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Injunctive Relief and the Madsen Test

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INJUNCTIVE RELIEF AND THE *MADSEN* TEST

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I. INTRODUCTION

Though injunctive relief lies at the heart of judicial power, the United States Supreme Court surprisingly has decided very few speech restricting injunction cases outside the ambit of the National Labor Relations Act.[1] Until the Supreme Court's decision in *Madsen v. Women's Health Center, Inc.*,[2] cases involving injunctive relief have used a mixed analysis—combining standards applicable to ordinances[3] and standards applicable to injunctions without any critical distinction.[4] In *Madsen*, the Supreme Court finally made a distinction

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1. The few cases involving injunctions seeking to restrict speech outside application of federal labor picketing laws include: CBS, Inc. v. Davis, 114 S. Ct. 912 (1994) (Blackmun, J., in chambers) (setting aside state court preliminary injunction against a scheduled broadcast); Alexander v. United States, 113 S. Ct. 2766 (1993); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Morland v. Sprecher, 443 U.S. 709 (1979) (Blackmun, J., in chambers) (expediting appeal involving an injunction restraining publication); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); National Socialist Party of Am. v. Village of Skokie, 432 U.S. 43 (1977); Organization for A Better Austin v. Keefe, 402 U.S. 415 (1971); New York Times Co. v. United States, 403 U.S. 713 (1971); Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968); Walker v. City of Birmingham, 388 U.S. 307 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Hughes v. Superior Court of Cal., 339 U.S. 460 (1950); Building Serv. Employees Int'l Union v. Gazzam, 339 U.S. 532 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943); Bakery & Pastry Drivers & Helpers Local 802 v. Wohl, 315 U.S. 769 (1942); Near v. Minnesota, 283 U.S. 697 (1931); Truax v. Corrigan, 257 U.S. 312 (1921); Gompers v. United States, 233 U.S. 604 (1914); Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911).

2. 114 S. Ct. 2516 (1994).

3. In this Article, references to ordinances include statutes and regulations.

4. *Madsen*, 114 S. Ct. at 2526 n.4 (noting that the Court's opinion in

between injunctions and ordinances, and developed a new test applicable to content-neutral injunctions.

The *Madsen* test applies only to content-neutral injunctions which are neither prior restraints nor content-based restrictions. That test is summarized as follows: injunctive relief affecting speech is permissible only upon a showing that (1) "the defendant has violated, or imminently will violate, some provision of statutory or common law";[5] (2) there is a "cognizable danger of recurrent violation";[6] (3) a nonspeech restrictive injunction preventing the repeated illegal conduct has proven ineffective to protect the significant government interests because the defendant has repeatedly violated the injunction;[7] and (4) a subsequent speech restrictive injunction may not burden more speech than necessary to serve a significant government interest.[8] The first two prongs of this test are applicable to any injunction since injunctive relief is an equitable remedy.[9] Thus, prongs one and two must be met before the entry of any injunction, whether the injunction restricts speech or conduct. After prongs one and two are met, a court may restore law and order by a nonspeech restrictive injunction. If that injunction proves to be ineffective, a subsequent speech restrictive injunction may be issued, but that injunction may not burden more speech than necessary to serve a significant government interest.

II. THE HISTORY OF *MADSEN*

In order to apply the *Madsen* decision, it is imperative to understand its historical background. This background involved two separate injunctions, the first a nonspeech restrictive permanent injunction, and the second a speech restrictive amended permanent injunction.

A. The First Injunction

On September 30, 1992, a Florida state trial court permanently enjoined certain pro-life protesters[10] from trespassing on, sitting

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Claiborne Hardware, 458 U.S. 886 (1982) cited Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), a case involving an injunction, and Keyishian v. Board of Regents, 385 U.S. 589 (1967), a case involving a statute and regulations).

5. *Madsen*, 114 S. Ct. at 2524 n.3.

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

7. *Id.* at 2527.

8. *Id.* at 2525-26.

9. *Id.* at 2524 n.3.

10. The named protesters included Operation Rescue, Operation Rescue

in, blocking, impeding, or obstructing ingress into or egress from any abortion clinic in Brevard and Seminole counties, Florida, and further restrained them from physically abusing persons entering, leaving, or using any services of the facilities.[11] Following the shooting of Dr. David Gunn outside a Pensacola, Florida abortion clinic, one of the clinics[12] involved in the first injunction, Aware Woman Center for Choice, Inc. (Aware), located in Melbourne, Florida, requested that the 1992 injunction be amended to further restrict pro-life activities.[13]

America, Operation Goliath, Bruce Cadle, Pat Mahoney, Randall Terry, and the three petitioners who were before the Supreme Court: Judy Madsen, Ed Martin, and Shirley Hobbs. *Madsen*, 114 S. Ct. at 2521 n.1. Interestingly, there was no such organization known as Operation Rescue America or Operation Goliath. Moreover, there is no corporate entity presently known as Operation Rescue. The real organization involved in the protests was Operation Rescue National, but that entity was never named as a defendant.

11. *Madsen*, 114 S. Ct. at 2521; *see also* Brief for Petitioners at 3, Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994) (No. 93-880).

12. The clinics which sought the first injunction were Women's Health Center, Inc., Aware Woman Center for Choice, Inc., EPOC Clinic, Inc., and Central Florida Women's Health Organization, Inc. Petitioner's Request for Certiorari at 3-5, *Madsen* (No. 93-880).

13. Though Aware was the only clinic involved in requesting the amended permanent injunction, the trial court did not amend the pleadings. Despite the fact that Aware was the only clinic at issue in the second injunction, the clinics in the first injunction remained named parties. The requested amendment coincided with increased pro-life activity by a group known as Operation Rescue National. In addition to requesting that the injunction be amended, Aware also requested that the defendants in the previous injunction be held in contempt for violating that court order. Of the three petitioners who eventually went to the United States Supreme Court in the *Madsen* case, only one testified because no allegations of contempt were brought against the other two—Judy Madsen and Shirley Hobbs. Ed Martin was the only petitioner before the Supreme Court who testified in the state trial court proceedings to amend the permanent injunction. He testified that he had not been at the Aware clinic in two to three years. The only evidence introduced against him was that on one occasion he was walking back and forth across the clinic driveway entrance, and when a doctor drove up, the doctor honked the horn, and he moved out of the way. *See* Petitioners' Reply Brief at 10-11, *Madsen* (No. 93-880). The lead petitioner in the *Madsen* case, Judy Madsen, had never been to the Aware clinic. During the 1993 hearing to amend the injunction, attorneys for Aware stated: "I have already said that Judy Madsen is not a target of these contempt proceedings." *Id.* at 9. The entire transcript of the 1993 proceedings was reproduced in a Joint Appendix before the Supreme Court, along with the following interchange between the state trial court judge and counsel for Judy Madsen:

> [COUNSEL] Weiss: With respect to, I believe there has been a stipulation that Mrs. Madsen has not violated any of the court's [permanent] injunction whatsoever. If I've got that cleared then --
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> The COURT: That's my understanding.

Id. at 9.

B. The Second Injunction

On April 8, 1993, the Florida state trial court entered the second injunction, known as the amended permanent injunction. That injunction incorporated the language of the prior 1992 injunction[14] but added a thirty-six foot speech-free zone around the clinic;[15] a restriction on noises and images which could be seen or heard from within the clinic;[16] a 300 foot no-approach or consent zone around the clinic;[17] a 300 foot anti-picketing zone around the residential homes of those associated with the clinic;[18] and other restrictions not challenged before the United States Supreme Court.[19]

In addition to restricting the named defendants, the injunction was expanded to include persons acting in concert or in participation with them.[20] Though no named defendant was ever found in con-

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14. The language incorporated from the 1992 injunction prohibiting trespassing on, sitting in, blocking, impeding, or obstructing ingress into or egress from the clinics, and physical abuse was not challenged. *Madsen*, 114 S. Ct. at 2522, 2526 n.5.

15. The injunction prohibited the defendants "[a]t all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of the public right-of-way or private property within [36] feet of the property line of the Clinic. . . ." *Madsen*, 114 S. Ct. at 2522. This speech-free zone prohibited mere penetration into the zone, two sides of which applied to record title owners of private property if those owners or their invitees acted in concert with those named in the injunction. *Id.*

16. The injunction prohibited those named between "the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic." *Id.*

17. The injunction enjoined the protesters at "all times on all days, in an area within [300] feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring. . . ." *Id.*

18. The injunction prohibited those named at "all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [clinic] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits, or driveways of the residences of any of the [clinic] employees, staff, owners or agents." *Id.*

19. Not challenged before the Supreme Court were the sections prohibiting physical abuse, grabbing, intimidating, harassing, touching, pushing, shoving, crowding, or assaulting persons entering or leaving, or working at or using the services of the clinic, or threatening any present or former doctor, health care professional, or other staff member, employee, or volunteer who assisted in providing services at the clinic. *Madsen*, 114 S. Ct. at 2522, 2526 n.5.

20. *Id.* at 2530. The first injunction applied only to named parties.

tempt of the 1992 or 1993 injunctions, following the 1993 injunction (which included an "in concert" provision), approximately 150 people were arrested over several weekends for merely penetrating the thirty-six foot speech-free zone.[21] The injunction, as applied to those named, and as applied to those alleged to be "in concert," resulted in two separate cases which formed the basis of the Supreme Court's granting certiorari.

C. *The Conflict Between the Federal and State Courts*

1. The Federal Court Decision

Once it became apparent that the amended permanent injunction was being applied by the trial court against nonparties who merely penetrated the thirty-six foot speech-free zone, Myrna Cheffer, a peaceful pro-life activist who had never been arrested, brought suit in federal court claiming that she, too, would be arrested for merely penetrating the zone. On October 20, 1993, the Eleventh Circuit Court of Appeals in *Cheffer v. McGregor*,[22] found that the state court's broad application of the injunction to nonparties resulted in a content-based restriction on free speech.[23] Not only did the *Cheffer* court find the injunction content-based, it found it to be an unconstitutional viewpoint restriction against nonparties.[24] The court found that the practical effect of the injunction was to "assure that while

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21. The appendix to Justice Scalia's dissent included a colloquy between the same state court judge who entered the 1993 amended permanent injunction and the nonparty demonstrators who were arrested for merely penetrating this 36 foot speech-free zone. *See Madsen*, 114 S. Ct. at 2550-52.

22. Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993). The defendant, Judge Robert B. McGregor, was the state trial judge who entered the amended permanent injunction challenged in *Madsen*. *Cheffer*, 6 F.3d at 706.

23. Though the *Cheffer* decision was decided by a 2-1 majority, all three judges agreed that the state trial court violated Cheffer's constitutional rights. The two voting in the majority, including the Chief Judge of the Eleventh Circuit, found that the injunction was a content-based restriction. Instead of entering its own injunction blocking enforcement of the state court injunction, the two in the majority decided to return the case to the lower court for entry of an injunction following the analysis set out in the majority opinion. Following that analysis, the lower court would undoubtedly enter its own injunction. *Id.* at 712. The one dissenter would have entered the injunction directly from the Eleventh Circuit Court of Appeals without remanding it to the trial court, further stating that the state court exceeded its jurisdiction by attempting to apply this injunction to nonparties. *Id.* at 712-15.

24. *Id.* at 711. It should be noted that the *Cheffer* court did not decide the issue of content or viewpoint restriction as it related to named parties, but only as the injunction had been applied to nonparties. The court found that the broad application of the injunction to nonparties based solely on their belief, rather than conduct, operated like a criminal statute. *Id.* at 707 n.2, 708-09.

'pro-life' speakers would be arrested, 'pro-choice' demonstrators would not."[25]

The *Cheffer* opinion noted that by entering its own injunction blocking enforcement of the state court injunction, the court would "promote only speech and expressive conduct, not assault, trespass, or destruction of property."[26] The court characterized the dispute as a clash "between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights."[27] The *Cheffer* case found that other state laws already protected the interests of the clinic without infringing upon First Amendment rights and concluded by stating: "We protect much that offends in the name of free speech—we cannot refuse such protection to those who find abortion morally reprehensible."[28]

2. The State Court Decision

On October 28, 1993, eight days following the Eleventh Circuit Court of Appeals decision in *Cheffer*, the Florida Supreme Court rendered its decision upholding the entire injunction.[29] The Florida Supreme Court recognized the *Cheffer* opinion in a footnote but offered no comment.[30] The Florida Supreme Court found that the injunction was content-neutral and, though it acknowledged that the injunction could be narrowed, declined "to entertain quibbling over a few feet."[31] The court rejected the prior restraint argument, concluding that a prior restraint challenge was inapplicable in the absence of a content-based restriction.[32] The court also rejected a challenge based on vagueness or overbreadth, stating that the sounds or images observable restriction was sufficiently specific to give proper notice as to what would be considered illegal.[33] The Florida Supreme Court found the entire injunction constitutional.[34] It also found that the "in concert" section created no danger that the injunction would be unfairly enforced.[35] This classic conflict between the

25. *Cheffer*, 6 F.3d at 711.
26. *Id.*
27. *Id.*
28. *Id.* at 712.
29. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993). This appeal was brought by the named parties. The state proceedings involving the named parties were pursued simultaneously with the federal suit brought by a nonparty.
30. *Id.* at 676 n.10.
31. *Id.* at 673.
32. *Id.* at 674.
33. *Id.* at 674-75.
34. *Id.* at 675.
35. *Id.* Interestingly, the City of Melbourne attempted to intervene after the

jurisdiction's highest federal and state courts on the identical injunction set up the basis for the United States Supreme Court to grant certiorari.[36]

III. THE UNITED STATES SUPREME COURT'S ANALYSIS

Before developing a new heightened scrutiny test governing certain types of injunctions, *Madsen* first considered whether the injunction was a content-based restriction. The Court then briefly considered whether the injunction was a prior restraint. After finding that it involved neither of these forms of restriction, it developed the new *Madsen* test.

A. *Content-Neutral versus Content-Based*

The protesters argued that the injunction was content-based because it restricted only pro-life speech while permitting pro-choice speech. The Court noted that to accept this argument would result in finding "virtually every injunction as content or viewpoint based."[37] The Court further stated:

> An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past action in the context of a specific dispute between real parties.[38]

Madsen further noted that "none of the restrictions imposed by the [trial] court were directed at the content of petitioner's message."[39] Not every injunction restricting speech is thereby content-based. To determine content-neutrality, courts must consider "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'"[40] In order to determine

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entry of the amended permanent injunction at the state trial court level in order to request clarification as to how the "in concert" section should be applied. The clinic opposed the City's request and the state trial court denied their right to intervene. Petitioners' Brief at 32, *Madsen* (No. 93-880).

36. *Madsen*, 114 S. Ct. at 2523. Two petitions for certiorari were filed with the Supreme Court. One petition was on behalf of Operation Rescue, Randall Terry, Pat Mahoney, and Bruce Cadle. Operation Rescue v. Women's Health Ctr., 114 S. Ct. 923 (1994). The other petition was on behalf of Judy Madsen, Ed Martin, and Shirley Hobbs. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 907 (1994). The Court denied the former but granted the latter.

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

38. *Id.*

39. *Id.*

40. *Id.* (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (internal quotation marks omitted); *see also* R.A.V. v. City of St. Paul, 112 S.

content-neutrality in an injunction, courts must "look to the government's purpose as the threshold consideration."[41] *Madsen* then found that the state trial court imposed restrictions on the protesters incidental to their speech because they repeatedly violated the court's original order.[42]

> That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group *whose conduct* violated the court's order happen to share this same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based.[43]

The Supreme Court's rejection of the injunction as content-based defies logic. First, the pro-life petitioners did not argue that *all* injunctions are content-based, but that the challenged injunction was content-based, and in fact, viewpoint-based.[44] Second, the Court stated that it need not determine "whether the 'images observable' and 'no-approach' provisions are content based."[45] If the Court was confident that the entire injunction was content-neutral, then why was this later caveat necessary? Third, the Court did not give sufficient weight to the state trial judge's own comments regarding the purpose of the injunction.[46] Finally, the majority based part of its analysis on the mistaken assumption that the picketers had "repeatedly violated the court's original order."[47]

Obviously, not every injunction is content-based. An injunction prohibiting trespass restricts not speech but conduct. However, an injunction restricting the display of a certain message critical of a business because of the message is content-based. This precise distinction occurred in *Madsen*. The amended permanent injunction

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Ct. 2538, 2553 (1992); Arkansas Writer's Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514-15 (1981); Carey v. Brown, 447 U.S. 455, 466-68 (1980).

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

42. *Id.* at 2523-24.

43. *Id.* at 2524 (emphasis supplied).

44. Petitioners' Brief at 9-14, *Madsen* (No. 93-880).

45. *Madsen*, 114 S. Ct. at 2529 n.6.

46. *See* Forsyth County v. The Nationalist Movement, 112 S. Ct. 2395, 2402 (1992) (holding courts must consider authoritative constructions, including implementation and interpretation); *see also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

47. *Madsen*, 114 S. Ct. at 2524. This finding gave rise to a scathing dissent by Justices Scalia, Kennedy, and Thomas. *Id.* at 2535-37, 2545-48.

prohibited the display of any "images observable" which could be viewed from within the clinic.[48] That section was not intended to restrict "For Sale" signs, political signs, street signs, billboards, or birthday party signs on someone's neighboring property. The images prohibited were signs such as "Baby Killer," "Child Murderer," or "Choose Life." This point is driven home by the fact that this restriction on images observable applied not only to the named parties, but to those acting in concert with them. To determine whether nonparties were acting in concert with named parties in terms of displaying prescribable images requires a content-based analysis of the message displayed. Such an analysis depends on the listener's reaction to the speech, and as the Court has previously held, a listener's "reaction to speech is not a content-neutral basis for regulation."[49]

In addition to the images observable restriction, the injunction contained a "no-approach" provision within a 300 foot radius of the clinic that prohibited one with a pro-life message from "approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or inquiring."[50] Under that restriction, the named defendants, and those acting in concert with them, were prohibited from speaking unless the listener favorably reacted, by either approaching or indicating a desire to communicate.[51] If the Supreme Court was confident that the entire injunction was content-neutral, it would not have been necessary to later state in a footnote[52] that it need not decide whether this portion of the injunction was actually content-based. Since the Court had previously decided the injunction was content-neutral, then why later raise the issue in a footnote? Moreover, the injunction contained a section regarding "invited contact" which the Court failed to quote. In relevant part, the "invited contact" provision stated:

> [A]t all times on all days, [the named pro-life parties] will have the right of invited contact with persons protected hereby so long as it is outside the Clinic buffer zone. "Invited contact" is defined as conduct

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48. *Id.* at 2522.

49. *Forsyth County*, 110 S. Ct. at 2403; *see also* Texas v. Johnson, 491 U.S. 397, 411 (1989) (overturning a flag burning conviction because prosecution "depended on the likely communicative impact" of expressive conduct); Boos v. Barry, 485 U.S. 312, 321 (1988) ("The emotive impact of speech on its audience is not a 'secondary effect.'").

50. *Madsen*, 114 S. Ct. at 2522.

51. *Cf.* United Food and Commercial Workers Int'l Union v. IBP, Inc., 857 F.2d 422, 432 (8th Cir. 1988) (overturning a ban on picketing and talking to or communicating in any manner with a person or persons against his, her, or their will).

52. *Madsen*, 114 S. Ct. at 2529 n.6.

> by the person sought to be contacted which affirmatively indicates a desire to engage in conversation or to receive literature. Such affirmative indication may include where the person sought to be contacted physically approaches [a named pro-life party], or where such person extends his or her hand to receive literature, or speaks words indicating a *positive* interest in what the [named pro-life party] is saying. Such invited contact by a person protected hereby as it relates to a contact at such persons [sic] residence is limited to conduct transmitted by the resident to a [named pro-life party] at a distance from and at *a time prior to the contact* and shall not include the uninvited ringing of a doorbell or knock on the door.[53]

The injunction further stated that once invited contact had been initiated, the person associated with the clinic could end the communication by stating such words as "stop," "withdraw," "back off," "get away," "leave me alone," or words or actions of similar import.[54] When the desire to end the contact was made known, the pro-life speaker was required to immediately terminate the contact and leave the presence of the person protected by the injunction.[55] The "invited contact" section hinged on the emotive impact of the listener by using such words as "positive interest" and by providing that the listener affirmatively make the invitation to speak prior to the attempted contact. In other words, the pro-life speaker was not allowed to speak unless the listener first gave an invitation to do so.

The *Madsen* decision relied heavily on the assumption that the injunction was content-neutral because those named therein had violated the first permanent injunction.[56] However, none of the petitioners had been held in contempt of the previous injunction. Moreover, the amended permanent injunction made no finding that the protesters had violated the first injunction.[57] The case did not involve locking arms, trespassing, or physically blocking access to the clinic. The only finding by the trial court was that the size of the crowds was such that, on occasion, traffic had to slow its progress. A finding against any of the pro-life petitioners was never brought before the Supreme Court. In fact, at the contempt hearing (where no one was found in contempt) and the hearing to modify the first permanent injunction, the Aware clinic acknowledged that Judy Madsen

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53. Petitioners' Request for Certiorari at B11-12, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) (No. 93-880) (emphasis added); Women's Health Ctr., Inc. v. Operation Rescue, No. 91-2811-CA-16-K (Fla. Cir. Ct. Apr. 8, 1993) (amended permanent injunction).

54. *Id.*

55. *Id.*

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

57. *Id.* at 2535-37 (Scalia, J., dissenting).

was not a target of any contempt proceedings.[58] Justice Scalia pointed out this fact in his dissent:

> At no time is there any apparent effort to prevent entry or exit, or even delay it, except for the time needed for the picketers to get out of the way. There was no sitting down, packing en masse, linking of hands or any other effort to blockade the clinic property.[59]

The videotape,[60] the record evidence, and the trial court's findings did not "contain any suggestion of violence near the clinic, nor did they establish any attempt to prevent entry or exit."[61] Moreover, there was no trial court finding that the protesters had violated any state law.[62] There was simply "no factual finding that petitioners engaged in *any* intentional or purposeful obstruction."[63] The Supreme Court's failure to critically review the evidence de novo in order to determine whether the protesters had in fact violated the previous injunction or prior state law disturbingly results in the Court's accepting a conclusion by the trial court that the prior injunction was not adequate to allow free ingress and egress.[64] By re-

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58. Petitioners' Reply Brief at 9, *Madsen* (No. 93-880).

59. *Madsen*, 114 S. Ct. at 2536 (Scalia, J., dissenting).

60. The tape contained edited footage from six to eight hours of video taken on three separate days by employees of Aware to focus on only "the kinds of activities that seem to be some of the most menacing and harassing." Petitioners' Reply Brief at 8 n.13, *Madsen* (No. 93-880) (quoting the trial testimony of a witness produced by the Aware clinic who supervised the editing process). Justice Scalia discussed the contents of the video in his dissent. *Madsen*, 114 S. Ct. at 2535-37.

61. *Madsen*, 114 S. Ct. at 2537 (Scalia, J., dissenting).

62. *Id.* at 2544 n.5.

63. *Id.* at 2546 (emphasis in original).

64. Petitioners requested the Court to review the trial court's findings de novo. Petitioners' Brief at 10 n.4, *Madsen* (No. 93-880) (citing Peel v. Attorney Registration & Disciplinary Comm'n of Ill., 496 U.S. 91, 108 (1990); Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 485, 509 (1984); and Edwards v. South Carolina, 372 U.S. 229, 235 (1963)). The Court justified its refusal to review the evidence de novo on the mistaken assumption that the Florida Supreme Court did not have a certified record. *Madsen*, 114 S. Ct. at 2527-28. The *Madsen* court mistakenly commented that the full record was not before the Florida Supreme Court, when in fact, the Florida Supreme Court had all of the record testimony including the videotape entered into evidence by Aware. The only testimony not present before the Florida Supreme Court that was present before the United States Supreme Court was the testimony of three individuals, all of which related to residential picketing, and none of which related to the three petitioners before the Supreme Court. Petitioners' Reply Brief at 7-9, *Madsen* (No. 93-880).

Contrary to the Court's finding that petitioners objected to the evidence being admitted in appendix format, the petitioners made no such objection. Indeed, the Florida Supreme Court indicated that it had reviewed the record evidence de novo. *Operation Rescue*, 626 So. 2d at 670. The clinic's brief before

fusing to review the record testimony de novo, the Court departed from its prior precedent in *Claiborne Hardware*, where, Justice Stevens, writing for the majority, stated that a speech restrictive injunction "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity."[65]

In concluding that the injunction was content-neutral, the Supreme Court also ignored the state trial court's own admission regarding the purpose of the injunction. After the amended permanent injunction was entered, and nonparty individuals were arrested for merely penetrating the zone, the trial judge stated that the injunction "did not pertain to those on the other side of the *issue,*" that it applied only to those who "*seemed to be supportive of pro-life*," that it applied only to those of a "pro-life position," and that if a person could convince the court she was in fact pro-choice, "perhaps the prosecutor wouldn't bring the formal charge."[66] If the Court must consider authoritative constructions including implementation and interpretation,[67] and if the Court must "look to the government's purpose as the threshold consideration"[68] in determining content-neutrality, the Supreme Court miserably failed.

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the United States Supreme Court also acknowledged that the Florida Supreme Court reviewed the record evidence. Respondents' Brief at 11, *Madsen* (No. 93-880). What petitioners found objectionable was duplicating all of the three days of trial evidence in appendix format without excerpting portions of the testimony.

Under the Rules of the Supreme Court of the United States, Rule 26.1, petitioners and respondents are required to prepare a Joint Appendix, and are specifically instructed against duplicating evidence already in the record. The Joint Appendix should consist of excerpted portions of testimony rather than the testimony en masse. The clinic sought to duplicate the entire three day trial testimony in the Joint Appendix, whereas petitioners argued that the testimony should be excerpted in relevant part so as to avoid duplication and excessive costs. The Joint Appendix eventually duplicated the entire three day trial testimony. The cost of printing alone amounted to more than $23,000. Petition for Rehearing of Petitioners at 2-4, Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994) (No. 93-880).

65. *Claiborne Hardware*, 458 U.S. at 933-34.

66. *Madsen*, 114 S. Ct. at 2550-52 (appendix to opinion of Scalia, J., dissenting) (emphasis supplied).

67. *Forsyth County*, 112 S. Ct. at 2402 (citations omitted); *see also Lakewood*, 486 U.S. at 750.

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

B. Prior Restraint

Not only did the Supreme Court find that the injunction was content-neutral, it also found the injunction was not a prior restraint.[69] To reach this conclusion, the *Madsen* majority focused only on the thirty-six foot buffer zone.[70] The Court concluded that the protesters were free to express themselves in a number of ways except within the thirty-six foot zone.[71] In rejecting a prior restraint argument, the Court never bothered to consider the images proscription, the no-approach zone, or the invited contact provision. If the invited contact provision is not a prior restraint whereby it prohibits communication "prior to" its occurrence and allows communication only after the listener invites the speaker, then a prior restraint finding will be rare indeed.

Though the *Madsen* Court stated that prior restraints "do often take the form of injunctions,"[72] in the prior term, the Court found that "temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints."[73] Indeed, the term "prior restraint" is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[74] However, in *Madsen*, the Court stated that not all injunctions which may "incidentally affect expression" are prior restraints in the sense that the Court used the term in *New York Times Co. v. United States*[75] or *Vance v. Universal Amusement Co.*[76] The Florida Supreme Court found that the injunction was not a prior restraint because it was not a content-based restriction.[77] The *Madsen* Court also stated that the injunction was

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69. *Id.* at 2524 n.2.

70. The Court avoided addressing this question as it related to the "images observable" and the "no-approach" sections. *Id.* at 2529 n.6. These sections were stricken using the *Madsen* test without reaching a content-based or prior restraint test.

71. *Id.* at 2524 n.2.

72. *Id.*

73. Alexander v. United States, 113 S. Ct. 2766, 2771 (1993).

74. *Id.*

75. 403 U.S. 713 (1971) (refusing to enjoin publication of "The Pentagon Papers").

76. 445 U.S. 308 (1980) (per curiam) (holding that the Texas Public Nuisance Statute which authorized state judges, on the basis of a showing that a theater had exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene was unconstitutional as authorizing an invalid prior restraint).

77. *Operation Rescue*, 626 So. 2d at 674.

not issued because of the content of the protesters' expression as was the case in the *New York Times Co.* and *Vance*, "but because of their prior unlawful conduct."[78]

In finding that the injunction was not a prior restraint, the Court departed from its past precedent. Had the Court found that the injunction was a prior restraint, then a level of scrutiny equal to, or higher than, a content-based restriction would have been applicable. A prior restraint bears a "heavy presumption" against its constitutional validity.[79] The state must meet a "heavy burden" to impose a prior restraint on speech.[80] The presumption against prior restraints is heavier, and the degree of protection broader, than that against limits on expression imposed by criminal statutes. Society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[81] The Supreme Court has previously noted that in "determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the [First Amendment] guarantee to prevent previous restraints upon publication."[82] Indeed, the Court has stated that "the prevention of [prior restraint] was the leading purpose in the adoption of [the First Amendment]."[83]

A prior restraint finding is not dependent on a content-based finding. The injunction in *Carroll* was content-neutral but was analyzed as a prior restraint.[84] The Supreme Court has traditionally condemned licensing schemes as prior restraints without regard to content restrictions.[85] As Justice Scalia noted:

> Although a speech-restricting injunction may not attack content *as content* . . . it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he

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78. *Madsen*, 114 S. Ct. at 2524 n.2. Presumably the Court would have entertained the prior restraint argument if the protesters had not allegedly violated a prior nonspeech restrictive injunction. In other words, if the challenged injunction was entered in the absence of alleged past illegal conduct, it would have been analyzed as a prior restraint.

79. *Bantam Books*, 372 U.S. at 70.

80. *Nebraska Press Ass'n*, 427 U.S. at 539; *see also New York Times Co.*, 403 U.S. at 713; *Vance*, 445 U.S. at 315-16; *Near*, 283 U.S. at 713.

81. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 559 (1975).

82. *Near*, 283 U.S. at 713.

83. Lovell v. City of Griffin, 303 U.S. 444, 451-52 (1938); *see also Carroll*, 393 U.S. at 181 ("prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement").

84. *Carroll*, 393 U.S. at 181.

85. *Forsyth County*, 112 S. Ct. at 2395 (parade permits); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (public demonstration permits); *Lovell*, 303 U.S. at 444 (literature distribution permit).

> *knows* he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in speech-restricting injunctions almost invariably.[86]

Justice Scalia rightly pointed out:

> [T]he Court errs in thinking that the vice of content-based statutes is that they necessarily have the invidious purpose of suppressing particular ideas. "Our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" . . . The vice of content-based legislation—what renders it *deserving* of the high standard of strict scrutiny—is not that it is *always* used for invidious, thought-control purposes, but that it *lends itself* to use for those purposes. And, because of the unavoidable 'targeting' . . . precisely the same is true of the speech-restricting injunction.[87]

In other words, the vice of a prior restraint, whether in a licensing scheme or an injunction, is not that the restriction is content-based, but that it lends itself to those purposes.[88] Whether the decision maker is a judge, or an individual with whom discretionary licensing power is vested, makes no difference—both are prior restraints regardless of whether the restriction is facially content-based. The fact that the decision maker is able to make content-based restrictions is enough for a prior restraint. Moreover, in the *Madsen* injunction, the fact that listeners were empowered by the trial judge to make content-based restrictions, choosing whether to communicate if they showed a "positive interest" in the subject matter, or invited the contact prior to its communication, is proof that at least part of the injunction lent itself to a prior restraint because it afforded the opportunity for a content-based restriction.

If the Court had found the *Madsen* injunction to be a prior restraint, the level of scrutiny would have equaled, or exceeded, that

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86. *Madsen*, 114 S. Ct. at 2538 (Scalia, J., dissenting) (emphasis in original).

87. *Id.* at 2539 (Scalia, J., dissenting) (quoting Simon & Schuester v. New York Crime Victims Bd., 112 S. Ct. 501, 509 (1991)) (other citations omitted).

88. A prior restraint "lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). Such a deterrent need not affect total suppression in order to create a prior restraint. *Conrad*, 420 U.S. at 556 n.8. Vesting the right to suppress speech to the discretion of the decision maker results in a prior restraint. *See Thornhill*, 310 U.S. at 88. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* at 97.

applicable to content-based restrictions. As content-based restrictions come to the Court with a heavy presumption against their constitutionality,[89] so prior restraints are presumptively invalid.[90]

C. *The New* Madsen *Test*

The "newly enunciated test"[91] in *Madsen* applies only to injunctions which are neither content-based restrictions nor prior restraints. The *Madsen* test is not applicable to statutes or ordinances. In the case of a content-based injunction, a content-based test should be utilized.[92] If the injunction is a prior restraint, then the *Madsen* test is inapplicable and the prior restraint analysis should be utilized.[93]

For the first time in its history, the Supreme Court in *Madsen* delineated differences between injunctions and generally applicable statutes or ordinances.[94] The Court found that the injunction was content-neutral and thus not deserving of the highest level of scrutiny. However, the Court found that the content-neutral stan-

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89. *See, e.g., Vance*, 445 U.S. at 315-16; *Nebraska Press Ass'n*, 427 U.S. at 560; *New York Times Co.*, 403 U.S. at 714; *Organization for a Better Austin*, 402 U.S. at 419; *Bantam Books*, 372 U.S. at 70; *see also* Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981).

90. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992).

91. Pro-Choice Network v. Schenck, 34 F.3d 130, 140 (2d Cir. 1994).

92. A content-based regulation is subject to strict scrutiny. Burson v. Freeman, 112 S. Ct. 1846 (1993); *see also R.A.V.*, 112 S. Ct. at 2542; *Boos*, 485 U.S. at 321 ("the most exacting scrutiny"); Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981) (strict scrutiny). The regulation must be supported by a compelling governmental interest and must be narrowly tailored to achieve that interest. The narrow tailoring is often referred to as the least restrictive means. *Boos*, 485 U.S. at 329; *see also* Frisby v. Schultz, 487 U.S. 474, 482 (1988); *Ward*, 491 U.S. at 799; City of Houston v. Hill, 482 U.S. 451, 464-67 (1987); Wygant v. Jacksonville Bd. of Educ., 476 U.S. 267, 280 n.6 (1986) (plurality opinion). "Content-based restrictions also have been held to raise Fourteenth Amendment equal-protection concerns because, in the course of regulating speech, such restrictions differentiate between types of speech." *Burson*, 112 S. Ct. at 1850 n.3. Like content-based regulations, equal protection violations also face strict scrutiny. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); *see also* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Niemotko v. Maryland, 340 U.S. 268, 272-73 (1951).

93. A prior restraint faces a heavy presumption against constitutional validity, and like content-based restrictions, must be narrowly tailored. *See, e.g., Alexander*, 113 S. Ct. at 2766; *Vance*, 445 U.S. at 308; *Village of Skokie*, 432 U.S. at 43; *Organization for a Better Austin*, 402 U.S. at 415; *New York Times Co.*, 376 U.S. at 254; *Bantam Books*, 372 U.S. at 58; *Near*, 283 U.S. at 697; *see also* Blasi, *supra* note 89. Prior restraints are considered "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n*, 427 U.S. at 559.

94. *Madsen*, 114 S. Ct. at 2524-26.

dard was not sufficiently vigorous when applied to injunctions.[95] Prior to the *Madsen* case, the three levels of scrutiny had previously been enunciated as follows: (1) strict scrutiny for content-based regulations regardless of the forum; (2) intermediate scrutiny for content-neutral regulations in a public forum; and (3) a rational basis test for content-neutral regulations in a nonpublic forum.[96] The Court was not willing to utilize the intermediate level of scrutiny for content-neutral regulations because of the obvious differences between ordinances and injunctions.[97] The Court noted:

> Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree . . . [i]njunctions also carry greater risks of censorship and discriminatory application than do general ordinances.[98]

The Court found that the differences between content-neutral regulations and content-neutral injunctions required "a somewhat more stringent application of general First Amendment principles."[99] The Court then noted that its past precedents relied both on general First Amendment principles while also seeking to ensure that injunctions were no broader than necessary to achieve the desired goals.[100] The Court observed:

> [C]lose attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, "that injunctive relief should be no more burdensome to the defendants than necessary

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95. *Id.* at 2524-25. Reasonable time, place, and manner restrictions are permissible in content-neutral regulations. Such restrictions must be narrowly tailored to serve a significant government interest and leave open ample alternative means of communication. *See Ward*, 491 U.S. at 791; *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

96. *Perry Educ. Ass'n*, 460 U.S. at 37.

97. *Madsen*, 114 S. Ct. at 2524. Though Justice Scalia brought up the collateral bar rule in his dissent as one obvious difference between injunctions and ordinances, the *Madsen* majority did not address this issue. The collateral bar rule in and of itself should require a higher level of scrutiny for injunctions as opposed to ordinances. For example, a protester contesting the constitutionality of a speech restrictive ordinance may ignore it and later challenge its constitutionality. *Shuttlesworth*, 394 U.S. at 150. However, a protester faced with a speech restrictive injunction must obey the injunction even if it is later found to be unconstitutional. A subsequent finding of unconstitutionality does not invalidate the penalty for violating the injunction. *Cf. Shuttlesworth*, 394 U.S. at 147; Walker v. City of Birmingham, 388 U.S. 307 (1967).

98. *Madsen*, 114 S. Ct. at 2524 (citation omitted).

99. *Id.*

100. For this proposition, *Madsen* cited *Claiborne Hardware*, 458 U.S. at 886; *Carroll*, 393 U.S. at 175; Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

to provide complete relief to the plaintiffs."[101]

The Court then concluded:

> Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.[102]

Ironically, although the Court opined that its new test is more stringent than that applicable to content-neutral regulations, the test itself—whether the injunction burdens no more speech than necessary to serve a significant government interest—originated in content-neutral regulations, and as such, was reiterated by the Supreme Court only three days before the *Madsen* decision.[103] During the same week *Madsen* was decided, the Supreme Court in *Turner Broadcasting System* stated that a content-neutral regulation may not "burden more speech than necessary."[104]

In adopting this new standard for content-neutral injunctions, the Supreme Court argued that this standard was similar to the "precision of regulation" demanded in *Claiborne Hardware*[105] and the *Carroll* standard which requires an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective."[106] The Court stated the requirement that the injunction "burden no more speech than necessary to serve a significant government interest" was equivalent to the standard utilized in *Claiborne Hardware* and *Carroll*.[107] In *Claiborne Hardware* the Court used the phrase "pre-

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101. *Madsen*, 114 S. Ct. at 2525 (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).

102. *Id.* at 2525.

103. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2469 (1994); *see also* United States v. Edge Broadcasting Co., 113 S. Ct. 2696, 2704 (1993); City of Cincinnati v. Discovery Network, Inc., 113 S. Ct. 1505, 1510-11 (1993); International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2722 (1992) (O'Connor, J., concurring); Gentle v. State Bar of Nev., 111 S. Ct. 2720, 2746 (1991) (Rehnquist, J., dissenting); United States v. Kokinda, 497 U.S. 720, 757 (1990) (Brennan, J., dissenting); Board of Trustees v. Fox, 492 U.S. 469, 476-78 (1989); *Ward*, 491 U.S. at 798-99; *Frisby*, 487 U.S. at 491, 496 (Brennan, J., dissenting); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984).

104. *Madsen*, 114 S. Ct. at 2469.

105. *Claiborne Hardware*, 458 U.S. at 916 (internal quotation marks omitted).

106. *Carroll*, 393 U.S. at 183.

107. *Madsen*, 114 S. Ct. at 2526. If the level of scrutiny under the *Madsen* test was equivalent to the scrutiny used in *Claiborne Hardware* and *Carroll*, then the scrutiny required by *Madsen* was indeed vigorous. The challenged injunctions in *Claiborne Hardware* and *Carroll* were found to be unconstitutional.

cision of regulation" in the context of a stringent review of the record to ensure that any restrictions on speech mixed with conduct did not violate the First Amendment.[108] The injunction at issue in *Carroll* was a prior restraint.[109]

The facts in *Claiborne Hardware* were more egregious than the facts in *Madsen*.[110] In March 1966, several hundred African-Americans implemented a boycott of white merchants following racial abuses in Claiborne County, Mississippi. This boycott, which lasted approximately seven years, included "acts of physical force and violence" including "[i]ntimidation, threats, social ostracism, vilification, and . . . the stationing of guards . . . in the vicinity of white-owned businesses."[111] The Court described the "atmosphere of fear" which prevailed and further found that in two cases shots were fired at a house, and a brick was thrown through a windshield.[112] Other incidents include shots, a fight, slashing of tires, and threatening telephone calls.[113] Store watchers were posted outside the white-owned business who recorded the names of the boycott violators and later published them in *The Black Times* in order to coerce others to comply with the boycott demands.[114] During this time period, a local civil rights leader was shot and killed, and Dr. Martin Luther King, Jr. was assassinated on April 4, 1968. The "[t]ension in the community neared a breaking point."[115] Coinciding with the escalation in violence was the continuous, uniformly peaceful, and orderly picketing of the white-owned businesses, that primarily took place on weekends.[116]

The Mississippi Supreme Court permanently enjoined the boycott, but the United States Supreme Court reversed and found that each element of the boycott was a protected form of speech.[117] The Court declared that the right to associate did not lose all constitu-

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108. *Claiborne Hardware*, 458 U.S. at 916.

109. *Cf. Carroll*, 393 U.S. at 181; *Madsen*, 114 S. Ct. at 2524 n.2.

110. One difference between the two cases is that *Madsen* involved a prior nonspeech restrictive injunction which the Court (erroneously) assumed had been violated. The protesters who boycotted in *Claiborne Hardware* had not violated a prior nonspeech restrictive injunction before the entry of the speech restrictive injunction. According to *Madsen*, the violation of a nonspeech restrictive injunction is an important element in upholding portions of a subsequent speech restrictive injunction. *Madsen*, 114 S. Ct. at 2527; *see also* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 698 (1978).

111. *Claiborne Hardware*, 458 U.S. at 894.

112. *Id.* at 904.

113. *Id.*

114. *Id.* at 903-04.

115. *Id.* at 901-02.

116. *Id.* at 903.

117. *Id.* at 911-12.

tional protection "merely because some members of the group may have participated in conduct or advocated doctrine that is itself protected."[118] Finding that "precision of regulation" was demanded, the Court carefully examined the record for factual support, and concluded that the injunction "must be dissolved" or "modified to restrain only unlawful conduct and the persons responsible for conduct of that character."[119]

Though the majority opinion in *Madsen* argues that its newly enunciated test is no different than the test found in *Carroll*, the *Carroll* standard appears to be more analogous to strict scrutiny. The injunction in *Carroll* was a prior restraint. With regard to an injunction, the Court cautioned:

> [I]n the area of First Amendment rights [an injunction] must be couched in the *narrowest terms that will accomplish the pin-pointed objectives* permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved" . . . . In other words, *the order must be tailored as precisely as possible to the exact needs of the case.*[120]

Carroll's use of language including "narrowest terms," "pin-pointed objective," and "tailored as precisely as possible to the exact needs of the case," sounds closely analogous to the content-based requirement of strict scrutiny and least restrictive means.[121] Despite the Court's twisted logic, we must take *Madsen* at its word that the

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118. *Claiborne Hardware*, 458 U.S. at 908.

119. *Id.* at 924 n.67. Justice Stevens authored the majority opinion in *Claiborne Hardware*, but in *Madsen*, he was the only justice who argued that injunctions should be analyzed with less scrutiny then content-neutral regulations. *Madsen*, 114 S. Ct. at 2531-34 (Stevens, J., concurring in part and dissenting in part); *see also* Hirsch v. City of Atlanta, 495 U.S. 927 (1990) (Justice Stevens, in a denial of certiorari regarding an anti-abortion picketing injunction, stated that it was content-neutral based upon the past activities of the protesters, and therefore should not be compared with other injunctive cases such as *Village of Skokie*, 432 U.S. at 43).

120. *Carroll*, 393 U.S. at 183-84 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)) (emphasis added).

121. The strained reasoning by the *Madsen* majority is what led Justice Scalia to castigate the Court by stating that, were it not for the context being abortion, a different result would have ensued. Justice Scalia pointed to an opinion written by Justice O'Connor and joined by then-Justice Rehnquist:

> "This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. . . . "

Madsen, 114 S. Ct. at 2535 (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 814 (1989)).

newly enunciated standard for content-neutral injunctions—whether the injunction burdens no more speech than necessary to serve a significant government interest—is more stringent than content-neutral regulations.

Taken in context based on the facts of *Madsen*, the new test is clearly more stringent than the test applicable to content-neutral regulations. *Madsen* began its inquiry into the new test by stating that under general equity principles, an injunction may issue only if "[1] there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and [2] that there is a 'cognizable danger of recurrent violation.'"[122] Once these two prerequisites have been met, then a nonspeech restrictive injunction may be implemented. In *Madsen*, the first injunction restricted only conduct, not speech. That injunction prohibited trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from the abortion clinic. The injunction further prohibited physically abusing persons entering, leaving, or using any services of any abortion facility. Moreover, that injunction applied only to named defendants, not those acting in concert with them. Only identifiable, illegal conduct was prohibited by the first injunction. Consequently, once the first two prerequisites are met, an injunction may be entered prohibiting the illegal conduct that gave rise to the issuance.

The next step in the *Madsen* analysis questions whether the nonspeech restrictive injunction effectively achieved the significant government interests. The interest identified in *Madsen* was maintaining physical access to the clinic. Because the Court concluded that the first injunction was inadequate to protect access, and (wrongly) concluded that the named defendants repeatedly violated the first injunction, the Court was willing to uphold certain speech restrictive portions of the second injunction. Consequently, the second injunction, known in the *Madsen* case as the amended permanent injunction, was literally four steps removed from illegal activity.[123]

In summary, the *Madsen* opinion sets up a four part test before a speech restrictive injunction may be upheld: (1) there must be a showing that the defendant has violated, or eminently will violate, some provision of statutory or common law; (2) there is a cognizable danger of recurrent violation; (3) an injunction designed to

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122. *Madsen*, 114 S. Ct. 2525 n.3 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953)).

123. The majority opinion cited *National Soc'y of Professional Eng'rs*, 435 U.S. at 679, for the proposition that an injunction may restrict what would normally be protected expressive activities when, in the context of that restriction, the violator is known to have repeatedly engaged in illegal conduct. *Madsen*, 114 S. Ct. at 2527.

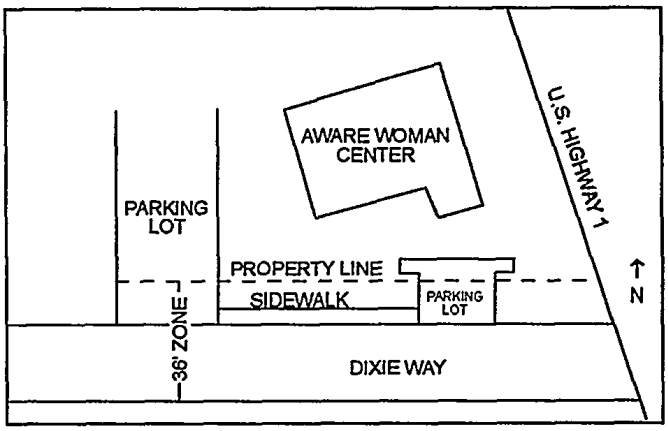
restrict illegal conduct rather than speech is found to be inadequate to serve the significant government interests because it too has been repeatedly violated; and (4) the subsequent speech restrictive injunction may not burden more speech than necessary to serve a significant government interest.[124]

1. The Thirty-Six Foot Zone

The thirty-six foot buffer zone in *Madsen* extended outward from three sides of the clinic property and prohibited the named defendants, and those acting in concert with them, from entering the zone. Directly in front of the clinic was a public highway known as Dixie Way, and parallel to that road was a small sidewalk that connected the clinic driveway to another clinic entrance. No other sidewalks were in the community. The clinic operated as a business out of a home located in a residential area. Directly in front of the clinic was Dixie Way, by which access to the clinic was achieved. On the side of the clinic intersecting with Dixie Way was the highway known as U.S. Highway 1. In the back and on the other side of the clinic were private residential homes. The thirty-six foot zone extended onto this private property, but the record title holders were exempted unless they, or their invitees, were found to be acting in concert with the named defendants. If they were in concert, then they were prohibited on their own private property from congregating, picketing, and even entering the zone.[125] The *Madsen* opinion con-

124. The Second Circuit Court of Appeals in *Pro-Choice Network*, though not articulating *Madsen* as a four-part test, analyzed the buffer zone restriction using this format and found a fifteen (15) foot buffer zone to be unconstitutional under the heightened scrutiny demanded by *Madsen*. *Pro-Choice Network*, 34 F.3d at 140-41.

125. Below is a diagram of the clinic and surrounding geography which was part of the record before the United States Supreme Court:



cluded that the "state court seems to have had few other options to protect access given the narrow confines around the clinic."[126] The Court assumed that the first injunction failed to protect access to the clinic and consequently more radical measures were necessary. Though the Court noted that "a complete buffer zone near the clinic entrances and driveway may be debatable,"[127] it gave deference to the state court's familiarity with the factual background and concluded:

> We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order.[128]

The Court upheld the thirty-six foot buffer zone around the clinic entrance and driveway but struck down two sides of the thirty-six foot zone that extended onto private residential property. Interestingly, although the Court ignored certain evidence when striking down two sides of the thirty-six foot zone on private property, the Court recognized that no evidence was presented that the protesters located on the private property blocked vehicular traffic.[129] The Court then stated:

> Absent evidence that petitioners standing on the private property have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, this portion of the buffer zone fails to serve the significant government interest relied on by the Florida Supreme Court.[130]

Petitioner's Request for Certiorari at B14, *Madsen* (No. 93-880).

126. *Madsen*, 114 S. Ct. at 2527. In upholding the portion of the 36 foot zone at the clinic entrance and driveway, the Court focused on two factors: (1) an assumption that the protesters had violated a prior nonspeech restrictive injunction which was ineffective in maintaining free ingress and egress; and (2) the narrow confines of the clinic which included a narrow strip of sidewalk approximately four feet wide and 37 feet long which connected the two parking lots. The road directly in front of the clinic was known as Dixie Way which was only 21 feet, four inches wide. Other than the narrow strip of sidewalk directly in front of the clinic, no other sidewalks existed in the residential area along Dixie Way or U.S. Highway 1. Clearly, if the first factor was absent, the Court would not have upheld the 36 foot zone at the clinic entrance and driveway. Additionally, if the second factor was absent, the Court may not have upheld this portion of the zone. In other words, if the confines of the clinic were not so narrow, leaving little other alternative but the imposition of the 36 foot zone, the Court more than likely would have struck this portion of the injunction as it struck the majority of the injunction.

127. *Id.* at 2527.

128. *Id.* (citing *National Soc'y of Professional Eng'rs*, 435 U.S. at 697-98).

129. *Id.* at 2528.

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

2. The Noise Restriction

The injunction prohibited the named picketers from "'singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment, or other sounds or images observable to or within earshot of the patients inside the clinic' during the hours of 7:30 a.m. through noon on Mondays through Saturdays."[131] In upholding this portion of the injunction, the Court took into account the place to which the regulation applied, noting that noise control was particularly important around hospitals and medical facilities.[132] The Court found that the noise ordinance did not burden more speech than necessary and that the First Amendment did "not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protest."[133]

3. The Images Observable Restriction

The amended permanent injunction further prohibited the protesters from displaying any image which could be observed by someone within the clinic. The Court found that this blanket prohibition on all images observable burdened more speech than necessary.[134] The Court further noted that "if the blanket ban on 'images observable' was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail."[135] The Court concluded that the only plausible reason a patient would be bothered by images observable would be "if the patient found the

131. *Id.*

132. *Id.* At this point in the opinion, the Court made another factual error. Specifically, the Court quoted NLRB v. Baptist Hosp., Inc., 442 U.S. 773, 783-84 n.12 (1979), which in turn quoted Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment), and referred to these decisions as "another injunction involving a medical facility." *Madsen*, 114 S. Ct. at 2528. Neither *Baptist Hospital* nor *Beth Israel Hospital* involved injunctions as Justice Scalia rightfully pointed out in his dissent. *Madsen*, 114 S. Ct. at 2547 (Scalia, J., dissenting). Indeed, both cases dealt "not with whether the government had violated the First Amendment by restricting noise, but with whether the hospital had violated the National Labor Relations Act by restricting solicitation (including solicitation of union membership)" *inside* the hospital. *Id.* The Court's careless findings of fact and inaccuracies in identifying its own past precedents might be explained on the basis that they placed *Madsen* on an expedited tract, accepting certiorari on January 21, 1994, and rendering an opinion on June 30, 1994.

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

134. *Id.* at 2529.

135. *Id.*

expression contained in such images disagreeable."[136] The Court concluded that it would be much easier "for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic."[137] The Court consequently struck down the images restriction.

4. The No-Approach Consent Zone

The Court also struck down the 300 foot zone around the clinic which can be described as the no-approach zone or the consent zone.[138] When entering this zone, the named defendant was prohibited from approaching a person associated with the clinic either as an employee, patient, volunteer, owner, or "agent" unless such person indicated a desire to communicate.[139] Consequently, within this 300 foot radius around the clinic, the pro-life speaker could only speak with the consent and invitation of the listener. The Court noted:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protestors' speech is independently prescribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm . . . this provision cannot stand. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[140]

The Court concluded that the "consent" requirement alone burdened more speech than necessary to prevent intimidation and to ensure access to the clinic.[141]

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136. *Madsen*, 114 S. Ct. at 2529. If that is the case, then why are the images observable not a content-based restriction? The Court refused to address this question. *Id.* at 2529 n.6.

137. *Id.* at 2529.

138. *Id.*

139. *Id.*

140. *Madsen*, 114 S. Ct. at 2529 (quoting Boos v. Barry, 485 U.S. 322 (1988)) (emphasis added) (other internal citations and quotations omitted).

141. *Madsen*, 114 S. Ct. at 2529. Here the Court inserted its footnote indicating that it need not determine whether the "images observable" and the "no-approach" provisions were content-based. *Id.* at 2529 n.6. Based on their own internal discussions, both provisions were obviously content-based. The majority's discussion at this point of the opinion contradicts the earlier part of the opinion where the Court concluded that the injunction was content-neutral.

5. The Residential Zone

The final substantive regulation analyzed by the Court was a 300 foot buffer zone placed around the residential homes of the clinic employees, staff, owners, or agents. This section of the amended permanent injunction differed from the 300 foot zone around the clinic. The residential zone prohibited approaching, congregating, picketing, patrolling, demonstrating, or using bullhorns or other sound amplification equipment within 300 feet of the residential homes, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstructing the entrances, exits, or driveways of the residences.[142]

In the context of an ordinance, the Supreme Court had previously upheld a restriction against targeted picketing of residential homes, noting that the home was the "last citadel of the tired, the weary, and the sick."[143] However, the Court noted that the 300 foot zone in *Madsen* was much larger than the ordinance upheld in *Frisby*.[144] The prohibition in *Frisby* was limited to "focused picketing taking place solely in front of a particular residence."[145] "By contrast, the 300-foot zone would ban '[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses.'"[146] The Court therefore found that the residential zone did not contain sufficient justification for such a broad ban on picketing, but noted that "a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result."[147]

6. The "In Concert" Provision

The *Madsen* Court declined to consider the "in concert" provision, stating that the named picketers lacked standing to challenge that portion of the order because it applied to persons not parties before the Court.[148] It was precisely the "in concert" provision that was challenged by *Cheffer*[149] in the Eleventh Circuit Court

142. *Id.* at 2522.
143. *Id.* at 2529.
144. Frisby v. Schultz, 487 U.S. 474, 484 (1988).
145. *Id.* at 483.
146. *Madsen*, 114 S. Ct. at 2530 (quoting *Frisby*, 487 U.S. at 483).
147. *Id.*
148. *Id.* at 2530 (citing Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14 (1945)).
149. Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993).

of Appeals which gave rise to the conflict leading to the grant of certiorari.[150] Cheffer was a nonparty who challenged the "in concert" provision and therefore had standing, but the petitioners before the Supreme Court were named defendants and consequently could not challenge the "in concert" provision because it did not apply to them and was not subject to an overbreadth challenge. In the proper context, it is quite possible an injunction may be content-neutral as it relates to the named parties based upon their past illegal conduct, but content-based as applied to nonparties through an "in concert" provision. A broad application of an "in concert" provision applied to someone with no past illegal conduct may well be considered content-based, and subject to content-based scrutiny rather than to the *Madsen* test.[151]

IV. CONCLUSION

On the road to developing a new test for content-neutral injunctions, the *Madsen* majority accepted as fact certain evidence not supported by the record and twisted past precedent. First, the *Madsen* opinion based its ruling on the assumption that the picketers had repeatedly violated statutory or common law and a prior nonspeech restrictive injunction. Second, the Court assumed that the first injunction was inadequate to protect access to the clinic.[152]

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150. *Madsen*, 114 S. Ct. at 2522-23.

151. A cursory reading of *Madsen* and *Cheffer* seems to suggest a conflict between the two opinions. *Madsen* found that the injunction was content-neutral whereas *Cheffer* found the same injunction content-based. *Cf. Madsen*, 114 S. Ct. at 2523-24 *with Cheffer*, 6 F.3d at 710-11. Upon closer analysis, the two opinions are consistent. The two cases are clearly distinguishable in that *Madsen* addressed the injunction in light of the named defendants, but *Cheffer* addressed the injunction in light of nonparties. In *Madsen*, the Court focused on the fact that the named defendants (1) violated some statutory or common law, (2) engaged in recurrent violations of statutory or common law, and (3) repeatedly violated a nonspeech restrictive injunction issued to enforce the repeated violations of statutory or common law. In light of this assumption, the Court found that the speech restrictive portions of the injunction were content-neutral because the injunction served only to restrict illegal conduct rather than speech. *Madsen*, 114 S. Ct. at 2523-24 n.3. In *Cheffer*, the Eleventh Circuit Court of Appeals found that the *application* of the injunction to *nonparties* was content-based. *Madsen* did not address the "in concert" provision, *Madsen* 114 S. Ct. at 2530, whereas *Cheffer* only addressed the "in concert" provision. *Cheffer*, 6 F.3d at 708-11. The *Cheffer* court found that the "in concert" provision had been applied so broadly by the judge to nonparties based solely on their beliefs, rather than their conduct, and therefore operated more like a criminal statute. *Id.* Applying this broad application to Cheffer, who had neither violated any statutory or common law nor any nonspeech restrictive injunction, resulted in a content-based restriction to her speech. *Id.* at 707-08, 711.

152. As noted previously, the record evidence does not support these find-

Third, the Court found that the injunction was content-neutral.[153] Fourth, the Court concluded that the injunction was not a prior restraint.[154] The Court concluded that its new test was similar to the "precision of regulation" used in *Claiborne Hardware*, and the precise tailoring used to meet the pin-pointed objective test noted in *Carroll*.[155]

Despite the factual and legal hurdles, the Court developed a new test for content-neutral injunctions by taking language from past decisions involving content-neutral regulations. The Court concluded however, that the new test was more stringent than the test applicable to content-neutral regulations. An accurate application of this test demands a correct predicate before the test can be applied.

The analysis in applying the *Madsen* test is as follows: (1) if the injunction is content-based, then the *Madsen* test is inapplicable because a content-based analysis must be followed; or (2) if the injunction is a prior restraint, then the *Madsen* test is inapplicable since a prior restraint analysis must be followed. If the injunction is neither a content-based restriction nor a prior restraint, then *Madsen* applies, and the following analysis should be utilized in determining the constitutionality of the injunctive relief: (1) there must be a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law; (2) there is a cognizable danger of recurrent violation; (3) a nonspeech restrictive injunction preventing the repeated illegal conduct has proven ineffective to protect the significant government interests because the defendant has repeatedly violated the injunction; and (4) a subsequent speech restrictive injunction may not burden more speech than necessary to serve a significant government interest.[156]

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153. The Court's finding of content-neutrality was based in large part upon the assumption that the picketers had repeatedly violated statutory or common law and continued to violate a nonspeech restrictive injunction. However, the Court did not totally dispense with the possibility that portions of the injunction were content-based, namely the "images observable" and the "no-approach" sections. *Madsen*, 114 S. Ct. at 2529 n.6.

154. Ironically, in the prior term, the Court indicated that permanent injunctions were classic examples of prior restraints. Alexander v. United States, 113 S. Ct. 2766, 2771 (1993).

155. However, in *Claiborne Hardware*, the Court painstakingly scrutinized the record and concluded that speech when mixed with conduct could not be abridged by merely lumping protected expressive activities with illegal conduct. Moreover, in *Carroll*, the Court found the injunction to be a prior restraint, which leads one to question how can the *Madsen* test be identical to the *Carroll* test since prior restraints are met with a higher level of scrutiny than the *Madsen* test provides.

156. The *Madsen* Court relied heavily on the assumption that the petitioners

The impact of *Madsen* will require a majority of the injunctions involving buffer zones[157] to be reconsidered under the new heightened scrutiny. Many of these types of injunctions which have been upheld relied on a content-neutral regulation analysis.[158] Most injunctions involving abortion clinic buffer zones which have been upheld by state or federal courts will not survive the new *Madsen* test. Though it seems axiomatic that injunctions are equitable remedies, many courts prior to *Madsen* have ignored the two fundamental prerequisites which must be present for the entry of any injunction, namely: (1) there is a showing that the defendant has violated, or imminently will violate, some form of statutory or common law, and (2) there is a cognizable danger of recurrent violation.[159]

Indeed, many of these injunctions will not even survive the two prerequisites necessary before getting to a nonspeech restrictive injunction. If the *Madsen* decision is used out of context for the proposition that an injunction is not *ipso facto* content-based or a prior restraint, or if a quick handed approach is used to uphold buffer zones without using the four step process, then the *Madsen* case will, in fact, weaken the First Amendment. However, if the facts of

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repeatedly violated a nonspeech restrictive injunction, and it is based on this reliance that the Court later upheld portions of the 36 foot buffer zone involving the speech restrictive portion of the second injunction. The Second Circuit Court of Appeals recognized this analysis in striking down a 15 foot buffer zone and in overruling one of its prior decisions under the new *Madsen* test. *Pro-Choice Network*, 34 F.3d at 140-42.

157. The *Madsen* analysis is applicable to any content-neutral injunction. It does not apply to only abortion clinic buffer zones, but extends to labor disputes and any other speech restrictive injunction.

158. *See, e.g.*, Murray v. Lawson, 642 A.2d 338 (N.J.), *cert. granted, vacated and remanded*, 115 S. Ct. 44 (1994). Planned Parenthood Shasta-Diablo, Inc. v. Williams, 873 P.2d 1224 (Cal. 1994); Kaplan v. Prolife Action League of Greensboro, 431 S.E.2d 828 (N.C. Ct. App. 1993); Fargo Women's Health Org., Inc. v. Lambs of Christ, 488 N.W.2d 401 (N.D. 1992); Northeast Women's Ctr., Inc. v. McMonagle, 939 F.2d 57 (3d Cir. 1991); Planned Parenthood Ass'n of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); Hirsch v. City of Atlanta, 401 S.E.2d 530 (Ga.), *cert. denied*, 111 S. Ct. 2836, 112 S. Ct. 75 (1991)); Valenzuela v. Aquino, 800 S.W.2d 301 (Tex. Ct. App. 1990); Bering v. SHARE, 721 P.2d 918 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987).

159. *Madsen*, 114 S. Ct. at 2525 n.3. On this basis alone, *Madsen* will result in the reexamination of many injunctions. Even in cases where these two prerequisites have been met, *Madsen* will require the reexamination of speech restrictive injunctions that have been entered in the absence of finding repeated violations of prior nonspeech restrictive injunctions. Finally, in those cases where these three prerequisites have been met, *Madsen* will require the reexamination of injunctions using the new heightened scrutiny analysis because some courts have used a lesser content-neutral test applicable to ordinances. Taken in context, *Madsen* will allow a speech restrictive injunction only after a showing of persistent illegal conduct.

Madsen and the Court's assumptions, whether right or wrong, are utilized in the four step process which the Court itself undertook, then, on balance, the *Madsen* test is a laudable decision in First Amendment jurisprudence.