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# Telemarketing, Commercial Speech, and Central Hudson: Potential First Amendment Problems for Indiana Code Section 24-4.7 and Other "Do-Not-Call" Legislation

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# TELEMARKETING, COMMERCIAL SPEECH, AND CENTRAL HUDSON: POTENTIAL FIRST AMENDMENT PROBLEMS FOR INDIANA CODE SECTION 24-4.7 AND OTHER "DO-NOT- CALL" LEGISLATION

## I. INTRODUCTION

Which do Americans hate more: Osama Bin Laden or telemarketers? Regardless of the answer, [www.antitelemarketer.com](http://www.antitelemarketer.com), a website devoted to combating the telemarketing industry, recently displayed a fabricated video depiction of Osama Bin Laden being tortured by the United States' most powerful weapon against the answering machine-less Taliban: telemarketers.<sup>1</sup> As punishment for refusing to turn over Bin Laden, a Taliban official, looking suspiciously like Osama himself, is subjected to endless telephone calls made by solicitors of aluminum siding, credit cards, cable television, and long distance services.<sup>2</sup>

Amusement aside, telemarketing has become both big business and a big problem in the United States. In 1999, nearly 5.5 million Americans

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<sup>1</sup> <http://www.antitelemarketer.com> (last visited Nov. 8, 2002). The website promotes itself as "[t]he web's #1 source for stopping unwanted telephone sales calls." *Id.* Telemarketing is defined as "the selling or promoting of goods and services by telephone." ENCARTA WORLD ENGLISH DICTIONARY 1833 (1999).

<sup>2</sup> <http://www.antitelemarketer.com> (last visited Nov. 8, 2002). The exchange described unfolds as follows:

(PHONE RINGING)

[MR. TALIBAN]: Taliban.

[AGENT JOHNSON]: Yes, this is Agent Johnson of the U.S. F.B.I. My President has instructed me to ask you for the final time to turn over the person or location of one Osama Bin Laden for his actions against our country or you must face the consequences . . .

[MR. TALIBAN]: We do not fear your weapons. We have anti-aircraft, and anti-tank, and anti-missile and weaponry.

[AGENT JOHNSON]: We know that, but you don't have answering machines.

[MR. TALIBAN]: What?

[AGENT JOHNSON]: Will you give us Bin Laden?

[MR. TALIBAN]: No!

[AGENT JOHNSON]: O.K., you asked for it. (CLICK)

[MR. TALIBAN]: Answering machine? What is that?

(PHONE RINGING)

[MR. TALIBAN]: Taliban.

[UNIDENTIFIED FEMALE TELEMARKETER]: Hello, how are you this afternoon? Would you like better rates on your long distance service? (Mr. Taliban is then subjected to an endless barrage of telemarketing calls).

*Id.*

were employed in the telemarketing industry, and over five hundred and forty billion dollars were earned through telephone solicitations.<sup>3</sup> Recent estimates report that the ten largest telemarketing firms in the country are able to make five hundred and sixty calls per second.<sup>4</sup> At that rate, these telemarketers alone are able to make "33,600 calls a minute; 2,016,000 calls per hour; 16,128,000 per eight-hour day; 80,640,000 per five-day week; or enough to call every phone number in the United States, some several times over—each and every month."<sup>5</sup> Whether due to the frequency with which telemarketing calls are received, or the irritating nature of the calls themselves, Americans have come to hate telemarketers.<sup>6</sup> One recent commentator described telemarketing calls as "a scourge of American life, . . . a rare object of loathing that cuts across gender, class, and culture."<sup>7</sup> As a result of this disdain for telephone solicitations, increasing numbers of state residents are becoming fed up with the nightly annoyance of unwanted telemarketing calls.<sup>8</sup> They are also demanding that their legislators do something about it.<sup>9</sup>

The most recent response to the telemarketing problem has been the advent of "do-not-call" statutes.<sup>10</sup> These statutes allow state residents to signal their desire to receive no telemarketing calls by having their names and telephone numbers placed on a list or database maintained by the state.<sup>11</sup> The list is then purchased by or provided to telemarketers

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<sup>3</sup> Craig Savoye, *States Spare Residents from Telemarketers*, CHRISTIAN SCI. MONITOR, Dec. 22, 2000, at 2, available at 2000 WL 4433175.

<sup>4</sup> Fred Kaplan, *Demands for Privacy Curb Telemarketers*, BOSTON GLOBE, Dec. 26, 2000, at A1, available at 2000 WL 3356952.

<sup>5</sup> *Id.*

<sup>6</sup> See Stuart A. Hirsch, 'Phone Rage,' *Good Business Collide in Telemarketing Bill*, INDIANAPOLIS STAR, Feb. 19, 2000, at A1 (reporting the observations of one telephone consumer who stated that telemarketers made her "furious" and that telemarketing represents "a gross invasion of privacy"); *Telemarketing Bill is Small, Welcome Step*, INDIANAPOLIS STAR, Feb. 2, 2001, at A16 [hereinafter *Telemarketing Bill*].

<sup>7</sup> Kaplan, *supra* note 4, at A1.

<sup>8</sup> See *Telemarketing Bill*, *supra* note 6, at A16. When asked to rank the importance of twenty-four issues pending before the Indiana General Assembly in the 2001 legislative session, Hoosiers ranked telemarketing as their second biggest concern. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See Jerry Markon, *Take Me Off Your List! (Pretty Please?)*, STAR TRIB. (Minneapolis-St. Paul), Dec. 27, 2000, at 1D, available at 2000 WL 7003353.

<sup>11</sup> See, e.g., TENN CODE ANN. § 65-4-405(a) (Supp. 2001). The statute provides that "[t]he [Tennessee regulatory] authority shall establish and provide for the operation of a database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations." *Id.*

doing business in the state.<sup>12</sup> Telemarketers who thereafter call numbers appearing on the lists face potentially serious civil or even criminal penalties.<sup>13</sup>

"Do-not-call" statutes have become the legislative rage. At least seventeen states, including Indiana, have enacted such statutes within the past few years, and many more states are currently considering "do-not-call" bills as legislators rush to garner credit for providing relief to their constituents.<sup>14</sup> However, because of statutory exemptions for various types of calls, the relief expected and the relief delivered by "do-not-call" statutes are often two different things.<sup>15</sup> Due to heavy lobbying by various trade industries, state legislatures have included exemptions in the statutes for telemarketing calls made by car dealers, banks, funeral homes, and many other types of businesses.<sup>16</sup> Indiana's new "do-not-call" law excludes, among others, telemarketing calls made by charitable organizations, real estate agents, insurance agents, and those soliciting the sale of newspapers.<sup>17</sup>

Arguably, this is not the type of protection state telephone consumers want from their legislatures: "do-not-call" statutes that still allow telemarketing calls to be placed to their homes, disturbing their privacy. However, this also may not be the type of protection required by the Constitution. Given the United States Supreme Court's increased protection of commercial speech in its recent interpretations of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,<sup>18</sup>

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<sup>12</sup> See *id.* § 65-4-405(d)(1) ("A person or entity desiring to make telephone solicitations to any residential subscriber shall pay to the authority . . . an annual registration fee of five hundred dollars to defray regulatory and enforcement expenses.")

<sup>13</sup> See, e.g., FLA. STAT. ANN. § 501.059(8) (West Supp. 2001) (prescribing a maximum \$10,000 penalty); IDAHO CODE § 48-1003A(3) (Michie Supp. 2001) (allowing penalties up to \$5,000 for multiple violations); IND. CODE ANN. § 24-4.7-5-2 (West Supp. 2001) (authorizing civil penalties of \$10,000 for first-time violations and \$25,000 for subsequent violations of the "do-not-call" provisions); KY. REV. STAT. ANN. § 367.46999 (Banks-Baldwin 2001) (providing criminal penalties for violation of its "do-not-call" statute).

<sup>14</sup> See *infra* Part IV.A (listing the existing state "do-not-call" statutes and discussing the "do-not-call" phenomenon).

<sup>15</sup> See *infra* Part IV.B (discussing exemptions placed within the statutes).

<sup>16</sup> See, e.g., ARK. CODE ANN. §4-99-406 (Michie Supp. 2001); see also *infra* notes 290-91 and accompanying text (noting the effect of lobbying on "do-not-call" statutes).

<sup>17</sup> IND. CODE ANN. § 24-4.7-1-1.

<sup>18</sup> 447 U.S. 557 (1980).

potential First Amendment concerns are raised by statutes that have an insufficient connection between their legislative means and end.<sup>19</sup>

This Note argues that state legislatures, in drafting "do-not-call" statutes, have underestimated the value the Court places on commercial speech and have failed to appreciate the manner in which the Court has interpreted *Central Hudson* in recent years.<sup>20</sup> Specifically, this Note suggests that state legislatures that have enacted "do-not-call" statutes should re-think the exemptions placed within them and those considering such legislation should draft their statutes with care. To this end, Part II of this Note provides the legal background of the Court's commercial speech doctrine.<sup>21</sup> Part III discusses prior attempts to regulate the telemarketing industry and the constitutionality of those efforts.<sup>22</sup> Part IV then describes the "do-not-call" phenomenon and the exemption problem before analyzing the constitutionality of "do-not-call" legislation enacted to date in terms of the exemptions in the statutes.<sup>23</sup> Particular attention is paid in this section to Indiana's "do-not-call" statute.<sup>24</sup> Finally, Part V proposes a model statute for state legislatures so they might avoid the exemption problem when drafting "do-not-call" statutes.<sup>25</sup>

## II. THE SUPREME COURT'S COMMERCIAL SPEECH DOCTRINE

### A. *The Early Position: No Protection for Commercial Speech*

The First Amendment's protections of speech initially appear quite sweeping.<sup>26</sup> Written in absolute terms, the amendment seems to

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<sup>19</sup> See *infra* Part IV.D (discussing First Amendment concerns raised by "do-not-call" statutes). *Central Hudson* provides a four-part test used to evaluate the constitutionality of commercial speech restrictions. See *infra* Part II.C.

<sup>20</sup> See *infra* Part II.D (discussing the recent application of *Central Hudson*).

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> See *infra* Part IV.C.

<sup>25</sup> See *infra* Part V.

<sup>26</sup> U.S. CONST. amend. I. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ." *Id.* While part of the United States Constitution, the protections of the First Amendment have been incorporated through the Fourteenth Amendment to apply to the states. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Court in *Gitlow* held,

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights

preclude the government from statutorily abridging the speech of its citizens in any fashion.<sup>27</sup> Yet such an extreme position clearly is untenable, for as Justice Holmes aptly stated, even "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>28</sup> Once it is accepted that all speech is not automatically immunized under the First Amendment, line-drawing by the government becomes inevitable.<sup>29</sup> Courts must attempt to balance governmental interests against the intrusion on speech to determine whether, in light of the purposes of protecting speech, the First Amendment can tolerate the encroachment.<sup>30</sup>

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and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.

*Id.*

<sup>27</sup> U.S. CONST. amend I. Indeed, not only novices, but some scholars in constitutional law, view the amendment's commands as being literal. Justice Black, perhaps the chief defender of the absolutist position, argued that "[t]he phrase 'Congress shall make no law' is composed of plain words, easily understood . . . . [T]he Framers themselves did [the necessary] balancing when they wrote [the First Amendment] . . . . Courts have neither the right nor the power . . . to make a different [judgment]." Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960). For an interesting discussion concerning the viability of Justice Black's absolutist position, see Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63-68.

<sup>28</sup> *Schenk v. United States*, 249 U.S. 47, 52 (1919).

<sup>29</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 895 (2d ed. 2002).

<sup>30</sup> *Cf. Schenk*, 249 U.S. at 52 (suggesting that a case-by-case analysis must be undertaken with restrictions on speech considering, among other things, the context of the speech and the governmental interest at stake). Although there are many different views of why the Framers sought to protect speech, perhaps none has been expressed as eloquently as that of Justice Brandeis who stated that

[The Framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). It is widely understood that the First Amendment was at least meant to abolish the restrictions on publication without approval of the Crown that existed in England. CHERMERINSKY, *supra* note 29, at 892. However, discerning the true legislative intent of the First Amendment is complicated in that many of those involved in drafting and ratifying the amendment later adopted the Alien and Sedition Acts of 1798. *Id.* at 894. These laws allowed prosecution for publishing statements critical of the government and were widely used by the Federalists against rival Republicans. *Id.*

Thus, with no clear direction from the Framers, the United States Supreme Court's First Amendment jurisprudence has developed on a case-by-case basis. In this process, the Court has created a hierarchy of speech, determining that certain speech is more essential to the continued existence of a democracy and, thus, deserving of greater protection under the First Amendment.<sup>31</sup> At the pinnacle of this hierarchy, and, therefore, subject to little regulation, is political speech.<sup>32</sup> Occupying the lowest position in the hierarchy are the types of speech designated by the Court as being "unprotected."<sup>33</sup> Speech that is "unprotected" includes language that incites illegal activity, speech falling under the classification of "fighting words," and obscene forms of communication.<sup>34</sup> Because the Court finds such forms of communication to be of little or no value, the government may essentially regulate such speech freely.<sup>35</sup> Occupying the middle of the Court's hierarchy is speech that, while not unprotected, is less protected than speech considered to

<sup>31</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, White, & Blackmun, JJ., concurring).

<sup>32</sup> *Id.* Judge Learned Hand, explaining the justification for such protection of political speech, stated that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). Elaborating on Judge Hand's averment, the Court later stated that "[in light of] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on the government and public officials." *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>33</sup> *R.A.V.*, 505 U.S. at 422.

<sup>34</sup> See *Miller v. California*, 413 U.S. 15, 23 (1973) (stating that it "has been categorically settled . . . that obscene material is unprotected by the First Amendment"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (affirming defendant's conviction for using words "likely to provoke the average person to retaliation"); *Schenk*, 249 U.S. at 52-53 (affirming convictions of defendants advocating the illegal activity of resisting the draft).

<sup>35</sup> *Chaplinsky*, 315 U.S. at 571-72. The Court stated,

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Id.* But see *R.A.V.*, 505 U.S. at 383-84 (holding that even among categories of unprotected speech, government may not improperly make content-based distinctions by proscribing only limited types of unprotected speech).

have higher value.<sup>36</sup> Falling into this middle category of lesser-protected speech is speech that, although not obscene, is sexually explicit and speech that is commercial in nature.<sup>37</sup>

Like many areas of its jurisprudence, the Court's commercial speech doctrine has undergone a metamorphosis since its inception. The starting point for examining the Court's approach to commercial speech is *Valentine v. Christenson*.<sup>38</sup> In *Valentine*, F.J. Christenson, owner of a retired United States Navy submarine to which he intended to sell admission tickets, sought to enjoin New York City Police Commissioner, Lewis Valentine, from enforcing an ordinance forbidding the distribution of handbills of a commercial or business nature.<sup>39</sup> *Valentine* required the Court to address squarely whether regulation of commercial advertising represented an abridgement of rights guaranteed by the First Amendment.<sup>40</sup> In a brief opinion, devoid of analysis, explanation, or citation to any authority, a unanimous Court held that the First Amendment afforded no protection to commercial speech.<sup>41</sup>

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<sup>36</sup> *R.A.V.*, 505 U.S. at 422 (explaining that commercial speech and pornographic speech are forms of "second-class expression").

<sup>37</sup> *Id.* Commercial speech has been defined by the Court as having three characteristics: (1) the speech is an advertisement of some kind; (2) the speech refers to a specific product; and (3) the speaker has an economic motive for the speech. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66-67 (1983). The core notion of commercial speech is that it "[does] no more than propose a commercial transaction." *Id.* at 67 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

<sup>38</sup> 316 U.S. 52 (1942).

<sup>39</sup> *Id.* at 52-53. Christenson's handbills merely solicited visitors to view the submarine at a pier where it was moored. *Id.* Upon being told that handbills devoted solely to public information or protest were not prohibited by the ordinance, Christenson had double sided handbills prepared. *Id.* at 53. One side of the reprinted handbills retained the commercial advertisement, minus any mention of the admission fee, while the reverse side contained a statement of protest against the city's dock department for denying him wharf facilities for exhibition purposes. *Id.* The police advised Christenson that all commercial advertising would need to be eliminated for the handbills to be lawful; however, he distributed the reprinted handbills despite this warning and was restrained by police. *Id.*

<sup>40</sup> *Id.* at 54.

<sup>41</sup> *Id.* (stating that, while government may usually not unduly burden public thoroughfares in regard to information of public interest, "the Constitution imposes no such restraint on government as respects purely commercial advertising"). Despite this initial lack of protection for commercial speech by the Court, it is apparent that advertising has been a central part of American culture from the very beginning of its history. See generally DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 328 (1958); JAMES PLAYSTED WOOD, *THE STORY OF ADVERTISING* 45-69 (1958) (describing the widespread use of advertising in colonial America). Boorstin quotes Isaiah Thomas, a colonial printer, as saying that "[advertisements] are well calculated to enlarge and



The Court perpetuated this lack of protection for commercial speech when it decided *Breard v. City of Alexandria*.<sup>42</sup> In *Breard*, a magazine salesman was convicted of violating an Alexandria, Louisiana, ordinance that made it unlawful to solicit door-to-door.<sup>43</sup> The Supreme Court of Louisiana upheld *Breard's* conviction, emphasizing the city's purpose of

enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound." BOORSTIN, *supra*, at 328. In fact, commercial advertisements played such a formative role in colonial America that Benjamin Franklin authored an early defense of a free press in support of his unpopular decision to print an advertisement for a voyage to Barbados. Benjamin Franklin, *An Apology for Printers*, June 10, 1731, reprinted in BENJAMIN FRANKLIN'S AUTOBIOGRAPHICAL WRITINGS 32-37 (Carl Van Doren ed., 1945); see also 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 495-96 (1996) (making this observation regarding Franklin).

<sup>42</sup> 341 U.S. 622 (1951).

<sup>43</sup> *Id.* at 624. The ordinance in part provided as follows:

'An ordinance regulating solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise in the city of Alexandria, Louisiana; declaring it to be a nuisance for those engaging in such pursuits to go in or upon private residences without having been requested or invited to do so; providing penalties for the violation hereof; repealing all ordinances in conflict herewith.

'Section 1. Be it ordained by the council of the city of Alexandria, Louisiana, in legal session convened that the practice of going in and upon private residences in the City of Alexandria, Louisiana by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do by the owner or owners, occupant or occupants of said private residences for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or disposing of and/or peddling or hawking the same is declared to be a nuisance and punishable as such nuisance as a misdemeanor.

'Section 2. Be it further ordained, etc., that any person violating the provisions of this ordinance shall upon conviction thereof be fined not more than \$100.00 or imprisoned not more than 30 days or both fined and imprisoned in the discretion of the Court.

'Section 3. Be it further ordained, etc., that the provisions of this ordinance shall not apply to the sale, or soliciting of orders for the sale, of milk, dairy products, vegetables, poultry, eggs and other farm and garden produce so far as the sale of the commodities named herein is now authorized by law. . . .'

*City of Alexandria v. Breard*, 47 So. 2d 553, 554-55 (La. 1950). This type of ordinance was known as a Green River ordinance, after the town of Green River, Wyoming, which first attempted to address the problems associated with door-to-door sales in 1931. *Breard*, 341 U.S. at 627-28. The ordinance was challenged on multiple occasions by the Fuller Brush Company as were similar ordinances in many other states. *Id.* at 628-29. The results of these challenges were detailed by the Court in *Breard*. *Id.* at 627-28 n.6.

protecting the privacy of its residents.<sup>44</sup> In pleading his case to the United States Supreme Court, Breard alleged, inter alia, that the ordinance improperly infringed on his freedom of speech.<sup>45</sup> The Court first considered the developing problems posed by the increased use of door-to-door sales before upholding the ordinance against Due Process and Commerce Clause challenges.<sup>46</sup>

Turning to a First Amendment analysis, the Court initially agreed that the selling of magazines implicated the amendment.<sup>47</sup> However, the Court held that, because only the selling of the publications was at issue, the speech was commercial in nature and, therefore, could be regulated by communities offended by the sales practices.<sup>48</sup> Thus, although the

<sup>44</sup> *Breard*, 47 So. 2d at 557. Emphasizing privacy rights, the Louisiana Supreme Court stated that "[a] salient feature of this case . . . is that, transcendent over the rights which appellant claims are infringed by the ordinance, is a fundamental principle of the law—a man's home is his castle. No one has any vested prerogative to invade another's privacy." *Id.* at 556.

<sup>45</sup> *Breard*, 341 U.S. at 625. Breard also argued that the ordinance violated his rights to due process and that it was an unconstitutional burden on interstate commerce. *Id.*

<sup>46</sup> *Id.* at 626-27, 633, 640. The Court stated that such methods "are a nuisance, or worse to peace and quiet" and that "responsible municipal officers have sought a way to curb the annoyances while preserving complete freedom for desirable visitors to the homes." *Id.* at 627. In upholding the ordinance against these initial arguments, the Court's concern for privacy was unmistakable. The Court stated,

Great as is the value of exposing citizens to novel views, home is the place where a man ought to be able to shut himself up in his own ideas if he desires. There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines. A doorbell cannot be disregarded like a handbill. It takes several minutes to ascertain the purpose of the propagandist and at least several more to get rid of him . . .

*Id.* at 640 n.27 (quoting ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 406 (1941)).

<sup>47</sup> *Id.* at 641. However, the Court noted that "[o]nly the press or oral advocates of ideas could urge this point. It was not open to the solicitors for gadgets or brushes." *Id.* It is interesting to note that even the great defender of the First Amendment, Justice Black, although dissenting in *Breard*, would have upheld the ordinance if it were applied against a common merchant selling pots and pans door-to-door rather than a salesman of magazines. *Id.* at 650 n.\* (Black, J., dissenting).

<sup>48</sup> *Id.* at 642, 645 ("It would be . . . a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."). In upholding the ordinance, the *Breard* Court was forced to distinguish *Martin v. City of Struthers*, 319 U.S. 141 (1943), which had invalidated a similar ordinance enacted by the City of Struthers, Ohio, as applied to the distribution of religious tracts. *Id.* at 642-43. Noting that commercial speech was not at issue in *Martin*, the *Breard* Court felt the two opinions were "not necessarily inconsistent." *Id.* at 643. Therefore, the Court clearly signaled that otherwise protected speech could be targeted for

"marketplace of ideas" was becoming a revered concept within the Court's First Amendment jurisprudence, the actual marketplace of daily commerce was thought to be outside the amendment's protections.<sup>49</sup>

*B. The Change in Position: Protection for Commercial Speech*

Commercial speech remained unprotected by the First Amendment after *Breard* until 1975, when the Court decided *Bigelow v. Virginia*.<sup>50</sup> At issue in *Bigelow* was a Virginia statute that made it unlawful to encourage the procuring of an abortion through the use of advertisements.<sup>51</sup> *Bigelow*, a newspaper editor, ran an advertisement in his Virginia newspaper soliciting abortion services in New York and was convicted of violating the statute.<sup>52</sup> The Supreme Court of Virginia upheld the conviction, relying on the Court's withholding of First Amendment protection to commercial speech in *Valentine*.<sup>53</sup> The Court, in reversing, held that "speech is not stripped of First Amendment protection merely because it appears [in commercial] form."<sup>54</sup> The Court distinguished *Valentine's* holding as being limited and reasoned that, where an advertisement contains material of public interest and, therefore, does more than simply propose a commercial transaction, First Amendment protections should apply.<sup>55</sup> The Court explained that

restrictions by government precisely because of its commercial nature. Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 453 (1971).

<sup>49</sup> *Id.* at 429. The marketplace of ideas was one of Justice Holmes' most famous analogies, first appearing in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See CHEMERINSKY, *supra* note 29, at 897. Arguing that truth emerges from the testing of an idea against competing notions, Holmes stated that "the ultimate good . . . is better reached by free trade [of] ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." *Abrams*, 250 U.S. at 630.

<sup>50</sup> 421 U.S. 809 (1975).

<sup>51</sup> *Id.* at 812-13. The statute was originally enacted in 1878, and *Bigelow's* prosecution was possibly the first under the statute. *Id.* at 813 n.2.

<sup>52</sup> *Id.* at 811-14.

<sup>53</sup> *Id.* at 814, 819.

<sup>54</sup> *Id.* at 818. The Court suggested that its precedents, decided since *Valentine*, supported this holding. *Id.* at 820 (noting the decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

<sup>55</sup> *Id.* at 819, 822. Justice Blackmun, who penned the majority opinion, explained that *Valentine's* application to a particular handbill "does not [provide authority] for the proposition that all statutes regulating commercial advertising are immune to constitutional challenge." *Id.* at 819-20. In fact, it was noted that Justice Douglas, a member of the Court at the time *Valentine* was decided, felt the Court's decision in that case was "casual, almost offhand . . . [a]nd [that] it ha[d] not survived reflection." *Id.* at 820 n.6.

commercial speech is not automatically devoid of value simply because of its economic nature.<sup>56</sup> Rather, in determining the extent to which First Amendment protections should apply to commercial speech, the Court reasoned that the First Amendment interests at stake were to be balanced against the strength of the public interest in regulating the speech.<sup>57</sup> Emphasizing that the advertisement at issue contained information of public interest, the Court held that the Virginia statute was unconstitutional as applied to Bigelow's advertisement.<sup>58</sup>

While *Bigelow* concerned the protection of commercial speech that was of public interest, the following year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,<sup>59</sup> the Court was asked to determine whether purely commercial speech was wholly outside the First Amendment's protections.<sup>60</sup> At issue was a Virginia statute that prohibited pharmacists from advertising the prices of prescription medications.<sup>61</sup> This statute was challenged, not by pharmacists subject to the statute's provisions, but by users of prescription medications.<sup>62</sup> Their claim was that the First Amendment prohibited the government from disrupting the flow of information from

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<sup>56</sup> *Id.* at 826 ("The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.").

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 822, 829. The Court's decision to extend First Amendment guarantees to commercial speech sparked debate among legal scholars as to whether economically motivated speech is deserving of such protection. Critics assert that the First Amendment protects only limited values such as self-government and individual expression, neither of which is implicated by commercial speech. Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 5 (1979). The Court's retreat from the commercial speech exception has even been likened to a return to the economic due process of the *Lochner* era. *Id.* at 30. *But see* Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 932 (1992) (suggesting that denying First Amendment protection to commercial speech "reinforces a narrow vision of First Amendment values" and focuses primarily on political speech while ignoring the wider range of human expression the amendment was designed to protect). Other supporters of commercial speech protection focus on its informational value. *See generally* Redish, *supra* note 48. Redish suggests that only through exposure to competing commercial ideas do consumers receive the information needed to achieve the greatest degree of personal satisfaction allowed by their resources. *Id.* at 433.

<sup>59</sup> 425 U.S. 748 (1976).

<sup>60</sup> *Id.* at 760-61 (acknowledging that *Bigelow* had left a "fragment of hope" for the commercial speech exception to First Amendment protections but finding the issue squarely before the Court in the case at bar).

<sup>61</sup> *Id.* at 749-50.

<sup>62</sup> *Id.* at 753. This raised a standing issue; however, the Court declared that, when the First Amendment was implicated, "the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756.

pharmacists willing to provide the information to consumers who wished to receive it.<sup>63</sup>

The Court's opinion, written by Justice Blackmun, initially observed that whether or not the speaker's primary motivation was economic was irrelevant for the First Amendment claim.<sup>64</sup> Thereafter, Justice Blackmun stressed the importance of commercial speech to society.<sup>65</sup> He suggested that the consumer's interest in the free flow of commercial information may be "keener by far" than similar interest in current political debate.<sup>66</sup> Furthermore, the Court found that society in general had a strong public interest in maintaining the free flow of commercial information, explaining that

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that these decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . . . Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.<sup>67</sup>

Weighing the asserted state interests in maintaining a high degree of professionalism and the protection of its citizens against these First Amendment concerns, the Court invalidated the Virginia statute.<sup>68</sup>

While the Court's decision in *Virginia State Board* was the strongest expression yet of First Amendment protection for commercial speech, it

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<sup>63</sup> *Id.* at 754.

<sup>64</sup> *Id.* at 762 (noting that speech in labor disputes had been provided First Amendment protection despite the economic motivation of the parties).

<sup>65</sup> *Id.* at 763-66.

<sup>66</sup> *Id.* at 763.

<sup>67</sup> *Id.* at 765 (footnotes omitted).

<sup>68</sup> *Id.* at 766-70.

did little more than *Bigelow* in providing guidance to state legislatures on the limits to which such speech could be regulated.<sup>69</sup> In *Virginia State Board*, the Court merely observed that, despite its holding, some forms of commercial speech regulation were still permissible, such as time, place, or manner restrictions and prohibitions on advertising that is false or misleading.<sup>70</sup> It was not until 1980, when the Court decided *Central Hudson Gas & Electric Corp. v. Public Service Commission*,<sup>71</sup> that a test was articulated for measuring governmental restrictions on commercial speech.

### C. *Evaluating Restrictions on Commercial Speech*

In *Central Hudson*, the source of contention was a regulation of the Public Service Commission of the State of New York that completely prohibited any promotional advertising by electrical utility companies.<sup>72</sup> *Central Hudson*, a utility company, challenged this regulation as an unconstitutional restriction on speech.<sup>73</sup> The Supreme Court's appraisal of the dispute was prefaced by acknowledging that its precedents had both recognized the value of commercial speech in society as well as consistently affirmed its lowered hierarchical position.<sup>74</sup> The Court also

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<sup>69</sup> *Bigelow v. Virginia*, 421 U.S. 809, 825 (1975). *Bigelow* had expressly left the question unanswered, stating, "We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." *Id.*

<sup>70</sup> *Virginia State Bd.*, 425 U.S. at 770-71. The time, place, or manner test for restrictions on speech requires that such restrictions be justifiable without reference to the content of the regulated speech; that the restrictions be narrowly tailored to serve a significant government interest; and that they leave ample alternative channels of communication open to the information regulated. *See id.* at 771; *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>71</sup> 447 U.S. 557 (1980).

<sup>72</sup> *Id.* at 558. The ban on advertising was justified by the Public Service Commission on the grounds that promotional advertising by electric companies was contrary to a national policy of conservation encouraged due to an existing energy shortage. *Id.* at 559-60. Electric utilities were allowed to continue "informational" advertising designed to shift user consumption of electricity to off-peak hours. *Id.* at 560.

<sup>73</sup> *Id.* The order of the trial court affirming the commission's order was upheld by the New York Court of Appeals. *Consol. Edison Co. v. Pub. Serv. Comm'n*, 390 N.E.2d 749, 758 (N.Y. 1979). Noting that advertising by a utility company operating a monopoly was unnecessary, especially during an energy crisis, the court of appeals found that the governmental interest in prohibiting the speech outweighed the speech's limited constitutional value. *Id.* at 757-58.

<sup>74</sup> *Central Hudson*, 447 U.S. at 562-63 (stating that, although "we have rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech[,] . . . our decisions have recognized the 'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech").

confirmed that the level of protection afforded to commercial speech was dependant upon a balancing of the nature of the expression and the interests asserted by government in regulating it.<sup>75</sup>

The majority opinion, written by Justice Powell, attempted to give meaning to the Court's commercial speech jurisprudence by describing a four-part test based on principles extracted from its prior cases.<sup>76</sup> The Court held that the initial inquiry should be whether the restrictions on commercial speech concerned illegal or misleading speech because such speech is lawfully regulated by the government.<sup>77</sup> If this inquiry revealed that the speech was lawful, the government's power to regulate it was more circumscribed, and only a substantial government interest would justify the imposition of restrictions on the speech.<sup>78</sup> Finally, the regulatory technique used by government to restrict the speech must be carefully tailored to achieve the governmental interest.<sup>79</sup> Thus restated,

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<sup>75</sup> *Id.* at 563.

<sup>76</sup> *Id.* at 563-66.

<sup>77</sup> *Id.* at 563 ("[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.").

<sup>78</sup> *Id.* at 564. Noting that regulating commercial speech based on its content represented an exception to the general rule that content-based regulations must meet strict scrutiny, the Court offered its justifications for allowing such regulation:

Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity . . . . In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not "particularly susceptible to being crushed by overbroad regulation."

*Id.* at 564 n.6 (citations omitted). The Court has also suggested that commercial speech is "less central to the interests of the First Amendment" than other types of speech and acknowledged a fear that conferring equal status on commercial speech will, "simply by a leveling process," erode the protections afforded noncommercial speech. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). *But see* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634-37 (1990) (suggesting that there is no rational basis for the commercial speech distinction and attacking the Court's proffered justifications).

<sup>79</sup> *Central Hudson*, 447 U.S. at 564. The Court explained that this last requirement has two components. *Id.* First, the regulation is required to directly advance the state interest, meaning that "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* Second, the restriction must be narrowly tailored so that no less-restrictive alternative regulations would provide the same effect. *Id.* Under the *Central Hudson* test, the government bears the burden of proof in justifying its restrictions on commercial speech. *See* *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983).

the four-part test of *Central Hudson* asks the following questions of commercial speech restrictions:

1. Is the speech lawful, not misleading, and thus deserving of protection? If so,
2. Is a substantial government interest asserted to justify speech restrictions? If so,
3. Does the regulation directly advance the asserted governmental interest? If so,
4. Is the restriction more extensive than is necessary to achieve the government's objective (i.e., do less restrictive alternatives exist)?<sup>80</sup>

Applying the test to the facts in *Central Hudson*, the Court found the speech to be truthful, concerning lawful matters, and no less-deserving of protection because Central Hudson had monopolistic control over the electricity needs of its consumers.<sup>81</sup> Further, the Court found the government's asserted interest in assuring fair rates to its consumers to be substantial.<sup>82</sup> The Court also found that the prohibitions on advertising by the utility provider directly advanced the government's interests.<sup>83</sup> However, the regulations on advertising were invalidated under the final step of the newly announced test because the government failed to demonstrate that the same purpose could not be served by means less restrictive of speech.<sup>84</sup>

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<sup>80</sup> *Central Hudson*, 447 U.S. at 566. Note that the test essentially resembles intermediate scrutiny, which requires laws to be substantially related to an important government interest. See *Califano v. Webster*, 430 U.S. 313, 316-17 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976). In fact, the Court has since stated that intermediate scrutiny applies to restrictions on commercial speech. See *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995) (stating that "we engage in 'intermediate' scrutiny of restrictions on commercial speech, analyzing them under the framework set forth in *Central Hudson*"). Additionally, the Court has found the *Central Hudson* test to be "substantially similar" to its time, place, or manner test used to evaluate restrictions on protected speech. See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987).

<sup>81</sup> *Central Hudson*, 447 U.S. at 566-67.

<sup>82</sup> *Id.* at 569.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 570-71. Note that the last requirement of the *Central Hudson* test, the least-restrictive means analysis, appears to at least be in doubt if not altogether abandoned by the Court. *CHEMERINSKY*, *supra* note 29, at 1050-51. Emphasizing the broad authority of government over commercial speech, the Court refused to apply a least-restrictive means analysis in *Board of Trustees v. Fox*, stating that doing so would render illusive the "ample



## D. Recent Application of Central Hudson

Despite recurring questions by some Justices regarding its continued viability, *Central Hudson* remains the test for commercial speech regulations.<sup>85</sup> However, in recent years the Court has interpreted *Central Hudson* with increased vigor, especially with respect to its third and fourth prongs, which require a "reasonable fit" between legislative means and ends.<sup>86</sup> In a series of cases, the Court has repeatedly struck down legislation regulating commercial speech because the means used by the legislature did not directly advance the asserted government interest in regulating commercial speech.<sup>87</sup> For instance, in 1993, in *City of Cincinnati v. Discovery Network, Inc.*,<sup>88</sup> the Court struck down a Cincinnati ordinance that prohibited commercial newsracks from being placed on public property while allowing noncommercial newsracks to

scope of [the state's] regulatory authority." 492 U.S. 469, 477-78 (1989). Instead, the Court in *Fox* suggested that what was required by its precedents under the final prong of *Central Hudson* was a reasonable fit between the legislature's ends and the means used to accomplish those ends. *Id.* at 480; see *infra* note 152. However, despite *Fox's* rejection of the least-restrictive means requirement, it was re-instituted six years later in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). Without acknowledging that the requirement appeared to have been abandoned, the Court, in striking down the governmental restrictions at issue in *Rubin*, held that alternatives existed "that would prove less intrusive to the First Amendment's protections for commercial speech." *Rubin*, 514 U.S. at 491. Adding to this confusion was the Court's opinion in *44 Liquormart, Inc. v. Rhode Island*, which appeared to recognize the validity of the least restrictive means analysis as well as the approach taken in *Fox*. 517 U.S. 484, 507. Perhaps attempting to address this confusion, the Court, in a recent case, affirmed the *Central Hudson* test for restrictions on commercial speech "as applied in our more recent commercial speech cases." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554-55 (2001) (emphasis added). In *Lorillard*, the Court expressly stated that the least restrictive means approach is not required but reaffirmed *Fox's* view that its precedents do require "a reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.'" *Id.* at 556 (citations and quotation marks omitted).

<sup>85</sup> See *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (positing that the *Central Hudson* test should not be applied in instances where the government's interest is to keep consumers uninformed); *44 Liquormart*, 517 U.S. at 527 (Thomas, J., concurring) (suggesting that *Central Hudson* is difficult to apply with uniformity, thus leading to unprincipled results and calling for a return to the reasoning and holding of *Virginia State Board* in certain types of cases). For affirmation of *Central Hudson* as the test for commercial speech restrictions, see *Lorillard*, 533 U.S. at 554-55 (directly rejecting calls to apply a different standard by stating that "*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision").

<sup>86</sup> See *infra* notes 87-115 and accompanying text.

<sup>87</sup> See *infra* notes 88-115 and accompanying text.

<sup>88</sup> 507 U.S. 410 (1993).

remain.<sup>89</sup> The city's asserted interests in enforcing this ordinance were aesthetic and safety concerns presented by the presence of the newsracks.<sup>90</sup> However, because the ordinance was applicable to only sixty-two commercial newsracks, allowing approximately 2,000 noncommercial newsracks to remain, it did not directly advance the city's interests and failed *Central Hudson's* "reasonable fit" requirement.<sup>91</sup>

Similarly, in 1995, the Court, in *Rubin v. Coors Brewing Co.*,<sup>92</sup> unanimously struck down a federal regulation that prohibited beer labels from displaying alcohol content.<sup>93</sup> Congress' asserted interest in

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<sup>89</sup> *Id.* at 430-31. Discovery Network provided adult educational and recreational programs to Cincinnati-area residents. *Id.* at 412. It advertised the programs in a free magazine it distributed nine times per year in thirty-eight newsracks the city had authorized it to use in 1989. *Id.* Harmon Publishing Company, another plaintiff that challenged the ordinance, distributed a free real estate magazine in twenty-four newsracks on public property. *Id.* at 412-13. Using a pre-existing, unenforced ordinance that banned distribution of "commercial handbills," the city revoked the permit of each plaintiff to distribute its publication. *Id.* at 413. The plaintiffs were permitted to continue their use of the newsracks while challenging the constitutionality of the city's order in the United States District Court for the Southern District of Ohio. *Id.* at 414. Both the district court and the Sixth Circuit Court of Appeals found that the city's ordinance failed *Central Hudson's* "reasonable fit" requirement. *Id.* at 414-15.

<sup>90</sup> *Id.* at 412 ("Motivated by its interest in the safety and attractive appearance of its streets and sidewalks, the city of Cincinnati has refused to allow respondents to distribute their commercial publications through freestanding newsracks located on public property.").

<sup>91</sup> *Id.* at 417-18. The Court observed that the distinction made by the city's ordinance between commercial and noncommercial newsracks "bears no relationship whatsoever to the particular interests that the city has asserted." *Id.* at 424. The Court also held that the ordinance was not a permissible time, place, or manner restriction of commercial speech because the ban was not content-neutral. *Id.* at 429-30.

<sup>92</sup> 514 U.S. 476 (1995).

<sup>93</sup> *Id.* at 491. The statute at issue in *Rubin* was part of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2) (1994). *Id.* at 478. The Act was adopted by Congress shortly after the Twenty-first Amendment ended the nation's experiment with Prohibition and was designed to establish national rules concerning alcohol production, distribution, and importation. *Id.* at 480. The relevant section of the Act prohibited advertising the alcoholic strength of malt beverages unless state law required such disclosure. *Id.* at 480-81. However, the regulations implementing the Act applied the provision only to states that affirmatively prohibited advertising such information. *Id.* at 488. Because only eighteen states prohibited these ads, brewers remained free in most of the country to advertise the strength of their beer. *Id.* The Act was challenged by the Adolph Coors Brewing Company after one of its proposed label designs was denied approval by the Bureau of Alcohol, Tobacco, and Firearms pursuant to the regulation. *Id.* at 478-79. The United States District Court for the District of Colorado entered a declaratory judgment for Coors, finding that the statute violated the First Amendment. *Id.* The Tenth Circuit Court of Appeals affirmed following remand, finding that the government had failed to demonstrate in any way that its prohibition directly advanced its interest. *Id.* at 479-80.

that case was to prevent "strength wars" between brewers who might seek to compete for customers on the basis of the alcoholic content of their product.<sup>94</sup> However, because the prohibition applied only to labels on bottles of beer, and not to wine or liquor labels or to advertisements for beer, the Court held that the regulation was irrational and did not directly or materially advance the government's interest.<sup>95</sup> Therefore, the regulation was struck down under *Central Hudson's* third prong.<sup>96</sup> This reasoning was again applied by the Court in *44 Liquormart v. Rhode Island*<sup>97</sup> in 1996 to strike down a statutory ban on liquor price advertising.<sup>98</sup> The government argued that it had a substantial interest in reducing alcohol consumption in the state.<sup>99</sup> However, the Court held that any reduction in the rate of consumption would merely be fortuitous because the State had presented no evidence that the speech prohibition would actually serve its legislative purpose.<sup>100</sup> Therefore, the statute was invalidated under *Central Hudson*.<sup>101</sup>

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<sup>94</sup> *Id.* at 483. Alternatively, the government asserted an interest in facilitating state efforts to regulate alcohol under the Twenty-first Amendment. *Id.* at 485. The Court concluded that preventing strength wars among brewers constituted a substantial state interest under *Central Hudson* but that assisting state efforts to regulate alcohol did not. *Id.* at 485-86.

<sup>95</sup> *Id.* at 488-89. The Court observed that the statute's exemptions and inconsistencies bring into question the purpose of the labeling ban. To be sure, the Government's interest in combating strength wars remains a valid goal. But *the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end.* There is little chance that § 205(e)(2) can directly and materially advance its aim, while other provisions of the same Act directly undermine and counteract its effects.

*Id.* at 489 (emphasis added).

<sup>96</sup> *Id.* at 491. The Court also observed, without analysis, that less restrictive alternatives appeared to be available to Congress, thus invalidating the Act under *Central Hudson's* fourth prong as well. *Id.*

<sup>97</sup> 517 U.S. 484 (1996).

<sup>98</sup> *Id.* at 516. The challenged statutes were two separate 1956 enactments of the Rhode Island Legislature. *Id.* at 489. The first prohibited in-state vendors and out-of-state manufacturers, wholesalers, and shippers from advertising the price of any alcoholic beverage in any manner. *Id.* The only exception to this statute was for price tags on liquor inside a licensed vendor's premises so long as the price tags or signs were not visible from outside the store. *Id.* The second statute categorically prohibited the publication or broadcast of any advertisements referring to liquor prices including the prices of stores located in states other than Rhode Island. *Id.* at 489-90.

<sup>99</sup> *Id.* at 504.

<sup>100</sup> *Id.* at 505-07 (observing that the state had presented no evidence to suggest that its prohibition on commercial speech would significantly reduce marketwide consumption). In making this finding, the Court emphasized that a party seeking to justify such a

Continuing its intensive third-prong analysis, the Court, in 1999, invalidated a federal statute restricting lawful gambling advertisements on First Amendment grounds in *Greater New Orleans Broadcasting Ass'n v. United States*.<sup>102</sup> In that case, the plaintiff desired to broadcast radio and television advertisements for lawful casino gambling in Louisiana and Mississippi but was prevented from doing so by a federal regulation that restricted such advertisements if they might also be received in nearby states where gambling was unlawful.<sup>103</sup> The statutory scheme enacted by Congress to address gambling, however, included a number of exemptions for certain types of gambling, such as Native American and charitable gaming.<sup>104</sup> These exemptions significantly curtailed the coverage of the statute at issue.<sup>105</sup> In defending a challenge brought against its advertising ban by the plaintiff on First Amendment grounds, the government asserted that it had substantial interests under *Central*

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sweeping prohibition of lawful speech must make a significant factual showing "not merely that its regulation will advance its interest, *but also that it will do so to a material degree.*" *Id.* at 505 (emphasis added) (citation and quotation marks omitted). The Court further observed that "speculation or conjecture" is "an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest." *Id.* at 507 (citation and quotation marks omitted).

<sup>101</sup> *Id.* at 516. The Court also found that the statutes at issue failed to meet *Central Hudson's* fourth prong, as less restrictive means such as a tax on liquor purchases or educational programs were available. *Id.* at 507. Another significant concern of the Court in *44 Liquormart* was the attempt by the state to entirely prohibit the dissemination of truthful, non-misleading commercial messages in order to protect its citizenry. *Id.* at 501-03. The Court observed that such paternalistic statutes "usually rest on the offensive assumption that the public will respond 'irrationally' to the truth." *Id.* at 503.

<sup>102</sup> 527 U.S. 173, 195-96 (1999).

<sup>103</sup> *Id.* at 180-81. The statute at issue was 18 U.S.C. § 1304, and its Federal Communications Commission ("FCC") implementing regulations was 47 CFR § 73.1211 (1998). *Id.* at 181. The statute provided that

Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined under this title or imprisoned not more than one year, or both.

18 U.S.C. § 1304 (1994).

<sup>104</sup> *Greater New Orleans Broad. Ass'n*, 527 U.S. at 178 (1999). The Court detailed at length the exemptions which had affected the coverage of § 1304 since its enactment. *Id.* at 178-80. Creating additional inconsistencies within the broadcasting ban were exemptions made for state lotteries and exemptions contained within a related sports-gambling statute for certain types of advertisements. *Id.* at 179.

<sup>105</sup> *Id.* at 178.

*Hudson* in reducing the social costs of gambling and in assisting states that prohibited gambling in doing so.<sup>106</sup> The government further asserted that its prohibition, by limiting the advertisements, directly advanced these interests.<sup>107</sup> The Court, however, did not agree. Instead, the Court found the statute fundamentally flawed because it was "pierced by exemptions and inconsistencies."<sup>108</sup> Because the regulatory scheme contained provisions that appeared to undermine the very goal Congress sought to further through the ban on broadcast advertising, the Court refused to believe that the ban directly advanced the government's interest.<sup>109</sup>

As recently as 2001, the Court continued this line of reasoning under *Central Hudson* and struck down portions of a Massachusetts statute regulating tobacco advertisements in *Lorillard Tobacco Co. v. Reilly*.<sup>110</sup> The regulation in question in *Lorillard* restricted point-of-sale advertising of tobacco products and required ads in retail establishments to be placed no lower than five feet from the floor.<sup>111</sup> The state's asserted goal in

<sup>106</sup> *Id.* at 185. In describing the "social costs" of gambling, the government noted that gambling "contributes to corruption and organized crime; underwrites bribery, narcotics trafficking, and other illegal conduct; imposes a regressive tax on the poor; and offers a false but sometimes irresistible hope of financial advancement." *Id.* (citation and quotation marks omitted).

<sup>107</sup> *Id.* at 189, 194. The government, in defending its first claimed interest, suggested that by limiting the advertisement of casino gambling, demand would be decreased, thus decreasing gambling's social costs. *Id.* at 189.

<sup>108</sup> *Id.* at 190. The Court stated that

We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under *Central Hudson*, however, because the flaw in the Government's case is more fundamental: The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.

*Id.*

<sup>109</sup> *Id.*; Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587, 642 (2000). Langvardt suggests that, following *Greater New Orleans Broadcasting*, the Court will now look beyond the statute being challenged when conducting a third-prong analysis to the broader regulatory framework containing the speech prohibition. *Id.* Langvardt observes that "[a] coherent regulatory policy—one that does not point simultaneously in different directions—now seems a prerequisite to any realistic opportunity to clear part three of the *Central Hudson* test." *Id.*

<sup>110</sup> 533 U.S. 525 (2001).

<sup>111</sup> *Id.* at 565. The statute in question was part of a much larger statutory scheme intended to combat perceived deceptive and unfair advertising practices and reduce tobacco use in Massachusetts. *Id.* at 533-34. The Court also invalidated a separate section

adopting this regulation was to curb the demand for tobacco products by minors by limiting youth exposure to tobacco advertising.<sup>112</sup> Once again, the Court invalidated the regulation under the third prong of *Central Hudson*, finding that the five-foot rule did not directly advance the state's goal.<sup>113</sup> The Court noted that not all children were under five feet in height and those that were certainly had the ability to look up and take in their surroundings.<sup>114</sup> In striking down the regulation, the Court observed that "[a] regulation cannot be sustained if it 'provides only ineffective or remote support for the government's purpose' . . . or if there is 'little chance' that the restriction will advance the State's goal."<sup>115</sup>

Thus, in its adoption and application of *Central Hudson*, the Court has expressed a willingness to extend First Amendment protection to commercial speech and has provided standards for judging restrictions on this type of speech. Accordingly, it is against these standards that any legislative effort to restrict telemarketing must be judged.

### III. THE CONSTITUTIONALITY OF PAST EFFORTS TO REGULATE TELEMARKETING

Just as the citizens of Alexandria, Louisiana, in *Breard*, would likely not have mourned the end of door-to-door sales calls, most people today would probably applaud either the elimination of the telemarketing industry or the placement of severe restrictions upon it.<sup>116</sup> However, proposed regulations of telemarketing must take into account the variety of competing concerns reflected by *Central Hudson*. Legitimate privacy expectations of consumers must be balanced not only against the First Amendment rights of companies who would use telemarketing as a means of advertising, but also against the First Amendment rights of consumers who may be willing to receive that information from

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of the Act that regulated outdoor tobacco advertising on First Amendment grounds. *Id.* at 555-65.

<sup>112</sup> *Id.* at 566.

<sup>113</sup> *Id.* Again, the Court additionally found a violation of *Central Hudson's* fourth prong. *Id.* Without analyzing other less restrictive means available to the state to decrease youth exposure to tobacco advertising, the Court merely observed that the means used by the state did not constitute a "reasonable fit" within the meaning of *Central Hudson*. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* (citations omitted).

<sup>116</sup> See Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 686 (2000) (noting studies indicating that approximately 75% of those surveyed were in favor of restrictions on telemarketing).

telemarketers.<sup>117</sup> As an asserted government interest under *Central Hudson*, privacy rights may be particularly important should a challenge to telemarketing regulation ever find its way to the Supreme Court. While the Court would likely not tolerate extensive bans placed on unsolicited telemarketing calls due to free speech concerns, the Court's recognition of the constitutional right to privacy would support significant restrictions on such calls.<sup>118</sup>

With or without these concerns in mind, Congress and most state legislatures have undertaken regulation of the telemarketing industry in one form or another.<sup>119</sup> The bulk of this legislation is directed at the use of automatic dialing and announcing devices ("ADADs").<sup>120</sup> Because

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<sup>117</sup> Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029, 1030 (1992).

<sup>118</sup> Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 104-05 (1986). The Court's precedents have consistently upheld the privacy right of individuals within their homes. Justice Brandeis once referred to "the right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). This notion was invoked by the Court to uphold a statute authorizing addressees to refuse delivery of unsolicited advertisements through the mail. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970) ("That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere[.] . . . [t]he asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain."). Likewise the Court upheld prohibitions on the use of a sound truck to broadcast speech due to its intrusion into the home. *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). The Court recently reiterated these sentiments by explaining that "the right to avoid unwelcome speech has special force in the privacy of the home." *Hill v. Colorado*, 530 U.S. 703, 717 (2000). In fact, the Court has explicitly stated that "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

<sup>119</sup> Joseph R. Cox, Note, *Telemarketing, the First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL'Y 403, 403 (1996) (citing a Ninth Circuit decision that reported that forty-one states and the District of Columbia had enacted telemarketing legislation directed at automatic dialing and announcing devices).

<sup>120</sup> See Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Statute or Law Pertaining to Telephone Solicitation*, 44 A.L.R. 5th 619, 619 (1996) (discussing the problems posed by ADADs, computerized dialing devices that automatically dial phone numbers to play pre-recorded messages and "which can and will literally call every number that exists"); see also Cox, *supra* note 119, at 404. Cox states that

ADADs were singled out for regulation because people found the absence of a live operator particularly frustrating. Additionally, when the technology was in its early stages, the computers sometimes tied up all the lines of a single business, in some cases hospitals, or failed to disconnect after the recipient hung up, thus creating safety concerns.

these regulations, and the subsequent challenges to them, provide background for analyzing the constitutionality of telemarketing legislation, a review is essential to understand how future challenges will be viewed. Therefore, this Note will briefly consider both federal and representative state efforts to regulate telemarketing and the most significant challenges to the regulation.<sup>121</sup>

A. *Federal Efforts: The Telephone Consumer Protection Act of 1991*

By enacting the Telephone Consumer Protection Act of 1991 ("TCPA"), "Congress took the first significant step in curbing what many perceived as an onslaught of telemarketing that had invaded American homes."<sup>122</sup> Responding to significant expansion of the telemarketing industry and consumer complaints, particularly involving the use of ADADs, Congress enacted the TCPA in order to "protect the privacy interests of residential telephone subscribers."<sup>123</sup> Federal legislation was viewed as being necessary due to the inadequacy of state efforts to reach interstate calls and the failure of the Federal Communications Commission ("FCC") to take affirmative action toward regulation of the problem.<sup>124</sup>

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But perhaps the most compelling reason for regulating ADADs was their potential proliferation and dogged efficiency: a single person operating 193 ADADs could call every U.S. residence once a week.

Cox, *supra* note 119, at 404. Illustrative of the problems posed by ADADs is the example of a New York mother who was unable to summon an ambulance to attend her collapsed child. James Barron, 'Junk' Phone Calls: Danger on the Line?, N.Y. TIMES, May 21, 1988, § 1, at 36, available at LEXIS, News & Business, News, Major Newspapers File. This situation was caused by an ADAD that refused to disconnect from the woman's telephone line despite her having hung up the phone. *Id.* Other examples include the use of ADADs to sell a subscription to Playboy magazine to a three-year-old and a new roof to another child in Dallas, Texas. *Id.*

<sup>121</sup> See *infra* Part III.A-D.

<sup>122</sup> Miller & Biggerstaff, *supra* note 116, at 668; The Telephone Consumer Protection Act, 47 U.S.C. § 227 (2000).

<sup>123</sup> S. REP. NO. 102-178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968. Among its findings, the Senate noted that the FCC received over 2,300 consumer complaints in 1990. *Id.* It was further noted that the telemarketing industry had revenues of approximately \$435 billion in 1990, an increase of over 400% from 1984. *Id.* at 1970. Part of the success of the telemarketing industry was attributed to the use of ADADs, which dramatically reduced the costs of telemarketing. *Id.* Data relied on by the Senate indicated that telemarketers used ADADs to call over seven million numbers in the United States daily. *Id.*

<sup>124</sup> *Id.* The Senate noted that, although over forty states had enacted legislation directed at the use of ADADs, such measures were of limited effectiveness because the states, unlike Congress, did not have jurisdiction over interstate calls. *Id.* The FCC had previously



The TCPA takes several steps to limit the types of telemarketing calls that can be made.<sup>125</sup> First, it prohibits any calls made by ADADs to emergency telephone numbers, to the telephone lines of patients in health care facilities, or to pagers, cellular telephones, or any service where the party called is responsible for the costs of the call.<sup>126</sup> Second, it bans all ADAD calls to residential telephone numbers, except for calls previously consented to or those made for emergency purposes.<sup>127</sup> Third, ADAD calls to fax machines or computers are prohibited.<sup>128</sup> Finally, the use of ADADs to occupy more than two telephone lines of a business at any one time is unlawful.<sup>129</sup> However, Congress specifically authorized the FCC, in implementing the TCPA, to exempt calls made for reasons other than commercial purposes.<sup>130</sup>

The TCPA provides for both private and government enforcement.<sup>131</sup> Individuals who have received two or more telephone calls prohibited by the act in any twelve-month period are entitled to injunctive relief plus actual damages or the sum of five hundred dollars, whichever is

determined that it should refrain from regulating unsolicited telemarketing calls and ADADs, viewing an outright ban on the latter as unconstitutional. *In re Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1024 (1980).

<sup>125</sup> See Cox, *supra* note 119, at 405.

<sup>126</sup> See 47 U.S.C. § 227(b)(1)(A) (exempting calls either consented to or made for emergency purposes); Cox, *supra* note 119, at 405.

<sup>127</sup> See 47 U.S.C. § 227(b)(1)(B); Cox, *supra* note 119, at 405. Congress provided that calls made under this provision could later be exempted by the FCC. 47 U.S.C. § 227(b)(1)(B).

<sup>128</sup> See 47 U.S.C. § 227(b)(1)(C); Cox, *supra* note 119, at 405.

<sup>129</sup> See 47 U.S.C. § 227(b)(1)(D); Cox, *supra* note 119, at 405.

<sup>130</sup> 47 U.S.C. § 227(b)(2)(B)(i) ("The Commission shall prescribe regulations to implement the requirements of this subsection. In [doing so], the Commission . . . may . . . exempt . . . calls that are not made for a commercial purpose."). The FCC did in fact exempt, among other types of calls, calls made for noncommercial purposes and those made by nonprofit organizations from the provisions of the Telephone Consumer Protection Act of 1991 ("TCPA"). See 47 C.F.R. § 64.1200(c) (2000). This different treatment of nonprofit organizations by Congress and the subsequent FCC regulations implementing the TCPA has been criticized as being an unconstitutional, content-based distinction between commercial and noncommercial speech. See Deborah L. Hamilton, Note, *The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional*, 94 MICH. L. REV. 2352, 2355 (1996). Hamilton suggests that this distinction fails the *Central Hudson* test because the means used by Congress in banning calls with recorded commercial, but not noncommercial, purposes does not fit the end of protecting the privacy of telephone consumers. *Id.* at 2376. Hamilton further argues, in looking at the TCPA's legislative history, that Congress failed to adequately demonstrate that recorded commercial advertisements cause harms that recorded messages serving other ends do not. *Id.* at 2377-80. *But see infra* text accompanying note 155 for the Ninth Circuit's decision on the TCPA's content neutrality.

<sup>131</sup> See 47 U.S.C. § 227(b)(3), (c)(5), (f)(1); Cox, *supra* note 119, at 405-06.

greater.<sup>132</sup> Should citizens fail to assert their own claims, states are authorized to bring civil actions on behalf of their residents providing similar relief.<sup>133</sup> Further, the TCPA explicitly provides that it does not preempt state laws imposing more restrictive regulations on intrastate telemarketing calls.<sup>134</sup>

Interestingly, Congress chose not to impose similar restrictions on live telemarketing calls even though many people likely find such calls as annoying as those made by ADADs.<sup>135</sup> Instead, the FCC was authorized to initiate rulemaking proceedings to implement the TCPA.<sup>136</sup> The FCC was given discretion to evaluate a number of alternative methods and procedures to regulate telemarketing calls.<sup>137</sup> These methods included the use of electronic databases, emerging telephone technologies, specially-marked telephone directories, and even "do-not-call" systems, presumably national in scope, which would likely have prohibited live telemarketing calls.<sup>138</sup> However, the FCC failed to adopt any of these alternative measures, opting instead to require individual telemarketing companies to maintain their own lists of consumers who express a desire not to be solicited by their company by telephone.<sup>139</sup>

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<sup>132</sup> See 47 U.S.C. § 227(c)(5); Cox, *supra* note 119, at 405-06.

<sup>133</sup> See 47 U.S.C. § 227(f)(1); Cox, *supra* note 119, at 406. Both the individual and government remedies provide for treble damages in the case of willful or knowing violations of the TCPA. 47 U.S.C. § 227(c)(5), (f)(1).

<sup>134</sup> See 47 U.S.C. § 227(e)(1); Cox, *supra* note 119, at 406. This "savings clause" preserves intact state laws that are more restrictive than the TCPA, preempting less-restrictive regulations by establishing broad, minimum standards for the states to follow or enhance. Miller & Biggerstaff, *supra* note 116, at 675.

<sup>135</sup> Michael E. Shannon, Note, *Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 389-90 (2001).

<sup>136</sup> 47 U.S.C. § 227(c)(1).

<sup>137</sup> *Id.* § 227(c)(1)(A).

<sup>138</sup> *Id.* President H.W. Bush, apparently reluctant to sign the TCPA into law because of its potential negative impact on businesses, did so with an express statement that the FCC was to interpret the TCPA in a manner which "preserve[s] legitimate business practices." 27 WEEKLY COMP. PRES. DOC. 1877 (Dec. 23, 1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1979. This perhaps explains the FCC's reluctance to broaden the scope of the TCPA.

<sup>139</sup> Shannon, *supra* note 135, at 390 n.74 (citing the statement of Andrew Barrett, Commissioner of the FCC at the time the regulations went into effect, who felt that "company-specific do-not-[call] lists" were "the most effective, easily implemented and the least costly of the methods proposed to curb unwanted telephone solicitations"). Under the FCC's regulations implementing the TCPA, each person or entity making telephone solicitations must establish a written policy for maintaining a do-not-call list of consumers who request to receive no further telephone sales calls and must maintain a record of the party's request for a ten-year period. 47 C.F.R. § 64.1200(e)(2)(i), (iii), (vi) (2000). The FCC, however, is presently considering changes to these regulations. See *infra* note 246.

The steps taken by the TCPA, at the time it was enacted, were an unprecedented attempt to reduce the intrusive effect of telemarketing on the privacy of residential telephone consumers.<sup>140</sup> Perhaps due to this fact, concerns were expressed from the TCPA's very inception as to its constitutionality, particularly with respect to its intrusion on the First Amendment's protection of speech.<sup>141</sup> However, despite the TCPA's apparent abridgment of commercial speech rights, courts have rejected several challenges to its constitutionality.<sup>142</sup>

## B. Challenges to the TCPA

### 1. *Moser v. FCC*

In 1992, the first significant challenge to the TCPA's constitutionality was brought in *Moser v. FCC*.<sup>143</sup> Kathryn Moser and her husband, operators of a small chimney-sweep business in Keizer, Oregon, relied on the use of ADADs to generate interest in their services.<sup>144</sup> The Mosers initially sought and obtained preliminary injunctive relief from the

<sup>140</sup> See *supra* note 122 and accompanying text.

<sup>141</sup> See S. REP. NO. 102-178, at 4 (1991), reprinted in 1991 U.S.C.C.A.N. 1968.

Some people have raised questions about whether S. 1462 [the TCPA] is consistent with the First Amendment protections of freedom of speech. The [Commerce, Science and Transportation] Committee believes that S. 1462 is an example of a reasonable time, place, and manner restriction on speech, which is constitutional. The reported bill, does not discriminate based on the content of the message. It applies equally whether the automated message is made for commercial, political, charitable, or other purposes. The reported bill regulates the manner (that is, the use of an artificial or prerecorded voice) of speech and the place (the home) where the speech is received.

*Id.* The Senate report went on to cite decisions of the Supreme Court that emphasized the legitimacy of such restrictions on speech when privacy was sought to be protected including *Kovacs v. Cooper*, 336 U.S. 77 (1949), and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *Id.*

<sup>142</sup> See William G. Phelps, Annotation, *Validity, Construction and Application of Telephone Consumer Protection Act* (47 U.S.C.A. § 227), 132 A.L.R. FED. 625, 630 (1996).

<sup>143</sup> 811 F. Supp. 541 (D. Or. 1992).

<sup>144</sup> *Id.* at 542. Kathryn Moser was also the president of the National Association of Telephone Operators, a named plaintiff in this matter, which represented small businesses employing telemarketing sales techniques. *Id.* The Mosers also successfully challenged an Oregon telemarketing statute regulating the use of ADADs. See *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993). The Oregon Supreme Court, applying the Oregon Constitution, held that the statute at issue drew unconstitutional distinctions between calls made for commercial versus noncommercial purposes. *Id.* at 1288. For discussion and criticism of this decision, see George Pitcher, Note, *Moser v. Frohnmayer: Oregon's Dangerous Approach to Protecting Commercial Speech*, 31 WILLAMETTE L. REV. 685 (1995).

TCPA's provisions while the Oregon District Court considered the First Amendment implications of the congressional scheme.<sup>145</sup> Thereafter, the court held that the TCPA's prohibition against the use of ADADs to send recorded messages was an unconstitutional burden on the Mosers' commercial speech.<sup>146</sup> The court reasoned that, because the TCPA, as implemented by the FCC, prohibited ADAD calls for commercial purposes while permitting the same calls for noncommercial uses, it impermissibly drew content-based distinctions between telemarketers.<sup>147</sup> The court, therefore, rejected a content-neutral time, place, or manner analysis and, instead, applied the *Central Hudson* test for restrictions on commercial speech.<sup>148</sup>

Although acknowledging the substantial government interest in protecting privacy, the court found that the TCPA failed the third and fourth prongs of *Central Hudson*.<sup>149</sup> The court reasoned that, because privacy was equally invaded by both commercial and noncommercial calls, the TCPA did not directly advance Congress' interest in protecting privacy.<sup>150</sup> The court also found the TCPA's ban on ADAD calls, while permitting telemarketing calls made by a human telemarketer, inconsistent with its stated interest in protecting privacy.<sup>151</sup> For these reasons, and because of concerns regarding the effectiveness of the statute, the court found that the TCPA did not possess the "reasonable

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<sup>145</sup> *Moser*, 811 F. Supp. at 546.

<sup>146</sup> *Moser v. FCC*, 826 F. Supp. 360, 367 (D. Or. 1993).

<sup>147</sup> *Id.* at 363. The court rejected the government's claim that the TCPA was, on its face, not content-based and that it was the FCC regulations that instead drew distinctions between the two types of speech, finding rather that the statute itself sufficiently distinguished among forms of speech. *Id.*

<sup>148</sup> *Id.* at 363-64.

<sup>149</sup> *Id.* at 365. The court relied heavily on *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), in its opinion as that case had been decided only two months earlier. See generally *id.* The Court in *Discovery Network* invalidated a Cincinnati regulatory scheme for lack of a "reasonable fit" between the city's interest in aesthetics and safety and its partial ban of newsracks on public property. *Discovery Network*, 507 U.S. at 417. For a statement of the *Discovery Network* decision, see *supra* notes 88-91 and accompanying text.

<sup>150</sup> *Moser*, 826 F. Supp. at 365-66 (the third prong). The court stated,

There is no . . . justification presented . . . in the bald assertion that banning commercial solicitations but not nonprofit solicitations furthers the protection of residential tranquility. Both kinds of telemarketing calls trigger the same ring of the telephone; both kinds of calls invade the home equally, and both risk interrupting the recipient's privacy equally . . . .

*Id.* at 366.

<sup>151</sup> *Id.*

fit" between legislative means and ends that *Central Hudson* and its progeny required.<sup>152</sup>

Two years later, the Ninth Circuit reversed the decision of the district court.<sup>153</sup> Finding that nothing in the TCPA itself *requires* the FCC to distinguish between commercial and noncommercial speech, the Ninth Circuit reasoned that the district court had erred in applying *Central Hudson*.<sup>154</sup> The court found instead that the TCPA should be

<sup>152</sup> *Id.* at 366-67 (utilizing the fourth prong). The court's concern for the effectiveness of the TCPA was based on evidence presented that indicated that calls banned by the statute represented less than three percent of all telemarketing calls received by Americans. *Id.* at 366. For a discussion of the "reasonable fit" requirement under *Central Hudson's* fourth prong, see *supra* note 84. This requirement was discussed at length by the Supreme Court in *Fox*:

What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served[;]" that employs not necessarily the least restrictive means but, as we have put it in other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

*Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989) (citations omitted). It should be noted that some courts view the "reasonable fit" requirement as part of *Central Hudson's* fourth prong. See, e.g., *Minnesota v. Casino Mktg. Group Inc.*, 491 N.W.2d 882, 891 (Minn. 1992). However, since the Court referred to both governmental means and ends in *Fox*, other courts have viewed the "reasonable fit" requirement as collapsing the third and fourth prongs of *Central Hudson* into a single inquiry. See *Lysaght v. New Jersey*, 837 F. Supp. 646, 650 n.5 (D.N.J. 1993). The district court's opinion in *Moser* triggered criticism of the TCPA's approach to the telemarketing problem. One writer suggests that the two primary distinctions made by the TCPA—the distinction between commercial and noncommercial calls and that between live and recorded solicitations—"bear[s] little relation" to the legitimate interest of protecting privacy." Howard E. Berkenblit, Note, *Can Those Telemarketing Machines Keep Calling Me?—The Telephone Consumer Protection Act of 1991 After Moser v. FCC*, 36 B.C. L. REV. 85, 109 (1994). Berkenblit goes on to suggest that all of the concerns of Congress in enacting the TCPA remain after its passage due to its failure to eliminate noncommercial and live telemarketing calls and that, in the end, "[b]y only banning ADADs used in commercial speech, Congress made a judgment about the content of the message, rather than the use of ADADs." *Id.* at 111-12.

<sup>153</sup> *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 519 U.S. 1161 (1995).

<sup>154</sup> *Id.* at 973 (finding the language directing the FCC to establish regulations and consider the exemption of noncommercial calls "permissive . . . not mandatory"). This finding, which is critical to determining which test to apply, seems a bit disingenuous given the wording of the TCPA. See *supra* note 130 and accompanying text; see also Paul S. Zimmerman, Note & Comment, *Hanging up on Commercial Speech: Moser v. FCC*, 71 WASH. L. REV. 571, 586-87 (1996) (asserting that the TCPA "on its face" distinguishes between commercial and noncommercial speech and that the Ninth Circuit "ignored both the plain

analyzed as a content-neutral time, place, or manner restriction on speech.<sup>155</sup> Applying this test, the court acknowledged the government's substantial interest in protecting residential privacy.<sup>156</sup> The court further reasoned, in light of the findings of Congress, that the TCPA was sufficiently narrowly tailored.<sup>157</sup> Finally, the court found that the TCPA left open ample alternative channels for communication of the telemarketer's message.<sup>158</sup> Therefore, the Ninth Circuit found the TCPA constitutional.<sup>159</sup>

## 2. Other Challenges

The Superior Court of New Jersey, Law Division, heard another early challenge to the TCPA's constitutionality in *Szefczek v. Hillsborough Beacon*.<sup>160</sup> In *Szefczek*, a pro se telephone consumer brought an action under the FCC regulations implementing the TCPA, which required telemarketing businesses to maintain company-specific "do-not-call" lists.<sup>161</sup> Since the defendant in this matter contended that the TCPA was unconstitutional, the United States intervened to defend the TCPA's constitutionality.<sup>162</sup> The court first found the relevant sections of the TCPA to be content neutral, as all telemarketers were subject to the "do-

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meaning of the statute and the evidence of legislative intent" to rule that the statute was not content based). *But see* Rita Marie Cain, *Call up Someone and Just Say 'Buy'—Telemarketing and the Regulatory Environment*, 31 AM. BUS. L. J. 641, 651 (1994) (suggesting that it was the district court's analysis in *Moser* that was flawed). For a statement of the time, place, or manner test, see *supra* note 70.

<sup>155</sup> *Moser*, 46 F.3d at 973.

<sup>156</sup> *Id.* at 974.

<sup>157</sup> *Id.* at 974-75 (citing the extensive evidence before Congress of the particular problem posed by ADADs and Congress' consideration of less-restrictive alternatives). The court, citing the Supreme Court's decision in *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993), also noted that Congress was entitled to regulate some telemarketing calls without prohibiting them all. *Id.* at 974 ("Nor do we require that the Government make progress on every front before it can make progress on any front.")

<sup>158</sup> *Id.* at 975 (suggesting the possibility of using live solicitation or taped messages introduced by live speakers, practices not proscribed by the TCPA).

<sup>159</sup> *Id.*

<sup>160</sup> 668 A.2d 1099 (N.J. Super. Ct. Law Div. 1995). Although a federal statute, the TCPA specifically authorizes a private right of action in state courts if such an action is permitted by state law. 47 U.S.C. § 227(b)(3) (2000).

<sup>161</sup> See *supra* note 139 and accompanying text. The plaintiff received several telephone calls from the same solicitor despite repeated requests to be removed from the telemarketer's list. *Szefczek*, 668 A.2d at 1101-02.

<sup>162</sup> *Id.* at 1102. As the court in *Szefczek* was deciding that case only days after the Ninth Circuit had issued its opinion in *Moser*, the court was forced to consider *Moser's* implications. *Id.* at 1103. The court, as a preliminary matter, found *Moser* inapposite as it arose under a different section of the TCPA. *Id.*

not-call" list requirements.<sup>163</sup> Thereafter, the court applied *Central Hudson* to the challenged portion of the TCPA.<sup>164</sup> The court found that Congress had a substantial governmental interest in enacting the TCPA and its subsequent regulations.<sup>165</sup> The court further found that the TCPA directly advanced the governmental interest in protecting privacy.<sup>166</sup> Finally, the court held that the TCPA and its regulations were narrowly tailored in that they did not restrict speech that was not intended to be restricted.<sup>167</sup>

Another section of the TCPA was tested in *Destination Ventures, Ltd. v. FCC*.<sup>168</sup> The plaintiff in *Destination Ventures*, a business that advertised seminars for travel agents by sending unsolicited faxed advertisements to travel agencies, brought First and Fifth Amendment challenges to the section of the TCPA banning such advertisements.<sup>169</sup> Applying *Central Hudson*, the district court found, despite somewhat less congressional concern for fax advertisements in the TCPA's legislative history, that Congress had a substantial governmental interest in regulating this type of communication.<sup>170</sup> Further, the court found that the banning of unsolicited fax advertisements directly advanced the government's interest.<sup>171</sup> The court further found the challenged portions of the TCPA to be sufficiently narrowly tailored to achieve the "reasonable fit" required for restrictions on commercial speech despite less restrictive

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<sup>163</sup> *Id.* at 1105-06. Interestingly, the court appeared to disagree with the Ninth Circuit in *Moser* by suggesting that the sections of the TCPA considered by the *Moser* court did distinguish between the messages being delivered on the basis of content. *Id.*

<sup>164</sup> *Id.* at 1106.

<sup>165</sup> *Id.* at 1108.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 1109 (finding that the relevant FCC regulations only restricted telephone solicitations during certain hours and then only when consumers requested to be placed on "do-not-call" lists). The court, after upholding the TCPA's constitutionality, awarded injunctive relief and damages of \$500 per call received by the plaintiff in violation of the TCPA and denied treble damages. *Id.* at 1110-11.

<sup>168</sup> 844 F. Supp. 632 (D. Or. 1994).

<sup>169</sup> *Id.* at 634. 47 U.S.C. § 227(b)(1)(C) (2000) provides that "[i]t shall be unlawful for any person . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." For a discussion of the "junk fax" problem addressed by this section of the TCPA and the cost-shifting associated with advertisers forcing fax recipients to pay for unsolicited ads, see Michael M. Parker, Note, *Fax Pas: Stopping the Junk Fax Mail Bandwagon*, 71 OR. L. REV. 457 (1992).

<sup>170</sup> *Destination Ventures*, 844 F. Supp. at 637.

<sup>171</sup> *Id.*

means being available to Congress.<sup>172</sup> Finally, the court upheld the TCPA against a Fifth Amendment equal protection challenge finding that, in the absence of any suspect class targeted by the statute, the provision clearly had a rational basis in protecting consumers from the burdens imposed by the receipt of unsolicited faxes.<sup>173</sup> This reasoning was affirmed by the Ninth Circuit on appeal, which underscored that Congress had achieved a reasonable fit between the TCPA's means and end.<sup>174</sup>

Similarly, the United States District Court for the Southern District of Indiana upheld the same portions of the TCPA against a commercial speech challenge in *Kenro, Inc. v. Fax Daily, Inc.*<sup>175</sup> The court in *Kenro* also found that the damage provisions of the TCPA did not violate the Due Process Clause of the Fifth Amendment despite the fact that no judicial review of damages was permitted by the statutorily-prescribed remedy.<sup>176</sup> In fact, with the exception of the district court opinion in *Moser* that was later reversed, the TCPA has been looked on with favor by each court to hear a challenge to it.<sup>177</sup> Given this acceptance of telemarketing regulation by the federal government, it is perhaps natural

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<sup>172</sup> *Id.* at 637-39. The court found *Discovery Network* inapposite because, unlike the ordinance at issue in that case, the TCPA served the specific purpose Congress meant for it to serve. *Id.* at 639.

<sup>173</sup> *Id.* at 639-40.

<sup>174</sup> *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56-57 (9th Cir. 1995) (refuting appellant's claim that there was no reasonable fit since other "noncommercial" unsolicited faxes were not banned and finding the TCPA's prohibition of unsolicited faxes "even-handed" because "it applies to commercial solicitation by any organization, be it a multinational corporation or the Girl Scouts").

<sup>175</sup> 962 F. Supp. 1162, 1167-69 (S.D. Ind. 1997) (applying *Central Hudson* and following the reasoning of the Ninth Circuit in *Destination Ventures*).

<sup>176</sup> *Id.* at 1167.

<sup>177</sup> *See, e.g., Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000) (joining five other circuits in concluding that the TCPA's grant of jurisdiction to state courts is not unconstitutional); *Int'l Sci. & Tech. Inst. v. Inacom Communications Inc.*, 106 F.3d 1146, 1157 (4th Cir. 1997) (finding no violation of equal protection under the TCPA despite the fact that private actions for violations of its provisions were permitted in the courts of some states and prohibited in others and that the TCPA did not impermissibly commandeer state courts in violation of the Tenth Amendment); *Hooters Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. Ct. App. 2000) (interpreting the TCPA as permitting private state court actions). *But see Missouri v. Am. Blast Fax, Inc.*, 196 F. Supp. 2d 920, 927-34 (E.D. Mo. 2002) (declaring portions of TCPA governing unsolicited fax advertisements unconstitutional under a *Central Hudson* third-prong analysis); *see also infra* Part IV.D.1.



that the majority of states would also attempt to protect the privacy of their citizens from the effects of telemarketing.<sup>178</sup>

### C. State Efforts to Regulate Telemarketing

By large measure, state legislation aimed at the problems caused by telemarketing has enjoyed approval in the courts similar to that of the TCPA.<sup>179</sup> Although much of the state legislation presently codified is directed at the problems caused by ADADs, new legislation is routinely being enacted around the nation.<sup>180</sup> Indeed, during the first half of 1999 alone, various state legislatures introduced more than 150 bills designed to regulate the telemarketing industry.<sup>181</sup>

The states vary in their approaches to telemarketing regulation. Many state statutes follow the example of the federal government and contain provisions similar to those of the TCPA.<sup>182</sup> For example, some states require telemarketing companies to establish and maintain their own "do-not-call" lists of consumers who request telemarketing companies not to contact them a second time.<sup>183</sup> Other states regulate the manner in which telemarketing can take place, restricting such things as the hours that telephone solicitation can be conducted or requiring live operators to first introduce themselves and ask the telephone consumer's consent to continue.<sup>184</sup> Other statutes deal more closely with the use of ADADs, either prohibiting their employment by telemarketers, or

<sup>178</sup> See *supra* note 119 and accompanying text. The TCPA is not the federal government's only response to the telemarketing industry. In 1994, in an attempt to address the emerging problem of interstate telemarketing fraud, Congress enacted the Telemarketing and Consumer Fraud Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (2000). This Act empowered the Federal Trade Commission to prescribe rules prohibiting deceptive or abusive telemarketing acts or practices. 15 U.S.C. § 6102. These regulations, known as the Telemarketing Sales Rule, are set forth in the Code of Federal Regulations. 16 C.F.R. § 310 (2001).

<sup>179</sup> See generally Zitter, *supra* note 120. State telemarketing regulation is not preempted by the TCPA due to the Act's "savings clause," which allows states to adopt regulations that are more restrictive than the TCPA. 47 U.S.C. § 227(e)(1) (2000); see *supra* note 134 and accompanying text.

<sup>180</sup> See Cox, *supra* note 119 (stating that, as of 1995 when *Moser* was decided by the Ninth Circuit, forty-one states and the District of Columbia had enacted statutes addressing the use of ADADs).

<sup>181</sup> Shannon, *supra* note 135, at 393.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* (citing laws in the states of Nebraska, Maine, and Rhode Island that require such lists).

<sup>184</sup> See, e.g., 815 ILL. COMP. STAT. ANN. 413/15 (West 1999).

allowing them to be utilized subject to certain requirements.<sup>185</sup> Although surprisingly few constitutional challenges have been brought against state telemarketing regulations, a few of the cases that have been decided, like the cases interpreting the TCPA, provide insight into how future challenges may be viewed.

1. *Lysaght v. New Jersey*

One of the earliest challenges to a state telemarketing statute, and the only currently valid precedent striking down telemarketing regulations on constitutional grounds, is *Lysaght v. New Jersey*.<sup>186</sup> In *Lysaght*, both individual telemarketers and the National Association of Telecomputer Operators brought suit to enjoin the State of New Jersey and its Attorney General from enforcing its new law restricting the use of ADADs for commercial purposes.<sup>187</sup> In considering the burden placed on the commercial free speech rights of the plaintiffs, the court rejected the State's invitation to analyze the statute as content neutral under the time, place, or manner test.<sup>188</sup> Instead, because the content of the message was

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<sup>185</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-2919 (West 2001) (criminalizing the use of ADADs if used "for the purpose of soliciting persons to purchase goods or services"); CAL. PUB. UTIL. CODE § 2874(a) (West 1994) (prohibiting the use of ADADs unless first introduced by a live operator who obtains consent to play any recorded message). Indiana adopted a law regulating the use of ADADs in 1988. See IND. CODE ANN. § 24-5-14-1 (West 1995). This statute prohibits the use of ADADs for "commercial telephone solicitation" unless the device is designed and operated so that it will disconnect within ten seconds after the telephone consumer hangs up. *Id.* §§ 24-5-14-3, 24-5-14-6. The statute exempts the use of ADADs when used for public purposes, when used to inform employees of work schedules, and in cases where the telephone consumer has a pre-existing business relationship or has consented to receive such calls. *Id.* §§ 24-5-14-3, 24-5-14-5. The statute specifically forbids the use of ADADs to call health care providers, law enforcement agencies, or fire departments. *Id.* § 24-5-14-12.

<sup>186</sup> 837 F. Supp. 646 (D.N.J. 1993). For *Lysaght's* precedential value, see Cox, *supra* note 119, at 418-19; see generally Zitter, *supra* note 120.

<sup>187</sup> *Lysaght*, 837 F. Supp. at 646-47. Plaintiffs alleged both that the New Jersey statute violated their First Amendment rights and that the statute was preempted by the TCPA. *Id.* at 648. The challenged statute provided that "[a] caller shall not use a telephone or telephone line to contact a subscriber to deliver a recorded message for the purpose of delivering commercial advertisement to the subscriber, unless the recorded message is introduced by an operator who shall obtain the subscriber's consent before playing the recorded message . . ." N.J. STAT. ANN. § 48:17-28 (West 1998). In 1997, the statute was amended to apply only to intrastate calls and all calls made by ADADs, for all purposes except emergencies. *Id.*

<sup>188</sup> *Lysaght*, 837 F. Supp. at 649.

determinative of whether a particular message was prohibited by the statute, the court applied *Central Hudson*.<sup>189</sup>

As neither the first nor second prongs of *Central Hudson* were disputed by the parties, the court turned immediately to whether the New Jersey statute possessed the reasonable fit required between the legislature's ends and the means used to achieve them.<sup>190</sup> In answering this question, the court considered whether the distinctions drawn by the statute, those between recorded and live calls, and those between commercial and noncommercial messages, were reasonably related to New Jersey's interest in protecting privacy.<sup>191</sup> Drawing support from the district court's opinion in *Moser*, the court held that the distinctions drawn by the statute could not be reconciled with its purpose and, therefore, found that the statute failed the reasonable fit requirement.<sup>192</sup> Put simply, the court stated, "[B]oth commercial and noncommercial prerecorded messages equally disrupt residential privacy . . . [and] all telemarketing calls, whether non-recorded, introduced by a live operator, or prerecorded, threaten the privacy of the home."<sup>193</sup>

Because the *Lysaght* Court imported reasoning from the district court's opinion in *Moser* that was later reversed, the precedential value of *Lysaght* has been questioned.<sup>194</sup> However, as different statutes and circuits were involved in each case, the *Lysaght* decision has not been overturned and may well appear attractive to courts in the future when considering similar statutes due to the confused reasoning of the Ninth Circuit's *Moser* opinion.<sup>195</sup> If for no other reason, *Lysaght* remains relevant for its singular willingness to strike down telemarketing regulations as unconstitutional.

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 650. In discussing the strength of the state interest, the court, considering U.S. Supreme Court precedents on privacy, found the state interest to be particularly strong due to the ability of telemarketing calls to hold the called party captive in his own home. *Id.* For a discussion of the Court's recognition of the privacy right, see *supra* note 118 and accompanying text.

<sup>191</sup> *Lysaght*, 837 F. Supp. at 650.

<sup>192</sup> *Id.* at 651-52. The court also relied extensively on the Supreme Court's opinion in *Discovery Network*. *Id.* at 650-52; see also *supra* notes 88-91.

<sup>193</sup> *Lysaght*, 837 F. Supp. at 651, 653.

<sup>194</sup> See Cox, *supra* note 119, at 418.

<sup>195</sup> See *supra* note 154 and accompanying text.

## 2. Minnesota Challenges

Two challenges were brought against a Minnesota statute governing the use of ADADs, which, unlike the New Jersey law, makes only limited distinctions between commercial and noncommercial speech.<sup>196</sup> The primary purpose of the statute is instead to prohibit the use of ADADs, unless any message is first preceded by a live operator who obtains the called party's consent to play the message.<sup>197</sup>

The first challenge brought against this statute, *Minnesota v. Casino Marketing Group, Inc.*,<sup>198</sup> was initiated before the TCPA was enacted. Like *Lysaght*, the challenge was brought by telemarketers on First Amendment grounds to enjoin the enforcement of Minnesota's statute.<sup>199</sup> Despite the careful wording of the statute, the Minnesota Supreme Court found it to be clearly directed at commercial speech and applied *Central Hudson*.<sup>200</sup> Although the court downplayed the state's asserted interest of preventing fraud by enacting the statute, it did find the State's interest in protecting privacy to be overwhelming due to the "startling" efficiency of ADADs and the intrusion they represented on citizens' privacy.<sup>201</sup>

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<sup>196</sup> MINN. STAT. ANN. §§ 325E.26-325E.31 (West 1995). The statute does define "commercial telephone solicitation;" however, only the time of day restrictions in the statute apply to that term. *Id.* § 325E.30. Despite its content neutrality, Minnesota amended the statute in 1994, apparently in an effort to make the statute more content neutral in the wake of *Moser*, *Lysaght*, and *Discovery Network*. *Cox*, *supra* note 119, at 414.

<sup>197</sup> MINN. STAT. ANN. § 325E.27. This section and the time of day restrictions do not apply to messages from school districts to parents, messages advising employees of their work schedules, or messages between parties with business or personal relationships. *Id.* The statute also exempts calls by ADADs that have been knowingly requested or consented to. *Id.*

<sup>198</sup> 491 N.W.2d 882 (Minn. 1992).

<sup>199</sup> *Id.* at 884-85. The telemarketers' claim was actually a counterclaim to suits filed against them under the statute and a subsequent motion by the State for an order enjoining their use of ADADs. *Id.* A state constitutional claim was also made under a provision similar to the First Amendment. *Id.* However, since Minnesota interpreted its own provision in accordance with the First Amendment, the First Amendment analysis was dispositive of the state issue. *Id.* at 885 n.2.

<sup>200</sup> *Id.* at 886-87.

<sup>201</sup> *Id.* at 888. Justice Coyne's description of the telephone's capacity to intrude on privacy has been widely quoted:

The telephone . . . is uniquely intrusive. The caller, who can convey messages which very young children can understand, is able to enter the home for expressive purposes without contending with such barriers as time or distance, doors or fences . . . . Moreover, the shrill and imperious ring of the telephone demands immediate attention.

The court's analysis of the statute in light of *Central Hudson's* third prong stands in rather stark contrast to the *Lysaght* court's reasoning. The *Casino Marketing* court held that the statute did directly advance the state's interest even though ADADs could still be used if first introduced by a live operator.<sup>202</sup> The court held that this requirement was met because the statute both reduced the efficiency with which such calls could be made and because live operators, as opposed to ADADs, could ascertain the propriety of proceeding to play a recorded message.<sup>203</sup> The court specifically rejected the contention that the statute failed to directly advance the state interest because charitable organizations were exempted from the statute's definition of commercial telephone solicitation, stating that

[The statute] directly advances the state's objective of protecting residential privacy by reducing the number of unsolicited commercial telephone calls. The state is free to believe that commercial telephone solicitation is a more acute problem than charitable solicitation; and the legislature is free to determine that in the light of Minnesotans' recognized sense of community, the enhancement of the quality of life in this state by charitable contributions is of greater value than

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Unlike the unsolicited bulk mail advertisement found in the mail collected at the resident's leisure, the ring of the telephone mandates prompt response, interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom. Indeed for the elderly or disabled, the note of urgency sounded by the ring of the telephone signals a journey which may subject the subscriber to the risk of injury. Unlike the radio or television . . . the telephone [deprives the subscriber] of the ability to select the expression to which he or she will expose herself or himself.

*Id.* at 888-89.

<sup>202</sup> *Id.* at 890. The court felt that requiring live operators to introduce ADAD calls was a reasonable response to the problem posed by the machines because that requirement balanced the speech and privacy interests at stake. *Id.*

<sup>203</sup> *Id.* The court rejected the argument that the statute failed to directly advance the state's interest because live operators intrude similarly on privacy. *Id.* The court held that "[a] regulation of commercial speech does not fail to directly advance the state's substantial interest merely because it does not eradicate all the evils that offend that interest." *Id.*; see also *supra* note 157 (noting the Ninth Circuit's reliance on underinclusiveness in *Moser*).

generating profit through commercial telephone sales messages.<sup>204</sup>

Finally, the court found that, because the statute imposed no blanket restrictions on the use of ADADs and allowed their use when introduced by a live operator, it was sufficiently narrowly tailored to achieve the reasonable fit required by the fourth prong of *Central Hudson*.<sup>205</sup>

The second challenge to the Minnesota law was heard by the Eighth Circuit in *Van Bergen v. Minnesota*.<sup>206</sup> The *Van Bergen* court reviewed the same statute at issue in *Casino Marketing* but applied a different test to reach its determination that political, rather than commercial, speech was restrained in that case.<sup>207</sup> Finding exemptions within the statute to be based on the type of relationship between the caller and consumer, not based on content, the Eighth Circuit applied a time, place, or manner analysis.<sup>208</sup> Applying the test, the court had no difficulty finding that the Minnesota legislature had a substantial interest in limiting the use of unsolicited ADAD calls.<sup>209</sup> The court further held that due to the live operator option and the availability of other methods of communicating the message at issue, the statute was narrowly tailored and left open ample alternative channels of communication.<sup>210</sup> Therefore, the court upheld the statute as a constitutional time, place, or manner restriction on speech.<sup>211</sup>

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<sup>204</sup> *Casino Mktg.*, 491 N.W.2d at 890-91. For an analysis of restrictions on the use of telemarketing by charitable organizations, see *infra* note 280.

<sup>205</sup> *Casino Mktg.*, 491 N.W.2d at 891. A dissenting opinion found that the statute failed both the third and fourth prongs of *Central Hudson* because calls introduced by live operators intruded similarly on privacy and perhaps were more difficult to terminate by the called party than calls placed directly by ADADs. *Id.* at 892 (Tomljanovich, J., dissenting). Because the regulation provided "only ineffective, remote support for the government's purpose," the dissent felt the statute neither directly advanced the government's interest in privacy nor possessed the required reasonable fit. *Id.*

<sup>206</sup> 59 F.3d 1541 (8th Cir. 1995).

<sup>207</sup> *Id.* at 1553. The challenger in *Van Bergen* was a gubernatorial candidate who sought to use ADADs as an inexpensive means of campaigning. *Id.* at 1546.

<sup>208</sup> *Id.* at 1551, 1553 ("[T]he exceptions . . . all rest on a single premise: that the caller has a relationship with the subscriber implying the subscriber's consent to receive the caller's communications.").

<sup>209</sup> *Id.* at 1554-55 (finding telephone calls more intrusive than the door-to-door solicitation problems addressed by the Supreme Court in *Breard* and *Martin v. City of Struthers* "because the recipient must respond once to each caller" and cannot post a 'no solicitation' sign on his phone).

<sup>210</sup> *Id.* at 1555-56.

<sup>211</sup> *Id.* at 1556.

3. *Bland v. Fessler*

A telemarketer's First Amendment challenge to two California ADAD statutes met a fate similar to the Minnesota challenges when considered by the Ninth Circuit in *Bland v. Fessler*.<sup>212</sup> These statutes, similar to the Minnesota statute, essentially prohibited the use of ADADs unless first introduced by a live operator who has obtained the consumer's consent to play the message.<sup>213</sup> One statute, "the utilities statute," regulated all users of ADADs, while the other, "the civil statute," was directed only at prohibiting business uses of ADADs as unfair or deceptive practices.<sup>214</sup>

Turning first to the utilities statute, the court, following the lead of its opinion in *Moser* and that of the Eighth Circuit in *Van Bergen*, applied a time, place, or manner test.<sup>215</sup> Finding the statute's exceptions to be based not on content, but on some pre-existing relationship that implied consent to receive ADAD calls, the court found the statute to be content neutral.<sup>216</sup> Next, consistent with all other courts so far cited, the court found California's interest in protecting its citizens' privacy to be significant.<sup>217</sup> Finally, the court found that the statute was narrowly tailored in that no less restrictive means were "readily apparent" and that the statute left ample alternative channels of communication open to disseminate messages.<sup>218</sup>

Turning to the civil statute, the court employed *Central Hudson* because only commercial speech was restrained by the regulation.<sup>219</sup>

<sup>212</sup> 88 F.3d 729 (9th Cir. 1996). The statutes are: CAL. CIV. CODE § 1770(a)(22) (West 1998) (the "civil statute"); CAL. PUB. UTIL. CODE §§ 2871-2876 (West 1994) (the "utilities statute").

<sup>213</sup> CAL. CIV. CODE § 1770(a)(22)(A); CAL. PUB. UTIL. CODE § 2874. Exceptions were made by the utilities statute for, inter alia, calls between parties with existing business relationships, calls made by nonprofit organizations to their members, calls made by schools reporting attendance problems, calls made by utility companies reporting service problems or emergencies, or calls made by public safety officials. CAL. PUB. UTIL. CODE § 2872. California's statute is unique in that consumers can expressly consent to receive calls made by any ADADs. *Id.* § 2873.

<sup>214</sup> *Bland*, 88 F.3d at 738.

<sup>215</sup> *Id.* at 733.

<sup>216</sup> *Id.* For a list of the pre-existing relationships, see *supra* note 213.

<sup>217</sup> *Bland*, 88 F.3d at 734.

<sup>218</sup> *Id.* at 736-37. The court specifically addressed the prospect of establishing a state-wide "do-not-call" list and found such an alternative less attractive as it placed the burden on the public rather than the telemarketer and because it forced citizens to make an "all or nothing choice" about receiving pre-recorded messages. *Id.* at 736.

<sup>219</sup> *Id.* at 738-39.

Importing its reasoning from the analysis of the utilities statute, the court quickly concluded that the state interest again was substantial and that the regulation possessed the "reasonable fit" necessary under the test.<sup>220</sup>

*D. Effect of Precedent on Future Challenges to Telemarketing Regulation*

In reviewing constitutional challenges to both federal and state telemarketing regulations to date, it is clear that courts are quite willing, and perhaps even anxious, to uphold such legislation.<sup>221</sup> In virtually every facial challenge to the constitutionality of a telemarketing regulation, the regulation has been upheld.<sup>222</sup> The only major exceptions are *Lysaght* and the district court opinion in *Moser*, which was later overruled by the Ninth Circuit.<sup>223</sup>

One initial difficulty in synthesizing these cases is that the courts, analyzing differing statutes, have applied different tests to judge their constitutionality.<sup>224</sup> Courts viewing the challenged statute as drawing content-based distinctions between telemarketers, such as the *Lysaght* court and the district court in *Moser*, have applied the *Central Hudson* test.<sup>225</sup> However, courts viewing distinctions made between telemarketers as content neutral, such as the *Szefczek* court and the Ninth Circuit in *Moser*, have applied either *Central Hudson* or the time, place, or

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<sup>220</sup> *Id.* at 739.

<sup>221</sup> See *Cox*, *supra* note 119, at 419. Indeed, a wide variety of telemarketing regulations have been upheld against constitutional and other challenges. See generally *Zitter*, *supra* note 120. For example, a West Virginia statute banning telephone solicitation of pre-need funeral services was upheld under *Central Hudson*. *Nat'l Funeral Serv., Inc. v. Rockefeller*, 870 F.2d 136, 144-46 (4th Cir. 1989). Likewise, annual fee and bonding requirements for telemarketers have been found constitutional. *Erwin v. Nevada*, 908 P.2d 1367, 1370-71 (Nev. 1995). Prohibitions on telephone solicitation by medical providers have also been upheld due to the substantial government interest in regulating the medical profession. *Desnick v. Dep't of Prof'l Regulation*, 665 N.E.2d 1346, 1356-60 (Ill. 1996). Telemarketing regulations singling out specific businesses have also been upheld against equal protection challenges. *Erwin*, 908 P.2d at 1372-73 (upholding fee and bonding requirements for telemarketers engaged in sports information services). But see *Tex. State Troopers Ass'n v. Morales*, 10 F. Supp. 2d 628, 636 (N.D. Tex. 1998) (holding that provisions of the Texas Law Enforcement Telephone Solicitation Act, which created disclosure requirements applying only to charitable organizations run by law enforcement agencies, violated the equal protection clause).

<sup>222</sup> See *supra* Part III.B-C.

<sup>223</sup> See *supra* Part III.B-C.

<sup>224</sup> See *Cox*, *supra* note 119, at 419-20.

<sup>225</sup> See *supra* notes 147-48 and 188-89 and accompanying text.



manner test.<sup>226</sup> However, it has been observed that the two tests are substantially similar, demanding essentially the same requirements of restrictions on speech.<sup>227</sup> Under either approach, the government must demonstrate that the challenged regulation is designed to protect a substantial or significant state interest.<sup>228</sup> Similarly, each test imposes a "reasonable fit" requirement between the government's ends and the means used to achieve those ends.<sup>229</sup>

The significant government interest requirement appears to pose no obstacle to telemarketing legislation. No court analyzing a telemarketing regulation to date has failed to find that the regulation was designed to serve a substantial government interest.<sup>230</sup> By far, the courts have consistently found the government's interest in protecting the privacy of

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<sup>226</sup> See *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (applying the time, place, or manner test); *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099, 1106 (N.J. Super. Ct. Law Div. 1995) (applying *Central Hudson*). Understandably, where the challenged statute clearly restricts only commercial speech, the courts have applied *Central Hudson*. See *Bland v. Fessler*, 88 F.3d 729, 738-39 (9th Cir. 1996) (analyzing the "civil statute"); *Destination Ventures Ltd. v. FCC*, 844 F. Supp. 632, 637 (D. Or. 1994); *Minnesota v. Casino Mktg. Group Inc.*, 491 N.W.2d 882, 886-87 (Minn. 1992). Likewise, when noncommercial speech is restrained by a telemarketing statute, *Central Hudson* is inapplicable and a time, place, or manner analysis is used by the courts so long as the restriction is content neutral. See *Bland*, 88 F.3d at 733 (analyzing the "utilities statute"); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1553 (8th Cir. 1995).

<sup>227</sup> See *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987) (stating that the *Central Hudson* and the time, place, or manner tests were "substantially similar" because both tests require a balancing of the governmental interest against the magnitude of the restriction on speech); *Moser*, 46 F.3d at 973 ("[W]e note that the tests for time, place, and manner restrictions for content-neutral speech and regulations for commercial speech regulations are essentially identical."); see also *Cox*, *supra* note 119, at 419. But see *supra* notes 153-59 and accompanying text (discussing the Ninth Circuit's reversal in *Moser* which suggests that *Central Hudson* and the time, place, or manner analysis can reach different results on the same facts).

<sup>228</sup> See *Cox*, *supra* note 119, at 420. The second prong of the *Central Hudson* test inquires whether a substantial government interest has been asserted to justify the restriction on speech. See *supra* note 80 and accompanying text. Under the time, place, or manner analysis, the restrictions on speech must be narrowly tailored to serve a significant government interest. See *supra* note 70.

<sup>229</sup> See *supra* notes 84 and 152 (discussing *Central Hudson's* "reasonable fit" requirement). The "reasonable fit" requirement of the time, place, or manner test is found in its second prong, which requires that the speech regulation be narrowly tailored to serve a significant government interest. See *supra* note 70.

<sup>230</sup> See *Bland*, 88 F.3d at 734, 739; *Van Bergen*, 59 F.3d at 1554-55; *Moser*, 46 F.3d at 974; *Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997); *Destination Ventures*, 844 F. Supp. at 637; *Lysaght v. New Jersey*, 837 F. Supp. 646, 649 (D.N.J. 1993); *Moser v. FCC*, 826 F. Supp. 360, 364 (D. Or. 1993); *Casino Mktg.*, 491 N.W.2d at 888-89; *Szefczek*, 668 A.2d at 1108.

the home from the intrusions posed by telemarketing to be the most compelling interest proffered.<sup>231</sup> Other interests, such as fraud prevention and efficiency in business administration, have also been suggested as justifying restrictions on telemarketing.<sup>232</sup> However, none has been found to be as persuasive as the privacy argument.<sup>233</sup>

Given the degree to which it is discussed in the preceding cases, the apparent key to the constitutionality of telemarketing regulation seems to lie in its "reasonable fit" within the meaning of *Central Hudson* and subsequent cases spelling out this requirement.<sup>234</sup> The main inquiry under this prong of *Central Hudson* is whether government, in drafting its legislation, has been careful to choose means that directly advance its ends.<sup>235</sup> In examining the cases to date, it appears that the only significant potential pitfall for telemarketing regulations under *Central Hudson* arises when distinctions are made between the types of calls made or when exemptions from regulation are made for some calls but not others.<sup>236</sup> This situation was critically examined in both the district courts' opinions in *Moser* and in *Lysaght* where the challenged statutes made distinctions between commercial and noncommercial calls and between live and recorded telemarketing calls.<sup>237</sup> Both of these courts, in striking down telemarketing legislation, found that the underinclusive nature of the statutes did not directly advance the government's interest in protecting privacy, thus failing *Central Hudson*.<sup>238</sup> Therefore,

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<sup>231</sup> See Cox, *supra* note 119, at 420; see also *supra* text accompanying note 193.

<sup>232</sup> See Cox, *supra* note 119, at 420; see also *supra* text accompanying note 193.

<sup>233</sup> See Cox, *supra* note 119, at 420.

<sup>234</sup> See *Kenro*, 962 F. Supp. at 1167-69; *Destination Ventures*, 844 F. Supp. at 637-39; *Lysaght*, 837 F. Supp. at 650-53; *Moser*, 826 F. Supp. at 365; *Casino Mktg.*, 491 N.W. 2d at 890-993; *Szefczek*, 668 A.2d at 1109; see also *supra* Part II.D (discussing the Supreme Court's most recent cases applying the "reasonable fit" requirement).

<sup>235</sup> See *supra* notes 84 and 152 (discussing the "reasonable fit" requirement).

<sup>236</sup> Such distinctions were made by the statutes in both *Moser* (the district court opinion) and *Lysaght*, the only precedents striking down telemarketing legislation under *Central Hudson*. See *supra* notes 143-52 and 186-93 and accompanying text. The "reasonable fit" requirement was also a source of debate between the majority and dissent in *Casino Mktg.* See *supra* notes 202-205 and accompanying text.

<sup>237</sup> See *Lysaght*, 837 F. Supp. at 651-52; *Moser*, 826 F. Supp. at 365-66.

<sup>238</sup> See *Lysaght*, 837 F. Supp. at 651-52; *Moser*, 826 F. Supp. at 365-66. But see *Casino Mktg.*, 491 N.W.2d at 890 (finding exemptions made to telemarketing legislation to be allowable). The Minnesota Supreme Court in *Casino Marketing* reasoned that that state's legislature was free to find some types of telemarketing calls more problematic than others and to eradicate some of the evils posed by telemarketing calls without eliminating all of them. *Id.*

legislatures should be wary of including too many exemptions in telemarketing legislation.<sup>239</sup>

At the same time, telemarketing regulations must not be overinclusive. A blanket ban on all telemarketing would similarly run afoul of *Central Hudson's* directive of a "reasonable fit" because it would likely not be sufficiently narrowly tailored.<sup>240</sup> Such a ban would proscribe too much speech, preventing those who actually wish to receive telemarketing calls from being able to do so.<sup>241</sup> Therefore, any future legislative efforts to restrict telemarketing should be wary of both underinclusiveness and overinclusiveness. Legislatures should endeavor to create statutes with limited exemptions that specifically target privacy concerns, prohibiting telemarketing calls to those bothered by them, while allowing those who wish to receive such calls to be able to do so.

#### IV. ANALYZING THE FUTURE OF TELEMARKETING REGULATION: STATE "DO-NOT-CALL" LEGISLATION IN LIGHT OF *CENTRAL HUDSON*

This Part examines potential First Amendment problems with the latest embodiment of telemarketing legislation—state "do-not-call" statutes. The Part begins by introducing "do-not-call" laws, the most recent attempt by states to combat telemarketers.<sup>242</sup> Secondly, this Part presents the basic problem with these statutes both from a consumer's and a constitutional perspective: the exemptions placed within the statutes by state legislatures.<sup>243</sup> Next, the Part briefly discusses Indiana's "do-not-call" statute in light of these considerations.<sup>244</sup> Finally, the Part discusses the First Amendment implications of the exemptions in light of *Central Hudson* and the Court's most recent cases interpreting it.<sup>245</sup>

##### A. *The "Do-Not-Call" Phenomenon*

The most recent response to the problems associated with telemarketing, and one that has the capacity to avoid overbreadth problems by specifically targeting individuals bothered by the practice,

<sup>239</sup> See *infra* Part IV.B.

<sup>240</sup> See Cox, *supra* note 119, at 421.

<sup>241</sup> *Id.*; see also *supra* text accompanying note 67 (discussing the value of commercial speech to some in a free market economy).

<sup>242</sup> See *infra* Part IV.A.

<sup>243</sup> See *infra* Part IV.B.

<sup>244</sup> See *infra* Part IV.C.

<sup>245</sup> See *infra* Part IV.D.

is the state "do-not-call" statute.<sup>246</sup> Such statutes, taking advantage of the TCPA's "savings clause," which allows states to enact telemarketing legislation that is more restrictive than the TCPA, authorize the state to create a database of its citizens who have expressly objected to receiving telemarketing calls.<sup>247</sup> This "do-not-call" list is then compiled and must

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<sup>246</sup> See generally Cox, *supra* note 119, at 421 (discussing how privacy concerns might be addressed by future telemarketing legislation); Shannon, *supra* note 135, at 408-11 (discussing the advent of state "do-not-call" statutes). Although only statewide "do-not-call" lists presently exist, a national "do-not-call" database was considered and rejected by the FCC in its 1992 report and order implementing the TCPA. *In re Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, 8761 (1992), 1992 WL 690928 [hereinafter FCC Rules]. In considering this option, the FCC concluded that a nationwide database would be expensive as well as difficult to organize and maintain. *Id.* at 8758 (citing estimates of between twenty and eighty million dollars in first-year operating costs and twenty-million dollar estimates for succeeding years). Also troublesome to the FCC was the fact that consumers would be forced to make "an all or nothing choice [to] either reject all telemarketing calls, even those which the consumer might wish to receive, or accept all telemarketing calls, including those which the consumer does not wish to receive." *Id.* at 8759. Additionally, the FCC was concerned that consumers would still be disappointed even if a nationwide database was compiled due to timing considerations and exemptions that would exclude some businesses and organizations. *Id.* at 8758-59. Furthermore, the FCC was concerned that such a database would continually be out of date and that it would be difficult to protect, leading to possible abuses by unscrupulous telemarketers. *Id.* at 8759. Therefore, the FCC summarized: "In view of the many drawbacks of a national do-not-call database, and in light of the existence of an effective alternative (company-specific do-not-call lists), we conclude that this alternative is not an efficient, effective, or economic means of avoiding unwanted telephone solicitations." *Id.* at 8761. *But see* Shannon, *supra*, note 135, at 397-98 (noting that one year after the TCPA's passage, a House subcommittee found company-specific "do-not-call" lists to be less effective than envisioned and urged the adoption of a nationwide "do-not-call" database). Shannon argues that a national "do-not-call" system "may be the most uniform and cost-efficient way to reduce unwanted telemarketing calls." *Id.* at 418. Perhaps due to the recent explosion of state "do-not-call" statutes, the federal government has again begun investigating the possibility of establishing a national database. *Government Wants Telemarketing Limits*, POST TRIB. (Porter Co., Ind.), Jan. 23, 2002, at A9. The Federal Trade Commission is presently investigating the feasibility of a national "do-not-call" list in addition to other regulations of the telemarketing industry. See <http://www.ftc.gov/bcp/online/edcams/donotcall/index.htm> (last visited Nov. 8, 2002) (soliciting comments on a proposal by the Federal Trade Commission to establish a national "do-not-call" registry). Besides these actions taken by the Federal Trade Commission, the FCC announced on September 12, 2002, that it, too, was seeking public comment on the possibility of its involvement in the establishment of a national "do-not-call" list. *FCC Seeks Comment on Updating Telemarketing Rules*, available at <http://www.fcc.gov> (last visited Sept. 17, 2002).

<sup>247</sup> See, e.g., ALA. CODE § 8-19C-2(b)(1) (Supp. 2001); see also Markon, *supra* note 10, at 1D (explaining the operation of "do-not-call" statutes). Generally, state residents must telephone, write, or e-mail the enacting state's attorney general, a consumer protection agency, or other third party in order to be placed on the "do-not-call" list. *Id.* For a statement of the TCPA's savings clause, 47 U.S.C. § 227(e)(1) (2000), see *supra* note 134 and

usually be purchased on a regular basis by telemarketers seeking to do business in that state.<sup>248</sup> Some sort of sanction, generally a fine, is provided by statute for any calls placed by telemarketers to numbers appearing on the "do-not-call" list.<sup>249</sup> In essence, "do-not-call" statutes attempt to erect virtual no solicitation signs on telephone numbers much like signs erected to combat the problem of door-to-door solicitation addressed in *Breard*.<sup>250</sup>

"Do-not-call" statutes have become extremely popular in recent years, with at least seventeen states passing a version in some form or another.<sup>251</sup> These states include Alabama,<sup>252</sup> Alaska,<sup>253</sup> Arkansas,<sup>254</sup>

accompanying text. Different states enacting "do-not-call" statutes have placed a variety of state agencies in charge of administering the database. See ARK. CODE ANN. § 4-99-404 (Michie Supp. 2001) (placing the attorney general's office in charge of establishing and maintaining the database); COLO. REV. STAT. ANN. § 6-1-905 (West Supp. 2002) (naming the state's public utilities commission as administrator); CONN. GEN. STAT. ANN. § 42-288a(b) (West Supp. 2002) (placing the state department of consumer protection in charge of the "do-not-call" list).

<sup>248</sup> Markon, *supra* note 10, at 1D.

<sup>249</sup> See, e.g., FLA. STAT. ANN. § 501.059(8) (West Supp. 2002) (authorizing both injunctive relief and a civil penalty of \$10,000.00 per violation).

<sup>250</sup> See Shannon, *supra* note 135, at 394.

<sup>251</sup> See National Conference of State Legislatures, *State Do-Not-Call Statutes*, at <http://www.ncsl.org/programs/lis/CIP/donotcall.htm> (last visited Sept. 23, 2002). Besides true "do-not-call" statutes, this site lists the statutes of several states that follow the TCPA's approach of requiring each telemarketing company to maintain its own company-specific "do-not-call" list. *Id.* While these statutes are beyond the scope of this Note, they are as follows: ARIZ. REV. STAT. ANN. § 44-1278(B)(2)(c) (West Supp. 2001); HAW. REV. STAT. § 481P-4(11) (Supp. 2001); 815 ILL. COMP. STAT. ANN. 413/15(3) (West Supp. 2002); ME. REV. STAT. ANN. tit. 10, § 1499 (West 1997); NEB. REV. STAT. § 86-1212 (1999); N.J. STAT. ANN. § 48:17-25 (West 1998); R.I. GEN. LAWS § 5-61-3.5 (1999); S.C. CODE ANN. § 16-17-445(E) (Law. Co-op. Supp. 2001); TEX. UTIL. CODE ANN. § 55.151 (Vernon 1998). *Id.* Note that between the original completion of this Note and its submission for publication, seven additional states—Illinois, Kansas, Massachusetts, Minnesota, Oklahoma, Pennsylvania, and Wisconsin—enacted "do-not-call" laws. 2002 Ill. Legis. Serv. 92-795 (West) (effective Aug. 9, 2002); 2002 Kan. Sess. Laws 179 (adopted May 29, 2002); 2002 Mass. Legis. Serv. ch. 265 (West) (effective Jan. 1, 2003); 2002 Minn. Sess. Law Serv. 367 (West) (adopted May 15, 2002); 2002 Okla. Sess. Laws 72 (effective Jan. 1, 2003); 73 PA. CONS. STAT. ANN. §§ 2242-2245.2 (West 2002) (effective June 2, 2002); Wis. Stat. Ann. § 100.52 (West Supp. 2002) (effective Jan. 1, 2003).

<sup>252</sup> ALA. CODE §§ 8-19C-2 to 8-19C-12 (Supp. 2001) (effective July 1, 2000). Alabama charges its residents a fee for inclusion in the database. *Id.* § 8-19C-3. Violations can be remedied by an action brought either by the state or by the consumer. *Id.* §§ 8-19C-6, 8-19C-7. Injunctive relief and damages of \$2,000.00 per violation are the statutorily-prescribed remedies. *Id.*

<sup>253</sup> ALASKA STAT. § 45.50.475 (Michie 2000) (effective Nov. 4, 1996). Rather than authorize the state to create a "do-not-call" database, the Alaska statute provides that those who do not wish to receive telemarketing calls will be identified in some manner in the local

California,<sup>255</sup> Colorado,<sup>256</sup> Connecticut,<sup>257</sup> Florida,<sup>258</sup> Georgia,<sup>259</sup> Idaho,<sup>260</sup> Kentucky,<sup>261</sup> Louisiana,<sup>262</sup> Missouri,<sup>263</sup> New York,<sup>264</sup> Oregon,<sup>265</sup>

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telephone directories, essentially placing the burden of operating the system on the telephone companies. *Id.* § 45.50.475(a)-(b). This approach would seem to create particular difficulties in maintaining an accurate listing and also in addressing the time lag between the date that telephone consumers express their preference not to receive telemarketing calls and the date the next telephone directory is published. *See generally* FCC Rules, *supra* note 246, at 8758-59.

<sup>254</sup> ARK. CODE ANN. §§ 4-99-404 to 4-99-408 (Michie Supp. 2001) (effective Jan. 1, 2000). The Arkansas statute requires the consumer to pay a \$10.00 initial fee and thereafter a \$5.00 annual fee for inclusion in the database. *Id.* § 4-99-404(2)(B). No civil remedy is provided by the statute. Instead, violations are pursued by the attorney general's office as a violation of the state's deceptive trade practices act. *Id.* § 4-99-407.

<sup>255</sup> CAL. BUS. & PROF. CODE §§ 17590-17595 (West Supp. 2002) (effective Jan. 1, 2003). The California statute is unique in that it allows the telephone consumer to allow certain telephone calls specifically identified by the consumer while disallowing all other telemarketing calls. *Id.* § 17591(b). This provision obviates one concern the FCC identified as a drawback to "do-not-call" lists—requiring the consumer to make an "all or nothing choice" between telemarketing calls. *See* FCC Rules, *supra* note 246, at 8759. California's statute also prescribes a sliding-scale fee for purchase of the list by telemarketers. CAL. BUS. & PROF. CODE § 17591(c). Larger companies with over 1,000 employees must pay the full fee while telephone solicitors with fewer than five employees are not required to pay a fee for the list. *Id.*

<sup>256</sup> COLO. REV. STAT. ANN. §§ 6-1-901 to 6-1-908 (West Supp. 2002) (effective Aug. 8, 2001). As do several other "do-not-call" statutes, the Colorado statute provides affirmative defenses against enforcement of the act if the telemarketing agency has established and implemented rules and procedures to comply with the act, or if the violation is a result of a technical mistake. *Id.* § 6-1-906.

<sup>257</sup> CONN. GEN. STAT. ANN. § 42-288a (West Supp. 2002) (effective Jan. 1, 2001).

<sup>258</sup> FLA. STAT. ANN. § 501.059 (West Supp. 2002) (effective July 1, 1997). In addition to standard "do-not-call" list requirements, the Florida statute sets forth specific requirements for contracts made pursuant to telemarketing calls, presumably as a method of fraud prevention. *Id.* § 5(a)-(c).

<sup>259</sup> GA. CODE ANN. § 46-5-27 (Supp. 2002) (effective July 1, 1998). For legislative history information and a review of the Georgia Act's provisions, see Kristine G. Visage, Recent Statute, *Telephone and Telegraph Service*; O.C.G.A. § 46-5-27 (1998), 15 GA. ST. U. L. REV. 209 (1998).

<sup>260</sup> IDAHO CODE § 48-1003A (Michie Supp. 2002) (effective Jan. 1, 2001).

<sup>261</sup> KY. REV. STAT. ANN. § 367.46955(15) (Banks-Baldwin 2002) (effective July 15, 1998). Rather than imposing civil sanctions, the Kentucky statute makes violations of its "do-not-call" statute misdemeanor criminal offenses. *Id.* § 367.46999.

<sup>262</sup> LA. REV. STAT. ANN. §§ 45:844.11-45:844.15 (West Supp. 2002) (effective May 24, 2001).

<sup>263</sup> MO. ANN. STAT. §§ 407.1095-407.1107 (West 2001) (effective July 1, 2001). As do several other "do-not-call" statutes, the Missouri statute expressly contemplates the FCC's creation of a national "do-not-call" database pursuant to the authority granted it by the TCPA. *Id.* § 407.1101(3). Were the FCC to do so, the Missouri statute authorizes its own inclusion in the national database. *Id.* For information concerning the FCC's consideration of a national "do-not-call" statute, see FCC Rules, *supra* note 246.

<sup>264</sup> N.Y. GEN. BUS. LAW § 399-z (McKinney Supp. 2001) (effective Apr. 1, 2002). Unique to the New York law, violations are not brought either by state officials or private consumers

Tennessee,<sup>266</sup> and Texas.<sup>267</sup> The vast majority of these laws have taken effect only within the past two years.<sup>268</sup> The momentum for these laws continues to build as several other states contemplate similar legislation.<sup>269</sup> Presently, a visit to almost any state legislature's official web page will confirm that a "do-not-call" statute is under consideration.<sup>270</sup> This phenomenon seems to be at least partly attributable to national displeasure, if not contempt, for the telemarketing industry and the resulting attempt by politicians to garner credit for impeding it.<sup>271</sup> Also responsible are frustrations with existing

as civil actions. *Id.* § 6. Rather, violation proceedings are treated as administrative in nature, and the violator may be fined up to \$2,000.00 by the state's consumer protection board. *Id.*

<sup>265</sup> OR. REV. STAT. § 646.574 (1999) (effective 1999; amended May 22, 2001).

<sup>266</sup> TENN. CODE ANN. § 65-4-405 (Supp. 2001) (effective May 17, 2000).

<sup>267</sup> TEX. BUS. & COM. CODE ANN. §§ 43.001-43.253 (Vernon Supp. 2002) (effective Jan. 1, 2002). The Texas statute exempts five different types of telemarketing calls from the provisions of its "do-not-call" statute. *Id.* § 43.003. Exempted are calls made in response to a consumer's inquiry, in connection with an "established business relationship," to a business, to collect a debt, or by a state licensee such as a real estate or insurance agent. *Id.*

<sup>268</sup> Shannon, *supra* note 135, at 409.

<sup>269</sup> See Savoye, *supra* note 3, at 2 (reporting that as of December 2000, twenty-seven states were considering "do-not-call" legislation); see also Richard Roesler, *Bills Target Telephone Solicitors*, THE SPOKESMAN REV., Jan. 24, 2001, at A1, available at 2001 WL 7044834 (reporting that legislators in the State of Washington were considering five separate anti-telemarketing bills).

<sup>270</sup> See, e.g., <http://www.michiganlegislature.org> (last visited Nov. 8, 2002) (indicating that the State of Michigan is considering four separate "do-not-call" bills); [http://www.legislature.state.oh.us/bills.cfm?ID=124\\_HB\\_199](http://www.legislature.state.oh.us/bills.cfm?ID=124_HB_199) (last visited Nov. 8, 2002) (indicating that a "do-not-call" bill was introduced in the Ohio Legislature in April 2001); <http://legis.state.nm.us/session01.asp?chamber=s&type=++&number=220> (last visited Sept. 29, 2002) (outlining Senate Bill 220, a "do-not-call" bill introduced in the first session of the 2001 New Mexico Legislature by Rep. Feldman); <http://www.legis.state.pa.us/WU01/LI/BI/BT/2001/0/HB1469P3478.HTM> (last visited Sept. 29, 2002) (reporting an amended bill under consideration by the Pennsylvania General Assembly); [http://www.leg.wa.gov/pub/billinfo/2001-02/House/1600-1624/1600\\_01302001.txt](http://www.leg.wa.gov/pub/billinfo/2001-02/House/1600-1624/1600_01302001.txt) (last visited Sept. 29, 2002) (outlining a proposed "do-not-call" bill in the State of Washington).

<sup>271</sup> See Kaplan, *supra* note 4, at A1; Markon, *supra* note 10, at 2 (discussing the disdain of Americans for telemarketing). One journalist, in blaming the rise of telemarketing for a variety of societal ills, described her satisfaction with the Missouri "do-not-call" statute in the following manner:

What thrills me most is the satisfaction of knowing that a limitation can be placed on some of the nuisances and irritations that we have been forced to accept as commonplace. I've always resented the fact that I have to pay a monthly bill for a telephone that I had installed for my personal convenience and then have it usurped by people I don't want to be in communication with.

Rose M. Nolen, *Rude Awakening Telemarketers Rang in this Era of Incivility*, ST. LOUIS POST-DISPATCH, Jan. 21, 2001, at B3, available at 2001 WL 4440204. Displeasure with the

attempts to curb telemarketing and a widespread belief among consumers that federal efforts at regulating the industry have been ineffective.<sup>272</sup> As a result, telephone consumers have rushed to take advantage of these laws wherever they have been enacted.<sup>273</sup> However, due to exemptions placed within the statutes by state legislatures, not all "do-not-call" statutes afford the same degree of protection from unsolicited telemarketing calls.<sup>274</sup>

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telemarketing industry has reportedly been on the rise. See Resler, *Measure Has a Nice Ring to It*, MILWAUKEE J. SENTINEL, Dec. 4, 2000, at 10A, available at 2000 WL 26099517 (noting that, in Wisconsin, telemarketing complaints to state consumer protection officials ranked 29th in volume among all written complaints in 1997, climbed to 7th in 1999, and appeared certain to be included in the top five in 2000); see also Roesler, *supra* note 269, at A1 (quoting a Washington legislator who felt that interest in legislation aimed at reducing telemarketing was increasing due to rising consumer frustration).

<sup>272</sup> Shannon, *supra* note 135, at 408; see also Cox, *supra* note 119, at 406 (noting that, under the TCPA's company-specific "do-not-call" solution, all telemarketers can in theory "get you once" until a request is made that the company remove your name from its calling list). Dissatisfaction with the TCPA's company-specific "do-not-call" list approach is not limited to legal commentators. According to one journalist,

["Do-not-call"] laws have spread in response to rising complaints about telemarketers, whose ranks have swelled because of economic growth and declining long-distance phone rates. Another factor is dissatisfaction with a 1994 federal law that requires individual telemarketers to keep a list of consumers who say they don't want to be called by them again. Unlike the state laws, the weaker federal law requires consumers to tell the telemarketers directly of their disinterest. The federal law also contains numerous exemptions and allows a company to escape fines of up to \$10,000 if it can show that it trained its personnel and any subsequent call was an undefined 'error.'

Markon, *supra* note 10, at 1D.

<sup>273</sup> Shannon, *supra* note 135, at 410; Markon, *supra* note 10, at 1D (noting that more than 1.6 million people had signed up for "do-not-call" lists in thirteen different states including 20,000 in a single day in Missouri and 368,000 New York residents in a two-month period); Savoye, *supra* note 3, at 2 (reporting that 110,000 Missouri residents signed up for the "do-not-call" list during the first week of registration alone and that residents of bordering states also sought to be included on the list).

<sup>274</sup> Shannon, *supra* note 135, at 408. Besides exemptions within the statutes, Shannon also cites lack of enforcement of the statutes by various states as a potential weakness of "do-not-call" statutes. *Id.* This lack of enforcement varies by state; for instance, Alaska has not imposed any fines on telemarketers since passage of its law in 1996. Markon, *supra* note 10, at 1D. Policy in the State of Arkansas, which also has not fined anyone, is to allow violators eight to ten unpunished infractions before imposing any sanctions. *Id.* The State of Florida, which could by law collect \$10,000.00 per violation, settles infractions it chooses to punish for \$1,000.00. *Id.* But see Russell Gold, *Call-Blocking Laws Bring Added Revenue*, WALL ST. J., Dec. 12, 2001, at B11, available at 2001WL-WJSJ 29680521 (stating that Missouri has collected nearly half a million dollars in fines from violators since its statute took effect); Sherri Buri McDonald, KNIGHT-RIDDER TRIB. BUS. NEWS, Jan. 3, 2001, at 1, available at



## B. Exemptions

Despite the explicit desire of consumers registering for state “do-not-call” statutes to receive no telemarketing calls of any kind, state statutes enacted to date have frequently been heavily layered with exemptions for various types of telemarketing calls.<sup>275</sup> Most often, this is accomplished by excluding the favored types of telemarketing calls from the statute’s definition of telephone solicitation.<sup>276</sup> However, such exemptions are also made by simply excluding certain telephone solicitations from application of the statute at its outset.<sup>277</sup>

Some of the common exemptions made by various “do-not-call” statutes, on their face, appear less objectionable than others. For instance, it seems difficult to object to allowing calls made in response to an express request of the telephone consumer,<sup>278</sup> those made to conduct

2001 WL 2835522 (reporting two different “enforcement sweeps” conducted by the Oregon Attorney General’s office against thirty-five companies violating the state’s “do-not-call” law).

<sup>275</sup> See Shannon, *supra* note 135, at 411; Michael Booth, *Group to Push Call-Block Measure Legislation Targets Telemarketers*, DENVER POST, Jan. 13, 2001, at A01, available at 2001 WL 6740370 (noting that consumers in states where “do-not-call” statutes have been enacted have complained that the laws are “full of holes,” which allow too many telemarketing calls to be placed).

<sup>276</sup> See, e.g., COLO. REV. STAT. ANN. § 6-1-903(b) (West 2002); FLA. STAT. ANN. § 501.059(c) (West Supp. 2002); MO. ANN. STAT. § 407.1095(3) (West 2001). The Missouri statute excludes the following types of calls from its definition of telephone solicitation communications:

- (a) To any residential subscriber with that subscriber’s prior express invitation or permission;
- (b) By or on behalf of any person or entity with whom a residential subscriber has had a business contact within the past one hundred eighty days or a current business or personal relationship;
- (c) By or on behalf of any entity organized pursuant to Chapter 501(c)(3) of the United States Internal Revenue Code, while such entity is engaged in fundraising to support the charitable purpose for which the entity was established provided that a bona fide member of such exempt organization makes the voice communication;
- (d) By or on behalf of any entity over which a federal agency has regulatory authority to the extent that:
  - a. Subject to such authority, the entity is required to maintain a license, permit or certificate to sell or provide the merchandise being offered through telemarketing; and
  - b. The entity is required by law or rule to develop and maintain a no-call list . . . .

MO. ANN. STAT. § 407.1095(3).

<sup>277</sup> See ARK. CODE ANN. § 4-99-406 (Michie 2002).

<sup>278</sup> See, e.g., CONN. GEN. STAT. ANN. § 42-288a(a) (West Supp. 2002).

polls,<sup>279</sup> or perhaps even calls made by charitable organizations.<sup>280</sup> On the other hand, exemptions for car dealers,<sup>281</sup> funeral establishments,<sup>282</sup>

<sup>279</sup> See, e.g., COLO. REV. STAT. ANN. § 6-1-903(10)(b)(VI).

<sup>280</sup> See, e.g., ALASKA STAT. § 45.50.475(g)(3)(B)(ii) (Michie 2000); GA. CODE ANN. § 46-5-27(b)(3)(C) (Supp. 2002); TENN. CODE ANN. § 65-4-401(6)(B)(ii) (Supp. 2001). United States Supreme Court precedents suggest that exemptions for charitable organizations would be treated differently than other "do-not-call" statute exemptions should a First Amendment challenge be brought. See, e.g., *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959-62 (1984); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). In *Schaumburg*, the Court considered a city ordinance regulating the percentage of funds collected by charitable organizations that was to be used toward charitable, not administrative purposes. 444 U.S. at 624 n.4. The city in *Schaumburg* argued that charitable solicitation was similar to a business proposition and, therefore, constituted commercial speech deserving of lesser First Amendment protections. *Id.* at 628. The Court, however, rejected that premise and held that charitable solicitations "involve a variety of speech interests . . . that are within the protection of the First Amendment . . . [and, therefore, have] not been dealt with as purely commercial speech." *Id.* at 632. The Court then, applying strict scrutiny, invalidated the ordinance as not sufficiently narrowly tailored. *Id.* at 635-39. The Court followed this line of reasoning in *Riley v. National Federation of the Blind*. 487 U.S. 781, 795-96 (1988). The statute challenged in that case, among other requirements, required professional fundraisers to disclose to potential donors the percentage of funds collected by the organization during the previous year that were actually used for charitable purposes. *Id.* at 786. The government defended the requirement compelling speech by asserting that it regulated only the commercial fundraiser's profit from the solicited contribution. *Id.* at 795. The government, therefore, suggested that a commercial speech analysis was appropriate. *Id.* The Court declined this invitation, however, stating, "[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech . . . . Therefore, we apply our test for fully protected expression." *Id.* at 796 (citations omitted). Applying "exacting First Amendment scrutiny," the Court thereafter invalidated the statute. *Id.* at 798. These cases make clear that if no exemption is made for charitable organizations in a "do-not-call" statute, strict scrutiny will be applied in a First Amendment challenge. *Id.* at 796; *Schaumburg*, 444 U.S. at 632. Applying similar reasoning, a few courts have invalidated telemarketing restrictions placed on charitable organizations. See *Tex. State Troopers Ass'n v. Morales*, 10 F. Supp. 2d 628, 637 (N.D. Tex. 1998); *Optimist Club v. Riley*, 563 F. Supp. 847, 850 (E.D.N.C. 1982); *Planned Parenthood League v. Attorney Gen.*, 464 N.E.2d 55, 62 (Mass. 1984). Perhaps recognizing these precedents, several states have exempted charitable organizations from the provisions of their "do-not-call" statutes. See, e.g., CONN. GEN. STAT. ANN. § 42-288a(a)(6)(B) (excluding "tax-exempt nonprofit organization[s]"); LA. REV. STAT. ANN. § 45:844.12(4)(d) (West Supp. 2002) (excluding nonprofit organizations that do not employ the services of professional telemarketers). Colorado makes explicit references to First Amendment considerations in exempting charitable organizations in its "do-not-call" statute. COLO. REV. STAT. ANN. § 6-1-902(1)(d) (West 2002) ("Although charitable . . . organizations are exempt from the provisions of this [statute] because of considerations of freedom of speech, the general assembly encourages such organizations to voluntarily comply with this [statute] when possible."). However, the state interest in adopting "do-not-call" legislation is compelling. See *supra* notes 118 and 230-31 and accompanying text. Further, by limiting the application of "do-not-call" statutes only to those who have expressed a desire to receive no telephone solicitations, "do-not-call" statutes are inherently narrowly tailored. See, e.g., *Riley*, 487 U.S.

telephone companies,<sup>283</sup> book clubs,<sup>284</sup> real estate agents,<sup>285</sup> and insurance salesmen<sup>286</sup> seem to defy the purpose of enacting the statutes. Some statutes even allow telemarketing calls that attempt to arrange in-home sales presentations rather than concluding business over the telephone, inviting further intrusion into the home.<sup>287</sup> Another common exemption is made for calls to consumers with a "pre-existing" business relationship, an often ill-defined term that would seem to authorize a bevy of otherwise-silenced telemarketing calls.<sup>288</sup> The dividing line between who is granted an exemption and who is not is so seemingly

at 799 n.11 (discussing the narrowly-tailored requirement in strict scrutiny analysis). States may make the statutes further narrowly tailored by allowing consumers to determine whether calls from charitable organizations are still desired despite their registration on the state's "do-not-call" list. See CAL. BUS. & PROF. CODE § 17591(b) (West Supp. 2002). Besides the state's interest in protecting the privacy of its residents, the consumers registering for "do-not-call" lists are, in a sense, asserting their right not to speak, a right recognized by the Court. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *West Va. St. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633-34 (1943). Despite the obstacles presented by strict scrutiny, perhaps "do-not-call" legislation, due to the strength of the government interests involved and the narrow tailoring of the statutes, could join the Court's other precedents to survive such stringent analysis. See *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding prohibition on distribution of campaign literature near polling place under strict scrutiny review); *Snepp v. United States*, 444 U.S. 507 (1980) (upholding prior restraint on publication of book by former CIA employee under strict scrutiny).

<sup>281</sup> See, e.g., ARK. CODE ANN. § 4-99-406(2).

<sup>282</sup> See, e.g., *id.* § 4-99-406(8).

<sup>283</sup> See, e.g., MO. ANN. STAT. § 407.1095(3)(d) (West 2001).

<sup>284</sup> See, e.g., KY. REV. STAT. ANN. § 367.46951(2)(d)(14) (Banks-Baldwin 2002).

<sup>285</sup> See, e.g., *id.* § 367.46951(2)(d)(4).

<sup>286</sup> See, e.g., *id.* § 367.46951(2)(d)(6).

<sup>287</sup> See, e.g., *id.* § 367.46951(2)(d)(15); N.Y. GEN. BUS. LAW § 399z(1)(j)(iv) (McKinney Supp. 2002) (exempting calls made "in which the sale of goods and services is not completed, and payment or authorization of payment is not required, until after a face-to-face sales presentation by the telemarketer or a meeting between the telemarketer and customer").

<sup>288</sup> See, e.g., FLA. STAT. ANN. § 501.059(1)(c)(3) (West Supp. 2002) (authorizing calls made "[t]o any person with whom the telephone solicitor has a prior or existing business relationship" but leaving the terms undefined); GA. CODE ANN. § 46-5-27(b)(3)(B) (Supp. 2001); IDAHO CODE § 48-1003A(4)(b) (Michie Supp. 2002) (authorizing all calls made where an "established business relationship exists" but specifically excluding calls under this exemption made by a telephone company to a telephone subscriber). Linda Goldstein, a New York City lawyer who represents telemarketers, argues that "[t]here are very valid and legitimate reasons why a business would want to contact its existing customers and why a customer would want to hear from a business it has a relationship with" even if the customer is on a "do-not-call" list. Markon, *supra* note 10, at 1D. However, "the practical effect of the exemption in many states is that consumers can be called by any company—or even a unit of a larger corporation—from which they have ever bought products or services." *Id.*

arbitrary and unfair as to call the legitimacy of many "do-not-call" statutes into doubt.<sup>289</sup>

Such exemptions are frequently the product of heavy lobbying by the telemarketing industry itself or other organizations such as insurers, real estate agents, and stockbrokers that are able to exert pressure on state legislatures.<sup>290</sup> Representatives shepherding "do-not-call" bills through state legislatures must often make compromises that weaken the ultimate law in order to pass any legislation at all.<sup>291</sup> These exemptions have the effect of disappointing the expectations of consumers who believe that they will be free from telemarketing calls upon their inclusion in the "do-not-call" database.<sup>292</sup>

Depending upon their number and type, exemptions can potentially reduce, and perhaps even eliminate, the effectiveness of "do-not-call" statutes.<sup>293</sup> Some states have enacted "do-not-call" statutes that, despite

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<sup>289</sup> Savoye, *supra* note 3, at 2.

<sup>290</sup> See *id.*; Bill Bell Jr., *Missourians May Sign up for No-Call List to Block Some Telemarketers*, ST. LOUIS POST-DISPATCH, Dec. 14, 2000, at B1, available at 2000 WL 3566312 (noting that pressure from various companies fighting the restrictions created loopholes in the Missouri statute). Indeed, telemarketing firms and businesses relying heavily on telephone solicitation have been able to derail state efforts to enact "do-not-call" statutes in at least two states. See Booth, *supra* note 275, at A01; Timothy B. Wheeler, *Curb on Telemarketers Dies in Senate Panel; 'Do-not-Call' List Opposed by Business*, BALT. SUN, Feb. 23, 2000, at 1B, available at 2000 WL 4859072 (reporting that a Maryland "do-not-call" bill that enjoyed broad public support was derailed due to opposition by large businesses that threatened to move their operations outside the state if the measure was passed). *But see* Kaplan, *supra* note 4, at A1 (noting that some telemarketers support "do-not-call" legislation). Ron Weber, head of a large telemarketing company, finds no problem with the laws because "[n]obody in [the telemarketing] business wants to call someone who doesn't want to be called . . . . It's a waste of time for us, too." *Id.*; see also Ed Fanselow, *Hoosiers May Put Names on No-Call List*, INDIANAPOLIS STAR, May 4, 2001, at D1 (quoting a chamber of commerce official as saying that "[l]egitimate businesses don't want to call people that don't want to be called").

<sup>291</sup> See Bell, Jr., *supra* note 290, at B1 (reporting that Rep. D.J. Davis, a co-sponsor of Missouri's "do-not-call" law, had initially planned a much stronger bill but was forced to make compromises resulting in exemptions to get any legislation approved).

<sup>292</sup> See Markon, *supra* note 10, at 1D (noting that consumer enthusiasm for "do-not-call" statutes is often unfounded due to the failure of the statutes to fulfill their promise). Disappointing consumer expectations was a concern of the FCC when considering the establishment of a nationwide "do-not-call" list and one reason this option was ultimately rejected by the FCC. See FCC Rules, *supra* note 246, at 8758-59.

<sup>293</sup> See Jim Bencivenga, *Resolved: One, Two*, CHRISTIAN SCI. MONITOR, Jan. 4, 2001, at 11, available at 2001 WL 3732806 (noting that "some ["do-not-call" statutes] are good, some adequate, and some have so many loopholes as to be unenforceable"). According to Robert Bulmash, president of Private Citizen Inc., a consumer advocacy group, "do-not-call" laws "may reduce telemarketing fifteen or twenty percent, but they clearly have been gutted

their exemptions, are still fairly protective of consumer privacy.<sup>294</sup> For instance, Idaho's "do-not-call" law contains a scant three exemptions for calls made to business telephone numbers, where an established business relationship exists, and by minors using telephone solicitations to benefit a charitable purpose or organization.<sup>295</sup> Likewise, Tennessee has a fairly strong "do-not-call" law, allowing exemptions only for calls made with a telephone subscriber's express permission, those made by members of a tax-exempt, nonprofit organization, and calls soliciting existing customers.<sup>296</sup> Unlike Idaho, Tennessee takes pains to carefully describe the nature of the existing business relationship, excluding telemarketing companies or businesses that make more than three telephone solicitation calls per week, thus further strengthening the law.<sup>297</sup>

However, "do-not-call" statutes in other states are so diluted by exemptions that one might question whether they eliminate any telemarketing calls at all.<sup>298</sup> The Alabama statute, as a rather extreme example, makes a staggering twenty-five exemptions to its "do-not-call" law, making it the weakest statute enacted to date.<sup>299</sup> Among the

with so many exemptions . . . [that] the reality is that these laws don't get the job done." Markon, *supra* note 10, at 1D.

<sup>294</sup> See Shannon, *supra* note 135, at 411.

<sup>295</sup> IDAHO CODE §48-1003A(4) (Michie Supp. 2001). Idaho strengthened its "established business relationship" exemptions by specifically prohibiting telephone companies from benefiting by this exemption. *Id.* § 48-1003A(4)(b). However, the exemption is weakened by leaving the term undefined. *Id.* For a discussion of the problems surrounding this type of exemption, see *supra* note 288 and accompanying text.

<sup>296</sup> TENN. CODE ANN. § 65-4-401(6)(B) (Supp. 2001).

<sup>297</sup> *Id.* § 65-4-401(6)(B)(iii). Other states have similarly effective statutes. See FLA. STAT. ANN. § 501.059(c) (West Supp. 2001) (containing four exemptions); GA. CODE ANN. § 46-5-27(b)(3) (Supp. 2001) (making three exemptions similar to the Idaho and Tennessee statutes); N.Y. GEN. BUS. LAW § 399-z(1)(j) (McKinney Supp. 2001) (providing four exemptions); OR. REV. STAT. §§ 646.567-569 (1999) (making five exemptions). It has been reported that Florida's statute, despite its exemptions, "eliminates 70% to 80% of unwanted sales calls to Florida homeowners." Matt Moore, *State Can Block Some Telemarketers-For a Price*, NEWS HERALD, Jan. 22, 1998, available at <http://www.newsherald.com/archive/local/tm012298.htm> (last visited Sept. 28, 2002).

<sup>298</sup> See, e.g., KY. REV. STAT. ANN. § 367.46951(2) (Banks-Baldwin 2001) (exempting twenty-two different types of telemarketing calls from its "do-not-call" statute).

<sup>299</sup> ALA. CODE § 8-19A-4 (Supp. 2000). Although the "do-not-call" provisions themselves are in section 8-19C-3, the definitions for that chapter are provided in a previous section. See *id.* § 8-19A-3. Under the definition of "telephone solicitation" used in the "do-not-call" statute is a reference to a list of statutorily-exempt callers listed in still another section of the code. See *id.* 8-19A-3(17). The exemptions listed in section 8-19A-4 are, therefore, applicable to the "do-not-call" statute as well as the section in which they appear.

exemptions included in the statute are calls made by stockbrokers; commodities dealers; persons selling newspaper subscriptions or cable television services; book, video, or record clubs; banks; insurance agents; telephone companies; telemarketing businesses, either licensed by the state or that have conducted business under the same name for at least one year; persons soliciting the sale of more than five-hundred dollars worth of food; or those soliciting the sale of "an annual publication comprised of a biographical compilation of notable and distinguished individuals."<sup>300</sup>

Similarly, Kentucky makes twenty-two separate exemptions to its "do-not-call" statute.<sup>301</sup> So ineffective is the Kentucky statute that, according to one estimate, ninety-five percent of all business and nonprofit organizations that place telemarketing calls within the state are exempted from its "do-not-call" provisions.<sup>302</sup> Other statutes, while not nearly as business-friendly as those in Alabama or Kentucky, also make several exemptions that dilute the laws' utility.<sup>303</sup> The effectiveness of "do-not-call" legislation appears to be a product of how broadly each individual state is willing to extend its application.<sup>304</sup>

C. *The Indiana "Do-Not-Call" Statute: Ind. Code § 24-4.7*

One of the most recent additions to the "do-not-call" landscape is Indiana's effort to restrict unsolicited telemarketing calls, Indiana Code Section 24-4.7, which became effective on January 1, 2002.<sup>305</sup> "Do-not-call" legislation was previously introduced in two earlier sessions of the

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Telephone interview with Sue Ellen Young, Counsel, Ala. Pub. Serv. Comm'n (Jan. 10, 2001).

<sup>300</sup> ALA. CODE § 8-19A-4.

<sup>301</sup> KY. REV. STAT. ANN. § 367.46951(2).

<sup>302</sup> Shannon, *supra* note 135, at 403.

<sup>303</sup> See, e.g., ARK. CODE ANN. § 4-99-406 (Michie Supp. 2001) (making eight exemptions including those for car dealers and funeral homes); CAL. BUS. & PROF. CODE § 17952(e) (West Supp. 2002) (listing seven exemptions).

<sup>304</sup> Shannon, *supra* note 135, at 412.

<sup>305</sup> IND. CODE ANN. § 24-4.7 (West Supp. 2001). Although effective July 1, 2001, the Indiana Attorney General's office was given until January 1, 2002 to have the "do-not-call" list in operation. *Id.* The State of Indiana previously adopted laws restricting the use of ADADs by telemarketers. *Id.* §§ 24-5-14-1 to 24-5-14-13. Another article regulates telemarketers in general, prescribing registration requirements and fees and disclosure requirements. *Id.* § 24-5-14-12.

Indiana legislature.<sup>306</sup> Heavy lobbying by the telemarketing industry, exemptions contained in the earlier bills, and plans to charge state residents for inclusion in the database ultimately led to the failure of those bills.<sup>307</sup> However, “do-not-call” legislation was finally approved by the 112th General Assembly in May 2001.<sup>308</sup>

As in other states, the law has proven to be incredibly popular with state residents who rushed to be placed on the “do-not-call” list.<sup>309</sup> Nearly 800,000 Indiana residents signed up by the registration deadline for the first list, with over 360,000 numbers being added in the final week before publication.<sup>310</sup> In fact, public support for the law was so great that the state firefighters’ union, which had sought an injunction to prevent the law from taking effect, dismissed its challenge in the face of public opposition to its actions.<sup>311</sup>

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<sup>306</sup> Telephone Interview with Rep. Dale Sturtz (Jan. 3, 2002) [hereinafter Sturtz interview]. Rep. Sturtz was the sponsor or co-sponsor of all three “do-not-call” bills introduced to the Indiana General Assembly. *Id.*

<sup>307</sup> Jennifer Wagner, *‘Do not call’ Bill Targets National Telemarketers*, INDIANAPOLIS STAR, Jan. 12, 2001, at A01 (citing exemptions and fees as reasons for the demise of one bill); Stuart A. Hirsch & R. Joseph Gelarden, *Session Ends in Limbo*, INDIANAPOLIS STAR, Mar. 4, 2000, at A01 (reporting that the telemarketing lobby, as well as exemptions and fee requirements, were to blame for a prior “do-not-call” bill’s failure). Sign up fees were a particular defect in an earlier bill, regarded by members of the House Rules and Legislative Procedures Committee as a “tax on the right to privacy.” Hirsch & Gelarden, *supra*.

<sup>308</sup> *The Indiana General Assembly*, INDIANAPOLIS STAR, May 6, 2001, at B03.

<sup>309</sup> See Tim Logan, *Phone Privacy List has Public Hanging on the Line[;] Stymied Callers Eager to Ward off Telemarketers Must Show Persistence to Register, CallNet Advises*, INDIANAPOLIS STAR, July 17, 2001, at A01, available at LEXIS, News Library, INSTAR File (reporting that 15,000 Hoosiers signed up during one five-day period). Consumer interest in the law resulted in residents overwhelming operators hired by the state to register numbers for the list. *Id.* One resident attempted to register by phone thirty-five times during a three-day period and reached a message each time asking her to try again later. *Id.* Eventually, the Attorney General introduced a web site to deal with consumer demand. See Mike Redmond, *Blunt Method Works Best on Telemarketers*, INDIANAPOLIS STAR, Aug. 7, 2001, at E01, available at LEXIS, News Library, INSTAR File (reporting that the state had been “swamped with people trying to get on the ‘do not call’ list” by telephone). The state’s website provides information about registration, obtaining the list, exemptions, and other details regarding the law. See <http://www.in.gov/attorneygeneral/telephoneprivacy> (last visited Sept. 28, 2002).

<sup>310</sup> *More Than 780,000 Residents Sign up for First No-Call List*, AP NEWSWIRES, Dec. 13, 2001, available at Westlaw, INNEWS Database.

<sup>311</sup> *Firefighters’ Union Drops Lawsuit Against No-Call List*, AP NEWSWIRES, Dec. 22, 2001, available at Westlaw, INNEWS Database. The firefighter’s union initially requested the injunction due to concerns about the law’s impact on its ability to raise funds through telephone solicitations requesting donations. *Id.* But see *Telemarketing Company Files Suit Over No-Call List*, THE TIMES (Porter Co., Ind.), Jan. 25, 2002, at A5 (reporting that two

Indiana's "do-not-call" statute, also known as the Telephone Privacy Law, takes several steps to reduce telemarketing-related problems within the state.<sup>312</sup> In addition to the no-call provisions, the statute attempts to reduce telemarketing fraud by requiring written contracts for sales completed over the telephone.<sup>313</sup> The statute also mandates certain disclosure requirements for all telemarketing calls made to state residents, regardless of whether or not they are included in the state's database.<sup>314</sup>

The "do-not-call" conditions of the Indiana statute are substantially similar to those of other states.<sup>315</sup> The statute first sets forth its definitions and the duties of the attorney general's office in giving effect to the law.<sup>316</sup> The "do-not-call" proscription itself is found in chapter four, section two of the article and provides that "[a] telephone solicitor may not make or cause to be made a telephone sales call to a telephone number if that telephone number appears in the most current quarterly listing published by the [consumer protection division of the attorney

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vacuum cleaner sales companies filed suit in Vanderburgh County, Indiana, Circuit Court, challenging the Indiana "do-not-call" statute as being unconstitutional).

<sup>312</sup> See IND. CODE ANN. §§ 24-4.7-1-1 to 24-4.7-5-6 (West Supp. 2001).

<sup>313</sup> *Id.* § 24-4.7-4-4(b). The statute provides that "[a] contract made under a telephone sales call is not valid and enforceable against a consumer unless the contract complies with this section." *Id.* The statute specifies that contracts made over the telephone "must be reduced to writing and signed by the consumer." *Id.* § 24-4.7-4-4(c). Certain contracts are specifically excluded by the statute's requirements such as those where the consumer is allowed to return the goods purchased within one week without incurring any obligation. *Id.*

<sup>314</sup> *Id.* § 24-4.7-4-2 (requiring telemarketers to immediately disclose their true first and last name and the name of the company they are soliciting for).

<sup>315</sup> See *supra* Part IV.A.

<sup>316</sup> IND. CODE ANN. §§ 24-4.7-2 to 24-4.7-3. The statute defines "telephone sales call" as a call made to solicit consumer goods or services, charitable contributions, or to obtain information from a consumer for the direct solicitation of goods, services, or an extension of credit. *Id.* § 24-4.7-2-9. The attorney general is directed to, inter alia, establish and maintain a quarterly listing "of telephone numbers of Indiana consumers who request not to be solicited by telephone." *Id.* § 24-4.7-3-1(a). Chapter three of the statute also provides for updating of the listing, authorizes the attorney general to charge telemarketers a fee for the listing and to contract with an agent to perform the duties under the article, and spells out reporting requirements. *Id.* §§ 24-4.7-3-1 to 24-4.7-3-5. This chapter also authorizes the attorney general's consumer protection division to investigate complaints received regarding violations of the article. *Id.* § 24-4.7-3-3. The chapter requires an annual report from the consumer protection division including the amount of fees deposited in the fund authorized by the chapter, expenses incurred, total number of consumers on the listing, and the number of telephone subscribers added to and removed from the listing each year. *Id.* § 24-4.7-3-5. Finally, the consumer protection division is authorized to adopt rules pursuant to section 4-22-2 of the code to implement the new statute. *Id.* § 24-4.7-3-7.



general's office]."<sup>317</sup> Telemarketers who fail to comply with the law commit a deceptive act, actionable by the attorney general.<sup>318</sup> Although no private remedy is authorized, the attorney general's office may seek injunctive relief plus a civil penalty of \$10,000 for a first violation and \$25,000 for each subsequent violation.<sup>319</sup>

Despite this announced protection from unwanted telemarketing calls, Indiana's "do-not-call" law also contains exemptions that ultimately dilute the law's benefit to telephone consumers.<sup>320</sup> The first chapter of the law provides that the statute does not apply to calls made in response to an express request of the consumer, calls made in connection with an existing debt or contract where performance is not complete, and calls made by volunteers or employees of tax-exempt charitable organizations.<sup>321</sup> While these exemptions are perhaps understandable, the chapter goes on to exclude calls made by real estate agents, insurance agents, and those soliciting the sale of newspaper subscriptions, exemptions that are less likely to be understood by those who have registered for the no-call list.<sup>322</sup>

The exemptions in the Indiana law, similar to those made in other states, are clearly the product of heavy lobbying of and compromise between legislators.<sup>323</sup> As mentioned, the initial and obvious problem

<sup>317</sup> *Id.* § 24-4.7-4-1.

<sup>318</sup> *Id.* § 24-4.7-5-1.

<sup>319</sup> *Id.* § 24-4.7-5-2. The attorney general may also seek any money obtained by the telemarketer in violating the statute, plus reasonable costs in investigating and maintaining the action, including reasonable attorney's fees. *Id.* §§ 24-4.7-5-2(3) to 24-4.7-5-2(6). The statute provides that each telephone call made in violation of the article constitutes a separate actionable violation. *Id.* § 24-4.7-5-2(2). Violations may only be pursued by the attorney general and may only be brought in the Circuit or Superior Courts of Marion County. *Id.* §§ 24-4.7-5-2, 24-4.7-5-5.

<sup>320</sup> *See id.* § 24-4.7-1-1 (listing six exemptions to Indiana's "do-not-call" statute). Attempts to make additional exemptions to the Indiana "do-not-call" list are anticipated in future legislative sessions. *See* Mike Smith, *Reed, Carter Prepare Their Own Lobbying Campaigns*, AP NEWSWIRES, Dec. 31, 2001, available at Westlaw, INNEWS Database (reporting that the Indiana Attorney General will attempt to prevent additional exemptions from being included in the statute). In January 2002, Rep. Joe Harrison introduced legislation proposing to add a "pre-existing business relationship" exemption to the Indiana "do-not-call" statute. Sturtz interview, *supra* note 306.

<sup>321</sup> IND. CODE ANN. § 24-4.7-1-1(1) to (3) (thus excluding large telemarketing companies soliciting on behalf of the charity). Certain disclosures are also required of the charitable organization's solicitor under the statute. *Id.* § 24-4.7-1-1(3)(B).

<sup>322</sup> *Id.* § 24-4.7-1-1(4) to (6).

<sup>323</sup> Sturtz interview, *supra* note 306. Rep. Dale Sturtz, who co-sponsored the Indiana "do-not-call" statute, reports that the primary reason for the exemptions in the law is lobbying

presented by these exemptions is that they ultimately weaken the utility of "do-not-call" statutes.<sup>324</sup> However, a far more ominous problem with the exemptions may be looming than mere concerns with effectiveness. By including many and varied exemptions in their "do-not-call" statutes, state legislatures may have run afoul of *Central Hudson*, raising concerns about the constitutionality of the new laws.

D. *Potential First Amendment Problems with "Do-Not-Call" Statute Exemptions.*

1. Problems with *Central Hudson's* Penultimate Prong

In making numerous and often nonsensical exemptions to "do-not-call" laws, legislators in Indiana and other states appear to have paid insufficient attention to *Central Hudson* and the way in which it has been interpreted in recent years.<sup>325</sup> "Do-not-call" statutes, as they have been

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by the real estate, insurance, and newspaper industries. *Id.* Sturtz related that the "bottom line is that compromises had to be made in order to get the bill to pass." *Id.*; see also Thomas Wyman, *You're Really Serious About Having Dinner in Peace, Aren't You?*, INDIANAPOLIS STAR, Dec. 9, 2001, available at 2001 WL 31595584; *supra* notes 290-91 and accompanying text. Reporting efforts by the Hoosier State Press Association, the state newspapers' lobby, to obtain an exemption, Wyman quips that "[t]hese exceptions aren't laws Moses brought down from Mount Sinai. Human beings—lawmakers—write this stuff." Wyman, *supra*. Because between thirty and seventy percent of newspaper subscriptions and renewals are the product of telemarketing, the lobby "went to work, talking senators into tacking on the exemption for newspapers." *Id.* Rep. Sturtz apparently did not protest the change to the bill, reportedly stating that "you don't fight with people who buy their ink by the barrel." *Id.*

<sup>324</sup> See *supra* note 291 and accompanying text. Initial reports indicated Indiana's "do-not-call" law was relatively successful at preventing unwanted telemarketing calls during initial days of operation. See Ruth Ann Krause, *The State Can Shield Your Phone Number from Telemarketers*, POST TRIB. (Porter Co., Ind.), Jan. 20, 2002, at E1 (reporting fewer than 400 complaints were received by the attorney general's office from the 780,000 consumers registered on the "do-not-call" list during the first nineteen days of the statute's effectiveness); *Some on Indiana No-Call List Still Receiving Telemarketing Calls*, AP NEWSWIRES, Jan. 9, 2002, available at Westlaw INNEWS database (reporting only seventy-nine formal complaints received during the first eight days of the statute's operation).

<sup>325</sup> Despite the exemptions placed within their "do-not-call" statutes, a few states have at least acknowledged the potential for their statute to conflict with the First Amendment. See ALA. CODE § 8-19C-1(6) (Supp. 2000); COLO. REV. STAT. ANN. § 6-1-902(d) (West Supp. 2001); GA. CODE ANN. § 45-5-27(a)(6) (Supp. 2001). Three states make essentially the same legislative finding, conceding that they are entering the province of commercial speech by enacting the telemarketing regulation. See ALA. CODE § 8-19C-1(6); COLO. REV. STAT. ANN. § 6-1-902(d); GA. CODE ANN. § 45-5-27(a)(6). The Alabama and Georgia findings are almost identical, reading: "[I]ndividuals' privacy rights and commercial freedom of speech can be balanced in a way that accommodates both the privacy of individuals and legitimate telemarketing practices." ALA. CODE § 8-19C-1(6); see also GA. CODE ANN. § 45-5-27(a)(6).

enacted to date, seem to present the same problem identified by past courts evaluating restrictions on telemarketing.<sup>326</sup> That is, due to exemptions made for some calls but not others, the statutes are underinclusive.<sup>327</sup> Indiana's statute, for example, exempts insurance agents soliciting applications for insurance, while making its "do-not-call" provisions fully applicable to dentists and other professionals who would advertise their services by telephone.<sup>328</sup> Employees of a newspaper are free under the statute to solicit new and renewed subscriptions, while publishers of magazines or books have been proscribed from doing so, at least to those residents appearing on the "do-not-call" list.<sup>329</sup>

This problem of underinclusiveness was identified by the district court of Oregon in *Moser* and by the district court of New Jersey in *Lysaght*.<sup>330</sup> In evaluating the challenged telemarketing regulations, both of those courts found that distinctions made by the regulations were inconsistent with, and, therefore, did not directly advance the

"Do-not-call" statutes would be properly analyzed under *Central Hudson* rather than the time, place, or manner analysis, as that test requires content neutrality. See *supra* note 70 (discussing the requirements of the test). Whether a certain phone call is prohibited by a "do-not-call" statute or not can only be determined by the content or purpose of the phone call, thus requiring a *Central Hudson* analysis. See, e.g., IND. CODE ANN. § 24-4.7-2-9 (defining the types of calls prohibited to consumers on the "do-not-call" list).

<sup>326</sup> See *supra* notes 147-52, 191-93, and 205 and accompanying text (reporting the observations of the *Moser* district court, the *Lysaght* court, and a dissenting opinion in *Casino Marketing* on underinclusiveness in telemarketing regulations).

<sup>327</sup> For a statement of the problem of underinclusiveness, see CHEMERINSKY, *supra* note 29, at 647 (stating that a law is underinclusive "if it does not apply to individuals who are similar to those to whom the law applies"). "Do-not-call" statutes would not appear to present an overinclusiveness or overbreadth problem since they are only applicable to calls made to residents who have voiced their objection to receiving telephone solicitations. See, e.g., TENN. CODE ANN. § 65-4-405 (Supp. 2001) ("The authority shall establish and provide for the operation of a database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations."). California goes even farther toward avoiding overbreadth in that its statute allows consumers to register for the "do-not-call" list while still allowing certain types of telemarketing calls to be placed to their number. CAL BUS. & PROF. CODE § 17591(b) (West Supp. 2002) ("A subscriber may exclude from the coverage of the "do not call" list telephone calls from entities identified by the subscriber."). Due to this selectivity, "do-not-call" legislation is likely to be viewed with approval under *Central Hudson's* fourth prong. See *supra* note 84 (discussing *Central Hudson's* fourth prong).

<sup>328</sup> IND. CODE ANN. § 24-4.7-1-1.

<sup>329</sup> *Id.*

<sup>330</sup> *Lysaght v. New Jersey*, 837 F. Supp. 646, 649-53 (D.N.J. 1993); *Moser v. FCC*, 826 F. Supp. 360, 365-67 (D. Or. 1993).

government's stated interest in, protecting privacy.<sup>331</sup> As a result, both courts found that the regulations failed *Central Hudson's* third prong, thus violating the guarantees of the First Amendment.<sup>332</sup>

As previously mentioned, the decisions of the *Lysaght* court and the district court in *Moser* have represented the minority position among courts reviewing telemarketing legislation.<sup>333</sup> Most courts, instead, have been quite willing to uphold regulation of the telemarketing industry.<sup>334</sup> Some courts, facing the very same question of underinclusiveness, have found that it is acceptable for the government to solve a portion of the problems it addresses without completely eliminating them.<sup>335</sup> However, times may have changed since the decisions in *Moser* and *Lysaght* were rendered in 1993. Since that time, the pendulum of the Supreme Court's commercial speech jurisprudence has swung in favor of the speech.<sup>336</sup> A number of recent decisions by the Supreme Court suggest that the Court itself, or a lower court faithful to its recent precedents, may well side with the *Lysaght* and *Moser* district court's interpretation of underinclusiveness and its meaning within *Central Hudson*.<sup>337</sup>

In recent opinions, the Court has again emphasized the value of commercial speech and extended increased protection to it.<sup>338</sup> For

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<sup>331</sup> *Lysaght*, 837 F. Supp. at 649-53; *Moser*, 826 F. Supp. at 365-67.

<sup>332</sup> *Lysaght*, 837 F. Supp. at 651-52; *Moser*, 826 F. Supp. at 367. Observe that subsequent to the completion of this Note, the United States District Court for the Eastern District of Missouri used essentially the same third-prong, reasonable-fit analysis described in this section to declare portions of the TCPA governing unsolicited fax advertisements unconstitutional. See *Missouri v. Am. Blast Fax, Inc.*, 196 F. Supp. 2d 920, 927-34 (E.D. Mo. 2002).

<sup>333</sup> See *supra* Part III.B-C (reporting federal and state court decisions on the constitutionality of telemarketing regulations).

<sup>334</sup> See *supra* note 221 and accompanying text.

<sup>335</sup> *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995) (finding that Congress was entitled to proscribe some telemarketing calls with the TCPA without prohibiting all of them); *Minnesota v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 890 (Minn. 1992) (holding that "[a] regulation of commercial speech does not fail to directly advance the state's substantial interest merely because it does not eradicate all the evils that offend that interest"). But see *infra* notes 336-72 and accompanying text (speculating about the future acceptability of such underinclusiveness).

<sup>336</sup> See *supra* Part II.D (discussing increased protection for commercial speech in recent Supreme Court decisions).

<sup>337</sup> See *supra* Part II.D.

<sup>338</sup> See, e.g., 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 495-504 (1996) (tracing the history of the Court's commercial speech doctrine and emphasizing the value of commercial advertising to state residents); *City of Cincinnati v. Discovery Network, Inc.*,

instance, in *Discovery Network*, the Court was highly critical of the city of Cincinnati's plan that targeted only commercial newsracks for elimination from public property.<sup>339</sup> In finding the scheme violative of the First Amendment, the Court stated that the city had "attach[ed] more importance to the distinction between commercial and noncommercial speech than [the Court's] cases warrant[ed] and seriously underestim[ed] the value of commercial speech."<sup>340</sup> The continued rigid application of *Central Hudson's* third prong by the Court in *Rubin*, *44 Liquormart*, *Greater New Orleans Broadcasting*, and *Lorillard* to invalidate underinclusive or illogical legislation, signals an ongoing willingness on the part of the Court to protect commercial speech that is regulated without sufficient justification.<sup>341</sup> Indeed, in recent years, it has been suggested that heightened standards of review should apply to certain types of commercial speech cases.<sup>342</sup> Some justices have even openly pondered whether commercial speech should be less protected than other speech at all.<sup>343</sup> Justice Stevens, for example, concurring in *Rubin*, observed that

507 U.S. 410, 419 (1993) (discussing the value of commercial speech). For a discussion of the Supreme Court's increased protections of commercial speech, see Langvardt, *supra* note 109, at 587-652.

<sup>339</sup> *Discovery Network*, 507 U.S. at 424-28.

<sup>340</sup> *Id.* at 419 (emphasis added).

<sup>341</sup> For a discussion of these cases, see *supra* Part II.D.

<sup>342</sup> See *Discovery Network*, 507 U.S. at 416 n.11; *44 Liquormart*, 517 U.S. at 501. The Court observed the following:

[I]f commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech.

*Discovery Network*, 507 U.S. at 416 n.11. The *Liquormart* Court noted that

The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply . . . [W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages . . . there is far less reason to depart from the rigorous review that the First Amendment generally demands.

*44 Liquormart*, 517 U.S. at 501.

<sup>343</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 575 (2001) (Thomas, J., concurring); *Discovery Network*, 507 U.S. at 431 (Blackmun, J., concurring) (observing that "there is no reason to treat truthful commercial speech as a class that is less 'valuable' than noncommercial speech"). Justice Thomas posited that "there is no 'philosophical or historical basis for asserting that 'commercial speech' is of a 'lower value' than 'noncommercial' speech' . . . . Indeed I doubt whether it is even possible to draw a coherent distinction between [the two]." *Lorillard*, 533 U.S. at 575.

economic motivation or impact alone cannot make speech less deserving of constitutional protection, or else all authors and artists who sell their works would be correspondingly disadvantaged. Neither can the value of speech be diminished solely because of its placement on the label of a product. Surely a piece of newsworthy information on the cover of a magazine, or a book review on the back of a book's dust jacket, is entitled to full constitutional protection.<sup>344</sup>

In light of this increased protection of commercial speech, and specifically the way in which the Court has interpreted *Central Hudson* in recent years, it appears likely that "do-not-call" statutes do not have the "reasonable fit" required of commercial speech restrictions because their means are not carefully tailored to advance their ends.<sup>345</sup> The routine

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<sup>344</sup> *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring).

<sup>345</sup> See *supra* Part II.D (discussing recent United States Supreme Court decisions interpreting *Central Hudson*). Other potential constitutional problems beyond the scope of this Note are raised by "do-not-call" statutes besides First Amendment concerns. Michael E. Shannon, in his observations of "do-not-call" statutes, notes that at least two other constitutional questions regarding the statutes have been untested. Shannon, *supra* note 135, at 413. First, is the question of whether state "do-not-call" laws are in fact preempted by the TCPA. *Id.* As previously mentioned, Congress, by including a "savings clause" within the TCPA, explicitly provided that state statutes that were more restrictive than the TCPA were not preempted. See *supra* note 134 and accompanying text. The wording of the savings clause presents the problem, however, in stating that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations . . ." 47 U.S.C. § 227(e)(1) (2000) (emphasis added). A strict interpretation of this provision thus allows states to impose regulations that are more restrictive only on in-state telemarketers calling residents of that same state. Shannon, *supra* note 135, at 413-14. The unanswered question, however, is whether Congress intended to reserve interstate regulatory authority to itself, or whether the TCPA's "savings clause" impliedly authorizes states to regulate interstate calls. *Id.* at 414. The second problem noted by Shannon respecting "do-not-call" statutes concerns Congress' dormant Commerce Clause power. *Id.* at 414-17. While Congress has been given the positive authority to regulate commerce among the several states, the Court has continually held since the mid-nineteenth century that, because the commerce power is an exclusive grant of power to Congress by the Constitution, it operates on a negative basis to prevent states from unduly burdening interstate commerce. See U.S. CONST. art. I, § 8, cl. 3; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199-200 (1824) (implying that Congress' commerce power is exclusive by stating that "when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do"). Therefore, state laws may be held unconstitutional if they unduly burden interstate commerce, even if Congress has not enacted legislation in the given area and its commerce power is dormant. CHEMERINSKY, *supra* note 29, at 401. This principle presents a problem for the "do-not-call" statutes enacted to date as most purport to apply to both intrastate and interstate calls. See,

exemption of various types of telemarketing calls by state legislatures in their "do-not-call" statutes, in fact, bears a striking resemblance to the types of underinclusive governmental schemes struck down in *Rubin*, *Greater New Orleans Broadcasting*, and *Lorillard*.<sup>346</sup> Moreover, the exemptions raise the same type of problem under *Central Hudson's* third prong that the challenged government regulations in *Discovery Network* and *44 Liquormart* presented, that is, failure of the program to directly

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*e.g.*, IND. CODE ANN. §§ 24-4.7-2-5, 24-4.7-2-10 (West Supp. 2001) (defining the terms applied in its "do-not-call" statute to apply to those "making telephone sales calls to consumers located in Indiana whether the telephone sales calls are made from a location in Indiana or outside Indiana"). Further, if discriminatory intent against out-of-state entities can be demonstrated on the part of the legislature, strict scrutiny may apply. See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352-54 (1977). Statements made to the press by Indiana legislators are particularly troubling in this regard. See *In Brief Legislature*, INDIANAPOLIS STAR, Feb. 13, 2001 (reporting the comments of Dale Sturtz, a sponsor of Indiana's "do-not-call" bill, who stated that his "main concern is targeting national telemarketers"); Wagner, *supra* note 307, at A1 (reporting the statements of another representative who stated that the exemptions in Indiana's "do-not-call" statute were "necessary to preserve local trade"). Were a dormant Commerce Clause challenge brought against such a "do-not-call" statute, it seems likely the statute would be found to be extraterritorial, and, thus, unconstitutional. Shannon, *supra* note 135, at 416. Besides these observations by Shannon, another avenue for attack by the telemarketing industry on state "do-not-call" statutes may be state constitutions, including equal protection clauses. See *supra* note 144 (discussing the application of a state constitution to a telemarketing statute). It is clear that such a challenge brought under the Equal Protection Clause of the United States Constitution would fail as only rational basis review would apply in the absence of any suspect classification. See, *e.g.*, *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949) (rejecting an equal protection challenge brought against a statute that prohibited advertising on all vehicles except business delivery vehicles under rational basis review). However, given the success similar challenges have experienced under stricter state constitutions, it is equally clear that state constitutions could have significant implications in a challenge to a state "do-not-call" statute. See generally *Moser v. Frohnmayer*, 845 P.2d 1284 (Or. 1993) (invalidating a state telemarketing regulation under the state's equal protection clause); see also *supra* note 144 (discussing the *Moser* opinion).

<sup>346</sup> See *Lorillard*, 533 U.S. at 565-66; *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 178-79 (1999); *Rubin*, 514 U.S. at 486-90. While the Court in these cases does not expressly refer to the problem identified in the legislative schemes as underinclusiveness, it does refer to the "irrationality" of the schemes, and it is clear that allowing some advertising, while prohibiting others, is the heart of the Court's concern when analyzing the regulations in these cases under *Central Hudson's* third prong. See *Lorillard*, 533 U.S. at 565-66; *Rubin*, 514 U.S. at 488 ("We conclude that [the challenged regulation] cannot . . . advance its asserted interest because of the overall irrationality of the Government's regulatory scheme . . . . If combating strength wars were the goal, we assume that Congress would regulate disclosure of alcohol content for the strongest beverages as well as for the weakest ones.").

advance the legislative purpose.<sup>347</sup> In considering these decisions, it seems difficult to fathom how a court might differentiate "do-not-call" statute exemptions from the invalidated regulations in those cases. For example, how does a "do-not-call" statute with twenty-five different exemptions "directly advance" the state's interest in protecting the privacy of its residents within the meaning of these cases?<sup>348</sup> Exempting some telemarketing calls from the provisions of "do-not-call" statutes while applying the laws to others who are similarly situated seems indistinguishable from *Rubin's* prohibitions on advertising the alcoholic strength of beer but not wine on bottle labels.<sup>349</sup> Such exemptions are also similar to the federal prohibitions on gambling advertisements struck down in *Greater New Orleans Broadcasting* that, due to their exemptions, failed to directly advance the government's interest.<sup>350</sup> Why should exemptions in "do-not-call" statutes be viewed any differently than the Massachusetts regulations at issue in *Lorillard* that allowed tobacco advertising above five feet in height in retail stores while prohibiting any lower placement of the ads?<sup>351</sup> The Court has made clear in these cases that consistency by government in serving its interests is a prerequisite to any finding that its interests have been directly advanced.<sup>352</sup> Given this continued line of reasoning by the Court under *Central Hudson's* third prong, it seems highly probable that a decision rendered by the Court on the constitutionality of a "do-not-call" statute filled with exemptions would join the *Lysaght* and *Moser* district courts' view of underinclusiveness.

Despite this recent interpretation of *Central Hudson* by the Court, past courts, such as the Ninth Circuit in *Moser* and the Minnesota Supreme Court in *Casino Marketing*, have not identified constitutional problems with underinclusiveness in other telemarketing regulations.<sup>353</sup>

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<sup>347</sup> See *44 Liquormart*, 517 U.S. at 504-09; *Discovery Network*, 507 U.S. at 424 (noting that the distinction in the challenged statute "bears no relationship whatsoever to the particular interests that the city has asserted"). For discussion of these cases, see *supra* Part II.D.

<sup>348</sup> See ALA. CODE § 8-19A-4 (Supp. 2000) (making twenty-five exemptions to its "do-not-call" statute); see also *supra* notes 299-300 and accompanying text (discussing the Alabama statute and its exemptions).

<sup>349</sup> For a discussion of *Rubin*, see *supra* notes 92-96 and accompanying text.

<sup>350</sup> The Court's opinion in *Greater New Orleans Broadcasting* is set forth in Part II.D of this Note. See *supra* notes 102-09 and accompanying text.

<sup>351</sup> The Massachusetts regulatory scheme at issue in *Lorillard* is discussed in Part II.D of this Note. See *supra* notes 110-15 and accompanying text.

<sup>352</sup> See *Langvardt*, *supra* note 109, at 642.

<sup>353</sup> See *supra* note 335 (discussing the Ninth Circuit opinion in *Moser* and the Minnesota Supreme Court's opinion in *Casino Marketing*).



These courts, instead, found it permissible for the government to solve only a portion of the problems the regulations address, allowing seemingly incongruent exemptions to be made.<sup>354</sup> However, both of these courts, in determining that underinclusiveness was permitted, relied on the *United States v. Edge Broadcasting Co.*<sup>355</sup> line of cases for authority.<sup>356</sup> *Edge* was decided in 1993, the same year as both *Discovery*

<sup>354</sup> See *supra* note 335 and accompanying text.

<sup>355</sup> 509 U.S. 418 (1993).

<sup>356</sup> See *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995) (directly invoking *Edge*); *Minnesota v. Casino Mktg. Group, Inc.*, 491 N.W.2d 882, 890 (Minn. 1992) (relying on authority invoked in *Edge*). *Posadas De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), provide authority for the position that underinclusiveness is permissible in commercial speech regulation. See Arlen W. Langvardt & Eric L. Richards, *The Death of Posadas and the Birth of Change in Commercial Speech Doctrine: Implications of 44 Liquormart*, 34 AM. BUS. L.J. 483, 511 (1997) (suggesting *Edge* and *Posadas* represented the Court's willingness to accommodate legislative decisions, weakening the third and fourth prongs of *Central Hudson*); Cox, *supra* note 119, at 410 (asserting that *Metromedia* and *Posadas* "stand for the proposition that once the government demonstrates a significant interest, it need not take all possible steps to protect that interest"). In *Metromedia*, the Court agreed that the City of San Diego could ban certain billboards while allowing others. *Metromedia*, 453 U.S. at 512. In applying *Central Hudson*, the Court found the city had legitimate interests in furthering traffic safety and aesthetics. *Id.* at 507. Applying the third prong, the Court held that underinclusiveness was permissible and that the city was free to believe that some billboards presented a more acute problem than others. *Id.* at 511. In *Posadas*, the Court held that the Puerto Rican government had a legitimate interest in discouraging gambling and could do so through underinclusive means. *Posadas*, 478 U.S. at 341-42. The Court held that a ban on casino gambling advertising directly advanced the government's interest in reducing gambling, even though advertising of other forms of gambling was permitted by applying the *Metromedia* rationale. *Id.* at 342. The *Posadas* Court went even farther in its legislative deference by holding that the government could freely restrict the advertising of a practice it could legally prohibit altogether under a "greater power includes the lesser" rationale. *Id.* at 345-46. Finally, the Court, in *Edge*, considered federal statutes that prohibited the radio broadcast of lottery advertising by licensees located in non-lottery states and held that such a scheme did not violate *Central Hudson*. *Edge*, 509 U.S. at 422-23, 436. The broadcasting entity, *Edge*, was located on the border of North Carolina, a non-lottery state, and Virginia, a lottery state. *Id.* at 423. *Edge* was prevented from advertising Virginia's lottery under the law because the station itself was located in North Carolina, even though ninety percent of its listening audience was in Virginia. *Id.* at 423-24. Applying *Central Hudson*, the Court held that the government had a substantial interest in supporting the policies of non-lottery states. *Id.* at 426. Moving on to the third prong, the Court rejected the finding of the lower court that the regulation did not directly advance the government interest because the state residents within *Edge*'s broadcast range were already receiving advertisements from across state lines for the same lottery and, thus, the regulation was ineffective. *Id.* at 427-28. Relying heavily on *Posadas*, the Court held that the third prong of *Central Hudson* was not offended by the lack of effect the regulation would have on the residents near state lines, explicitly approving the underinclusiveness of the regulation to address out-of-state advertising. *Id.* at 434 ("Nor do we require that the Government make progress on every front before it can make progress on any front . . .

*Network* and *Edenfield v. Fane*,<sup>357</sup> two decisions that rigidly applied the third prong of *Central Hudson*.<sup>358</sup> *Edge*, on the other hand, applied both the third and fourth prongs of *Central Hudson* in a manner much more deferential to governmental regulatory prerogatives without attempting to distinguish, in any meaningful fashion, the *Discovery Network* or *Edenfield* opinions decided earlier that year.<sup>359</sup> In upholding a federal statute that banned broadcast advertising of state lotteries unless the broadcaster was located in a state where a lottery was permitted, the *Edge* Court expressly allowed underinclusiveness.<sup>360</sup> The Court, invoking *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*<sup>361</sup> as authority, specifically stated that the government need not "make progress on every front before it can make progress on any front."<sup>362</sup> Both the Ninth Circuit in *Moser* and the Minnesota Supreme Court in *Casino Marketing* relied on this reasoning.<sup>363</sup>

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Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated."). The *Multimedia*, *Posadas*, and *Edge* line of cases have fallen out of favor in recent Court opinions, with the Court expressly disavowing the reasoning of these cases in some instances. See *infra* notes 364-372 and accompanying text.

<sup>357</sup> 507 U.S. 761 (1993).

<sup>358</sup> *Id.* at 770-73; *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993). *Edenfield* provides another example of the Court's rigid application of *Central Hudson*'s third prong. *Edenfield*, 507 U.S. at 770-73. In *Edenfield*, a First Amendment challenge was brought against a Florida Board of Accountancy regulation that prohibited certain public accountants from engaging in the personal solicitation of potential clients. *Id.* at 763-64. The state attempted to justify this ban on advertising by suggesting that its purpose in adopting the measure was to protect consumers from fraudulent behavior by accountants and to maintain the fact and appearance of accountant independence in auditing and attesting to financial statements. *Id.* at 768. The Court acknowledged the legitimacy of these interests. *Id.* at 769-70. However, an eight-justice majority held that the state had failed to prove *Central Hudson*'s third element: the advertising ban's direct advancement of the state interest. *Id.* at 771-73 (citing the lack of any studies or any anecdotal evidence that would suggest the state ban advanced its interests). The *Edenfield* Court also suggested that analysis would not be substantially different under a time, place, or manner analysis in that the challenged restriction "still must serve a substantial state interest in 'a direct and effective way.'" *Id.* at 773 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

<sup>359</sup> P. Cameron De Vore, *The Two Faces of Commercial Speech Under the First Amendment*, 12 COMM. LAW. 1 (Spring 1994). De Vore asserts that the Court's 1993 commercial speech cases were highly incongruent. *Id.* *Discovery Network* and *Edenfield* on the one hand "strongly reaffirmed the high value of commercial speech," while *Edge* demonstrated an unusual willingness to accommodate legislative judgments. *Id.*

<sup>360</sup> *Edge*, 509 U.S. at 434.

<sup>361</sup> 478 U.S. 328 (1986).

<sup>362</sup> *Id.*; see also *supra* note 356.

<sup>363</sup> See *supra* note 335 (discussing the *Moser* and *Casino Mktg.* courts' reasoning).

Simply stated, the *Edge* decision, although not expressly overruled, has not stood the test of time and has been all but abandoned by the Court in recent decisions.<sup>364</sup> The *Edge* opinion, which relied on a strange blend of partial concurrences to achieve its result, is viewed as an anomaly, especially in light of the *Discovery Network* and *Edenfield* opinions.<sup>365</sup> The result in *Edge* has come to be understood as the result of a unique factual situation in which the Court was responding to federalism concerns.<sup>366</sup> The *Edge* decision seems even more anomalistic in light of *Rubin's* resurrection of *Edenfield's* interpretation of *Central Hudson's* third prong in an eight-to-one decision two years later.<sup>367</sup> Furthermore, the Court specifically rejected an attempt by Rhode Island to rely on *Posadas* and *Edge* in an appeal for deference to its decision to ban liquor advertising in *44 Liquormart*.<sup>368</sup> The Court instead suggested that "unquestioningly accepting legislative judgments bordered on abdication of the Court's role in resolving constitutional questions" and refused to "give force to its highly deferential approach."<sup>369</sup> Finally, the *Posadas* decision itself, which had been relied on in *Edge*, was expressly abandoned by the Court in *44 Liquormart*.<sup>370</sup> In *44 Liquormart*, the Court openly stated that *Posadas* had "erroneously performed the First Amendment analysis" and could not be reconciled with the Court's commercial speech precedents.<sup>371</sup> In light of the foregoing discussion, and the Court's repeated invocation of the *Edenfield* standard for *Central*

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<sup>364</sup> See Langvardt & Richards, *supra* note 356, at 513 n.152; see also *infra* notes 365-72 and accompanying text. The *Edge* decision was mentioned by the Court in one recent decision, *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999). However, this was due to the fact that the same statute challenged in *Edge* was again at issue in *Greater New Orleans Broadcasting*. *Greater New Orleans Broad.*, 527 U.S. at 176. Further, the Court in *Greater New Orleans Broadcasting* "pointedly refused to engage in *Edge Broadcasting*-like tolerance for government restrictions on commercial speech, despite the existence of a plausible argument that *Edge Broadcasting* should control." Langvardt, *supra* note 109, at 640.

<sup>365</sup> De Vore, *supra* note 359, at 23-24.

<sup>366</sup> *Id.* at 26-27 (explaining that *Edge's* unusual fact situation and federalism concerns distinguish that case from the Court's mainstream line of commercial speech cases).

<sup>367</sup> See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995); Langvardt & Richards, *supra* note 356, at 513. In *Rubin*, the Court directly implied that the result in *Edge* had been produced by federalism concerns. *Rubin*, 514 U.S. at 486 (noting that the government officials in that case were not in need of federal assistance as were the states in *Edge*).

<sup>368</sup> *44 Liquormart v. Rhode Island*, 517 U.S. 484, 508-10 (1996).

<sup>369</sup> *Id.* at 510; Langvardt & Richards, *supra* note 356, at 539.

<sup>370</sup> *44 Liquormart*, 517 U.S. at 509 (stating that the *Posadas* opinion "cannot be reconciled with the unbroken line of prior cases"); Langvardt & Richards, *supra* note 356, at 538 (suggesting that the *44 Liquormart* majority opinion's "careful dismantling of *Posadas* leaves virtually no life in that decision").

<sup>371</sup> *44 Liquormart*, 517 U.S. at 509.

Hudson's third prong in its recent commercial speech cases, it appears likely that underinclusiveness in "do-not-call" statutes will not be well received in future decisions.<sup>372</sup>

## 2. Evidentiary Difficulties for States Defending "Do-Not-Call" Statutes

When a First Amendment challenge is brought against a "do-not-call" statute, evidentiary concerns regarding the statutory exemptions also become apparent in light of the Supreme Court's recent precedents. These cases make clear that the government should demonstrate that it is aware of its intrusion on speech and that it has "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition."<sup>373</sup> The precedents also place the burden squarely on the government to demonstrate that its regulation achieves the "reasonable fit" requirement of *Central Hudson*.<sup>374</sup> The Court described this obligation in detail in *Edenfield*, where it observed that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech *must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.*"<sup>375</sup> In the years since *Edenfield* was decided, the Court, in its recent commercial speech cases, has not retreated from this demand, but rather has continued to require such a showing from governmental bodies seeking to restrain commercial speech.<sup>376</sup> In these cases, the Court continues to look for substantial evidence from the government that its regulations will in fact directly advance the government's interest.<sup>377</sup> Mere "anecdotal evidence," "educated guesses," and other "tidbits" have been held to be insufficient.<sup>378</sup> Rather, the Court has made clear that the government

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<sup>372</sup> For a discussion of the Court's invocation of *Edenfield*, see *infra* Part IV.D.2.

<sup>373</sup> *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

<sup>374</sup> *Id.* at 416; *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989) (finding that, "since the State bears the burden of justifying its restrictions, . . . it must affirmatively establish the reasonable fit we require") (citation omitted).

<sup>375</sup> *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (emphasis added). "Without this requirement [the Court observed], a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* at 771. The Court in *Edenfield* found that the government in that case had not presented any studies or statistical evidence that would substantiate that the state interest was directly advanced by the advertising ban at issue. *Id.*

<sup>376</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 566 (2001); *44 Liquormart*, 517 U.S. at 505; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (referring to this showing by government as being "critical" in the *Central Hudson* analysis).

<sup>377</sup> *44 Liquormart*, 517 U.S. at 505; *Rubin*, 514 U.S. at 487-89.

<sup>378</sup> *Rubin*, 514 U.S. at 490.

should present studies, findings of fact, or other similarly persuasive evidence to establish the ability of a regulation to directly and significantly advance the government's asserted interest.<sup>379</sup>

A clear example of this need for evidentiary support is provided in *44 Liquormart* where the government, in support of its ban on alcohol price advertising, asked the Court to accept the "common sense" notion that such a prohibition would ultimately lead to higher alcohol prices and, thus, impact the purchasing patterns of state residents.<sup>380</sup> While the Court agreed with this proposition in the abstract, it held that such a lack of evidence would still not support a finding that the prohibition on advertising would *significantly* reduce alcohol consumption in the state as required by *Central Hudson*.<sup>381</sup> Rather, the Court was looking for the state to provide findings that would identify the price level at which significant reductions in alcohol consumption would occur and what level of decrease in price would occur if the ban was not in place.<sup>382</sup> The Court stated that, without such information provided by the state, it would have to engage in "speculation or conjecture," which it viewed as an "unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's interest."<sup>383</sup>

State interests fared much better in *Florida Bar v. Went for It, Inc.*,<sup>384</sup> where regulations of the Florida Bar Association prohibiting certain direct-mail solicitations of personal injury victims were challenged.<sup>385</sup> In applying *Central Hudson* in that case, the Court observed that the government's asserted interest in protecting the privacy of personal injury victims and their families against unsolicited contact by lawyers

<sup>379</sup> *44 Liquormart*, 517 U.S. at 505-06 (citing a lack of findings, or evidentiary support whatsoever, for the state's claim that its speech prohibition would reduce statewide alcohol consumption in any significant fashion); *Rubin*, 514 U.S. at 489 (finding that no credible evidence had been brought forward by the government to support its ban on advertising alcoholic content on beer labels and suggesting that evidence to the contrary existed).

<sup>380</sup> *44 Liquormart*, 517 U.S. at 505.

<sup>381</sup> *Id.* In fact, despite the prohibition on alcohol advertising having been in place for nearly forty years, one study indicated that Rhode Island was among the top thirty percent of all states in per capita consumption of alcoholic beverages. *Id.* at 493.

<sup>382</sup> *Id.* at 506-07.

<sup>383</sup> *Id.* at 507.

<sup>384</sup> 515 U.S. 618 (1995).

<sup>385</sup> *Id.* The challenged regulations prohibited personal injury attorneys from sending targeted direct-mail solicitations to victims of accidents or disasters or their family members for a thirty-day period following the incident. *Id.* at 620. The regulations were challenged by *Went For It, Inc.*, a lawyer referral service, as a violation of both the First and Fourteenth Amendments. *Id.* at 621.

was substantial.<sup>386</sup> Moving on to the third prong, the Court, citing a detailed one-hundred-and-six page summary of a two-year study conducted by the state bar, found that the regulation directly advanced the government's interest.<sup>387</sup> Standing in stark contrast to the lack of evidence presented by Rhode Island in *44 Liquormart*, the Court found the Florida Bar's evidentiary record "noteworthy" and quoted the results from the survey at length in its second-prong analysis.<sup>388</sup>

This demand for evidentiary support of restrictions on commercial speech would seem to present difficulty for states that have enacted "do-not-call" laws to date. While a few "do-not-call" statutes contain legislative findings that would assist a court in determining the government's interest or purpose in enacting the statute, only one statute attempts in any way to explain its exemptions.<sup>389</sup> As previously

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<sup>386</sup> *Id.* at 624-25. This interest was found to be part of a larger government interest in "curbing activities that negatively affect the administration of justice." *Id.* at 624.

<sup>387</sup> *Id.* at 628. The Florida Bar's survey indicated that approximately 700,000 direct-mail solicitations were mailed annually by Florida attorneys. *Id.* at 626. Approximately forty percent of these solicitations were mailed to accident victims or their survivors. *Id.* A survey of state residents concerning these solicitations was commissioned by the Florida Bar. *Id.* Fifty-four percent of those surveyed found the solicitation practice to violate privacy rights. *Id.* at 627. Forty-five percent of a random sampling of those who had received direct mail solicitations from attorneys found the tactics were designed to take advantage of unstable or gullible persons. *Id.* Twenty-seven percent of these persons found that the solicitations lowered their regard for the legal profession. *Id.*

<sup>388</sup> *Id.* at 626-29.

<sup>389</sup> *See, e.g.,* ALA. CODE § 8-19C-1 (Supp. 2001). The ordinance states:

The Legislature of Alabama finds all of the following:

- (1) The use of the telephone to market goods and services to the home is pervasive now due to the increased use of cost-effective telemarketing techniques.
- (2) Over 30,000 businesses actively telemarket goods and services to businesses and residential customers.
- (3) Everyday, over 300,000 solicitors place calls to more than 18 million Americans, including citizens of this state.
- (4) Telemarketing, however, can be an intrusive and relentless invasion of the privacy and peacefulness of the home.
- (5) Many citizens of this state are outraged over the proliferation of nuisance calls to their homes from telemarketers.
- (6) Privacy rights and commercial freedom of speech of individuals can be balanced in a way that accommodates both the privacy of individuals and legitimate telemarketing practices.
- (7) It is in the public interest to establish a mechanism under which the individual citizens of this state can decide whether or not to receive telemarketing calls in their homes.

*Id.* These findings are identical to the findings in the Georgia statute. GA. CODE ANN. § 46-5-27(a) (Supp. 2001). Another state to include findings, including a finding regarding

mentioned, exemptions to "do-not-call" statutes are primarily a result of lobbying of state legislatures rather than part of some conscious choice by representatives to apply the statute only to the telemarketers representing the greatest intrusion into residents' homes.<sup>390</sup> However, there may be some indication that state representatives also consider the relative threat to privacy posed by those exempted when adopting "do-not-call" statutes. For instance, Representative Dale Sturtz, the sponsor of the Indiana "do-not-call" bill that was ultimately enacted, candidly admits that the primary reason for the exemptions contained in Indiana's law was the pressure put on state representatives by the real estate, insurance, and newspaper lobbies.<sup>391</sup> However, Representative Sturtz also indicated that the consensus among state representatives who eventually voted for the bill was that those who would receive exemptions did not make a significant percentage of telemarketing calls to state residents.<sup>392</sup> Therefore, the legislators felt that the bill would still apply to those large telemarketing companies representing the greatest invasion of consumers' privacy.<sup>393</sup>

While such concern for privacy is refreshing, it is clear, in light of the foregoing discussion, that appeals to such common sense considerations

exemptions for charitable organizations or political speech, is Colorado. See COLO. REV. STAT. ANN. § 6-1-902 (West Supp. 2002). The Colorado statute provides the following findings:

- (1) The general assembly hereby finds, determines, and declares that:
  - (a) The use of the telephone and telefacsimile ("fax") to market goods and services is widespread;
  - (b) Many citizens of this state view telemarketing as an invasion of privacy;
  - (c) Individuals' privacy rights and commercial freedom of speech should be balanced in a way that accommodates both the privacy of individuals and legitimate telemarketing practices;
  - (d) Although charitable and political organizations are exempt from the provisions of this part 9 because of considerations of freedom of speech, the general assembly encourages such organizations to voluntarily comply with this part 9 when possible; and
  - (e) It is in the public interest to establish a mechanism under which the individual citizens of this state can decide whether or not to receive telephone solicitations by phone or fax.

*Id.* Section 6-1-902(1)(d) represents an attempt to explain an exemption in the statute. *Id.* § 6-1-902(1)(d).

<sup>390</sup> See *supra* notes 290-91 and 323 and accompanying text.

<sup>391</sup> See *supra* note 323 (reporting comments made by Rep. Sturtz concerning the exemptions).

<sup>392</sup> Sturtz interview, *supra* note 306.

<sup>393</sup> *Id.*

will not suffice to demonstrate *Central Hudson's* "reasonable fit." Were a First Amendment challenge brought against a statute such as Indiana's, where legislative consideration of privacy concerns presented by exemptions went unexpressed, the result would likely be similar to that in *44 Liquormart*.<sup>394</sup> Rather than accepting appeals to common sense, a reviewing court remaining true to the Court's recent precedents would instead be looking for a more concrete expression of the state's privacy concerns.<sup>395</sup> Such a court would likely expect evidence supporting the state's conclusions regarding the privacy threat posed by those exempted in the form of studies, surveys, or findings.<sup>396</sup> Were such studies conducted by a state enacting a "do-not-call" statute with exemptions, they may well be sufficient to bring the statute within *Central Hudson's* "reasonable fit." After all, the "fit" need not be perfect to survive review under *Central Hudson* but merely "reasonable."<sup>397</sup> However, without such evidentiary support for the exemptions placed within "do-not-call" statutes, those enacted to date are clearly threatened by the "reasonable fit" requirement.<sup>398</sup>

#### V. A MODEL "DO-NOT-CALL" STATUTE

In the absence of any new federal efforts to restrict telemarketing, it appears that "do-not-call" statutes will continue their present popularity with state legislatures.<sup>399</sup> Those states that have not already enacted a "do-not-call" statute are likely already considering a "do-not-call" bill in some form or another.<sup>400</sup> If not, they surely will be forced to consider such a measure in the near future due to overwhelming public demand for the laws. Those states that have not already enacted "do-not-call" laws can make use of the provisions of some presently existing laws that reflect legislative attention having been paid to the problems surrounding such a statute. They should, however, also pay close attention to the Supreme Court's recent interpretations of *Central Hudson* and attempt to draft statutes that are more likely to survive a searching

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<sup>394</sup> See *supra* text accompanying notes 380-83 (discussing the *44 Liquormart* decision).

<sup>395</sup> See *supra* text accompanying notes 373-79.

<sup>396</sup> See *supra* text accompanying notes 373-79.

<sup>397</sup> *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989); see also *supra* note 152 (discussing the "reasonable fit" requirement).

<sup>398</sup> See *supra* text accompanying notes 380-83.

<sup>399</sup> See *supra* note 246 (discussing the possibility of a federal "do-not-call" statute); *supra* notes 251-73 and accompanying text (discussing the popularity of state "do-not-call" statutes).

<sup>400</sup> See *supra* note 270 and accompanying text (listing the web sites of several state legislatures presently considering "do-not-call" bills).



“reasonable fit” analysis.<sup>401</sup> States that have already enacted “do-not-call” statutes should also consider reviewing their statutes and amending them in such a way as to comply more closely with the increasing demands of legislation that burdens commercial speech.<sup>402</sup>

The following model statute offers a starting point for drafting a “do-not-call” statute that is likely to survive a *Central Hudson* analysis, thus avoiding invalidation of the statute on First Amendment grounds.<sup>403</sup> It incorporates the provisions of several state “do-not-call” statutes that reflect obvious effort on the part of legislatures to address the needs of both consumers and telemarketers raised by this form of advertising and the prohibitions placed upon it.<sup>404</sup>

*Title: Business and Commercial Code*

Chapter: State Telephone Privacy Act

*Section 1: Legislative Findings*

(a) The Legislature finds that:

(1) The use of the telephone to market goods and services to the home has become a widespread and pervasive practice due to the increased use of cost-effective telemarketing techniques.<sup>405</sup>

(2) Over 30,000 businesses in the United States actively telemarket goods and services to residential consumers.<sup>406</sup>

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<sup>401</sup> See *supra* Part IV.D.1 (analyzing underinclusiveness in telemarketing regulations in light of recent Supreme Court precedents).

<sup>402</sup> See *supra* Part IV.D.1.

<sup>403</sup> It should be mentioned that several sections of the typical “do-not-call” statute, beyond the scope of this Note, yet necessary for its complete implementation, have been excluded from the model statute. Such sections include remedies, funding, and reporting requirements among others. See, e.g., IND. CODE ANN. §§ 24-4.7-3-5, 24-4.7-3-6, 24-4.7-5-2 (West Supp. 2001).

<sup>404</sup> The statutory provisions cited within this model statute have been set forth in whole or in part as they appear in their respective state codes. See *infra* notes 405-11, 413-18, 422-26 and accompanying text. To date, no state “do-not-call” statute contains the specific provisions contained within this model statute.

<sup>405</sup> See, e.g., GA. CODE ANN. § 46-5-27(a)(1) (Supp. 2001).

<sup>406</sup> See *id.* § 46-5-27(a)(2).

- (3) Each day, over 1 million telemarketing calls are placed to citizens of this state.<sup>407</sup>
- (4) Unrestricted telemarketing represents a threat to the privacy of the citizens of this state.<sup>408</sup>
- (5) Many citizens of this state are outraged over the proliferation of intrusive calls to their homes from telemarketers, consider such calls to be a nuisance, and have requested that their representatives address this problem.<sup>409</sup>
- (6) The proliferation of unsolicited telemarketing sales calls, especially during the evening hours, creates a disturbance upon the home and family life of the citizens of this state.<sup>410</sup>
- (7) Some consumers maintain telephone service primarily for emergency situations, and unrestricted placement of telemarketing calls to these consumers may create a health and safety risk to those consumers.<sup>411</sup>
- (8) Telemarketing has been used successfully as a method of perpetrating fraud on the citizens of this state, particularly targeting the state's senior citizens.<sup>412</sup>
- (9) There is a compelling state interest in protecting the privacy of the citizens of this state who wish to avoid unsolicited telemarketing sales calls.<sup>413</sup>

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<sup>407</sup> See generally ALA. CODE § 8-19C-1(3) (Supp. 2001). The number of phone calls in this example is hypothetical. In order to demonstrate compliance with *Central Hudson's* third prong, it would benefit each state to conduct its own survey of the threat to privacy posed by telemarketing to its residents. See *supra* Part IV.D.2 (discussing *Central Hudson's* evidentiary demands).

<sup>408</sup> See, e.g., ARK. CODE ANN. § 4-99-402(a)(2) (Michie 2001).

<sup>409</sup> See *id.* § 4-99-402(a)(3). It would be beneficial if state representatives, prior to voting on "do-not-call" legislation, kept track of public opinion of such a statute in order to give meaning to this provision.

<sup>410</sup> *Id.* § 4-99-402(a)(4).

<sup>411</sup> *Id.* § 4-99-402(a)(5).

<sup>412</sup> See *Minnesota v. Casino Mktg. Group*, 491 N.W.2d 882, 887-88 (Minn. 1992) (recognizing fraud prevention as a legitimate and substantial state interest under *Central Hudson*).

(10) It is in the public interest to establish a mechanism under which the individual citizens of this state can decide whether or not to receive unsolicited telemarketing sales calls in their homes, just as they may already lawfully decide whether to receive solicitations at their door.<sup>414</sup>

(11) The privacy rights of the citizens of this state and the commercial freedom of speech rights of those using telemarketing sales techniques as well as those of citizens who wish to receive telemarketing calls must be balanced in a way that protects both privacy and legitimate telemarketing practices.<sup>415</sup>

(12) The establishment of a "do-not-call" list, by which consumers who choose to receive no telemarketing calls can express their choice while permitting telemarketers to call consumers who do not object to such calls, is the means of protecting consumers that is least restrictive of commercial speech interests.

(13) Although some consumers enjoy and may benefit from receiving unsolicited telemarketing sales calls, others who are bothered by such sales practices are unlikely to respond affirmatively to receiving such calls. Thus, telemarketers have no further legitimate interest in continuing to invade the privacy of those consumers who affirmatively express their objections to such calls.<sup>416</sup>

(14) Legitimate telemarketers can make their telemarketing efforts more cost-effective by avoiding calling those consumers who have expressed their objections to receiving such calls.<sup>417</sup>

(15) The Legislature intends that this chapter protect the privacy of state telephone consumers who have

<sup>413</sup> CAL. BUS. & PROF. CODE § 17590(a) (West Supp. 2002).

<sup>414</sup> See, e.g., GA. CODE ANN. § 46-5-27(a)(7) (Supp. 2001).

<sup>415</sup> See, e.g., ARK. CODE ANN. § 4-99-402(a)(6).

<sup>416</sup> See *id.* § 4-99-402(a)(7).

<sup>417</sup> *Id.*

affirmatively expressed an objection to receiving unsolicited telemarketing sales calls, and the Legislature intends that this chapter be liberally construed to effect that goal.<sup>418</sup>

### Commentary

The primary purpose of section one is to establish the government's purpose in enacting the statute. Should a First Amendment challenge be brought against the statute, it is here that a court will look to determine whether the state has articulated a substantial interest within the meaning of *Central Hudson*. The findings first attempt to define the scope of the problem the state is attempting to address and announce that the problems presented by telemarketing affect the state's residents. Several of the findings then announce that the state is attempting to protect the privacy of its citizens. Fraud and safety concerns, which are secondary interests, are also articulated by the findings.

These findings further announce to a reviewing court that the legislature was mindful of First Amendment considerations when drafting the statute and that the legislature has attempted to balance the important interests of privacy and commercial freedom of speech.<sup>419</sup> The findings recognize, not only the commercial speech rights of the telemarketers, but also those of state residents who might wish to receive telemarketing calls. Besides announcing interests required under the second prong of *Central Hudson*, the findings also offer some support for other prongs of the test. The findings demonstrate that the state is attempting, through the least restrictive means possible, to protect the privacy of those citizens who are bothered by telemarketing calls, while allowing telemarketers to continue calling all other telephone consumers in the state.<sup>420</sup> The third prong is given limited support by findings that demonstrate that the state has investigated the extent to which telemarketing is utilized in the state before adopting the statute, thus

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<sup>418</sup> *Id.* § 4-99-402(b).

<sup>419</sup> See *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (observing that government, in restricting commercial speech, must demonstrate that it has "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition").

<sup>420</sup> See *supra* note 84 (discussing the least restrictive means requirement of *Central Hudson*).

providing valuable evidentiary support that the statute will directly advance the state's goal.<sup>421</sup>

*Section 2: Definitions*

(a) As used in this chapter:

(1) "Division" refers to the Consumer Protection Division of the Attorney General's Office.<sup>422</sup>

(2) "List" refers to the no telemarketing sales call list maintained and published by the Division under Section 3 to which consumers may have their names and telephone numbers added to voice their objection to receiving unsolicited telemarketing sales calls and thus bring themselves within the protections of this chapter.<sup>423</sup>

(3) "Consumer" means a residential telephone subscriber in this state or any other persons residing in the same residence as the subscriber.<sup>424</sup>

(4) "Telemarketer" means any person or corporation who makes an unsolicited telemarketing sales call to a consumer or any person who directly supervises the conduct of the telemarketer.<sup>425</sup>

(5) "Unsolicited telemarketing sales call" means:

(i) Soliciting a sale of consumer goods or services, offering an investment, business, or employment

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<sup>421</sup> See *supra* Part IV.D.2 (discussing the evidentiary requirements of *Central Hudson's* third prong). Demonstrating the governmental interest in enacting a "do-not-call" statute will be difficult for those states that do not make legislative findings or record legislative history. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567-68 (1991) (observing that it "is impossible to discern, other than from the text of the statute, exactly what governmental interest the Indiana legislators had in mind when they enacted [the public indecency] statute, for Indiana does not record legislative history"). States that do not clearly state their purpose or interest in enacting legislation leave the finding of such an interest to the reviewing court. See *id.*

<sup>422</sup> IND. CODE ANN. § 24-4.7-2-4 (West Supp. 2002).

<sup>423</sup> See *id.* § 24-4.7-2-7.

<sup>424</sup> See MO. ANN. STAT. § 407.1095(2) (West 2001).

<sup>425</sup> See N.Y. GEN. BUS. LAW § 399-z(1)(g) (McKinney Supp. 2001).

opportunity, or offering a consumer loan to the consumer called;

(ii) Obtaining information that will or may be used for the solicitation of a sale of consumer goods or services, the offering of an investment, business, or employment opportunity, or the offering of a consumer loan to the consumer called;

(iii) Offering the consumer called a prize, gift, or anything else of value, if payment of money or other consideration is required in order to receive the prize or gift, including, but not limited to, the purchasing of other merchandise or services or the payment of any processing fees, delivery, shipping and handling, or any other fees or charges; or

(iv) Offering the consumer called a prize, gift, or other incentive to attend a sales presentation for consumer goods or services, an investment or business opportunity, or a consumer loan, or property;

(v) "Unsolicited telemarketing sales call" does not include any telephone call made in response to the express written request of the consumer.<sup>426</sup>

### Commentary

Section two sets forth the essential terms used in the "do-not-call" statute. The primary importance of this section is its noticeable lack of exemptions. As opposed to numerous existing "do-not-call" statutes, this section has not been used to define telemarketing to exclude several types of business calls to consumers.<sup>427</sup> By eliminating the exemptions to the statute, the legislature following this model avoids potential First Amendment problems. As mentioned previously, the Supreme Court in recent years has rigidly interpreted the third prong of the *Central Hudson* test for commercial speech restrictions.<sup>428</sup> Recent precedents in this area suggest that the Court, or a lower court carefully reading its opinions,

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<sup>426</sup> See KY. REV. STAT. ANN. § 367.46951(1)(a) (Banks-Baldwin 2002).

<sup>427</sup> See *supra* Part IV.B (discussing exemptions placed within the "do-not-call" statutes of several states).

<sup>428</sup> See *supra* Part IV.D.

will examine a commercial speech restriction to ensure that the statute's means are carefully tailored to advance its ends. Drafting a "do-not-call" statute with exemptions dramatically increases the likelihood that no "reasonable fit" will be found between the government's means and end, requiring the statute to be invalidated.<sup>429</sup>

The one exemption contained within the model statute, allowing calls to which the consumer expressly consents, provides protection for calls that are unobjectionable to the consumer and protects the statute from a finding of overbreadth. A provision such as this may also be used to protect existing business interests rather than including an additional "pre-existing business relationship" exception that would present difficulties in interpretation, likely subjecting the consumer to many unwanted calls.<sup>430</sup> Under the model statute exemption, creditors could require debtors to consent in writing to such calls, and businesses with which the consumer frequently has dealings could similarly request permission to contact the consumer. This exemption places the consumer, not the telemarketer, in charge of which calls may be placed, making the statute more carefully tailored to protect privacy interests while not proscribing speech to which there is no objection.

*Section 3: Establishment and Maintenance of No  
Telemarketing Sales Call List*

(a) The Division shall establish and operate a database to compile a list of telephone numbers of consumers who

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<sup>429</sup> See *supra* Part IV.D. Due to extensive lobbying efforts by various business entities, legislators are often forced to place exemptions within "do-not-call" statutes. See *supra* notes 290-91 and accompanying text. However, legislators may ultimately agree to the exemptions due to a perception that the exempted parties are not responsible for a significant percentage of telemarketing calls received by their state's telephone consumers. See *supra* text accompanying notes 392-93 (describing events leading to the passage of Indiana's "do-not-call" statute). Such a scenario presents a slightly different opportunity for legislators to demonstrate the "reasonable fit" of their statute. To comply with the evidentiary requirements described in Part IV.D.2, the legislature of such a state should conduct a study of all telemarketing calls received by state telephone consumers and determine the percentage of calls placed by parties that would be exempt under the statute. See *supra* Part IV.D.2 (discussing evidentiary requirements under *Central Hudson's* third prong). An additional finding could then be added to the effect that the exempted calls represent, for example, less than two percent of all telemarketing calls received by consumers. Given the Supreme Court's often repeated holding that the "fit" under the third and fourth prongs of *Central Hudson* need not be perfect, but only "reasonable," such a finding may permit the statute to survive judicial review. See *supra* note 152.

<sup>430</sup> See *supra* note 288 (discussing the "pre-existing" business relationship exemption).

object to receiving unsolicited telemarketing sales calls. The Division shall begin compiling this list upon the passage of this Act and shall have the database in operation before July 1, 2003.<sup>431</sup>

(b) Any consumer who wishes to be placed on the list shall notify the Division either by calling a toll-free number established by the Division for this purpose or by registering on the attorney general's website if such registration is authorized by the attorney general. Registration on the list will be without charge to the consumer.<sup>432</sup>

(c) The Division will publish, at least quarterly, an updated version of the list to be distributed to telemarketers seeking to place unsolicited telemarketing sales calls in the state. The list will be distributed to these telemarketers at a fee not greater than necessary to provide for publication costs of the list.

(d) The Division will establish methods whereby additional consumers may indicate their desire to be included on the next quarterly publication of the list.

(e) The Division will establish a procedure whereby those already on the list and who wish to have their numbers removed may do so.

(f) A consumer may exclude from the coverage of the list telemarketing sales calls from entities identified by the consumer. The consumer shall designate any exclusions in the manner prescribed by the Division.<sup>433</sup>

(g) If the federal government establishes a single, unified, national database of telephone numbers of consumers who object to receiving unsolicited telemarketing sales calls, the Division shall provide the

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<sup>431</sup> See ALA. CODE § 8-19C2(b)(1) (Supp. 2001).

<sup>432</sup> See CONN. GEN. STAT. ANN. § 42-288a(b) (West Supp. 2002).

<sup>433</sup> CAL. BUS. & PROF. CODE § 17591(b) (West Supp. 2002).



state's list to the federal government for inclusion in the federal "do-not-call" database.<sup>434</sup>

### Commentary

Section three is essential to the establishment and maintenance of the state's "do-not-call" list and is the section through which legislatures set the list in motion. This section contemplates that the attorney general's office will be placed in charge of establishing and overseeing the database which is often, but not always, the case in "do-not-call" statutes enacted to date. The primary importance of this section, besides describing the operation of the database, is its attempt to restrict only that speech which the consumer objects to and no more. The section provides for an ongoing registration process for consumers who wish to be added to the database and allows those who wish to be removed from the list to have their numbers deleted. One important feature of this section, which so far has only been included in the California "do-not-call" statute, is found in section 3(f). This provision allows consumers to be placed on the list yet allows, in advance, certain types of telemarketing calls or calls from specific telemarketers. Some states, in placing charitable organization exemptions within "do-not-call" statutes, may have done so in the belief that these types of calls are unobjectionable to most consumers. This provision, instead, allows each individual consumer to make this decision, allowing a more careful tailoring of the statute's prohibitions on speech.

#### *Section 4: Unlawful Unsolicited Telemarketing Sales Calls*

No telemarketer shall make or cause to be made any unsolicited telemarketing sales call to any consumer whose number appears on the then-current quarterly list published by the Division.<sup>435</sup>

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<sup>434</sup> See, e.g., MO. ANN. STAT. § 407.1101(3) (West Supp. 2001). Such a provision would enable an easier transition to a federal database should a national "do-not-call" list be established by the federal government. See *supra* note 246 (discussing the possibility of a national database).

<sup>435</sup> See, e.g., IND. CODE ANN. § 24-4.7-4-1 (West Supp. 2002); FLA. STAT. ANN. § 501.059(4) (West Supp. 2002).

## Commentary

Section four is the essence of any "do-not-call" statute—the statement of the prohibition on calls to consumers on the list. This section is very straightforward and does not dilute the strength of its protections with qualifications on its application as do some existing state "do-not-call" statutes.<sup>436</sup>

## VI. CONCLUSION

In responding to the increased use of telemarketing techniques to market goods and services, state legislatures are faced with the same types of problems posed by door-to-door solicitations at the time *Breard* was decided.<sup>437</sup> Legislative efforts to regulate telemarketing are merely the modern equivalent of the ordinances that were enacted by the same state legislatures in response to that earlier advertising problem. Like legislation directed against door-to-door solicitation in the early part of the twentieth century, legislation aimed at controlling the telemarketing industry has, to this point, enjoyed broad support in the courts.<sup>438</sup>

However, courts and legislators must not lose sight of the fact that telemarketing, though intrusive, is still speech and is afforded constitutional protection. Certainly the Supreme Court, though wavering in its protections of commercial speech, has not lost sight of this simple truth. The Court has clearly signaled, through its recent rigorous application of *Central Hudson*, that restrictions on commercial speech must not be lightly undertaken. Instead, such restrictions must represent a carefully calculated, logically applied, and clearly supportable governmental effort to balance the need for the regulations with the protections afforded commercial speech. This message being sent by the Court spells trouble for "do-not-call" statutes as they have been enacted to date. By including exemptions in their statutes in such a cavalier fashion, state legislatures have not only afforded less protection to those on "do-not-call" lists than consumers desire and expect but

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<sup>436</sup> See, e.g., FLA. STAT. ANN. § 501.059(4).

<sup>437</sup> See *supra* notes 42-48 and accompanying text (discussing *Breard* and the problems presented by door-to-door solicitation). Note that section 3 of the ordinance at issue in *Breard* prohibiting door-to-door sales in Alexandria, Louisiana, also contained an exemption for (presumably) local sellers of produce. See *supra* note 43.

<sup>438</sup> See *supra* Part III.B-C.

appear also to have ignored the Court's increased protection of commercial speech, placing the laws at risk of invalidation.

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\* This Note is dedicated to the memory of the author's mother, Judith S. (Hamann) Probst, who died shortly after the Note's completion. Without her constant support, and the example of courage she provided daily, this Note would not have been possible.