Vittitow v. City of Upper Arlington: As Mixed Questions of Law and Fact, Should Ordinances and Injunctions be Reviewed Under the *Madsen* and *Frisby* Standards of Review by Using a De Novo Standard or a "Clearly Erroneous" Standard?*

In Vittitow v. City of Upper Arlington, *the Sixth Circuit used a de novo scope of review and applied the new intermediate standard of review, developed by the Supreme Court in* Madsen v. Women's Health Center, Inc., *for content-neutral limits to methods of protest. The author argues that appellate courts may narrow their scope of review without risking any "chilling effect" on the First Amendment. The dangers of systematic bias in state courts that drove the Supreme Court to de novo review in civil rights and First Amendment cases in the 1960s no longer exist. Furthermore, judicial deference in these kinds of cases may be justified because the antiabortion movement still has access to the political process, the lack of which is a necessary precursor to any civil disobedience in a just society, as defined by John Rawls in* Theory of Justice. *Given a narrowed scope of review, the Sixth Circuit should have remanded the case back to the district court for resolution under the* Madsen *standard of review where the court could have developed a more complete record with which to support—or modify—its findings.*

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* I would like to thank Professor Charles Wiggins for his insight and support. I dedicate this Note to my wife, Pat. Without her, IT WOULD NOT HAVE BEEN POSSIBLE.

I. INTRODUCTION

The nature of a woman's right to a choice concerning access to abortion may be the most divisive social issue of our time. Juxtaposing the competing issues of free speech and protest on one hand, and the right of targets of that protest to be left alone on the other, onto the abortion debate merely adds fuel to the fire. Over the last decade, parts of the pro-life movement, increasingly frustrated by a lack of progress within the legislatures and the courts,[1] have taken to public protest. Some groups, such as Operation Rescue, have targeted for extended blockade specific clinics offering abortions.[2] Groups have also targeted the homes of doctors and other abortion providers. Violence, all of it apparently stemming from elements within the pro-life movement, has flared.[3] In response, many of these targeted clinics and doctors filed for injunctive relief.[4] In addition, local and state legislative bodies have enacted ordinances to help control, and in some cases outright ban, protests in residential areas.[5] Inevitably, litigation ensued that has

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1. Joseph Sobran, *The Only Option Left? Paul Hill's Dilemma Led Him to a Violent Act*, DETROIT FREE PRESS, Aug. 4, 1994, at 13A. In this article, the author comments on the disenfranchisement felt by many pro-life activists in the wake of the 1992 Supreme Court decision in Planned Parenthood v. Casey, 505 U.S. 833 (1992):

> [I]n 1992, came the day the pro-lifers had worked and waited for. And they got the reward of Sisyphus. The court, almost all Republican appointees by now, reaffirmed its arbitrary ruling in *Roe*, not on grounds that it was constitutionally sound, but for the frank reason that the court's own prestige was at stake. . . . This meant that the pro-life movement could achieve nothing through the political process.

Sobran, *supra*.

2. *See, e.g.*, Joan Biskupic, *Limit On Protests at Abortion Clinic Reaches Top Court*, WASH. POST, Apr. 24, 1994, at A13 (reporting that protests at a Melbourne, Florida health clinic continued even while litigaton enused about injunctions against certain types of protest. This litigation would later culminate in Madsen v. Women's Health Ctr., 114 S. Ct. 2516 (1994); *see infra* analysis of *Madsen* in text accompanying notes 105-33).

3. Laurie Goodstein & Pierre Thomas, *Clinic Killings Follow Years of Antiabortion Violence*, WASH. POST, Jan. 17, 1995, at A1. The article quoted a spokesperson from the Bureau of Alcohol, Tobacco, and Firearms who stated that, of the 49 people prosecuted by the agency so far, "We found that all expressed antiabortion views. There is nothing in our cases that would show it's providers or supporters of abortion that are doing these acts." *Id.* at A8.

4. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993); *Madsen*, 114 S. Ct. at 2524. For a typical state court action, see Murray v. Lawson, 649 A.2d 1253 (N.J. 1994), *cert. denied*, 115 S. Ct. 2264 (1995).

5. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1987). For analysis of this case, see *infra* text accompanying notes 92-104.

resulted in at least four major Supreme Court decisions in this area since 1987, three of them in the last two years.[6]

The stakes are very high. The antiabortion picketing cases mark the first time in decades that the Court has systematically sanctioned limits on the right to protest and dissent.[7] The ferocity of protests and the increasing incidents of violence on one side,[8] and the privacy rights of targeted parties on the other,[9] may well force a critical re-examination of the role of protest and dissent in American society on a scale

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6. *Frisby*, 487 U.S. at 488 (constitutionality of ordinance upheld in response to a facial challenge); *Madsen*, 114 S. Ct. at 2524 (new standard of review for content-neutral injunctions against targeted protests); *Bray*, 506 U.S. at 263 (1993). In *Bray*, the Court held that women seeking abortions are not a class within the meaning of 42 U.S.C. § 1985, thus, eliminating a major method for obtaining federal jurisdiction. *Id.* at 266-74. This problem of obtaining federal jurisdiction has since been seemingly rectified by passage of the Freedom of Access to Clinic Entrances (FACE) Act of 1994. However, pro-life organizations have challenged the constitutionality of FACE and won in one district court. But, the case was subsequently overturned, and similar suits have been lost in six other district courts and the Fourth Circuit Court of Appeals. For further discussion of cases involving the constitutionality of FACE, see *infra* note 253. For another cause of action that abortion rights advocacy groups have used to try to curb antiabortion protest, see National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994) (allowing potential use of Racketeer Influence and Corrupt Organizations (RICO) Act in suing antiabortion protesters for damage to clinics).

7. The Red Scare cases of the 1920s and the 1950s contrast sharply with the Court's approach today. But, in any comparison in this area, one must keep in mind that because of the development of the First Amendment during the course of the twentieth century, the Red Scare cases were decided on very different grounds. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."); Dennis v. United States, 341 U.S. 494 (1951) (the Smith Act, which prohibited conspiracy to organize certain groups such as the Communist Party, was upheld as constitutional based upon the application of the "clear and present danger" test to the means used to control speech advocating the violent overthrow of the government). In the 1960s, the Court generally expanded the right to protest. For a discussion of the distinction between the approaches of the two eras, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

8. *See, e.g.*, Goodstein & Thomas, *supra* note 3, at A1 ("Militant antiabortion activists have been waging a protracted campaign of violence against women's health clinics and the people who work in them over the past decade, creating a climate of terror long before a gunman opened fire last month at clinics in Massachusetts and Virginia.").

9. For a detailed examination of the support for that right to privacy, see, for example, Joy H. McMurtry & Patti S. Pennock, *Ending The Violence: Applying the Ku Klux Klan Act, RICO, and FACE to the Abortion Controversy*, 30 LAND & WATER L. REV. 203 (1995).

unprecedented since the civil rights and antiwar protest days of the 1960s.[10]

The Court, in *Madsen v. Women's Health Center, Inc.*, established standards for the lower courts to use in fashioning content-neutral limits to methods of protest.[11] Honoring these limits may do much to prevent our social fabric from tearing further than it has to date[12] by acting as a deterrent to future violence and social unrest. To do so meaningfully, the lower courts must administer these limits with fairness and certainty.[13] At this point in the struggle over abortion, the courts are acting much like a referee in a prizefight where the boxers are locked up with each other. The risk of illegal blows and "rabbit punches" runs high. The referee must separate the fighters. The courts, to act as effective referees, must have the tools and the ability to apply them with timely certainty.

Appellate courts can potentially play a significant role by assisting the trial courts in their role. They can help ensure that enforcement is more timely by limiting the scope of their review of injunctions that are issued by federal district court judges to restrain violent protest. Traditionally, the Supreme Court has conducted an "independent review" of First Amendment cases; ostensibly to avoid the risk of a "chilling effect" on free speech.[14] But, that "chilling effect" is minimized in cases where federal court judges properly invoke content-neutral injunctions to curb disruptive or violent protests. Thus, appellate courts may be able to routinely apply a "clearly erroneous" standard or an "abuse of discretion" standard and greatly speed up the enforcement of injunctions.[15]

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10. Signs abound that this debate is already underway. On the side of limits, see *id.* For warnings of the dangers of limits, see Richard Stith, *A Pro-Life Strategy*, WASH. POST, Dec. 2, 1994, at A31 (interpreting *Madsen* as enjoining sidewalk counselling, which cuts off pro-lifers' hopes to work within the system nonviolently); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67 (1990).

11. 114 S. Ct. 2516 (1994). *See infra* text accompanying notes 105-33.

12. See *infra* text accompanying notes 205-31 for discussion of John Rawls's theory that in a reasonably just society, one's duty to obey the law may well override one's right to resist injustice, when, under certain conditions, the two conflict.

13. *See infra* text accompanying notes 232-40.

14. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984). Yet, the Court also commented that "[t]he requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of the broader proposition that the presumption of correctness that attaches to factual findings is stronger in some cases than in others." *Id.* at 500. *See infra* text accompanying notes 43-55.

15. Evan Lee concludes that appellate courts should apply a "clearly erroneous" standard to the review of mixed questions of law and fact in those cases where it is not creating "meaningful precedent." *See* Evan T. Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L.

A number of factors mitigate the risk of a "chilling effect"[16] in this area: the now relatively settled state of the case law;[17] the passage of the Freedom of Access to Clinic Entrances (FACE) Act of 1994,[18] which guarantees federal jurisdiction; and a lack of systemic bias against one class of parties versus others within the federal court system.[19] The context for this proposed reduction in the scope of appellate review is *Vittitow v. City of Upper Arlington*, a case recently decided by the Sixth Circuit that overturned an ordinance banning residential picketing.[20] The court used the new *Madsen* standard of review and lifted the district court's preliminary injunction, which regulated protests targeted at clinics and individuals.[21] Rather than aggressively reviewing cases in the manner that the Sixth Circuit did in *Vittitow*, appellate courts may, in the wake of *Madsen*, allow the district courts to manage enforcement with less interference. This policy would make enforcement more certain and more equitable to all parties, contributing to the deterrent effect of the injunctions and working towards the ultimate goal

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REV. 235, 285 (1991). Lee defines "meaningful precedent" as "a decision that the appellate judge believes some future court will find to control the case before it." *Id.* at 285 n.276. As will be discussed, the relatively settled state of the case law in the wake of *Madsen* will decrease the probability that an appellate court will be forced to review every case de novo. *See infra* text accompanying notes 254-55.

16. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 923 n.67 (1982) (overturning a Mississippi state court imposed injunction against a violence-tinged boycott that occurred in the context of desegregation in the 1960s). *See infra* text accompanying notes 183-95.

17. The Court's decision in *Frisby* may have left the state of the law unsettled concerning enforcement of ordinances. However, the standard of review developed in *Madsen* may well have rectified that shortcoming. *See infra* text accompanying notes 93-104.

18. 18 U.S.C.A. § 248 (West 1994). Based upon its commerce power, Congress enacted a law guaranteeing access to women's health clinics. In support of the Act, Congress made legislative findings that violence, threats of force, and physical obstructions aimed at persons seeking reproductive health services affected interstate commerce. The Act provides for criminal and civil penalties. Just as importantly, it also provides for a federal question cause of action for those seeking an injunction against demonstrators. However, pro-life organizations have attacked the Act's constitutionality, albeit unsuccessfully. *See infra* note 253.

19. *See infra* text accompanying notes 56-85. Evan Lee advanced this proposition in support of his argument to limit the scope of appellate review in mixed questions cases where the appellate court is not creating meaningful precedent. *See also* Lee, *supra* note 15.

20. 43 F.3d 1100 (6th Cir.), *cert. denied*, 115 S. Ct. 2276 (1995).

21. *Id.* at 1104.

of ameliorating a climate that is currently breeding increasing levels of violence.

II. SCOPE OF REVIEW: THE PROBLEM OF ALLOCATION OF ROLES BETWEEN THE TRIAL AND APPELLATE COURTS

The right to appeal in the United States is virtually universal.[22] Yet, "[r]arely have commentators sought to justify why at least one appeal should be available in every case."[23] The position of the American Bar Association's Commission on Standards of Judicial Administration, which supports a standard mandating appeal of right, typifies the summary nature of the reasoning: "The right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness as generally understood in this country."[24] But, other reasons for appellate review may be found.

In that regard, the appellate courts must, as their primary function, review the application of the rule of law made at the trial level for errors in the law used, the application of the law, or, under certain circumstances, the factual findings.[25] The distinction between fact and law has historically governed the intensity of that review.[26] At the simplest level the trial court has authority over findings of fact because it has the "keener eye for the mien of an untruthful witness than do[es its] appellate siblings."[27] The trier of fact has the opportunity to observe the demeanor of the witness, not merely review a written record. Also, the trial judge has considerable latitude in determining what evidence the trier of fact hears.[28]

The appellate courts, by contrast, decide questions of pure law because they are "arguably . . . in the best position to determine whether, where,

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22. Harlon L. Dalton, *Taking the Right To Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985).

23. *Id.* at 66.

24. *Id.* (quoting ABA COMM'N ON STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.10, at 12 (1977)).

25. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986).

26. *Id.* at 993, 1000-02.

27. Lee, *supra* note 15, at 260.

28. The trial court has a superior vantage point for weighing evidence against witness credibility. *Id.* The trial court can also call witnesses itself, decide questions of relevance, authenticity, and a myriad other issues that the appellate court can only review. *See generally* FED. R. EVID. 401, 403, 901-03; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES (2d ed. 1993).

when and how the law is in need of clarification or revision."[29] The distinction of law and fact and the concomitantly differing roles of the two levels of courts represent only two arbitrary positions on a "continuum of experience"[30] that meets in a muddied middle, suggesting an ambivalence about who ought to make the primary decisions. At one extreme, the Federal Rules of Civil Procedure (FRCP) allow appellate courts to overturn findings of fact only if they are "clearly erroneous."[31] This 1985 addition to the Rules codified the long-held rule "that fact-finding is the special province of the trial level."[32] The trial courts exercise discretionary power in fact-finding and application of the law to the facts "as defined by and within the limits set by law."[33] The appellate courts reserve declaration of law to themselves.[34]

The distinction between law and fact would appear to provide a nice dividing line between the two levels of courts.[35] However, "the two categories have been used to describe at least *three* distinct functions: law declaration, fact identification, and law application."[36] The trial court may perform all three at one point or another.[37] The appellate

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29. Dalton, *supra* note 22, at 70-71. One excellent example is the redefinition of the law of defamation concerning public figures by the Supreme Court in New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964). Louis, *supra* note 25, at 1017.

30. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985).

31. FED. R. CIV. P. 52(a).

32. Louis, *supra* note 25, at 994.

33. *Id.* at 1017.

34. *Id.*

35. *See* Monaghan, *supra* note 30, at 235 (quoting H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 374-75 (tentative ed. 1958)):

> Law declaration involves "formulating a proposition [that] affects not only the [immediate] case . . . but all others that fall within its terms." . . .
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> Fact identification . . . is a case-specific inquiry into *what happened here.* It is designed to yield only assertions that can be made without *significantly* implicating the governing legal principles.

36. *Id.* at 234.

37. *See id.* at 234-39. At least some law declaration must occur at the trial level because "[q]uite obviously there are occasions when *trial* judges are acutely aware that the state of the law they are asked to apply is sorry." Dalton, *supra* note 22, at 71. Fact identification is the trial court's special province. *See supra* text accompanying note 31.

court will operate in those areas as well, illustrating the difficulties attendant in deciding "what decisionmaker should decide the issue."[38]

These allocative decisions, the "need for continuous development of constitutional principles on a case-by-case basis," and the "danger of systemic bias of other actors in the judicial system" come together in any analysis of the scope of review of the application of the law.[39] The scope has traditionally varied along a continuum from de novo review[40] to the "clearly erroneous" standard.[41] It has been argued that in certain cases involving constitutional questions, de novo appellate review may be mandatory.[42]

A. The New York Times Rule for the Appellate Scope of Review of First Amendment Cases

The Supreme Court announced, in the landmark case of *New York Times v. Sullivan*, that independent appellate review was required to ensure that any judgment "does not constitute a forbidden intrusion on the field of free expression."[43] The Court alluded to examination of mixed questions by saying that the Seventh Amendment's "ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts."[44]

The Court subsequently adopted the *New York Times* rule in a number of different First Amendment areas: obscenity,[45] defamation,[46] and

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38. Monaghan, *supra* note 30, at 237 ("Law application is a distinctive operation. The real issue is not analytic, but allocative . . . .").

39. *Id.* at 239.

40. For a more complete discussion of constitutional facts, see *id.* at 229. *See also* Louis, *supra* note 25.

41. *See* Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980). For a full discussion of this case and others like it, see Lee, *supra* note 15, at 239.

42. *See* Monaghan, *supra* note 30, at 246. Professor Monaghan ultimately rejects the assertion that de novo appellate review is mandatory, even in First Amendment cases, as an overly broad reading of Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984). He notes the "potentially burdensome character" and sense of overkill in avoiding a "chilling effect" of mandatory de novo review. *Id.* at 267-71.

43. 376 U.S. 254, 285 (1964) (overturning a libel award sustained by the Alabama Supreme Court. The trial court had found that a full page advertisement, in support of Martin Luther King when he was arrested in Birmingham, Alabama in connection with the civil rights protests there and containing insignificant factual errors was "libelous per se.").

The motivation for this rule may be grounded elsewhere and may not be required. *See infra* text accompanying notes 56-85. *See also* Lee, *supra* note 15, at 283-84.

44. New York Times Co. v. Sullivan, 376 U.S. at 285 n.26.

45. *See* Miller v. California, 413 U.S. 15, 25 (1972) ("First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by

civil rights boycotts.[47] Each of these cases would appear to support across-the-board de novo review. The Court most clearly stated that proposition in *Bose Corp. v. Consumers Union of United States*.[48]

In *Bose*, the Court accepted certiorari specifically to determine whether the appellate court's de novo review was warranted or should have been restricted to the "clearly erroneous" standard of FRCP 52(a).[49] The Court did not restrict its affirmation of de novo review of First Amendment cases merely to defamation, but construed it broadly "in order to preserve the precious liberties established and ordained by the Constitution."[50] But, application of the concept of judicial *duty* to apply the standard remains unclear, even within First Amendment cases,[51] let alone the myriad civil and criminal cases involving constitutional questions.[52] Henry Monaghan advanced the notion that appellate discretion in deciding whether to review a case de novo or to apply a more limited scope of review might well "rest on an unarticulated and undefended neo-Brandeisian premise: only 'personal' constitutional rights, or some kinds of personal rights, warrant close appellate

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the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 100 (1972).

46. *Bose Corp.*, 466 U.S. at 485.

47. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). The Court held that nonviolent boycotts are protected by the First Amendment through the Due Process Clause of the Fourteenth Amendment. Only violent activity, which falls outside the protected status afforded by the First Amendment, may be so proscribed. *Id.* at 915-16 n.50. The Court further reaffirmed its power to "'make an independent examination of the whole record.'" *Id.* (quoting Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

48. 466 U.S. at 501 (Fed. R. Civ. P. 52(a) "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact.").

49. *Id.* at 487.

50. *Id.* at 511.

51. Monaghan, *supra* note 30, at 246.

52. *Id.* at 264-65. Monaghan cites Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 (1983), as "an excellent . . . example of limited review of constitutional law application. Over commerce and due process clause objections, the Court upheld application of a state tax to the income of a domestic corporation's foreign subsidiaries." Monaghan, *supra* note 30, at 265. In *Container Corp.*, the Court said that "[i]t will do the cause of legal certainty little good if this Court turns every colorable claim that a state court erred in a particular application of . . . principles into a *de novo* adjudication." *Container Corp.*, 463 U.S. at 176. In a footnote, the Court added that "[t]his approach is, of course, quite different from the one we follow in certain other constitutional contexts." *Id.* at 176 n.13. As an example of the contrasting approach, the Court then cited New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *Id.*

scrutiny."[53] Monaghan asked whether, in the wake of *Bose*, the Court may "properly limit its grant of review to whether correct first amendment standards have been employed, leaving the 'routine' law application point for final disposition in the court[s] below?"[54] One answer to that question may lie in whether or not the appellate court views the state of the law as adequate or in need of further elaboration. Even if the law needs further elaboration, Monaghan argues that a discretionary, case-by-case approach may be best where appellate courts pick and choose the most suitable cases.[55]

B. The "Clearly Erroneous" Standard Examined

In a very different approach to the scope of appellate review, Evan Lee has argued that appellate courts should adopt the "clearly erroneous" standard of review for mixed questions of law and fact, and principled decision-making in de novo review of what the court will consider pure questions of law.[56] Law and fact lie at two extremes of a continuum that reflects the allocation of decision-making authority between judges and juries or between appellate courts and trial courts.[57] The Supreme Court has defined mixed questions as the application of undisputed law to established facts.[58]

Lee found that the circuit courts used four different models in adjudicating mixed questions:[59] (1) the "clearly erroneous" standard, practiced by the First and Seventh Circuits;[60] (2) the de novo scope of

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53. Monaghan, *supra* note 30, at 265-66. This notion "reflects the specific substantive constitutional values at stake rather than generalized notions about the nature of federal judicial power." *Id.* at 259.

54. *Id.* at 246.

55. *Id.* at 274. Monaghan discusses the Court's approach in habeas corpus cases, where it has refused to go so far as to require de novo review of each case. *Id.*

56. Lee, *supra* note 15, at 238 (citing Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982)). By contrast, mixed questions of law and fact are known as "questions of ultimate fact." *Id.* at 238 n.18. An "[u]ltimate fact is the 'legally determinative consideration . . . which is or is not satisfied by subsidiary facts admitted or found by the trier of fact.'" *Id.* at 238 (quoting *Pullman-Standard*, 456 U.S. at 286). *See also infra* note 58.

57. Lee, *supra* note 15, at 236.

58. *Id.* at 235 n.1. According to Lee:

> The Court . . . defined mixed questions of law and fact as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

Id. (quoting *Pullman-Standard*, 456 U.S. at 289 n.19).

59. *Id.* at 235-36, 238.

60. *Id.* at 239.

review, practiced by the Second, Third, Eighth, and D.C. Circuits;[61] (3) a variable standard, practiced by the Ninth and Tenth Circuits;[62] and (4) no discernible pattern of review in the Fourth, Fifth, and Sixth Circuits.[63] Overall concerns of judicial efficiency,[64] as well as credibility and prestige,[65] in Lee's analysis, steer courts in the direction of restricting the scope of appellate review because government power must be constrained in order to be legitimized.[66] The appellate process itself externally constrains the district courts.[67] However, because parties cannot automatically appeal appellate decisions to the Supreme Court, the Circuit Courts of Appeal do not suffer the same external constraint. Lee likened the one external constraint on the Circuit Courts, that of stare decisis, to the teeth of an old comb: strong, but "sporadically distributed."[68]

In order to conserve its continued judicial legitimacy, an appellate court takes precedential baggage into account when reviewing lower court decisions de novo.[69] Other courts will necessarily have to follow the appellate court's decision, often with potentially far-reaching ramifications.[70] Professor Wechsler postulated that the "main constitu-

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61. *Id.* at 241.
62. *Id.* at 244.
63. *Id.* at 245.
64. *Id.* at 250-52.
65. *Id.* at 252-54.
66. *Id.* at 252. Interestingly, Monaghan makes much the same argument in favor of a duty of appellate courts to make independent review of administrative decisions. *See* Monaghan, *supra* note 30, at 254-63.
67. Lee, *supra* note 15, at 252. *But see* Dalton, *supra* note 22, at 86-93. Dalton hypothesizes that the constraint may have more to do with the type of judge sitting on the bench than with any intrinsic, normative influence the appellate process itself has. For instance, if the judge is merely a bench-warmer, she will "forego the chance to be a heroine in order to avoid being a goat." *Id.* at 87. A bench builder, by contrast, takes her role "quite seriously," takes outcomes quite seriously, and seeks to insulate her opinion from review at all costs because it was arrived at as a just result. *Id.*
68. Lee, *supra* note 15, at 253.
69. *Id.* at 287.
70. *Id* at 285-89. Lee applies his model of "principled decision making" to Clevenger v. Oak Ridge Sch. Bd., 744 F.2d 514 (6th Cir. 1984). In *Clevenger*, a handicapped boy's mother brought suit seeking an injunction to force the local school board to place her son at a particular school. The Sixth Circuit held that the issue was a mixed question and averred that such questions may be reviewed freely. But, it also said that, even under the "clearly erroneous" standard, it would overturn the district court. Lee analyzed the *basis* for the court's decision, rather than the outcome. If the court had made the decision based upon statutory construction, then it would have

ent of the judicial process is precisely that it must be genuinely principled,"[71] capable of producing meaningful precedent.[72] Lee postulates that a combination of this restrained, "principled decision-making" by the appellate courts when creating precedent, as well as deference to the lower courts in all other cases, would provide substitute constraints, thereby enhancing the legitimacy of appellate review.[73] Thus, if the appellate court reviews a mixed question and constrains itself to a "clearly erroneous" standard, then justice may be done in the particular case without the danger of a broad new precedent being set.

Lee then advanced the hypothesis that the Court was concerned about *state* actions reviewed by *state* court fact-finders in both obscenity and defamation cases, *Bose* notwithstanding.[74] He contrasted this independent review to the great leeway the Court granted district courts in the application of the law to school desegregation cases, starting with *Green v. County School Board*.[75] There, the Court wanted quick results and that required "a great deal of district court discretion."[76] Once the Court had clearly articulated its ultimate goal of banishing de jure segregation, it adopted a "hands-off" approach to district court remedies because de jure segregation involved the interests of a wide range of people.[77] Lee dismissed *Bose* as an aberration to this pattern, "merely [a] reflexive application[] of the independent review practice."[78]

Lee's pattern also explains the Court's decision in *NAACP v. Claiborne Hardware Co.*,[79] cited by Justice Scalia in his dissent to

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precedential value that would potentially affect vast numbers of future cases. If the court made the decision based upon a "clearly erroneous" standard, then it was free to consider only the facts in this particular case without worrying about precedential value. Of course, the court must make this distinction quite clear in its review, lest there be confusion. The court did not make itself clear in *Clevenger*. Lee, *supra* note 15, at 286.

71. Hans Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

72. Lee, *supra* note 15, at 237 (citing *id.*).

73. *Id. See also supra* note 70 (discussing Lee's application of the constraints of deferential review as compared to de novo review in *Clevenger*, 744 F.2d at 514).

74. Lee, *supra* note 15, at 281-84. *But see* Monaghan, *supra* note 30, at 272 ("The premise that state courts are to be suspected of distorted factfinding and law application is disquieting.").

75. Lee, *supra* note 15, at 266 (citing Green v. County Sch. Bd., 391 U.S. 430 (1968)).

76. *Id.*

77. *Id.* at 269-70. "Despite outward appearances, it does not seem that the Court has abandoned its 'hands-off' approach to district court remedies in its recent decision of the Yonkers desegregation case, *Spallone v. United States*." *Id.* at 270 (citing Spallone v. United States, 493 U.S. 265 (1990)).

78. *Id.* at 284 n.273 (citing Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 518 n.2 (1984) (Rehnquist, J., dissenting)).

79. 458 U.S. 886 (1982).

Madsen.[80] The Court overturned the Mississippi Supreme Court's judgment that black citizens were intimidated by an NAACP-led boycott of white-owned businesses in Claiborne County, Mississippi.[81] Here too, the Court was ensuring that southern state courts were not systematically biased against one of the parties. In this context, "[n]on-deferential review . . . amounts to little more than supervising the handiwork of state court fact-finders suspected of acting in bad faith. It falls well short of disproving the broad notion that the proper role of an appellate court is restricted to formulating general rules."[82] Monaghan expressed alarm that appellate courts would engage in this sort of behavior.[83] But, indeed, the Court in *Claiborne Hardware* may have been doing just that.

In state court cases, such as *New York Times v. Sullivan*[84] and *NAACP v. Claiborne Hardware*,[85] the Court was also trying to ensure that the civil rights movement received a fair shake. Both cases originated in the 1960s as de jure segregation was breathing its last breath. To have acted otherwise would have prolonged its death. The Court's actions in the school desegregation cases also conform to this explanation. The obscenity cases have a similar policy twist: the Court was attempting to end an era of unwarranted intrusion into free speech concerns. Both veins could well be said to reflect, at least to a degree, the dominant public policy concerns of the day.

III. BACKGROUND TO *VITTITOW*: THE STATE OF THE LAW ON CONTENT-NEUTRAL RESTRICTIONS ON PROTESTS

The Supreme Court has defined rules concerning content-neutral restrictions on protests in two related contexts that deal directly with

80. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2533 (1994) (Scalia, J., dissenting). But, Lee's hypothesis provides a powerful counterpoint to Scalia's attempt to equate the two movements. For analysis of Justice Scalia's dissent, see *infra* text accompanying notes 125-33.

81. *Claiborne Hardware*, 458 U.S. at 920-24.

82. Lee, *supra* note 15, at 284.

83. Monaghan, *supra* note 30, at 272 ("The premise that state courts are to be suspected of distorted factfinding and law application is disquieting. After all, the constitution presupposes that the state courts will enforce declared federal law fairly.").

84. 376 U.S. 254 (1964).

85. 458 U.S. 886 (1982).

antiabortion protest. The first is in the 1988 case of *Frisby v. Schultz*,[86] where the Court ruled on the constitutionality of an ordinance that prohibited residential picketing. The second is in the 1994 case of *Madsen v. Women's Health Center, Inc.*, where the Court, in a much broader opinion, seemingly created a new standard of review for content-neutral injunctions.[87] With these cases, the Court has defined what now appears to be a continuum of standards of review for First Amendment cases. In the traditional public forum, the Court has reviewed content or viewpoint based restrictions with strict scrutiny.[88] By contrast, the Court has reviewed restrictions that it found content-neutral with an intermediate standard of review, using a principle of inquiring into "whether the government has adopted a regulation of speech 'without reference to the content of the regulated speech.'"[89] In *Madsen*, because of repeated violation of previous court orders, the Court expanded the definition of content-neutral restrictions to include those "incidental to the . . . message."[90] In contrast, some members of the Court have reviewed areas of speech and conduct deemed as falling outside the scope of First Amendment protection on a rational relation basis.[91]

With *Madsen* and *Frisby*, the Court has put an overall framework into place, allowing the lower courts to enforce consistent standards over a relatively wide range of fact patterns. In both of these cases, the Court conducted a largely independent review. In both instances, the state of the law was unsettled and the Court needed to develop constitutional principles "on a case by case basis."[92] But, even while conducting an independent review, both majority opinions clearly deferred to the lower courts in some aspects.

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86. 487 U.S. 474 (1988).

87. 114 S. Ct. 2516 (1994).

88. *Id.* at 2522. "To enforce a content-based exclusion[,] the State must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

89. *Id.* at 2523 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (upholding noise regulations)).

90. *Id.* at 2524.

91. Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (Scalia, J., concurring) (while majority used an intermediate standard of review to uphold a ban on nude dancing, Justice Scalia, concurring in the result, would have found nudity non-expressive conduct per se, separate from dancing, and thus reviewed under a rational relation standard).

92. Monaghan, *supra* note 30, at 239.

A. Frisby v. Schultz

The appellees, "strongly opposed to abortion," mounted a facial challenge to an ordinance issued by the town of Brookfield, Wisconsin, in the wake of antiabortion picketing targeted at residences of abortion providers.[93] The ordinance made it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual"[94] and had a clearly stated, primary purpose of "protection and preservation of the home."[95] With five justices joining an opinion written by Justice O'Connor,[96] the Court upheld the constitutionality of the ordinance based upon a "well-established principle that statutes will be interpreted to avoid constitutional difficulties."[97]

The majority held that residential streets—even narrow ones—are clearly a traditional public forum.[98] The Court deferred to the lower courts in finding the ordinance content-neutral,[99] allowing use of an intermediate level of scrutiny as the appropriate standard of review.[100] Under that standard, the Court construed the ordinance's ban on protests as very limited.[101] It then found that the ordinance served a significant state interest: "'well-being, tranquility, and privacy of the home.'"[102] However, Justice O'Connor did note that "particular hypothetical applications" could have altered the outcome on the issue of how such

93. Frisby v. Schultz, 487 U.S. 474, 476-77 (1987). Appellees and others had picketed in groups of 11 to 40 outside the residence of a Brookfield, Wisconsin doctor who "apparently performs abortions . . . in neighboring towns." *Id.* at 476. The town reacted by enacting the ordinance in May, 1985. The town attorney informed the appellees of the new ordinance and the town's intent to implement enforcement. "Faced with this threat of arrest and prosecution, appellees ceased picketing in Brookfield, and filed this lawsuit." *Id.* at 477.

94. *Id.* at 477.

95. *Id.*

96. Justice White concurred. *Id.* at 488. Justices Brennan and Stevens dissented in separate opinions. *Id.* at 491, 496. Justice Marshall joined Justice Brennan in dissent. *Id.* at 491. The division occurred along lines of what standard of review should be applied. A similar division occurred in Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994). *See infra* text accompanying notes 105-33.

97. *Frisby*, 487 U.S. at 483.

98. *Id.* at 479-80.

99. *Id.* at 482.

100. *Id.* at 479.

101. *Id.* at 483.

102. *Id.* at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

an ordinance might have been enforced.[103] As discussed *infra*, the enforcement issue can readily explain the different outcome in *Vittitow* where an identically worded ordinance was found unconstitutional.[104]

B. The New Standard of Review in Madsen

Madsen v. Women's Health Center, Inc. potentially marks a major shift in the Court's standard of review for cases involving injunctions against public protesters who target specific individuals. Courts must now apply "a somewhat more stringent application of general First Amendment principles" to injunctions that curb protests to ensure "'that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs.'"[105]

The case began in 1992 when a Florida state court permanently enjoined pro-life demonstrators from blocking or interfering with public access to an abortion clinic after a series of demonstrations aimed at abortion clinics and the homes of doctors and clinic workers. The trial court issued a broader injunction six months later when the clinic complained that the original injunction had not succeeded in allowing unimpeded access to the clinic.[106] The case was appealed to the Supreme Court through two different routes. The Florida Supreme Court affirmed the trial court's injunction.[107] In a separate, but parallel challenge, the Eleventh Circuit Court of Appeals found the injunction to be content-based and, thus, unconstitutional based upon a strict scrutiny standard of review.[108] The Supreme Court granted certiorari to resolve this conflict.[109] Chief Justice Rehnquist, joined by four other justices, wrote the Court's opinion.[110]

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103. *Id.* at 488.
104. Vittitow v. City of Upper Arlington, 43 F.3d 1100, 1106 (6th Cir. 1995).
105. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2524-25 (1994) (quoting Califano v. Yamasaki, 442 U.S. 682, 702 (1979)).
106. *Id.* at 2521.
107. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993).
108. Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993).
109. *Madsen*, 114 S. Ct. at 2523.
110. Both Justice Stevens and Justice Scalia wrote separate opinions advocating differing standards of review. Justice Scalia's advocacy of the application of strict scrutiny is discussed *supra* in text accompanying notes 125-33. In contrast to the majority and to Justice Scalia, Justice Stevens would have governed injunctive relief by a more lenient standard than legislation because an injunction is more narrowly aimed. Injunctions "should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts." *Id.* at 2531 (Stevens, J., concurring). Furthermore, the 300-foot ban on protesters approaching persons seeking services prohibits a species of conduct, not speech. In that light, Stevens argues, the situation is analogous to labor picketing. *Id.* at 2532. "Physically approaching" is no broader than necessary given the unchallenged facts. *Id.* at 2533.

The Court used a two-step inquiry. First, it determined whether the injunction was content-neutral, using previously developed standards.[111] In the second step, it developed a "more stringent application of general First Amendment principles."[112] The Court has traditionally distinguished content-neutral restrictions from content-based restrictions because the former, if enforced properly, do not affect the nature of the message, only the methods used to deliver it. Content-based restrictions reflect a paternalistic concern about how people will react to the communicative impact of the message.[113] In finding that the injunction was indeed content-neutral, the Court explained that "the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."[114] The restrictions that this injunction directed at the protestors were "incidental to [the protestor's] antiabortion message because they repeatedly violated the court's original order."[115] In one of the more significant aspects of this case, the Court used the record to determine that the injunction was content-neutral, instead of merely deferring to the lower court, thereby setting a precedent for broader application of that definition by the lower courts.[116]

The majority then found that the government had demonstrated legitimate purposes, citing the Florida Supreme Court's decision: (1) "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy;" (2) "public safety and order;" and (3) protecting the "State's strong interest in residential privacy, acknowledged in *Frisby v. Schultz*."[117] The majority further held that a court must "examine each contested provision . . . to see if it burdens more speech than necessary to accomplish its goal."[118]

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111. A content-neutral restriction is adopted "'without reference to the content of the regulated speech.'" *Id.* at 2523 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

112. *Id.* at 2524.

113. A classic fear of the message may be found in the World War I cases, such as Schenck v. United States, 249 U.S. 47 (1919) (speech advocating draft avoidance was punishable). Yet, in the 1960s, a much different approach was taken. *See supra* note 7.

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

115. *Id.*

116. *Id.* at 2523-24.

117. *Id.* at 2526 (citing Frisby v. Schultz, 487 U.S. 474, 484 (1987)).

118. *Madsen*, 114 S. Ct. at 2526.

The injunction handed down by the Florida state court[119] followed earlier, more narrowly based injunctions that had apparently failed to ensure access to the blockaded clinic.[120] The Court held that some of the restrictions in the injunction covering access to the clinic,[121] noise levels in its vicinity,[122] restrictions on sidewalk counseling,[123] and the use of sound amplification equipment passed muster and others did not. The Court also restricted the scope of injunctions against residential picketing.[124]

Reflecting the divisive nature of the underlying context of abortion, Justice Scalia, in his dissenting opinion, demanded that the court use a standard of strict scrutiny because the distinctive characteristics of an injunction were, for reasons of policy and precedent, as fully in need of such a level of review as "content-basis" for doing so.[125] His policy reasons included: (1) danger that injunctions may be 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";[126] and (2) injunctions

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119. *Id.* at 2521-22.

120. *Id.* at 2521.

121. The 36-foot buffer near clinic entrances passed muster with the new standard of review because "some deference must be given to the state court's familiarity with the facts and background of the dispute . . . even under our heightened review." *Id.* at 2527. But, the Court distinguished the 36-foot buffer on the back and sides of clinic, which bordered other private property. "Absent evidence that petitioners standing on private property have obstructed access to the clinic . . . this portion of the buffer zone fails to serve the significant government interests relied on by the Florida Supreme Court." *Id.* at 2528.

122. Restrictions on high noise levels outside the clinic were also upheld. "The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Id.* at 2528. In contrast to its rulings on noise levels, the Court found "images observable," such as signs and banners, a different kettle of fish. *Id.* at 2529. The Court held that "it is 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." *Id.*

123. On the grounds that the consent provision burdened more speech than necessary in restricting sidewalk counselling, the Court invalidated the ban on protesters approaching anyone within 300 feet of the clinic entrance without her consent in order to prevent "clinic patients and staff from being 'stalked' or 'shadowed'" by the protesters. *Id.*

124. The "prohibition against picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff" failed because alternatives were available. Compared to the zone provided for in *Frisby*, the Court found the 300-foot ban on picketing around residences was much too large based on the record. *Id.* at 2529-30. The zone around the residences was too big in light of possible alternative limitations on "time, duration of picketing, and number of pickets outside a smaller zone." *Id.*

125. *Id.* at 2538 (Scalia, J., dissenting).

126. *Id.* at 2539.

> are the product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman. . . . [T]he injunction is a much more powerful weapon than a statute.[127]

Persons subject to an injunction face a Hobson's choice if they have no money or time to lodge an appeal: remain silent or face contempt proceedings.[128]

Scalia felt that this injunction was really content-based anyway. The residual coverage of "'all persons acting in concert or participation with [the named individuals and organizations], or on their behalf' would not include those who merely entertained the same beliefs and wished to express the same views as the named defendants."[129] He quoted colloquies in his dissent that, in his view, demonstrated that the revised injunction "is tailored to restrain persons distinguished, not by proscribable *conduct*, but by proscribable *views*."[130] He vehemently protested that the record failed to demonstrate any violence. But, even where "First Amendment activity is intermixed with *violent* conduct, 'precision of regulation' is demanded."[131] Justice Scalia unfavorably compared the *Madsen* majority's holding to the holding in *NAACP v. Claiborne Hardware Co.*, where blacks were protesting various forms of racial discrimination.[132] He called abortion protesters a "disfavored class."[133]

Within a few months of the Court handing down the *Madsen* opinion, the Sixth Circuit heard an appeal of a preliminary injunction issued by an Ohio district court prior to *Madsen*. This injunction stayed enforcement of an ordinance patterned after *Frisby*. The district court had issued the injunction against the protesters limiting the scope of their picketing of the residence of a doctor who performed abortions.[134]

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127. *Id.*
128. *Id.*
129. *Id.* at 2539-40 (quoting from the language of the injunction).
130. *Id.* at 2540.
131. *Id.* at 2541 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
132. *Madsen*, 114 S. Ct. at 2542-43 (referring to NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).
133. *Id.*
134. *See* Vittitow v. City of Upper Arlington, 43 F.3d 1100 (6th Cir.), *cert. denied*, 115 S. Ct. 2276 (1995).

IV. *VITTITOW V. CITY OF UPPER ARLINGTON*

A. Facts

In 1991, plaintiffs targeted the residence of Dr. Raymond Robinson, a doctor living in Upper Arlington who performed abortions in Dayton, as a focal point for a number of protests.[135] Dr. Robinson lived on a cul-de-sac where a few other homes also stood. Plaintiffs repeated their protests in April, 1992.[136] In August, 1992, the City Council responded by passing an ordinance that read: "No person shall engage in picketing before or about the residence or dwelling of any individual in this City."[137] Plaintiffs again targeted the doctor in October, 1992. Police responded to a complaint and asked plaintiffs to leave after determining that probable cause existed that a specific house was targeted in contravention of the ordinance. Plaintiffs left without further incident. Police took a videotape of the incident.[138]

Plaintiffs then brought an action in district court seeking an injunction against the enforcement of the ordinance, alleging that it violated their constitutional rights under the First Amendment.[139] The district court issued a preliminary order enjoining the city from enforcing the ordinance. But, the order provided for conditional enforcement:

> 1) Picketers shall continue moving at all times and shall not stop or gather in front of or around any residence; 2) Picketers shall not give undue emphasis to directing their activities to one residence; 3) The presence or absence of signs, banners, etc. shall not in any way diminish or enhance the activities of the picketers; 4) Picketers shall at all times be mindful of the legitimate and compelling interest of the City of Upper Arlington to maintain traffic and safety—particularly as it applies to children. Picketers are directed to obey any legitimate orders of the police concerning the safety of those in the area being picketed; 5) The City of Upper Arlington shall adopt, issue and post appropriate written authority to comply with this Order within thirty (30) days of the issuance of the Court's pending Opinion and Order.[140]

Sua sponte, the district court modified its order because it considered the original order unworkable. The court held that:

> 1. Defendants may not prevent plaintiffs from picketing in any particular residential neighborhood, street, or cul-de-sac. 2. Defendants may, however, properly prevent plaintiffs from picketing in front of: (a) the doctor's home,

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135. *Id.* at 1101.
136. *Id.*
137. *Id.*
138. *Id.* at 1101-02 & n.3.
139. *Id.* at 1102.
140. *Id.*

> and (b) the two homes on either side of the doctor's home. 3. Similarly, defendants may properly prevent plaintiffs or others from picketing in front of: (a) the home of anyone defendants have probable cause to believe is the target, focus or subject of the picketing, as well as (b) the two homes on either side of the home just described.[141]

Both parties appealed this later injunction.[142]

B. The Sixth Circuit's Analysis of the Injunction

The appeals court held that the injunction itself was content-neutral under the inquiry used in *Madsen*.[143] "[N]one of the restrictions imposed by the court were directed at the contents of [plaintiffs'] message. . . ."[144] The injunction (as well as the ordinance) seeks to regulate not plaintiffs' message, but rather the means by which plaintiffs seek to convey their message."[145] The court also found that the ordinance itself was content-neutral, citing the *Frisby* Court's concerns about "privacy of the home."[146]

The court then inquired into "whether the challenged provisions [of the injunction] burden no more speech than is necessary to serve that interest."[147] The plaintiffs contended that the "modified injunction would allow the City to arrest and prosecute individuals for doing little more than walking down a city sidewalk."[148] The court used both *Frisby* and *Madsen* as a basis for a de novo inquiry into the injunction, as well as into the enforcement of the ordinance.

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141. *Id.* at 1102-03 (citing Vittitow v. City of Upper Arlington, 830 F. Supp. 1077, 1083 (S.D. Ohio 1993)).
142. *Id.* at 1102.
143. *Id.* at 1104.
144. *Id.* (quoting Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523 (1994)).
145. *Id.*
146. *See* Frisby v. Schultz, 487 U.S. 474, 484 (1988). Justice O'Connor's opinion, extensively quoted in *Vittitow*, went on to say, "Our prior decisions have often remarked on the unique nature of the home, 'the last citadel of the tired, the weary and the sick.'" *Id.* (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)). She also wrote that "[o]ne important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 484-85.
147. *Vittitow*, 43 F.3d at 1105.
148. *Id.* (internal quotations omitted).

The *Vittitow* court noted that the *Frisby* Court "saved [the ordinance] by the extraordinary measure of accepting counsel's representation at oral argument before the Supreme Court as to how the ordinance would be enforced."[149] The *Vittitow* court then chastised the city for adopting the *Frisby* ordinance language when "a federal district judge, a divided Seventh Circuit Court of Appeals, and four Supreme Court Justices found it to be overbroad."[150] Ultimately, the *Vittitow* court found enforcement of the ordinance to contravene the *Madsen* standard.[151] It used this record of enforcement to distinguish *Frisby*.[152] The court further noted:

> Finally, and most important, the videotape and the testimony in this case indicate how the City reads *Frisby* in enforcing this ordinance. The videotape (Plaintiffs' Exhibit H) demonstrates that the City's police view the ordinance as violated when they can discern one residence as being the target of picketing. In our view, that is a misreading of *Frisby*. All picketing of this nature will have a target, otherwise it is not really picketing. *Frisby* could not be more clear: "[O]nly focused picketing *taking place solely in front of a particular residence* is prohibited."[153]

However, in this finding, the court did not explain exactly what in the district court's opinion offended it. The court merely took issue with the trial judge who "tried to save this ordinance with a one-size-fits-all injunction."[154] The court said that "the complete ban on residential picketing mandated by the ordinance [is] inconsistent" with *Madsen* and entered a permanent injunction against enforcement of the ordinance.[155] The court refused to remand the case to the district court to have the injunction, the ordinance, and the enforcement of the ordinance reconsidered in light of the *Madsen* standard. As the dissent pointed out, the district court had yet to hold a full hearing on the merits.[156] The *Vittitow* court justified its actions by recognizing that federal "'courts do not rewrite statutes to create constitutionality.'"[157] It furthermore chastised the city for failing to learn from *Frisby* in writing such a broad

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149. *Id.* at 1106.
150. *Id.*
151. *Id.*
152. *Id.* (distinguishing Frisby v. Schultz, 487 U.S. 474, 488 (1987)). In *Frisby*, Justice O'Connor expressed the concern that such an ordinance might well have been found unconstitutional if it had been improperly enforced. *Frisby*, 487 U.S. at 488. *See also supra* text accompanying note 103.
153. *Vittitow*, 43 F.3d at 1106-07 (quoting *Frisby*, 487 U.S. at 483).
154. *Id.* at 1107.
155. *Id.*
156. *Id.* (Martin, J., dissenting).
157. *Id.* at 1106 (quoting Eubanks v. Wilkinson, 937 F.2d 1118, 1122 (6th Cir. 1991)).

ordinance.[158] Nor would the court give either plaintiff or the city "an advisory opinion as to how the ordinance might be enforced."[159]

C. *The Dissent*

Judge Martin's dissent focussed on the procedural posture of the case and did not argue the merits of the injunction, the ordinance, or the enforcement of the ordinance. He postulated that the merits of the ordinance had never been argued.[160] In his eyes, the district court had merely issued a preliminary injunction, an equitable remedy designed to "maintain the relative positions of the parties until proceedings on the merits [could] be conducted."[161] Judge Martin argued that FRCP Rule 65(a)(2) does allow a consolidated proceeding when an injunction is issued, but that did not occur in this case.[162]

Because this was a preliminary injunction only, Judge Martin said that the appropriate standard of review should have been one of deference. The "decision of a district court to grant a preliminary injunction is 'generally accorded a great deal of deference on appellate review and will only be disturbed if the court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard.'"[163] He found "no clear error."[164] In his eyes, the majority obviously thought that the plaintiff would succeed on the merits. "The majority should have stopped its analysis there and affirmed the district court as to the propriety of issuing the injunction, assuming they find no

158. *Id.* at 1107.
159. *Id.*
160. *Id.* (Martin, J., dissenting).
161. *Id.*
162. *Id.* at 1107-08.
163. *Id.* at 1108 (quoting Michigan Coalition v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991), *rev'd on other grounds*, 954 F.2d 1174 (6th Cir. 1992)). The dissent said that, in reviewing a preliminary injunction, it must balance four factors in reviewing only for abuse of discretion. These factors are:

> "(1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction."

Id. at 1108-09 (quoting Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994)).
164. *Id.* at 1109.

error in the district courts' findings and conclusions on the other factors."[165]

Even though Judge Martin found no abuse of discretion in the granting of the injunction itself, he went on to say that the district court could abuse its discretion in the scope of the injunction. He said that the scope of the injunction was the "crux of the parties' dispute—whether the three (or five) house buffer zone is constitutional"[166] under the standards of *Frisby*,[167] and under *Madsen*,[168] which was decided after the parties briefed the issues. He further stated, "Because the size of the buffer zone at issue here is unclear, I would construe the injunction as creating a three-house zone and would remand for the district court to clarify its order accordingly."[169]

Judge Martin clearly viewed *Frisby* as balancing the "residential privacy interests of the homeowner with the First Amendment rights of the picketers who were, as here, engaged in focused, targeted picketing."[170] Using the Supreme Court's rationale of balancing competing interests, he construed *Frisby* as not preventing the banning of "forms of targeted, focused residential picketing" other than that "taking place solely in front of one home."[171]

In this case,

> [m]erely because the plaintiffs chose to march slowly by other residences, as well as the targeted residence, does not insulate their activity from regulation. The targeted homeowner is as much a captive audience when picketers repeatedly march in front of a home as when they are standing still. The psychological injury and disturbance to the tranquility of the home are not reduced because the picketers are marching slowly.[172]

With that, Judge Martin would have affirmed the district court's injunction as proper in seeking to curb the undesirable effects of plaintiffs' targeted picketing.[173]

Judge Martin was critical of the new standard of review in *Madsen*. "Because [it] does not alter my analysis, I wonder if this is a 'new' test for content-neutral injunctions."[174] He did not believe that the *Madsen* Court correctly interpreted *Frisby*. He did not see *Frisby* as creating a

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165. *Id.*
166. *Id.* at 1110.
167. Frisby v. Schultz, 487 U.S. 474 (1987).
168. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516 (1994).
169. *Vittitow*, 43 F.3d at 1110 (Martin, J., dissenting).
170. *Id.*
171. *Id.*
172. *Id.* at 1111.
173. *Id.*
174. *Id.*

zone as did the *Madsen* Court.[175] He viewed the striking down of a 300-foot zone around the residence of a target of the picketing as heavily fact-dependent.[176] Indeed, the *Madsen* Court held that "the record before us does not contain sufficient justification for this broad a ban on picketing."[177]

Even so, using the *Madsen* standard, Judge Martin would have found the three-house zone "no more burdensome than necessary to protect the significant governmental interest in protecting residential privacy."[178] Judge Martin was very aware of the difference in facts in individual cases when he contrasted the thirty-six foot buffer in front of the clinic in *Madsen* with the cul-de-sac in *Vittitow*.[179] He was concerned that, given the physical layout of the cul-de-sac, a zone might not be adequate. He thought that even limiting the number of picketers could be justified.[180]

Judge Martin then called for the Supreme Court to modify traditional public fora analysis of residential streets and sidewalks.[181] Several factors, such as whether the residents of these streets would consider them "traditional public fora," private ownership of the fee to the land underlying the streets, and private maintenance of sidewalks in many neighborhoods, combined with residential privacy interests, led him "to believe that it's time to reconsider whether all streets over which the public may travel are traditional public fora."[182]

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175. *Id.* As Judge Martin correctly points out, Chief Justice Rehnquist's opinion accepts the creation of a zone in *Frisby* as a matter of course. The word "zone" does not appear anywhere on the cited page in Frisby v. Schultz, 487 U.S. 474, 483 (1988). The *Frisby* opinion's emphasis on a balancing of interests, as highlighted by Judge Martin, meshes with this author's analysis *infra* calling for a more limited appellate review when the case law is well settled. Judge Martin's interpretation of *Frisby* neutralizes criticism of that opinion for not fully exploring all of the permutations that an ordinance and its subsequent enforcement could create by allowing a balancing of interests to take place. That balance really is at the heart of the face-off between the competing parties.

176. *Vittitow*, 43 F.3d at 1111.

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

178. *Vittitow*, 43 F.3d at 1111 (Martin, J., dissenting) (citing *Madsen*, 114 S. Ct. at 2524).

179. *Id.*

180. *Id.* at 1112.

181. *Id.*

182. *Id.*

V. WHY *MADSEN*-TYPE CASES ESCAPE THE "CHILLING EFFECT" DANGERS

Justice Scalia pointed out in his dissent to *Madsen* that the context for the new standard of review is abortion, but the case itself is all about an injunction against free speech.[183] Kathleen Sullivan sounded the tocsin about the chilling effect of First Amendment regulation in an article chronicling "a recent sea change in the politics of free speech."[184] She cited the "various recent measures to curtail the obstruction of abortion clinics by anti-abortion demonstrators," such as passage of FACE and the holding in *Madsen*, as exemplars of that sea change. She pointed out that Operation Rescue and other antiabortion groups make the argument that they should be protected by the same free speech doctrines that protected the civil rights movement, "but advocacy groups that typically argue for free speech pointedly have not flocked to their defense."[185]

Justice Scalia sounded a similar theme when he called the abortion protesters a "disfavored class,"[186] unfavorably comparing the outcome of *Madsen* to that in *NAACP v. Claiborne Hardware Co.*,[187] where nonviolent aspects of a boycott of local businesses, marred by sporadic outbreaks of violence, were held "'entitled to the protection of the First Amendment.'"[188] These concerns echo those of the Court in *New York Times*, *Bose*, and other cases discussed *supra*.[189] Sullivan proffered a possible institutional framework to articulate the dangers of government regulation of speech, involving three possibilities: first, the "'banned in Boston' phenomenon—making speech taboo may perversely increase demand"; second, the risk of error when government regulates speech as compared to, say, commercial regulation; and third, the danger of trusting government to change culture.[190]

But, neither the standard of review in *Madsen* nor controlling the scope of appellate review ostensibly try to ban content-based speech. That alone reduces the risk of a chilling effect. By contrast, in *New York Times v. Sullivan*, the Alabama courts were trying to attack the

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183. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2534-35 (1994) (Scalia, J., dissenting).
184. Kathleen M. Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203 (1994).
185. *Id.* at 206.
186. *Madsen*, 114 S. Ct. at 2542.
187. 458 U.S. 886 (1982).
188. *Madsen*, 114 S. Ct. at 2543 (Scalia, J., dissenting) (quoting *Claiborne Hardware*, 458 U.S. at 915).
189. *See supra* text accompanying notes 56-85.
190. Sullivan, *supra* note 184, at 214.

very content of the advertisements in question.[191] The one goal that *Madsen* does not have is that of trying to change culture. It and *Frisby* are faced with balancing the competing, constitutionally protected interests of two nearly irreconcilable groups: the antiabortion picketers (with their right to protest) and the abortion providers and the women seeking abortions (with their rights to residential privacy and access to abortion facilities). The very act of balancing these interests is likely to increase dialogue, not stifle it.

Justice Scalia is correct when he points out that a single district court judge issuing an injunction may involve some risk that a particular application of a content-neutral standard could be pretextual.[192] But appellate review, even of the relatively restricted "clearly erroneous" standard, stands as a formidable external constraint on any district court judge's abuse of discretion.[193] Furthermore, systematic bias has historically been a state court problem, not federal. *Claiborne Hardware* was a paradigm for Lee's observations about systematic state court bias, where the state courts' seemingly content-neutral standard was merely pretext and really aimed at the message itself.[194] The Court has always reviewed First Amendment cases de novo because the fairness of state court review of state actions was in question.[195]

The risk of a "chilling effect" may also be decreased because the pro-life movement, as a single issue movement, may be quite distinguishable from past protest movements, such as the civil rights movement, in the extent of the protest the movement should allow itself. Both former Supreme Court Justice Abe Fortas and philosopher John Rawls make cogent arguments that a right to protest may be limited in a reasonably just society.

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191. 376 U.S. 254 (1964).

192. *Madsen*, 114 S. Ct. at 2539 ("often [issued by] judges who have been chagrined by prior disobedience of their orders").

193. Lee, *supra* note 15, at 237, 252. *See also* Dalton, *supra* note 22, at 86-93. *See also supra* text accompanying notes 69-78, especially notes 70 and 73.

194. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915-16 n.50 (1982) (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)) ("This Court's duty is not limited to the elaboration of constitutional principles; we must also . . . review the evidence . . . particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'").

195. Lee, *supra* note 15, at 281-84.

VI. WHY JUDICIAL DEFERENCE IN THE SCOPE OF APPELLATE REVIEW MAY HAVE ADDITIONAL PUBLIC POLICY BENEFITS IN ANTI-ABORTION PROTEST CASES

Former Supreme Court Justice Abe Fortas examined the issues of dissent and civil disobedience in American society in 1968, at the height of the antiwar and civil rights movements, examining the paradox of the duty to obey and to disobey.[196] He recognized that

> the citizen has the right, protected by the Constitution, to criticize, however intemperately; to protest, however strongly; to draw others to his cause; and in mass, peaceably to assemble. The state must not only respect these rights and refrain from punishing their exercise but it must also protect the dissenter against other citizens who seek by force, harassment, or interference to prevent him from exercising these rights.[197]

Fortas then opined that the United States has not always lived up to this theory.[198] Yet, in Fortas's eyes, "this obviously does not mean that the state must tolerate anything and everything that includes opposition to the government or to government law or policy. . . ."[199] The state may and should act if the protest includes . . . substantial interference with [] the rights of others . . . ."[200] Clearly, Fortas's theme recognized that the competing interests of the various sides involved in dissent must be balanced and that, in theory, that balance will be a level one even if, in practice, it may occasionally be tilted one way or another.[201]

In 1971, John Rawls wrote his magnum opus, *A Theory of Justice*, examining the same issues in the broader context of delineating the rules by which a society should proceed in order to be just.[202] In it, he advanced a position that one's duty to obey the law may well override one's right to resist injustice, when, under certain conditions, they conflict.[203] These themes, when combined with the increased certainty

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196. ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE (1968).
197. *Id.* at 43-44.
198. *Id.*
199. *Id.* at 47.
200. *Id.* at 48.
201. *Id.* at 52.
202. JOHN RAWLS, A THEORY OF JUSTICE (1971).
203. *Id.* at 350-55. *But see* Daniel M. Farrell, *Dealing With Injustice in a Reasonably Just Society: Some Observations on Rawls' Theory of Political Duty*, *in* JOHN RAWLS' THEORY OF SOCIAL JUSTICE 187 (H. Gene Blocker & Elizabeth H. Smith eds., 1980). Farrell calls Rawls's contention of political duty into question because the effects of decisions made in the original position cannot be predicted and, thus, only principles can be decided on. Society must then implement those principles when confronted with a problem. Farrell contends that Rawls's position really is a form of institutionalism for which there are no compelling arguments. However, he leaves the

of enforcement brought on by a reduced scope of review, and the lack of "chilling effect" discussed *supra*, support controlling the scope of review in *Madsen* injunction cases as opposed to broader movements, such as the civil rights movement of the 1950s and 1960s. Key to this argument is the basic assumption, discussed *supra*, that district courts have yet to exhibit a systematic bias against a particular side in the abortion debate, as distinguished from the systematic bias Lee observed in state courts in defamation and obscenity cases.[204]

A. Rawls and A Theory of Justice

If Justice Fortas was speaking specifically to a generation involved in the paroxysms of the civil rights movement and antiwar protests, his message still has currency today. John Rawls, writing at about the same time, approaching the right of dissent and the duty of obeying the law from a more theoretical level, arrives at a similar conclusion, but with a paradigm for discussing how that balance may be struck. He does so by looking not at "our system of government" per se, but at the very nature of the contract between a society and its people. Indeed, Rawls sees "justice as fairness" as an example of what he called a contract theory.[205] Parties to a social contract must make decisions about this contract and the nature of the fundamental agreements in it in an "original position." Starting at the original position ensures the creation of a "fair procedure so that any principles agreed to will be just."[206] This original position, then, must be found behind a "veil of ignorance" where the parties do not know certain kinds of facts, such as one's place in society, intelligence, and cultural biases.[207]

Rawls posits that, in the original position, parties to the contract will accept some form of majority rule and a set of procedures, because

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question open until Rawls's reasoning is more clearly elucidated. This does not call into question, however, Rawls's position on civic duty of a member of the reasonably just society to obey the law over civilly protesting an injustice.

204. *See* text accompanying notes 74-85.

205. RAWLS, *supra* note 202, at 16.

206. *Id.* at 136.

207. For a more complete discussion, see *id.* at 136-42. For a critical assessment of the veil of ignorance, see Louis I. Katzner, *The Original Position and the Veil of Ignorance*, *in* JOHN RAWLS' THEORY OF SOCIAL JUSTICE: AN INTRODUCTION 42 (H. Gene Blocker & Elizabeth H. Smith eds., 1980).

consent to these procedures is "surely preferable to no agreement at all."[208] In accepting majority rule, the parties take a duty of civility that imposes "a due acceptance of the defects of the institutions and a certain restraint in taking advantage of them"; without them, mutual trust and confidence would break down.[209]

Rawls's theory allows civil disobedience, defined as public, nonviolent, conscientious, yet political acts,[210] to occur in opposition to "instances of substantial and clear injustice, and preferably to those which obstruct the path to removing other injustices."[211] He defined three conditions that a movement must meet to practice civil disobedience in a reasonably just society. The first is whether the object of protest is appropriate for civil disobedience.[212] The second is that the political process has failed, even though "normal appeals to the political majority have already been made in good faith."[213] The third condition arises when the natural duty of justice requires a certain restraint;[214] society can absorb only so much civil disobedience or else serious disorder could follow and disrupt "the efficacy of the just constitution."[215]

If the pro-life movement can meet these conditions, they could and should, under Rawls's theory, engage in a campaign of civil disobedience with the government giving them wide latitude. If the movement cannot meet these conditions, then society cannot tolerate civil disobedience, let alone violent protest. To preserve social stability, the government may fashion limits to the scope of allowable protest in order to balance the rights of the rest of the society against those of the movement.

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208. RAWLS, *supra* note 202, at 354. This logic calls to mind Hobbes's aphorism of "the life of man, solitary, poore, nasty, brutish, and short" in the absence of societal constraints. *See* THOMAS HOBBES, LEVIATHAN 186 (C.B. MacPherson ed., Penguin Books 1971) (1651).

209. RAWLS, *supra* note 202, at 355.

210. *Id.* at 364.

211. *Id.* at 372.

212. *Id.* at 371-73.

213. *Id.* at 373.

214. *Id.*

215. *Id.* at 374. Rawls assumes that

> there is a limit on the extent to which civil disobedience can be engaged in without leading to a breakdown in the respect for law. . . . There is also an upper bound on the ability of the public forum to handle such forms of dissent . . . . [T]he effectiveness of civil disobedience as a form of protest declines beyond a certain point; *and those contemplating it must consider these constraints*.

Id. (emphasis supplied).

A comparative analysis of the pro-life movement with another, now universally accepted, civil disobedience campaign may help illuminate whether the pro-life movement meets Rawls's three conditions. Accepting the pro-life argument that abortion is murder, then the movement clearly meets Rawls's first condition. In this analysis, one could also stipulate that there are no competing protest movements forcing curtailment of the overall level of dissent, thus meeting Rawls's third condition.[216] The critical question is whether the movement has met the second condition or not.

To meet the second condition, the political process must have failed the movement. Legal means of redress would have proved ineffective. The indifference of the political parties to the movement's demands to have laws repealed or modified would exemplify such a failure. Another example would be failure of legal protest and demonstrations, especially over a period of time.[217] It would not be inaccurate to describe the civil rights movement in the mid-1950s and 1960s as facing a failed political process. Seventy-five years of institutionalized Jim Crow in the South had effectively marginalized blacks. White dominance of the political process was complete. The march on Birmingham, Alabama in 1963 starkly symbolized the daunting odds blacks in the South faced, even when certain parts of the political process had begun to operate in favor of redressing the imbalance of the races.[218]

The pro-life movement in 1995 has a degree of access to the political system undreamed of by the civil rights movement prior to the mid-1960s. Numerous Supreme Court decisions have altered the Court's position on abortion since *Roe v. Wade*,[219] although it has not been

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216. However, as Rawls indicated (*see supra* note 215), even one protest movement at a time could be too much for the society if it is excessive, not to mention that the movement could reach a point of diminishing returns. *See* RAWLS, *supra* note 202, at 373.

217. *Id.*

218. For a more complete analysis of the origins of the civil rights movement in the 1950s and early 1960s, and a recounting of the failure of the political process, see HARVARD SITKOFF, THE STRUGGLE FOR BLACK EQUALITY (2d ed. 1993). For a focus more on the leaders themselves and the origins of their philosophical underpinnings, see TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63 (1988).

219. 410 U.S. 113 (1973) (characterizing a woman's choice on whether to have an abortion as a fundamental right of privacy protected under the Substantive Due Process Clause of the Fourteenth Amendment). Numerous decisions, culminating in Planned Parenthood v. Casey, 505 U.S. 833 (1992), have considerably undercut the scope of the

completely reversed. Although many provisions have been ruled unconstitutional under *Roe*, numerous state legislatures have passed laws severely restricting access to abortion, powerfully demonstrating pro-life influence.[220] Even President Bush advocated a constitutional amendment restricting abortion.[221] Congress has, since 1977, restricted federal funding for abortions.[222] The Republican Party has openly debated adoption of an anti-abortion stance in every presidential election since 1980.[223]

Despite the lack of success in achieving all of their aims, the pro-life movement has demonstrably shifted the terms of the abortion debate over the course of the last twenty years. These characteristics do not denote a failure of the political process, but rather show a political process with the capacity to balance, albeit imperfectly, two seemingly irreconcilable political movements. With this sort of access to an ongoing political dialogue, the pro-life movement fails to meet Rawls's second condition. With this failure, recourse to civil disobedience falls outside the bounds of acceptable protest under Rawls's theory. The pro-life movement would appear duty bound to accept limits to the scope of their protest even if they find it unjust.

The nature of the violence surrounding the two movements also strongly distinguishes them. The civil rights movement itself drew on strong themes of nonviolence throughout the 1950s and 1960s.[224]

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fundamental right to choice.

220. *See, e.g.*, the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989, which formed the basis for the challenge culminating in *Planned Parenthood*, 505 U.S. at 833.

221. This position represented a major political shift for Bush, who was pro-choice as recently as the 1980 election. Presumably, he would not have made this public volte-face without a calculation of the political capital he was likely to gain. It also reflects the potency of the pro-life lobby to the Republican Party and the resulting healthy respect for it that some politicians developed. *See, e.g.*, Gerald F. Seib, *The Inauguration: Into the Fray*, WALL ST. J., Jan. 20, 1989, at R7 ("Earlier in his career . . . [he] opposed a constitutional amendment banning abortion, yet he campaigned in 1988 . . . *in favor of an abortion amendment.*").

222. Eric Pianin, *Senate Keeps Medicaid Abortion Limits*, WASH. POST, Sept. 29, 1993, at A11 (Senate voted to keep restrictions on public funding for abortions that had, in various guises, been in place since the Hyde Amendment was first adopted in 1977).

223. E.J. Dionne, Jr., *Abortion Battle Cry Heard Inside GOP; Rights Supporters Vow Fight to Remove or Weaken Party Plank*, WASH. POST, July 21, 1991, at A4 (describing the struggle between pro-choice and pro-life factions in months prior to the 1992 general election campaign). *See also Republicans Backed by Abortion Foes*, SAN DIEGO UNION-TRIB., Mar. 12, 1995, at A10 ("The head of the Christian Coalition said yesterday he believes the Republican Party will keep its anti-abortion stance and that it is the Democratic Party 'that has an abortion problem.'").

224. *See, e.g.*, BRANCH, *supra* note 218, at 140 (in a speech in Montgomery, Alabama in December of 1955, Martin Luther King declared at a rally in the early days of the Montgomery bus boycott, "Now let us say that we are not here advocating

Violence was visited upon the movement from southern whites opposed to desegregation.[225] The pro-life movement faces a much different political picture. By all accounts, violence in the abortion debate has largely sprung from the fringe elements of the movement itself.[226] Arguably, a movement that has engendered the violence itself is under even more of a duty than otherwise to obey Rawls's tenet.

The *Madsen* restraints, while appearing unjust to the pro-life movement, lie quite plausibly within the acceptable bounds of justice when viewed in the context of the failure of the pro-life movement to meet Rawls's conditions, the violence surrounding the movement originating from its fringe elements, and the lack of a "chilling effect" on the exercise of First Amendment rights, as discussed *supra*. Therefore, the state may, and should, enforce content-neutral restrictions in order to balance the various competing interests. The Supreme Court, if it had not already endorsed this proposition in its two-track analysis of content-based and content-neutral speech, has explicitly acknowledged the acceptability of limits to the way a message is delivered by developing the new "intermediate plus" standard of review in *Madsen*.[227] The Court has, more clearly than ever, articulated the difference between a state apparatus crushing the message[228] and the state trying to control the dysfunctional externalities attendant to a particular method of dissent.[229]

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violence. . . . We have overcome that. . . . The only weapon that we have in our hands this evening is the weapon of protest.").

225. For a particularly compelling account of the nature of the extremist reactions to the 1963 campaign in Birmingham, Alabama, see *id.* at 793-800.

226. *See, e.g.*, Henry Chu & Mike Clary, *Doctor, Volunteer Slain Outside Abortion Clinic*, L.A. TIMES, July 30, 1994, at A1 ("Hill often demonstrated outside the clinic [where the victims were slain] with placards advocating violence against doctors who perform abortions.").

227. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2525 (1994) ("[W]hen evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous.").

228. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In *Sullivan*, the Court limited a state's power to award damages in libel actions by developing what has become widely known as the "New York Times malice" test and by insisting upon de novo review of such cases. As Lee pointed out, this case took place during the middle of the Civil Rights movement in a state, Alabama, that was fiercely resisting the dismantling of Jim Crow. *See supra* text accompanying notes 69-85.

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

Clearly, Justice Scalia and others do not support that contention.[230] Others have postulated that the courts and legislatures should not exercise the limits defined by *Madsen* and FACE because to do so may "cut off pro-lifers' every hope in these matters. In order for pro-lifers to work within the system, they must believe that their views can somehow in the end have an impact."[231] However, those arguments tend to lose their force in view of the conclusion reached through Rawlsian analysis: the pro-life movement can—and has for years—adequately accessed the political system. The *Madsen* limits also do not preclude public protest per se nor do they in any way impinge upon the expression of particular viewpoints. Indeed, by providing a legal mechanism for separating the two sides, they provide a possible mechanism for easing the conditions that may be leading to some of the extreme examples of violence.

B. Theory of Certainty of Enforcement

The best way to enforce any law is with certainty.[232] The restriction of the scope of appellate review in federal actions will add to the certainty of enforcement. Protesters will not be able to delay the enforcement of injunctions by appealing, unless the district court judges have abused their discretion in the application of established law. The injunctions will be seen as a line drawn in the sand to constrain the behavior of protesters. "'The certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity.'"[233] Deterrence is one of the central tenets in support of granting injunctions in cases of civil disobedience, let alone violent protest. Even those who oppose the use of injunctions to curb civil disobedience

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230. *Id.* at 2538 (Scalia, J., dissenting).

231. Stith, *supra* note 10 (interpreting *Madsen* as enjoining sidewalk counselling, which cuts off pro-lifers' hope to work within the system nonviolently); *see also* Ledewitz, *supra* note 10, at 135-36 (criticizing efforts to limit antiabortion protests through the use of injunctions and ordinances, citing fear of an inevitable "chilling effect").

232. Debate has raged heavily about the deterrent value of the death penalty. *See* Frank G. Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 588 (1982). The author argues that punishment has a deterrent value, despite being empirically unprovable, because the "pure threat of sanction as a deterrent to criminal activity . . . is logically compelling." *Id.* at 605.

233. RALPH D. ELLIS & CAROL S. ELLIS, THEORIES OF CRIMINAL JUSTICE: A CRITICAL REAPPRAISAL 7 (1989) (quoting CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 11 (1963)).

concede that enforcement of ordinances that protect the homes of protest targets have their role.[234]

In the abortion protest cases, deterrence is only the penultimate goal. The ultimate goal is a reduction in the intensity of the atmosphere surrounding the clinics that should lead to a change in tactics by the pro-life movement. The various pro-life groups might actually limit themselves.[235] If the pro-life movement adopts other tactics, such as renewed pressure within the political system, and other types of campaigns to influence public opinion, then the danger of violence as an outgrowth of the clinic protests may decrease.

The focus upon the clinics as the source of evil, from the perspective of the pro-life movement, has increased the likelihood of violence.[236] Thus, changing the focus to the political process, which, even now, appears to be as accessible as ever,[237] may defuse the heightened tensions that now exist around the clinics.

By limiting the scope of appellate review to the "clearly erroneous" standard or to an "abuse of discretion" standard, both injunctions and ordinances will receive the *Madsen* standard of review. The demonstrable lack of systematic bias within the federal system protects against the need for the level of independent review that the Supreme Court exercised in the obscenity and defamation cases.[238] If the combination of a clear federal cause of action under FACE and the certainty of enforcement of injunctions had been available in Melbourne, Florida, the years of tension and the threat of violence there could have been attenuated.[239] Conceivably, the December, 1994 murders in Massachusetts might have been avoided if the atmosphere outside that clinic had been less charged.

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234. Ledewitz, *supra* note 10, at 128.
235. *Id.* at 135.
236. Douglas Frantz, *The Rhetoric of Terror*, TIME, Mar. 27, 1995, at 48.
237. *Republicans Backed*, *supra* note 223. *See also White House 1996 GOP Platform: Pro-Lifers Call For Return to Party Values*, AM. POL. NETWORK ABORTION REP., Mar. 20, 1995 (Focus on Family President James Dobson called on Republican National Committee Chairman Haley Barbour not to ignore evangelical Christians and to ensure that the pro-life plank remains in the GOP platform. The Family Research Council's Gary Bauer threatened formation of a third party for the 1996 elections if the Republicans did not sufficiently adhere to the pro-life stance.).
238. *See supra* text accompanying notes 56-85.
239. *See* Biskupic, *supra* note 2.

Empirically, this conclusion would be difficult to prove.[240] But, if one accepts Rawls's notion of a duty of civility, even when the law is a perceived injustice, then stimulating the pro-life movement into heightened reliance on the political processes to relieve the stress on the social fabric while, at the same time, avoiding a "chilling effect" on the substance of dissent, may be an important public policy goal for the courts. The next question is what effect limiting the scope of appellate review would have on a given situation.

VII. ANALYSIS OF *VITTITOW* IN LIGHT OF THE MIXED QUESTION DOCTRINE

Judge Martin's dissent in *Vittitow*, criticizing the majority for reaching the merits of the challenge to the ordinance,[241] matches very neatly with the philosophy behind limiting the appellate scope of review. The interests of judicial economy and upholding the legitimacy of the district court would seemingly dictate allowing the full hearing or the consolidated hearing called for in FRCP 65(a)(2). At the very least, the majority could have remanded the case back to the district court for resolution under *Madsen*. Arguably, the standards called for in *Madsen* are stricter than those used by courts previously and, thus, will provide a greater degree of protection if properly applied.[242] Presumably, the district court would have heeded that additional guidance if the case had been remanded. But, Judge Martin put his finger on the bottom line in *Vittitow*:

> While the district court in this case may have had more evidence or more time to consider whether to issue the preliminary injunction than is usual, neither of these factors transforms the district court's findings or conclusions into final findings of fact or conclusions of law regarding the merits of the plaintiffs' complaint.[243]

It may well be that the district court would have eventually reached much the same conclusion that the majority did. But, the decision precludes it from doing so. The ordinance, though similar to the Brookfield, Wisconsin ordinance challenged in *Frisby*, was not

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240. However, Congress connected the escalation of violence directed at abortion clinics to the change in tactics and the increased use of blockades. *See* H.R. CONF. REP. NO. 488, 103rd Cong., 2d Sess. 7 (1994), *reprinted in* 1994 U.S.C.C.A.N. 724, 724.

241. *See supra* text accompanying notes 163-65.

242. *See* Murray v. Lawson, 649 A.2d 1253 (N.J. 1994). The New Jersey Supreme Court changed an injunction after remand from the Supreme Court in the wake of *Madsen*, commenting that "as currently structured, the injunction does not satisfy the stricter standards . . . announced in *Madsen*." *Id.* at 1264.

243. Vittitow v. City of Upper Arlington, 43 F.3d 1100, 1108 (6th Cir. 1995) (Martin, J., dissenting).

challenged facially, but based upon its enforcement.[244] Although the majority in *Frisby* construed the ordinance in a most favorable light, it did concede that the outcome may well have changed if a different fact pattern had been before it.[245] *Vittitow* could very well be that different fact pattern. Furthermore, the district court was also balancing the First Amendment rights of plaintiff against Dr. Robinson's right to privacy, finding at least a "significant government interest"[246] in protecting him while the case was resolved.[247]

The majority pointed out that this case varied from *Frisby* because plaintiffs did not facially challenge the ordinance. Enforcement had taken place. The enforcement itself apparently triggered overturning the ordinance because it presented the open field to do so.[248] The Supreme Court, by going to "extraordinary measures" to save the statute in *Frisby*, left the field open for further statutory interpretation.[249] Indeed, one could argue that it left matters unresolved enough that the Upper Arlington City Attorney's office, in its attempt to follow the case law, opened itself to criticism from the Sixth Circuit.[250]

The ultimate question is whether the outcome would have varied if the Sixth Circuit had allowed the district court to complete its process. Given the apparent agreement of both the majority and dissent on the probable outcome of any further hearing at the district court level,[251] the prospects for plaintiffs' success in overturning the ordinance seemed quite good. But, remand to the district court would have allowed application of the *Madsen* standard to a complete record, as well as the

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244. *Id.* at 1102.
245. Frisby v. Schultz, 487 U.S. 474, 488 (1987).
246. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2518, 2525 (1994).
247. *Vittitow*, 43 F.3d at 1102-03 & n.4.
248. *Id.* at 1106 ("[H]ere, the court was faced with a videotape and testimony demonstrating how the City did enforce the ordinance. The record made in the district court indicates the City was enforcing this ordinance in a manner contrary to the teaching of *Madsen*.").
249. *Frisby*, 487 U.S. at 483. *See also Vittitow*, 43 F.3d at 1106.
250. *Vittitow*, 43 F.3d at 1106. The Sixth Circuit was less charitable: "The City enacted this ordinance long after the decision in *Frisby* was issued and should have been well aware of the pitfalls in attempting to enforce an ordinance worded this broadly." *Id.*
251. *See id.* at 1109 ("As to . . . the likelihood of success on the merits, the majority's opinion supports my view that we should affirm the district court. The majority has reached the merits of the central questions in this case . . . and has decided that the plaintiffs are likely to succeed on the merits.").

opportunity for the parties to present further evidence and argument, not merely the truncated record available to the appellate court.

A. A Paradigm For Limited Scope of Review

Because of the short time since *Madsen*, none of the injunction cases currently before the appeals courts have been decided at the district court level under the new standard of review. Yet, some possible patterns of review may be developing that courts may use in determining what scope of appellate review should be applied. The first issue is whether to restrict application of a "clearly erroneous" or "abuse of discretion" standard to federal causes of action. Implementation of FACE seemingly guarantees access to the federal courts for clinics claiming damage from vociferous, even violent, protest, and for individuals who have been injured, intimidated, or interfered with by protesters.[252] Pro-life groups have challenged FACE's constitutionality in district court. However, they have been largely unsuccessful to date.[253] It would appear that any future challenge will face an uphill battle.

The second issue likely to be litigated is whether a particular injunction or ordinance is content-neutral or not. If a court finds a particular injunction to be content or viewpoint based, a strict scrutiny standard of review applies, almost certainly dooming it. If it is content-neutral, then the *Madsen* standard applies. In the wake of *Madsen*, federal appellate courts have applied the *Madsen* standard in a consistent manner, paying close attention to the criteria laid down in the case.[254] That trend indicates the settled state of the law on that point. Only the

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252. 18 U.S.C.A. § 248 (West 1994). Section 248(a)(1) speaks to individuals who obtain or provide reproductive health services; § 248(a)(3) to clinics damaged by protest; § 248(c)(1)(A) grants a right of action for civil remedy. *Id.*

253. *See* American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995) (a three-judge panel of the Fourth Circuit upheld the constitutionality of FACE on the basis that the Act was within the scope of Congress's commerce power; it did not violate the First Amendment's Free Speech Clause; it was not overbroad or vague; and the Act's liquidated damages clause did not violate the First Amendment); *but see* United States v. Wilson, 880 F. Supp. 621 (E.D. Wis.), *rev'd*, 73 F.3d 675 (7th Cir. 1995) (federal district court's holding the Act unconstitutional as an improper use of Congress's commerce power overturned on appeal).

254. *See, e.g.*, Sabelko v. City of Phoenix, 68 F.3d 1169, 1171 (9th Cir. 1995); Pro-Choice Network of Western New York v. Schenck, 67 F.3d 377, 381 (2d Cir. 1995); National Org. for Women v. Operation Rescue, 37 F.3d 646, 655 (D.C. Cir. 1994); Fischer v. City of St. Paul, 894 F. Supp. 1318, 1326-27 (D. Minn. 1995). The majority in *Vittitow* also applied the *Madsen* rule consistently, however prematurely. *See supra* text accompanying note 243. So has the one state supreme court to rule on the matter. *See* Murray v. Lawson, 649 A.2d 1253 (N.J. 1994).

advent of new and different fact patterns that do not yield to a *Madsen* analysis will change that trend.[255]

Furthermore, the types of government interests that the courts will find significant also seem settled at this juncture. *Vittitow* and *Madsen* echo the *Frisby* language in discussion of residential privacy and an analogous medical privacy.[256] The more interesting question in each of the cases discussed *supra* has been whether the particular provisions of an ordinance or injunction in question burdens "no more speech than necessary to serve a significant government interest" in light of a given record.[257]

In *Madsen*, the majority failed to uphold the buffer at the sides and rear of the clinic property because "nothing in the record indicates that petitioners' activities on the private property have obstructed access to the clinic."[258] The *Murray v. Lawson* court also commented on the "sparse findings of the state court in *Madsen*" in granting the 300-foot buffer.[259] One of Justice Scalia's major complaints was about the lack of showing of violence and other proscribable activity around the *Madsen* clinic.[260] The Sixth Circuit likewise cited the lack of support in the record for proper enforcement in overturning the ordinance in question, protestations of the city attorney's office not withstanding.[261]

Each of these instances, as well as the more detailed analysis of the cases *supra*, points towards a quintessential mixed question. Each case, and, perforce, each record in each trial is unique. Every clinic and every protest are differently situated. But, when viewed in light of Lee's analysis concerning how the Supreme Court viewed various fact finders,[262] trial courts may discern a fairly clear message for the future: ensure that the record in any particular case errs on the side of being

255. Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2526 (1994).
256. *Id.* at 2526. *See also* Vittitow, 43 F.3d at 1105.
257. *Madsen*, 114 S. Ct. at 2526.
258. *Id.* at 2528.
259. 649 A.2d 1253, 1264 (N.J. 1994).
260. *See Madsen*, 114 S. Ct. at 2535 (Scalia, J., dissenting) (commenting that "[a]nyone seriously interested in what this case was about must view that [video]tape. And anyone who is familiar with run-of-the-mine labor picketing, not to mention some other social protests, will be aghast at what it shows we have today permitted an individual judge to do.").
261. Vittitow v. City of Upper Arlington, 43 F.3d 1100, 1106-07 (6th Cir. 1995).
262. *See* Lee, *supra* note 15, at 281-84. *See also supra* text accompanying notes 56-85.

fully developed and able to support very narrow tailoring and be specific and unambiguous about the exact contours of an injunction.[263] If trial courts exercise their discretion carefully over a period of time, then appellate courts may become more comfortable with limiting the scope of review even in this sensitive, First Amendment area. Protesters will then see more prompt and certain (and more enlightened, in view of *Vittitow*) enforcement of injunctions and ordinances. Tensions around the clinics themselves may decrease along with the unwanted violence.

VIII. CONCLUSION

This society is not likely to soon resolve the divisive question of abortion and all of the competing rights that it encompasses. The rising tide of violence bears testimony to the increasing rancor in the debate. But, as Rawls so eloquently points out, we, the members of a reasonably just society, bear a duty of civility. We also cannot condone violence. As a society, we must search for ways to defuse the tensions and anger that lead to violence while not infringing upon the precious, First Amendment right to protest. The judiciary, at all levels, stands at the center of this fine balancing act.

The Supreme Court's decisions in *Frisby* and *Madsen* provide a framework for the courts to tailor injunctions along the limits of First Amendment protection of the right to protest. Ensuring that protest remains within these limits could do much to defuse the currently rising tide of violence. Pro-life advocates might even turn to other, seemingly more effective tactics to effect the changes in the law they desire so much. But, endless and multiple appeals have blunted prompt and certain enforcement of the injunctions and ordinances, robbing them of much of their efficacy. Clearly, this was necessary while Congress and the courts developed the law necessary to cope with the problems. That framework would now appear largely in place.

Application of the *Madsen* and *Frisby* principles by the trial courts is the quintessential mixed question.[264] The appellate courts have shown discomfort in allowing a narrow scope of review in many areas of constitutional law, but have allowed considerable discretion in others.

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263. For a good example of this, see *Murray*, 649 A.2d at 1265 (the trial judge knew the street where the residence in question was located because he had paid a visit to the location).

264. The recent Second Circuit decision in Pro-Choice Network v. Schenck, 67 F.3d 377 (1995), upholding, inter alia, a floating fifteen foot buffer zone would seem to highlight this point. As this casenote was going to press, the Supreme Court granted certiorari to this case. It will be interesting to see on what basis it reviews the case. Pro-Choice Network v. Schenck, 116 S. Ct. 1260 (1996).

But, if the trial courts are careful in their application of the case law and develop their records fully to support their findings, then the appellate courts may allow them to exercise their discretion by promptly upholding their findings. This will allow more prompt enforcement and a concomitant decrease in the level of tension and violence surrounding the clinics.

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