Case Note

CONSTITUTIONAL LAW—Freedom of Expression: Wyoming Says Protecting Children Comes Second to Protecting Freedom of Speech; *Operation Save America v. City of Jackson*, 275 P.3d 438 (Wyo. 2012)

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Introduction

Demonstrations surrounding the abortion debate have dominated the recent decade and have led to increased violence.[1] Violent incidents by protesters have included gunfire, arson, bombing, and firebombing attacks.[2] These attacks have led to what is often referred to as the Madisonian Dilemma.[3] This dilemma is

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[1] *See generally* Gary LaFree & Bianca Bersani, Hot Spots of Terrorism and Other Crimes in the United States, 1970 to 2008, Final Report to Human Factors/Behavioral Sciences Division, Science and Technology Directorate, U.S. Dep't of Homeland Security (2012) (discussing single-issue attacks, including anti-abortion, in the United States); *see also* Tara K. Kelly, Note, *Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protesters in* Madsen v. Women's Health Center, 68 S. Cal. L. Rev. 427, 434 (1995); William Booth, *Doctor Killed During Abortion Protest*, Wash. Post, Mar. 11, 1993, at A01, *available at* http://www.washingtonpost.com/wp-srv/national/longterm/abortviolence/stories/gunn.htm; Ryan Smith, *Jim Pouillon, Anti-Abortion Activist Murdered in Front of School*, CBSNEWS (Sept. 11, 2009), http://www.cbsnews.com/8301-504083_162-5304025-504083.html.

[2] Kelly, *supra* note 1.

[3] Kathleen A. Brady, *Putting Faith Back into Constitutional Scholarship: A Defense of Originalism*, 36 Cath. Law. 137, 140–141 (1995). James Madison in his tenth essay in the *Federalist Papers* discussed the potential threat posed on popular government through individuals organizing to further their common interest. The Federalist No. 10 (James Madison). This dilemma has become known as the Madisonian Dilemma. Brady, *supra*, at 140. The dilemma embodies the idea if the government fails to allow individuals to organize and further their common interests then this takes away from their fundamental rights. Jeffrey M. Berry & Clyde Wilcox, The Interest Group Society 1–3 (5th ed. 2008). However, on the other hand, if the government allows individuals to advocate whatever they want whenever they want then there is the danger allowing these advocacies may cause a potential threat and harm to the general public. *Id.* In other words, the tension between "popular government through majority rule and the protection of individual rights

the tension that exists between balancing one's fundamental interests against governmental interests to protect and promote the greater good of a larger community.[4] The general public usually looks down upon authoritarian controls restricting freedom of speech.[5] However, it has become difficult to protect the safety of citizens without trampling on individual rights.[6]

In *Operation Save America v. City of Jackson*, the Wyoming Supreme Court faced a situation pitting the right to freedom of expression against the safety and psychological well-being of children.[7] The Wyoming Supreme Court was confronted with anti-abortion protesters approaching young children and showing them pictures of aborted fetuses, while calling a local doctor a "killer."[8] The protesters' presence in Jackson, Wyoming, sparked a sizable group of counter-demonstrators, with one counter-demonstrator striking a person holding a graphic image with his vehicle.[9] Additionally, a member of Operation Save America made a threat indicating he was looking for bomb-making materials.[10] In light of the dangerous circumstances, the City of Jackson obtained a temporary restraining order preventing protesters from demonstrating at the annual Boy Scout festival, set to take place that summer.[11] The protesters appealed the order.[12] The Wyoming Supreme Court subsequently found the restraining order unconstitutional under the First Amendment.[13]

This case note criticizes the Wyoming Supreme Court's analysis in *Operation Save America*, which overlooked applicable precedent and important policy considerations.[14] First, a review of relevant case law suggests the Wyoming Supreme Court should not have applied a strict scrutiny level of review.[15] The court should have applied either a content-neutral time, place, and manner intermediate scrutiny level of review or the level of review adopted by the United

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against encroachment by these democratic majorities" is the Madisonian Dilemma. Brady, *supra*, at 140. Consequently, the role of the judiciary is to find the appropriate balance between protecting the interests of the larger community against an individual's fundamental rights. *Id.*

[4] Brady, *supra* note 3, at 140.

[5] *See id.*

[6] *See id.*

[7] 275 P.3d 438, 460–61 (Wyo. 2012).

[8] *Id.* at 444.

[9] Brief of Appellee at Exhibit 1(B) ¶13 (Affidavit of Robert Gilliam), Operation Save Am. v. City of Jackson, 275 P.3d 438 (Wyo. 2012) (No. S-11-0149).

[10] *Id.* at Exhibit 1(B) ¶ 5 (Affidavit of Robert Gilliam).

[11] *Operation Save Am.*, 275 P.3d at 445–46.

[12] *Id.* at 447.

[13] *Id.* at 466.

[14] *See infra* notes 162–273 and accompanying text.

[15] *See infra* notes 162–216, 247–73 and accompanying text.

States Supreme Court in *Madsen v. Women's Health Care Center*.[16] Nevertheless, the temporary restraining order should have survived the content-based strict scrutiny standard of review applied by the Wyoming Supreme Court.[17] Lastly, the court should have followed the juvenile exception under the First Amendment allowing for content-based time, place, and manner restrictions in the limited context of a juvenile audience.[18]

BACKGROUND

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble[.]"[19] The First Amendment reflects the idea that "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[20] However, the United States Supreme Court has consistently held the general protections of the First Amendment are not absolute.[21]

A. Limiting Freedom of Expression by the Courts

Justice Oliver Wendell Holmes, Jr. suggested the First Amendment serves to ensure the continuance of the "marketplace of ideas."[22] The "marketplace of ideas" presumes listening citizens are educated decision makers capable of understanding not only the speech itself but also any corrupt motives underlying it.[23] Normally, the burden falls on the viewer or listener to avoid an expression he or she does not wish to see or hear.[24] In narrow circumstances, however, the United States

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[16] *See infra* notes 162–216 and accompanying text.

[17] *See infra* notes 217–46 and accompanying text.

[18] *See infra* notes 247–73 and accompanying text.

[19] U.S. CONST. amend. I.

[20] Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (citation omitted).

[21] *Id.*; *see also* Gitlow v. New York, 268 U.S. 652, 666–67 (1925) ("It is a fundamental principle, long established, that the freedom of speech . . . which is secured by the Constitution, does not confer an absolute right to speak . . . without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.").

[22] JOHN R. VILE, A COMPANION TO THE UNITED STATES CONSTITUTION AND ITS AMENDMENTS 123 (5th ed. 2011). Justice Holmes introduced the "marketplace of ideas" theory in his dissenting opinion in *Abrams v. United States*. 250 U.S. 616, 630 (1919). Justice Holmes believed the theory of the United States Constitution was "the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 630.

[23] ANNE PROFFITT DUPRE, SPEAKING UP 8 (2009).

[24] Erznoznik v. Jacksonville, 422 U.S. 205, 210–11 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent . . . narrow circumstances . . . the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'") (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

Supreme Court seeks to balance freedom of expression against the need to protect public health and safety.[25] Nevertheless, courts are often split when restrictions impede on freedom of expression.[26]

In its attempt to balance government and individual interests, the United States Supreme Court has noted "the character of every act depends upon the circumstances in which it is done."[27] Thus, in deciding whether to uphold a limitation on freedom of expression, a court must determine the government's purpose for controlling or restricting the expression.[28] Most important is the court must conclude whether the restriction's purpose is content-based or content-neutral.[29] In doing so, the court determines which analytical method of review to employ.[30] In *Snyder v. Phelps*, the United State Supreme Court articulated that the best way to ascertain whether a restriction is content-neutral or content-based is by considering whether a speaker delivering a different message under the exact same circumstances would be subjected to the same restrictions.[31]

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[25] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 20.12 (5th ed. 2012).

[26] *See, e.g.*, Madsen v. Women's Health Ctr, Inc., 512 U.S. 753, 763 n.2 (1994) (finding the injunction content-neutral because the injunction was not issued "because of the content of [the protesters'] expression . . . but because of their unlawful conduct"). Justice Scalia, writing for the dissent, argued the injunction was content-based because the injunction sought restrictions "against a single-issue advocacy group" because of a "social interest in suppressing that group's point of view." *Id.* at 793 (Scalia, J., dissenting). *See also* Renton v. Playtime Theatres, Inc. 475 U.S. 41, 48 (1986) (finding a city ordinance restricting the location of adult theatres content-neutral because "by its terms [the ordinance was] designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of . . . neighborhoods . . .' not to suppress the expression of unpopular views."). The dissent in *Renton*, however, found the ordinance content-based because it "impose[d] limitations on the location of a movie theater based exclusively on the content of the films shown there." *Id.* at 55 (Brennan, J., dissenting).

[27] Schenck v. United States, 249 U.S. 47, 52 (1919) (citing Aikens v. Wisconsin, 195 U.S. 194, 205–06 (1904)).

[28] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[29] *See id.* (finding if the government adopted "a regulation of speech because of disagreement with the message it conveys" then the government's regulation is content-based because it is not "justified without reference to the content of the regulated speech" (citing *Renton*, 475 U.S. 41, 47–48 (1986))).

[30] *See, e.g.*, *id.* at 791–93 (distinguishing whether the regulation was content-neutral or content-based to determine whether to apply a strict scrutiny level of review or the standard time, place, and manner intermediate scrutiny level of review); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 190 (1983) ("The Court employs two quite distinct modes of analysis to assess the constitutionality of content-based and content-neutral restrictions.").

[31] 131 S.Ct. 1207, 1219 (2011) (finding "[a] group of parishioners . . . holding signs that said 'God Bless America' and 'God Loves You,'" would not have been subject to the same liability).

1. Content-based restrictions

Content-based restrictions regulate speech because of its message and are presumptively invalid.[32] In 1972, Justice Thurgood Marshall declared speech regulated due to the content of its message undermines the First Amendment and is the essence of censorship.[33] In *Police Department of Chicago v. Mosley*, the United States Supreme Court held "any restriction on expressive activity because of its content would completely undermine the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'"[34] The Court in *Mosley* articulated the doctrine of content neutrality, which "has become the cornerstone of the [United States] Supreme Court's First Amendment jurisprudence."[35]

Two principles emerged under the doctrine of content neutrality and are the focal point of content-based regulation: the rule against content regulation and the rule against content discrimination.[36] The rule against content regulation states the government "may not restrict speech because of its content."[37] Whereas the rule against content discrimination states the government may not use "content as a basis for treating some speech more favorably than other speech."[38] If governmental action contravenes either of these two principles then the action is content-based.[39] The United States Supreme Court has consistently found a government's restriction on an expression aimed at a purpose directly related to the message of the expression is content-based.[40] Expanding upon this rule, the United States Supreme Court found restrictions imposed because of listeners' reactions and the speech's direct impact are content-based.[41]

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[32] *E.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2543–44 (2012) ("[C]ontent-based restrictions on speech [are] presumed invalid . . . and . . . the Government bear[s] the burden of showing their constitutionality." (citing Ashcroft v. ACLU, 542 U.S. 656, 660 (2004))); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007) ("[C]ontent-based regulations of speech are presumptively invalid." (citing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992))); *see also* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650 (2002) ("Governmental action that contravenes these principles is said to be 'presumptively invalid' under the First Amendment.").

[33] Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972).

[34] *Id.* (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[35] Heyman, *supra* note 32, at 650.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See supra* note 32 and accompanying text.

[40] *See generally, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.").

[41] Boos v. Barry, 485 U.S. 312, 320–21 (1988) (finding a restriction that focuses only on the content of the speech and the direct impact that speech has on its listeners is content-based);

Content-based restrictions are subject to a strict scrutiny standard of review.[42] Strict scrutiny requires the government demonstrate it has used the least restrictive means to further a compelling governmental interest.[43] In applying strict scrutiny, the government bears the burden in establishing the restrictions' constitutionality under the First Amendment.[44]

2. Content-Neutral Time, Place, and Manner Restrictions

Freedom of expression "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[45] Content-neutral restrictions limit where and when an expression occurs for reasons other than the government's disagreement with the message.[46] Some restrictions can be labeled content-neutral even when the restriction, to a certain extent, refers to a specific expression.[47] For example, if a restriction is aimed at the secondary effects of the speech and not the speech itself, the restriction can be labeled content-neutral.[48] Secondary effects are outcomes caused by the initial expression that occur later in time and are reasonably foreseeable.[49]

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811–12 (2000) (finding a restriction's justification that focuses only on the direct impact the speech has on its listeners is the essence of content-based regulation).

[42] *E.g.*, *Playboy Entm't Grp., Inc.*, 529 U.S. at 813 (holding a provision that is content-based "can stand only if it satisfies strict scrutiny"); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 403 (1992) (applying strict scrutiny to a content-based regulation of protected expression under the First Amendment).

[43] *Playboy Entm't Grp.*, *Inc.*, 529 U.S. at 813 ("[I]f a [restriction] regulates speech based on its content, it must be narrowly tailored to promote a compelling government interest."); *see also Boos*, 485 U.S. at 321 (requiring the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"(citation omitted)).

[44] United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

[45] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Greer v. Spock, 424 U.S. 828, 836 (1936) ("The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (quoting Adderley v. Florida, 385 U.S. 39, 48 (1976))).

[46] *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791–92 (1989); *see also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762 (1994).

[47] *See, e.g.*, *supra* note 46 and accompanying text; *see also infra* notes 48–63, 67–85 and accompanying text.

[48] *E.g.*, Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48–49 (1986) (finding zoning ordinances designed to combat secondary effects of adult theatres "are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations"); *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71–73 (1976) (holding an ordinance that ultimately "turns on the nature of [the film's] content" is constitutional because the city was interested in protecting "the present and future character of its neighborhoods").

[49] *See generally, e.g.*, Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774–75 (1983) (emphasizing psychological health damage from the risk of a nuclear accident at a nuclear plant is not a direct effect from the physical environment, as the causal chain is too attenuated; therefore, the risk of psychological damage was an indirect or secondary effect); BLACK'S

A court's primary concern in a content-neutral analysis is whether an individual's right to communicate his or her views is significantly impaired.[50] The United States Supreme Court's goal is to ensure the government is not restricting an expression from fully entering the "marketplace of ideas."[51] Content-neutral restrictions are reviewed under a less rigorous standard known as "intermediate scrutiny."[52] Intermediate scrutiny requires a restriction be narrowly tailored to further a substantial governmental interest.[53]

A restriction is subject to intermediate scrutiny when it is aimed at the secondary effects of speech.[54] In *Renton v. Playtime Theatres, Inc.*, the city of Renton, Washington enacted an ordinance prohibiting adult theatres from operating "within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[55] The City of Renton argued the ordinance's purpose "was to preserve the character and quality of residential life in its neighborhoods."[56] Additionally, the city argued the goal of the ordinance was "'to protect neighborhood children from increased safety hazards, and the offensive and dehumanizing influence created by the location of adult movie theatres in residential areas.'"[57]

LAW DICTIONARY 1471 (9th ed. 2009) (defining secondary effects as "an indirect harm flowing from regulated expression"); *infra* notes 55–63 and accompanying text (discussing the secondary effects of an ordinance restricting the location of adult movie theatres).

[50] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 192 & n.6, 193 (1983) (discussing the Court's primary concern in a content-neutral analysis is whether one's expression rights are significantly impaired; however, stating there are two other concerns the Court looks at—"disparate impact and improper motivation").

[51] *See generally, e.g.*, N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 208 (2008) ("The First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference." (citing Abrams v. United States, 250 U.S. 616, 630 (1919))).

[52] *E.g.*, Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) ("[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny."); *see also* Madsen v. Women's Healthcare Ctr., Inc., 512 U.S. 753, 764–68 (1994) (finding standard time, place, and manner analysis under intermediate scrutiny is not rigorous enough; thus, the Court applied a standard slightly above intermediate scrutiny).

[53] Hill v. Colorado, 530 U.S. 703, 725–26 (2000) (finding content-neutral time, place, and manner statutory restriction was narrowly tailored to serve state's significant and legitimate interests); *Madsen*, 512 U.S. at 791 (Scalia, J., concurring) ("[I]ntermediate scrutiny requires that the restriction be 'narrowly tailored to serve a significant government interest.'").

[54] *See supra* notes 46–53 and accompanying text.

[55] 475 U.S. 41, 43 (1986).

[56] Brief for Appellants at 4, Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (No. 84-1360), 1985 WL 669595, at *4.

[57] *Id.* (citing Northend Cinema, Inc. v. City of Seattle, 585 P.2d 1153, 1155 (Wash. 1978)).

The United States Supreme Court held the ordinance did not violate the First Amendment.[58] The Court found the ordinance to be a proper time, place, and manner restriction.[59] The Court reasoned the ordinance was designed to "generally protect and preserve the quality of the city's neighborhoods, commercial districts and the quality of urban life."[60] As a result, the Court found the ordinance to be aimed at the secondary effects of the speech and designed to serve a substantial governmental interest in preserving the city's quality of life.[61] Moreover, the ordinance left open "reasonable alternative avenues of communication."[62] Ultimately, the Court found the ordinance's justifications outweighed the theatre owner's First Amendment rights.[63]

3. The United States Supreme Court and Restrictions on Anti-abortion Protests

Courts balance individual interests against governmental interests when reviewing a content-neutral or a content-based restriction.[64] However, violent abortion protests cause conflicting dilemmas for courts attempting to reach an appropriate balance between protecting the safety and health of citizens while allowing unfettered expression on abortion issues.[65] It has thus proven difficult for courts to protect the public's safety and well-being without impeding on First Amendment rights.[66]

i. *Madsen v. Women's Health Center, Inc.*

In *Madsen v. Women's Health Center, Inc.*, the United States Supreme Court reviewed the constitutionality of an injunction restricting anti-abortion protests outside an abortion clinic.[67] Women's Health Center, Inc. sought an injunction prohibiting protesters from abusing patients entering and exiting one of the health center's clinics.[68] Moreover, the health center wanted to prevent interference with

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[58] *Renton*, 475 U.S. at 46–50.

[59] *Id.*

[60] *Id.* at 48 (citation omitted).

[61] *Id.* at 51–52.

[62] *Id.* at 53–54.

[63] *Id.* at 54–55.

[64] *See supra* notes 25, 27 and accompanying text.

[65] *See generally, e.g.*, Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9 (2006); *see supra* notes 1–3 and accompanying text; *see infra* notes 67–89, 99–116 and accompanying text.

[66] *See generally, e.g.*, *supra* notes 1–3 and accompanying text; *see also infra* notes 67–89, 99–116 and accompanying text.

[67] 512 U.S. 753 (1994).

[68] Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 666–69 (Fla. 1993) (per curiam), *aff'd in part, rev'd in part*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

patient access to the clinic.[69] The Eighteenth Judicial Circuit Court of Florida granted a temporary injunction restricting the protesters' actions.[70] Approximately six months later, the health center sought to broaden the order.[71] The Florida circuit court amended the injunction to ban demonstrations within a thirty-six foot buffer zone around the clinic.[72]

Judy Madsen appealed the injunction, claiming it violated her First Amendment right to free speech.[73] The Florida Supreme Court, however, declared the circuit court's injunction was content-neutral and constitutional under the First Amendment.[74] After granting judicial review, the United States Supreme Court held parts of the injunction constitutional, including the thirty-six foot buffer zone.[75] The United States Supreme Court rejected Madsen's argument that the injunction was content-based because it only applied to a particular group, the anti-abortion protesters.[76] The Court reasoned, "[t]o accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based."[77] The Court recognized an injunction regulates a party's activities, and perhaps speech, because of past conduct in the context of a specific dispute, and thus, "by its very nature, applies only to a particular group."[78]

Madsen discussed governmental interests significant enough to impose restrictions upon a certain group's expression.[79] These interests include protecting the health and safety of citizens and ensuring the ingress and egress from parking lots.[80] Additionally, the Court established a new standard of review for analyzing injunctions under the First Amendment.[81] The Court found "injunctions . . . carry greater risks of censorship and discriminatory application than do general ordinances."[82] The Court reasoned that an intermediate scrutiny level of review is

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[69] *Id.*

[70] *Id.* The injunction restricted protesters "and all other persons, known and unknown, acting on behalf of any [protesters], or in concert with them" from trespassing, blocking, or obstructing ingress and egress to the clinic, physically abusing employees and patients of the clinic, and attempting to direct others to take similar actions. *Id.* at 666 n.1.

[71] *Id.* at 667–69.

[72] *Id.*

[73] *Id.* at 670–71.

[74] *Id.* at 674–75.

[75] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 776 (1994).

[76] *Id.* at 762.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 767–69.

[80] *Id.*

[81] *See id.* at 765–66.

[82] *Id.* at 764.

not sufficiently rigorous enough when evaluating a content-neutral injunction.[83] Thus, the Court articulated a new standard of review for a content-neutral injunction: "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest."[84] The Court further emphasized that when reviewing the constitutionality of a buffer zone "some deference must be given to the state court's familiarity with the facts and the background of the dispute."[85]

ii. *Hill v. Colorado*

In *Hill v. Colorado*, Hill sought to enjoin a Colorado statute making it "unlawful . . . for any person to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with that person.'"[86] Hill argued the statute violated her First Amendment right of free expression.[87] The United States Supreme Court held the statute did not violate the First Amendment because the statute merely regulated "the places where some speech may occur."[88] The Court emphasized a government's need to protect a listener's right to be free from a confrontational expression in public settings.[89]

4. Protecting Children from Freedom of Expression

As the United States Supreme Court reinforced in *Hill* and *Madsen*, time, place, and manner restrictions must be content-neutral.[90] However, in the limited context of a juvenile audience, time, place, and manner restrictions may be content-based.[91] In spite of this, the United States Supreme Court in *Brown v.*

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[83] *Id.* at 765–66.

[84] *Id.*

[85] *Id.* at 769–70.

[86] 530 U.S. 703, 707 (2000) (discussing COLO. REV. STAT. § 18-9-122(3) (1999)).

[87] *Id.* at 708–09.

[88] *Id.* at 719.

[89] *Id.* at 714–18.

[90] *Id.* at 719; Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 762–64 (1994).

[91] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (finding a high school assembly with an unsuspecting juvenile audience was no place for lewd or indecent speech, as there is an obvious concern to protect children from indecent or lewd speech in a captive audience setting); FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding an FCC decision regulating indecent radio broadcasts, even though the broadcasts were obscene, when children were "undoubtedly in the audience"); Erznoznik v. Jacksonville, 422 U.S. 205, 208–14 (1975) (finding in relatively narrow and well-defined circumstances states or municipalities may bar public dissemination of protected materials to juveniles by enacting reasonable, time, place, and manner regulations applicable to all speech irrespective of content); *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 85–86

Entertainment Merchants Association refused to adopt a category of content-based regulation permissible only for speech directed at children.[92] Nevertheless, the United States Supreme Court has consistently held the government indisputably has a special interest in protecting the well-being of children.[93]

The Court's willingness to uphold restrictions on an expression to protect children "stems in large part from the fact . . . 'a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.'"[94] Children may not be able to understand and protect themselves from certain speech.[95] Accordingly, states, municipalities, and courts "can adopt more stringent controls on communicative materials available to youths than on those available to adults,"[96] leaving parents to decide what expressions children are exposed to.[97] These restrictions, however, cannot deny adults access to the same materials and must be in relatively narrow and well-defined circumstances.[98]

Courts are currently split on restrictions protecting children from protests surrounding the abortion debate.[99] Two recent Colorado Court of Appeals

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(1976) (Stewart, J., dissenting) ("[C]ardinal principles of First Amendment law . . . require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience.").

[92] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733–38 (2011). The Court found there is no tradition of restricting juveniles' access to renderings of violence in the United States; therefore, the Court did not adopt a wholly new category of content-based restrictions to protect children from video game violence. *Id.*

[93] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 732 (1978) (upholding an FCC decision regulating indecent broadcasts on the radio in the early afternoon when children were "undoubtedly in the audience"); Ginsberg v. New York, 390 U.S. 629, 638–40 (1968) (emphasizing "even where there is an invasion of protected freedoms," the safety and well-being of children is well within the state's independent interest and constitutional power to regulate).

[94] *Pacifica Found.*, 438 U.S. at 757 (citing *Ginsberg*, 390 U.S. at 649–50 (Stewart, J., concurring)).

[95] *Id.* at 757–58.

[96] *Erznoznik*, 422 U.S. at 212 (citing *Ginsberg*, 390 U.S. 629).

[97] *Pacifica Found.*, 438 U.S. at 758.

[98] *E.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735–36 (2011); Reno v. ACLU, 521 U.S. 844, 874 (1997).

[99] *See generally, e.g.*, Bering v. SHARE, 721 P.2d 918, 935, 941 (Wash. 1986) (en banc) (holding a permanent injunction prohibiting anti-abortion protesters from using the words "murder," "kill," and any derivatives as content-neutral and that the state "has a compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by picketers' speech"); *cf.* Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't, 533 F.3d 780 (9th Cir. 2008) (finding that individuals are permitted to drive their trucks around a school with pictures of aborted fetuses on the truck as long as any restriction on such conduct is directed at the children's reaction to the speech and not an attempt to solve school disruption problems); Lefemine v. Davis, 732 F. Supp. 2d 614, 624 (D.S.C. 2010) (finding an ordinance based solely on the content of

cases upheld a restriction protecting children from anti-abortion protests.[100] These two cases involved balancing the disturbing aspects of gruesome images against protecting and shielding children.[101] The first case is a 2008 Colorado Court of Appeals case entitled *Saint John's Church in the Wilderness v. Scott* (*Saint John's I*).[102] The second case is a 2012 appeal of the 2008 *Saint John's I* case after remand (*Saint John's II*).[103] Saint John's Church brought a private nuisance and conspiracy action seeking an injunction against anti-abortion protesters.[104] Protesters were interfering with church services by holding signs protesting abortion.[105] A relevant issue on appeal was "whether the [injunction] against 'displaying large posters . . . of mutilated fetuses or dead bodies in a manner reasonably likely to be viewed by children under 12 years of age' . . . [was] content-neutral."[106]

Initially, the Colorado Court of Appeals, in *Saint John's I*, applied *Madsen* and *Hill* and determined the injunction was content-neutral.[107] The court in *Saint John's I*, thus, applied the standard of review the United States Supreme Court established in *Madsen*.[108] The court in *Saint John's I* found the injunction was a method to protect children and not a method to restrict the message itself.[109] Therefore, the court held the protection of children from undeniably gruesome images was a "proper content-neutral purpose."[110] The court remanded the injunction to the trial court to determine whether it burdened no more speech than necessary.[111]

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graphic signs as content-based and striking down a ban to protect children from graphic signs as the ban was not narrowly tailored), *vacated sub nom.* Lefemine v. Wideman, 133 S. Ct. 9 (2012) (vacated for reasons that protester was entitled to attorney fees); *see also infra* notes 100–16 and accompanying text.

[100] Saint John's Church in the Wilderness v. Scott, 194 P.3d 475 (Colo. App. 2008), *appeal after remand*, Saint John's Church in the Wilderness v. Scott, 296 P.3d 273 (Colo. App. 2012), *reh'g denied* (Aug. 2, 2012), *cert. denied*, 2013 WL 119791 (Colo. Jan. 7, 2013). This article refers to the 2008 appeal of Saint John's Church in the Wilderness as "*Saint John's I*" and the 2012 appeal of Saint John's Church in the Wilderness as "*Saint John's II*."

[101] *Saint John's I*, 194 P.3d 475; *Saint John's II*, 296 P.3d 273.

[102] *Saint John's I*, 194 P.3d 475.

[103] *Saint John's II*, 296 P.3d 273.

[104] *Saint John's II*, 296 P.3d at 275–76.

[105] *Id.* at 275.

[106] *Id.* at 279.

[107] *Saint John's I*, 194 P.3d at 482–83.

[108] *Id.* at 485.

[109] *Id.* at 484.

[110] *Id.*

[111] *Id.* at 488.

On appeal, after remand, in *Saint John's II*, the same court analyzed the same injunction differently.[112] The court found that a restriction aimed at protecting children from emotional distress is content-based.[113] Therefore, the Court in *Saint John's II* applied a strict scrutiny level of review.[114] In its ruling, the court found the injunction survived strict scrutiny because protecting the psychological well-being of children was a compelling governmental interest.[115] Additionally, the court reasoned the injunction reasonably described the image likely to cause the young children harm; therefore, it was narrowly tailored.[116]

B. Wyoming Statute Authorizing Government Regulation of Demonstrations

The United States Supreme Court has long recognized a protester's conduct—even if the conduct is to express ideas—may be prohibited if the conduct threatens disorder or invades the rights of others.[117] In light of the United States Supreme Court's holding, the Wyoming Legislature has expressly conferred such powers to Wyoming municipalities.[118] Section 15-1-103(a)(xviii) provides a town may "[r]egulate, prevent or suppress riots, disturbances, disorderly assemblies . . . or any other conduct which disturbs or jeopardizes the public health, safety, peace or morality, in any public . . . place."[119] Therefore, Wyoming courts may restrict a protest that jeopardizes the safety and psychological well-being of children in a public forum.[120]

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[112] *Saint John's II*, 296 P.3d 273 (Colo. App. 2012), *reh'g denied* (Aug. 2, 2012), *cert. denied*, 2013 WL 119791 (Colo. Jan. 7, 2013). *Saint John's I* was decided by the Colorado Court of Appeals on April 21, 2008. 194 P.3d at 475. *Saint John's II* was decided by the Colorado Court of Appeals on April 26, 2012. 296 P.3d at 273. *Saint John's II* was decided sixteen days after the Wyoming Supreme Court's decision in *Operation Save America*. *Id.*; 275 P.3d 438, 438 (Wyo. 2012). The Colorado Court of Appeals, in *Saint John's II*, cited in its decision the holding in *Operation Save America*—a ban on gruesome images to protect children is content-based. *Saint Johns II*, 296 P.3d at 283.

[113] *Saint John's II,* 296 P.3d at 282–83 (citing Boos v. Barry, 485 U.S. 312 (1988)).

[114] *Id.* at 283.

[115] *Id.* at 283–84.

[116] *Id.* at 284–85.

[117] *See generally, e.g.*, Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 513 (1969) ("[C]onduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."); *see also* Cantwell v. Connecticut, 310 U.S. 296, 307–09 (1940) (discussing the weighing of the state's interest in peace within its borders against an individual's constitutional guarantees).

[118] Coulter v. Rawlins, 662 P.2d 888, 895 (Wyo. 1983).

[119] WYO. STAT. ANN. § 15-1-103(a)(xviii) (2011).

[120] *See supra* notes 96–97, 117–19 and accompanying text.

PRINCIPAL CASE

On May 18, 2011, twenty members of an anti-abortion organization, Operation Save America (OSA), arrived in Jackson, Wyoming.[121] Members of OSA intended to protest the operations of the only abortion clinic in Wyoming and its owner, Dr. Brent Blue.[122] The twenty protesters assembled and demonstrated at Jackson Hole High School and Jackson Hole Middle School.[123] The group handed out flyers and displayed four-foot by four-foot graphic images of disfigured and aborted fetuses.[124] The members not only emphasized their message by displaying the images of the aborted fetuses, but also by calling Dr. Blue a "killer."[125]

Pastor Mark Hollick and Mark Gallagher, the leaders of OSA, both acknowledged their purpose for displaying the graphic and offensive photographs was to offend and shock the public into joining their anti-abortion movement.[126] One demonstrator went as far as boarding an occupied school bus filled with children, while displaying the disturbing images and asking if the children knew Dr. Blue was a "killer."[127] Additionally, upon the group's arrival in Wyoming, they stopped at a convenience store in Boulder, Wyoming, and bragged to the store clerk, OSA was about to "shut down the last abortionist in Wyoming."[128] One member of the group even made a threat to the store clerk about Dr. Blue, indicating the group was "looking for bomb-making materials."[129] OSA's presence in Jackson, Wyoming sparked a sizable counter-demonstration.[130] On May 20, 2011, violence almost erupted when a counter-demonstrator attempted to run over an OSA member with his vehicle.[131]

During the time the OSA protesters occupied the Town of Jackson, a Boy Scout festival was set to take place in the town square.[132] The Boy Scout festival primarily attracts children aged seven to fourteen.[133] Among other things, the

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[121] Operation Save Am. v. City of Jackson, 275 P.3d 438, 444 (Wyo. 2012).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.* at 445.

[127] *Id.* at 444.

[128] Brief of Appellee, *supra* note 9, at Exhibit 1(B) ¶5.

[129] *Id.*

[130] *Id.* at Exhibit 1(B) ¶13.

[131] *Id.*

[132] *Operation Save Am.*, 275 P.3d at 445.

[133] *Id.*

festival provides children with outdoor education and activities.[134] On March 30, 2011, the Boys Scouts applied and received a permit for the exclusive use of the town square.[135]

Lieutenant Gilliam of the Jackson City Police asked the protesters to refrain from displaying their graphic photographs at the Boy Scout event.[136] In response, Pastor Hollick and Gallagher stated "OSA reserved [the] right to display the photographs in any public setting."[137] Upon OSA's denial to refrain from demonstrating in the area, the Town of Jackson filed a Petition for Temporary Restraining Order and/or Temporary Injunction.[138] The District Court for the Ninth Judicial District, Teton County, Wyoming granted the temporary restraining order.[139] The temporary restraining order prohibited OSA "from assembling on the Jackson town square without a permit or holding posters/signs or materials of any graphic nature (e.g., aborted fetus pictures) on the town square or within a two (2) block radius thereof."[140] OSA appealed the order, arguing it was unconstitutional under the First Amendment.[141]

Majority Opinion

The Wyoming Supreme Court, in a three-to-two decision, found the temporary restraining order unconstitutional under the First Amendment of the United States Constitution.[142] The Wyoming Supreme Court considered whether the temporary restraining order was content-based or content-neutral.[143] The City of Jackson argued the temporary restraining order was content-neutral as a permissible time, place, and manner restriction aimed at protecting the safety and

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[134] ELKFEST 2013, http://elkfest.org/events.htm (last visited May 9, 2013).

[135] *Operation Save Am.*, 275 P.3d at 445.

[136] *Id.*

[137] *Id.*

[138] Brief of Appellee, *supra* note 9, at Exhibit 1 (Petition for Temporary Restraining Order and/or Injunction).

[139] Appellant's Brief at Attachments (Appealable Order W.R.A.P. 7.01(j)), *Operation Save Am.*, 275 P.3d 438 (No. S-11-0149).

[140] *Id.*

[141] *Operation Save Am.*, 275 P.3d at 438–47.

[142] *Id.* at 438–43. Chief Justice Kite filed a dissenting opinion joined by Justice Hill. *Id.* at 466–67 (Kite, C.J., dissenting). The dissenting opinion is not discussed in this article, as the dissent did not disagree with the majority on either content-neutral or content-based grounds. *See id.* Instead the dissent reasoned the issue presented by Operation Save America was moot when it reached the court because the Boy Scout Festival had already taken place. *Id.* According to the majority, the temporary restraining order was not moot because it fell within the special category of disputes "capable of repetition, yet evading review." *Id.* 447–53 (majority opinion).

[143] *Id.* at 459.

welfare of children in a public forum.[144] OSA argued the restriction was content-based, requiring a strict scrutiny level of review, because the order distinguished "between allowed or banned speech based on content—whether or not the signs/posters or materials used are of a 'graphic nature (e.g., aborted fetus pictures).'"[145]

The Wyoming Supreme Court, applying *Boos v. Barry* and *Brown v. Entertainment Merchants Association*, held the temporary restraining order was content-based.[146] The court reasoned the restriction was intended "to protect or shield an audience from disturbing or distressing aspects of speech," and therefore, applied a strict scrutiny standard of review.[147] The court found—despite the government's compelling interest to protect children from certain speech—there was no evidence in the record pertaining to the irreparable harm of gruesome images displayed to children.[148]

Furthermore, the court reasoned that although the government had an interest in maintaining peace, there was no basis to limit speech unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[149] The majority discussed there was no evidence in the record OSA's speech would produce violence.[150] Additionally, the court found the government failed to demonstrate the two block buffer zone in each direction surrounding the town square was necessary or the least restrictive means to limit the protesters' speech.[151] Consequently, the government's argument failed to survive the strict scrutiny analysis.[152] Since the government failed to demonstrate the need to solve a compelling government interest and because the injunction was not the least restrictive means, the Wyoming Supreme Court held the injunction unconstitutional under the First Amendment.[153]

ANALYSIS

The Wyoming Supreme Court's decision in *Operation Save America* is misguided on doctrinal and policy grounds. The Wyoming Supreme Court made a good faith attempt to balance OSA's First Amendment rights against protecting

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[144] Brief of Appellee, *supra* note 9, at 54–60.

[145] Appellant's Brief, *supra* note 139, at 25.

[146] *Operation Save Am.*, 275 P.3d at 459 (citing Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011); Boos v. Barry, 485 U.S. 312, 321 (1988)).

[147] *Id.* at 459–60.

[148] *Id.* at 460–62.

[149] *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 409 (1989)).

[150] *Id.* at 461–62.

[151] *Id.* at 462–63.

[152] *Id.* at 463.

[153] *Id.* at 459–66.

the safety and well-being of children.[154] However, the court improperly relied on *Boos* when it determined the temporary restraining order was content-based.[155] As a result, the court omitted applicable United States Supreme Court precedent regarding restrictions on anti-abortion protests.[156] The Wyoming Supreme Court subsequently applied a higher standard of review to the temporary restraining order than required.[157] Regrettably, in the court's application of a higher standard of review the court overlooked the need to protect the safety and well-being of children.[158]

This note criticizes the decision in *Operation Save America* for three primary reasons. First, the Wyoming Supreme Court should have found the temporary restraining order was content-neutral and applied a less stringent standard of review.[159] Second, even if a strict scrutiny level of review was proper, the temporary restraining order should have survived.[160] Lastly, Wyoming should have followed the juvenile audience exception that allows content-based time, place, and manner restrictions in the limited context of a juvenile audience.[161]

The Restrictions Imposed Were Content-Neutral Time, Place, and Manner Restrictions

The temporary restraining order in *Operation Save America* is a content-neutral restriction and should be subject to a less stringent standard of review.[162] A restriction is content-neutral when it limits where some speech may occur rather than discriminating against the message itself.[163] The controlling consideration as to whether a restriction is content-neutral or content-based is the government's purpose for the restriction.[164] The principal inquiry is whether the government

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[154] *See id.* at 459–63.

[155] *See infra* notes 162–216 and accompanying text.

[156] *See supra* notes 67–89 and accompanying text; *see also infra* notes 180–216 and accompanying text.

[157] *See infra* notes 162–216, 247–73 and accompanying text.

[158] *See supra* notes 127–31 and accompanying text; *see also infra* notes 162–273 and accompanying text.

[159] *See infra* notes 162–216 and accompanying text.

[160] *See infra* notes 217–46 and accompanying text.

[161] *See infra* notes 247–73 and accompanying text.

[162] *See infra* notes 163–91 and accompanying text.

[163] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981); Greer v. Spock, 424 U.S. 828, 836 (1936) ("The guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'") (quoting Adderley v. Florida, 385 U.S. 39, 48 (1976)).

[164] Ward v. Rock Against Racism, 491 U.S. 781, 791–93 (1989).

sought the restriction "because of [a] disagreement with the [speaker's] message."[165] If the government's purpose is unrelated to the expression's content, then the restriction is content-neutral, even if the restriction limits some expressions and not others.[166]

Even though the temporary restraining order only limited OSA's protest, it is still constitutional under *Madsen*. The United States Supreme Court in *Madsen* reasoned an injunction is not unconstitutional just because it limits certain speakers' rights.[167] An injunction, by its very nature, regulates a particular party's activities, because of their past actions.[168] The temporary restraining order only limited OSA's protests at a particular location to address the concern for the safety and psychological well-being of children.[169] These concerns emanated from OSA's past conduct and violent reactions to its protests.[170] Therefore, the temporary restraining order, though it only limited OSA's protests, is content-neutral under *Madsen*. The temporary restraining order was imposed because of OSA's past conduct and safety concerns.[171]

While the temporary restraining order is content-neutral under *Madsen*, it is also a valid time, place, and manner restriction under *Hill v. Colorado*. In *Hill*, the United States Supreme Court concluded that any restrictions on speech regulating expressive activity are considered content-neutral if such restrictions are "justified without reference to the content of [the] regulated speech."[172] The United States Supreme Court, in *Hill*, focused on the restriction regulating where some speech may occur and not a regulation of the speech itself.[173] Therefore, the restriction in *Hill* was content-neutral.[174] In *Operation Save America*, the temporary restraining order only enjoined protesters from assembling in the town square and within a two block radius of the town square during the Boy Scout festival.[175] The temporary restraining order was only meant to restrict the time, place, and manner of OSA's protests; it was not a ban on OSA's message.[176]

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[165] *Id.* at 791 (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984)).

[166] *Ward*, 491 U.S. at 791 (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986)).

[167] Madsen v. Women's Health Ctr., 512 U.S. 753, 762 (1994).

[168] *Id.*

[169] *See supra* notes 124–31, 140 and accompanying text.

[170] *See supra* notes 124–31 and accompanying text.

[171] *See generally* supra notes 67–85 (discussing *Madsen*, 512 U.S. 753 and the constitutionality of a content-neutral injunction restricting anti-abortion protests due to an abortion clinic's need to ensure ingress and egress and patients' safety and health); *see also supra* notes 123–31 and accompanying text.

[172] Hill v. Colorado, 530 U.S. 703, 720 (2000).

[173] *See supra* notes 86–89 and accompanying text.

[174] *Hill*, 530 U.S. at 719–25.

[175] Appellant's Brief, *supra* note 139.

[176] *See id.* (restricting OSA from demonstrating only at the Boy Scout festival and within the vicinity and only during the times the Boy Scout festival took place).

The temporary restraining order was justified without reference to OSA's expressions and only limited when and where OSA could demonstrate.[177] The City of Jackson had a significant interest to ensure the safety and well-being of children and did so without eliminating OSA's ability to communicate its idea or by favoring one idea over another.[178] For example, if OSA was protesting with signs that said "God Loves You," and this caused the same safety and psychological concerns, the City of Jackson more than likely would have obtained the same temporary restraining order.[179] As a result, the Wyoming Supreme Court should have found the temporary restraining order was a content-neutral time, place, and manner restriction.

Madsen v. Women's Health Care Center, Inc. *Was the Appropriate Standard*

The temporary restraining order in *Operation Save America* was content-neutral and subject to a less stringent standard of review.[180] The Wyoming Supreme Court, in its analysis, should have relied on *Madsen*.[181] Although the injunction imposed in *Madsen* restricted protests outside an abortion clinic, it is a case of precedential value.[182] The United States Supreme Court in *Madsen* upheld an injunction meant to protect the safety and well-being of patients.[183] Furthermore, the injunction's purpose was to ensure ingress and egress into the building.[184]

The United States Supreme Court, in *Madsen*, held injunctions carry a great risk of censorship, which is why applying the time, place, and manner analysis is not rigorous enough.[185] The standard as applied in *Madsen* is not as lenient as a standard time, place, and manner analysis, but it is not as rigorous as a strict scrutiny analysis.[186] The Court in *Madsen* asked "whether the challenged

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[177] *See id.*; *see also* Brief of Appellee, *supra* note 9, at Exhibit 1 (Petition for Temporary Restraining Order and/or Injunction).

[178] *See* Brief of Appellee, *supra* note 9, at Exhibit 1 (Petition for Temporary Restraining Order and/or Injunction); Appellant's Brief, *supra* note 139; *see also supra* notes 127–31 and accompanying text; *infra* notes 199–203, 234–37, 245–46 and accompanying text.

[179] *See also* Appellant's Brief, *supra* note 139. *See generally supra* note 31 and accompanying text.

[180] *See supra* notes 162–79 and accompanying text.

[181] *See generally* Operation Save Am. v. City of Jackson, 275 P.3d 438 (Wyo. 2012); *see also supra* notes 68–85 and accompanying text (providing background in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994)).

[182] *See supra* notes 68–85 and accompanying text.

[183] *See supra* notes 68–85 and accompanying text.

[184] *See supra* notes 68–85 and accompanying text.

[185] *Madsen*, 512 U.S. at 764–66.

[186] *Id.* at 765–66.

provisions of the injunction burden no more speech than necessary to serve a significant government interest."[187]

The Wyoming Supreme Court should have given the district court some deference in its decision and applied the "intermediate-intermediate scrutiny" standard as set forth in *Madsen*.[188] The temporary restraining order in *Operation Save America* sought to regulate the group's activities based on their past actions and not because of their underlying message.[189] The court imposed the restrictions on OSA incidental to their anti-abortion message.[190] The restrictions addressed the group's harassment of children and the need to ensure public safety and the ingress and egress into the festival from the available parking areas around the town square.[191] Therefore, the standard set forth in *Madsen* was the more appropriate test to apply to the temporary restraining order in *Operation Save America*.

The Temporary Restraining Order Was a Content-Neutral Restriction Under Renton

The temporary restraining order in *Operation Save America* was a content-neutral restriction and should be analyzed under the standard set forth in *Madsen*, but it was also a reasonable limitation on undesirable secondary effects.[192] If a restriction is aimed at preventing harmful secondary effects caused by an expression and not the expression itself, then the restriction is content-neutral and subject to intermediate scrutiny.[193] The temporary restraining order in *Operation Save America* was an appropriate remedy to address the potential secondary effects caused by OSA's graphic posters.[194]

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[187] *Id.* at 765.

[188] *Id. See generally* supra notes 68–85 (discussing *Madsen*, 512 U.S. 753 and the constitutionality of a content-neutral injunction restricting anti-abortion protests due to the abortion clinic's need to ensure ingress and egress and the health and safety of patients). The United States Supreme Court in *Madsen* did not name the new standard set forth in *Madsen*. *See* 512 U.S. at 765–91. Justice Scalia, however, in his opinion, in which he concurs in part and dissents in part, stated perhaps the standard should be referred to as the "intermediate-intermediate scrutiny" standard. *Id.* at 791.

[189] *See supra* notes 127–31 and accompanying text; *see also* Brief of Appellee, *supra* note 9, at Exhibit 1(B) ¶5 (Affidavit of Robert Gilliam); *id.* at Exhibit 1 (Petition for Temporary Restraining Order and/or Injunction); Appellant's Brief, *supra* note 139.

[190] *See supra* notes 127–31 and accompanying text; *see also* Brief of Appellee, *supra* note 9, at Exhibit 1(B) ¶5 (Affidavit of Robert Gilliam); *id.* at Exhibit 1 (Petition for Temporary Restraining Order and/or Injunction); Appellant's Brief, *supra* note 139.

[191] *See supra* note 127 and accompanying text; *see also infra* notes 242–46 and accompanying text.

[192] *See supra* notes 162–91 and accompanying text; *see also infra* notes 193–216 and accompanying text.

[193] *See supra* notes 46, 48–53 and accompanying text.

[194] *See infra* notes 198–203 and accompanying text.

The United States Supreme Court, in *Renton*, encompassed the need to protect the safety and psychological well-being of children in its secondary effects doctrine.[195] In *Renton*, the city enacted an ordinance "to protect neighborhood children from increased safety hazards, and the offensive and dehumanizing influence created by the location of adult movie theatres in residential areas."[196] The United States Supreme Court ultimately held the ordinance restricting placement of adult theatres represented "a valid governmental response to the admittedly serious [secondary effects] created by adult theaters."[197]

Secondary effects are outcomes caused by the initial expression that occur later in time and are reasonably foreseeable.[198] A child's environment and experiences greatly influence his or her development.[199] "Exposure to disturbing images can cause or exacerbate post-traumatic stress in children."[200] Children of varying ages will experience different reactions from exposure to disturbing images.[201] Some children's development skills can be compromised and lead to loss in speech, toileting skills, or disturbance in sleep from nightmares to a fear of going to sleep.[202] The problems caused by a traumatic event can often be difficult

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[195] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52 (1986); Brief for Appellants, *supra* note 56. The United States Supreme Court has attempted to limit *Renton*'s secondary effects doctrine to zoning cases; however, the City of Renton's concerns are the City of Jackson's same concerns. *See generally, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803 (2000) (stating the zoning cases which restrict speech due to secondary effects are irrelevant when targeting the impact of speech on young children); *see also supra* notes 55–63 and accompanying text.

[196] Brief for Appellants, *supra* note 56. The City of Renton also enacted the ordinance because of expressed concerns about the adult theatres' "interference with parental responsibilities toward children." *Id.*

[197] *Renton*, 475 U.S. at 54.

[198] *See generally, e.g.*, Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774–75 (1983) (emphasizing psychological health damage from the risk of a nuclear accident at a nuclear plant is not a direct effect from the physical environment, as the causal chain is too attenuated; therefore, the risk of psychological damage was an indirect or secondary effect); BLACK'S LAW DICTIONARY 1471 (9th ed. 2009) (defining secondary effects as "an indirect harm flowing from regulated expression"); *supra* notes 55–63 and accompanying text (discussing the secondary effects of an ordinance restricting the location of adult movie theatres).

[199] *Child Development Tracker: Your Seven Year Old*, PBS PARENTS (Mar. 4, 2013), http://www.pbs.org/parents/childdevelopmenttracker/seven/.

[200] RUTH TEICHROEB, DART CTR. FOR JOURNALISM & TRAUMA, COVERING CHILDREN & TRAUMA: A GUIDE FOR JOURNALISM PROFESSIONALS 8 (2006), *available at* http://dartcenter.org/files/covering_children_and_trauma_0.pdf; *see also* CITY OF NEW YORK, *Protecting Children from Disturbing Media Reports During Traumatic Events*, NYC HEALTH (last visited May 9, 2013), *available at* http://www.nyc.gov/html/doh/downloads/pdf/mhdpr/child-tv.pdf.

[201] THE NATIONAL CHILD TRAUMATIC STRESS NETWORK, *Age-Related Reactions to a Traumatic Event*, www.NCTSNET.org (last visited May 9, 2013), http://www.nctsn.org/nctsn_assets/pdfs/age_related_reactions.pdf.

[202] *Id.*

to identify and develop over time.[203] Hence, these problems are a secondary effect as they are foreseeable, but only occur after the initial reaction of seeing the traumatic images.

The temporary restraining order in *Operation Save America* was a reasonable restriction on the secondary effects caused by anti-abortion protests. The temporary restraining order in *Operation Save America*—like the zoning ordinance in *Renton*—attempted to limit the places protesters could demonstrate to protect the safety of children and prevent psychological damage.[204] OSA's demonstrations may have inadvertently compromised children's developmental skills with their graphic images, as well as impacted the children's safety—just as the adult theatres in *Renton* may have inadvertently increased safety hazards and led to an offensive influence on children.[205] Therefore, the temporary restraining order was an appropriate remedy to prevent any secondary effects caused by the graphic images.[206]

The Wyoming Supreme Court found the temporary restraining order's purpose of protecting children was content-based under *Boos*, because "a restriction that seeks to protect or shield an audience from disturbing or distressing aspects of speech is content-based."[207] The United States Supreme Court, in *Boos,* found

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[203] *See generally* PARAMJIT T. JOSHI, SHULAMIT M. LEWIN & DEBORAH A. O'DONNELL, CHILDREN'S NAT'L MED. CTR., THE HANDBOOK OF FREQUENTLY ASKED QUESTIONS FOLLOWING TRAUMATIC EVENTS: VIOLENCE, DISASTERS, OR TERRORISM (2005), *available at* http://www.childrensnational.org/files/PDF/DepartmentsandPrograms/ichoc/handbook_english.pdf.

[204] *See* Brief of Appellee, *supra* note 9, at Exhibit 1(B) ¶5 (Affidavit of Robert Gilliam); *id.* at Exhibit 1 (Petition for Temporary Restraining Order and/or Injunction); Appellant's Brief, *supra* note 139. *See generally supra* notes 55–63, 126–31, 195–203 and accompanying text.

[205] *See generally supra* notes 55–63, 127–31, 198–203 and accompanying text.

[206] *See supra* notes 198–203 and accompanying text; *see also* sources cited *supra* notes 138–39.

[207] Operation Save Am. v. City of Jackson, 275 P.3d 438, 459 (Wyo. 2012) (finding "a restriction that seeks to protect or shield an audience from disturbing or distressing aspects of speech is content-based" under *Boos v. Barry*, 485 U.S. 312 (1988), although *Boos* applied to adult diplomats). The Wyoming Supreme Court relies on *Boos* for its analysis; however, *United States v. Playboy Entertainment Group, Inc.* is an important case to consider. *See* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811–15 (2000). *Playboy Entertainment Group* is one of a string of cases where the United States Supreme Court attempted to address technological advancements and children's access to explicit materials in their homes. *See generally, e.g.*, *id.* at 806 (addressing the constitutionality of § 505 of the Telecommunications Act of 1996 restricting sexually explicit television programming); Reno v. ACLU, 521 U.S. 844 (1997) (addressing the constitutionality of the 1996 Communications Decency Act affording protections to minors from obscene and indecent materials on the internet). The United States Supreme Court, applying *Boos*, reasoned psychological damage from exposure to sexually explicit programming is a direct impact and not a secondary effect of speech. *Playboy Entm't Grp., Inc.*, 529 U.S. at 812–15. *Playboy Entertainment Group*, however, is distinguishable from *Operation Save America*. In *Playboy Entertainment Group*, parents could regulate children's ability to view expressions in their own homes whereas in *Operation Save America*, parents were unable to regulate children's exposure to expression. *See id.* at 824–25; *supra* notes 121–35 and accompanying text. Parents had the option to prevent children from

that protecting "[t]he emotive impact of speech on its audience is not a 'secondary effect'" under *Renton*.[208] *Boos*, however, is distinguishable from *Operation Save America*. The restriction in *Boos* was meant to shield diplomats (i.e., adults) from offensive signs criticizing their governments.[209] Conversely, the restriction in *Operation Save America* was aimed at protecting children.[210] Additionally, the temporary restraining order protected children from safety hazards, whereas the restriction in *Boos* was not concerned with safety hazards.[211] Therefore, the Wyoming Supreme Court should have relied on *Renton* and found the temporary restraining order had a content-neutral purpose.

Boos represents a case that states the *Renton* secondary effects analysis does not apply when a restriction is aimed at protecting the emotional and psychological impact on individuals.[212] As discussed above, however, *Boos* is distinguishable from *Operation Save America*.[213] Therefore, the Wyoming Supreme Court should have applied *Renton*'s secondary effects analysis.[214] The Wyoming Supreme Court should have found the temporary restraining order represented a valid governmental response to protect children from any secondary harm—such as bedwetting, loss in appetite and increased fearfulness—that may have developed from exposure to the graphic images.[215] Accordingly, the Wyoming Supreme Court should have found the temporary restraining order content-neutral under *Renton* and applied a less stringent standard of review.[216]

Application of Heightened Standard of Strict Scrutiny Applied to Content-Based Restrictions

As demonstrated above, the temporary restraining order is best characterized as content-neutral and not content-based; nevertheless, the temporary restraining order should have survived a strict scrutiny analysis reserved for content-based

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attending the festival. This is an unreasonable expectation as the festival was an educational event meant specifically for children. *See supra* notes 132–35 and accompanying text. Additionally, the restraining order in *Operation Save America* imposed restrictions at an event directed at a juvenile audience, whereas the restrictions in *Playboy Entertainment Group* imposed restrictions on television programs during times with both a juvenile and adult audience present. *See supra* notes 121–35 and accompanying text; *see also Playboy Entm't Grp., Inc.*, 529 U.S. at 811–12.

[208] *Boos*, 485 U.S. at 321.

[209] *Id.* at 321–22.

[210] Appellant's Brief, *supra* note 139, at Attachments (Appealable Order W.R.A.P. 7.01(j) ¶ 3).

[211] *See id.*; *see also Boos*, 485 U.S. at 321.

[212] *Boos*, 485 U.S. at 320–21.

[213] *See supra* notes 207–11 and accompanying text.

[214] *See supra* notes 192–211 and accompanying text.

[215] *See supra* notes 198–203 and accompanying text.

[216] *See supra* notes 192–215 and accompanying text.

restrictions.[217] The Wyoming Supreme Court should have reached a similar conclusion as the Colorado Court of Appeals in *Saint John's II*.[218] *Saint John's II* found a restriction protecting children from gruesome images survived strict scrutiny.[219] Strict scrutiny requires the restriction be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end."[220]

The temporary restraining order in *Operation Save America* cites two significant reasons for its justification.[221] First, the Order Granting Temporary Restraining Order cites public safety as a significant purpose.[222] The district court granted the restraining order citing the threat of violence, the violence that had already occurred, and the threat to the public health, safety, peace, and morality.[223] Given the history of OSA's conduct and the dangerous fights that threatened to develop, the town had a substantial interest to protect the safety of the 200 plus children expected to attend the festival.[224] In addition to the town's interest in ensuring public safety and order, the town had a significant interest in promoting the free flow of traffic on streets and sidewalks to and from the festival.[225] The Wyoming Supreme Court, however, held the government did not meet its burden by showing the speech would incite or produce lawless action.[226] Therefore, according to the court, there was no need to ensure public safety.[227]

Second, the temporary restraining order cited the governmental interest in protecting the well-being of children.[228] Protecting the well-being of children

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[217] *See supra* notes 192–216 and accompanying text. Strict scrutiny "leaves few survivors," as most government restrictions are invalidated when courts apply a strict scrutiny standard of review. Los Angeles v. Alameda Books, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

[218] *See Saint John's II*, 296 P.3d 273, 281–82 (Colo. App. 2012), *reh'g denied* (Aug. 2, 2012), *cert. denied*, 2013 WL 119791 (Colo. Jan. 7, 2013) (holding that there is no precedent for a 'minors' exception to prohibition on banning speech because of listeners' reaction to content; thus the children's distress is a primary effect of speech and a restriction solely to prevent this distress is content-based).

[219] *Id.* at 283–85.

[220] *Id.*; *see supra* notes 42–44 and accompanying text.

[221] Appellant's Brief, *supra* note 139.

[222] *Id.* at Attachments (Appealable Order W.R.A.P. 7.01(j) ¶ 2).

[223] *Id.*

[224] *See supra* notes 121–35 and accompanying text; *see also* sources cited *supra* notes 128 and 138–39.

[225] *See supra* note 191 and accompanying text; *see also infra* notes 242–44 and accompanying text.

[226] Operation Save Am. v. City of Jackson, 275 P.3d 438, 460–62 (Wyo. 2012).

[227] *Id.*

[228] Appellant's Brief, *supra* note 139, at Attachments (Appealable Order W.R.A.P. 7.01(j) ¶ 3).

is already recognized as a fundamental government interest.[229] Moreover, the United States Supreme Court found governments are not required to have certain scientific criteria supporting their restrictions.[230] The Wyoming Supreme Court found there is a compelling government interest to protect children from disturbing images.[231] However, according to the court, the government did not make a strong enough argument as to the impact experienced by the children.[232] Although in *Saint John's II* the church's brief cited an exact instance of a young girl becoming distraught at the site of graphic images, the Wyoming Supreme Court should not have required such an instance indicating the psychological harm on a child.[233]

The Wyoming Supreme Court should have relied on past court decisions already finding anti-abortion protests have a significant impact on children. For example, in *Bering v. SHARE*, the Washington Supreme Court upheld a permanent injunction prohibiting anti-abortion protesters from using the words "murder," "kill," and their derivatives because a state has a "compelling interest in avoiding subjection of children to the physical and psychological abuse inflicted by the picketers' speech."[234] The harassment of young children, such as continuously telling them there is a killer in Jackson, is likely to have a psychological impact.[235] A child may not have the ability to ignore a protestor's speech.[236] Likewise, a child may have difficulty avoiding a protester that hands the child a picture of an aborted fetus.[237]

The only difference between *Saint John's II* and *Operation Save America* is the church in *Saint John's II* referred to a specific instance when the gruesome

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[229] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding an FCC decision regulating indecent broadcasts on the radio in the early afternoon when children were "undoubtedly in the audience"); Ginsberg v. New York, 390 U.S. 629, 638–40 (1968) (emphasizing "even where there is an invasion of protected freedoms," the safety and well-being of children is well within the state's independent interest and constitutional power to regulate).

[230] *See Ginsberg*, 390 U.S. at 642–43 (1968) ("We do not demand of legislatures 'scientifically certain criteria of legislation.'" (citing Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911))).

[231] *Operation Save Am.*, 275 P.3d at 460.

[232] *Id.* at 460–62 ("The record contains no evidence concerning the injury or potential injury to children from viewing the images displayed by OSA, and of particular importance in the context of the request for injunctive relief, evidence of irreparable harm to the children.").

[233] *See Saint John's II*, 296 P.3d 273, 284 (Colo. App. 2012), *reh'g denied* (Aug. 2, 2012), *cert. denied*, 2013 WL 119791 (Colo. Jan. 7, 2013); *see also supra* note 230.

[234] 721 P.2d 918, 935 (Wash. 1986).

[235] *See id.* (holding the government "has a compelling state interest in avoiding subjection of children to the physical and psychological abuse inflicted" by anti-abortion protesters' speech).

[236] *See supra* notes 94–98 and accompanying text.

[237] *See supra* notes 94–98 and accompanying text.

images impacted a child.[238] This slight difference should not be the determinative factor for holding one injunction over another as constitutional. The Wyoming Supreme Court should not have overlooked the significant interest in protecting the safety and psychological well-being of children.

Lastly, for the restraining order to survive strict scrutiny the restraining order must satisfy the second prong—"the curtailment of free speech must be actually necessary to the solution."[239] Here, the court asks "whether the challenged regulation is the least restrictive means among available, effective alternatives."[240] The Wyoming Supreme Court found the two block buffer zone was too broad and not the least restrictive means.[241]

Located at the Jackson town square, the festival attracts a minimum of 200 children with the possibility of attendance of 3000 to 4000 spectators and tourists.[242] Parking around the one acre town square is limited, with approximately 200 to 250 parking spaces within the immediate vicinity.[243] Additionally, the adjacent streets are used by tourists traveling to national parks.[244] The two block radius was a narrow solution to ensure the ingress and egress of traffic on streets and sidewalks to the festival, as well as to address safety concerns. There were ample locations in the city for OSA to voice its message. The City of Jackson has fourteen other parks in which OSA could have protested.[245] Moreover, OSA was allowed to communicate its message in the town square after the children's event

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[238] *See Saint John's II*, 296 P.3d at 281–84.

[239] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011).

[240] Ashcroft v. ACLU, 542 U.S. 656, 666 (2004).

[241] Operation Save Am. v. City of Jackson, 275 P.3d 438, 462–63 (Wyo. 2012); *see also* Appellant's Brief, *supra* note 139 (prohibiting OSA "from assembling on the Jackson Town Square without a permit or holding posters/signs or materials of any graphic nature (e.g., aborted fetus pictures) on the Town Square or within a two (2) block radius thereof").

[242] ELKFEST 2013, http://elkfest.org/events.htm (last visited May 9, 2013) (presenting the locations of the various events and activities); E-mail from Todd Smith, Chief of Police, Jackson Hole Police Department, to author (Sept. 28, 2012, 16:16 MST) (on file with author). Please note these numbers are approximations from Todd Smith, Chief of Police, Jackson Hole Police Department and are subject to change.

[243] *Parks Directory and Map*, TETON COUNTY JACKSON PARKS & RECREATION, http://www.tetonparksandrec.org/parks-pathways/park-directory (last visited Mar. 4, 2013); E-mail from Todd Smith, Chief of Police, *supra* note 242. Please note these numbers are approximations from Todd Smith, Chief of Police, Jackson Hole Police Department and are subject to change.

[244] E-mail from Todd Smith, Chief of Police, *supra* note 242. Please note this is an observation and is subject to change.

[245] *See Parks and Pathways*, TETON COUNTY JACKSON PARKS & RECREATION, http://www.tetonparksandrec.org/parks-pathways ("Teton County Jackson Parks & Recreation Department oversees 15 parks and athletic fields . . . .").

had ended.[246] The temporary restraining order was the least restrictive means to ensure the safety and psychological well-being of children, as well as the ingress and egress of all attending the festival.

Wyoming Should Follow the Juvenile Audience Content-Based Time, Place, and Manner Exception

The temporary restraining order meets the content-neutrality requirement for a time, place, and manner restriction.[247] However, time, place, and manner regulations affecting First Amendment rights can be content-based in the limited context of a juvenile audience.[248] It is well-established courts "can adopt more stringent controls on communicative materials available to youths than on those available to adults," leaving parents to decide what expressions children are exposed to.[249] The United States Supreme Court recognized three reasons for a need to make a constitutional distinction between adults and children: (i) children's vulnerability, (ii) children's "inability to make critical decisions in an informed, mature manner," and (iii) "the importance of the parental role in child rearing."[250] For this reason, states, municipalities and courts can "bar public dissemination of protected materials to [minors]" in "relatively narrow and well-defined circumstances."[251] Therefore, the Wyoming Supreme Court should have followed the principle that time, place, and manner restrictions can be content-based under the juvenile audience exception.[252]

The Wyoming Supreme Court, in *Operation Save America*, cited *Brown v. Entertainment Merchants Association*, which provides "a [s]tate possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed."[253] Moreover, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."[254] However, the Wyoming Supreme Court's reference to *Brown* is incomplete.[255]

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[246] *See* Appellant's Brief, *supra* note 139 (prohibiting OSA from protesting only "between the hours of 5:00 a.m. and 5:00 p.m. on Saturday, May, 21, 2011").

[247] *See supra* notes 162–216 and accompanying text.

[248] *See supra* note 91 and accompanying text.

[249] Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975); *see supra* notes 94–98 and accompanying text.

[250] Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[251] Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2735 (2011).

[252] *See infra* notes 253–73 and accompanying text.

[253] Operation Save Am. v. City of Jackson, 275 P.3d 438, 461 (Wyo. 2012); *Brown*, 131 S. Ct. at 2736.

[254] *Brown*, 131 S. Ct. at 2736.

[255] *Id.* at 2735–36.

In *Brown*, the Court held "in relatively narrow and well-defined circumstances [the government may] bar public dissemination of protected materials to [minors]."[256] If the restriction is not "broader than permissible" in protecting children from a protester's expression then the town can restrict a protest.[257] Here the restriction was relatively narrow and well-defined to address children's safety and well-being concerns at the Boy Scout festival.[258] The restriction only prevented OSA from protesting at the festival and within the immediate vicinity.[259] Thus, the City of Jackson was justified in restraining OSA from demonstrating at the Boy Scout festival and within a two-block radius.[260]

Following the content-based time, place, and manner juvenile audience exception and allowing restrictions in narrow circumstances aids a parent's fundamental right to decide what speech his or her child can hear and repeat.[261] The United States Supreme Court has determined restrictions can be placed on speech available to children to leave parental decisions as to what speech children hear and repeat up to the parents.[262] Failing to restrict anti-abortion protests at a children's event leaves a parent with a limited choice. A parent can either allow a child to attend the event, despite the controversial and shocking expressions, or a parent can make the child stay at home to avoid exposure to the undesired expressions. A parent should not have to avoid taking a child to an educational event, specifically intended for children, for fear the child may encounter political speech the child likely cannot comprehend. Adhering to the juvenile audience content-based time, place, and manner exception aids a child's positive development through attending social and educational events.[263]

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[256] *Id.* at 2736.

[257] Erznoznik v. Jacksonville, 422 U.S. 205, 213–14 (1975) (finding a restriction limiting drive-in theatres from airing sexually explicit material to protect children was "broader than permissible" to prohibit youth from viewing the films).

[258] Appellant's Brief, *supra* note 139.

[259] *Id.*

[260] *See generally Erzoznik*, 422 U.S. at 213–14.

[261] *See generally Brown*, 131 S. Ct. at 2736 n.3 (discussing Justice Thomas' dissent and his argument that parents traditionally have the right to determine what children hear or say); United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 815 (2000) ("The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt."); FCC v. Pacifica Found., 438 U.S. 726, 758 (1978) ("[S]ociety may prevent the general dissemination of speech to children, leaving to parents the decision as to what speech . . . their children shall hear and repeat.").

[262] *See generally supra* note 261 and accompanying text.

[263] *See generally* Prince v. Massachussets, 321 U.S. 158, 168 (1944) ("[A] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.").

Following the content-based time, place, and manner juvenile audience exception safeguards protection of a parent's fundamental right to raise a child as he or she sees fit.[264] Additionally, this exception is further supported by the underlying rationale of the First Amendment.[265] The central reason content-based restrictions are viewed suspiciously is because of the fear "the government might distort the marketplace and favor certain ideas over others."[266] However, there is a presumption that individuals encountering speech can understand an expression and any corrupted motives for the expression.[267] Throughout a child's development, there are considerable differences in a child's physical, cognitive, and psychological abilities.[268] A sixteen-year-old may be able to filter out corrupted speech more readily than a seven-year-old.[269] Therefore, Wyoming has a special interest in regulating expressions that reach children—specifically the time, place, and manner of the expression—to protect children's development.[270]

Since the Boy Scout festival in Jackson, Wyoming was an event for young children specifically intended to teach children outdoor survival and first aid skills, the government should be allowed to place appropriate content-based time, place, and manner restrictions under the juvenile audience exception.[271] Restricting certain speech topics at a children's event in a public forum assists in the protection and growth of society's youth,[272] while aiding a parent's decision as to what speech their children shall hear and repeat.[273] Therefore, the Wyoming Supreme Court should have followed the juvenile audience content-based time, place, and manner exception.

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[264] *See* sources cited *supra* notes 96–97 and 261.

[265] *See, e.g.*, *Pacifica Found.*, 438 U.S. at 757–58 (Powell, J., concurring) (emphasizing the Court's ability to regulate expression more strenuously with regard to children "stems in large part from the fact that 'a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees'" (quoting Ginsberg v. New York, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring in result))).

[266] DAVID L. HUDSON, JR., LEGAL ALMANAC SERIES THE FIRST AMENDMENT: FREEDOM OF SPEECH § 2.2 (2012); *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972) (finding under the First Amendment the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities").

[267] *See supra* notes 22–23, 94 and accompanying text.

[268] Elizabeth Heubeck, *Violent and Shocking Images Impact Children Differently: Experts Offer Age-Appropriate Tips to Maintain Your Child's Sense of Security in a World Bombarded by Scenes of Violence*, WEBMD, http://www.webmd.boots.com/children/guide/violent-images-impact-children-differently (last visited May 9, 2013).

[269] DUPRE, *supra* note 23; *see also supra* notes 94–95 and accompanying text.

[270] *See generally supra* notes 93–96, 199–203, 263 and accompanying text (discussing the government's need to protect society's youth to ensure the development of children).

[271] *See generally supra* notes 132–35, 248–70 and accompanying text.

[272] *See generally supra* notes 93–96, 199–203, 263 and accompanying text (discussing the government's need to protect society's youth to ensure the development of children).

[273] *See* sources cited *supra* note 261.

CONCLUSION

The First Amendment ensures the protection of one's fundamental right to freedom of expression.[274] However, it is hard to fathom the First Amendment protects adults who, in any forum, approach seven-year-olds and show them pictures of aborted fetuses, while calling a local medical professional a "killer."[275] The United States Supreme Court has recognized time, place, and manner restrictions can be content-based in the limited context of a juvenile audience.[276] The Wyoming Supreme Court in *Operation Save America* failed to recognize this content-based exception, as well as failed to address applicable United States Supreme Court precedent.[277] As a result, the Wyoming Supreme Court applied a higher standard of review than necessary.[278]

The Wyoming Supreme Court should not have relied on *Boos v. Barry* in determining whether the restriction was content-based or content-neutral.[279] This reliance led the Wyoming Supreme Court to overlook the importance in preventing the secondary effects egregious expressions can have on children.[280] Additionally, the Wyoming Supreme Court overlooked the pivotal role the government plays in aiding a parent's fundamental right in the upbringing of his or her child.[281] The temporary restraining order barred public dissemination of materials to protect children in a relatively narrow and well-defined circumstance and to aid a parent's fundamental right to decide what speech his or her children shall hear and repeat.[282] Therefore, the Wyoming Supreme Court should have applied a less stringent standard of review and found the temporary restraining order constitutional under the First Amendment.[283]

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[274] *See supra* notes 19–21 and accompanying text.

[275] FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)) (reiterating the importance of protecting children from protected expressions through time, place, and manner restrictions—"nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard"); *see also supra* notes 93–98 and accompanying text.

[276] *See supra* note 91 and accompanying text.

[277] *See supra* notes 162–216, 217–46 and accompanying text (discussing the Wyoming Supreme Court should have found the temporary restraining order was content-neutral or applied the juvenile audience content-based exception for time, place, and manner restrictions).

[278] *See supra* notes 162–91 and accompanying text (discussing the temporary restraining order was content-neutral and the Wyoming Supreme Court should have applied the "intermediate-intermediate" standard from *Madsen v. Women's Health Center*, 512 U.S. 753 (1994)).

[279] *See supra* notes 192–216 and accompanying text (discussing the court should have relied on a secondary-effects analysis or other anti-abortion injunction precedent).

[280] *See supra* notes 198–203, 268 and accompanying text.

[281] *See supra* notes 97, 261–63 and accompanying text (discussing a parent's fundamental right in upbringing of his or her children and the government's ability to aid a parent's right).

[282] *See supra* notes 247–73 and accompanying text; *see also* Appellant's Brief, *supra* note 139.

[283] *See supra* notes 162–273 and accompanying text.