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THE CONSTITUTIONALITY OF REQUIRING
TELEPHONE COMPANIES TO PROTECT THEIR
SUBSCRIBERS FROM TELEMARKETING CALLS

James A. Albert*

I. INTRODUCTION

This article focuses upon the privacy implications when telephone companies sell their subscriber lists to telemarketers. It considers the developing, but rarely acknowledged relationship between the telephone companies and telemarketing and concludes that this relationship strongly implicates the privacy right of telephone subscribers and is, therefore, ripe for governmental regulation. The article also rejects the assumption that such regulation is unconstitutional and then offers a remedy to those who demand a restoration of their telephones as instruments of convenience, rather than annoyance.

II. THE PROBLEMS

In the United States, more than 300,000 direct marketing salespeople currently make some 18 million telephone calls per day to private homes and businesses.¹ These calls, which generally arrive during the evening when most prospective customers are at home, are routinely objected to by approximately eighty-two percent of their recipients.² The calls can be loud, jarring, and disruptive in

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their urgent summoning of people to the phone to impose whatever sales pitch the person or machine on the other end desires to communicate. Nearly everyone leaps and runs when commanded by a telephone. Even one suicidal jumper, already on the ledge of a building and ready to leap several stories to his death, reportedly crawled back into the building just to answer a telephone that began ringing.⁴

For the purposes of this article, the definition of telemarketing is an uninvited solicitation by telephone from someone with whom the recipient has no prior business relationship. It explicitly does not include, for instance, the use of the telephone by a local department store to alert a customer that an ordered product has arrived or similar consensual business uses.

The use of automated dialing and recorded message players (hereinafter ADRMPs) exacerbates the typical annoyance potential of telemarketing firms. No larger than a typewriter, these robot dialers are potent and can each access more than one thousand homes per day with their pre-recorded sales pitches.⁵ ADRMPs are relatively inexpensive as they retail for as little as $300, and allow telemarketers to prospect blindly for sales at breakneck speed.⁶ Telemarketing firms cannot buy enough of the machines, which are manufactured by more than thirty different companies.⁷

Unattended and automatic, ADRMPs are really computer connected telephones that store tens of thousands of telephone numbers.⁸ An auto-dialer serially dials the home telephone numbers listed on the computer system and plays a pre-recorded message; when the pre-recorded message ends, the auto-dialer dials the next number and continues the cycle. While a boon to telemarketers, ADRMPs have caused several problems for private citizens.

Because many of the auto-dialers do not disconnect the line when the recipient of the call hangs up, the auto-dialer blocks any use of the phone line, including emergency telephone calls, until the pre-recorded message concludes. The dire consequences of an auto-dialer were very poignantly exemplified when an auto-dialer pre-

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4. Thorn Kupper, Call for Regulation; Congress Targets Automated Phone Pitches, NEWSDAY, Sept. 4, 1991, at 41.
7. Id.
vented a Michigan family from calling an ambulance after its father suffered an unexpected and sudden injury. After investigating the problems with auto-dialers, the Los Angeles Times reported that ADRMPs routinely overload switchboards at hospitals, and even cited one example in Colorado where auto-dialer machines took over all incoming lines to a hospital and commanded the hospital operators to listen to "the following important message."

In the hands of an unscrupulous operator, an auto-dialer can wreak havoc in a community. In 1988, Des Moines, Iowa hair stylist Jerry Feick purchased an auto-dialer, pre-recorded three different thirty-second messages advertising his hair styling business and his man-to-man dating service, programmed the machine to crank out its maximum 2,000 calls every twenty-four hours and left it on around the clock. Feick calibrated his ADRMP to call local numbers with a Drake University prefix. As a result, Feick roused hundreds of college and law students out of bed in the middle of the night during final exam week. Feick's auto-dialer subjected the students to messages such as, "If I had hair as ugly as yours, I'd call Jerry Feick, hair stylist, immediately" and, "Are you lonely and looking for someone to romp with on your waterbed?" Feick admitted that he was aware of the Drake University final exam schedule, acknowledging that, "I knew that they'd be in their dorms studying,' and available to receive the messages."

His machine also reached throughout Iowa's capital city, including patients' rooms at two local hospitals as his auto-dialer went through all the telephones at those institutions. When reporters asked Feick to respond to the frustration and irritation of local residents who were called around the clock, Mr. Feick blithely told reporters: "I don't care . . . ." Because the use of such auto-dialers were neither prohibited nor regulated by any federal or state statute, Mr. Feick received only weak penalties for his harassment and can continue his calling. As he saw it, he had an absolute constitutional

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8. Kupper, supra note 4, at 41.
10. Tom Carney, Phone Dialer Reaches Out and Annoys People, DES MOINES REG., Jan. 15, 1988, at 1M.
12. Carney, supra note 10, at 1M.
13. Id.
14. Id.
15. Benning, supra note 11, at 3M.
right to freedom of speech and a right to conduct his business as he wanted. As for those law students studying for exams, Feick bristled they "all think they're F. Lee Baileys," and he vowed never to accede to their threats. In fact, he forewarned that he would purchase an even more sophisticated auto-dialer, listing at $8,000, that could make up to 200,000 telephone calls a day.

Most telemarketers who arm themselves with auto-dialers are not as malevolent as Mr. Feick. The other thousands of them, according to syndicated columnist Judith Martin ("Miss Manners"), are just rude. As Miss Manners sees it, the use of an auto-dialer is the equivalent of "breaking into somebody's house." The difference is that an ADRMP, unlike a burglar, does not even need a house. Following the 1989 San Francisco earthquake, a homeowner surveying the damage to his leveled house heard his telephone ringing from underneath a pile of rubble. He searched through the debris, found the phone and lifted the receiver to his ear only to hear a loud and clear prerecorded sales message courtesy of an auto-dialer.

High tech consumer fraud has also evolved from modern telemarketing methods as large scale scams are easily facilitated by new technologies. Faceless "boiler room" con artists (a phone bank sweat shop operated by a platoon of salespeople armed with Wide-Area Telecommunications Service (hereinafter WATS) lines and phony pitches) can victimize unwary consumers far easier by phone than in person. Typically, the con artist telemarketers describe bogus companies with phony investment schemes. The schemes may promise riches in rare coins, artwork, precious metals, and oil and gas finds to the unsuspecting. However, such schemes rarely delivers upon their promised riches.

During the 1980's, for instance, consumers paid more than $500 million for fake Dali prints that were first forged and then sold by phone. Over a four-year period, Fort Lauderdale telemarketers bilked $75 million by phone from people in their homes by promising to sell bars of gold bullion; in truth, the telemarketers sold pieces of wood painted gold and stored in a Florida vault. Given the tens of thousands of calls that can be made from a boiler room, the con

16. Carney, supra note 10, at 1M.
17. Id.
18. Smith, supra, note 6, at 42D.
19. Kupper, supra note 4, at 41.
20. Telefraud: They've Got Your Number, CONSUMER REP., May 1987, at 290 [hereinafter Telefraud].
21. Id. at 291.
artists find an appreciable number of unwary and unsophisticated consumers each day. The practice is so successful that Consumer Reports magazine calculated that dishonest boiler room telemarketers bilk consumers out of $1 billion each year in phony investments.22

Telephone fraud remains widespread despite the efforts of states like Florida and California to crack down on boiler room operations,23 telephone fraud remains widespread today. The Federal Trade Commission’s Bureau of Consumer Protection reported in 1991 that it was “seeing more solicitations that look like a problem,”24 especially involving travel scams that offer free airfare and other gimmicks. One 1991 telephone hustle offered consumers a ground floor opportunity to earn a sixteen percent return by investing in the nascent cable television industry in the former Soviet Union.25 In April 1991, Visa and Mastercard sued several telemarketing companies that sold “low interest credit cards” for a processing fee that ranged from seventy to two-hundred dollars. The telemarketers charged the fees to preexisting credit cards and provided the takers with a readily available, and typically free, list of banks that charged twelve percent interest on their credit cards.26

Thirty-two boiler room operations in Los Angeles, Dallas and Salt Lake City used the Persian Gulf War to bilk $50 million out of private citizens for phony oil and gas investments.27 Scott Stapf, of the North American Securities Administrators Association (a securities fraud monitoring group), explained that, “There aren’t any illusions about telemarketing fraud going away,”28 [because given the link that the telephone provides to virtually every home in the country] . . . [there’s an almost unlimited supply of potential victims for schemes.”29


23. Telefraud supra note 20, at 293.


26. Id. at 61.

27. Id.

28. Id.

29. Id.
III. THE UTILITY OF TELEMARKETING

The vast majority of telemarketers are certainly honest. Despite the fact that the telemarketing industry is subject to intense criticism from some consumers for invasions of privacy and the potential for fraud, the industry is very successful. In the last twenty years, telemarketing became the largest direct marketing medium in the country, used far more by sellers than the U.S. Mail or in-person solicitation.

While some surveys indicate that as many as eighty-six per cent of those receiving evening telemarketing calls object to such an invasion of their privacy, fourteen percent apparently are not offended and will consider purchasing products sold over the telephone. This mere fourteen percent is actually an enormous market considering that telemarketing reaches millions of homes each year. Telemarketers reaped $120 billion in sales in 1986, the most recent year for which statistics are available. On top of that, one out of every fourteen people called by an auto-dialer bought the product being sold.

Interestingly, telephone companies are among the most extensive users of telemarketing; a little known fact. The telephone companies are enticed into using telemarketing by telemarketing’s potential to reach vast numbers of consumers quickly, cheaply, and successfully. Giant long-distance companies like AT&T, U.S. Sprint, and MCI use telemarketing to sell their services to millions. Regional and local telephone companies, from Wisconsin Bell to Pennsylvania Bell, employ telemarketers to merchandise such optional services to their customers as call waiting, call forwarding and speed dialing.

Telemarketers working for MCI make seven million calls each month to households on behalf of that company. Eugene Eidenberg, MCI’s Executive Vice President, boasts, “We have used
telemarketing quite aggressively and quite successfully." The three major national long distance carriers are intensely competitive, and it is telephone bank against telephone bank as those companies log millions of calls fighting for the long distance market.

Some of those telemarketers, trying to pry customers from their existing carrier, actually record sales and switch services without the customer’s permission. The practice, known as “slamming,” is so widespread in the phone banks that Bell Atlantic, the regional phone company serving the Washington, D.C., area, predicted that MCI will slam 80,000 of its customers in one year.

The fierce competition between telemarketers for long distance customers reached a pinnacle in 1990 when AT&T sued MCI and its telemarketing agents, Pioneer Teletechnologies, Inc., in a New Jersey federal court alleging “unfair and deceptive telemarketing practices and the switching of customers’ long-distance service without their permission.” MCI retorted that AT&T was just “whining [because it was] frustrated about losing market share,” and counter-sued AT&T for the same offense. A year later, however, the companies reached a quiet settlement and dismissed their suits, amid industry speculation that neither wanted to risk having its secret telemarketing techniques exposed during trial.

Allegations of telephone telemarketers’ overreaching have not been limited to the competition for long distance dollars. In 1989, for example, Wisconsin Bell was fined $1.2 million by the state Public Service Commission for telemarketing abuses within that state.

IV. THE TELEPHONE COMPANIES’ FINANCIAL STAKE IN TELEMARKETING

The telephone companies profit at every stage of the telemarketing cycle. They place the consumer in a vice and themselves in a conflict of interest concerning the privacy of their subscribers by working both sides of the street.

38. Id.
39. Id.
41. Id.
43. Id.
A. At Home

Local and long distance telephone companies have many opportunities to bill their customers for home telephone use. For example, different telephone companies either sell or lease telephones to citizens for use in their homes. For each telephone, local service companies charge a monthly service fee for the privilege of making and receiving local calls, while a long distance provider charges subscribers for long distance calls.

The phone company can even reap an additional fee by offering unlisted telephone numbers, for an additional charge, to those customers concerned with their privacy.

B. In the Phone Bank

Similarly, telephone companies profit from telemarketers in a myriad of methods. As with residential users, telemarketers either purchase or lease the telephones that they use directly from the telephone companies. Monthly service fees are charged by the local companies. Long distance carriers profit from every long distance call a telemarketer makes, charging them for either WATS lines or straight long distance time by the minutes and hours used.

Local, regional, and long distance phone companies generate additional income by using telemarketers to contact citizens to sell them long distance packages or local service add-ons. To make the calls, some phone companies employ their own in-house telemarketers while others retain outside specialists.46

Several local independent telephone companies actually enter formal business partnerships with telemarketers. Telemarketing centers are constructed with the phone companies typically contributing fifty percent of the cost of the boiler rooms while the profits are then divided between the phone companies and the telemarketers.46

Local telephone companies also sell lists of their subscribers' numbers to telemarketers and other businesses.47 Armed with such lists, solicitors can easily program their auto-dialers without handling cumbersome directories.

45. Telephone Interview with Lee Larschied, supra note 34.
46. Id.
Yet, the public is generally unaware of the extent of the phone companies' financial interest in telemarketing. The fact that telephone companies are making money at both ends of the millions of calls has simply not been prominently reported or publicly debated by the federal and state regulators who have been investigating telemarketing practices for the past several years. This financial intertwining should be promptly disclosed to the public.

So, too, should the potential of the following additional phone company money-maker: phone companies that are forced to protect the privacy of their paying subscribers from telemarketers can charge for that, too.

V. AN IRRITATING IRONY—TELEPHONE COMPANIES CHARGE SUBSCRIBERS TO PROTECT THEIR PRIVACY

In response to the drumfire of protest from hundreds of thousands of outraged citizens, state and federal legislators and regulators, have attempted to solve the problem in a variety of ineffective ways. A primary stumbling block has been a false belief that telemarketers have a constitutional right to engage in any type of business practice. This article will attempt to debunk such a mistaken premise.

VI. THE LEGISLATORS' AND REGULATORS' RESPONSES AND SOLUTIONS

Neither state legislatures, state public utility commissions, the U.S. Congress nor the Federal Communications Commission has fully exercised its powers to regulate the telemarketing industry. More than half of the states have enacted limited restrictions on telemarketing activity. Most fall far short of effectively shielding unwilling recipients from being called. State regulations have taken three basic forms—attempting to protect the unwilling citizen from the calls to begin with, forcing telemarketers to be more polite when they do call, or making it difficult for a con artist to defraud someone by phone.

Examples of the first type include the asterisk laws in Oregon


49. See Note, Unwanted Telephone Calls A Legal Remedy? 1967 Utah L. Rev. 379 passim (1967); Crocker, supra note 48, at 1-25; Unsolicited Telephone Calls, 77 FCC.2d 1023.

and Florida, and the Massachusetts regulation which requires phone companies to keep a list of consumers who don’t want to receive autodialed calls. The second approach, taken in Texas, has been to ban ADRMP calls after 9:00 p.m., force the caller to disclose the name of the company making the call and to require that telemarketers “make every effort not to call consumers who ask not to be called again.”

The third course, taken by Kansas, focuses on telefraud and not on privacy. A 1991 Kansas statute voids all verbal agreements between a telemarketer and a consumer for the purchase of goods or services unless it is later memorialized in a written contract with complete disclosure of the full purchase price and the name, address and telephone number of the telemarketer who sold the product.

Yet, there are significant limitations inherent in each approach. List keeping requirements are ineffective because many telemarketers simply do not use telephone directories—they either purchase computer lists of numbers for different areas or program their auto-dialers to call numbers randomly and sequentially. Also, whether it is because of the cost involved or their own skepticism about its effectiveness, few consumers are paying to participate in the asterisk programs. The law leaves everyone else unprotected. While Massachusetts requires phone companies to compile lists of those who do not want to be called, it does not require telemarketers to ask the phone companies for that list before firing up the phone banks.

While the politeness rules alleviate some peripheral annoyances, they still permit the prime abuse—telemarketers calling people who don’t want to be disturbed by phone sales pitches. Many consider telemarketing calls to be inherently impolite, regardless of attendant niceties like caller identification. Finally, the Kansas policy of focusing on fraudulent telemarketers ignores the privacy rights of the greater number of citizens who don’t want to be bothered in the first place and who would not consider buying anything from a

51. Meier, supra note 2, at 48.
55. Meier, supra note 2, at 48.
56. Id.
57. Smith, supra note 6, at 42D.
telemarketer.

At the federal level, the Federal Communications Commission declined to restrict telemarketing practices in 1980 after a two year study of the issues raised by more than 4,000 consumers' complaints about unsolicited calls and auto-dialers. The Commission's inaction was based on the following determinations: that an outright ban on those calls would violate the Constitution, that an alternative approach permitting subscribers to request that they not receive such calls would be too costly and difficult to enforce, and that even imposing time, place and manner restrictions on telemarketers was unnecessary because the agency didn't believe there were widespread abuses at the interstate level and read its jurisdiction as not extending to intra-state calls.

The FCC's constitutional analysis was flawed and the reading of its own enabling act was far too restrictive. It should also be noted that the Commission completely underestimated the extent of the problem, was insensitive to the privacy interests that subscribers were asserting, failed to recognize that vast changes in telephone technology were already outpacing already existing regulation and was rapidly turning the telephone into an instrument of real annoyance to millions of Americans.

The agency's refusal to act in 1980 led directly to a proliferation in the use of ADRMPs, which itself changed the face of the telemarketing industry and brought millions more homes within the reach of telemarketers.

Indeed, its blinders were exposed when it concluded "we decided not to propose restrictions on ADRMP equipment because ADRMPs do not appear to be in widespread interstate use and are not causing network congestion or other substantial problems at the present time." First, ADRMPs are particularly and extensively used interstate. The classic telemarketing operation, in 1980 and currently, is a telephone bank of WATS lines and auto-dialers located in one state and spraying thousands of calls simultaneously across several states. The technological acumen of phone banks to

58. In the Matter of Unsolicited Telephone Calls, 77 FCC.2d 1023, 1023 (1980). See generally Comment by Institute for Public Interest Representation, Georgetown University Law Center (which made a compelling argument for Commission regulation and included an erudite analysis of the relevant constitutional issues).

59. Unsolicited Telephone Calls, 77 FCC.2d at 1024-25.


61. Unsolicited Telephone Calls, supra note 58, at 1025.

62. Telefraud, supra note 20, at 291.
reach across geographic expanse has even escalated to the point that large phone banks located in Panama and Costa Rica can rapidly send calls throughout the United States. Beyond that, the FCC's finding that the ADRMPs weren't a problem simply because they had not adversely affected the telephone companies' networks reflects the agency's failure to recognize that the real problem of telemarketing is its potential to disrupt the peace and quiet of millions of average American citizens.

In response to constituent pressures, Congress enacted the Telephone Consumer Protection Act of 1991. Representative Edward J. Markey, the chief sponsor of the House version of the bill, expressed the feelings of most members: "I believe that telemarketing can be a powerful and effective business tool, but the nightly ritual of phone calls to the home from 'strangers' and 'robots' has many Americans fed up." Signed into law by President Bush on December 20, 1991, the law went into effect exactly one year later.

The Act addresses both ADRMPs and human telemarketing, and is harsher on the former. Although ADRMPs are not banned, their use is restricted and such calls can be made only to households expressly consenting, for emergency purposes, or if the FCC enacts a rule in 1992 exempting certain types of ADRMP calls from the Act's restrictions. Telemarketers have already recognized that the new law can be circumvented by employing live operators who would ask recipients if they would agree to hear a recorded message. Given that loophole, the prior consent limitation is questionable because it would simply not avoid an unwanted call. With respect to telemarketing generally, the Act directs the FCC to enact regulations within nine months to protect the privacy rights of residential telephone subscribers. In doing so, the Commission is to evaluate alternative approaches, including a national "do not call" list, restrictions based on telephone network technology and telephone directory markings. The Act clearly favors a national "do

63. Watterson, supra note 25, at 61.
68. Reiman, supra note 66, at 14.
70. Id. § 227(c)(1)(A).
not call" database and permits the FCC to determine how to cover the cost.\textsuperscript{71} Implicit, however, is the understanding that the Commission can assess such costs against subscribers who wish to be placed on the list. Nonprofit, charitable and political organizations are exempted from any FCC rule under the Act, including an opt-out list, although the use of ADRMPs by those groups is subject to the same restrictions as commercial businesses.\textsuperscript{72}

As Richard A. Barton, the senior Vice President of the Direct Marketing Association, assessed the law from the industry perspective:

[t]he bill . . . was not perfect, but it does give telemarketers some breathing space and a first-class chance to mold the national regulation that may affect them. As a result of this legislation, the Federal Communications Commission will be the focal point for most national telemarketing issues in 1992, which is much better for direct marketers. (And, I expect, for our customers.)\textsuperscript{73}

Given the timidity that the FCC has previously demonstrated in this area, and its belief that the First Amendment precludes strong regulation, Mr. Barton is probably correct in his assessment.

The congressional action was tempered by its acceptance of the argument that its options were limited by the Constitution. The House and Senate rejected proposed legislation to impose more extensive restrictions on telemarketers, and passed a more moderate bill after communications committee members such as Senator Hollings (D. South Carolina) expressed concerns about hampering the free speech rights of telemarketers.\textsuperscript{74} During debate on the legislation, Senator Pressler focused on the First Amendment delicacies of regulating telemarketers and placed in the record a Chicago Tribune editorial warning that stronger regulations would "probably run afoul of the Constitution as well."\textsuperscript{75}

The new law leaves charities and political organizations unfettered, plenty of loopholes for telemarketers to continue to use

\textsuperscript{71} Id. §§ 227(c)(3)-(4).
\textsuperscript{72} Id. § 227(a)(3).
\textsuperscript{74} Jeffrey H. Birnbaum, House Says, 'Sorry, Wrong Number' to Telephone Sales, WALL ST. J., Nov. 19, 1991, § B, at 1; Skrzycki, supra note 65, at 13.
ADRMPs, and a hesitant FCC as the final arbiter of the morass.

The failure of government to act more forcefully is compounded by the absence of any stiff self-regulation by the telemarketing industry. For instance, the Direct Marketing Association (telemarketing's most prominent trade organization) which supported several of the more cautious regulatory approaches suggested by different members of Congress and has even developed its own national do-not-call list, has rejected numerous more extensive restrictions.

In the absence of meaningful limitations, there has been an explosion in the telemarketing industry. The use of ADRMPs has escalated sharply and the number of calls has burgeoned. Consumers have responded harshly to the telemarketing explosion. Former Colorado Public Utilities Commissioner Ron Lehr reported that annoying telemarketing calls were the second major source of complaints received from citizens during his seven years on the commission. Ann Landers, flooded with angry letters, told one Memphis reader, "I don't blame you for wanting to reach out and belt someone." Columnist Mike Royko protested in one of his columns that people don't have to accept being interrupted and disturbed by nuisance calls at home merely because they have telephones. When telemarketers responded that he was advocating censorship and wouldn't like it if his own column were censored, Royko retorted: "I don't call people while they're having dinner and read my column to them over the phone."

Humorist Art Buchwald observed in 1988 that "[y]ou can't get a law passed [against telemarketers] by Congress because most of the legislators use junk calls to get reelected. And others make them to raise campaign funds." Buchwald suggested that one way to get Washington's attention would be for people to call their member of Congress at home at night on several successive nights and ask them to ban junk calls.

76. Kupper, supra note 4, at 41.
82. Id.
In 1990, an enterprising Massachusetts lawyer sought the intervention of the courts to protect the privacy of subscribers from rampant telemarketing. Alan J. Schlesinger sued the brokerage firm of Merrill Lynch for invading his privacy by making repeated cold calls to his office after he had twice requested in writing that they stop. Merrill Lynch employed 10,000 telephone solicitors, many of whom specifically targeted attorneys and Schlesinger continued to be interrupted at work by different callers on behalf of the brokerage firm. At the trial court level, the judge was persuaded that Merrill Lynch's conduct violated the state's privacy statute, which protected a person's "right against unreasonable, substantial or serious interference with his privacy," and entered an injunction enjoining the firm's marketers from calling Schlesinger.

On appeal, the Supreme Judicial Court of Massachusetts held that Schlesinger's privacy rights had not been violated and overturned the injunction, in part because Merrill Lynch only called the complainant three to five times a year.

The court admonished that it was "important to recognize, as a general proposition, that 'in an industrial and densely populated society, some intrusions into one's private sphere are inevitable'" and that "[t]he law does not provide a remedy for every annoyance that occurs in everyday life."

Such hide-bound thinking has been widely accepted and has prevented effective regulatory action by bureaucrats and legislators. But a solution exists which would both respect the free speech rights of telemarketers and protect those people who don't want to be pestered at home by unsolicited telephone calls.

VII. EFFECTIVE ACTION COULD INDEED BE TAKEN

Without violating the constitutional rights of telemarketers, the Federal Communications Commission could exercise its statutory power to regulate the interstate operations of telephone companies in order to require that their tariffs include specific provisions which

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84. Id. at 913.
85. Id. at 916.
86. Id. at 915 (quoting R. Rodman, PROCEDURAL FORMS § 1051, at 491 (1990)).
would shield home recipients of interstate telemarketing solicitations from unwanted calls on request.

Every state public utility commission could also exercise similar authority and require that the tariffs of the telephone companies within their states contain such provisions. In those ways, every telephone subscriber in the country could be protected from every source of call, whether it be from within their own state or outside it.

A tariff is a required document that telephone companies file and which describes the company's obligations to the public. Essentially, it is an agreement negotiated and entered into between the telephone companies and the regulatory agencies, the latter acting on behalf of the public. The tariff then becomes a contract between the telephone companies and their individual subscribers. As such, the regulatory agencies can require that certain provisions be inserted in tariffs for the benefit of the subscribers.

Through the tariff vehicle, a remedy can be readily fashioned to place the responsibility for protecting subscriber privacy on the telephone companies who are in the best position to do so.

This plan is particularly alluring since it is not a blanket prohibition of telemarketing. Instead, it protects only those unwilling listeners who choose to have the privacy of their homes or businesses shielded from such calls, thereby allowing telemarketers to conduct their business in those homes where they are welcomed.

Technological advances in the telephone industry have recently invited the privacy invading problems now faced by consumers. However, the telephone companies now have the technology to remedy the problem through "exchange blocking."

"Exchange blocking" allows certain telephone numbers to be blocked out either at the subscriber's home or at the telephone company. It works by installing a blocking device on a telephone line which makes it impossible for anyone calling from that line to be connected to a certain, proscribed number. The engineering and mechanics were refined in the 1980's as a means for parents to deny their children access to 900-prefix and 976-prefix "dial-a-porn" numbers, and it indeed permitted them to block calls from their home to specific telephone numbers they found objectionable. In fact, the California Public Utilities Commission ordered Pacific Bell

89. See, e.g., MICH. COMP. LAWS ANN. § 460.6 (West 1991); TEX. REV. CIV. STAT. ANN. art. 1446c(18) (West 1980).
91. Carlin Communications v. FCC, 787 F.2d 846, 849, 852 (2d Cir. 1986).
92. Id. at 849.
to block access to such telephone numbers at the request of any residential subscriber.93

Exchange blocking works effectively and can easily be applied to telemarketing. Tariff provisions could obligate telephone companies to accept "opt out" requests from subscribers at no cost and to maintain a computerized listing of those telephone numbers which are not to receive telemarketers’ calls. In turn, the lines that telephone companies provide to telemarketers, often in boiler rooms, would be automatically blocked from calling the numbers on the opt-out list. Exchange blocking is itself currently being enhanced and an upgraded version, "Customer Local Area Signaling Service (CLASS)," exists which makes blocking from a central office even easier.94

VIII. BLOCKING TELEMARKETING CALLS WOULD NOT VIOLATE THE CONSTITUTION

It cannot be denied that the courts have consistently protected the privacy of people in their homes from the intrusions of commercial speech. Restrictions on the First Amendment rights of salespeople and solicitors have long been imposed by state and local governments.95 In fact, there is a solid body of case law affirming restrictions on commercial speech which traces the evolving means seized by solicitors over the years to reach people in their homes.

The courts have permitted restrictions on such speech in virtually every form it has taken—door-to-door solicitation, the use of sound trucks, picketing of private homes, handbilling, unsolicited mailings, and radio and television broadcasting.96 Telemarketing, of course, is simply the latest means used to reach people in their homes. If those several means of speech can be constitutionally regulated under a privacy rationale, then a fortiori, the restrictions proposed by this article would also pass First Amendment muster.

The courts have examined the propriety of such restrictions by employing a traditional balancing test and applying strict scrutiny.97

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94. Carlin Communications, 787 F.2d at 852.
96. Id.
Most of the cases have arisen in the context of speakers challenging certain limitations imposed to protect privacy rights. In each, the courts have weighed the free speech rights of the speaker against the public interest in the privacy of the home.

IX. Similar Restrictions on Other Forms of Commercial Speech Have Long Enjoyed Judicial Favor

A. Door-to-door Solicitation Can Be Constitutionally Restricted

In its 1976 decision in Hynes v. Mayor of Oradell, the Supreme Court held that narrowly drawn, content neutral restrictions may be imposed upon door-to-door solicitation in order to protect citizens’ privacy. At issue was a local ordinance that required advance written notice to the local police by “[a]ny person desiring to canvass, solicit or call from house to house . . . for a recognized charitable cause . . . or . . . political campaign or cause . . . in writing, for identification only.” The plaintiff, who was seeking reelection to the state assembly from the municipality, and others, brought suit, claiming that the ordinance unconstitutionally restricted their rights of free speech. The Court ultimately struck down the ordinance on vagueness grounds, but in so doing, it reiterated that not all ordinances regulating door-to-door solicitation are constitutionally objectionable:

The Court has consistently recognized a municipality’s power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment.


98. See sources cited supra note 97.
99. See sources cited supra note 97.
101. Id. at 611.
102. Id. at 614-15.
103. Id. at 620.
104. Id. at 616-17.
The *Hynes* Court embraced the work of Professor Zechariah Chafee in recognizing the right of individuals to be left alone in the privacy of their homes:

Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.\(^{106}\)

The *Hynes* opinion also quoted as authority the Court's 1943 *Martin v. Struthers*\(^{106}\) decision which struck down a similar ban on door-to-door religious solicitation. In that case, the challenged Struthers, Ohio, ordinance was held violative of the free speech rights of those who wished to distribute literature door-to-door. The Court reasoned that the ban constituted "the naked restriction of the dissemination of ideas"\(^{107}\) and was too stringent to correctly serve even the legitimate goal of protecting the privacy of unwilling residents.\(^{108}\)

Provocatively, *Martin* analysis emphatically supports the constitutionality of the proposal advanced by this article. In its decision, the Court acknowledged that the privacy and crime "dangers of distribution can be so easily controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors . . . ."\(^{109}\) As well, the opinion recognized that "[t]raditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off."\(^{110}\) The Court had no problem with such trespass statutes, but faulted the ordinance as effectively making every visitor a trespasser "without an explicit command from the owners to stay away."\(^{111}\)

Given this legislative power to protect the privacy of homeowners who demand it, the Court actually characterized as proper a National Institute of Municipal Law Officers proposal to make it a

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107. *Id.* at 147.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 148.
criminal offense for a door-to-door solicitor to ring the bell of a householder who has given notice that they do not want to be disturbed. The Court noted that, "[t]his or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . ." Yet because the ordinance applied to all homes regardless of whether their occupants desired protection, it was found to be unconstitutional.

In the final analysis, Martin v. Struthers is powerful authority for the constitutionality of a restriction on telemarketers which limits their calls solely to willing recipients, or more precisely, prohibits them from calling those who have indicated an unwillingness to be called. The narrowness of such a regulation would insulate it from constitutional infirmity.

As previously discussed, telemarketing fraud is a threat of epidemic proportion. The quick access to homes by nameless, faceless telemarketers and equally fast retreat, by hanging up from their boiler room sometimes several states away makes protecting the average home from telemarketing fraud even more difficult and imperative than when the con artist is on foot going house to house working a neighborhood and who can be seized by police upon complaint and held accountable for any attempted fraud.

Even the Supreme Court's 1980 decision in Village of Schaumburg v. Citizens for a Better Environment, striking down as overbroad a municipal ordinance prohibiting certain charitable solicitations, can legitimately be read as support for a limitation upon telemarketing activities. In Village of Schaumburg, an ordinance prohibiting the solicitation of contributions by organizations not using at least seventy five percent of their receipts for "charitable purposes" was invalidated as overbroad because the Court could not find a substantial relationship between the seventy five percent requirement and the protection of public safety or residential privacy. It is a straightforward time, place and manner restriction that would apply across the board to all speakers and is not based on the content of what they have to say. Instead, it is based on the wishes of the home dwellers who simply don't want to be solicited. Therefore, by definition, this regulation would not be overbroad because it would

112. Id.
113. Id.
115. Id. at 638.
not reach either protected non-commercial speech, nor would it limit the use of the several remaining avenues of communication open to solicitors.

The most persuasive Supreme Court pronouncement on this point was provided in its 1951 Breard v. Alexandria opinion. In Breard, the Court upheld a city's complete proscription of door-to-door solicitation of magazine subscriptions by reasoning that the householder's interest in privacy outweighed any First Amendment rights of publishers to distribute magazines by means of uninvited entry onto private property.

The City of Alexandria had enacted the challenged ordinance to protect the privacy of its citizens' homes because householders had complained that, in some instances, "solicitors were undesirable or discourteous and . . . whether a solicitor was courteous or not, they did not desire any uninvited intrusion into the privacy of their home." The Court acknowledged that a city has the duty to protect its citizens against practices threatening their privacy and quiet, that a householder has a right to rely on such protection, and that door-to-door salespeople do disturb the peace and quiet.

In addressing the rights to free speech enjoyed by businesses, the Court reasoned:

As a matter of business fairness, it may be thought not really sporting to corner the quarry in his home and through his open door put pressure on the prospect to purchase. As the exigencies of trade are not ordinarily expected to have a higher rating constitutionally than the tranquillity of the fireside, responsible municipal officers have sought a way to curb the annoyances while preserving complete freedom for desirable visitors to the homes.

The Court was also particularly solicitous of the fact that the other customary methods of solicitation, including radio, periodicals, and mail, remained open and available to the magazine publishers in Alexandria. The Court stated that although such methods do not necessarily produce as much business as house-to-house canvassing, localities were to be provided a great deal of discretion in local deci-

117. Id. at 644.
118. Id. at 625.
119. Id. at 640.
120. Id. at 626-27.
121. Id. at 627.
122. Id. at 631-32.
sion-making in the absence of federal legislation preempting them from prohibiting door-to-door soliciting.\(^{123}\)

Based on this analysis, it would not violate the First Amendment to prohibit telemarketing calls to homes not wishing to receive them if other alternative means of commercial speech to reach those homes remained, including the mail and newspaper, magazine, radio and television advertising.

The Court placed its imprimatur on the steps Alexandria chose to take to eliminate the nuisance of door to door selling:

Subscriptions may be made by anyone interested in receiving the magazines without the annoyances of a house-to-house canvassing. We think those communities that have found these methods of sale obnoxious may control them by ordinance. It would be, it seems to us, 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. We see no abridgment of the principles of the First Amendment in this ordinance.\(^{124}\)

In no uncertain terms, then, the Court's decision in Breard pointedly rejects the assumption long harbored by policy makers and legislators that the First Amendment precludes regulation of telemarketers.

Informed by the Supreme Court opinions discussed here, the Circuit Courts of Appeals have similarly upheld ordinances restraining door-to-door canvassing. In its 1988 decision in Curtis v. Thompson,\(^{125}\) the Seventh Circuit upheld an Illinois statute which prohibited real estate agents from telephoning or visiting the homes of residents who had previously provided notice that they did not want to sell their homes or be solicited by any agent attempting to list their homes for sale.

In rejecting a realtor's First Amendment challenge, the court recognized the right of states to regulate commercial speech with content-based restrictions "[b]ecause of the greater potential for deception or invasion of privacy"\(^{126}\) involved in commercial speech. The court applied the test set out in the Supreme Court's landmark commercial speech decision, Central Hudson Gas and Electric Corp. v. Public Service Commission,\(^{127}\) which provided a four-part
test in assessing the constitutionality of a governmental restriction upon commercial speech. The *Central Hudson* test requires courts to determine whether the expression involved is protected by the First Amendment, whether the asserted governmental interest sought to be achieved by the regulation is substantial, whether the regulation directly advances the substantial government interest and whether the regulation is more extensive than necessary to satisfy that interest.  

In applying the test, the Seventh Circuit found that the state's interest in ensuring the privacy of its residents in their homes was "strong and valid" given that:

The right to privacy sets America apart from totalitarian states in which the interests of the state prevail over individual rights; moreover, the unique importance of the right to privacy in the home has, from time immemorial, been amply demonstrated in our constitutional jurisprudence.

Further, the court emphasized that commercial free speech rights are not absolute, reasoning that "[w]hen the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction."

In terms of the means chosen by the Illinois legislature in satisfying its substantial interest, the court concluded that the statute was not too extensive given that real estate agents could still contact those prospective buyers who had not previously expressed a desire not to be solicited.

The *Central Hudson* test, the one used today by the Supreme Court to determine whether or not certain commercial speech is protected by the First Amendment, is satisfied by the regulation this article proposes for exactly the same reasons it was in *Curtis*.

With similar reasoning, the Third Circuit upheld a municipal ordinance prohibiting post-daylight door-to-door charitable solicitations in its 1984 decision in *Pennsylvania Alliance for Jobs and Energy v. Council of Munhall*. In finding a constitutionally per-
missible time, place and manner restriction, the court was persuaded that the city’s interest in preventing crime and protecting its residents’ privacy was clearly promoted by a regulation that prohibited uninvited solicitors from attempting to sell their wares during the dinner hour and in the evening.\textsuperscript{134}

Obviously, the application of the \textit{Pennsylvania Alliance} facts and analysis couldn’t be more pertinent to those issues framed by similar annoyances by telephone solicitors. And the teaching of all of the cases analyzed here couldn’t be clearer—if it’s constitutional to limit door-to-door solicitation, and it is, then it’s constitutional to limit telemarketing.

B. \textit{The Use of Sound Trucks Can Constitutionally Be Restricted}

Sound trucks were a new technology used to an appreciable degree in political campaigns in the late 1930’s and early 1940’s.\textsuperscript{135} Although candidates often savored the opportunity to broadcast their messages quickly and cheaply from the streets directly to voters in their homes, many citizens found the rolling campaign wagons and their loud speakers disruptive of their peace and quiet. As a result, some municipalities enacted ordinances restricting the use of sound trucks within their city limits.\textsuperscript{136}

Trenton, New Jersey, was one of those cities. It enacted an ordinance prohibiting the use of sound trucks, calliopes or any similar means of speech which emitted loud and raucous noises on the streets of Trenton.\textsuperscript{137} Charles Kovacs subsequently used a sound truck to comment on an ongoing labor dispute and was convicted of violating the sound truck statute.\textsuperscript{138} His conviction was upheld by the New Jersey Supreme Court and the U.S. Supreme Court accepted certiorari to consider Kovacs’ contention that the ordinance violated his free speech rights.\textsuperscript{139}

In what became the landmark loud speaker case, the Court upheld the law as a valid manner restriction on speech which violated the rights of Trenton residents to privacy in their homes.\textsuperscript{140} The opinion recognized that the police power of a state “comprehends the duty, within constitutional limitations, to protect the well-being and

\textsuperscript{134} \textit{Id.} at 187.
\textsuperscript{135} Kovacs v. Cooper, 336 U.S. 77, 81-82 (1949).
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.} at 78.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 87.
tranquility of a community;"\textsuperscript{141} and concluded that citizens relaxing at home or trying to work in their offices needed the protection of the ordinance, provided that:

The unwilling listener [exposed to loud sound trucks while in their homes] is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.\textsuperscript{142}

The Court held that "the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance"\textsuperscript{143} and affirmed Kovacs' conviction.

That very same need to protect people in their homes and offices from disruptive and annoying speech which, because of the means by which it is communicated, renders its targets helpless to avoid the interference justifies protection against telemarketers. After all, they penetrate the homes of unwilling listeners by means starkly similar to those who sped through neighborhoods in the 1940's blaring their spiels through loud speakers. The difference is that telemarketers use one inch speakers which, ironically, are built right in to the telephones people have purchased for their homes, eliminating the need for the solicitor to rent a sound truck to begin with.

C. The Picketing of Private Residences Can Be Constitutionally Restricted

The Supreme Court's 1988 decision in \textit{Frisby v. Schultz}\textsuperscript{144} upheld the constitutionality of a Brookfield, Wisconsin, ordinance which banned picketing in residential neighborhoods. The city council passed the law to protect the rights of home dwellers to "well-being, tranquility, and privacy"\textsuperscript{145} after residents complained about anti-abortion protesters who had picketed the home of a Brookfield abortion doctor.\textsuperscript{146}

The ordinance survived the plaintiffs' First Amendment challenge and the Court's application of the strict scrutiny test reserved

\textsuperscript{141. Id. at 83.}  
\textsuperscript{142. Id. at 86-87.}  
\textsuperscript{143. Id. at 89.}  
\textsuperscript{144. Frisby v. Schultz, 487 U.S. 474 (1988).}  
\textsuperscript{145. Id. at 477.}  
\textsuperscript{146. Id. at 476-77.}
for "restrictions on speech in traditional public fora"\textsuperscript{147} because the Justices were persuaded that the city's interest in protecting individual privacy in the home simply outweighed any free speech rights of the plaintiffs to communicate their views in that manner:

The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society. Our prior decisions have often remarked on the unique nature of the home, the last citadel of the tired, the weary, and the sick, and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."\textsuperscript{148}

Of special concern to the Court in its decision was the protection of the right to privacy of the "unwilling listener:"

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear [citations] the home is different. . . . Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. [citations]\textsuperscript{149}

Obviously, \textit{Frisby} rejects most of the legal premises assumed by those who elevate the free speech rights of telemarketers and discount the privacy rights of people in their homes. It also unequivocally recognizes the right of government to protect unwilling listeners in their homes from speech they do not want to hear, and it is precisely that interest which telemarketing regulation would similarly ensure.

A contention could also be made that the telephone does not constitute a traditional public forum for political speech, and that, therefore, the rational basis standard should be applied to allow the states wide First Amendment latitude in restricting the activities of telemarketers. The \textit{Frisby} decision is particularly significant in that the city's ordinance survived the application of strict scrutiny, an outcome which speaks forcefully to the weight the Court is currently providing to the privacy rights of unwilling listeners in their own

\textsuperscript{147} \textit{Id.} at 481.
\textsuperscript{148} \textit{Id.} at 484 (citations omitted).
\textsuperscript{149} \textit{Id.} at 484-85.
homes, even as it relates to highly protected political speech.

D. Unsolicited Mail Can Constitutionally Be Restricted

The mail is also used as a means of in-home commercial solicitation. As direct merchandising evolved and as the technologies and capabilities of the U.S. Postal Service improved, numerous major businesses chose to contact home dwellers through the mail in order to reach several thousands of prospective customers. The mail became a seller's feast, as direct mail letters, catalogs and sweepstakes invited tens of millions of recipients to buy products from their homes. In fact, businesses spent more than $24 billion on direct mail advertising in 1991 in an explosion of third-class mail.\textsuperscript{150}

But not every business mailer sells welcomed merchandise. Congress responded to the growing public concerns by enacting a statute entitling a recipient to demand that a mailer cease providing advertising which is offensive in its sexual explicitness.\textsuperscript{161} Specifically, the Act permits a citizen to demand that the Postal Service issue an order requiring that the mailer "refrain from further mailings to the named addressees."\textsuperscript{182}

The constitutionality of that statute was challenged by several publishers, mail order houses and mailing list brokers in \textit{Rowan v. Post Office Department}.\textsuperscript{153} The challengers contended that the restriction violated their free speech and due process rights, and that the statute was vague, standardless and ambiguous.\textsuperscript{154} In rejecting those contentions, the Supreme Court first noted the legislative intent upon which the law was predicated by noting that the "declared objective of Congress was to protect minors and the privacy of homes from such material and to place the judgment of what constitutes an offensive invasion of those interests in the hands of the addressee."\textsuperscript{155}

Further, the Court acknowledged that the law was "intended to allow the addressee complete and unfettered discretion in electing whether or not he desired to receive further material from a particular sender."\textsuperscript{156}

\textsuperscript{152} Id. § 3008(b).
\textsuperscript{154} Id. at 731.
\textsuperscript{155} Id. at 732.
\textsuperscript{156} Id at 734.
Against those societal interests, then, the Court balanced the commercial speech rights asserted by the challengers with the interests asserted by Congress and found that the law was not an unconstitutional deprivation of the right to communicate, primarily because of the unique nature of the home:

In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . . Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.  

In specifically striking the balance in favor of householders' rights to privacy, the Court reasoned:

[weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee.]

And with language which has particularly persuasive application to the issues discussed in this paper, the Court concluded:

Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit . . . . The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality . . . . 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 . . . . The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.

The Court's analysis in Rowan with respect to the constitutional permissibility of restricting commercial speech in order to nurture privacy in the home is consistent with the previous decisions analyzed in this article which have considered other statutory limitations on the evolving technologies of commercial communication. Rowan is particularly compelling authority for the remedy proposed herein because both the Postal Revenue and Federal Salary Act and

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157. Id. at 736.
158. Id. at 736-37.
159. Id. at 737-38.
the proposed telemarketing restriction act permit individuals to choose and restrict the types of communications they wish to receive. The limitation on the commercial speech right in each instance would result from an affirmative act of the recipient giving notice that he or she did not wish to be bothered by further communications from a particular source.

Arguably, an even stronger privacy case can be made on behalf of home dwellers in the telemarketing context than on behalf of home dwellers in the mail solicitation context. Specifically, telephone soliciting is much more disruptive of a person's solitude than is the receipt and inspection of junk mail which is undertaken at an individual's leisure. Mail can also be simply discarded by a recipient who doesn't wish to read particular advertising, a privilege not enjoyed by a home dweller who runs to the phone on command of the ubiquitous ringing that pierces his or her premises.

E. Broadcast Content Can Constitutionally Be Restricted

A salesperson's reach was exponentially expanded by the development of radio and television broadcasting. Broadcasting has impacted and often shaped most aspects of our lives; and it is undeniable that it revolutionized American commerce. The actual truth is that radio and television programming is the lure which draws audiences near the audio and video hearths to subject them to commercial messages from advertisers.

Television and radio broadcasting is a commercial boon. By combining visual and audio impact, television broadcast commercials can ignite immediate consumer demand for products advertised by demonstrating them in the living rooms of millions of viewers, at often less than a penny per household, becoming high-tech, cost efficient substitutes for door-to-door salespeople.\(^\text{160}\)

Radio and television commercials indeed best represented technological advancement in commercial speech for most of the twentieth century. And every inch of the way, from the 1920's and continuing to the present, the law has kept pace and unstintingly imposed a myriad of restrictions and limitations. So extensive is the regulation of these means of commercial speech that Congress created the Federal Radio Commission in 1927,\(^\text{161}\) the Federal Communications


\(^{161}\) National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943).
Commission in 1934, and delegated the specific regulation of broadcast advertising to the FCC and the Federal Trade Commission.

Industry challenges to such extensive regulation, typically on First Amendment grounds, have been routinely rejected by the courts. As early as 1943, the Supreme Court affirmed statutes and regulations which restricted and limited the free speech rights of broadcasters. The Court subsequently refined its analysis of the regulation of broadcasting as the technology of broadcasting itself achieved increased sophistication. By 1976, the Court was again faced with a free speech challenge to a statute which restricted broadcast speech, and in a seminal decision, affirmed the regulation on grounds which are relevant to the privacy implications of telemarketing.

In *FCC v. Pacifica Foundation*, the Court considered whether the FCC had the power to regulate a radio broadcast which was merely “indecent” but not “obscene.” Framed in First Amendment terms, the question confronted by the Court was whether the First Amendment denied government the power to restrict the broadcasting of indecent language in any circumstances. The controversy arose as a result of the broadcast by a radio station in New York state of a recording of a George Carlin monologue which contained the “seven dirty words” which Carlin joked were never supposed to be broadcast and which included words which explicitly described sexual and excretory functions in street vernacular terms. The Pacifica Foundation, which operated the radio station which broadcast the monologue, vigorously argued that the FCC had acted improperly in punishing the monologue’s broadcast and that the underlying indecency statute was an unconstitutional content restriction of free speech.

The Supreme Court upheld the FCC’s action and validated the statute criminalizing indecent language on radio and television. The Court had little difficulty categorizing the Carlin monologue as

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162. 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.)
166. *Id.* at 729.
167. *Id.* at 744.
168. *Id.* at 729, 751.
169. *Id.* at 742, 744.
170. *Id.* at 738, 742.
indecent and it then upheld the constitutionality of the regulation of broadcast indecency.¹⁷¹ In so doing, it noted that not all media of expression enjoy the same constitutional protection and that “it is broadcasting that has received the most limited First Amendment protection.”¹⁷² The Court explained that the reason broadcast speech can be restricted more than other forms of expression is, in part, because such speech “confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be let alone plainly outweighs the First Amendment rights of an intruder.”¹⁷³

And, with reasoning that speaks persuasively to the precise argument which is advanced by those opposing the regulation of telemarketers’ calls, the Court rejoined:

To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.¹⁷⁴

While the specific harm to which the Supreme Court referred in the context of indecent phone calls is not typically duplicated in calls made by telemarketers, fraud and other harms are so implicated. And Congress has boldly acted to eliminate abuses by telephone and provide remedies to people who are harassed by telephone callers. By statute, debt collectors are prohibited from “plac[ing] of telephone calls without meaningful disclosure of the caller’s identity;”¹⁷⁵ and “engaging any person in telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass any person at the called number.”¹⁷⁶

To be sure, limitations can be placed on the content of speech broadcast to peoples’ homes for the reasons enumerated in Pacifica, particularly in order to protect the privacy rights of people in their homes. And the analogy could not be more perfect to the present case because particularly salient to the Court’s holding in Pacifica was that the Carlin monologue was offensive to a person who did not

¹⁷¹. *Id.* at 741, 744.
¹⁷². *Id.* at 748.
¹⁷³. *Id.*
¹⁷⁴. *Id.* at 748-49.
¹⁷⁶. *Id.* § 1692d(5).
want to receive it. And the remedy the Court embraced was not to place the burden on the recipient to avoid the unwanted speech, but to limit the speaker by imposing time and place restrictions on the speech.

F. Telemarketing Can Constitutionally Be Restricted

Telemarketing, like each of the means developed before it, is yet another method to solicit sales from people in their homes. It is assuredly futuristic, high-tech and fiber-optic, but it remains commercial speech, with limited constitutional protection.

And while some members of Congress and the telemarketing industry protest that calling restrictions would violate free speech rights, the courts are slowly beginning to address those constitutional questions in the precise context of telemarketing as the latest sales technology.

In *National Funeral Services, Inc. v. Rockefeller*, the Fourth Circuit Court of Appeals upheld the constitutionality of a West Virginia statute which extensively regulated the sale of "pre-need" funeral services in that state. Specifically, one provision prohibits both the in-person and telephone solicitation of prospective buyers of those funeral services if the targeted consumers reside in a nursing home, a hospital or a private residence. As the court explained, such restrictions were enacted "in an attempt to reduce fraud and preserve privacy," and "that the West Virginia Legislature considers these contracts [contracts for such services signed by people in those locations and, within the reach of another provision of the Act, contracts signed with the relatives of persons near death] to be a threat to the consuming public." The statute was challenged by National Funeral Services, Inc., a West Virginia corporation which sold "pre-need" funeral services, on the ground, that it violated the seller's First Amendment free speech rights. While the petitioners sought review only of the "in-home" solicitation restriction, the court additionally reached the merits of the restriction on telephone sales. Particularly, the challengers argued that the statute was content-based and an abridgment of le-

179. *National Funeral Services*, 870 F. 2d at 138.
180. *Id.*
In its analysis, the court first noted the law that governs cases involving restrictions on commercial speech. It emphasized the well-settled tenets,

[t]hat the Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression . . . that the potential for deception and invasion of privacy inherent in some forms of commercial speech can, and has, justified content-based restrictions . . . [that] these restrictions can certainly be based on the place and manner of the expression . . . and that if the content of the speech or its method of solicitation might be "inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions."

As well, the court's analysis of the challenged statute was guided by the four-part test enunciated in *Central Hudson Gas v. Public Service Commission of New York*, which requires that determinations be made concerning whether the challenged regulation is more extensive than necessary to meet the substantial governmental interests for which it was enacted.

The court concluded that while the funeral services solicitation was protected by the First Amendment, West Virginia had nonetheless articulated substantial interest in support of its restrictions on "pre-need" funeral services solicitation. Specifically, the interests recognized by the court were those of protecting consumers from high pressure sales tactics at a point of vulnerability and ensuring the privacy of the home. As Circuit Judge Hall saw it:

The discussion of the death of a family member can be a disquieting experience when done with a loved one, let alone when done with a perfect stranger who uninvitedly knocks on your door, or calls on your phone. I believe that West Virginia's ban on solicitation is supported by the substantial interest of protecting privacy.

With specific reference to the statute's restriction on telephone solicitation, the judge found that telemarketing invited fraud and deceptive sales practices, that it offered sales people the opportunity to
overreach and that the intrusiveness of such calls was particularly pronounced because it invaded the privacy of the home by forcing the recipient to answer the call, confront the solicitor and rid themselves of the caller.\textsuperscript{187}

The court was also satisfied that West Virginia had acted reasonably and that its restrictions did not exceed what was necessary to protect the governmental interests at stake. It was persuaded that since only uninvited in-person solicitation and telemarketing were made unlawful, all the other means of communication were left open to those who sold "pre-need" funeral services, including the use of the mails and every other form of advertising.\textsuperscript{188}

In the final analysis, the court held that the challenged statute satisfied the four-part \textit{Central Hudson} test and was a constitutional exercise of the state's police powers to protect the privacy of the home and to guard against consumer fraud. The opinion concluded with the observation that "this presents a textbook case of the appropriate restraint of commercial speech."\textsuperscript{189}

This was a textbook case because West Virginia restricted only the place and manner of the speech involved, preserved the speaker's right to advertise its product and solicit sales in a variety of other ways, and furthered valid state interests in the protection of personal privacy and in preventing fraudulent conduct.

But the analysis and reasoning relied upon by the court of appeals upholding West Virginia's action applies with full and persuasive force here because the whole case turns on the court's recognition that telemarketing and in-person home solicitation are forms of commercial speech. And as such, they enjoy lesser First Amendment protection and can be regulated by the state to protect the privacy of the home in the same way that the other forms of selling discussed in this section have been regulated as the technology of sales has advanced.

\textbf{X. REQUIRING THE BLOCKING OF TELEMARKETING CALLS WOULD BE A VALID TIME, PLACE AND MANNER RESTRICTION ON COMMERCIAL SPEECH}

The regulators, legislators and telemarketing industry representatives who argue that meaningful restrictions on telemarketing would be unconstitutional are dead wrong. And the authority for

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{187} \textit{Id.} at 144.
  \item \textsuperscript{188} \textit{Id.} at 145.
  \item \textsuperscript{189} \textit{Id.} at 146.
\end{itemize}
\end{footnotesize}
that statement is that every decision previously cited in this article has upheld limitations on door-to-door solicitation, sound trucks, picketing, unsolicited mailings and broadcast programs in order to protect the privacy rights of home dwellers. Public policy decision-makers must understand and be guided by such a compelling wall of precedent.

As well, those decision-makers must be educated on two important and basic tenets of constitutional law which inform the debate on telemarketing restrictions.

A. Telemarketing Is Commercial Speech and It Can Be Regulated

Many individuals manifest a simplistic, Pavlovian reaction to any law which limits speech. They simply accept as an article of faith that any restriction would be an unconstitutional abridgment of the speaker’s First Amendment rights. However, the Court has consistently provided commercial speech, such as telemarketing, with limited First Amendment protection. Even content-based restrictions can be imposed on commercial speech to protect against invasion of privacy and consumer deception. Of course, the proposal offered here is content neutral and even less potentially offensive to the First Amendment.

As the Supreme Court has emphasized: “we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.”

It was, after all, the commercial nature of the speech in all of the home sales cases analyzed previously which allowed the restrictions at issue to be upheld by the courts. The Supreme Court has defined commercial speech as expression which “does no more than propose a commercial transaction.” Telemarketing easily meets that definition, is therefore commercial speech, and can lawfully be restricted in the manner in which this article proposes.

This is not to imply that commercial speech is valueless and without First Amendment protection. In its seminal Central Hudson

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191. See Curtis v. Thompson, 840 F.2d 1291, 1298 (7th Cir. 1988).


Gas and Electric Corp. opinion, the Supreme Court recognized the worth of commercial speech in serving not only the economic interest of the speaker, but also assisting consumers to be better informed about products that they are comparing or buying. In Central Hudson, the Court held that the constitutional protection available for particular commercial speech turned on the nature both of the expression and of the governmental interests served by its regulation, and enunciated a four-part test as the appropriate analytical calculus to be used in commercial speech cases. The essence of the Central Hudson test is that any restriction on commercial speech may be no more extensive than is necessary to meet the stated governmental interest. And while the record in Central Hudson failed to establish that the challenged total ban on all advertising promoting the use of electricity met that requirement, the telemarketing proposal here can be easily distinguished since it protects residential privacy without banning all telemarketing calls. Under the proposal, only those calls to unwilling recipients would be restricted.

The voluntary opt-out option, which leaves telemarketers free to call willing recipients, avoids the constitutional infirmity which the Supreme Court has found in other regulations of commercial speech which have involved total suppression. In its 1977 decision in Carey v. Population Services International, the Court invalidated a New York statute that criminalized the advertisement or display of contraceptives, reasoning that a state may not completely suppress the dissemination of truthful commercial information. As well, the Court's holding in Village of Schaumburg v. Citizens for a Better Environment that a blanket ban on door-to-door charitable solicitation by organizations not using at least seventy five percent of their receipts for charitable purposes is overbroad and unconstitutional, is also avoided here. The Schaumburg Court allowed that a city may enact regulations to serve its legitimate interests, but that it must do so with narrowly tailored limitations that do not interfere with First Amendment rights. In quoting from its 1963 decision in NAACP

195. Id. at 561-62.
196. Id. at 563.
197. Id. at 566.
198. Id. at 572.
200. Id. at 700.
202. Id. at 637.
v. Button, the Court reiterated that "[b]road prophylactic rules in the rules of free expression are suspect. Precision of regulation must be the touchstone . . . ." Applying those general rules, the Court concluded that the Schaumburg ordinance did not survive scrutiny under the First Amendment because of its breadth.

Tellingly, the Schaumburg ordinance not only prohibited door-to-door charitable solicitation but also made such solicitations unlawful on the city's public streets, thus effectively depriving charitable solicitors of any other avenues of communication. One can readily distinguish the proposed telemarketing restriction on the bases that it is not an overbroad, total ban on this commercial speech, but also the weight of the governmental interest in privacy is stronger and much more persuasive because since Schaumburg's ban applied to solicitation not only on the doorsteps of the city but also on all of its streets, it could not assert as compelling a residential privacy interest. The Supreme Court found Schaumburg's proffered justification for the ban inadequate to outweigh the speakers' free speech rights. That insufficiency is avoided by the proposed telemarketing restriction by a narrowly focused restriction which protects only the residential privacy of those seeking such protection, and which allows telemarketers access to every other means of available advertising.

This proposal also satisfies the teaching of a third major Supreme Court case which invalidated a restriction on commercial speech. In its 1983 decision in Bolger v. Youngs Drug Products Corp., the Court invalidated a statute which prohibited the mailing of advertisements for contraceptives. The purpose of the statute was to allow parents to control the information their children received about birth control and to shield recipients from information that they might find offensive. Reasoning that potential offensiveness is no justification for a blanket prohibition on commercial speech, the Court invalidated the law as an unnecessarily "sweeping prohibition" on contraceptive advertising. Again, such constitutional infirmity is avoided here because rather than the government making a blanket determination that everyone would be offended by

203. Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
204. Id. (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).
205. Id. at 639.
206. Id.
207. Id. at 636.
209. Id. at 71.
210. Id.
211. Id. at 72.
telemarketing calls to their homes, and therefore would not want to receive them, this proposal leaves to the individual home dweller the right to make that decision, thereby avoiding impermissible overbreadth.

B. Valid Time, Place and Manner Restriction Can Be Imposed on Telemarketing

All classes of protected speech, including commercial speech, are subject to reasonable time, place and manner restrictions. Such limitations are considered reasonable if they are content neutral, narrowly tailored to serve a legitimate governmental interest and leave open ample alternative channels for communication of the restricted information. Each of these requirements is easily satisfied by the proposed restriction on telemarketing activities.

The telemarketing regulation offered is, by definition, content neutral in that the restriction is not related to the content of the speech. As the Supreme Court has sharply warned, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." This regulation would involve no inquiry into the content of any telemarketing call and no distinction would be made between commercial and non-commercial calls. Telephone calls selling products and services would be treated the same as those seeking charitable or political contributions. They all similarly invade a home dweller's privacy, and the proposed regulation also treats them the same. As well, the content of the message would in no way be regulated; rather, it is the place of the communication which would be restricted. In all of these ways, then, this proposal would avoid violating the doctrine of content neutrality.

The regulation proposed here has been narrowly tailored to meet the legitimate governmental interest in residential privacy and thus satisfies the second test of reasonableness. This is no broad, blanket prohibition of all telemarketing calls since it eliminates no more than the evils it seeks to remedy. The only calls prohibited by the proposal would be those made to the homes and businesses of unwilling recipients. Thus, it would be difficult to fashion a nar-

214. Kovacs, 336 U.S. at 78.
rower regulation of telemarketing solicitation. As well, the causal link between the restriction and the insulation of certain homes from telemarketing calls would be direct and certain. Implementation of the regulation would, therefore, eliminate calls to those not wishing to receive them. And as to the remaining component of the analytical equation, the time has long since passed when anyone could deny the interest of the state in ensuring the privacy of its residents in their homes. The validity of such an interest has been recognized for decades by the Supreme Court.\footnote{The final reasonableness test is readily met by this proposal, too, as it is undeniable that numerous alternative channels remain open for the communication of the information conveyed by the calls to the homes “opting out.” Included would be the mail, radio and television advertising, and newspaper and magazine advertising.}

The final reasonableness test is readily met by this proposal, too, as it is undeniable that numerous alternative channels remain open for the communication of the information conveyed by the calls to the homes “opting out.” Included would be the mail, radio and television advertising, and newspaper and magazine advertising.

To be upheld by the courts, time, place and manner restrictions must not discriminate either on their face or in their application.\footnote{As this proposed regulation applies to all telemarketing calls, commercial, charitable and political, equally and regardless of content or source, no discrimination would result.}

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\section{XI. Conclusion}

This article has attempted to rebut the conventional belief of most legislators and regulators that the First Amendment prohibits restrictions on telemarketing activities. It has argued that a home dweller’s right of privacy outweighs any telemarketer’s commercial speech rights and that the telemarketing debate must finally be placed in its correct constitutional context.

The Congress, and regulators, have been mired for years in attempting to answer the question of where to draw the line as to which telemarketing calls should be restricted and which should not. This article has suggested an alternative which would allow private citizens to draw it for themselves by being authorized to inform their telephone providers that they want telemarketing calls blocked from their line. Such legislation would be effective and constitutional.

