \textit{Madsen}, 114 S. Ct. at 2542.
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} 323 U.S. 214 (1944).
\item \textsuperscript{253} \textit{Madsen}, 114 S. Ct. at 2549.
\end{itemize}
The use of a more relaxed form of scrutiny when analyzing injunctions that control speech is a dangerous trend to allow, according to Justice Scalia, and should "give all friends of liberty great concern."\textsuperscript{254}

VII. \textbf{Analysis}

On the surface, \textit{Madsen} is a fair opinion. Women choosing to exercise their constitutionally protected right may now do so; Operation Rescue still can protest at the location, but must remain across the street from the Melbourne clinic. The Court rejected the injunctive restrictions on the protestors First Amendment rights that appeared overly broad and confining, while upholding the precise restrictions that were specifically tailored to the situation.

Two examples taken from the Court's analysis of the amended injunction demonstrate the moderation and fairness of this opinion. First, the Court rejected the images observable restriction while accepting the noise restriction placed on the pro-life demonstrators. Here, the Court fairly pointed out that the Aware Woman Center for Choice could avoid viewing the banners and pro-life signs by hanging curtains in the clinic's windows. However, the clinic had no effective way to stop the loud noise that permeated the clinic walls. Because of the noise's adverse effects on the health of the patients, the Court held that this form of expression could be constitutionally restricted.

Second, the Court closely analyzed the thirty-six foot buffer zone and found that it passed constitutional muster only as applied on two sides. While this distinction may appear to be insignificant given the exact location of the Melbourne clinic, it does support the notion that the Court fairly and critically reviewed the facts of the case in an effort to restrict the pro-life demonstrators only as far as necessary to reasonably ensure access to the clinic.

The \textit{Madsen} opinion can also be seen as a moderate victory for First Amendment supporters. After concluding that the injunction was content neutral, the Court could have simply applied a traditional intermediate level scrutiny test to the injunction. The injunction's time, place, and manner restrictions fell easily within the legitimate governmental interests, and the injunction would have passed constitutional scrutiny. Indeed, the Supreme Court of Florida followed this approach. Instead, the Court introduced a heightened intermediate level scrutiny standard. This higher standard provides greater protection to First Amendment rights because it increases the burden or

\textsuperscript{254} \textit{Id.} at 2550.
threshold an injunction must overcome to be constitutional. Specifically, to be constitutional, an injunction can burden no more speech than is necessary, and the Court applied this standard in rejecting some portions of the injunction, while upholding other portions. Thus, by restricting the ability of judges to regulate speech and expression, the *Madsen* opinion appears to be both facially fair and a positive step towards First Amendment protection.

An explanation of the Court’s introduction of this new heightened intermediate level standard can be found in the transcripts of the case. The fact that Judge McGregor, the official author of the injunction, is quoted in the transcripts as stating that this injunction was directed specifically at pro-life demonstrators and their views is a sobering reality. Justice Scalia felt compelled to include lengthy portions of the transcript as an appendix to his dissent. When asked if the injunction was issued to “apply only to people that were demonstrating that they were pro-life,” Judge McGregor responded, “In effect, yes.” Whether one agrees with the pro-life position or not, the ability of one person to devise an order whose purpose is to specifically prohibit one group from demonstrating is a frightening prospect.

The circuit court granted a temporary injunction on October 25, 1991 to prevent a well advertised October 26 demonstration. This temporary injunction was not violated in any form, yet a permanent injunction was soon in place. The constitutional rights of women and clinic employees to access a clinic facility should be protected. However, should not these rights be defended by law enforcement, instead of through a judicial remedy? Instead of merely punishing the demonstrators for their illegal conduct, one could argue that the ability of all citizens to protest has been adversely affected by this decision.

Consider the following situations. Could a state judge in Georgia prevent African-Americans from protesting the Georgia state flag in front of the Olympic stadium in 1996 using *Madsen* as support for his decision? Could the judge’s order move the demonstrators to the other side of the Olympic parking lot and still be constitutionally valid? Might a pro-management lawyer now seize *Madsen* as support to justify moving the union picket lines away from the store front with the emplacement of a buffer zone because the protestors were preventing access and intimidating potential customers? Could a pharmaceutical company representative carrying a copy of *Madsen* in one hand, and a brief case full of facts in the other, request from a judge an order preventing an AIDS activist group from demonstrating within thirty feet of the company’s plant? One might argue that these examples are not completely analogous to the *Madsen* case and that
subtle differences would surely impact on any decision. In reality, however, obvious parallels exist between these examples and the *Madsen* case, as does the uncertainty in the actual precedential value that will be afforded the *Madsen* decision.

Technological advances and societal acceptance of such advancements will move the center stage of the abortion battle from the street-front of clinics to the privacy of bathroom medicine cabinets. Today, technology exists that permits a woman to terminate a pregnancy by using prescription medication. This method will eventually become available to the American public, and it will dramatically change the landscape surrounding the harassment and First Amendment issues of the abortion debate. What will remain however, is a Supreme Court decision which many feel is questionable. Additionally, one should not underestimate the associated effects of *Madsen* on the First Amendment. While many people are quick to point out that the First Amendment protects freedom of expression it also assists individuals in identifying potential adversaries. We can identify enemies because they are standing, marching, and chanting right in front of us. They are not silently creeping through the night in a covert manner but can be seen across the road during the day. Extreme caution must be exercised when limiting one particular group's ability to demonstrate. The obvious fear here is that the group will move "underground" with the potential negative result of expressing its view through more violent forms of protest. While the bombings and murders of doctors by fringe pro-life groups are well documented, forcing the mainstream protestors off the street by limiting their ability to demonstrate may ultimately result in additional violence. The *Madsen* opinion attempts to address this problem by limiting in a fair and wise manner the ability of know demonstrators to disrupt and adversely effect the clinic's activities.

VIII. CONCLUSION

The *Madsen* decision is a departure from the traditional three-level analysis of First Amendment issues. Whether this is a poor, shallow holding, or a wise, Solomonic decision will be determined over time. Whether the Court's decision is "right" or "wrong" not only depends on one's social or religious views regarding abortion, but on whether one believes the principles of our legal system always take precedence

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over reality. If one holds a fundamental belief that our law effects people in real situations and should be applied in a specific manner, this decision represents a fine application of First Amendment jurisprudence. Here, women were being prevented from entering a clinic to receive abortions. If they did enter the clinic, they were subjected to harassment by certain demonstrators. Now, these individuals are able to enter the clinic and, while pro-life supporters cannot demonstrate on the sidewalk in front of the clinic, they are only a street width away.

However, if one believes not only that abortion is fundamentally wrong, but also that the law must be applied in a strict manner conforming to a set of well-defined principles, the decision in *Madsen* is insupportable. The Court appeared to have adopted a new standard that, as Justice Scalia points out, has not been applied in other cases involving speech-restricting injunctions. It seems that the pro-life movement has been singled out. In situations where unions and the NAACP have been allowed to protest, these religious groups are silenced.

The decision in *Madsen* combines abortion rights and First Amendment principles. When seen in terms of these competing interests, the Court’s compromise position is logical at best, understandable at least. Recent increased anti-abortion violence reveals that the conflict between the right of expression and the right to choose an abortion is far from over. Time will tell if this decision, which impacts only one Central Florida clinic, will be used as a foundation to limit the rights of pro-life expression in a far broader context.