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Tiffany Keast

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TIFFANY KEAST, ESQ.*

INTRODUCTION

Although they line up so nicely in the Bill of Rights, our constitutional rights have been seen brawling like gladiators, and not infrequently. Almost always on the scene, and frequently starting the fight, is the First Amendment. From campaign contributions to prayer in schools to political protest, free speech promises to take on anyone—privacy, public order, even the now-ubiquitous national security.

* Tiffany Keast is a 2001 graduate of University of California, Hastings College of the Law and is now a civil rights litigator in San Jose, California. The author offers special thanks to professors Mark Aaronson, Shauna Marshall, and David Levine.

In the 1990s one volatile forum for this debate was demonstration at health care clinics where abortions were performed. Demonstrators sometimes threatened, harassed, and assaulted patients, visitors, and staff, while at other times they simply handed out leaflets and asked people passing to listen for a moment. Many of those "people passing" experienced demonstration activity as a violation of their Constitutional rights to privacy, medical treatment, and practicing their livelihood. Some asked for the courts' help in protecting their rights. As the demonstrations became more dramatic, a difficult and lengthy battle began to play itself out in the courts and in the legislatures. Legislatures enacted laws and courts granted injunctions. Difficult cases retooled constitutional analysis as we sought to balance our rights.

Until *Madsen v. Women's Health Center, Inc.*, both statutes and injunctions that restricted speech faced the same level of constitutional scrutiny: intermediate scrutiny.[1] However, a series of difficult cases involving injunctions led the U.S. Supreme Court to conclude in *Madsen* that speech-restrictive injunctions should face stricter scrutiny than statutes.[2] After *Madsen* and its progeny, an injunction must "burden no more speech than necessary to serve a significant government interest."[3] Though the Court attempted to resolve the problems of conflicting rights, *Madsen* raised a whole new set of challenges: are speech-restrictive injunctions necessarily content-based? Who can be enjoined? Are injunctions really deserving of higher scrutiny than statutes? Can the reviewing court raise government interests that the government has not pled, and what function can those state interests play in the analysis? What factual findings are necessary to support a speech-restrictive injunction? In short, how is it possible for a court to craft an injunction that protects listeners, protesters, and the Constitution itself?[4]

This Paper will examine these dilemmas. Part I assesses the pre-*Madsen* state of injunctive relief in cases involving free speech.[5] Part

1. *See* 512 U.S. 753, 757 (1994) (evaluating whether an injunction requiring a buffer zone between public demonstrations and an abortion clinic "passes muster under the First Amendment").

2. *See id.* at 764-65 (justifying a more stringent review—strict scrutiny—based on the fact that judges can tailor injunctions to provide more targeted restraint of speech).

3. *Id.* at 765.

4. *See id.* at 764 (noting that injunctions are court-created solutions aimed at halting specific violations).

5. *See infra* Part I (providing a background as to how courts issue injunctions restricting speech).

II traces the rise through the lower courts of the two most important Supreme Court decisions on this point: *Madsen* and *Schenck v. Pro-Choice Network of Western New York*.[6] Part III addresses the questions raised above, as analyzed in *Madsen*, *Schenck*, and a more recent case involving statutory restrictions on speech, *Hill v. Colorado*.[7]

I. PRE-*MADSEN* ANALYSIS OF SPEECH-RESTRICTIVE INJUNCTIONS AND STATUTES

Injunctive relief is an equitable remedy that can have prohibitory and/or mandatory effects, meaning it can prohibit or require certain activities, or both.[8] Most injunctions are prohibitory, and thus forbid the enjoined party from an act that harms another.[9] While generally a matter of judicial discretion, because of the potentially sweeping coverage of injunctive relief, that discretion is not absolute and is subject to general principles governing equitable remedies.[10] Accordingly, when crafting an injunction, a court should consider such equitable issues as irreparable injury and lack of an adequate remedy at law.[11]

Injunctions that restrict free speech are subject to constitutional challenge because they put the government's weight behind that restriction: a court orders it, and state officers enforce it.[12] When an injunction will limit the enjoined party's free speech, it is subject to the same analysis as a statute or ordinance that restricts free speech.[13]

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6. *See* 519 U.S. 357 (1997) (upholding an injunction that created a fixed "buffer zone" around an abortion clinic); *infra* Part II (analyzing examples of cases where courts have issued injunctions restricting speech).

7. *See* 530 U.S. 703 (2000) (affirming the validity of a Colorado statute that had the effect of prohibiting abortion protesters from coming within eight feet of patients entering and exiting an abortion clinic); *infra* Part III (analyzing specific cases in issuance of injunctions).

8. *See* BLACK'S LAW DICTIONARY 784 (6th ed. 1990) (defining "injunction" as "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury"); *see also* BLACK'S LAW DICTIONARY 788 (7th ed. 1999) (listing types of injunctions including mandatory ("orders an affirmative act or mandates a specified course of conduct") and preventive ("designed to prevent a loss or injury in the future")).

9. *See, e.g., Madsen*, 512 U.S. at 759 (forbidding abortion protestors from taking various actions).

10. *See* State Corp. Comm'n of Kan. v. Wichita Gas Co., 290 U.S. 561, 568 (1934) (stating that courts should not grant injunctions "unless necessary to protect rights against injuries otherwise irremediable").

11. *See*, *e.g.*, *id.* at 561.

12. *See, e.g.*, *Madsen*, 512 U.S. at 770 (demonstrating the government's high level of commitment to enforcing an injunction). Where a narrower injunction has failed to provide relief, a court may extend or broaden the original injunction. *Id.*

13. *See id.* at 765 (requiring courts to test whether the injunction burdens "no

That analysis initially turns on whether the injunction or law is "content-based," *i.e.*, based on the speech's content, or "content-neutral," *i.e.*, made without reference to speech's content.[14] The type of forum (public or private) in which the speech takes place and the public and private interests the injunction is supposed to address are also important factors.[15] Depending on how the reviewing court uses that analytical framework, a pre-*Madsen* injunction or law must pass either "intermediate scrutiny," as delineated by *Ward v. Rock Against Racism*[16] or "strict scrutiny," as described in *Carey v. Brown.*[17]

A content-neutral injunction or law is one made "without reference to the content of the regulated speech."[18] Pre-*Madsen*, if a court found an injunction to be content-neutral, it had to pass "intermediate scrutiny," under which restrictions on the time, place, and manner of speech were lawful as long as they were narrowly tailored to serve a significant government interest and left open ample alternative channels of communication.[19] In contrast, if a court found an injunction to be content-based (made with reference to the speech's content), the injunction had to pass "strict scrutiny": it had to be necessary to serve a compelling state interest and narrowly drawn to achieve that interest.[20]

Once content-neutrality is assessed, the court must analyze the nature of the place where the speech occurs.[21] Courts are highly protective of demonstration in a public forum regarding matters of

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more speech than necessary to serve a significant government interest").

14. *See id.* at 762 (assessing whether the injunction in question was "content or viewpoint based").

15. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791, 796 (1989). The Supreme Court is divided on whether the *Ward* language, although the most common statement of the test, is the primary test, the only test, or only one of several tests that should be used in deciding content neutrality. *Id. See, e.g.*, *Hill*, 530 U.S. at 746 (Scalia, J., dissenting).

16. See *Ward*, 491 U.S. at 791 (scrutinizing whether an ordinance was narrowly drawn to achieve a significant government interest and left open ample alternative channels of communication).

17. *See* 447 U.S. 455, 461-62 (1980) (determining whether a statute was necessary to serve a "substantial" state interest and was finely tailored to achieve that end).

18. *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

19. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983) (noting that courts would uphold restrictions on the time, place, and manner of the speech if they were tailored narrowly to serve a significant government interest and left open ample alternative channels of communication).

20. *See Carey*, 447 U.S. at 461-62 (applying strict scrutiny to an Illinois statute).

21. *See, e.g.*, Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985) (recognizing the "Combined Federal Campaign" as a public forum under First Amendment analysis).

public concern and generally will only uphold content-neutral restrictions in such a venue.[22] In numerous cases, the Court has reiterated that streets and sidewalks are the "classic" public fora.[23]

The court then must consider the nature of the interest the state is asserting in seeking to enjoin the speakers.[24] Courts have found that protecting public safety, ensuring order,[25] providing law enforcement officials with clear instructions,[26] and protecting patients' rights to seek medical treatment[27] all constitute valid state interests.[28]

One major difficulty starts at the very base of the issue: what is "speech?" Is conduct "speech?" Can it become "speech?" Or is conduct merely the manner in which "speech" takes place? Separating "speech" from "conduct," or even protected speech from unprotected, has a long and controversial history.[29] Courts have been willing to enjoin even peaceful protest activity when it occurs in a pervasive violent context.[30] For example, in a labor dispute that gave rise to window smashing, explosions, stench bombs, vandalism, and several severe beatings, the Court enjoined all the protesters,[31] while

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22. *See id.* at 800 (declaring that the principal purpose of traditional public fora is the free exchange of ideas).

23. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 480-81 (1988) (noting that streets and sidewalks are held in trust for the use of the public).

24. *See Perry Educ. Ass'n*, 460 U.S. at 45 (noting that a court may not prohibit all communicative activity).

25. *See, e.g.*, Milk Wagon Drivers Ass'n Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 317 (1941) (noting that courts have great authority to protect against threats to public safety).

26. *See, e.g., Hill*, 530 U.S. at 750 (noting that courts seek to prevent conduct that strangles effective law enforcement).

27. *See, e.g., id.* (noting the state's interest in promoting the health and safety of its citizenry).

28. *See id.*; *see also Milk Wagon Drivers Ass'n Union of Chicago, Local 753*, 312 U.S. at 317 (recognizing several threats to public safety where states have an interest in protecting its citizenry). This is not an exhaustive list, but in the abortion context (and the cases cited in this Paper) these interests are the most frequently asserted by the government.

29. *See, e.g.,* Tinker v. Des Moines Indep. Cmty. School Dist., 393 U.S. 503, 514 (1969) (protecting a student's wearing of a black arm band in protest of the Vietnam War).

30. *See* Planned Parenthood of the Columbia/Willamette, Inc., v. Am. Coalition of Life Activists, 290 F.3d 1058, 1085 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2637 (2003) (discussing incitement to violence in the abortion context). In *Planned Parenthood*, the Ninth Circuit held that it was proper for a court to consider the context in which the statement was made when determining whether a statement constituted a "true threat." *Id.* at 1063. The court found that publishing wild-west-style "Wanted" flyers that gave pictures, names, and addresses of doctors who performed abortions comprised a "true threat," given the "whole factual context," including the recent murders of several doctors who performed abortions. *Id.*

31. *See Milk Wagon Drivers Union of Chicago, Local 753*, 312 U.S. at 292, 298-99 (issuing an injunction to protect against continuing intimidation).

noting that such an injunction would only be proper if the violence truly "colored the entire collective effort" and not merely "the conduct of some of the [defendants]."[32] The Court has also recognized that the government can regulate speech more strictly in certain locations, such as in front of a person's home[33] or at a workplace.[34]

Courts do not protect violence in the context of protest.[35] However, courts may protect speech that is considered merely "coercive,"[36] "embarrassing,"[37] or "intimidating."[38] The difficulty ensues from deciding where coercion ends and violence begins. Thus the problem in the context of abortion protest: is it violence for a protester to use tactics that inflict upon the listener the risk of medical harm?

II. MAKING THE CHANGE

A. Madsen in the Courts Below

In September 1992, a Florida state court entered a permanent injunction restricting the anti-abortion protests of several groups and individuals ("the *Madsen* defendants") at a clinic in Melbourne, Florida.[39] The injunction barred the *Madsen* defendants from

32. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982).

33. *See Frisby,* 487 U.S. at 487 (noting that such people cannot avoid the objectionable speech).

34. *See, e.g., Planned Parenthood of the Columbia/Willamette*, 290 F.3d at 1058 (finding it persuasive that several doctors had been murdered after their pictures were posted on the Internet and in other protest group publications). Whether a reproductive health facility could use this "pervasive violence" argument is as yet untested but it is certainly arguable. Abortion protest, in the 1990s at least, occurred in a nationwide context of extreme violence—doctors were assassinated in their homes, clinic staff received death threats, facilities were bombed, and physical altercations broke out at facilities. Even today, that pervasive violence still persists. In *Planned Parenthood*, the Ninth Circuit held that a protest group's posting of, among other items, Wild West style "Wanted" ads displaying physicians names, pictures, and home addresses constituted a true threat of violence, not merely advocacy of violence, and was, therefore, proscribable.

35. *See Claiborne*, 458 U.S. at 887 (choosing not to impose damages for the consequences of violent conduct).

36. *See, e.g., Planned Parenthood of the Columbia/Willamette, Inc.*, 290 F.3d at 1082 (recognizing anti-abortion placards as protected by the First Amendment).

37. *See, e.g., Claiborne Hardware Co.*, 458 U.S. at 910 (noting that the First Amendment protects speech that amounts to mere social pressure or the threat of social ostracism).

38. *See, e.g., Planned Parenthood of the Columbia/Willamette, Inc.*, 290 F.3d at 1063 (noting that the First Amendment protects posters that are intimidating).

39. *See* Operation Rescue v. Women's Health Ctr., 626 So. 2d 664, 666 (Fla. 1993).

blocking or interfering with public access to the clinic and from physically abusing persons entering or leaving the clinic.[40] Six months later, the parties who had sought the injunction moved to broaden it.[41] During the hearing on that motion, the court found that, despite the first injunction, the *Madsen* defendants continued to impede access to the clinic by congregating in the street leading to the clinic, marching in the clinic's driveways, singing, chanting, and using loudspeakers and bullhorns.[42] The court also heard evidence showing that the protests took a physical toll on persons entering the clinic, some of whom were expecting surgery and accordingly were placed at greater risk during surgical procedures because of hypertension, anxiety, and the resulting need to undergo heavier sedation.[43]

The court then held that its original injunction had not been sufficient to protect the "health, safety and rights"[44] of area women and expanded the injunction to enjoin the defendants from entering the premises and property of the clinic, interfering with access to or exit from the clinic buildings and property, entering within thirty-six feet of the clinic property line, making sounds audible from inside the clinic during surgical and recovery periods (7:30 am to noon, Monday through Saturday), displaying images observable from inside the clinic at those same times, physically approaching anyone within 300 feet of the clinic unless that person indicated a desire to communicate, touching or harassing patients and staff, and inciting others to violate the injunction.[45]

The *Madsen* defendants appealed, and the state appellate court certified the case for immediate review in the Florida Supreme Court, which upheld the injunction.[46] The court recognized that the areas in which defendants were protesting, a public street and sidewalks, were traditional public fora.[47] The court also found the injunction to be content-neutral because it regulated only "when, where, and how

40. See *id.* at 667 n.1 (indicating that the injunction barred numerous activities).

41. *See id.* at 667 (noting that the injunction did not adequately protect the health and safety of women using the abortion clinic).

42. *See id.* at 667-68 (explaining in detail the actions of the defendants that harmed the women in their use of the abortion clinic).

43. *See id.* at 668 (describing the trauma associated with "running the gauntlet" to enter the abortion clinic).

44. *Id.* at 667.

45. *See Madsen*, 512 U.S. at 759-62 (narrowing the permitted behavior in front of the abortion clinic).

46. *Operation Rescue,* 626 So. 2d at 682.

47. *See id.* at 671.

Operation Rescue may speak, not what it may say. The restrictions make no mention whatsoever of abortion or any other political or social issue . . . ."[48] The court then held that the injunction's provisions were reasonable to protect significant government interests in ensuring public safety, the free flow of traffic, and a woman's right to seek medical services.[49]

Shortly before the Florida Supreme Court ruled, the Eleventh Circuit heard a separate challenge to the same injunction and struck the injunction down, finding that it was indeed content-based and therefore subject to strict scrutiny.[50] The Eleventh Circuit noted that a 1988 Ninth Circuit opinion upheld a similar injunction, which limited demonstrating, distributing literature, shouting, screaming, chanting, or yelling by anti-abortion organizations and "those acting in concert with them."[51] The Eleventh Circuit understood the Ninth Circuit's reasoning to be that the injunction was content-neutral because it did not mention viewpoint, but only limited the manner of expression.[52] The court found that reasoning "not at all persuasive . . . [An injunction like the one at bar] is no more viewpoint-neutral than one restricting the speech of 'the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp, and all persons acting in concert or participation with them or on their behalf.'"[53]

The U.S. Supreme Court granted certiorari in *Madsen* to resolve the conflict between the Florida Supreme Court and the Eleventh Circuit Court of Appeals on whether the injunction was content-neutral or content-based.[54] The Court ruled in *Madsen* that the injunction was in fact content-neutral, and that content-neutral, speech-restrictive injunctions should be judged by a new standard: they must burden no more speech than necessary to serve a significant government interest.[55]

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48. *Id.*

49. *See id.* at 672.

50. *See* Cheffer v. McGregor, 6 F.3d 705, 711 (11th Cir. 1993) (requiring a compelling state interest that is narrowly drawn).

51. *See id.* at 710 n.10 (quoting *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988)).

52. *See id.* (observing that the Ninth Circuit's decision focused neither on the advocates' viewpoints nor the "general issues raised at their demonstrations").

53. *Id.* at 710 n.10, 711.

54. *See Madsen*, 512 U.S. at 762.

55. *See id.* at 776 (upholding the Florida Supreme Court's noise restrictions and "buffer zones" at clinic entrances but striking as unconstitutional the "buffer zone" that extended to private property abutting abortion clinics, the "images observable" provision, the "300-foot no approach zone," and the "300-foot no-approach zone

B. Schenck in the Courts Below

While *Madsen* worked its way through the courts, another case was traveling a similar path in New York. In 1990, a group of anti-abortion activists ("*Schenck* respondents") began planning large-scale blockades of a number of clinic facilities in that state.[56] Pro-Choice Network of Western New York asked the district court for a temporary restraining order ("TRO") prohibiting the respondents' planned blockades.[57] That order was granted on September 27, 1990.[58] The district court found that in both "large-scale blockades" and in smaller groups, the *Schenck* respondents consistently attempted to stop or impede clinic operations by trespassing on the property and in the clinic buildings themselves, crowding around cars, and congregating in driveways and doorways, as well as approaching and speaking with women entering the clinic, sometimes grabbing and yelling at them.[59]

The TRO barred the respondents from physically blockading the clinics, physically abusing or tortiously harassing anyone entering or leaving the clinics, or "demonstrating within fifteen feet of any person" entering or leaving the clinics, with the exception that two "sidewalk counselors" at a time could enter this "buffer zone" to have a "conversation of a non-threatening nature" with persons entering or leaving the clinics, but must "cease and desist" their activity once the person indicated she did not wish to be "counseled."[60]

Five civil contempt findings later, the TRO was converted into a permanent injunction.[61] There were several significant changes between the TRO and the injunction. The injunction expanded the fifteen-foot buffer zone around persons entering or leaving the clinic to include "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveways entrances" of the clinics or "within fifteen feet of any person or vehicle seeking access to or leaving" the clinics.[62] In addition, the "two sidewalk counselors" permitted by the TRO to enter the buffer zone were required by the injunction to

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around [staff] residences"); *infra* Part III.A.

56. Pro-Choice Network of Western New York v. Project Rescue Western New York, 799 F. Supp. 1417, 1423 (W.D.N.Y. 1992).

57. *Id.* at 1417.

58. *Id.* at 1422.

59. *Id.* at 1423-27.

60. *Id.* at 1440-41.

61. Pro-Choice Network of Western New York v. Project Rescue Western New York, 828 F. Supp. 1018, 1032 (W.D.N.Y. 1993).

62. *See Schenck*, 519 U.S. at 367 (referring to these buffer zones respectively as "fixed buffer zones" and "floating buffer zones").

cease and desist and then move outside the fifteen-foot floating buffer zone around persons entering or leaving the clinic.[63] The *Schenck* respondents challenged the so-called fixed and floating buffer zones and the cease and desist requirement.[64]

In analyzing the respondents' First Amendment challenge, the district court found that the injunction was content-neutral because it restricted only the "volume, location, timing and harassing and intimidating nature of [respondents'] expressive speech."[65] The district court cited three significant government interests justifying the restriction on free speech: public safety; ensuring that abortions are performed safely; and ensuring that a woman's constitutional right to travel and to choose to abort a pregnancy were not sacrificed in the interest of respondents' First Amendment rights.[66]

Two respondents sought review in the Court of Appeals for the Second Circuit.[67] While the appeal was pending, the Supreme Court decided *Madsen*.[68] Applying the new *Madsen* test, the Court of Appeals reversed the district court, but on rehearing en banc, the Court of Appeals affirmed the district court decision and upheld the injunction, with the majority of the judges closely tracking the district court's reasoning.[69] Two respondents appealed to the U.S. Supreme Court, which granted *certiorari*.[70]

III. THE BIG ISSUES AND THE NEW TEST: THE U.S. SUPREME COURT'S RULINGS IN *MADSEN*, *SCHENCK*, AND *HILL*

A. Are the Injunctions Content-Neutral?

On the threshold issue of content-neutrality, the *Madsen* defendants argued that the state's injunction was content-based because it restricted only the speech of anti-abortion protesters.[71] Writing for the majority, Chief Justice Rehnquist relied on *Ward* and noted that the test for content-neutrality is whether the government has adopted a regulation of speech "without reference" to the content

63. *Id.* at 369.

64. *Id.* at 371.

65. *Pro-Choice Network of Western New York*, 799 F. Supp. at 1433.

66. *Id.*

67. Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994).

68. 512 U.S. at 753.

69. *Id.*; Pro-Choice Network of Western New York v. Schenck, 67 F.3d 377, 393 (2d Cir. 1995).

70. Schenck v. Pro-Choice Network of Western New York, 516 U.S. 1170 (1996).

71. *Madsen,* 512 U.S. at 762.

of the speech.[72] Rehnquist reasoned that any injunction necessarily applies only to a particular person or group and regulates the activities of that group: "[t]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."[73] Rehnquist found that the state enacted the broader injunction not because of the defendants' message, but because, in communicating that message, they repeatedly violated the state court's original order.[74] He further found that the injunction's lack of prohibitions against pro-abortion demonstrators was explained by the lack of violations by any such activists at the Melbourne clinic; had pro-abortion activists violated the first order (in which case, oddly enough, they would necessarily be "acting in concert with" the anti-abortion protesters), presumably they would have been enjoined under the expanded order.[75]

In dissent, Justice Scalia argued that the injunction was indeed content-based.[76] Scalia found that if, as the district court and the majority argued,[77] the injunction was designed to remedy past violations and not to suppress a particular viewpoint, the injunction's coverage of others acting "in concert with" the named defendants would only bind those who "did certain things."[78] Instead, Scalia found, the injunctions bound those who *said* certain things: the injunctions were "tailored to restrain persons distinguished, not by proscribable conduct, but by proscribable views."[79] Scalia quoted the record several times, including the trial judge's statements that "in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic,"[80] thereby finding that "all those who wish to express the same views as the named defendants are deemed to be 'acting in concert or participation.'"[81]

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72. *Id.* at 763.

73. *Id.*

74. *See id.*

75. *Id.*

76. *See id.* at 795 (arguing that the injunction was tailored to restrict an entire point of view, rather than particular conduct).

77. *See id.* at 762 (holding that as such, strict scrutiny should not be employed).

78. *Id.* at 796-97.

79. *See Id.*

80. *Id.* at 796.

81. *Id.* at 795. After several persons were arrested for walking within the thirty-six-foot buffer zone, the court stated at a hearing for those individuals, "I understand . . . [abortion-rights supporters] were also in the area . . . the Injunction did not pertain to [them] because the word in concert with means in concert with those who had taken a certain position." One defendant asked the court if, when the injunction was

Scalia found this to be the very essence of a content-based restriction and a prior restraint: an infringement upon an individual's expressive conduct before the individual's conduct has been found unlawful.[82] Scalia believed that while a speech-restrictive injunction might not be designed to target a particular viewpoint, it easily could be, and it would almost always have a greater impact on one side of a debate.[83] "The proceedings before us here illustrate well enough what I mean. The injunction was sought against a single-issue advocacy group by persons and organizations with a business or social interest in suppressing that group's point of view."[84]

Using the same reasoning as the *Madsen* defendants, the *Schenck* defendants argued the injunction against them was also content-based. Again writing for the majority, Rehnquist dismissed this contention.[85] Rehnquist found that the *Schenck* injunction was content-neutral for the same reason the *Madsen* injunction had been—it was based not on the content of the speech, but on the defendants' past unlawful conduct.[86] In his dissent, Scalia did not address this issue. Most courts appear to regard this as a settled issue; numerous cases have held that injunctions like those at issue in *Madsen* and *Schenck* are content-neutral.[87]

Feeling freed up to examine the statutory field, the Court took another crack at content-neutrality in *Hill v. Colorado*.[88] Colorado had enacted a state law making it a misdemeanor to "knowingly approach another person within eight feet of such person, unless

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issued, it was intended to apply only to anti-abortion demonstrators. The court responded, "In effect, yes." *Id.* at 795-96.

82. *See id.* at 797 (maintaining that such a restraint threatened the foundation of First Amendment rights).

83. *Id.* at 793.

84. *Id.* While the point may be valid, it ignores the trial court's errors in designing the injunction. A poorly drawn, poorly interpreted, or poorly enforced injunction is not necessarily content-based, even if its effect is felt more strongly by one side. Neutral drafting and neutral enforcement should be the goal and would not be difficult—if so instructed, police can easily arrest anyone trespassing in the buffer zone, regardless of that person's viewpoint or message.

85. *See Schenck*, 519 U.S. at 384 (arguing protesters are being silenced due to a difference of opinion with patients of the clinics).

86. *See id.* at 384-85 (pointing to past arrests for harassment).

87. *See, e.g.*, National Organization for Women v. Operation Rescue, 37 F.3d 646 (D.C. Cir. 1994) (using the test in *Madsen* to uphold a permanent injunction prohibiting activists from obstructing access to abortion clinic facilities); Lucero v. Trosch, 121 F.3d 591 (11th Cir. 1997); United States v. Scott, 187 F.3d 282 (2nd Cir. 1999); United States v. Mahoney, 247 F.3d 279 (D.C. Cir. 2001); New York v. Spitzer, 273 F.3d 184 (2nd Cir. 2001); *see also* United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996) (holding that the Freedom of Access to Clinic Entrances Act is content-neutral).

88. 530 U.S. 703 (2000).

such other person consents, for the purpose of . . . engaging in oral protest, education, or counseling . . . within a radius of one hundred feet from the entrance door to a health care facility."[89] A group of anti-abortion activists sued, arguing that the statute was unconstitutional on its face.[90]

The Colorado Court of Appeals upheld the statute.[91] The court found that the statute was supported by significant government interests in ensuring the safety and unobstructed access to patients and staff entering and leaving health care facilities.[92] Relying on the U.S. Supreme Court's analysis in *Madsen*, the court reasoned that the statute was content-neutral because "the specific viewpoint of any person who protests at a health care facility is not relevant to a determination whether a violation of the statute has occurred."[93] The statute also did not burden more speech than reasonably necessary because protesters could still communicate with their targets at a distance of eight feet: "Indeed, the restriction merely is directed at depriving protesters of the opportunity to intimidate or make other physical contact with the patients or staff."[94]

The *Hill* protesters also argued that the statute was unconstitutionally vague because the meaning of "knowingly approach," "consent," "protests," and "counseling and education" was unclear.[95] The court found it sufficient to give the legal definition of "knowingly" and to finish up by applying the "common sense meaning" of the remaining terms (with assistance from Webster's Third New International Dictionary).[96]

In the Colorado Supreme Court, Justice Scott threw a wrench into the relevant jurisprudence, opening his majority opinion by stating that the case required a determination of "whether a legislative enactment designed to protect the privacy rights of citizens . . . unduly burdens the First Amendment rights of other citizens."[97] While citing

89. *Id.* at 708.

90. *See id.* (contending that the injunction created a chill on their First Amendment rights).

91. *See id.* at 711.

92. Hill v. City of Lakewood, 911 P.2d 670, 674 (Colo. Ct. App. 1995) (upholding a statute requiring protesters to stay at least eight feet away from patients of a health care facility).

93. *Id.* at 673.

94. *Id.* at 674.

95. *Id.*

96. *Id.*

97. *Hill v. Thomas*, 973 P.2d 1246, 1247-48 (Colo. 1999). The district court had also discussed a "right to be let alone," but the appellate court ignored this thorny problem. *Id.* at 1259.

the statute's stated purpose of protecting a citizen's right to seek and obtain medical counseling and treatment,[98] Justice Scott placed this right under the broader "right to privacy" first mentioned by Justice Brandeis in an 1890 article and used as the basis for the decision in *Roe v. Wade*.[99] Justice Scott gave a fairly in-depth treatment of the right to privacy but he appeared wary of relying on it, instead basing his opinion on the state interest in protecting a citizen's "health and safety."[100]

Using *Ward* as its map, the Colorado Supreme Court found the statute content-neutral because it "serve[d] purposes unrelated to the content of expression."[101] The Court then held the statute was constitutional because it was narrowly tailored.[102] Justice Scott noted that in *Ward*, the U.S. Supreme Court emphasized that to be narrowly tailored, a statute need not be "'the least intrusive means' of achieving the desired end."[103] The Court found that the statute left open ample alternative channels of communication because the protesters could still speak, they just had to speak from eight feet away; there was nothing in the statute that would prohibit protesters from being seen and heard by their target audience.[104]

The *Hill* protesters appealed to the U.S. Supreme Court. Writing for the majority, Justice Stevens, under the *Ward* analysis, tested the statute by whether "the government ha[d] adopted a regulation of speech because of disagreement with the message it convey[ed]."[105] Stevens found that the statute at issue was content-neutral under the *Ward* test for three reasons. First, it was not a "regulation of speech."[106] Rather, it [was] a regulation of the places where some speech may occur.[107] Second, the regulation was not adopted

98. *Id.* at 1253.

99. *Id.*

100. *Id.* at 1251. The Florida Supreme Court's decision in *Madsen* was a precursor for this logic; the court used the government's interest in protecting residential privacy in *Frisby* and found that medical privacy is an analogous government interest. *Operation Rescue,* 626 So. 2d at 672. Similarly, the U.S. Supreme Court's decision in *Madsen* cites *Roe v. Wade* for the proposition that protection of the freedom to seek lawful medical counseling and services is a legitimate government interest. *Madsen,* 512 U.S. at 767-68.

101. *Hill v. Thomas*, 973 P.2d at 1256 (quoting *Ward*, 491 U.S. at 791).

102. *Id.* at 1257.

103. *Id.* at 1256.

104. *Id.* at 1259.

105. *Hill v. Colorado,* 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791).

106. *Id.* at 719.

107. *Id.*

"because of disagreement with the message [the speech] conveys."[108] Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.[109]

Petitioners argued that since the statute would only cover those engaged in "protest, education, or counseling," enforcing it would require analyzing the speech involved to assess whether it fit those categories, thus making the statute content-based.[110] Stevens noted that the kind of conduct that is the focus of the statute could in all probability be identified as that conduct without reference to the actual message being conveyed—if a person approaches someone with a leaflet, they are probably counseling, educating, or protesting.[111]

Stevens also noted that examining the content of a message in order to determine the speaker's purpose is not unusual, as is the case in assessing "fighting words," criminal threats, or a contractual offer.[112] Further, Stevens argued, the "theoretical" examination necessary would be cursory, and it would be supported by precedents that barred "picketing" and allowed examination of the speaker's behavior to analyze whether she was indeed "picketing."[113]

Stevens saw the statute as "a minor place restriction on an extremely broad category of communications with unwilling listeners."[114]

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108. *Id.*

109. *Id.* at 719-20.

110. *Id.* at 720.

111. *Id.* at 721.

112. *Id.*

113. *Id.* at 722.

114. *See id.* at 723 (explaining that abortion protestors, like used car salesmen and fundraisers, are subject to the same eight foot restriction when presenting their message to unwilling listeners). In several places in his argument, Stevens noted the difference between "willing" and "unwilling" listeners. *See, e.g., id.* at 715-16 (stating that the statute in question deals only with the interests of unwilling listeners). Stevens relied on earlier cases to remind us that a "captive audience," with little or no opportunity to avoid the offensive speech, has slightly more rights, and the speaker to the captive audience has slightly less. *See id.* at 718 (referring to a balancing test of First Amendment rights of speakers and privacy rights of unwilling listeners (citing *Erznoznik v. Jacksonwille*, 422 U.S. 205, 209 (1975))). Scalia wrote in dissent that he failed to see how someone walking quickly past a demonstrator on a public sidewalk was a captive audience, but this ignores the reality of the situations that have given rise to the need for these kinds of injunctions and statutes. *See id.* at 753 n.3 (Scalia, J., dissenting). Scalia's point (that if protecting access is the real goal, the statute's specific prohibition of blocking or impeding access is sufficient to reach it) is a good one, but it ignores the state's interest in protecting a patient's health, which can be jeopardized by a particularly distressing, face to face encounter with someone calling them a murderer, for example. *See id.* at 755. It also ignores the reality, for many reasons beyond the scope of this paper, that women and men may perceive what constitutes "blocking" or "impeding" differently. A small woman may find the

Souter concurred and added that restrictions solely upon the "circumstances of its delivery" were suitable for testing under *Ward* unless they effectively removed a subject or viewpoint from discourse, which they did not in this case.[115]

Dissenting again, Scalia (presumably by accident) apparently begins to give some credence to the idea that abortion is different.[116] When assessing the rights of those seeking medical services, Scalia examines only the text of the statute and refuses to speculate about the effect of the text on the reality of abortion protest.[117] But, when assessing the rights of those demonstrating at medical facilities, Scalia repeatedly decries the majority's practice of *ignoring* reality:[118] whatever a statute's text may say, and however content neutral it may appear, "[w]hen applied, as it is [in *Hill*], at the entrance to medical facilities, it is a means of impeding speech against abortion."[119]

To Scalia, then, even an injunction that purports to cover everyone (by failing to be more specific) will really only cover some people. So, how about a statute that does attempt to be more specific? Finding validity in both the text of the statute and the reality in which it was enacted, *CF&I Steel v. United Steel Workers of America* assesses content-neutrality by examining both.[120] Colorado's Labor Peace Act

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"dogging" referred to by Stevens to be a block or an impediment when it is performed by a person larger than herself, especially a man. *See id.* at 718. Kennedy argued in concurrence that a statute becomes unconstitutionally content-based because of its application to the specific locations where it occurs. *See id.* at 767 (Kennedy, J., concurring). Stevens replied that "[a] statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would also not be 'content based' even if it were enacted by a racist legislature that hated civil rights protesters." *Id.* at 724.

115. *Id.* at 735-36 (referring to the government's ability to make restrictions on the time, place, or manner of protected speech). Souter goes on to make a pleasantly concise statement about the content-neutrality problem at issue in this case: "There is always a correlation with subject and viewpoint when the law regulates conduct that has become the signature of one side of a controversy. But that does not mean that every regulation of such distinctive behavior is content based as First Amendment doctrine employs that term." *Id.* at 737.

116. *See id.* at 742 (Scalia, J., dissenting) (suggesting that the Court would have decided that the regulation was content-based had the issue been anti-war rather than anti-abortion protests). Scalia charges that the Court's jurisprudence shifts when it considers the abortion issue. *Id.*

117. *See id.* at 749 (comparing the interest that the State of Colorado sought to protect as stated in the text of the statute with the interest that the Court announced it was protecting, which was not derived from the text of the statute).

118. *See, e.g., id.* at 756 (asserting that the Court displays a "willful ignorance" of the kinds of communication the statute restricts).

119. *Id.* at 744 (supporting his position that the statute is content-based). In a separate dissent, Kennedy follows a similar "reality based" argument and finds that the statute's coverage of only the entrances to "medical facilities" makes it, in effect, content-based. *Id.* at 767 (Kennedy, J., dissenting).

120. *See* 23 P.3d 1197, 1202 (Colo. 2001) (determining that the Colorado statute

prohibited picketing in residential areas about labor disputes.[121] The lower court issued an injunction barring the defendants from residential picketing and held that the defendants had violated the Act.[122] The Supreme Court of Colorado held that the statute was content-based because, by its own terms, the statute only barred speech concerning labor disputes.[123]

Between *CF&I Steel* and *Hill*, it is clear that adherence to Scalia's analysis of content-neutrality would likely render every speech-restrictive statute and injunction content-based, as Rehnquist noted in *Madsen*.[124] An injunction is always ordered in response to the activities of an individual or group; under Scalia's analysis, this would render it necessarily content-based and would also render it void for over-inclusiveness.[125] But a court could also not order an injunction that specifically identifies that group by referring to the viewpoint or content the group shares because such a reference would make the injunction facially invalid according to *CF&I Steel*.[126] Under the logic of *CF&I Steel* and *Hill*, laws barring solicitation of campaign contributions outside a polling place would be necessarily content-based and would have to pass strict scrutiny.[127] Presumably, Scalia

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was content-based because it distinguished between lawful and unlawful picketing based on the subject matter of the picket). The court's reference to context seems to suggest that it is proper to look beyond the statute's terms in analyzing content-neutrality, but the court did not explain what it meant by "context" and specifically stated that the statute was "facially invalid." *Id.* Why a reviewing court would need to examine the "context" if the statute is invalid on its face is unclear.

121. 3 COLO. REV. STAT. § 8-3-108(2)(a) (2000).

> It is an unfair labor practice for an employee, individually or in concert with others, to . . . coerce or intimidate an employee in the enjoyment of his legal rights . . . or to intimidate his family or any member thereof, picket his domicile, or injure the person or property of such employee or his family or of any member thereof. . . .

§ 8-3-108(2)(a).

122. *See CF&I Steel,* 23 P.3d at 1198 (finding, however, that the union had not authorized or condoned the acts of the individual picketers).

123. *Id.* at 1202 (rejecting the argument that Colorado common law gave courts the power to regulate all residential picketing).

124. *See Madsen*, 512 U.S. at 762 (explaining that all injunctions enjoin specific groups based on past acts which may naturally correspond to the group's message).

125. *See id.* at 794 (Scalia, J., dissenting) (claiming that the true vice of content-based legislation is that it "lends itself to" rather than is "always" used to stifle a specific group's First Amendment rights).

126. *See CF&I Steel,* 23 P.3d at 1201-02 (deciding that an injunction was content-based and therefore facially invalid because it enjoined only picketers involved in labor disputes).

127. *Cf. id.* at 1202 (holding the injunction content-based because it only prohibited speech related to labor disputes); *Hill*, 530 U.S. at 713 n.19 (affirming that the statute was content-neutral because it only restricted time, place, and manner of speech).

approved of the pre-*Madsen* tiered analysis; his opinions in this line of cases are unclear as to whether he would advocate for the outcome demanded by the logic of *Hill* and *CF&I Steel*.

B. Who Can be Enjoined?

Responding to Scalia's argument in *Madsen* that the injunction was content-based, Rehnquist, writing for the majority, states that if seeking speech restrictive injunctions against particular issue groups makes the injunctions content-based, then it would be virtually impossible to craft an injunction that was content-neutral.[128] Necessarily, then, it would also be virtually impossible to remedy the unlawful conduct of protesters in an ongoing, fluid protest such as that at a particular clinic.[129] Under Scalia's reasoning, a person seeking an injunction to monitor the conduct of protesters would be required to return to the court each time a new individual protester appeared on the scene.[130] Rehnquist's argument is stronger, but there is certainly a difficulty; it is somewhat troubling (and, some courts would undoubtably hold, unlawful) to hold a person to the standards of a court order of which she has no notice and in which she was not named.[131]

For example, a New Jersey injunction restricted the protest activities of an organization called "Helpers" and all those acting in concert with it.[132] Based on repeated violations of the order by a protester

128. *See Madsen*, 512 U.S. at 762 (explaining that an injunction against a specific group is based on that group's past actions in a real dispute). Scalia might think this a good result; it is unclear why Rehnquist thinks it a bad one.

129. *See id.* at 763 (suggesting that it is the conduct of individual protestors at a specific place, not the group's views, that violate an injunction). Because the conduct is what is enjoined by the injunction, not the views of the protestors, the court would be unable to issue an injunction against recurring unlawful conduct at a specific place because it would be construed as content-based. *Id.*

130. *See* Horizon Health Ctr. v. Felicissimo, 723 A.2d 611, 613 (N.J. Super. Ct. App. Div. 1999) (asserting that injunctions would be rendered ineffective if groups and individuals could avoid the injunction by sending new groups and individuals to the site).

131. *See, e.g.,* Planned Parenthood Golden Gate v. Garibaldi, 132 Cal. Rptr. 2d 46, 57 (Cal. Ct. App. 2003) (holding that notice is a requirement to include an individual within the ambit of an injunction in which he is not named).

132. *See Horizon Health Ctr.*, 723 A.2d at 611, 613 (noting that membership in Helpers was not required for the injunction to apply). The New Jersey appellate court overturned the lower court's refusal to expand the injunction. *Id.* at 612. The court found that "acting in concert or participation with" the enjoined parties meant that the defendant knowingly violated the injunction's provisions. *Id.* Therefore, those participating with the parties to the injunction, with knowledge of the injunction's existence, were bound by the injunction as well. *Id.* at 613. The court found that to be effective, the injunction had to be construed this way. *Id.* Adopting the lower court's interpretation would render the injunction useless because protesters could not be restrained if the clinic could not meet the heavy burden of

who did not belong to Helpers, the clinic asked the court to broaden the injunction.[133] The court refused to do so, holding that to broaden the injunction against Helpers and those acting in concert with it required plaintiffs to show the protester either belonged to Helpers or was directed or assisted by its members.[134]

Can this problem be solved? In 1996, a California state court enjoined an organization, one named respondent, and "all persons acting in concert or participation with them, or either of them, and all persons with actual notice of this Judgment" from various abortion protest-related activities.[135] In 2001, Planned Parenthood sought declaratory relief to apply the injunction to protesters not named in the original suit.[136] Planned Parenthood alleged that, while not named in the original injunction, the respondents had been served with a copy of the injunction and therefore were bound by it.[137] Planned Parenthood's motion for summary judgment was granted.[138]

The First District appellate court overturned the ruling.[139] The appellate court found the notice provision was unconstitutional because it sought to apply the injunction against anyone, not simply those who acted "in concert with" the named defendants.[140] The court found that an injunction could only be enforced against the person to whom it was directed, against a class of persons to which that person belongs, or against someone aiding, abetting, or acting on that person's behalf.[141] The court remanded the case for findings of

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proving membership or direction by Helpers. *Id.* Each individual protester would have to have an injunction specifically directed against her. *Id.* (stating that the purpose of the injunction was to protect Horizon and its patients and not to punish members of Helpers).

133. *See id.* at 612 (asking the court to include in the injunction "and/or persons and organizations affiliated, acting in concert or participation with, or on behalf" of Helpers).

134. *See id.* (reasoning that to do otherwise would violate the due process rights of alleged, non-member violators).

135. *See* Planned Parenthood Ass'n. v. Operation Rescue, 57 Cal. Rptr. 2d 736, 744 (Cal. Ct. App. 1996) (affirming the fifteen-foot buffer zone at the clinic but reversing the 250 feet zone at the doctor's residence and the ban from approaching workers and patients due to the availability of a less restrictive approach).

136. *See Garibaldi*, 132 Cal. Rptr. at 50 (alleging that the defendants acted in concert and participation with Operation Rescue).

137. *See id.* at 50-51 (arguing that actual notice of the injunction renders the defendants bound by the injunction).

138. *See id.* at 51 (finding the defendants bound by the injunction as a matter of law).

139. *See id.* at 57 (reviewing the lower court's decision *de novo*).

140. *See id.* at 53-54 (stating that to apply an injunction to all anti-abortion protestors, rather than basing it on an individual's relationship to the enjoined party, would render the injunction content-based and contrary to the First Amendment).

141. *See id.* at 52 (holding that "[p]ersonal jurisdiction and notice are not enough

fact on whether other demonstrators did in fact act "in concert with" the named defendants.[142]

The problem, of course, is that once a particular protester has been specifically enjoined by name or by membership in an enjoined organization, he may simply move on to another facility and be replaced by another protester, who is free to act as she wants.[143] The petitioners will need to go back to court for each protester and prove that protester's link to the enjoined parties.[144] Should petitioners even have the time and resources for this, they will find it a further challenge to prove that an injunction is even required: they would have to come up with some kind of evidence to prove that the individual protester would violate the party's rights again.[145]

It would seem that, if Scalia's argument were accepted, any number of aggrieved parties could lose their right to seek redress in the courts, and their only recourse would be to organize themselves into a group large enough to encourage legislators to act. We saw the result of this approach in *Hill* and *CF&I Steel*. Even if such a legislative enactment could pass constitutional muster, it still would likely not address the problem that the party seeking the injunction is being injured right now and will continue to suffer injury until the legislative body acts. Even were they successful, they would still have no private right of action under statutes such as the federal Freedom of Access to Clinic Entrances Act, and they would have to rely on government enforcers to protect them.[146]

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to subject a person to the restraint of an injunction"). "The *order* must be directed against that person, either by naming that person as an individual or by designating a class of persons to which that person belongs." *Id.* (emphasis in original).

142. *See id.* at 57 (noting that although actual notice is not sufficient, it is still required).

143. *But see Madsen,* 512 U.S. at 802-03 (Scalia, J., concurring in judgment in part and dissenting in part).

> [T]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected . . . . [M]ere association with [a] group—absent a specific intent to further an unlawful aim embraced by that group—is an insufficient predicate for liability.

Id. (quoting *Claiborne*, 458 U.S. at 925-26).

144. *See, e.g., Garibaldi*, 132 Cal. Rptr. at 57 (requiring proof of participation with the named party and actual notice of the injunction).

145. *See* U.S. v. W. T. Grant Co., 345 U.S. 629, 633 (1953) (mandating proof of a "cognizable danger of recurrent violation" for the issuance of an injunction).

146. *See, e.g.,* 18 U.S.C. § 248(c)(1)(A) (1994) (providing a right of action to individuals "obtaining or seeking to obtain" services in a facility). This requirement eliminates the ability to sue after the individual received services at the facility. *Id.*

C. Should Speech-Restrictive Injunctions Receive Stricter Scrutiny than Speech-Restrictive Laws?

After determining that the *Madsen* injunction was content-neutral, Rehnquist garnered only four additional votes for his further reasoning that an injunctive order should be judged by a slightly stricter standard than an ordinance.[147] Rehnquist found that injunctions carry greater risks of censorship and discriminatory application.[148] His rationale for this finding is not clearly set out, but presumably, Rehnquist would argue that injunctions pose greater risks to free speech because they are targeted toward particular entities and particular speech, and they are brought by particular entities who feel they have been injured.[149] However, this danger would seem to be (and is, to Stevens) mitigated by Rehnquist's next observation: that injunctions are usually designed to punish for a violation of a prior law or court order.[150] In contrast, a generally applicable ordinance simply represents a legislative choice about promoting social interests.[151]

In his partial concurrence, Scalia agreed with the outcome, but not the reasoning: rather than articulating a new standard for content-neutral injunctions, Scalia argued, the Court should simply find that injunctions like the one at bar are content-based and judge them under strict scrutiny, thus avoiding the need for an entirely new tier of scrutiny. [152] Concurring in part and dissenting in part, Justice Stevens

147. *See Madsen*, 512 U.S. at 764 (concurring Justices included O'Connor, Blackmun, Ginsburg, and Souter).

148. *See id.* (touching upon how injunctions lend themselves more to arbitrary and unreasonable government than do statutes).

149. *See id.* (stating that "[t]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally") (quoting *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949)).

150. *See id.* at 765 (conceding that injunctions have some advantages over statutes). This is troublesome language because in the theoretical case, no one should be "punished" for exercising her constitutional rights. *Compare id.* at 794 n.1 (Scalia, J., concurring in part and dissenting in part) (stating that restricting First Amendment rights due to prior misconduct is an unprecedented form of punishment), *with id.* at 778 n.2 (Stevens, J., concurring in part and dissenting in part) (arguing that deprivation of liberty is a "remedy" for prior misconduct and not a form of punishment). The concept sounds less draconian in the case of *Garibaldi*, in which the court asserts that the defendants are being enjoined because they abused their rights previously. 132 Cal. Rptr. 2d at 53.

151. *See Madsen*, 512 U.S. at 764 (concluding that the ordinance poses more of a danger to First Amendment rights).

152. *See id.* at 791-92 (claiming that the difference between intermediate scrutiny

concurred with the holding that the injunction was content-neutral.[153] He also agreed that injunctions should be subject to a different standard of First Amendment scrutiny than should ordinances.[154] However, Stevens argued that injunctions should be scrutinized more leniently, not more strictly.[155]

Stevens found that there were several significant differences between statutes and injunctions that justified the use of a different standard. First, while statutes were imposed on large groups of people, injunctions applied "solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty—the normal consequence of illegal activity."[156] Second, under equitable principles an injunction must be carefully crafted by the judiciary to address the specific activities that justify it; Stevens argued that a more lenient standard should therefore be used in order to give deference to the issuing court's more intimate knowledge of those specific facts.[157]

Scalia disagreed with using a more lenient standard because of deference to the trial court, but he indicated that an injunction does necessitate different treatment than a law.[158] In his dissent he stated, "the judicial creation of a [zone] in which only a particular group, *which had broken no law*, cannot exercise its rights of speech" is at odds with the First Amendment and the Court's First Amendment jurisprudence (emphasis added).[159] While the differentiation between law-breakers and those who have not broken any law is

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and the new test created by the Court was "frankly too subtle for me to describe"). Scalia deemed the new standard "intermediate-intermediate scrutiny." *Id.* at 791.

153. *See id.* at 782 (Stevens, J., concurring in part and dissenting in part) (joining part II of the majority opinion).

154. *See id.* at 778 (framing the issue as comparing "generally applicable legislation" as "judicial remedies for proven wrongdoing").

155. *See id.* (basing this conclusion on a judge's ability to sanction a repeat offender by way of injunction the way a legislator could not sanction the community at large by statute).

156. *Id.* (concluding that while an ordinance restricting protest may be unconstitutional, an injunction for the same acts may be valid). The *Garibaldi* court also relied on this reasoning: "Indeed, [an injunction] may 'deprive the enjoined parties of rights others enjoy precisely because the enjoined parties have abused those rights in the past.'" 132 Cal. Rptr. 2d at 52 (quoting *People v. Conrad*, 64 Cal. Rptr. 2d 248, 250 (Cal. Ct. App. 1997)).

157. *See Madsen,* 512 U.S. at 779 (applying the facts of the case where the trial judge heard three days of testimony before rendering a decision).

158. *See id.* at 793 (Scalia, J., concurring in part and dissenting in part) (arguing that a lower court's permanent or expanded injunctions should be closely scrutinized because the court, when expanding the order or making it permanent, will be angry with respondents/defendants for defying its previous orders).

159. *See id.* at 785 (introducing the main theme of his dissent).

dictum, it suggests at least some agreement with Stevens' viewpoint.[160] This viewpoint would indicate that injunctions issued in response to violations of laws such as the federal Freedom of Access to Clinic Entrances Act ("FACE") should receive more lenient scrutiny, not stricter scrutiny.[161]

Scalia's argument for strict scrutiny is attractive, if only because it refuses to further muddy the waters on this point. Deciding what level of scrutiny to apply is often somewhat arbitrary, as this case shows.[162] Nevertheless, Stevens' logic is more persuasive because it seems antithetical to provide greater protection to those who have already abused their rights.[163] *Hill* makes this clear; the statute at issue in that case places quite extensive and complicated restrictions on people who have not yet demonstrated that they cannot exercise their rights without trampling on someone else's.[164] It is difficult to comprehend how this is less troubling than an injunction targeted against particular individuals.

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160. *Compare id.* at 778 (Stevens, J., concurring in part and dissenting in part) (asserting that injunctions apply to those who have engaged in past illegal conduct), *with id.* at 785 (Scalia, J., concurring in part and dissenting in part) (claiming that groups do not break the law by asserting their First Amendment rights).

161. For cases analyzing injunctions issued pursuant to FACE, 18 U.S.C. § 248 (1994), *see, e.g.,* U.S. v. Dinwiddie, 76 F.3d 913, 927 (8th Cir. 1996) (employing the *Madsen* standard of scrutiny to find part of the injunction violated the First Amendment); Lucero v. Trosch, 121 F.3d 591, 605-07 (11th Cir. 1997) (affirming a twenty-five foot buffer zone from the clinic and reversing a 100 foot zone from the doctor's residence and a floating twenty foot buffer from the doctor's person); U.S. v. Scott, 187 F.3d 282, 287 (11th Cir. 1999) (affirming an expanded buffer zone due to repeated violations of the first injunction by the defendant); U.S. v. Mahoney, 247 F.3d 279, 287 (D.C. Cir. 2001) (vacating as overbroad an injunction that prohibited defendants from going within twenty feet of any reproductive health facility within the Capital Beltway); New York *ex rel.* Spitzer v. Operation Rescue, 273 F.3d 184, 203 (2d Cir. 2001) (holding an injunction violates First Amendment rights because it was broader than necessary to address the state's interests); Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (upholding an injunction as not infringing upon First Amendment rights that prohibited defendants from threatening plaintiff doctors through "wanted" posters).

162. *See Madsen,* 512 U.S. at 791 (Scalia, J., concurring in part and dissenting in part) (describing the difficulty in applying the new and ill-defined standard put forth by the majority).

163. *See id.* at 778 (Stevens, J., concurring in part and dissenting in part) (basing a lesser standard of scrutiny on a judge's ability and power to determine individual culpability).

164. COLO. REV. STAT. § 18-9-122(3) (1999).

> No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility.

§ 18-9-122(3).

D. Can the Court Assume State Interests that Haven't Been Pled, and What Role Can Those Interests Play?

In *Madsen*, Rehnquist noted that the Florida Supreme Court found that the state had a strong interest in protecting a woman's freedom to seek lawful medical services relating to her pregnancy.[165] The state also had interests in maintaining public safety and order, keeping traffic moving on public streets and sidewalks, and protecting citizens' property rights.[166] Rehnquist held those state interests "quite sufficient to justify an appropriately tailored injunction to protect them."[167] The defendants in *Schenck* argued that the plaintiffs were not entitled to injunctive relief because the plaintiffs did not identify any state interests in their pleading.[168] Rehnquist stated that "in assessing a First Amendment challenge, a court looks not only at the private claims asserted in the complaint, but also inquires into the governmental interests that are protected by the injunction, which may include an interest in public safety and order."[169] The Court held that, given its factual similarity to *Madsen*, the *Schenck* injunction was justified by the same governmental interests: ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy related medical services.[170]

Scalia dissented.[171] The Court's "opinion . . . claims for the judiciary a prerogative I have never heard of: the power to render decrees that are in its view justified by concerns for public safety, though not justified by the need to remedy the grievance that is the subject of the lawsuit."[172] Scalia acknowledged that some remedial options were eliminated in *Madsen* because of public safety concerns, but he found that to be quite different from the Court's action in *Schenck*, in which, he argued, public safety provided part of the justification for the remedy itself and was not merely a tool for setting

165. *See Madsen,* 512 U.S. at 767-68 (listing the various significant governmental interests protected by the injunction).

166. *Id.* at 768.

167. *Id.*

168. *See Schenck,* 519 U.S. at 374 (claiming, therefore, that only one of seven claims survived the lower court's decision).

169. *Id.* at 375 (concluding that a plaintiff need not plead the state interest in the complaint).

170. *See id.* at 376 (comparing violations of private rights with violations of public order). The latter is a public right enforced by the state and therefore plaintiffs do not need to allege it in the complaint. *Id.*

171. *Id.* at 385-96 (Scalia, J., concurring in part, dissenting in part) (joining Justice Scalia were Justices Kennedy and Thomas).

172. *Id.* at 385-86 (introducing the main reason for his dissent).

the scope of that remedy.[173]

As he did in *Madsen*, Scalia debated whether any law had actually been violated which would thus justify injunctive relief.[174] Scalia disagreed with the District Court's assertion that the *Schenck* plaintiffs' injunction was justified because they were likely to succeed on the merits of their claims.[175] In addition, Scalia again asserted that the holdings of *Claiborne* require that when reviewing injunctions, especially those restricting free speech, a court must closely examine the findings for support of those restrictions.[176] Not only did the Court abandon this duty, but, Scalia argued, Rehnquist substituted his own assessments of past violations and future probabilities for those of the lower court.[177]

Scalia found this particularly disturbing because of the privacy rights relied upon by the lower court in crafting the injunction:[178] while the injunction was nominally based on a (questionable) right to unimpeded access to clinics, Scalia felt the District Court also supported the injunction with a "generalized right 'to be left alone.'"[179]

In particular, Scalia found that the terms of the injunction "ma[d]e no attempt to conceal" that the cease and desist provision, which

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173. *See id.* at 393 (reasoning that the Court's concern with public safety raised separation of powers difficulties because the executive branch is charged with protecting public safety).

174. *Compare Madsen*, 512 U.S. at 805-12 (Scalia, J., concurring in judgment in part, dissenting in part) (explaining that the Court failed to explain how the defendants violated a Florida law or injunction), *with Schenck,* 519 U.S. at 391-92 (Scalia, J., concurring in part, dissenting in part) (questioning the discriminatory nature of the state trespassing law and rejecting the lower court's determination regarding the merits of the claim).

175. *See Schenck,* 519 U.S. at 391-92 (Scalia, J., concurring in part, dissenting in part) (presenting contrary and controlling Supreme Court precedent).

176. *See id.* at 389-90 (Scalia, J., concurring in part, dissenting in part) (reciting precedent requiring a speech-restrictive injunction to be "'supported by findings that adequately disclose their evidentiary basis . . . that carefully identify the impact of [the defendants'] unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity'" (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933-34 (1992))).

177. *See id.* at 389 n.1 (Scalia, J., concurring in part, dissenting in part) (rejecting the Court's analogy to the proposition that appellate courts can affirm trial courts on different legal grounds).

178. *See id.* at 387 (Scalia, J., concurring in part, dissenting in part) (explaining that the District Court was clear in upholding the injunction on the right to be left alone rather than a right to unobstructed access to clinics).

179. *Compare id.* at 383 (stating that the lower court's basis did not accurately reflect Supreme Court precedent on a "right to be left alone"), *with id.* at 388-89 (Scalia, J., concurring in part, dissenting in part) (claiming that the Court ignored the District Court's basis for upholding the injunction: a nonexistent right to be left alone).

required "sidewalk counselors" to retreat outside the buffer zone if the patient indicated she did not wish to be counseled, was based on a supposed right to be left alone.[180] Scalia felt the injunction could not be analyzed without keeping that emphasis in mind, because "unduly burdensome" is a balancing test assessed, in part, by the right the restriction protects,[181] and a "right" the Court has arguably disclaimed should not be given much weight in that balancing.

The majority did denounce the concept of a "right to be left alone," but Scalia argued that it was impossible to reverse the lower court on what he considered this central point and still find that the injunction could pass the balancing test required by *Madsen*.[182] Rather than actually confront this issue, argued Scalia, Rehnquist made it irrelevant by abdicating *Claiborne*'s requirement of reviewing the facts, essentially by ignoring what the District Court actually found and deciding what it was "entitled" to find, then upholding the injunction on those grounds.[183]

An important theoretical issue raised by the *Schenck* opinion involves the very nature of injunctive relief itself: whose interests are being protected? Scalia argued in *Schenck* that the "Court's opinion . . . claims for the judiciary a prerogative I have never heard of: the power to render decrees that are in its view justified by concerns for public safety, though not justified by the need to remedy the grievance that is the subject of the lawsuit."[184] Rehnquist characterized Scalia's opinion as arguing that reliance on "public safety" is impermissible because only the government can seek an injunction based on that factor.[185] Rehnquist concluded that the District Court had not used public safety itself as a justification for the

180. *Id.* at 387 (Scalia, J., concurring in part, dissenting in part) (noting the District Court's approval of such terms). The Colorado Supreme Court discussed a "right to be let alone" wrapped in the right to privacy in its opinion in *Hill*, 973 P.2d at 1253.

181. *See, e.g., Madsen*, 512 U.S. at 765 (balancing speech restrictions by an injunction and the significant governmental interests protected by the injunction).

182. *See Schenck,* 519 U.S. at 386 (Scalia, J., concurring in part, dissenting in part) (explaining that the *Madsen* test to "burden no more speech than necessary" only protects "*legitimate* governmental interests") (emphasis in original).

183. *See id.* at 389 (Scalia, J., concurring in part, dissenting in part) (denouncing the Court's approach generally, but especially when it involves First Amendment rights).

184. *See id.* at 385-86 (Scalia, J., concurring in part, dissenting in part) (recognizing a difference between eliminating remedies because of conflicts with public safety and justifying a remedy on the basis of public safety).

185. *See id.* at 376 n.7 (discussing the difficulty a private individual has in alleging violations of public rights).

injunction, but simply as a factor in the constitutional analysis.[186]

Rehnquist has the stronger logic on this point. The District Court did craft the injunction based both on plaintiffs' private rights and on public interests.[187] However, it is solely the plaintiffs' interests that give rise to the need for relief.[188] State interests are necessary to constitutional analysis because the state will be enforcing the injunction via the police and the courts.[189] However, the state's interests, such as promoting the free flow of traffic, only affect the scope and details of the injunction.[190]

If a restrictive injunction were necessary to afford plaintiff relief but the state had no interest in enforcing the injunction, it is probable that the injunction would not be enforced. The plaintiff, therefore, could only be effectively protected if the state decided to sue, not in the plaintiff's interest, but in the public interest.[191] Political pressure, as well as scarce resources, could severely limit the state's ability to do so in all but the most exceptional cases.[192] As a result, a potentially very large group of individual plaintiffs would be unable to protect themselves from illegal activity.

The debate over state interests and their proper role raged on in *Hill*. Stevens cited as the state's interests in *Hill* one of those that the Colorado Supreme Court relied on: protecting the health and safety of the state's citizens.[193] Like the Colorado Supreme Court, Stevens

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186. *See id.* (asserting that a court can rely on public safety to assess the First Amendment argument).

187. *See id.* at 369 (holding the injunction served three significant governmental interests: public safety, a woman's constitutional rights to interstate travel, and a woman's constitutional rights to choose to have an abortion).

188. *See id.* at 362-67 (describing the acts of the defendants, including blockades and attempts to disrupt clinic operations and client access, which led plaintiffs to take action in the courts for relief).

189. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (requiring the state to show a compelling state interest before it could enforce a content-based exclusion that could potentially violate First Amendment rights).

190. *See Schenck*, 519 U.S. at 376 (assessing whether the injunction was appropriately tailored in light of the state's stated interests).

191. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000c-6 (1994) (authorizing the Attorney General to sue on behalf of individuals to advance the public interest of school desegregation, which also enforces individual protections under the Fourteenth Amendment).

192. *See, e.g.,* U.S. v. Scott, 187 F.3d 282 (2d Cir. 1999) (finding for the State on behalf of the individual). In *Scott*, the state brought suit against the defendant. The trial court found that Scott repeatedly used physical obstruction, threats, violence, harassment, and sound amplification that made his voice audible inside the clinic. *Id.* at 284. Police officers restrained Scott on twenty occasions and warned him not to stand in the clinic's doorways on forty or fifty occasions. *Id.* Between 1988 and 1996, Scott was arrested fourteen times on charges including harassment and third-degree assault. *Id.*

193. *See Hill*, 530 U.S. at 715 (balancing the petitioners' First Amendment rights

also referred to the controversial "right to be let alone" and stated that one aspect of that right was "[t]he unwilling listener's interest in avoiding unwanted communication"[194]—terminology that came about in *Frisby*, when protesters picketed a doctor's residence.[195]

This proved too much for Scalia, who stated that as if it was not enough for the *Schenck* Court to rely on interests the state had not pled, the Court in *Hill* goes on to rely on an interest "not only completely *different* from the interest that the statute specifically sets forth; [but an interest] explicitly *disclaimed* by the State in its brief before this Court, and characterized as a 'straw interest' *petitioners* served up in the hope of discrediting the State's case."[196] Scalia reminded the Court that just three terms ago, in *Schenck*, the Court expressed doubt that the concept of a right to be let alone was an accurate understanding of First Amendment jurisprudence.[197]

Although Scalia's frequently discourteous tone somewhat lessens the thrill of supporting his logic, Scalia's viewpoint is to be expected and is not misplaced. The idea that a court should only decide the issues before it is fundamental to American jurisprudence.[198] In many cases, interests, claims, and arguments not pled are expressly waived.[199] A reviewing court should be analyzing the issues the parties thought were important, not those the court thinks are important (or so the argument goes).[200] However, while the precision of this understanding of the court's role makes it appealing,

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against the legitimate state interests served by the statute). The Colorado Supreme Court also relied on the state's interest in protecting an individual's "'right to protest' or counsel against certain medical procedures" and a person's "right to obtain medical counseling and treatment." *Id.* at 712.

194. *Id.* at 716 (distinguishing between willing and unwilling listeners). These are two radically different statements and Stevens would have done better to stick with the latter version's language because the dissenters seize upon the concept of a "right to be let alone" and continue to address it with undisguised scorn. *Id.* at 741, 750 (Scalia, J., dissenting).

195. *See Frisby,* 487 U.S. at 484 (discussing the protection of the unwilling listener as one aspect of residential privacy rights).

196. *Hill*, 530 U.S. at 750 (Scalia, J., dissenting) (emphasis in original).

197. *See id.* at 750-51 (Scalia, J., dissenting) (accusing the Court of trying to find its way out of a "jam"); *see also supra* note 171 (demonstrating the different analyses of the Court and the dissenters in *Schenck*)

198. U.S. CONST. art. III, § 2 , cl. 1 ("judicial power shall extend to all Cases . . . [and] Controversies.").

199. *See, e.g.,* FED. R. CIV. P. 13(a) (requiring that any counterclaim rising out of the same transaction or occurrence be filed or a defendant is waived from bringing it in the same or subsequent cases).

200. *See, e.g.,* Allan D. Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477, 487 (1958) ("Our courts are passive instrumentalities, available to right wrong, but the initiative is never theirs. Our courts require the catalyst of a litigant who seeks relief.").

it ignores reality. The decrial of "judicial activism," in which courts interpret laws using not only their literal text but a variety of factors, such as evolving societal norms, is truly bipartisan: conservatives hold up *Roe v. Wade*;[201] liberals rally around *Bush v. Gore*.[202] Nevertheless, even Scalia, who generally prefers to interpret the meaning of the Constitution as the framers would have understood it, finds it hard to resist the role of judicial activist.[203] It would be hypocritical to ignore this reality.[204] If we must have courts engaging in "activism," it is better that they do so and acknowledge it, rather than decry it and then take it up without apparent awareness of the discredit such a turnaround casts on their positions.

E. How Much Deference to the Issuing Court's Findings of Fact is Appropriate?

One of the fundamental issues in the efficacy of the *Madsen* test is revealed in the continuing debate between Rehnquist and Scalia and addressed in Stevens' concurrence: since an injunction must be tailored carefully to address the facts, how closely is a reviewing court supposed to look at those facts?[205] Rehnquist's opinions in *Madsen* and *Schenck* both reveal substantial deference to the trial court;[206] Scalia, on the other hand, argues that an almost *de novo* factual review is demanded when the injunction restricts free speech.[207]

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201. 410 U.S. 113, 163 (1973) (recognizing a woman's right to choose to have an abortion).

202. 531 U.S. 98, 105-10 (2000) (holding that the process for mandatory recounts did not meet the non-arbitrary treatment of voters requirement under the Equal Protection Clause); *see also, e.g.,* Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001) (questioning whether the five justices in the majority ruled because they favored a Bush presidency).

203. *See*, *e.g., Bush*, 531 U.S. at 111-22 (joining not only in the majority opinion, but also joining Chief Justice Rehnquist in a concurring opinion in support of additional reasons for reversing the decision of the Florida Supreme Court).

204. *See* William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1244 (accusing the Conservative Court of not engaging in judicial activism but rather engaging in hypocrisy).

205. *See Madsen*, 512 U.S. at 778 (Stevens, J., concurring in part and dissenting in part) (expressing his belief that a more lenient standard of review should govern First Amendment challenges to injunctive relief than the standard applied to legislation).

206. *See id.* at 769-70 (reasoning that the trial court had greater knowledge of the facts of the case and the background of the dispute); *see also Schenck*, 519 U.S. at 381 (deferring to the trial court's assessment of the distance needed to keep entrances to the clinics clear).

207. *See Madsen*, 512 U.S. at 792 (Scalia, J., concurring in part and dissenting in part) (asserting that a speech-restrictive injunction is "at least" as deserving of strict scrutiny as statutory restrictions). Scalia expounds on this argument in his dissent to the denial of the second petition for certiorari in *Williams v. Planned Parenthood Shasta-Diablo, Inc.* After the Supreme Court of California upheld the injunction at issue, the defendants petitioned the U.S. Supreme Court for certiorari. In light of the

The *Madsen* plaintiffs' initial complaint was that the protesters blocked access to the clinic by demonstrating where the public street gives access to the clinic.[208] The original injunction accordingly banned the defendants from blocking or interfering with public access.[209] In the proceedings to broaden the injunction, the court found that, in numbers from a handful to four hundred, defendants continued to impede access.[210]

In his *Madsen* dissent, Scalia agreed that the interests presented by the Court were of the character the state may protect.[211] He then reminded the majority of its statement that an injunction issues only on a past or imminent violation of statutory or common law, and he argued that no state law or court order had been violated in *Madsen*.[212] The only violation even mentioned in the proceedings at the Supreme Court was of the original injunction, which was issued in response to defendants' threats to illegally blockade the clinic.[213] Scalia did not think even this had been violated: it enjoined defendants from "blocking, impeding or obstructing ingress into or egress from . . ." the clinic.[214] Scalia noted that the state court, in broadening the injunction, found that "there has been interference with ingress to the petitioners' facility . . . [in] the form of persons on

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Madsen decision, the Supreme Court vacated the judgment and remanded the case back to the California Supreme Court for reconsideration. The Supreme Court of California upheld the judgment, the defendants appealed again, and the Supreme Court denied certiorari. "It is not normally our practice to scrutinize the record support for the grounds asserted by state courts or lower federal courts as a basis for rejecting constitutional claims. We have, however, sometimes been disposed to do so when the abridgement of First Amendment rights was at issue." 520 U.S. 1133, 1136 (1997).

208. *See Madsen,* 512 U.S. at 758.

209. *See id.* at 757 (enjoining defendants from also physically abusing people entering or leaving the clinic).

210. *See id.* at 758 (listing defendants' acts as congregating in the street, marching in the clinic's driveways, engaging in "sidewalk counseling," and making noise that ranged from singing and chanting to the use of loudspeakers and bullhorns).

211. *See id.* at 804 (Scalia, J., concurring in part and dissenting in part) (listing as state interests securing a woman's freedom to seek lawful medical or counseling services, ensuring public safety and order, protecting property rights, protecting medical privacy rights and protecting the well-being of a patient held "'captive' by medical circumstance").

212. *See id.* (Scalia, J., concurring in part and dissenting in part) (arguing that the Court deferred too readily to the trial court in its conclusions that a law had been violated).

213. *See Madsen*, 512 U.S. at 757 (recognizing constitutional issues surrounding the injunction entered by the Florida Supreme Court).

214. *See id.* at 805 (Scalia, J., dissenting) (noting that the original injunction prohibited trespassing or interfering with access to abortion clinics; physically abusing those entering or leaving the clinics; and attempting or directing other persons to take such actions).

the paved portions . . . ." of the street in front of the clinic.[215]

Scalia also condemned the Court's ready acceptance of the lower court's finding and berated the Court for what he deemed its failure to perform its duty to examine closely the factual basis. Scalia relies on *Claiborne* for this point. However, the *Claiborne* Court did not revisit the lower courts' findings of fact in order to ensure thorough analysis. It did so because the lower courts did not articulate the evidence they relied on in making those findings, thereby leaving the *Claiborne* Court unable to apply the relevant facts to those findings.[216] Citing *Meadowmoor Dairies*, the *Claiborne* Court emphasized that the Court has the ultimate power to search the records in the state courts when the findings of fact are "insubstantial."[217]

As previously stated, Scalia denounced the Court's failure to examine the facts closely.[218] He spent the first six pages of his dissent recounting "the facts" as provided by a videotape provided by the plaintiffs which documented the protesters' activities.[219] According to Scalia's observations, the protesters' activities consisted of a "great many forms of expression and conduct . . . includ[ing] singing, chanting, praying, shouting . . . playing . . . music, speeches, peaceful picketing . . . handbilling, persuasive speech directed at opposing groups, efforts to persuade individuals not to have abortions, personal testimony, [and] interviews with the press . . . ."[220] However, Scalia found that the protesters' activities did not include any violent acts or attempts to impede access to the clinic.[221]

Scalia appears to argue that, while one has the right to access, one does not have the right to unimpeded access of abortion clinics.[222]

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215. *Id.* at 806 (Scalia, J., dissenting) (noting that petitioners were able to avoid violating the original injunction while still impeding access to the clinic by using such tactics as strategically picketing in front of the driveway leading to the abortion clinic).

216. *See Claiborne*, 458 U.S. at 3430 (citing *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941)).

217. *Id.* at 3431.

218. *See id.* (Scalia, J., dissenting) (noting Scalia's opinion that the Court too readily accepted the holding of the lower court).

219. *See generally id.* at 785-90 (Scalia, J., dissenting) (describing in detail the videotape footage of the protest).

220. *See id.* at 790 (Scalia, J., dissenting) (describing the activity justifying the amended injunction).

221. *See id.* (Scalia, J., dissenting) (noting that there was no suggestion that the protesters used violence or impeded access to the clinic in the videotape or in the trial court's findings).

222. *See id.* at 812-13 (Scalia, J., dissenting) (listing reasonable alternative restrictions that would impede access to clinics).

Before providing for such unimpeded access, Scalia would seem to require findings of violence, or of protesters' intent to *actually* prevent individuals from entering the clinic.[223] Lacking such findings, the original injunction itself would be invalid, and disobedience to that order would not justify a broader injunction.[224] Finally, Scalia argued that only in the context of abortion does the Court expand legal doctrine, as in *Madsen*, to allow such a result.[225]

Rehnquist noted that the videotape was not the only evidence before the the trial: the court also held three days of evidentiary hearings.[226] Rehnquist also seems to suggest that substantial deference is appropriate because the defendants declined to put a full factual record before the Court.[227] Had the defendants done so, it is unclear how much scrutiny Rehnquist would have given that record.[228]

In *Schenck*, Rehnquist prefaced his deference to the trial court by relating the factual details the trial court found.[229] Scalia retorted that Rehnquist simply was analyzing only what the lower court was "entitled" to conclude, not what it actually did conclude.[230] Accordingly, Scalia argued that the Court went beyond deferential treatment to abdication in *Madsen*, substituting its own conclusions about what burden was justified for those actually made by the lower court.[231]

Lower courts appear to be using a very deferential standard in reviewing factual findings. In *U.S. v. Dinwiddie*, the Eighth Circuit

223. *See id.* at 808 (Scalia, J., dissenting) (noting that the injunction refers to intentionally blocking, impeding, or obstructing, and not to temporary obstructions that occur as a normal consequence of protests).

224. *See id.* at 809 (Scalia, J., dissenting) (arguing that the First Amendment protects those who unintentionally impede access to clinics).

225. *See id.* at 784-85 (Scalia, J., dissenting) (quoting two other Supreme Court Justices who believe that the Court has a history of treating issues regarding abortion regulations differently from any other type of issue).

226. *See id.* at 770 (noting that the state court's review of the facts included witness testimony).

227. *See id.* at 770-71 ("[defendants] studiously refrained from challenging the factual basis for the injunction . . . [they] argued against including the factual record as an appendix in the Florida Supreme Court, and never certified a full record.").

228. *See id.* at 771 (stating that the Court must judge the constitutionality of the injunction based on the evidence and testimony available to the state court).

229. *See* 519 U.S. at 373 (adhering to the state court's familiarity with the facts and the background of the dispute).

230. *See id.* at 389 (Scalia, J., dissenting) (noting that the Supreme Court's role is not to conclude what decision the trial court should have reached).

231. *See id.* (Scalia, J., dissenting) (observing that the Court chose to approve an injunction that the District Court decided not to issue based on all of the facts of the case).

upheld an injunction pursuant to the Freedom of Access to Clinic Entrances Act barring the defendant from using "threats of force."[232] The appellate court set out the factors for analyzing whether a statement constitutes a "threat of force"[233] and then relied entirely on the district court's factual findings about the defendants' statements.[234] The Eighth Circuit, after quoting those findings, upheld the district court's judgment that the statements at issue did constitute "threats of force."[235]

The Eleventh Circuit also showed great deference to the district court's factual findings in *Lucero,* finding that that defendant's activity "violate[d] the nuisance law because it [was] harassing and 'substantially interfere[d]' with plaintiffs' lawful activities on the Clinic's premises."[236] The Eleventh Circuit did not, however, review those findings, apparently relying on the defendant's brief to raise questions about the facts if such questions existed.[237] The court held that defendants failed to give "any . . . coherent argument" as to how the court had misapplied the law,[238] and thus, the court declined to review the district court's application of the law to the facts.[239]

Similarly, the Second Circuit summarized and declined to review the district court's factual findings in *United States v. Scott*,[240] and stated that the district court "carefully tailored the expanded injunction to address the particular facts of this case . . . ."[241] The dissenting judge reviewed the underlying facts solely to assess the injunction's enforceability based on the relevant widths and distances

232. 76 F.3d at 929 (upholding an injunction prohibiting the appellant from engaging in a number of activities within 500 feet of an abortion clinic).

233. *See id.* at 925 (noting that statements constituting threats of force include factors like the reaction of the recipient of the threat and of other listeners, whether the threat was conditional, whether the threat was communicated directly to the victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker of the threats had a propensity to engage in violence).

234. *See id.* (upholding the District Court's findings based on the facts of the case).

235. *See id.* (describing statements which the defendant made to an abortion doctor as threats of force in light of the context in which they were made).

236. 121 F.3d 591, 599 (11th Cir. 1997).

237. *See id.* at n.12 (adhering to the defendant's brief for the questions).

238. *See id.*

239. *See id.* (ignoring the district court's interpretation of a distance law since the defendants did not raise the issue).

240. 187 F.3d 282 (2nd Cir. 1999).

241. *Id.* at 289 (finding that the district court's broadening of the injunction was prudent and not overbroad).

between physical structures.[242]

In short, while it is not always readily apparent from the appellate decisions what "review of the record" means to each court, the level of deference accorded to the trial courts' factual findings is quite high, even if the end result is to restrict free speech.

CONCLUSION

Scalia contends that expansive doctrines like that of *Madsen*, *Schenck,* and *Hill* could only take place in the context of abortion, because, to the Court's majorities in those cases, "abortion is different."[243] This raises a valid question: would the holdings in *Madsen*, *Schenck,* and *Hill* be the same if the demonstrators being enjoined were instead civil rights protesters in the 1960s?[244] Perhaps not, but the reason is not the viewpoint of the protesters. It is, quite simply, that abortion *is* different.[245] Scalia thinks this unacceptable, but arguably free speech and protest in the context of health care facilities where physicians perform abortions require special treatment.[246] White protesters trying to block African-Americans from a previously "whites-only" lunch counter or union protesters trying to block "scabs" from crossing the picket line surely affect many of their targets emotionally and physically.[247] However, abortion demonstrations can emotionally and physically affect medical patients about to undergo a variety of medical procedures, each not without physical risk.[248] The Supreme Court has found that medical testimony supports the conclusion that high-stress situations, such as passing through a vigorous demonstration outside the door of the doctor's office, can be dangerous to a patient's health.[249] The constitution requires listeners to put up with some offensive speech in

242. *See id.* at 289-92 (reviewing the facts solely as they applied to the "floating buffer zone").

243. *See*, *e.g.*, *Hill*, 530 U.S. at 741-42 (noting the expansion of restrictions surrounding the right to persuade women contemplating abortions to forego them).

244. *See supra* note 114 (comparing abortion protesters with civil rights protesters).

245. *See supra* pages 278-82 (noting the expansive doctrine in the abortion cases).

246. *See supra* note 116 (noting that Scalia even gives credence to the idea that abortion "is different").

247. *See id.* (recognizing that varying levels of trauma result depending on the context of the protest).

248. *See supra* note 43 and accompanying text (noting the medical risks associated with patients exposed to abortion protests).

249. *Madsen,* 512 U.S. at 758 (noting that many patients faced with protests can manifest high levels of anxiety or hypertension, causing them to need higher levels of sedation, which, in turn, increases the risk of the surgical procedures).

order to protect the First Amendment; rights must, after all, be balanced.[250] But "balance" should not require a listener to put her own health at risk so that another may speak freely.[251]

Madsen, *Schenck* and *Hill* have provided courts with some guidance for drafting constitutionally sound injunctions governing demonstrators.[252] However, this attempt at guidance has created new difficulties of its own. While currently still limited to abortion cases and a few labor matters, as long as Americans value protest, the issues raised in this paper inevitably will come up in suits outside this context. Recognizing that abortion is "different" could limit the prospective breadth of *Madsen*'s analysis on consideration of health risks, but the Court has ruled out such precision by finding that women seeking abortions are not a protected class.[253] Barring the precedent to support such precision, *Madsen*'s sweep could be broad indeed.

250. *See supra* notes 12-17 and accompanying text (setting forth the weighing of interests in First Amendment analysis).

251. *See supra* pages 282-83 (explaining the balancing analysis used by the Supreme Court in *Madsen*).

252. *See supra* pages 282-93 (noting the analysis in *Madsen, Schenck,* and *Hill*).

253. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993) (observing that a "class" is something more than a group of people who engage in similar conduct).