CASE COMMENTS

BURSTING THE BUBBLE ZONE IN TEXAS: AN ANALYSIS OF *EX PARTE TUCCI**

In *Ex parte Tucci*,[1] abortion protesters, jailed for contempt of court because they violated an injunctive "bubble zone" around Houston abortion clinics,[2] petitioned the Texas Supreme Court for habeas corpus relief.[3] The bubble zone was a speech-free buffer area placed around clinic property which, although it included public street and sidewalk areas, was declared off-limits to protesters.[4] Bubble zones, in which all protest activity was banned, had been placed around Houston abortion facilities to protect clinic access during the Republican National Convention in 1992.[5] The court released all seven relators, holding that the temporary restraining order was an unconstitutional prior restraint on speech, not under the United States Constitution but under the broader protections of the Texas Constitution.[6]

In considering the free speech rights of abortion protesters under the First Amendment, other courts in other jurisdictions

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* Best Student Article for 1993/94.

1. 859 S.W.2d 1 (Tex. 1993).

2. *Id.* at 3. The term "bubble zone" euphemistically refers to an area which is declared off-limits to abortion protesters, in this case "a judicially prohibited area of 'one-hundred (100) feet' from 'either side of or in front of any doorway entrance or exit, parking lot, parking lot entrance or exit, driveway, or driveway entrance or exit' of a clinic" *Id.*

3. *Id.* at 66 (Hecht, J., dissenting) ("Habeas corpus is a collateral attack on a contempt judgment. It is used to review whether the relator has been unlawfully imprisoned.... Habeas corpus has also been used to challenge the enforceability of the order, the violation of which is the basis for contempt."). The relators, those who requested the writ of habeas corpus, were the Reverend Keith Tucci, Randall Terry, Patrick Mahoney, Wendy Wright, Flip Benham, Joseph Slovenic and Robert Jewett. *Id.* at 1.

4. *Id.* at 6 ("This restriction had the effect of closing to protestors ... the entire city block...."). *See* Hague v. CIO, 307 U.S. 496, 515 (1939) ("[S]treets and parks ... have immemorially been held in trust for the use of the public and ... have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983) ("In these quintessential public forums, the government may not prohibit all communicative activity.").

5. The bubble zone was only one of several provisions of the temporary restraining orders which assured access to the clinics; however, it was the only one the relators challenged. *Tucci*, 859 S.W.2d at 5.

6. *Id.* at 16 (Phillips, C.J., concurring).

have reached different conclusions regarding the constitutionality of bubble zones.[7] The *Tucci* court, in releasing the relators, recognized three legal principles which benefited the pro-life demonstrators: rejection of the collateral bar rule, broad state constitutional protection of freedom of speech, and a narrow standard of review. These three principles are the limited focus of this article.

Part I will present the facts around which this case arose. In the analysis presented in Part II, Section A will examine how, in jurisdictions where it is recognized, the collateral bar rule can prohibit contemnors from collaterally attacking the constitutionality of a court order unless one of several exceptions applies. The dissent in *Tucci* wanted to use the collateral bar rule to prevent the relators from collaterally attacking the constitutionality of the temporary restraining order they had violated.[8] The Texas Supreme Court, however, rejected the collateral bar rule and allowed the relators to collaterally attack the prior restraint order through a petition for a writ of habeas corpus.[9]

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7. *See, e.g.*, Portland Feminist Women's Health Ctr. v. Advocates for Life, 859 F.2d 681, 687 (9th Cir. 1988) (a 12-foot rectangular bubble zone in front of a clinic was upheld as a means of assuring clinic access); Thompson v. Police Dept. of New York, 2 N.Y.S.2d 945, 947 (Sup. Ct. 1989) (an 8-foot by 15-foot bubble zone in front of clinic entrance was upheld to ensure access); Bering v. SHARE, 721 P.2d 918, 919 (Wash. 1986), *cert. dismissed*, 479 U.S. 1050 (1987) (the Washington Supreme Court upheld a geographical ban on speech even though other more specific provisions ensured clinic access); Frisby v. Schultz, 487 U.S. 474, 484-88 (1986) (holding that a municipality may ban all picketing in front of a particular residence); Northeast Women's Ctr. v. McMonagle, 939 F.2d 57, 67 (3d Cir. 1991) (a restriction allowed only six to eight protestors within 500 feet of clinic property); New York NOW v. Terry, 886 F.2d 1339, 1363 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990) (a preliminary injunction upheld in anticipation of an Operation Rescue event); Planned Parenthood v. Project Jericho, 556 N.E.2d 157, 162 (Ohio 1990) (protesters prohibited from making noise loud enough to be heard inside the clinic and from blocking the public sidewalk); Pro-Choice Network of Western New York v. Project Rescue, 799 F. Supp. 1417, 1432 (W.D.N.Y. 1992) (upheld a 15-foot place restriction); Mississippi Women's Medical Clinic v. McMillan, 866 F.2d 788, 795-96 (5th Cir. 1989) (holding that the trial court did not abuse its discretion in refusing to issue an anti-picketing injunction against pro-life demonstrators); Medlin v. Palmer, 874 F.2d 1085, 1091-92 (5th Cir. 1989) (upheld ordinance prohibiting use of hand-held amplifiers within 150 feet of clinics); Hirsh v. City of Atlanta, 401 S.E.2d 530, 535 (Ga. 1991), *cert. denied*, 112 S. Ct. 75 (1991) (holding that an injunction prohibiting more than 20 demonstrators within a 50-foot bubble zone was a reasonable time, place and manner restriction on protected speech). *But see* Parkmed Co. v. Pro-Life Counseling, Inc., 457 N.Y.S.2d 27, 29 (Sup. Ct. 1982) (held an injunction to be overly broad where picketing and demonstrating were precluded in a public plaza area of a building housing an abortion clinic); Thomason v. Jernigan, 770 F. Supp. 1195, 1201 (E.D. Mich. 1991) (prohibitions in cul-de-sac were not content-neutral).

8. *Tucci*, 859 S.W.2d at 65 (Hecht, J., dissenting).

9. *Id.* at 2.

In the context of judicially-ordered prior restraints on speech, Section B will examine a recent trend showing that some state courts are finding broader free speech protections in state constitutions than in their federal counterpart.[10] While a concurring opinion rejected the argument, Justice Doggett, writing for the plurality, saw the First Amendment of the United States Constitution as merely a minimum floor which the free expression provision of the Texas Constitution "may equal or exceed."[11]

Section C will examine the standards of review used by the Texas Supreme Court to strike down the injunctive speech-free bubble zone in *Tucci*. The plurality opinion used a "least restrictive means" test,[12] and specifically rejected a lowered standard recently articulated by the United States Supreme Court in *Ward v. Rock Against Racism*.[13] The *Ward* decision merely required that a regulation of free expression "'promotes a substantial government interest that would be achieved *less effectively*' otherwise."[14] The *Ward* Court, in the opinion of the *Tucci* plurality, tolerated "rather substantial adverse effects on speech if masked as directed to some purported goal other than suppression."[15] Two concurring opinions in *Tucci* found the bubble zone unconstitutional by utilizing a balancing test, one based on Texas constitutional law,[16] and the other based on a traditional First Amendment analysis.[17]

Part III of this article will preview *Madsen v. Women's Health Center*,[18] the first bubble zone case to be granted certiorari by the United States Supreme Court. This Florida case was argued in the Spring of 1994 and may resolve conflicting results reached in state and federal courts regarding the constitutionality of a bubble zone placed around an abortion clinic in Melbourne, Florida.

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10. *Id.* at 16 n.1 (Phillips, C.J., concurring).

11. *Id.* at 13.

12. *Id.* at 7. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (justifying "incidental limitations on First Amendment freedoms" if the governmental regulation "furthers an important or substantial governmental interest; ... is unrelated to the suppression of free expression; ... and is no greater than is essential to that interest").

13. 491 U.S. 781, 798-99 (1989) (abandoning the "least restrictive means" standard).

14. *Tucci*, 859 S.W.2d at 7-8 (quoting *Ward*, 491 U.S. at 799).

15. *Id.* at 8.

16. *Id.* at 64 (Gonzalez, J., concurring).

17. *Id.* at 36 (Phillips, C.J., concurring).

18. 6 F.3d 705 (11th Cir. 1993), *cert. granted*, 114 S. Ct. 907 (1994).

I. FACTS

Operators of abortion clinics in Houston, Texas were concerned during the Summer of 1992. The Republican National Convention was coming to town and so were pro-life demonstrators.[19] The pro-life activists were also concerned. They were fearful the G.O.P. might weaken its opposition to abortion.[20] The protesters were seeking to exercise their free speech rights both to condemn the practice of abortion and to "implore" President George Bush to appoint more judges sympathetic to the pro-life cause.[21] The clinic operators, wanting to protect their economic interests and to protect the rights of clients seeking abortions in Houston, petitioned the court to enjoin protest activities at the clinics.[22]

This conflict of rights set the stage for *Ex parte Tucci*. On August 5, 1992, several abortion clinics in Houston petitioned the 190th District Court of Harris County, Texas for injunctive relief "to restrict relators' public protests of abortion clinics in Houston planned to occur at the time of the Republican National Convention."[23] These petitioners offered "[u]ncontroverted evidence ... that the threat of injury posed by Operation G.O.P. to the women plaintiffs' right of access to the clinics and to the ability of clinics and businesses to operate was both imminent and irreparable."[24] In requesting temporary restraining orders against pro-life demonstrators, the petitioners claimed to have "no interest in limiting debate or lawful protest, including lawful protest against abortion."[25] Petitioners desired injunctive relief only against "blockades and other *illegal* activities directed at clinics, their patients,

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19. *Tucci*, 859 S.W.2d at 3.

20. *Id.*

21. *Id.*

22. *Id.* at 64 (Gonzalez, J., concurring).

23. *Id.* at 65 (Hecht, J., dissenting). Planned Parenthood of Houston, Houston Women's Clinic, Inc., Jerry Edwards, M.D., and others filed three separate lawsuits against Operation Rescue—National and other pro-life groups, requesting temporary restraining orders. *Id.* at 65 n.1. Adkins Architectural Antiques and Brian G. Martinez, D.D.S., two adjacent businesses, also joined the request. *Id.* at 4 n.5.

24. *Id.* at 4.

25. Plaintiff's Original Petition and Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction at 16, Houston Women's Clinic, Inc. v. Operation Rescue—Nat'l (190th District Court of Harris County, Texas, 1992) (No. 92-034123).

and their staffs."[26] The original petition cited threats of "massive illegal blockading of facilities; obstruction of sidewalks, streets and entry-ways; harassment, intimidation and physical coercion of clinic patients and staff; and mass resistance to arrest or direction by state and local law enforcement authorities."[27] In addition, the clinic plaintiffs claimed to have been targets of previous "demonstrations, vandalism, and efforts to obstruct access to the clinics."[28] Incidents mentioned were cutting of electrical wiring, knocking holes in a brick wall, jackhammering a hole in the roof, invading buildings, shooting out windows, pouring glue into building locks and drilling stink bait into roofs.[29] Clinic operators also claimed that the protesters' activities could cause serious risks to the health and welfare of patients, "including possible death."[30]

The petitioners requested temporary restraining orders which included a 100-foot speech-free buffer or bubble zone encompassing not only clinic entrances and exits, parking lots and driveways, "but public streets and sidewalks as well."[31] Other guarantees to assure clinic access were provisions prohibiting "trespassing on clinic property, blockading or impeding access to a clinic, invading clinic property, harassing or intimidating clinic staff or patients, and demonstrating in a twenty-five foot arc of any person seeking access to the clinic."[32]

An attorney for Rescue America[33] was present on August 5 for a day-long hearing regarding the temporary restraining or-

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26. *Id.* (emphasis added) ("Such activities have no First Amendment protection and, indeed, would violate numerous local ordinances and state statutes . . . .").

27. *Id.* at 18.

28. *Id.* at 13.

29. *Id.* at 14.

30. *Id.* at 22-23. In requesting the prior restraint order, petitioners explained:

> The most common abortion procedure performed by the Clinic Plaintiffs is a two-day procedure involving the use of a laminaria, a type of seaweed cord. On the first day of the procedure, the doctor inserts a laminaria into the patient's cervix. . . . It is absolutely essential to the health and safety of the patient . . . that the abortion procedure be completed on the next day after the laminaria is inserted. If clinic operations are interrupted because of defendants' activities, the patient . . . could suffer severe injury or death.").

Id.

Ironically, in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), Planned Parenthood argued (unsuccessfully) that a mandatory 24-hour waiting period between the provision of abortion-related information deemed necessary to informed consent and the performance of an abortion was "burdensome" because "a woman seeking an abortion [must then] make at least two visits to the doctor." *Id.* at 2825. *See also* Planned Parenthood v. Casey, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990) (Trial testimony showed that "[t]wo trips to the abortion provider may cause the women to incur additional expenses. . . .").

31. Ex parte Tucci, 859 S.W.2d 1, 6 (Tex. 1993).

32. *Id.* at 64 (Hecht, J., dissenting).

33. Groups named in the Petition, in addition to Operation Rescue—National, were

ders, but the relators in the *Tucci* case were not represented in that proceeding either by counsel or pro se.[34] On August 6, the district court issued the temporary restraining orders and "set the hearing on the applications for temporary injunction for August 12."[35]

The scheduled hearings never occurred because on August 10 protesters began to violate the restraining order by staging demonstrations within the 100-foot bubble zone.[36] When the Reverend Keith Tucci and others entered the bubble zone they were arrested, held in contempt, fined $500 each, and "committed to the Harris County jail for six months or for a lesser time if purged of contempt by paying the fine and announcing in open court a willingness to abide by the restraining orders."[37]

The relators argued that the 100-foot ban on demonstrating violated their rights under the United States Constitution because "the restrictions impermissibly infringed upon their freedom of speech," constituted an invalid prior restraint, and used the term "demonstrating" which was unconstitutionally vague as "applied in this case."[38] All seven of those arrested "sought habeas relief, asserting that the contempt judgment by which they were incarcerated was based upon a void, unconstitutional temporary restraining order."[39] After the court of appeals denied them relief, the Texas Supreme Court ordered the realtors released on bond.[40]

Operation Rescue, Rescue America, The American Anti-Persecution League, Christian Action Group, Christian Activists Serving Evangelism, The Christian Defense Coalition, Dallas Rescue, The Eagle's Nest, The Lambs of Christ, Let Me Live Ministries, Missionaries to the Pre-Born, Mother and Unborn Baby, Officers for Life, Operation Goliath, Pro-Life Action League, Pro-Life Action Network, Pro-Life Direct Action League, Rescue Outreach, Southeastern Pennsylvania Pro-Life Alliance, Texas Teen Rescue and Victims of Choice. Plaintiffs' Original Petition at 2-3.

34. See *Tucci*, 859 S.W.2d at 65 (Hecht, J., dissenting).

35. *Id.* at 66 (Hecht, J., dissenting).

36. *Id.* at 66 n.3 (Hecht, J., dissenting). "Relators thus do not attack any of the other provisions of the restraining orders but challenge only the one-hundred foot limitation as unconstitutional." *Id.* at 5. The relators did not challenge provisions which commentators have suggested are not protected under the First Amendment. *See generally* Adam D. Gale, *The Use of Civil Rico Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341, 1370-71 (1990) ("Forcible, unauthorized entry onto a clinic's property constitutes violence and will not receive first amendment protection. Likewise, blocking access to public or private property 'has never been upheld as a proper method of communication in an orderly society.'"); Antonio J. Califa, *RICO Threatens Civil Liberties*, 43 VAND. L. REV. 805, 824 (1990) ("Trespass is not constitutionally protected. . . .").

37. *Tucci*, 859 S.W.2d at 3.

38. *Id.* at 33-34 (Phillips, C.J., concurring).

39. *Id.* at 3.

40. *Id.*

Counsel for the petitioners and respondents disagreed on the nature of the protest demonstration which led to the relators' arrests. Counsel for the relators claimed that they had staged a peaceful protest consisting of prayer and preaching.[41] Counsel for the clinic operators presented a different version of the circumstances.[42] The dissent said, "Each of the relators was found to have knowingly violated at least one of the orders by demonstrating within a restricted area. There is no doubt that relators were aware of the orders. Tucci, Benham, Mahoney, Jewitt, and Wright were videotaped tearing up copies of the orders and announcing their intention to violate them."[43]

The plurality opinion noted that effective injunctive relief is always available to protect against incidents of violence, vandalism, trespass and blockading of entrances. The court found here, however, that "the limited record before the trial judge at the hearings on temporary restraining orders did not support a 100-foot ban on speech."[44]

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41. Relator's Petition for a Writ of Habeas Corpus at 5, *Tucci*, 859 S.W.2d 1 (Tex. 1993) (No. 2809) ("[T]he Reverend Keith Tucci preached on a public sidewalk within 100 feet of an abortion facility in a non-disruptive manner.").

42. Joint Brief in Opposition to Relator's Petition for Writ of Habeas Corpus at 3, *Tucci*, 859 S.W.2d 1 (Tex. 1993) (No. D-2809) (The Reverend Keith Tucci "was found in contempt because he led a crowd onto the private property of the West Loop Clinic, stood on a ladder, and used a bullhorn to yell at the clinic's patients and invitees. When presented with a copy of the District Court's Order, Tucci announced to the crowd that the person who served him was a 'confessed lesbian,' then tore up the Court's Restraining Order and put it on her head. Still using his bullhorn, Tucci screamed that he was 'not afraid of your judges who have been bought and paid for.'").

43. *Tucci*, 859 S.W.2d at 66 (Hecht, J., dissenting).

44. *Id.* at 7. *Compare* Ex parte Tucci *with* N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886 (1982). The *Claiborne* Court was careful not to penalize protected activity along with prohibited activity. The Court said, "The First Amendment does not protect violence.... When such conduct occurs along with constitutionally protected activity, however 'precision of regulation' is demanded." *Id.* at 916 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963)). The *Claiborne* Court also said, "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Claiborne*, 458 U.S. at 920 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)). The *Claiborne Hardware* case arose as the result of a local Mississippi civil rights boycott of white merchants. "Although the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred." *Claiborne*, 458 U.S. at 916. The question before the Court was whether the state courts were justified in imposing liability on demonstrators who had not participated in the violence. The Court held that such an imposition would be inconsistent with the First Amendment. *Id.* at 921. The Court emphasized that mere association with individuals who had perpetrated violence was insufficient to impose liability "absent a specific intent to further an unlawful aim." *Id.* at 925. N.A.A.C.P. Field Secretary Charles Evers was not held liable to the white merchants based on his speeches

II. ANALYSIS

A. *The Collateral Bar Rule*

The plurality opinion in *Ex parte Tucci* held that Texas jurisprudence "represents the converse of the federal collateral bar rule."[45] The collateral bar rule "ordinarily requires that judicial orders be obeyed until set aside."[46] Under this theory, the relators in *Tucci* would not have been entitled to violate the injunctive orders "without first exhausting all available efforts to have them set aside."[47] The basic premise of the collateral bar rule is that collateral attack upon a judgment, in this case, by using a writ of habeas corpus to collaterally attack the constitutionality of a temporary restraining order, "should not be permitted in every instance."[48] The plurality opinion, however, emphasized that Texas courts attach such importance to freedom of expression that they follow a "longstanding rule that one imprisoned for disregarding a court order restraining speech may challenge the underlying restraint as void through a habeas proceeding. . . ."[49]

The dissent in *Tucci* wanted to apply the collateral bar rule as used by the United States Supreme Court in *Walker v. City*

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in support of the boycott. Evers had "stated that boycott violators would be 'disciplined' by their own people . . ." and, in another speech, warned, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902. The Court noted that "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." *Id.* at 927. The Court concluded, "The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech. . . ." *Id.* at 928. The Court explained: "An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

45. *Tucci*, 859 S.W.2d at 2.

46. *Id.* at 65 (Hecht, J., dissenting).

47. *Id.* ("Relators chose a course of action which they expected would land them in jail. I would not disappoint them.").

48. *Id.* at 67 (Hecht, J., dissenting).

49. *Id.* at 2. The dissent commented, "Habeas corpus has been held to be the only remedy available to review an individual's incarceration for contempt." *Id.* at 66 n.7 (Hecht, J. dissenting). *See also* Wagner v. Warnasch, 295 S.W.2d 890, 893 (Tex. 1956) (holding that a challenge to incarceration for contempt must be by habeas corpus).

of Birmingham.[50] In *Walker*, the Court barred "release of Dr. Martin Luther King, Jr. and others from the Birmingham jail for disregarding unconstitutional restrictions upon their civil rights marches."[51] Justice Hecht, in his dissenting opinion in *Tucci*, argued that allowing a person to "intentionally violate a court order without consequence, even if there are grounds for reversing that order, strikes at fundamental notions of order in a free society."[52] While the *Tucci* dissent recognized that "[t]he collateral bar rule cannot be applied without exception,"[53] Justice Hecht did not believe that the circumstances of the *Tucci* case fell "within any warranted exception to the collateral bar rule."[54]

The dissent analyzed five possible exceptions to the collateral bar rule which surfaced in *Walker*: civil contempt, lack of opportunity to appeal, a "transparently invalid" order, a too-sudden turn in procedure, and lack of jurisdiction.[55]

The United States Supreme Court has only ruled directly on the first of these exceptions to the collateral bar rule. In *Willy v. Coastal Corp.*,[56] the United States Supreme Court upheld the distinction between civil and criminal contempt: "Given that civil contempt is designed to coerce compliance with the court's decree, it is logical that the order itself should fall with a showing that the court was without authority to enter the decree."[57] The collateral bar rule is deemed applicable "only in criminal or punitive contempt actions."[58] In civil contempt actions, "instead of imposing a fixed sentence for past contempt, [the court] seeks to procure compliance by, for example, imposing indefinite confinement until the contemnor purges the contempt."[59]

University of Michigan Law Professor Vincent Blasi has written: "The only type of contempt proceeding for which the

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50. 388 U.S. 307, 320-21 (1967) (The collateral bar rule is based on the "belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics, or religion.... One may sympathize with the petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.").

51. *Tucci*, 859 S.W.2d at 2.

52. *Id.* at 69 (Hecht, J., dissenting).

53. *Id.* at 68 (Hecht, J., dissenting).

54. *Id.* at 69 (Hecht, J., dissenting).

55. *Id.* at 68-69 (Hecht, J., dissenting).

56. 112 S. Ct. 1076 (1992).

57. *Id.* at 1081 (Rule 11 contempt sanctions were imposed in a wrongful discharge action.).

58. *Tucci*, 859 S.W.2d at 68 (Hecht, J., dissenting).

59. *Id.* at 68-69 n.9 (Hecht, J., dissenting).

collateral bar rule is applicable is criminal contempt,. . . ."[60] Accordingly, determination of the type of contempt involved is the "first duty of an appellate court in reviewing a contempt judgment."[61] If the purpose for the contempt citation is coercive, to enforce compliance with a court order, or remedial, to compensate an injured party, the contempt is civil. On the other hand, if the purpose of the contempt citation is punitive and is designed to vindicate the authority of the court rather than to promote compliance with the court order, then the contempt is criminal.[62]

The distinction between civil and criminal contempt is not always clear cut, however, and its categorization depends on the discretion of the court.[63] Richard Labunski, Assistant Professor of Communications at the University of Washington, analyzed the impact of the collateral bar rule on freedom of the press issues. He pointed out:

> Judges know that, at least theoretically, anyone held in civil contempt could also be adjudged guilty of criminal contempt. The boundaries between civil and criminal contempt are sufficiently vague that judges may determine that even after compliance is forced under civil contempt, the authority of the court must be vindicated in a criminal contempt proceeding. Thus anyone held in civil contempt could also be adjudged guilty of criminal contempt. This ensures that in those jurisdictions where criminal contempt is a separate cause of action, the collateral bar rule will be enforced even against civil contemnors.[64]

Despite this fact, federal appeals courts in many circuits have upheld the distinction.[65] The relators in *Tucci* were released

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60. Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11, 44-45 (1981). The *Tucci* plurality noted that even though the relators were being held in civil contempt, the dissent would still "refuse to review the constitutionality of the underlying order." *Tucci*, 859 S.W.2d at 3 n.4.

61. Smith v. Sullivan, 611 F.2d 1050, 1052 (5th Cir. 1980). The *Smith* court also held that the nature of the contempt proceeding is important in determining what type of notice is required and what standard of proof will apply. Clear and convincing proof is required for civil contempt, while criminal contempt requires merely proof beyond a reasonable doubt. With regard to intent, criminal contempt requires a willful, contumacious, or reckless state of mind, while intent is unimportant in civil contempt charges. *Id.*

62. *Id.* at 1053.

63. Luis Kutner, *Contempt Power: The Black Robe—A Proposal for Due Process*, 39 TENN. L. REV. 1, 8 (1971).

64. Richard E. Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutionality of Enforcing Unconstitutional Orders*, 37 AM. U. L. REV. 323, 347-48 (1988).

65. *See, e.g.*, United States v. Russotti, 746 F.2d 945, 949-50 (2d Cir. 1984) ("the

because Texas does not recognize the collateral bar rule.[66] However, the result in *Tucci* might have been achieved even in jurisdictions that recognize the collateral bar rule because the relators were only charged with civil contempt.

A second possible exception to the collateral bar rule is allowed in a "case where there was no opportunity for effective review of the order before it was violated."[67] "[U]nder the collateral bar rule enjoined speakers must go to court to vacate injunctions before they may proceed to speak."[68] According to the dissent, the relators in *Tucci* purposely ignored this principle and were justifiably barred from collaterally attacking the constitutionality of the injunctive bubble zone.[69] The plurality emphasized that the relators could not be faulted "for failing to pursue a remedy not available under Texas law, which prohibits an appeal of a temporary restraining order."[70]

The United States Supreme Court said in *Walker* that the petitioners, who had been charged with criminal contempt, should have directly attacked the constitutionality of the injunction in the Alabama courts by seeking "to have the injunction modified or dissolved" rather than disobeying the order and attacking its constitutionality in a later proceeding.[71] The Court said:

> This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims.... There was an interim of two days between the issuance of the

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order disobeyed should not have been issued [which] necessarily vitiates the adjudication of civil contempt and the accompanying sanctions"); Collins v. Barry, 841 F.2d 1297, 1299 (6th Cir. 1988) ("a finding of civil contempt is invalidated if the underlying order is invalidated"); Ager v. Jane C. Stormont Hosp., 622 F.2d 496, 499 (10th Cir. 1980) ("If the contempt is criminal it stands; if it is civil it falls."); Matter of Campbell, 761 F.2d 1181, 1185 (6th Cir. 1985) ("a party being held in civil contempt of a court order is allowed to challenge the underlying validity of that order"); NLRB v. Local 282, Int'l Bhd. of Teamsters, 428 F.2d 994, 999 (2d Cir. 1979) ("[A] party facing charges of civil contempt has the right to challenge the validity of a temporary injunction which he violated ....").

66. Ex parte Tucci, 859 S.W.2d 1, 2 (Tex. 1993).

67. *Id.* at 69 (Hecht, J., dissenting).

68. Blasi, *supra* note 60, at 83.

69. *Tucci*, 859 S.W.2d at 65 (Hecht, J., dissenting).

70. *Id.* at 3 n.4. The plurality said that if an exception to the collateral bar rule is allowed when "an appeal of an order restricting expression cannot be timely prosecuted," the court is then necessarily placed

> in the position of evaluating the importance of the timing of the speech. Judges, then, would be elevated to censors required to examine the content of the speech to determine whether or not the message could wait a week, two weeks, a month or years until an appeal is prosecuted.

Id.

71. Walker v. City of Birmingham, 388 U.S. 307, 317 (1967).

> injunction and the Good Friday march. The petitioners give absolutely no explanation of why they did not make some application to the state court during that period.[72]

The United States Supreme Court declined to review the issue of immediate direct review of injunctive orders when it denied certiorari to *United States v. Dickinson*,[73] a case in which the court of appeals upheld a criminal contempt conviction while unanimously concluding that the trial judge's order had been unconstitutional.[74] In *Dickinson*, the defendants had made a deliberate decision to bypass an available judicial review of the injunction. They announced instead "that they were going to violate the order and then, after violating the order, contemptuously announced to the public, at the end of their published articles, that they had published this story despite a [court order] not to do so."[75]

A third exception to the collateral bar rule may apply if an injunctive order is "transparently invalid."[76] The dissent in *Tucci* noted that "[a]lthough the district court's orders limiting relators' freedom to protest are more restrictive than the First Amendment allows, they are not transparently invalid."[77] The *Walker* Court had said that *Walker* was "not a case where the injunction was transparently invalid or had only a frivolous pretense to validity."[78] Professor Labunski noted that this dictum by the *Walker* Court is especially important because "several state and federal courts have interpreted this language to mean that if an injunction *is* transparently invalid or has only a frivolous pretense to validity, it may be disobeyed and challenged on appeal as a defense for a contempt conviction."[79] The United States Supreme Court permits persons "to violate other kinds of judicial orders

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72. *Id.* at 318-19.

73. 349 F. Supp. 227 (M.D. La. 1972), 465 F.2d 496 (5th Cir. 1972), 476 F.2d 373 (5th Cir. 1973) (per curiam), *cert. denied*, 414 U.S. 979 (1973) (a freedom of the press case in which an injunction prevented newspaper reporters from discussing testimony given at a hearing).

74. *Dickinson*, 465 F.2d at 509-10 (holding that there is a "well established principle in proceedings for criminal contempt that a [properly issued] injunction ... must be obeyed ... [a]bsent a showing of 'transparent invalidity' ... until reversed by orderly review or disrobed of authority by delay or frustration in the appellate process, regardless of the ultimate determination of constitutionality ....").

75. *Dickinson*, 349 F. Supp. at 227.

76. Ex parte Tucci, 859 S.W.2d 1, 69 (Tex. 1993) (Hecht, J., dissenting).

77. *Id.* at 65 (Hecht, J., dissenting).

78. Walker v. City of Birmingham, 388 U.S. 307, 315 (1967).

79. Labunski, *supra* note 64, at 335.

and still raise certain constitutional defenses in contempt proceedings."[80]

In the twenty-five years following the *Walker* decision, state courts and lower federal courts have issued varying opinions based on the "transparently invalid" exception in *Walker*.[81] The United States Supreme Court might have clarified this exception when it agreed to hear *In re Providence Journal*,[82] but the case was dismissed on other grounds.[83]

A fourth exception to the collateral bar rule may apply if there is "too sudden a turn on the procedural highway [which might] run afoul of additional constitutional guarantees, if, *e.g.*, a rule in contravention of earlier practice is suddenly adopted without notice."[84] The *Walker* Court had said that *Walker* was "not a case where a procedural requirement has been sprung upon an unwary litigant when prior practice did not give him fair notice of its existence."[85] The United States Supreme Court has not heard any additional cases on this issue, nor on the issue of jurisdictional authority which is the fifth and final possible exception to the collateral bar rule.

The *Tucci* dissent noted that "[t]here may be cases in which the order sought to be enforced is so patently outside the court's authority to act, under any set of facts, that a collateral attack

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80. Blasi, *supra* note 60, at 21. *See, e.g.*, Maness v. Meyers, 419 U.S. 449 (1975) (after violating a court order to produce evidence, the court allowed the privilege against self-incrimination to be invoked as a defense in the contempt hearing); Branzberg v. Hayes, 408 U.S. 665 (1972) (defendant was allowed to raise a First Amendment defense in contempt proceedings for violating a court order to testify after failing to quash a subpoena); United States v. Ryan, 402 U.S. 530 (1971) (holding that the proper forum for contesting the validity of a subpoena is the contempt proceeding).

81. Labunski, *supra* note 64, at 348.

82. 820 F.2d 1342 (1st Cir. 1986), 820 F.2d 1354 (1st Cir. 1987) (en banc), *cert. granted*, 484 U.S. 1001 (1987), *cert. dismissed*, 485 U.S. 693 (1988) (a case involving freedom of the press). "The First Circuit concluded that because the district court's order was transparently invalid, the newspaper should have been allowed to challenge its constitutionality at the contempt proceedings." Labunski, *supra* note 64, at 367. In a rehearing of the case, a per curiam opinion modified the original decision, holding that a publisher should make a good faith effort to seek emergency relief before violating the order and challenging its constitutionality in the contempt proceedings. In re Providence Journal, 820 F.2d at 1355.

83. United States v. Providence Journal, 485 U.S. at 693 (The case was dismissed because the special prosecutor appointed by the district court "could not represent the United States before the Supreme Court without authorization from the Solicitor General.").

84. Ex parte Tucci, 859 S.W.2d 1, 69 (Tex. 1993) (Hecht, J., dissenting).

85. Walker v. City of Birmingham, 388 U.S. 307, 319 (1967).

is permitted."[86] The *Walker* Court hinted that the jurisdictional authority of the court issuing the order is a crucial factor when it commented that "[w]ithout question the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners and over the subject matter of the controversy."[87]

After listing the possible exceptions to the collateral bar rule, the *Tucci* dissent concluded:

> The reasons for the collateral bar rule, however, are as compelling as the reasons for the exceptions.... A blanket exception to the rule whenever free speech rights are claimed to be infringed makes it very difficult for trial courts to enforce order in volatile situations, such as the one which is the setting for the present proceedings.[88]

The *Tucci* dissent seemed to want to reinforce the same mystique of judicial orders which Professor Blasi recognized when he explained that "[t]he collateral bar rule probably owes its existence to a desire to reinforce the mystique of injunctions...."[89] The *Walker* Court reinforced that mystique when it reached back fifty years to apply a rule of law found in *Howat v. Kansas:*

> An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.[90]

The United States Supreme Court had earlier set out this rationale in *Gompers v. Buck's Stove & Range Co.:*

> If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the

86. *Tucci*, 859 S.W.2d at 69 (Hecht, J., dissenting).
87. *Walker*, 388 U.S. at 315.
88. *Tucci*, 859 S.W.2d at 69 (Hecht, J., dissenting).
89. Blasi, *supra* note 60, at 84.
90. 258 U.S. 181, 189-90 (1922).

> Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.[91]

Bubble zones may be statutory as well as injunctive.[92] In considering the application of the collateral bar rule, it is necessary to distinguish between collaterally attacking an injunctive order and collaterally attacking a statute or ordinance. The *Tucci* court did not find it necessary to make this distinction; however, the distinction can be important. This was clearly shown in the differing outcomes of *Walker v. City of Birmingham*[93] and *Shuttlesworth v. City of Birmingham*,[94] two cases which arose out of the same general circumstances. The holding in *Walker* affirmed "the traditional rule that the legality of an injunction may not be challenged by disobeying its terms.... [T]he invalidity or even unconstitutionality of a court order would be no defense in a contempt proceeding based on violation of that order."[95] Disobeying an unconstitutional statute or ordinance is different. "In fact, in certain situations, intentional disobedience to the statute may be the only means of obtaining a judicial determination of its constitutionality."[96]

The events which led to both the *Walker* and *Shuttlesworth* cases occurred on the same day—Good Friday of 1963.[97] The petitioners in *Walker* were enjoined from holding a peaceful protest demonstration after failing to receive a permit for a protest march in Birmingham, Alabama.[98] In *Shuttlesworth*, the petitioners directly disobeyed the Birmingham city ordinance on which the *Walker* injunction was based.[99] Both groups conducted marches. While the demonstrators in *Walker* paid the penalty for their criminal contempt, the demonstrators in *Shuttlesworth* were not punished because the ordinance was found to be an unconstitutional prior restraint.[100] The Court held that "a person

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91. 221 U.S. 418, 450 (1911).

92. *See* COLO. REV. STAT. § 18-9-122 (1993) (The State of Colorado has enacted a statutory bubble zone which establishes a 100-foot buffer around the entrance or exit from any health care facility and an 8-foot buffer around any person entering or exiting the facility unless that person consents to being approached.).

93. 388 U.S. 307 (1967).

94. 394 U.S. 147 (1969).

95. John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 431 (1983).

96. United States v. Dickinson, 465 F.2d 496, 510 (5th Cir. 1972).

97. *Walker*, 388 U.S. at 310; *Shuttlesworth*, 394 U.S. at 148.

98. *Walker*, 388 U.S. at 325.

99. *Shuttlesworth*, 394 U.S. at 148.

100. *Id.* at 151.

faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license."[101]

In addition to outright disobedience, the United States Supreme Court allows an unconstitutional statute or ordinance to be challenged by seeking a declaratory judgment or an injunction against its enforcement.[102] A declaratory judgment was the method used in *Ward v. Rock Against Racism*.[103]

Demonstrators who disobey a statute or ordinance rather than an injunction are judged under the principles applied by the United States Supreme Court in *Shuttlesworth*, rather than those applied in *Walker*. This distinction could be important for pro-life protesters if Congress passes the Freedom of Access to Clinic Entrances Act (F.A.C.E.) of 1993.[104] If F.A.C.E. were en-

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101. *Id.*

102. *See e.g.*, Burson v. Freeman, 112 S. Ct. 1846 (1992) (declaratory judgment and injunctive relief sought against a statute imposing a 100-foot bubble zone around polling places on election day); Forsyth County v. The Nationalist Movement, 112 S. Ct. 2395 (1992) (suit challenging constitutionality of county's assembly and parade ordinance).

103. 491 U.S. 781 (1989) (a suit for declaratory judgment challenged the constitutionality of use guidelines for musical groups performing in city parks).

104. S. 636. H.R. 796, 103rd Congress, 1st Sess. (1993). As introduced by Senator Edward Kennedy and twenty co-sponsors on March 23, 1993,

> [t]he bill sets out the definition of the offense in terms of force, threat of force, physical obstruction, intentional injury, *intimidation, and interference*, provides for criminal penalties, and establishes a civil cause of action for injunction and either actual or $5000 damages, at the plaintiff's election. It also allows a court to assess a civil penalty in an amount not exceeding $15,000 for the first violation, and $25,000 for any subsequent violation.

Frederick Schauer, 1993 SUPPLEMENT (Westbury, NY: The Foundation Press, Inc., 1993) (emphasis added).

Senator Orin Hatch amended the bill to apply the same protections for "any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of worship" and for "the property of a place of worship." 139 CONG. REC., S15,659 (1993). Speaking in favor of the amendment, Senator Hatch said:

> Make no mistake about it: The right of Americans of various religions to attend their places of worship in peace is under attack throughout the country. Various groups, acting on behalf of various causes, have undertaken an interstate campaign of harassment, physical assaults, and vandalism. Consider, for example, some recent episodes: Just over a week ago, protesters disrupted Scripture reading at the Village Seven Presbyterian Church in Colorado Springs, CO, and pelted the congregation with condoms.... St. Jude's United Holiness Church in St. Petersburg, FL, was burned to the ground by an arsonist. Another arsonist set fire to at least 17 other churches throughout Florida and to churches in Tennessee and Colorado.... Catholic services have been disrupted and Catholic churches have been vandalized.... In New York, activists exposed churchgoers at St. Patrick's Cathedral to a pornographically altered portrait of Jesus, invaded the cathedral, screamed, waved their fists, and tossed condoms in the air.... In mid-September, in

acted, pro-life demonstrators could challenge its constitutionality by disobeying the Act. Or they could ask the court for a declaratory judgment or an injunction against enforcement of the Act. If a statute or ordinance is found to be unconstitutional, a contempt conviction will not stand.[105]

In summary, in jurisdictions which apply the collateral bar rule, contemnors might successfully defend against a contempt citation by using one of the possible exceptions found in *Walker* and discussed in the *Tucci* case. Courts might allow a defense based on the following questions: First, was the contempt charge civil rather than criminal? Second, was there an attempt to appeal the order prior to disobeying it? Third, was the order transparently invalid? Fourth, was sufficient notice of a change in procedure given? Fifth, did the court issuing the order have jurisdiction? Finally, was the violated prior restraint a statute or ordinance rather than an injunctive order? One of these exceptions might apply to protesters who have disobeyed an injunctive order in a jurisdiction which recognizes the collateral bar rule.

B. Broader Protection of Free Speech Rights Achieved Under the Texas Constitution

"The revitalized commitment to state constitutions has been one of the most important jurisprudential developments of our generation."[106] The *Tucci* court held that the Texas Constitution

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> San Francisco, activists blocked access to the Hamilton Square Baptist Church, pushed and shoved churchgoers, threw rocks and eggs at them and destroyed church property. The police failed to respond to calls for more assistance and made no arrests.... Synagogues have been victimized by defacement and vandalism.... Our Nation was founded on the principle of religious liberty. If any right deserves protection from private interference, it is religious liberty.... The choice for my colleagues is simple: Do they value religious liberty at least as much as abortion?

139 CONG. REC. S15,660 (1993).

105. *See* United States v. Dickinson, 465 F.2d 496, 510 (5th Cir. 1972) ("Significantly, it is only the orders of judicial authorities which must be tested in the courts before deliberate transgression can be excused on an eventual determination that the order was invalid.").

106. Ex parte Tucci, 859 S.W.2d 1, 37 (Tex. 1993) (Phillips, C. J., concurring) (preferring to rely solely on "the guarantees of the First Amendment to the United States Constitution [to] provide all the relief sought by Relators").

provides a broader protection of free expression than the First Amendment to the United States Constitution.[107]

Article I, section 8 of the Texas Constitution provides both a positive and a negative protection: "Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech."[108] The First Amendment of the United States Constitution, in contrast, provides only a negative protection: "Congress shall make no law ... abridging the freedom of speech."[109] The *Tucci* plurality opinion highlighted the difference between the two standards: "Rather than a restriction on governmental interference with speech such as that provided by the First Amendment of the United States Constitution, Texans chose from the beginning to assure the liberties for which they were struggling with a specific guarantee of an affirmative right to speak."[110]

In reviewing the validity of the 100-foot buffer in the temporary restraining orders which led to the *Tucci* case, the plurality looked first to the Texas Constitution.[111] The court decided the case on the basis of Texas precedents, even though the relators based less than 15% of their arguments on Texas law and did not discuss the Texas Constitution at all.[112] Justice Gonzalez, in his concurring opinion, agreed with the plurality that "the free speech guarantees of the Texas Constitution are greater than the guarantees provided by the First Amendment."[113] Chief Justice Phillips disagreed. In a forty-two page concurring opinion, he traced the history of the development of free expression in Texas and said, "I disagree that our clause is 'broader' than its federal counterpart in any sense that affects this case."[114] Chief Justice Phillips also compiled a twenty-page

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107. *Id.* at 16 (Phillips, C. J., concurring). *But see* Natalie Wright, *State Abortion Law After Casey: Finding "Adequate and Independent" Grounds for Choice in Ohio*, 54 OHIO ST. L.J. 891, 911 (1993) (suggesting that "a state court may be able to use a textual privacy provision in its state constitution as a tool for finding a broader right to abortion than is protected by the federal constitution").

108. *Id.* at 5 n.8.

109. U.S. CONST. amend. I.

110. *Tucci*, 859 S.W.2d at 10 (quoting Davenport v. Garcia, 834 S.W.2d 4, 12 (Tex. 1992)).

111. *Id.* at 5.

112. *Id.* at 33 (Phillips, C.J., concurring) (noting that the vast majority of the relators' argument was based solely on the First Amendment).

113. *Id.* at 62 (Gonzalez, J., concurring).

114. *Id.* at 16 (Phillips, C.J., concurring).

compendium of free speech clauses in constitutions from every state in the union.[115]

The *Tucci* court recognized that a long-established Texas precedent allowed "litigants imprisoned for the violation of court orders restricting speech to challenge the constitutionality of those orders through habeas proceedings."[116] "Texas courts have repeatedly granted habeas relief to release those confined for disregarding an unconstitutional restriction on varying types of expression."[117] The plurality maintained that "our state constitution requires that we enforce its stringent preference for freedom of expression even for those who advocate interference with other constitutional rights."[118]

The plurality opinion noted that Texas is not alone among states "in recognizing the unduly restrictive nature of a collateral bar rule."[119] Because of the uncertainty of the federal scope of the collateral bar rule regarding injunctions, some lower courts and some state courts "have often limited the applicability of *Walker* [and] have declined to adopt the collateral bar rule as a matter of state equity law."[120]

The *Tucci* plurality said, "Our Constitution calls on this court to maintain a commitment to expression that is strong and uncompromising for friend and foe alike."[121] Washington, California, Colorado and Oregon are other states whose constitutions maintain similar standards.

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115. *Id.* at 37-58 (Phillips, C.J., concurring).

116. *Id.* at 37 (Phillips, C.J., concurring).

117. *Id.* at 2. *See, e.g.*, Ex parte Henry, 215 S.W.2d 588 (Tex. 1948) (dealing with peaceful picketing); Ex parte Tucker, 220 S.W. 75 (Tex. 1920) (abusing or using opprobrious epithets); Ex parte McCormick, 88 S.W.2d 104 (Tex. 1935) (concerning a gag order); Ex parte Foster, 71 S.W. 593 (Tex. 1903) (an attempt to suppress publication of testimony in a murder trial). *See also* Ex parte Pierce, 342 S.W.2d 424 (Tex. 1961), *cert. denied*, 366 U.S. 928 (1961) (determining that the underlying order was constitutional and denying habeas relief).

118. *Tucci*, 859 S.W.2d at 6-7.

119. *Id.* at 2. *See, e.g.*, In re Berry, 436 P.2d 273, 280 (Cal. 1968) (en banc) (holding that public employees could collaterally attack an injunction preventing them from striking); State ex rel. Superior Court v. Sperry, 483 P.2d 608, 611 (Wash. 1971), *cert. denied*, 404 U.S. 939 (1971) (striking down a transparently invalid order as an unconstitutional prior restraint which could not support a contempt citation); Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594, 596 (Ariz. 1966) (holding that an invalid order could not support a contempt citation).

120. Blasi, *supra* note 60, at 21-22. *See, e.g.*, In re Timmons, 607 F.2d 120 (5th Cir. 1979); In re Halkin, 598 F.2d 176 (D.C. Cir. 1979); Goldblum v. National Broadcasting Corp., 584 F.2d 904 (9th Cir. 1978); Glen v. Hongisto, 438 F. Supp. 10 (N.D. Cal. 1977); Cooper v. Rockford Newspapers, Inc., 365 N.E.2d 744 (Ill. 1977).

121. *Tucci*, 859 S.W.2d at 8.

The Washington Supreme Court, for example, decided *State v. Coe* in part on the free speech provision of the Washington Constitution which "absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech."[122] The Washington Constitution has the same positive safeguards in article I, section 5 as its Texas counterpart: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[123]

California is another state that has used its state constitution to grant broader speech protection than the First Amendment. Although federal constitutional law does not recognize shopping malls as a public forum, California has interpreted its own constitution as guaranteeing a right of access to a shopping center in *Pruneyard Shopping Center v. Robins*.[124] The California Constitution provides positive free speech safeguards in article I, section 2(a): "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[125]

Another decision which allowed demonstrations in a shopping mall was *Bock v. Westminster Mall Co.*, also based on a state constitution.[126] The Supreme Court of Colorado said, "Colorado's tradition of ensuring a broader liberty of speech is long. For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment."[127] The Constitution of Colorado has a free expression clause which states "[t]hat no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write, or publish whatever he will on any subject, being responsible for all abuse of that liberty; . . ."[128]

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122. 679 P.2d 353, 360 (1984) (en banc) (A radio and television station was found in contempt for broadcasting accurate and lawfully obtained copies of tape recordings that had been used in open court.).

123. This provision is included in the Appendix Compendium of State Free Speech Clauses in *Tucci*, 859 S.W.2d at 58.

124. 447 U.S. 74, 81 (1980) (The Court said, "Our reasoning [does not] limit the authority of the State to exercise its . . . sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.").

125. This provision is included in the Appendix Compendium of State Free Speech Clauses in *Tucci*, 859 S.W.2d at 40.

126. 819 P.2d 55, 59 (Colo. 1991) ("We discern no obstacles in the United States Supreme Court's First Amendment jurisprudence which would limit our construction of the Colorado Constitution.").

127. *Id.*

128. This provision is included in the Appendix Compendium of State Free Speech Clauses in *Tucci*, 859 S.W.2d at 40.

The Oregon Supreme Court has also upheld state constitutional guarantees:

> [A] state's constitutional guarantees ... were meant to be and remain genuine guarantees against misuse of the state's governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law."[129]

In article I, section 8, the Oregon Constitution says: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever, but every person shall be responsible for the abuse of this right."[130]

In summary, "[t]he issue of whether state constitutional provisions impose greater restrictions against private deprivations of free expression than the First Amendment has also engaged spirited scholarly debate" both inside and outside Texas.[131] Therefore, a party being held in contempt of court in any jurisdiction might have two defensive options based on either federal or state constitutional provisions. A demonstrator who has violated an injunctive order which he believes is an unconstitutional prior restraint of his right of free expression may be able to

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129. State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983).

130. This provision is included in the Appendix Compendium of State Free Speech Clauses in *Tucci*, 859 S.W.2d at 53.

131. *Id.* at 17 n.1. *See, e.g.*, Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633 (1991); Alan E. Brownstein and Stephen M. Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. DAVIS L. REV. 1073 (1991); William Burnett Harvey, *Private Restraint of Expressive Freedom: A Post-Pruneyard Assessment*, 69 B.U. L. REV. 929 (1989); Elizabeth Hardy, *Note, Post-Pruneyard Access to Michigan Shopping Centers: The "Malling" of Constitutional Rights*, 30 WAYNE L. REV. 93 (1983); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1342, 1401-02 (1982); Peter J. Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, 71 JUDICATURE 100, 100 n.10 (1987); Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES IN ST. CONST. L. 17, 17 (1988); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); Steward G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977 (1985); Hans A. Line, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980), and Ronald R.K. Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 2 (1981).

obtain a better result under a state constitutional provision if it grants broader speech protections than its federal counterpart.

C. The Texas Standard of Review

In deciding that the 100-foot speech-free bubble zone around Houston abortion clinics was not an appropriate regulation of free expression, the *Tucci* court divided into three concurring opinions and one dissent. Each of the concurring opinions applied a different standard of review to reach the same conclusion.

1. The Plurality's Standard

The *Tucci* plurality applied a "least restrictive means" test.[132] The plurality opinion followed *Davenport v. Garcia*[133] in holding that "restrictions must be targeted at the effect of expression rather than at the expression itself."[134] The *Tucci* court held that "[a] least restrictive means requirement ensures that, when a variety of methods are available to prevent harm, our constitution commands the use of that approach which is least intrusive as to individual liberties."[135]

The court noted that this requirement did not "differ significantly from the appropriate interpretation of the meaning of 'narrowly tailored' under the better reasoned federal jurisprudence."[136] The plurality opinion specifically criticized the United States Supreme Court decision in *Ward v. Rock Against Racism*[137] for its "unfortunate repudiation of this protective standard...."[138] The *Tucci* plurality opinion sided with the dissent in *Ward* which stated: "Until today, a key safeguard of free speech has been government's obligation to adopt the least in-

132. *Tucci*, 859 S.W.2d at 7.

133. 834 S.W.2d 4, 10 (Tex. 1992) (The court held that the Texas Constitution "provides greater rights of free expression than its federal equivalent.").

134. *Tucci*, 859 S.W.2d at 5.

135. *Id.* at 7.

136. *Id. See* U.S. v. Grace, 461 U.S. 171, 177 (1983) (articulating the three-prong balancing test for time, place, and manner restrictions of free speech in public forums under which an indirect speech regulation is constitutional if it is 1) content neutral, 2) narrowly tailored to serve a significant state interest, and 3) leaves open ample alternative communication channels).

137. 491 U.S. 781 (1989) (upholding the constitutionality of a regulation allowing New York City to require that its own technicians control the volume of sound systems used by musicians performing in city park band shells).

138. *Tucci*, 859 S.W.2d at 7.

trusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference."[139] The *Ward* Court majority opinion held:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so.... So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[140]

The plurality opinion in *Tucci* cited several scholarly articles critical of the *Ward* decision.[141] These articles conclude that *Ward* signaled a retreat by the United Stated Supreme Court from an earlier "least restrictive means test" developed in *United States v. O'Brien*.[142]

In holding the bubble zone unconstitutional, the plurality opinion held that the 100-foot buffer around Houston abortion facilities did not meet the *Davenport* standard because "it was not proved at the trial court hearing that this large zone was the least restrictive means for guarding against [the anticipated] injuries."[143] Additionally, the respective bubble zones were "not tailored to the circumstances of each individual clinic."[144] Instead, the court found that restrictions had been imposed uniformly on all the clinics merely for the sake of "administrative convenience."[145] The court decided that "[w]ithout specific findings supported by evidence that the 100-foot speech-free zone was the

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139. *Ward*, 491 U.S. at 803 (Marshall, J., dissenting).

140. *Id.* at 798-99.

141. *Tucci*, 859 S.W.2d 7 n.11. *See, e.g.*, Paul A. Blechner, *First Amendment: Supreme Court Rejection of the Least Restrictive Alternative Test*, 1990 ANN. SURV. AM. L. 331 (1991); Gregory L. Lippetz, *The Day the Music Died:* Ward v. Rock Against Racism, 25 U.S.F. L. REV. 627 (1991); Carney R. Sherigan, *A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for Time, Place and Manner Restrictions*, 25 LOY. L.A. L. REV. 453 (1992).

142. 391 U.S. 367, 377 (1968) (holding that a regulation is justified "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest").

143. *Tucci*, 859 S.W.2d at 6.

144. *Id.*

145. *Id.*

least restrictive means to ensure unimpeded access to clinics and guard against intimidation and harassment, we hold that this limitation in the restraining orders violates article I, section 8 of the Texas Constitution."[146]

2. Justice Gonzalez' Standard

In his concurring opinion in *Tucci*, Justice Gonzalez noted that the United States Supreme Court has recognized that there is a fundamental difference between direct and indirect governmental regulation of free speech:

> The First Amendment cases of the United States Supreme Court have created two tracks for free speech analysis: 1) a track for direct speech regulation aimed at communicative impact, and 2) a track for indirect speech regulation aimed at noncommunicative impact that possesses adverse effects on communicative opportunity.... Direct speech regulation prevents the dissemination of a certain idea because of the potential effect of the idea.... In contrast, indirect speech regulation does not prevent the dissemination of an idea; it instead regulates either the timing of the speech, the place of the speech, or the manner of the speech. It is obvious that a direct speech regulation that prevents an idea from ever reaching the marketplace of ideas is more offensive than an indirect speech regulation that incidentally effects either the manner, the timing, or the placement of the expressive activity.[147]

The United States Supreme Court "closely scrutinizes direct speech regulations, holding that such regulations are unconstitutional unless the government establishes, for example, that the message being suppressed poses a 'clear and present danger,' or constitutes a defamatory falsehood.... In contrast, the Court engages in a balancing test for indirect speech regulations."[148]

In *U.S. Postal Service v. Council of Greenburgh Civic Associations*, the United States Supreme Court said:

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146. *Id.* at 7.

147. *Id.* at 59 (Gonzalez, J., concurring).

148. *Id.* at 60. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

> This Court has long recognized the validity of reasonable time, place, and manner regulations [in traditional public forums] so long as the regulation is content-neutral, serves a significant governmental interest, and leaves open adequate alternative channels for communication. [But] if a governmental regulation is based on the content of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's view.'[149]

In his concurring opinion in *Tucci*, Justice Gonzalez criticized the plurality for applying the standards used in evaluating direct speech regulations to an instance of indirect speech regulation.[150] He pointed out that *Davenport v. Garcia*,[151] the main case cited by the plurality involving a gag order which prevented an attorney from speaking about a case out of court,[152] was "obviously a direct regulation of speech."[153] The restraining orders which Rev. Tucci and the other relators violated were, according to Justice Gonzalez, merely an indirect regulation of speech because they only "regulated the location and manner of expression, rather than precluding wholly the dissemination of the relators' anti-abortion message."[154]

Therefore, Justice Gonzalez approved the use of a balancing test in this case: "[T]he trial court created this zone in an attempt to balance the free expression rights of the protestors against two [competing] rights: the right of women to be free from undue harassment in securing an abortion and the right of the clinic owners to engage in lawful activities without obstruction and intimidation."[155] The concurring opinion recognized that judicial discretion is involved when using a balancing test: "This requisite balancing of competing rights necessitates some discretion on the part of trial courts and legislatures in attempting to resolve these difficult issues."[156]

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149. 453 U.S. 114, 132 (1981). *See also* Frisby v. Schultz, 487 U.S. 474, 481 (1988).

150. *Tucci*, 859 S.W.2d at 60 (Gonzalez, J., concurring).

151. 834 S.W.2d 4 (Tex. 1992).

152. *Tucci*, 859 S.W.2d at 60 (Gonzalez, J., concurring).

153. *Id.* at 61.

154. *Id.* ("The relators were free to express their views anywhere except within a limited area around various abortion clinics in Houston.").

155. *Id.* ("[T]ime, place, and manner regulations fundamentally arise from the balancing of two competing interests.").

156. *Id. See* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) (inquiring into the propriety and consequences of the constitutional balancing test, noting the reliance on the principle of judicial restraint in weighing regulations of time, place, and manner; and postulating that the prohibition against abridgment of First Amendment rights has become a license to abridge them under a cloak of reasonableness).

The *Tucci* plurality declined to apply the federal classifications of direct and indirect speech or to apply a balancing test.[157] Justice Doggett, writing for the plurality, said: "Judicial inquiry is more appropriately focused on whether the restriction, however labeled, is directed solely to the harmful effects of speech and whether its proper objective is accomplished in the least restrictive manner."[158] The plurality insisted that it was preferable, not only to employ a least restrictive means standard, "but to reaffirm it clearly as an essential element of our jurisprudence. This ensures more consistent judicial consideration that cannot waver depending on a judge's personal approval or disapproval of the message that has been restricted."[159] The importance of limiting personal, judicial discretion cannot be underestimated. Professor Blasi observed: "A central tenet of modern first amendment theory . . . is that under conditions of uncertainty regarding consequences, both regulatory officials and judges tend to overestimate the dangers of controversial speech."[160]

The plurality recognized that "vigorous debate of public issues in our society may produce speech considered obnoxious or offensive by some" but that is a necessary cost of freedom.[161] The plurality opinion ended by defining "genuine freedom of expression,"[162] using the words of Justice Holmes' dissent in *United States v. Schwimmer*:[163] "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[164]

In his concurring opinion, Justice Gonzalez relied, as did the plurality, on the broader free speech protections of the Texas Constitution; however, he applied a modified version of the three-prong time, place, and manner balancing test to find the bubble zone unconstitutional.[165] He stated: "Rather than utilizing the

157. *Tucci*, 859 S.W.2d at 8 n.15. Justice Gonzalez criticized the plurality opinion: "[N]othing in the case law of this state prior to today's plurality opinion even hinted that some version of the time, place, and manner test would not apply to indirect speech regulations under the Texas constitution." *Id.* at 62 n.6.

158. *Id.* at 8 n.15.

159. *Id.* at 8.

160. Blasi, *supra* note 60, at 50.

161. *Tucci*, 859 S.W.2d at 8.

162. *Id.* at 8 n.16.

163. 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

164. *Id* at 654-55.

165. *Tucci*, 859 S.W.2d at 63 (Gonzalez, J., concurring) ("I would subject indirect speech regulations to a less onerous test than direct speech regulations.").

normal standard requiring that the restriction be narrowly tailored to serve an [sic] *significant* government interest, I would require that the restriction be narrowly tailored to serve a *compelling* government interest."[166] Justice Gonzalez concluded that the provisions of the restraining orders not challenged by the relators were sufficient to ensure clinic access. Therefore, there was "no compelling interest in keeping the relators one-hundred feet from all clinic entrances, exits, and parking lots when access to the clinic has been guaranteed by the other, more narrowly drawn prohibitions of the temporary restraining orders."[167]

Justice Gonzalez agreed with the plurality "that the *consideration* of less restrictive alternatives is *relevant* to the determination of whether a certain restriction is narrowly tailored to serve the government's interest;"[168] however, he did not agree that considering other alternatives is "the same as utilizing a *least restrictive alternative test.*"[169] He believed that the plurality's test was too narrow, and that under a "least restrictive means" test only the "most extraordinary" restrictions would survive the scrutiny.[170]

3. Chief Justice Phillips' Standard

Chief Justice Phillips, in a second concurring opinion, applied the standard First Amendment balancing test for indirect speech regulations.[171] He found the bubble zone provisions to be content-neutral but still unconstitutional because of the same two difficulties noted by Justices Doggett and Gonzalez. The first difficulty was that "in attempting to apply, in the name of administrative convenience, a blanket set of restrictions to such a wide variety of clinics, the trial court issuing the injunctive order [had overlooked] the careful, fact-specific balancing of interests" required under the First Amendment."[172]

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166. *Id.* (emphasis added).

167. *Id.* at 64 (Gonzalez, J., concurring) (The orders, he noted, also prohibited "trespassing on clinic property, blockading or impeding access to a clinic, invading clinic property, harassing or intimidating clinic staff or patients, and demonstrating in a twenty-five foot arc of any person seeking access to the clinic.").

168. *Id.* at 62 n.3 (Gonzalez, J., concurring).

169. *Id.*

170. *Id.*

171. *Id.* at 27 (Phillips, C.J., concurring).

172. *Id.* at 35-36 (Phillips, C.J., concurring).

Secondly, "[u]nder the First Amendment, it is the responsibility of parties seeking state-imposed place restrictions on expressive activity to adduce evidence from which the trial court—and appellate courts, if necessary—can ascertain whether parties wishing to express themselves may adequately make themselves heard."[173] Chief Justice Phillips also found that "there are a number of other provisions in the orders, not challenged by Relators, designed to effectuate the interests that Plaintiffs assert."[174]

> So long as clinic patients and staff are ensured access, the mere possibility that these unwilling listeners might find the protesters' message and presence distasteful, upsetting, or disturbing is not alone sufficient to justify a restriction on expression under the First Amendment. Ordinarily, "to avoid further bombardment of [their] sensibilities," unwilling listeners like the plaintiffs here are "simply [to] avert their eyes."[175]

In summary, the *Tucci* court found the injunctive bubble zone to be unconstitutional under both state and federal standards of review. The plurality declined to use a balancing test and employed a least restrictive means standard based on Texas precedents.[176] The two concurring opinions applied a balancing test. Justice Gonzalez, who specifically rejected the least restrictive means test, applied a balancing test based on a heightened Texas constitutional standard requiring a compelling government interest. Chief Justice Phillips applied a traditional First Amendment balancing test. Under all of these standards, the court found the bubble zone was unconstitutional because other provisions of the temporary restraining orders accomplished the purpose of ensuring clinic access while protecting the free speech rights of the protesters and because the trial court had applied a blanket

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173. *Id.* at 36 (Phillips, C.J., concurring). The plurality had said that "consideration of the less restrictive alternatives 'is relevant to deciding whether government has in fact left too little opportunity for communicative activity, whether for speakers or for listeners.'" *Id.* at 8.

174. *Id.* at 36 (Phillips, C.J., concurring).

175. *Id.* at 35 (Phillips, C.J., concurring) (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 (1975)).

176. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (presenting a general history and criticism of the balancing test, the battle of competing interests which has come to dominate constitutional reasoning). *See also* Frantz, *supra* note 156, at 1442 ("As treated by the balancing test, 'the freedom of speech' protected by the First Amendment is ... defined only by the weight of the interests arrayed against it and it is inversely proportional to the weight accorded to those interests.").

prohibition to all the Houston clinics merely for administrative convenience.

III. PENDING BUBBLE ZONE LITIGATION

On January 21, 1994, the eve of the 21st anniversary of *Roe v. Wade*,[177] the United States Supreme Court agreed to hear a bubble zone case for the first time. The Court granted certiorari to *Madsen v. Women's Health Center*,[178] combining two cases arising out of the same pro-life demonstration in Melbourne, Florida. The decisions in these cases, one coming from a state court and one coming from a federal court, reached opposite conclusions about the First Amendment rights of abortion protesters.

In *Operation Rescue v. Women's Health Center*,[179] the Florida Supreme Court upheld an injunction which, among other restrictions, created a bubble zone around a Melbourne abortion clinic and around the residences of any employee of the clinic.[180] The state court ruled that the restrictions did not violate the First Amendment rights of the protesters.[181]

Eight days earlier, in *Cheffer v. McGregor*,[182] the United States Court of Appeals for the Eleventh Circuit had ruled that the same injunctive relief, including the bubble zone provisions, violated the constitutional guarantee of free speech.[183] The plaintiff in *Cheffer* had filed a separate federal suit "seeking to enjoin enforcement of the state court injunction."[184] The Eleventh Circuit framed the issue this way:

> Perhaps few Americans are content with the current legal status of abortion in America. Many see a woman's ability to choose abortion as part of her fundamental constitutional right of self determination that is ill-protected by the wavering jurisprudence of the Supreme Court. Many others see the 1.4 million abortions each year as an American Holocaust

177. 410 U.S. 113 (1973) (finding a right to privacy and a qualified right to abortion in the United States Constitution).

178. 114 S. Ct. 907 (1994).

179. 626 So. 2d 664 (Fla. 1993) (per curiam).

180. *Id.* at 676 (including a 36-foot bubble zone around the clinic and a 300-foot zone around residences of staff).

181. *Id.* at 675.

182. 6 F.3d 705 (11th Cir. 1993).

183. *Id.* at 711-12 ("The clash here is between an actual prohibition of speech and a potential hindrance to the free exercise of abortion rights.").

184. *Id.* at 707.

> permitted by the moral vacillation of the government. This case arises out of the clash of these opposing beliefs, and governmental attempts to restrict their free expression.[185]

While the *Tucci* court was less eloquent in framing the issue, the Florida case now going before the United States Supreme Court presents exactly the same "clash of . . . opposing beliefs"[186] the Texas Supreme Court considered in *Ex parte Tucci*.

IV. CONCLUSION

In *Ex parte Tucci*, the Supreme Court of Texas held that the bubble zone provision in a temporary restraining order, which imposed a 100-foot speech-free buffer zone around abortion clinic entrances and exits, violated protesters' rights to freedom of expression. The court based its holding on article I, section 8 of the Texas Constitution which provided broader free speech protection than its federal counterpart.[187] The bubble zone was held to be unconstitutional absent a showing that it was the least restrictive means of protecting against alleged harmful effects from the protesters' activities.[188]

Ex parte Tucci was decided on the basis of Texas law and precedents;[189] however, the legal principles the court discussed could also benefit pro-life demonstrators outside the borders of Texas. Contempt and the collateral bar rule, use of broad state constitutional protections, and narrow standards of review are relevant issues in any jurisdiction considering a case of judicially-ordered prior restraint of speech.

It is settled law that a party may disobey a statute or ordinance which he feels is an unconstitutional prior restraint of free speech and, if he is right, he will suffer no penalty.[190] Disobeying court orders remains a more open question that is dependent upon the precedents and procedures in a given jurisdiction. Texas courts reject the collateral bar rule which mandates direct appeal of a judicial order before disobeying it.[191] In a jurisdiction that recognizes the collateral bar rule, when a

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185. *Id.* at 706.

186. *Id.*

187. Ex parte Tucci, 859 S.W.2d 1, 16 (Tex. 1993) (Phillips, C.J., concurring) (disagreeing that the Texas Constitution provides broader protection).

188. *Id.* at 7.

189. *Id.* at 1.

190. Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969).

191. *Tucci*, 859 S.W.2d at 2.

protester is faced with an injunction or other court order, the safest and best course to follow is still the procedure approved by the United States Supreme Court in *Walker*: Any person subject to a restraining order should make every effort to have it modified or vacated before disobeying it.[192] The best and safest way to test the constitutionality of a judicially-ordered prior restraint on speech is to challenge the order on direct appeal.[193] If no direct challenge was possible or if no such challenge was made, it may still be possible to collaterally attack the prior restraint order if the contempt proceeding is civil. Even if the contempt is criminal, it may still be possible to collaterally attack the prior restraint by challenging the jurisdiction of the court issuing the order,[194] by arguing that the order is transparently invalid,[195] or by arguing that it was a sudden change in a recognized procedure.[196]

In challenging the constitutionality of a prior restraint on speech, any demonstrator in any jurisdiction should consider the free speech provisions of both the federal constitution and the state constitution involved to determine which would be most beneficial. A defense could be made on the basis of both, particularly if the state constitution contains broader speech protections than its federal counterpart.

The standard of review applied by the court is also very important in determining the outcome of a constitutional challenge to a prior restraint order. The Texas Supreme Court burst the bubble zone around Houston abortion clinics because it used a least restrictive means test based on state precedent and refused to apply a federal balancing test.[197] One concurring opinion in *Tucci*,[198] however, as well as the majority opinion in *Cheffer*,[199] found bubble zone restrictions unconstitutional using a First Amendment balancing test.

Two key facts which benefited the pro-life demonstrators in *Tucci* might also be present in prior restraint cases in other jurisdictions. First, for the sake of administrative convenience,

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192. Walker v. City of Birmingham, 388 U.S. 307, 318-19 (1967).

193. Under 28 U.S.C. § 1292(a)(1), an order granting or denying an injunction is an immediately appealable interlocutory order.

194. *Walker*, 388 U.S. at 319.

195. *Id.* at 315.

196. *Id* at 319.

197. Ex parte Tucci, 859 S.W.2d 1, 7 (Tex. 1993).

198. *Id.* at 27 (Phillips, C.J., concurring).

199. 6 F.3d 705, 711-12 (11th Cir. 1993).

the injunctive orders blanketed all the abortion facilities with the same restrictions regardless of their particular needs.[200] Second, other provisions of the temporary restraining orders protected the clinics adequately without the additional speech free buffer.[201]

The relators in *Tucci* were not engaged in acts of violence; they were merely exercising their First Amendment right to protest abortion.[202] The United States Supreme Court has established "that the level of protection given to speech depends upon its subject matter; speech about public officials or matters of public concern receives greater protection than speech about other topics."[203] Justice Blackmun, writing the dissent in *Webster v. Reproductive Health Services,* acknowledged that abortion is "the most politically divisive domestic legal issue of our time."[204] It is only politically divisive because it is a matter of grave public concern on both sides of the issue. The abortion discussion, according to Justice Stevens' standards, would merit greater protection of expression than other topics.

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200. *Tucci*, 859 S.W.2d at 6.

201. *Id.*

202. *Id.* at 34 (Phillips, C.J., concurring). In NOW v. Scheidler, 114 S. Ct. 798, 806 (1994), the Court held that under the provisions of the Racketeer Influenced and Corrupt Organizations (RICO) chapter of the Organized Crime Control Act of 1970 (OCCA), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1988 and Supp. IV), "RICO contains no economic motive requirement." *Scheidler*, 114 S. Ct. at 806. This holding may open the door for some anti-abortion RICO-like activity to be prosecuted as racketeering activity. However, the Court explained: "[T]he question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise of racketeering activity has an overriding economic motive.... We therefore decline to address the First Amendment question." *Id.* at 806 n.6. In a concurring opinion, Justice Souter stated:

> [A]n economic-motive requirement would protect too much with respect to First Amendment interests, since it would keep RICO from reaching ideological entities whose members commit acts of violence we need not fear chilling.... [L]egitimate free-speech claims may be raised and addressed in individual RICO cases as they arise. Accordingly, it is important to stress that nothing in the Court's opinion precludes a RICO defendant from raising the First Amendment in its defense in a particular case. [A protester's alleged conduct] may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis.... I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake."

Id. at 807 (Souter, J., concurring).

203. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2563 (1992) (Stevens, J., concurring).

204. 492 U.S. 490, 559 (1989) (Blackmun, J., concurring in part and dissenting in part).

The United States Supreme Court may or may not burst the bubble zone in Florida in 1994 as the Texas Supreme Court burst the bubble zone in Houston in 1993. Whatever the outcome, if Justice Blackmun is correct, the abortion protest movement and the prior restraint legal challenges which accompany that movement are not likely to disappear from the American landscape any time soon. A careful study of the legal principles which emerged in *Ex parte Tucci* can be a "free speech primer" for pro-life demonstrators. *Tucci* provides a ready collection of possible defense strategies for protesters facing prior restraint orders which interfere with their right of free expression and with their right to participate in the "process by which public opinion is formed on public issues."[205]

BARBARA SPECHT WELLER

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205. Frantz, *supra* note 156, 1449 n.5.

On June 30, 1994, The United States Supreme Court handed down its decision in *Madsen v. Women's Health Center*, 1994 WL 285847 (U.S. Fla.). The Court, in a 6-3 decision, held that "the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded passes muster under the First Amendment...." *Id.* at *3.

The *Madsen* case concerned a permanent injunction that broadened an original injunction not challenged by pro-life demonstrators. *Id.* Because the Court found the injunction to be content-neutral, it did not apply heightened scrutiny. *Id.* at *5-6. The Court distinguished this content-neutral injunction from a content-neutral statute which would require a time, place, and manner analysis under the standard set forth in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). *Id.* at *6. The standard the court applied to the injunction was "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at *7. In the dissent, handed down in a rare separate decision for emphasis, Justice Scalia labeled the majority standard "intermediate-intermediate scrutiny." *Id.* at *20 (Scalia, J., dissenting). Justice Scalia also set down a detailed description of events on a videotape put into the record by the clinic. *Id.* at *18-20. Justice Scalia said, "Anyone seriously interested in what this case was about must view that tape.... And anyone doing do ... will be aghast at what it shows we have today permitted an individual judge to do." *Id.* at *18.

The holding in *Madsen* was fact specific to the physical circumstances of a particular Florida abortion clinic. The Court upheld the 36-foot bubble zone around a portion of the clinic in order to ensure ingress and egress "given the narrow confines around the clinic." *Id.* at *8. The Court said, "The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute ...." *Id.* The 36-foot buffer zone to the north and west of the clinic was struck down. *Id.* at *9. The Court upheld the injunction with regard to noise levels, but struck down the provision dealing with observable images. *Id.* at *9-10. Absent fighting words or threats, the Court also struck down a 300-foot no-approach zone around clinic patients and staff. *Id.* at *10. The no-approach provision referred to "sidewalk counseling." *Id.* at *14 (Stevens, J., concurring in part and dissenting in part). Finally, the Court struck down the 300-foot buffer relating to clinic staff residences. *Id.* at *11. Is it possible for a bubble to partially burst?