CONSTITUTIONAL LAW—FIRST AMENDMENT—INJUNCTION PROVISIONS ESTABLISHING BOTH A THIRTY-SIX-FOOT BUFFER ZONE AROUND AN ABORTION CLINIC ENTRANCE AND DRIVEWAY AND LIMITED NOISE RESTRICTIONS DO NOT VIOLATE THE FIRST AMENDMENT, BUT OTHER PROVISIONS OF THE INJUNCTION ARE UNCONSTITUTIONAL— *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

The First Amendment stipulates that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] These cumulative rights create a person's freedom of expression.[2] Courts have long

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[1] U.S. CONST. amend. I. Commentators have espoused two different views of how to interpret First Amendment issues. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 582 (1978). An absolutist approach denies the government any power to curtail First Amendment rights. *Id.*; DAVID CRUMP ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW 781 (1989) (citation omitted). The competing approach, however, promotes balancing opposing concerns of free speech interests and governmental objectives. *Id.* (citations omitted); TRIBE, *supra*, at 582.

[2] *See* TRIBE, *supra* note 1, § 12-1, at 576 (discussing the "first amendment's protections of speech, press, assembly, petition, and (by implication) association"); CRUMP ET AL., *supra* note 1, at 784 ("Although the first amendment does not expressly create a right of association, the right has been inferred from it . . . ."). The courts classify government regulation that restricts freedom of expression by the communicative impact of the affected expression. *See* CRUMP ET AL., *supra* note 1, at 783 (citations omitted) (explaining the dichotomy between "content-neutral" regulation and regulation based on the expressive content of a particular communication). If the state regulates speech based upon the communicative impact of expression, such regulation is considered content-based, and courts will subject the regulation to strict scrutiny review. *Id.* (citations omitted); *see* Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (citations omitted) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of . . . forbidden censorship is content control."). Such content-based regulation presumptively is unconstitutional. TRIBE, *supra* note 1, § 12-2, at 581. To meet strict scrutiny, a regulation must serve a compelling government interest and be tailored narrowly to achieve that interest. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing Carey v. Brown, 447 U.S. 455, 461 (1980)) ("For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

A content-based regulation only escapes strict scrutiny if it falls under a category that is not protected by the First Amendment, such as obscenity, defamation, advocacy of imminent lawless behavior, or fighting words. CRUMP ET AL., *supra* note 1, at 782 (describing "unprotected utterances" that are considered "speech that is not speech"); *see, e.g.*, Pope v. Illinois, 481 U.S. 497, 500, 501 (1987) (noting that the First Amendment does not protect obscene materials, but only protects works that reasonable persons find to possess "serious literary, artistic, political, or scientific value"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (propounding that speech intended to and likely to incite imminent lawless behavior is not protected by

the First Amendment); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (recognizing that the First Amendment does not shelter libelous statements); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (acknowledging that words directly inclined to provoke the targeted listener to violence, or "fighting words," do not receive First Amendment shelter). If the expression falls within an unprotected category, the government can prohibit the expression based on its content without any impediment from the First Amendment. *See* CRUMP ET AL., *supra* note 1, at 782 ("[O]ne way to approach the limits of the first amendment is by defining 'speech' so that it does not cover every kind of 'utterance.'"); *cf.* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-72, 773 (1976) (finding that commercial speech is not an unprotected category, and therefore may not be suppressed based on the possible effects of its content). The Supreme Court has recognized, however, that regulation of speech that falls into an unprotected category cannot discriminate on the basis of content where such discrimination is not reasonably necessary to achieve government interests. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2541, 2548, 2550 (1992) (concluding that a bias-motivated crime ordinance that specifically dealt with a cross-burning incident impermissibly was content-based because it prevented too specific a category of expression).

If the state aims a regulation at something other than the communicative impact of the expression, then the regulation is deemed content-neutral and receives intermediate, or mid-level, review. *See Perry*, 460 U.S. at 45 (citations omitted). A regulation will only be upheld under intermediate review if the regulation: (1) furthers a significant government interest; (2) is narrowly tailored to serve that interest; and (3) leaves open alternative means for communicating the information. *Id.* (citations omitted); *see also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (citations omitted) (noting that expression is subject to reasonable restrictions regarding the "time, place, or manner" of a given communication, as long as such regulations "are justified without reference to the content of the . . . speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information"). A regulation is narrowly tailored if there is no less restrictive alternative to achieve the same result. *See* TRIBE, *supra* note 1, § 12-8, at 602-03. Furthermore, when the government restricts speech that takes place in a public forum through a regulation confining the time, place, or manner of speech, the regulation must be content-neutral and meet intermediate level review. *Community for Creative Non-Violence*, 468 U.S. at 293 (citations omitted).

To pass constitutional muster, any government action affecting protected speech must not be vague or overbroad. CRUMP ET AL., *supra* note 1, at 782. A statute restricting conduct is unconstitutionally vague if the conduct is so unclearly defined that a reasonable person would have to guess at the statute's meaning. *See* Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (citations & quotation omitted) (holding that a challenged statute gave adequate notice to affected persons of what activities were proscribed). A regulation is unconstitutionally overbroad if, although it properly restricts constitutionally forbidden speech, the scope of the restriction extends to speech that is protected by the First Amendment. TRIBE, *supra* note 1, § 12-24, at 710-11 (quotation omitted) (defining and analyzing the concept of overbreadth); *see e.g.*, Thornhill v. Alabama, 310 U.S. 88, 105, 106, 107 (1940) (finding that a regulation restricting picketing was unconstitutionally overbroad because it covered activities that did not affect the state's interest in preventing injury to industrial concerns).

The First Amendment applies not only to pure speech, but also to conduct with an expressive component. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943) (noting that symbolism, such as a flag salute, embodies an effective means of communicating ideas). Where expression is mixed with conduct, however, the presence of protected speech does not prohibit the state from regulating conduct

recognized, however, that the First Amendment right to freedom of expression is not consummate.[3] When the concerns of a speaker and an unwilling listener conflict, the courts weigh the importance of the speaker's right to communicate her ideas with the listener's right to be left alone.[4] Courts often find in favor of the speaker,[5] but protect the reluctant listener's rights when his substantial privacy interests are invaded in an intolerable manner.[6]

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to preserve prominent societal interests. *See* Cox v. Louisiana, 379 U.S. 559, 573 (1965) (remarking that the state can "call a halt to a meeting which though originally peaceful, becomes violent" and "set reasonable time limits for assemblies").

[3] Note, *Too Close For Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1856 (1988). In contrast to an absolutist approach to the First Amendment, a balancing method has evolved that weighs First Amendment rights against other constitutional tenets and governmental objectives. CRUMP ET AL., *supra* note 1, at 781. This balancing approach, which seeks to produce a consistent system of evaluation, is affiliated particularly with Justice Harlan. *Id.* (citing Street v. New York, 394 U.S. 576, 590-94 (1969)).

[4] *See* Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970). In *Rowan*, the Court addressed the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, which empowered a person to dictate that a mailer eliminate her name from mailing lists, forcing the mailer to cease all future mailings to the person's home. *Id.* at 729 (citing 39 U.S.C. § 4009 (Supp. IV 1969)). To enforce the provision, a householder needed only to inform the Postmaster General that she found the specific mailing offensive. *See id.* at 733 (quotation omitted). Once informed, the Postmaster General was required to instruct the mailer to refrain from sending any further mailings to that resident. *Id.* (quotation omitted). The appellant, a mail-order businessman, argued that this regulation violated his First Amendment right to communicate through the postal system, an allegedly indispensable medium. *Id.* at 735 (quotation omitted). The *Rowan* Court upheld the provision, noting that the Supreme Court has traditionally enforced the privilege of residents to ban solicitors and peddlers from their homes. *Id.* at 736-37 (citing Martin v. City of Struthers, 319 U.S. 141, 147-48 (1943)) (other citation omitted). The Court extended that privilege by holding that a sender's right to communicate necessarily ends at an unreceptive party's mailbox. *Id.* at 736-37. In so holding, the Court permitted a resident, by withholding her acquiescence, to construct a barrier through which no solicitor may intrude. *Id.* at 738. The Court reasoned that although when outside the protection of the home, citizens are often captive audiences and subject to offensive speech, the home is a boundary at which a mailer's asserted right to communicate stops. *Id.* (citation omitted). Similarly, Justice Brandeis has described "the right to be let alone" as the most extensive and most valued of rights. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[5] *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 210-11 (1975) (citing Spence v. Washington, 418 U.S. 405, 412 (1974); Cohen v. California, 403 U.S. 15, 21 (1971)) (stating that the listener generally shoulders the burden of avoiding the undesired speech).

[6] *Cohen*, 403 U.S. at 21. In *Cohen*, the state charged the appellant under an "offensive conduct" statute for wearing a jacket inscribed with the message, "Fuck the Draft," while inside the Los Angeles County Courthouse. *Id.* at 16 (quotation omitted). The Court held that criminalizing the mere display of the word "fuck" is unconstitutional. *Id.* at 26. The Supreme Court reasoned that the government can ban speech only to protect offended audiences where the speech intrudes upon substantial privacy interests in an outrageous manner. *Id.* at 21. The Court explained that to adopt a broader

Because of the increasing intensity of the abortion debate, abortion clinics have become a common arena where privacy interests of reluctant listeners conflict with protestors' rights of speech.[7] Some lawmakers view the magnitude of anti-abortion protests occurring outside abortion clinics as tantamount to harassment and intimidation.[8] Anti-abortion demonstrators have followed patients while waving dismembered dolls, screamed derogatory names, and threatened patients and clinic staff,[9] forcing physical closeness on the listeners to increase the emotional impact of the protestors' message.[10] Abortion clinic physicians have testified that such protests enhance stress levels of patients, jeopardizing patients' health

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test would allow the majority interest to silence minority views solely based upon personal preferences. *Id.* The Court found that the offensive display in *Cohen* did not meet the outrageousness standard because the offended viewers easily could have avoided further privacy invasion by averting their eyes. *Id.* The Court further noted that the privacy interest of the courtroom did not reach the level of sanctity afforded the home with regard to shielding individuals from unwelcome speech. *Id.* at 21-22 (citation omitted).

The courts have relied occasionally on physical boundaries to identify the kinds of privacy interests that are deserving of protection. Note, *supra* note 3, at 1856. Accordingly, speech that comes within the confines of one's home or into one's mailbox is subject to regulation. *Id.* (citing FCC v. Pacifica Found., 438 U.S. 726, 748 (1978); *Rowan*, 397 U.S. at 736-37). Beyond the home, courts have been hesitant to allow a zone of privacy where a person may escape from unwanted speech. *Id.* at 1856 & n.6 (citing *Erznoznik*, 422 U.S. at 210-11). The courts, however, have protected listeners who cannot avoid easily undesired speech. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (holding that an ordinance was justified by the need to protect homes and businesses from loud broadcasts by sound trucks on public streets); International Soc'y for Krishna Consciousness, Inc. v. Rochford, 585 F.2d 263, 267, 268-69 (7th Cir. 1978) (finding that listeners were protected from religious solicitation while waiting on line for airline tickets). *Compare* Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974) (concluding that listeners should not be forced to listen to political advertising while aboard public buses) *with* Public Utils. Comm'n v. Pollak, 343 U.S. 451, 463 (1952) (holding that radio programs are permitted on bus speakers where there is no finding of objectionable propaganda in the programs).

7 *See, e.g.*, American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656, 666, 672 (E.D. Pa. 1985) (allowing a preliminary injunction to stop the enforcement of a provision requiring public disclosure in the abortion context because such disclosure infringes upon a woman's constitutional right to have an abortion), *remanded*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986).

8 *See Abortion Clinic Violence: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st & 2d Sess. 1, 3, 130 (1987) [hereinafter *Abortion Hearings*].

9 *American College of Obstetricians*, 613 F. Supp. at 661-63.

10 *See* Note, *supra* note 3, at 1856-57 (reporting protestors' use of intimidation tactics to enhance the force of the protestors' message); *see e.g., American College of Obstetricians*, 613 F. Supp. at 663 (describing episodes in which demonstrators leapt in front of cars and physically blocked entrances to abortion clinics); Bering v. Share, 721 P.2d 918, 923 (Wash. 1986) (en banc) (relating incidents in which protestors hindered ingress to and egress from the clinic and grabbed both patients and staff), *cert. dismissed*, 479 U.S. 1050 (1987); *Abortion Hearings*, *supra* note 8, at 23 (describing

and disrupting their care.[11] The impact of these protests has prompted judicial consideration.[12]

Recently in *Madsen v. Women's Health Center, Inc.*,[13] the United States Supreme Court addressed whether an injunction restricting protests at an abortion clinic violated the First Amendment rights of the protestors.[14] The Court held that the creation of a thirty-six-foot buffer zone around the clinic entrance and driveway and the imposition of limited noise restrictions were constitutional.[15] The Court, however, found that other provisions of the injunction did not meet constitutional standards.[16]

The respondent, Women's Health Center, managed a group of abortion clinics in central Florida.[17] The petitioners, including Judy Madsen, were anti-abortion activists who protested on a public road outside one of the clinics.[18] When the demonstrators threatened to protest near the abortion clinic, the clinic sought a permanent injunction banning the protestors' activities.[19] Accordingly, the trial court entered an injunction prohibiting anyone from hindering public admission to the clinic and from physically abusing those approaching or leaving the clinic.[20]

Six months later, the clinic moved to broaden the injunction when protestors continued to demonstrate actively and hamper access to the facility,[21] discouraging potential patients[22] and causing

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incidents in which protestors thrust signs into the faces of women attempting to enter a clinic).

11 *American College of Obstetricians*, 613 F. Supp. at 662, 663.

12 Note, *supra* note 3, at 1857. Courts are divided over the issue of whether injunctions restricting abortion protest activities in proximity to abortion clinics breach the First Amendment. *Id.* at 1857 n.1 (citations omitted).

13 114 S. Ct. 2516 (1994).

14 *Id.* at 2521.

15 *Id.* at 2521, 2530.

16 *Id.* These other provisions established a 36-foot buffer zone on private property alongside the clinic, banned visible images, instituted a 300-foot no-approach area surrounding the clinic, and created a 300-foot buffer zone surrounding the homes of the clinic staff. *Id.* at 2530. The Court found that these provisions swept too broadly in accomplishing the injunction's permissible goals. *Id.*

17 *Id.* at 2521.

18 *Id.* The clinic was located in Melbourne, Florida. *Id.*

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

20 *Id.* at 666-67 & n.4.

21 *Id.* at 667. The trial court found that clinic access was impeded due to the number of protestors assembled on the street leading up to the clinic and marching in the clinic's driveways. *Id.* at 667-68.

22 *Id.* at 668. The court intimated that patients were discouraged from entering the clinic due to the pressure exerted by the crowd of protestors. *Id.*

negative physical effects to women seeking medical assistance.[23] The trial court issued a broader injunction, which prohibited the protestors and those acting in concert with them from: entering into a thirty-six-foot buffer zone around the entrance and driveway of the clinic; making excessive noise near the clinic or displaying images observable to the patients within the clinic; approaching non-consenting potential patients within 300 feet of the clinic; and protesting within a 300-foot buffer zone around the clinic staff's residences.[24]

The protestors appealed to the Florida District Court of Appeal,[25] contending that the broadened injunction violated their right to free speech as guaranteed by the First Amendment.[26] Due to the public importance of this issue, the court certified the cause to the Florida Supreme Court.[27] After its deliberation, the Florida Supreme Court found that the road adjacent to the clinic was a traditional public forum[28] and that the provisions of the injunction were content-neutral.[29] The court therefore acknowledged that strict scrutiny was not the appropriate standard.[30] The supreme court further concluded that the provisions were narrowly tailored to protect a significant government interest while leaving protestors sufficient alternative methods of communication.[31] Accord-

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23 *Id.* A clinic doctor testified that the obstacles that patients needed to endure to reach the clinic caused the patients to have higher anxiety levels, which created a need for greater sedation prior to surgery. *Id.* The added sedation increased the risks associated with the operation. *Id.* Noise that could be heard by patients in the clinic undergoing or recovering from surgery also added to the patients' stress levels, increasing the risk associated with the procedure. *Id.* Patients who delayed their admission to the clinic due to the protestors also suffered increased health risks because of the delay. *Id.* at 668-69.

24 *Id.* at 669.

25 *Id.*

26 *Id.*

27 *Id.* Specifically, the appellate court "certified the trial court's order as passing on a matter of great public importance requiring immediate resolution by [the Supreme Court of Florida]."

28 *Id.* at 671 (citation omitted) ("The forum at issue . . . consists of public streets, sidewalks, and rights-of-way, which . . . constitute a traditional public forum.").

29 *Id.* The Florida Supreme Court determined that the regulation was content-neutral because it limited the place and manner in which the protestors could communicate, not what the protestors were allowed to say. *Id.* The supreme court noted that the provisions did not address specifically the abortion issue or any additional political or social views. *Id.* The court further declared that the provisions simply limited the volume, timing, site, and character of the protestors' expressive conduct. *Id.* The court emphasized that the regulation could impede equally pro-abortion demonstrations near the abortion clinic. *Id.* (quotation omitted).

30 *Id.* at 671-72 (quotation omitted).

31 *Id.* at 673. The Florida Supreme Court acknowledged several significant government interests, including a woman's liberty to seek medical assistance or counseling,

ingly, the Supreme Court of Florida upheld the injunction in its entirety.[32]

A split on this issue arose between the Florida Supreme Court and the United States Court of Appeals for the Eleventh Circuit.[33] Just prior to the Florida Supreme Court's ruling, the Eleventh Circuit heard a dispute concerning the same injunction.[34] While the Florida Supreme Court ruled that the injunction was content-neutral and met intermediate scrutiny,[35] the Eleventh Circuit determined that the injunction was content-based and failed to meet the requisite strict scrutiny standard.[36]

The United States Supreme Court granted certiorari[37] to determine whether the broadened injunction was constitutional.[38]

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fostering public safety and order, promoting the circulation of traffic, and protecting property rights. *Id.* at 672 (citation omitted). The court further reasoned that the privacy interest within the home, which the United States Supreme Court previously has protected, similarly applies to medical privacy. *Id.* The court explained that the anti-choice picketing was not meant to disseminate a public message, but was intended to impose upon the target in an offensive way. *Id.* The court found that such intrusions invade a person's residential or medical privacy and, accordingly, a complete prohibition of that kind of expression is justified. *Id.* at 672, 673.

32 *Id.* at 675.

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

34 *Id.* (quoting Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993), *vacated en banc*, 41 F.3d 1421 (11th Cir. 1994)). In *Cheffer*, a protestor with Operation Rescue brought suit in federal court attempting to enjoin execution of the state court injunction issued by defendant Judge McGregor of the Florida Circuit Court. *Cheffer*, 6 F.3d at 706, 707-08. Cheffer claimed that the injunction violated her First Amendment rights of free speech. *Id.* at 707-08. After the District Court for the Middle District of Florida denied Cheffer's motion, she appealed to the Eleventh Circuit. *Id.* at 708.

35 *Operation Rescue*, 626 So. 2d at 671-72, 675 (citation omitted).

36 *Cheffer*, 6 F.3d at 710, 711 (quotation omitted). The Eleventh Circuit treated the regulation as a criminal statute, noting that the injunction "in effect, created a criminal statute prohibiting 'pro-life' free speech activity in a certain geographical location." *Id.* at 708. The injunction, the court determined, was content-based because the parties affected by the injunction were pro-life activists and those acting in concert with the activists. *Id.* at 710 & n.10 (quotation omitted). The court of appeals supported this finding by observing that only pro-life protestors were arrested pursuant to the injunction. *Id.* at 711 & n.11. Thus, the Eleventh Circuit concluded that the injunction, a content-based regulation of speech in a public forum, was unconstitutional because it did not meet strict scrutiny. *Id.* at 711 (citation omitted). Moreover, the court found that interests of order and safety were protected sufficiently by other laws without addressing the First Amendment issue. *See id.* at 711 n.12. The Eleventh Circuit determined that the injunction had the effect of a criminal statute, and thus expressed that the district court improperly treated it as an ordinary injunction. *Id.* at 712. Consequently, the Eleventh Circuit vacated the district court's order and remanded the case for further consideration of whether the injunction should have been issued in light of the Eleventh Circuit's findings. *Id.*

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

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

The Court acknowledged the protestors' claim that the injunction restricted anti-abortion speech, but nevertheless ruled that the injunction was neither per se nor in-fact content-based.[39] The Court then articulated that the appropriate level of review for this issue was that the regulation encumber no more speech than is necessary to facilitate a "significant government interest."[40] The Court held that both the provision instituting a thirty-six-foot buffer zone surrounding the clinic driveway and entrances and the provision implementing limited noise restrictions did not violate the First Amendment.[41] The Supreme Court, however, struck down other provisions of the injunction[42] on the ground that the provisions burdened more speech than was necessary to achieve significant government interests.[43]

American jurisprudence has long recognized the importance of ensuring First Amendment freedom of expression rights while tempering those rights so as not to infringe upon the constitutional rights of others.[44] In *Thornhill v. Alabama*,[45] decided in 1940, the United States Supreme Court struck down an Alabama statute that prohibited all picketing near businesses.[46] The Court recognized that First Amendment freedom of speech is a cornerstone upon which our society is based.[47] The circulation of information

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

40 *Id.* at 2525 (citation omitted).

41 *Id.* at 2527, 2528.

42 *Id.* at 2528-30. The Court determined the following provisions to be unconstitutional: the creation of a 36-foot buffer zone on private property on the sides of the clinic, the banning of all "'images observable,'" the establishment of a 300-foot no approach zone around the clinic, and the installation of a 300-foot buffer zone around the residences of clinic staff. *Id.*

43 *Id.*

44 Note, *supra* note 3, at 1856 (quoting Rowan v. United States Post Office Dep't, 397 U.S. 728, 736 (1970)) (other citations omitted) ("When speaker's interests conflict with those of unwilling listeners, 'the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.'").

45 310 U.S. 88 (1940).

46 *Id.* at 91-92, 101. Section 3448 of the 1923 Alabama State Code made it unlawful to loiter or picket near a business for the purpose of dissuading potential patrons or to hinder, delay, or interfere with that business beyond mere competitive solicitation. *Id.* at 91-92. A union, whose membership included 96 of the 100 workers at Brown Wood Preserving Company, ordered a strike, during which the union established a 24-hour picket line. *Id.* at 94. While picketing, defendant Byron Thornhill approached a non-union employee, reminding him that the union members were on strike and that the union wanted no one to return to work. *Id.* Defendant Thornhill was arrested and convicted under § 3448 for these actions even though the non-union employee testified that he was neither threatened nor put in fear by Thornhill or the other picketers, but independently decided not to go to work. *Id.* at 94-95.

47 *Id.* at 102 ("Freedom of discussion, if it would fulfill its historic function in this

regarding the issues of a labor dispute, the majority asserted, are within the scope of the First Amendment.[48] The Supreme Court stated that the curtailment of such speech is only permitted where there exists a clear threat of substantive evils resulting from a lack of an available public forum in which to test the ideas.[49] Neither the danger of injury to industrial profits nor the mere possibility of violence initiated by picketing, the majority determined, were serious enough threats to allow for an abridgement of demonstrators' freedom of speech.[50]

A year after the *Thornhill* decision, in *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc.*,[51] the Supreme Court examined an injunction that banned both peaceful and violent union conduct aimed at milk retailers.[52] The Court upheld the injunction, reasoning that the violence in this case was pervasive and that even peaceful picketing necessarily had the effect of intimidation, which caused retailers to believe that non-compliance would be followed by violence.[53] The Supreme Court recognized the broad scope of protection afforded speech by the First Amendment.[54] The Court concluded, however, that the scope of those liberties

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nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

48 *Id.* (citations omitted).

49 *Id.* at 104-05. The Court noted that permitting a complete abridgment of speech based solely upon the public concerns arising from labor disputes would legitimize freedom of speech restrictions for nearly every situation of societal importance. *Id.* at 104.

50 *Id.* at 105. The Court noted that the statute challenged in *Thornhill* did not point specifically at serious encroachments on property or privacy interests. *Id.* Moreover, the Court asserted, the statute did not attempt to balance those interests against individual free speech interests. *Id.* In conclusion, the Supreme Court stated that "[t]he danger of breach of the peace or serious invasion of rights . . . at the scene of a labor dispute is not sufficiently imminent in all cases to warrant [a determination] that such place is not appropriate for the range of activities outlawed by § 3448." *Id.* at 106.

51 312 U.S. 287 (1941).

52 *Id.* at 291. The dispute arose out of the vendor system that was used by some dairies to distribute milk in Chicago. *Id.* Pursuant to this system, dairy companies sold milk to vendors who, operating their own trucks, resold the milk to retailers. *Id.* (citation omitted). These vendors disregarded the working standards that were set by the union for its dairy employees. *Id.*

53 *Id.* at 291, 294, 298. Witnesses testified to violent union activity surrounding the vendor system, including: window smashing; bombing Meadowmoor Dairy; stench bombing five stores; beating a storekeeper and truck driver; burning a store; destroying three vendor trucks; shootings; and beating dairy workers at gunpoint. *Id.* at 291-92. The Court explained that this pervasive violence was the distinguishing factor between this case and *Thornhill*, where peaceful picketing was protected by the First Amendment right to free expression. *See id.* at 297-98 (quotation omitted).

54 *Id.* at 296.

should not preclude the state courts from contending with coercion propelled by extensive violence.[55] Pervasive violence, the Court noted, was the sole justification for upholding the injunction and, thus, the injunction should remain in force only so long as it prevented continuing intimidation.[56]

In *Carroll v. President of Princess Anne*,[57] a case involving First Amendment concerns surrounding an injunction within a political context, the United States Supreme Court's pronounced standard of constitutional scrutiny was unclear.[58] The *Carroll* Court rejected an injunction that restrained members of a white supremacist political party from holding rallies for ten days.[59] The Court based its decision on the fact that the political party did not receive notice, formal or informal, that the townspeople were seeking an injunction.[60] The Supreme Court indicated that an order concerning First Amendment rights must be fashioned in the narrowest terms necessary to achieve a specific objective.[61] Participation by both parties, the Court concluded, is necessary to meet the above standard in the drafting of an injunction.[62]

Three years later, in *Organization for a Better Austin v. Keefe*,[63] the Supreme Court struck down an injunction that prohibited a

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55 *Id.* at 299. The Court specified, however, that dissociated previous acts of violence are not so compelling as to outweigh First Amendment protections. *Id.* at 296. Furthermore, the Court asserted that a state may not enjoin peaceful picketing activities because such activities may provoke others to commit violent acts. *Id.* (citations omitted).

56 *Id.* at 298 ("[The injunction] is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation.").

57 393 U.S. 175 (1968).

58 *Id.* at 176, 183-84.

59 *Id.* at 177 & n.3. On August 6, 1966, the National States Rights Party held a public rally at which petitioner made a militantly racist speech. *Id.* at 176. That day, officials of the town of Princess Anne obtained an ex parte restraining order that prohibited the Party from holding meetings in the county if such meetings would tend to disturb or endanger citizens. *Id.* at 177. On August 30, 1966, the court issued an injunction that effectively extended the restraining order for ten months. *Id.* at 177 & n.3.

60 *Id.* at 185 ("[I]t is clear that the failure to give notice . . . was incompatible with the First Amendment. . . . [W]e reverse the court below on this basis . . . ."). The Court stressed that the record established no reason why Carroll was not notified of the respondent's application for injunctive relief. *Id.* at 182.

61 *Id.* at 183. The Court stated that "[t]he order must be tailored as precisely as possible to the exact needs of the case." *Id.* at 184.

62 *Id.* Specifically, the Court concluded that without the participation of the party whose First Amendment rights are affected by the order, the possibility of devising a narrowly drawn order is reduced to the point where First Amendment protections are substantially imperiled. *Id.*

63 402 U.S. 415 (1971).

community organization from peacefully distributing[64] pamphlets containing coercive messages opposing the real estate practices of Keefe, a local realtor.[65] Keefe was engaged in "panic peddling," whereby he would motivate white homeowners to sell their homes by telling them that African-Americans were moving into the neighborhood.[66] He would then secure the listings and sell the homes to African-American clients.[67] The community organization passed out pamphlets to inform the community of Keefe's tactics and to induce Keefe to sign an agreement not to continue such methods.[68] The Appellate Court of Illinois upheld the injunction prohibiting the community organization's protests because the court found the organization's conduct to be coercive rather than informative.[69]

On appeal, the United States Supreme Court noted that it has historically recognized the peaceful dissemination of pamphlets as speech deserving of First Amendment protection.[70] The Court found that the intention to influence Keefe's conduct through the coercive result of the organization's pamphlets did not remove the speech from First Amendment protection.[71] The organization, the Supreme Court asserted, simply was informing the public of Keefe's practices.[72] Thus, the Court held that as long as the means are peaceful, the method of expression need not meet the public's acceptance.[73]

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64 *Id.* at 417. The trial court found that the circulation of the pamphlets was peaceful and orderly, disrupted no traffic, and led to no fights or other disturbances of the peace. *Id.*

65 *Id.* at 416-17, 420.

66 *Id.* at 416.

67 *Id.*

68 *Id.* at 417. One leaflet displayed Keefe's business card reading, "I only sell to Negroes." *Id.* Another leaflet stated that the organization would stop pamphleteering in Keefe's hometown of Westchester, Illinois once Keefe signed the "no solicitation" agreement. *Id.* A third urged recipients to call Keefe at his home and encourage him to sign the no solicitation agreement. *Id.*

69 *Id.* at 418. The appellate court concluded that public policy favored "protection of the privacy of the home and family from encroachment of the nature of petitioners' activities." *Id.*

70 *Id.* at 419 (citing Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Schneider v. State, 308 U.S. 147, 162, 164 (1939); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)).

71 *Id.* (citations omitted). The Court analogized the organization's intention to influence Keefe's actions to that of a newspaper's function of influencing societal actions through its publication *Id.* (citations omitted).

72 *Id.* The Court noted that as long as petitioners' means were peaceful, the communication did not otherwise need to meet standards of acceptability. *Id.*

73 *Id.* The Court reasoned that while the organization's message was offensive to Keefe and others, Keefe's tactics similarly were offensive to the organization. *Id.* The

The next year, the Supreme Court confronted the issue of locality with regard to First Amendment expressive conduct in *Grayned v. City of Rockford.*[74] In *Grayned*, the Court upheld an anti-noise ordinance,[75] but struck down an ordinance prohibiting picketing within 150 feet of a school.[76] Defendant Grayned was arrested for his participation in a demonstration outside of a Rockford, Illinois high school protesting the unequal treatment of black students and faculty at the school.[77] The Illinois Supreme Court upheld both ordinances,[78] but the United States Supreme Court disagreed, ruling that the anti-picketing ordinance was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.[79] Turning to the second provision, the Supreme Court reasoned that the anti-noise ordinance was constitutional because it was neither vague[80] nor overbroad[81] and

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Court also mentioned that no prior case had allowed a person, through the use of injunctive relief prohibiting pamphleteering, to escape public condemnation of his business methods. *Id.*

74 408 U.S. 104 (1972).

75 *Id.* at 108, 120. The ordinance prohibited anyone present on land adjacent to a school in session from wilfully creating a noise or diversion that disrupts or tends to disrupt the peace or order of the school. *Id.* at 107-08 (quotation omitted).

76 *Id.* at 107 (quotation & citation omitted). A subsection of the anti-picketing ordinance made it a disorderly conduct offense to picket or demonstrate on public property within 150 feet of a school in session and a half-hour before or after school hours. *Id.* (quotation omitted). The subsection did not prohibit picketing at a school implicated in a labor dispute. *Id.* (quotation omitted).

77 *Id.* at 105.

78 City of Rockford v. Grayned, 263 N.E.2d 866, 867, 868, 869 (Ill. 1970), *aff'd in part and rev'd in part*, 408 U.S. 104 (1972).

79 *Grayned*, 408 U.S. at 107 (citing Police Dep't v. Mosley, 408 U.S. 92, 101-02 (1972)). The Court followed the holding in *Police Department v. Mosley* in concluding that a blanket ban on picketing prohibited more expressive communication than necessary. *Id.* (citing *Mosley*, 408 U.S. at 101-02).

80 *Id.* at 109. The Court recognized the importance of an ordinance's clarity where First Amendment rights are concerned because vague laws do not provide a warning and may therefore trap the uninformed or inhibit the exercise of First Amendment freedoms due to fear of violating an unclear law. *Id.* at 108-09 (citations omitted). The Court found that the anti-noise ordinance was not vague because it clearly stated that it was applicable only in the school context. *Id.* at 112. Thus, the majority determined that the ordinance gave fair notice that disturbances would be measured by their effect on regular school activities. *Id.* The Court distinguished such an ordinance from a common "breach of the peace" ordinance, which would leave too much discretion in the hands of police and judges to determine what actions violate the ordinance. *Id.* at 113, 114 (citing Cox v. Louisiana, 379 U.S. 559, 574-75 (1965)) (other citations omitted). This kind of subjective determination of what activity violates the ordinance, the Court asserted, would open the door for people to be punished for voicing unpopular views. *Id.* at 113 (citations omitted).

81 *Id.* at 114-15. The Court noted that even an ordinance that is not vague cannot be constitutional if its scope is so broad that it also reaches constitutionally-protected conduct. *Id.* at 114 (citation omitted).

was narrowly tailored to achieve the government's compelling interest in having an undisturbed school session to promote student learning.[82]

In *NAACP v. Claiborne Hardware Co.*,[83] the Supreme Court addressed an injunction that prohibited the NAACP from boycotting white businesses.[84] The Mississippi Supreme Court upheld the injunction, finding the boycott unlawful partly based on the supreme court's findings that fear of retaliation influenced many African-American citizens to join the boycott.[85] On appeal, the United States Supreme Court noted that the First Amendment does not protect violent conduct or threats of violent conduct.[86] When such actions occur during constitutionally-protected activity, the Court asserted, "precision of regulation" is necessary.[87] The Court determined that although the NAACP's non-violent political activities

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[82] *Id.* at 119. The Supreme Court stated that the nature of a location dictates the reasonableness of a time, place, and manner regulation. *Id.* at 116. Freedom of speech, the Court indicated, deserves broad latitude in the school context because expression is essential to the educational process. *Id.* at 117 (citing Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511, 512 (1969)). The Court, noting that a silent vigil would be reasonable in a public library, articulated that making a speech in the same library would not be reasonable and, thus, would be subject to regulation. *Id.* at 116 (citation omitted). The general rule for determining the reasonableness of a regulation, the Court stated, is whether the manner of presentation is compatible with the ordinary activity of a specific place at a specific time. *Id.* Following this rule, the Court found that the ordinance in *Grayned* was not unconstitutional because it punished only conduct that was disruptive or potentially disruptive to ordinary school activities. *Id.* at 119.

[83] 458 U.S. 886 (1982).

[84] *Id.* at 889, 893. The NAACP instituted the boycott after white officials failed to respond adequately to a list of demands presented by black citizens seeking racial equality and integration. *Id.* at 889. The trial court ordered a broad injunction prohibiting the petitioners from stationing "store watchers," persuading others from patronizing businesses, using obscene and demeaning language, picketing, using violence, and damaging property. *Id.* at 893.

[85] *Id.* at 894-95 (quotations omitted). Names of persons who disregarded the boycott were announced at Claiborne County NAACP meetings and published in a newspaper called *Black Times*. *Id.* at 903-04. Some NAACP members then called the designated persons demeaning names, rejected them socially, and deemed them betrayers of the black cause. *Id.* at 904 (quotation omitted). There were also incidents of violence: shots were twice fired into a home; a brick was hurled through a windshield; and a garden was damaged. *Id.*

[86] *Id.* at 916. The Court noted that a state is not restricted from imposing tort liability where business losses result from violent conduct or threats of violence. *Id.* The Court, however, qualified this statement by asserting that "precision regulation" is required when the conduct occurs within the context of activities protected by the Constitution. *Id.* (citation omitted). Thus, the Court advised, where an activity is entitled to First Amendment protection, the Constitution imposes restraints on the basis upon which, and the individuals upon whom, damages liability may be grounded. *Id.* at 916-17.

[87] *Id.* at 916.

were deserving of full First Amendment protection, the Mississippi Supreme Court's findings of possible ostracism were inadequate to allow the injunction to meet the "precision of regulation" standard required by the First Amendment.[88]

With this background of case law, the Supreme Court, in *Madsen v. Women's Health Center, Inc.*, confronted the First Amendment freedom of speech issue with the controversial abortion debate looming in the backdrop.[89] The *Madsen* Court addressed the constitutionality of an injunction that restricted the areas and methods of anti-abortion demonstrations at an abortion clinic.[90] The Court held that a thirty-six-foot buffer zone surrounding the clinic's entrances and a limited noise restriction were constitutional.[91] The Court, however, rejected as unconstitutional a thirty-six-foot buffer zone as it applied to the sides of the clinic, an "images observable" prohibition, a 300-foot no approach without consent zone, and a 300-foot buffer zone around staff residences.[92]

Chief Justice Rehnquist, writing for the majority, first assessed the protestors' claim that the injunction necessarily was content-based because it effectively restricted only anti-abortion speech.[93] To accept this claim, the Court explained, would render every injunction content-based because an injunction, by its nature, is directed toward a particular group creating the conflict.[94] The Court reasoned that nothing in the record suggested that the Florida courts would not have restrained equally similar protest demonstrations targeting issues other than abortion.[95]

Next, Chief Justice Rehnquist explained that the rule for determining the content neutrality of speech regulation requires a consideration of whether the regulation refers to the content of the restricted speech.[96] The Court determined that the broadened injunction at issue in this case was without reference to anti-abor-

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88 *Id.* at 915, 921.

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

90 *Id.*

91 *Id.* at 2527, 2528.

92 *Id.* at 2528, 2529, 2530.

93 *Id.* at 2523.

94 *Id.* The Court submitted that injunctions are created in terms of a group's past actions concerning a specific issue. *Id.* The Court commented that injunctions are thus drafted to protect the rights of one party and are tailored to remedy a specific situation. *Id.* Thus, Chief Justice Rehnquist proffered, a court faced with an action seeking injunctive relief is charged with creating a remedy that targets a specific deprivation of rights, and not with formulating a statute of general application. *Id.*

95 *Id.* The Court noted that the injunction did not address pro-choice demonstrations because there were no such demonstrations occurring at the clinic. *Id.*

96 *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (other

tion speech, and thus content-neutral.[97] The motivation for this injunction, the majority posited, was the conduct of the group in violation of the initial injunction.[98] The fact that all those arrested shared the same anti-abortion viewpoint, the Chief Justice asserted, did not in itself make the injunction content-based.[99]

Having concluded that the injunction was content-neutral, the majority noted that strict scrutiny review was thus inapplicable.[100] In determining the appropriate level of review, the majority was wary of applying the mid-level review traditionally employed for content-neutral "time, place, and manner" regulations.[101] The Supreme Court cited its reason by distinguishing between an injunction and a generally applicable statute.[102] The Court noted that generally applicable statutes are legislatively-produced and therefore represent the advancement of societal interests.[103] Injunctions, on the other hand, the Court noted, are judicially-produced to remedy violations of legislative decrees and are more susceptible to censorship and discrimination.[104] The Court was concerned that mid-level review would not be sufficiently rigorous for analyzing injunctions due to that remedy's vulnerability to abuse.[105] The majority decided that the appropriate scrutiny for

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citations omitted). The threshold consideration, the Court noted, is the government's purpose in creating the regulation. *Id.*

97 *Id.* at 2523-24. Chief Justice Rehnquist explained that the injunction in *Madsen* was not rendered content-based merely because the injunction affected individuals who shared a particular viewpoint. *Id.* at 2524. That the protestors shared the same point of view as to the abortion issue, the Chief Justice stated, did not demonstrate that a content-based purpose motivated the order. *Id.* (citation omitted). Rather, the Court determined, the fact of the protestors' common viewpoint suggested only "that those in the group *whose conduct* violated the court's order happen[ed] to share the same opinion regarding abortions being performed at the clinic." *Id.*

98 *Id.*

99 *Id.* (citation omitted).

100 *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

101 *Id.* at 2524-25. The Court noted that the injunction in this case restricted speech in a "traditional public forum," thus invoking the requirement that time, place, and manner restrictions be "'narrowly tailored to serve a significant government interest.'" *Id.* at 2524 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (other citations omitted). The Supreme Court, however, noted that this standard had applied traditionally to ordinances of general application. *See id.* Examining the differences between an injunction and an ordinance, the Court concluded that injunctions require a "more stringent application of First Amendment principles." *Id.* (citations omitted).

102 *Id.*

103 *Id.*

104 *Id.* (citing United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

105 *Id.* at 2524, 2525 (citations omitted). The Court noted that the balance between the goal of the injunction and the constraint placed upon speech previously has been

this content-neutral injunction was to determine whether the provisions of the injunction burdened no more speech than required to achieve a significant government interest.[106]

With the standard of review established, the Court affirmed the Florida Supreme Court's finding that there was a significant government interest at issue in this case.[107] A combination of concerns, the Court agreed, adequately created this interest.[108] The majority identified the significant government interests as: protecting the freedom of a woman to pursue lawful medical assistance or counseling services with regard to her pregnancy;[109] securing public safety and order; ensuring the free flow of traffic; preserving the property rights of all citizens; and assuring medical privacy rights.[110] The Supreme Court then embarked upon an analysis of each contested provision to determine whether any provision burdened more speech than necessary to achieve its objective.[111]

The Chief Justice first examined the thirty-six-foot buffer zone around the clinic's entrances and driveway,[112] determining that the zone did not burden any more speech than necessary to effectuate the state's interest.[113] While the Supreme Court admitted that allowing the protestors to be on the sidewalk and driveway subject to certain restrictions would be less intrusive, the Court recalled that the first injunction attempted such action and proved unsuccessful.[114] The majority indicated that there were no alternatives that would insure an unimpeded entrance and exit from the clinic.[115]

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the focus of the Court's attention. *Id.* at 2524-25 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 912, 913 (1982); Califano v. Yamasaki, 442 U.S. 682, 702 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419-20 (1977); Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 295, 296 (1941)) (other citation omitted).

106 *Id.* (citations omitted).

107 *Id.* at 2526.

108 *Id.*

109 *Id.* (citing Roe v. Wade, 410 U.S. 113, 164-66 (1973); *In re* T.W., 551 So. 2d 1186, 1190, 1192 (Fla. 1989)).

110 *Id.* The Supreme Court previously acknowledged a strong state interest in residential privacy, which the Court believed applied analogously to a patient's interest in medical privacy. *Id.* (citing Frisby v. Schultz, 487 U.S. 474, 484 (1988)) (other citation omitted).

111 *Id.*

112 *Id.* The majority noted that the provision prohibited protestors from "'congregating, picketing, patrolling, demonstrating or entering'" within 36 feet of the clinic property line or on any part of the public right-of-way. *Id.*

113 *Id.* at 2527.

114 *Id.*

115 *Id.* The Chief Justice mentioned that the road was only 21 feet wide near the clinic. *Id.* (citation omitted). Allowing protestors to remain near the clinic entrance or on the road, the Court noted, obviously would obstruct vehicular traffic. *Id.*

Even with the thirty-six-foot buffer zone, the Court noted, protestors could still remain ten to twelve feet from vehicles approaching and exiting the clinic.[116] The Supreme Court concluded that this was an adequate distance from which protestors could communicate their anti-abortion message.[117]

Chief Justice Rehnquist next found that the creation of the thirty-six-foot buffer zone around the private property to the west and north of the clinic was unconstitutional.[118] The majority based its finding on the fact that there was no evidence in the record that the protestors' conduct in these areas obstructed access to the clinic, unlawfully disrupted the clinic's business, or hindered traffic near the clinic.[119] Patients and clinic staff, the Court noted, did not need to cross these areas to reach the clinic.[120] Thus, the majority concluded, a complete ban on the protestors' presence in these areas would burden more speech than necessary to achieve the government's objective of protecting access to the clinic.[121]

The Court then addressed the injunction's limited noise restrictions and found that they adequately ensured the well-being of patients and burdened no more speech than necessary in fulfilling this governmental interest.[122] The majority reasoned that it was necessary to take into consideration the location at issue when weighing the burden of the restrictions on free speech.[123] Chief Justice Rehnquist indicated that the Supreme Court previously had sustained a similar noise restriction aimed at protestors around a public school because of the importance of a quiet atmosphere near the school.[124] The majority reasoned that, for the purposes of the present case, limiting noise around a medical facility is similarly important to protect patients during surgery and periods of

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116 *Id.* (citation omitted).

117 *See id.* The Chief Justice noted that protestors, while standing across the street, could be heard and seen from the clinic's parking lots. *Id.*

118 *Id.* at 2528. The Court mentioned that the area west and north of the clinic constituted the side and rear of the clinic. *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* The provision restricted the protestors from "'singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds . . . within earshot of the patients inside the [c]linic' during the hours of 7:30 a.m. through noon on Mondays through Saturdays." *Id.* The significant government objective for this provision, the Court asserted, was the assurance of health and well-being for those being treated at the clinic. *Id.* (quotation omitted).

123 *Id.*

124 *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 116, 120 (1972)). The *Grayned* Court upheld the noise restrictions around a school after exploring the nature and usual activities of the school setting. *Grayned*, 408 U.S. at 116, 120.

recuperation.[125]

In contrast to the noise restriction clause, the Court determined that the "'images observable'" clause of the same provision did not pass constitutional muster.[126] Chief Justice Rehnquist emphasized that ensuring patients' well-being and stopping threats to patients were two possible governmental interests involved in this case.[127] The majority stated, however, that a ban on observable images burdened more speech than necessary to protect patients' health because the clinic easily could close the curtains, thus insulating the patients from this kind of expression.[128] The Court added that the ban constituted overly burdensome regulation because the provision, in an attempt to achieve the government's end, banned more than images conveying threatening messages.[129]

The Court rejected the injunction's 300-foot no approach zone requirement because the provision was broader than necessary to achieve the government objective of maintaining access to the clinic and to protect a person's right to be left alone.[130] The Court maintained that such a comprehensive ban on speech only could be upheld if the speech constituted fighting words or threats.[131] Otherwise, the Court asserted, First Amendment freedom of speech requires that citizens tolerate outrageous, and even offensive, speech.[132]

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125 *Madsen*, 114 S. Ct. at 2528. The Court previously announced the importance of quiet at a hospital due to the daily emotional and physical strain that patients endure. *Id.* (quoting NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-84 (1979)). In upholding the constitutionality of the *Madsen* provision, Chief Justice Rehnquist asserted that the First Amendment does not require that patients at a hospital shoulder extensive efforts to avoid the onslaught of political protests. *Id.*

126 *Id.* at 2528-29.

127 *Id.* at 2529.

128 *Id.* The majority made this argument in response to the clinic's claim that signs, as well as noise, increased the anxiety level of patients, creating greater medical risks. *Id.* at 2521. The Chief Justice noted that the clinic more easily could obstruct patients' views than patients' hearing, emphasizing the difference between this clause and the limited noise restrictions. *Id.* at 2529.

129 *Id.*

130 *Id.* The majority explained that the provision banned protestors from physically approaching any potential patients within 300 feet of the clinic, unless the potential patient consented to such communication. *Id.* Chief Justice Rehnquist commented that the provision was drafted to restrict "stalking" or "shadowing" of the patients as they approached the facility. *Id.* (citing International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2711, 2721 (1992) (reporting that solicitors will often seek out the vulnerable)).

131 *Id.* (citing Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc. 312 U.S. 287, 292-93 (1941)).

132 *Id.* (citing Boos v. Barry, 485 U.S. 312, 322 (1988)); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (rejecting proposed outrageousness standard

Finally, the Court addressed the constitutionality of the provision creating a 300-foot buffer zone around the homes of clinic staff.[133] The Chief Justice condemned the provision, noting that it placed a burden on more speech than was necessary to protect the privacy of one's home.[134] The majority expounded that the provision could have achieved its objective by simply limiting the amount of noise, the number of protestors, or the duration of protests, rather than banning all protests in the area.[135] The Court distinguished this provision from the buffer zone allowed in *Frisby v. Schultz*[136] because the ordinance in that case only prohibited demonstrations in front of a particular individual's home.[137] The restriction on speech created by the buffer zone, the majority articulated, was too broad to remain constitutional.[138]

The Court rejected the protestors' general assertion that the injunction was vague and overbroad because the injunction also applied to those acting "in concert" with protesters.[139] The majority found that the protestors, as parties to the suit, had no standing to challenge the vagueness of the "in concert" clause because it applied to those who were not parties to the suit.[140] The clause, the Supreme Court further instructed, was not subject to an overbreadth contention because it did not forbid any specific con-

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due to its inherent subjectivity, which contradicts the Court's prohibition against punishing speech that may have an unfavorable emotional effect on the audience).

133 *Madsen*, 114 S. Ct. at 2529. The provision prevented "picketing, demonstrating, or using sound amplification equipment" in a 300-foot zone around the residence of any clinic staff member. *Id.*

134 *Id.* at 2529-30.

135 *Id.* at 2530.

136 487 U.S. 474 (1988).

137 *Madsen*, 114 S. Ct. at 2530 (quoting *Frisby*, 487 U.S. at 477, 483). In *Frisby*, the Court upheld a municipal ordinance that banned picketing "'before or about the residence or dwelling of any individual in the Town of Brookfield.'" *Frisby*, 487 U.S. at 477 (quotation omitted). The Court found that this ordinance was content-neutral because the picketing was restricted without regard to the content of the speech. *Id.* at 482. As a content-neutral regulation, the Court applied intermediate level scrutiny and found that the ordinance was narrowly tailored to achieve the significant governmental goal of protecting the privacy of the home. *Id.* at 482, 483, 484 (citation omitted). The Court made this determination because the ordinance focused only on picketing centered on a particular residence and left open ample alternative channels through which protestors could disseminate their message. *Id.* at 483, 484.

138 *Madsen*, 114 S. Ct. at 2530. The Court noted that because the provision also prohibited protestors from impeding access to roadways that provide sole access to residences, protestors were forbidden to engage in "'[g]eneral marching through residential neighborhoods, or . . . walking a route in front of an entire block of houses.'" *Id.* (quoting *Frisby*, 487 U.S. at 483) (alteration in original).

139 *Id.*

140 *Id.*

duct.[141] The Court also repudiated the protestors' contention that the injunction obstructed their First Amendment freedom of association.[142] The Chief Justice explained that while the injunction did not stop the protestors from congregating with others to communicate a viewpoint, the First Amendment does not authorize anyone to unite with a group to divest others of their rights.[143] Accordingly, the Supreme Court affirmed in part, and reversed in part, the judgment of the Florida Supreme Court.[144]

In a concurring opinion, Justice Souter agreed with the Court's analysis, but wrote to elucidate two matters.[145] First, the Justice clarified that the trial judge stated that those acting "in concert" would not be defined by their political viewpoints, but the issue would instead be resolved on a case-by-case basis.[146] Next, the Justice noted that the protestors conceded that the stated governmental interests were disclosed in applicable Florida law.[147]

Justice Stevens authored an opinion concurring in part with and dissenting in part from the majority's opinion.[148] The Justice agreed with the Court's finding that the injunction was not content-based.[149] The Justice also conceded that it was constitutionally permissible to apply the injunction to those acting in concert.[150] Justice Stevens, however, disagreed with the standard of review that the Court adopted, reasoning that courts should evaluate injunctions more leniently than legislation.[151] The Justice also opposed

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141 *Id.* The Court announced that this situation was controlled by *Regal Knitwear Co. v. NLRB*. *Id.* (citing Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14, 16 (1945)). In *Regal Knitwear*, the National Labor Relations Board issued a cease and desist order pertaining to "'officers, agents, successors and assigns.'" *Regal Knitwear*, 324 U.S. at 10. Noting that the petitioners were neither successors nor assigns, the Court held that petitioners failed to bring a proper appeal because the provision did not affect their obligations or conduct. *See id.* at 16.

142 *Madsen*, 114 S. Ct. at 2530 (citation omitted). The freedom of association emanates from the First Amendment's express right of assembly, which necessarily implies a right of group action. *See* CRUMP ET AL., *supra* note 1, at 784. Courts have interpreted the First Amendment to extend this freedom to collective action with expressive content. *Id.* (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 932 (1982) (recognizing group boycotts as protected by the First Amendment)).

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

144 *Id.*

145 *Id.* (Souter, J., concurring).

146 *Id.* (citation omitted).

147 *Id.* at 2530-31 (Souter, J., concurring) (citations omitted).

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

149 *Id.* (quoting *id.* at 2523-24).

150 *Id.* (quoting *id.* at 2530).

151 *Id.* The Justice reasoned that legislation is subject to heightened scrutiny because it affects an entire community, while an injunction is tailored to a specific group engaging in illegal conduct. *Id.* Justice Stevens argued for lenient treatment of in-

the rejection of the 300-foot no approach zone around the clinic, finding that the majority read the provision too broadly.[152]

Justice Scalia drafted an opinion concurring in part and dissenting in part, in which Justices Kennedy and Thomas joined.[153] Justice Scalia speculated that the Court, contrary to established jurisprudence, permitted some provisions while disallowing others in an effort to appease both sides of the sensitive abortion issue.[154]

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junctions by charging that the propriety of an injunction depends entirely on the kind of activity prohibited and the probability of its recurrence. *Id.*

152 *Id.* at 2532 (Stevens, J., concurring in part and dissenting in part). Justice Stevens attacked the Court's interpretation that paragraph five of the injunction meant that the "300-foot no approach without consent zone" prohibited speech by the protestors. *Id.* Paragraph five of the injunction read:

> 'At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]. In the event of such invitation, the [petitioners] may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the [petitioners] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.'

Id. at 2532 n.4 (Stevens, J., concurring in part and dissenting in part) (quotation omitted) (alteration in original).

Advocating a stricter reading of paragraph five, Justice Stevens interpreted that paragraph to mean that so long as the protestors did not partake in the expressly prohibited conduct, they were free to communicate with approaching patients through "'sidewalk counseling'". *Id.* at 2532 & n.4 (Stevens, J., concurring in part and dissenting in part). Justice Stevens reasoned that while the First Amendment protects the protestors' right to communicate their message through sidewalk counseling, the First Amendment in no way gives protestors the right to harass a captive audience, especially those seeking medical treatment. *Id.* at 2533 (Stevens, J., concurring in part, dissenting in part) (citing Grayned v. City of Rockford, 408 U.S. 104, 116 (1972)). The Justice further urged that one has the right to communicate even a vulgar message to unwilling viewers. *Id.* (citing Cohen v. California, 403 U.S. 15, 21-22 (1971)). As such, Justice Stevens concluded that the 300-foot no approach zone burdened no more speech than necessary to ensure patients' safety and, therefore, survived First Amendment scrutiny. *Id.*

Justice Stevens indicated that the majority went beyond the pertinent issues in appraising the constitutionality of the 36-foot buffer zone, noise restrictions, and images observable provisions. *Id.* at 2533-34 (Stevens, J., concurring in part and dissenting in part). Justice Stevens expressed agreement with the Court's analysis of the noise and images issues, but reiterated that the issues did not apply to the Court's grant of certiorari. *Id.* at 2534 (Stevens, J., concurring in part and dissenting in part).

153 *Id.* (Scalia, J., concurring in part and dissenting in part).

154 *Id.* ("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.").

Justice Scalia posited that the Court's previous holdings required that the entire injunction be rejected.[155]

To strengthen this argument, Justice Scalia discussed a videotape presented in the record presumably displaying the worst of the protestors' conduct.[156] The Justice noted that the tape depicted both pro-abortion and anti-abortion activists making noise and displaying signs near the clinic.[157] Justice Scalia argued that the tape showed no effort by the protestors to stop or even delay traffic near the clinic entrance.[158] The Justice also observed that the tape did not display the slightest violent conduct.[159]

Justice Scalia propounded that a community sidewalk is a public forum to which the Court generally extends First Amendment protection.[160] The Justice then noted that the Court rejected both the protestors' request for strict scrutiny review[161] and the respondents' desire for intermediate scrutiny review,[162] and created its own standard.[163] Justice Scalia suggested that, contrary to the Court's belief, there is no discernible difference between the Court's standard and intermediate scrutiny.[164] Justice Scalia argued that intermediate scrutiny is not sufficient for cases involving injunctions because of their special nature.[165] Justice Scalia as-

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155 *Id.*

156 *Id.* at 2535-37 (Scalia, J., concurring in part and dissenting in part).

157 *Id.* at 2535-36 (Scalia, J., concurring in part and dissenting in part).

158 *See id.* at 2536 (Scalia, J., concurring in part and dissenting in part). Justice Scalia mentioned that the tape displayed a traffic delay of approximately ten seconds, which was merely the amount of time for the protestors to get out of the way of the entering vehicles. *Id.*

159 *Id.* Justice Scalia submitted that there was not any "jostling or physical contact" between the adversarial parties. *Id.*

160 *Id.* at 2537 (Scalia, J., concurring in part and dissenting in part) (citation omitted).

161 *Id.* (quotation omitted). The Justice noted that strict scrutiny generally is applied to content-based restrictions. *See id.* (quotation omitted).

162 *Id.* (citation omitted). The Justice mentioned that intermediate scrutiny generally permits time, place, and manner regulations that are content-neutral, narrowly drawn to achieve a significant state interest, and leave open alternative channels of communication. *Id.* at 2537-38 (Scalia, J., concurring in part and dissenting in part) (quotation omitted).

163 *Id.* at 2538 (Scalia, J., concurring in part and dissenting in part) (quoting *id.* at 2524, 2525).

164 *Id.* Justice Scalia commented that the Court purported to apply a standard between intermediate scrutiny and strict scrutiny. *Id.* (quoting *id.* at 2524, 2525).

165 *Id.* at 2538-39 (Scalia, J., concurring in part and dissenting in part). Justice Scalia asserted that an injunction by its nature lends itself to the suppression of specific ideas: while the injunction does not profess to limit speech, a judge necessarily will be aware of certain expression that the injunction will limit. *Id.* at 2538 (Scalia, J., concurring in part and dissenting in part). Additionally, the Justice reasoned that injunctions are issued by individual judges who may be angered by failure to comply

serted that the Court should afford an injunction strict scrutiny, whether content-based or not.[166]

Justice Scalia next expressed disagreement with the Court's finding that the injunction in this case was not content-based.[167] The Justice noted that the "in concert" provision of the injunction necessarily affected only anti-abortion activists.[168] Justice Scalia relied on testimony by those arrested and presented at trial who stated that selection for arrest was based upon an individual's anti-abortion position.[169]

Justice Scalia argued that injunctions are classic illustrations of prior restraints, to which the Court has attached a strong presumption against constitutionality.[170] The Justice underscored that in previous speech-restricting injunction cases, the Court required a compelling state need and "'precision of regulation,'" which is equivalent to strict scrutiny.[171] Even where violent conduct is present, Justice Scalia professed, strict scrutiny is still required.[172] Justice Scalia identified the lack of support for the majority's standard

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with their original orders. *Id.* at 2539 (Scalia, J., concurring in part and dissenting in part). The Justice propounded that free speech rights should not be left to the discretion of a single individual. *Id.* Justice Scalia further noted that injunctions are much more powerful than statutes and, thus, courts should apply the strictest scrutiny to injunctions. *Id.*

166 *Id.* at 2538 (Scalia, J., concurring in part and dissenting in part). Justice Scalia noted that what makes content-based legislation deserving of strict scrutiny is that such legislation lends itself to being used for invidious purposes. *Id.* at 2539 (Scalia, J., concurring in part and dissenting in part). Because injunctions often result in unavoidable "targeting," the Justice proffered, speech-restricting injunctions similarly may be used for invidious purposes. *Id.*

167 *Id.*

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

169 *Id.* at 2540 (Scalia, J., concurring in part and dissenting in part) (quotations omitted). These colloquies, Justice Scalia noted, suggested that pro-choice activists were also demonstrating at the same location, but were not arrested. *See id.* Justice Scalia remarked that the injunction was therefore tailored to control persons based upon their views, rather than their conduct. *Id.*

170 *Id.* at 2541 (Scalia, J., concurring in part and dissenting in part) (quotation & citations omitted). Justice Scalia mentioned that the Supreme Court historically has rejected speech-restricting injunctions. *Id.* (citations omitted).

171 *Id.* (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)) (other citation omitted).

172 *Id.* (citation omitted). The Justice provided that in *Youngdahl v. Rainfair, Inc.*, the Supreme Court struck down a provision prohibiting all picketing where there was evidence of only scattered violence because the complaining party did not prove that violence would recur if picketing continued. *Id.* at 2542 (Scalia, J., concurring in part and dissenting in part) (quoting Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139-40 (1957)). Justice Scalia explained that the only reason the Court allowed the injunction banning picketing in *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, was because that case involved pervasive violence and coercion surrounding the picketing. *Id.* at 2541 (Scalia, J., concurring in part and dissenting in part) (citing Milk

of review, explaining that the two cases upon which the majority relied actually advocate the application of strict scrutiny.[173]

Justice Scalia further argued that even under the Court's lenient standard, the provisions allowed by the majority should not stand.[174] In questioning the state's significant interest in the free flow of traffic, Justice Scalia suggested that an injunction is proper only when it is in response to an imminent or actual violation of law and when there is a danger of repeated violation.[175] Justice Scalia maintained that the majority's allowance of an injunction to promote the free flow of traffic absent a violation of any law that furthers that interest was in error.[176] To demonstrate the absence of a violation of law, Justice Scalia pointed to evidence on the record that showed that at worst, the protestors caused a momentary delay as they cleared the way for cars entering the parking lot.[177]

Justice Scalia then claimed that even if the Court had established a significant interest, the thirty-six-foot buffer zone burdened more speech than was necessary to achieve this interest because less drastic alternatives were available.[178] Justice Scalia

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Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 294, 295, 296, 299 (1941)).

173 *Id.* The Justice narrated that the Court relied upon *Carroll* and *Claiborne Hardware* to support the validity of its new standard. *Id.* (citing *Claiborne Hardware*, 458 U.S. at 921; Carrol v. President of Princess Anne, 393 U.S. 175, 184 (1968)). Justice Scalia cited *Carroll* as requiring a First Amendment regulation to be "'couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.'" *Id.* (quoting *Carroll*, 393 U.S. at 183). Justice Scalia concluded that the above standard is equivalent to strict scrutiny and not nearly as lenient as the *Madsen* Court's new standard. *Id.*

Justice Scalia next explained that in *Claiborne Hardware*, where there was evidence of scattered violence, the Court still required "surgical precision of regulation" because while the First Amendment does not protect violent conduct, the strict scrutiny standard must still be used when the violence occurs in the setting of a constitutionally-protected activity. *Id.* at 2543 (Scalia, J., concurring in part and dissenting in part) (quoting *Claiborne Hardware*, 458 U.S at 916).

174 *Id.* at 2544 (Scalia, J., concurring in part and dissenting in part).

175 *Id.* (citations omitted).

176 *Id.* The Justice related that the original injunction was issued as a response to protestors' threats to block passage to and shut down the clinic. *Id.* (quotation omitted). Justice Scalia then argued that the Court was remiss in blindly accepting the lower court's finding that the previous injunction was violated repeatedly. *Id.* at 2545 (Scalia, J., concurring in part and dissenting in part) (quoting *id.* at 2524).

177 *Id.* at 2545-46 (Scalia, J., concurring in part and dissenting in part) (quotation omitted). Justice Scalia professed that the courts below did not find that the protestors intentionally interfered with access to the clinic and, therefore, the protestors had not violated the previous injunction. *Id.* at 2546 (Scalia, J., concurring in part and dissenting in part). Without such a finding, Justice Scalia concluded, there was no violation of a state law protecting a significant government interest. *Id.*

178 *Id.* at 2548 (Scalia, J., concurring in part and dissenting in part). The Justice asserted that there were ample alternatives: the court could have banned petitioners

noted that the Court accepted the state court's opinion that because the first injunction failed, these less drastic alternatives necessarily would fail as well.[179] Justice Scalia posited that by circumventing its own stated standard and relying on the opinion of a lower court, the Court, in essence, formulated a new standard: the remedy must "'*arguably* burden no more speech than is necessary.'"[180] The Justice commented that such a standard is even more lenient than the intermediate scrutiny adopted by the Court and inappropriate for a restraint on speech.[181]

Justice Scalia also disagreed with the Court's argument that, because the protestors would still be only ten to twelve feet from the approaching cars, the buffer zone was acceptable.[182] Justice Scalia instructed that such an alternative forum argument is a classic intermediate review of a time, place, and manner restriction.[183] Justice Scalia noted that such an argument is misplaced because the injunction at issue in this case was not directed at all citizens.[184] Thus, the Justice asserted, these petitioners have the right to protest in the same places as all other Floridians, not merely at some reasonably effective location.[185] Justice Scalia concluded that such an alternative forum argument did not excuse an impermissible prior restraint.[186]

In the Court's opinion, Chief Justice Rehnquist addressed Jus-

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from the street, limited the number of protestors, and banned the protestors from picketing on the driveways. *Id.*

179 *Id.* (quoting *id.* at 2527).

180 *Id.* at 2549 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

181 *Id.*

182 *Id.* (quotation omitted).

183 *Id.* (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Justice Scalia noted that the time, place, and manner regulation at issue in *Ward* applied to all citizens. *Id.*

184 *Id.*

185 *Id.*

186 *Id.* (quotation omitted). Justice Scalia warned that the Court's decision in this case could cause future problems. *Id.* The Justice mentioned that courts will cite the case in the future as a "free-speech injunction case," rather than as an abortion rights case. *Id.* As such, Justice Scalia remarked, the Court allowed an injunction against speech to be addressed by the intermediate scrutiny previously applied to time, place, and manner regulations. *Id.* Justice Scalia noted that the Court allowed an injunction that is not linked closely to a violation of the law because the injunction supported sound social policy. *Id.* at 2549-50 (Scalia, J., concurring in part and dissenting in part). Justice Scalia also underscored that the Court affirmed the practice of permitting trial court conclusions that allow injunctions without contemplating whether those decisions are supported by the findings of fact. *Id.* at 2550 (Scalia, J., concurring in part and dissenting in part).

tice Scalia's disagreement with the chosen standard of review.[187] The majority attacked Justice Scalia's argument that content-neutral legislation is as worthy as content-based legislation for strict scrutiny, noting that the Justice could not cite one case in which the Court applied strict scrutiny to a content-neutral injunction.[188] The Court proceeded to criticize Justice Scalia's dissent by stating that the Justice misread *NAACP v. Claiborne Hardware Co.*[189] The Court concluded that the standard of review that it adopted for this case met the "precision of regulation" requirement adopted in *Claiborne Hardware*, and rejected Justice Scalia's interpretation of the term as "surgical precision of regulation" that could be achieved only by strict scrutiny.[190] The majority also addressed Justice Scalia's argument that *Carroll v. President of Princess Anne* required stricter scrutiny than that adopted by the Court in the present case.[191] Noting that *Carroll* required that the injunction be framed in the narrowest terms necessary to accomplish the specific objective,[192] the Court did not discern a difference between the *Carroll* requirement and the standard adopted in this case.[193]

Chief Justice Rehnquist then dismantled Justice Scalia's contention that the videotape of the demonstration was the worst of the protestors' actions and did not necessitate as intrusive an injunction as the one the trial court drafted.[194] The Chief Justice argued that it was unwarranted for Justice Scalia to assume that the videotape necessarily depicted the protestors' worst conduct without any other evidence supporting such a finding.[195] Further, the Chief Justice professed that this appeal is a question of law regarding the provisions of the injunction, not a question of fact concern-

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187 *Id.* at 2525.

188 *Id.* The Court distinguished the cases that Justice Scalia cited as being prior restraint cases. *Id.* (citing *id.* at 2541 (Scalia, J., concurring in part and dissenting in part)). The Court agreed that prior restraints on free expression do give rise to a presumption against constitutionality, but indicated that this injunction does not create a prior restraint and, thus, strict scrutiny is not mandated. *Id.* (citing *id.* at 2524 n.2).

189 *Id.* at 2525-2526 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)).

190 *Id.*

191 *Id.* at 2526.

192 *Id.* (quoting Carroll v. President of Princess Anne, 393 U.S. 175, 183 (1982)).

193 *Id.* The Court failed to acknowledge any legitimate difference between the following language: "'couched in the narrowest terms that will accomplish the pinpointed objective'" and "'burden no more speech than necessary' to accomplish its objective." *Id.* (quoting *Carroll*, 393 U.S. at 183).

194 *Id.* at 2527.

195 *Id.* (quoting *id.* at 2535 (Scalia, J., concurring in part and dissenting in part)).

ing the prayer for injunctive relief.[196]

Madsen v. Women's Health Center essentially presents a conflict between the free speech right to protest and the privacy rights surrounding the abortion decision and medical counseling. The *Madsen* Court attempted to downplay the sensitive abortion issue by dealing with the case as one primarily encompassing the issue of First Amendment freedom of speech. As a result, the Court produced an inconsistent and excessively lenient approach to dealing with the buffer zone issue. This approach may lead to confusion and debate in future freedom of speech cases.

The *Madsen* Court balanced two competing rights: the fundamental right to decide whether to terminate a pregnancy, which is a significant part of a woman's right to privacy, and the freedom of speech central to the American concept of democracy.[197] Following its own established guidelines, the Court should have struck down the thirty-six-foot buffer zone, unless the Court intended to pronounce that the right to abortion is so fundamental that it permits a complete ban on speech near facilities that provide abortion services.[198]

The Supreme Court historically has given First Amendment protection to peaceful picketing, including expressive conduct that is considered offensive or coercive.[199] The right to free speech,

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196 *Id.* at 2527-28 (quotation omitted).

197 Luke T. Cadigan, Note, *Balancing the Interests: A Practical Approach to Restrictions on Expressive Conduct in the Anti-Abortion Protest Context*, 32 B.C. L. REV. 835, 896 (1991); *see also* U.S. CONST. amend. I. (setting forth freedom of speech rights); Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing that the fundamental right to privacy encompasses a woman's decision whether to carry a pregnancy to term).

198 *See* American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656, 658, 670, 672 (E.D. Pa. 1985), *remanded*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986). In *American College of Obstetricians*, the District Court for the Eastern District of Pennsylvania recognized that a woman's right to abortion was compelling enough to strike down a disclosure requirement mandating abortion facilities to disclose the names of women obtaining abortions. *Id.* The court found that there was no compelling state interest in facilitating the First Amendment rights of anti-abortion protesters to justify regulating abortion. *Id.* at 670. However, such a restriction on First Amendment rights is nowhere near the intrusiveness of a complete ban on speech within a buffer zone. *Compare id.* at 658, 670, 672 (upholding a preliminary injunction prohibiting enforcement of disclosure requirements in the abortion context) *with Madsen*, 114 S. Ct. at 2526-27 (upholding the imposition of a 36-foot buffer zone, surrounding an abortion clinic, that broadly prohibited protest activities within its scope).

199 *See* Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941) (establishing that a complete prohibition on picketing would be upheld only where violence was imminent); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (denying a ban on picketing during a labor dispute where there was no danger to life or property or invasion of privacy interests). The Court did allow a ban on

however, is not absolute and may be restricted with regard to its time, place, or manner.[200] The established rule for restricting protected speech, which the *Madsen* Court chose not to apply, is that the regulation must be content-neutral, must be narrowly tailored to meet a significant governmental objective, and must maintain alternative channels of discussion.[201] The thirty-six-foot buffer zone in *Madsen*, however, was not narrowly tailored because it restricted more speech than was necessary to achieve the stated government interest.[202] The anti-noise provision alone would have stopped the protestors from affecting the patients inside the clinic and would have reduced the stress and anxiety thrust upon patients approaching the clinic.[203]

The Supreme Court enunciated the appropriate line of reasoning previously in *Grayned v. City of Rockford*, where the Court found that an anti-noise restriction near a school was narrowly tai-

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peaceful picketing in *Frisby v. Schultz*, where the picketing took place in front of the residences of specific individuals. *See* Frisby v. Schultz, 487 U.S. 474, 477, 488 (1988) ("[B]ecause of [the ordinance's] narrow scope, the facial challenge to the ordinance must fail."). The Court permitted the prohibition after considering the importance of a person's right to privacy within her home. *Id.* at 477, 484; *see also supra* note 6 (setting forth other physical boundaries that identify privacy interests deserving of protection).

200 Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (citations omitted).

201 *Frisby*, 487 U.S. at 481 (quoting Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983)).

202 *See Madsen*, 114 S. Ct. at 2548-49 (Scalia, J., concurring in part and dissenting in part) ("[T]here are surely a number of ways to protect those interests short of banishing the entire protest demonstration from the 36-foot zone."). The real government interest at issue here is a woman's right to an abortion. *See id.* at 2549 (Scalia, J., concurring in part and dissenting in part) ("What we have decided today seems to be . . . an abortion case."). The *Madsen* majority, however, attempted to downplay the issue by listing less controversial interests, such as fostering the free circulation of traffic. *Id.* at 2526. Such interests, however, easily could have been secured through municipal ordinances rather than a total ban on speech specified in the injunction. *See id.* at 2530-31 (citations omitted) (noting that the *Madsen* injunction prohibited activities addressed in state laws prohibiting the obstruction of public streets and promoting public peace).

203 People picketing quietly or civilly engaging an approaching patient would not create any additional anxiety or stress to the patient, and protestors First Amendment rights would be less affected because protestors still would be allowed to communicate their message near the clinics to approaching patients. *See id.* at 2521 (describing physician's testimony that the noise generated by the protestors—from chanting to the use of bullhorns—particularly was harmful to the well-being of the clinic's patients). It is important to remember that the core guarantee of the First Amendment freedom of speech is the right to communicate one's message, not the right to abuse, harass, or blast a message into an unreceptive party's ears. *See supra* note 6 (describing circumstances where listeners' privacy rights are more important than speakers' First Amendment rights).

lored to meet the state's interest in promoting education.[204] The *Grayned* Court, however, noted that a buffer zone prohibiting nondisruptive picketing near a school would not be narrowly tailored because it would restrict more speech than necessary to achieve the promotion of education.[205] Following the guidelines established in *Grayned*, the *Madsen* Court similarly should have found that while the anti-noise provision was narrowly tailored, the thirty-six-foot buffer zone was unconstitutional. The only justifiable reason for upholding the thirty-six-foot buffer zone is grounded in a finding that the right to abortion necessitates a complete ban on speech near clinics.[206]

The *Madsen* Court apparently agreed that the *Grayned* approach is appropriate because the Court applied similar reasoning in striking down the 300-foot buffer zone provision prohibiting picketing near staff residences.[207] The Court found that the right to privacy within a person's home, in this case, did not compel the extensive intrusion on First Amendment speech associated with a complete ban.[208] The Court determined that less restrictive means could achieve equally the state's significant interest in maintaining the privacy within an individual's home while allowing protestors

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204 Grayned v. City of Rockford, 408 U.S. 104, 118-120 (1972). The Court balanced the two interests and determined that the promotion of education was more important than the right to express an opinion by any means. *Id.*

205 *Id.* at 119. The *Grayned* Court weighed protestors' First Amendment rights against the state's right to promote education, determining the extent to which interest right should restrict First Amendment speech. *Id.* The Court determined that alternatives such as the anti-noise ordinance could achieve the government's interest in promoting education without intruding into protected speech as far as a buffer zone around schools. *Id.* The Court has allowed complete bans on picketing only where there was evidence of prevalent violence or where an individual's right to privacy within his home was invaded. *See, e.g.*, Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) (recognizing that a listener's home is a boundary where speakers' First Amendment rights are restricted greatly); Milk Wagon Driver's Union, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941) (holding that a blanket prohibition against picketing is permissible where a threat of imminent violence is established). Clearly, neither of those two situations are present in the case at hand. *See Madsen*, 114 S. Ct. at 2521 (stating that the injunction addressed protest activities outside of an abortion clinic); *id.* at 2536 (Scalia, J., concurring in part and dissenting in part) (noting that the protests involved no violence or threats of violence).

206 *Cf.* Frisby v. Schultz, 487 U.S. 474, 485, 486 (1988) (establishing the right to privacy within one's home as possibly necessitating a complete ban on First Amendment speech near a targeted person's home). The *Madsen* Court differentiated the impermissible 300-foot buffer zone in that case from the permissible *Frisby* buffer zone by noting that the *Frisby* buffer zone prohibited picketing only near the home of a single targeted person. *Madsen*, 114 S. Ct. at 2530 (quotations omitted).

207 *See Madsen*, 114 S. Ct. at 2530.

208 *Id.*

to disseminate their message near the home.[209]

The Court's decision to allow the thirty-six-foot buffer zone is therefore inconsistent with the guidelines the Court previously has asserted. Presumably, the Court did not follow this reasoning when it addressed the thirty-six-foot buffer zone because the abortion issue is such a sensitive political issue. If the Court, however, was not willing to declare that the right to abortion has the same force as the right to privacy in one's home with regard to the prohibition of First Amendment speech, then the Court should have struck down the thirty-six-foot buffer zone based on the Court's previous decisions. Instead, the Court's holding in *Madsen* is inconsistent with prior law, confusing the question of when First Amendment speech may be prohibited completely. This will no doubt lead to future problems concerning what other kinds of facilities compel the use of speech-restricting buffer zones and exactly how far a buffer zone may extend before intruding too far upon First Amendment rights.[210]

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209 *Id.* The Court listed less restrictive alternatives: limiting the amount of noise, number of protestors, or duration of protests. *Id.*

210 The New Jersey Supreme Court displayed such confusion in *Murray v. Lawson*, where the court allowed a 100-foot buffer zone around the residence of an abortion doctor. Murray v. Lawson, 138 N.J. 206, 234-35, 649 A.2d 1253, 1268 (1994). The supreme court interpreted the United States Supreme Court's ruling in *Madsen* to stand for nothing more than the premise that a 300-foot buffer zone was too large in restricting First Amendment rights. *Id.* at 233, 649 A.2d at 1267 (citing *Madsen*, 114 S. Ct. at 2530).

This confusion will continue unless the United States Supreme Court specifically states whether the right to abortion or the right to privacy in the home specifically allows for buffer zones and, if so, under what conditions. *See Madsen*, 114 S. Ct. at 2534 (Scalia, J., concurring in part and dissenting in part) ("The entire injunction in this case departs so far from the established course of our jurisprudence . . . . But the context here is abortion."). Without a clear ruling, the courts will be inundated with questions of measurements rather than competing constitutional rights. *See, e.g., Murray*, 138 N.J. at 233, 649 A.2d at 1267.