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Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules

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FIRST AMENDMENT LESSONS FROM THE FCC'S TCPA RULES

Justin (Gus) Hurwitz†

INTRODUCTION

The late 1980s brought a new terror into the world, "the scourge of civilization,"[1] one that is with us to this day: the unsolicited commercial phone call. Increasingly sophisticated digital technologies and rapidly falling costs enabled unsavory marketers to reach out and touch hundreds, thousands, or even more potential customers per hour. They did this through a combination of automated telephone dialers—simple computers that would dial phone numbers sequentially[2]—and prerecorded or artificial voice messages.[3]

Unfortunately for this new breed of telemarketers, their business was problematic for both consumers and the architecture of the telephone industry. The calls often came in the evening as families were sitting down to dinner or watching prime-time television—it was a different era, remember—and

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[1] As characterized by Senator Hollings. *See* Ajit Pai, *FCC is Voting to End Robocalls, the 'Scourge of Civilization',* HILL (Mar. 23, 2017, 8:40 AM EDT), http://thehill.com/blogs/pundits-blog/technology/325352-fcc-is-voting-to-end-robocalls-the-scourge-of-civilization [https://perma.cc/2ZLE-LP9N].

[2] *E.g.*, 555-0001, 555-0002, 555-0003, etc.

[3] *See* S. REP. NO. 102-178, at 2 (1991); *see also* 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, 1057–58 (1992).

seemed a grotesque invasion of their privacy.[4] Because this was before the widespread availability of Caller ID, the people had no way to differentiate wanted calls from unwanted ones, as these calls were deceptive, placing consumers in the impossible position of either missing calls from friends and family or answering calls from marketers. Additionally, these calls were also problematic due to the technical and economic features of the telephone network itself: they could tie up business and residential phone lines for hours at a time, fill up answering machine tapes, and even impose consequential costs on cell phone or fax machine owners.[5]

In response to these concerns, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA).[6] The TCPA provided general legal principles to govern the use of automatic telephone dialing systems and artificial or prerecorded messages,[7] and directed the Federal Communications Commission (FCC) to further develop these principles into rules.[8] The lodestone principle of the TCPA is that, subject to certain exceptions, it is unlawful to use automatic dialing systems or prerecorded messages to make phone calls except with the *prior express consent* of the called party.[9] In the past twenty-six years, Congress and the FCC have revisited the TCPA and the rules made pursuant to it numerous times, but both bodies have remained faithful to this principle.[10]

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[4] *See* Simon van Zuylen-Wood, *How Robo-callers Outwitted the Government and Completely Wrecked the Do Not Call List*, WASH. POST MAG. (Jan. 11, 2018), https://www.washingtonpost.com/lifestyle/magazine/how-robo-call-moguls-outwitted-the-government-and-completely-wrecked-the-do-not-call-list/2018/01/09/52c769b6-df7a-11e7-bbd0-9dfb2e37492a_story.html [https://perma.cc/XXL7-2JLG].

[5] These concerns are introduced in greater detail in Section I.A., *infra*.

[6] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2394 (codified as amended at 47 U.S.C. § 227 (2012)) (finding, *inter alia*, that "[t]he use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques. . . . Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers. . . . Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer."); *see also* S. REP. NO. 102-178, at 2 (1991) (discussing harms of unsolicited telemarketing calls).

[7] Telephone Consumer Protection Act § 227.

[8] *Id.* The FCC first implemented such rules in Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 FCC Rcd. 8752, 8753 (1992) [hereinafter 1992 TCPA Order].

[9] *See infra* Section I.B.

[10] *See* Bipartisan Budget Act of 2015, Pub. L. 114–74, § 301(a), 129 Stat. 584, 588 (codified as amended at 47 U.S.C. § 227 (2012 & Supp. IV 2017)); Truth in Caller ID Act of 2009, Pub. L. 111-331, § 2, 124 Stat. 3572, 3572 (2010) (codified as amended at 47 U.S.C. §§ 227, 609 (2012)); Junk Fax Protection Act of 2005, Pub. L. 109-21, §§ 2(a)–(g), 3, 119 Stat. 359, 359–62 (codified as amended at 47 U.S.C. §§ 227, 609 (2012)); CAN-SPAM Act of 2003, Pub. L. 108-187, § 3, 117 Stat. 2699, 2700 (codified as amended at 15 U.S.C. §§ 7702 (2012)); Communications Assistance for Law Enforcement Act, Pub. L.

As every modern telephone owner knows, the TCPA has not eliminated the scourge of unwanted telephone calls. To the contrary, today there are as many as 4.2 billion robocalls placed each month, as much as 59 percent of which are made using technologies that falsify or mask the identity of the caller.[11] Who has not received a call from "Rachel from Card Services"?[12] But while the basic problem today seems similar to that of 1991, so much about the ecosystem has changed that the underlying problems are almost all fundamentally different. To consider just a few examples: today, these calls come throughout the day, mostly to cell phones; Caller ID is pervasive; the U.S. government has developed a comprehensive (if ineffective) Do-Not-Call regime; callers use complex tricks to make called parties think they are talking to a human; and automatic dialers are far smarter, such that they are far less likely to tie up phone lines for more than a few seconds (if the call goes unanswered).[13]

No. 103-414, 108 Stat. 4279 (1994) (codified as amended at 47 U.S.C. §§ 1001–1002 (2012)); Telephone Disclosure and Dispute Resolution Act, Pub. L. No. 102-556, 106 Stat. 4181 (1992) (codified as amended at 15 U.S.C. §§ 5701, 5711 (2012)); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 31 FCC Rcd. 9074, 9079 (2016) [hereinafter 2016 TCPA Order]; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, TCPA Omnibus Declaratory Ruling and Order, 30 FCC Rcd. 7961, 7967–68 (2015) [hereinafter 2015 TCPA Order]; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 27 FCC Rcd. 1830, 1832 (2012) [hereinafter 2012 TCPA Order]; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Second Order on Reconsideration, 20 FCC Rcd. 3788, 3801 (2005) [hereinafter 2005 TCPA Order]; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd. 14014, 14115 (2003) [hereinafter 2003 TCPA Order]; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order on Further Reconsideration, 12 FCC Rcd. 4609, 4609 (1997) [hereinafter 1997 TCPA Order]; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order, 10 FCC Rcd. 12391, 12396 (1995) [hereinafter 1995 TCPA Order]; 1992 TCPA Order, *supra* note 8, at 8753.

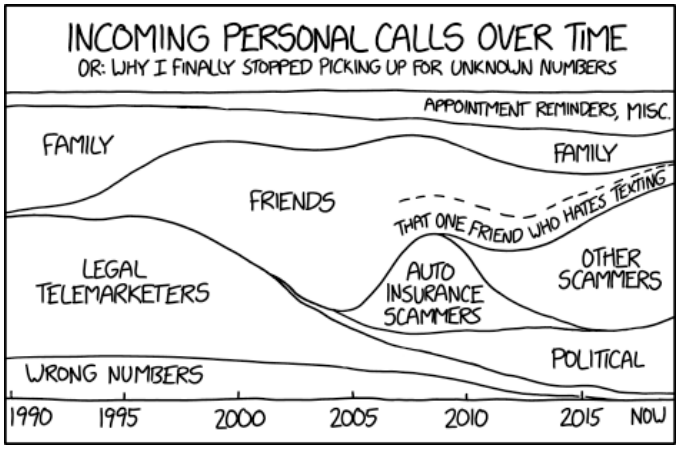
[11] *See August 2018 Nationwide Robocall Data,* YOUMAIL ROBOCALL INDEX, https://robocallindex.com/2018/august [https://perma.cc/8CQB-AQ9M] (Sept. 21, 2018); *see also* Advanced Methods to Target & Eliminate Unlawful Robocalls, 32 FCC Rcd. 2306, 2331–34 (2017) (statements of Chairman Pai and Commissioner Clyburn). For 59 percent number, *see* Laura J. Nelson, *FTC Hangs up on Robocalls from 'Rachel'*, L.A. TIMES (Nov. 1, 2012), http://articles.latimes.com/2012/nov/01/business/la-fi-tn-ftc-robocalls-credit-card-services-20121101 [https://perma.cc/H6Q6-GLVE]; Spencer Weber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 390–91 (2014); Marissa A. Potts, Note, *"Hello, it's me. [Please don't sue me!]" Examining the FCC's Overbroad Calling Regulations Under the TCPA*, 82 BROOK. L. REV. 281, 302 (2016).

[12] *See, e.g.*, Bikram Bandy, *What's the Deal with "Rachel from Card Services"? Your Top 3 Questions Answered*, FED. TRADE COMM'N: CONSUMER INFO. BLOG (Aug. 21, 2015), https://www.consumer.ftc.gov/blog/whats-deal-rachel-card-services-your-top-3-questions-answered [https://perma.cc/NZ97-XXLK]; Andrew Johnson, *The FTC Gets Rachel the Robocaller . . . Again*, FED. TRADE COMM'N: CONSUMER INFO. BLOG (June 14, 2016), https://www.consumer.ftc.gov/blog/ftc-gets-rachel-robocaller-again [https://perma.cc/U6YD-EYV4].

[13] The evolution of the scope and changing nature of the problem of unwanted phone calls is captured by a recent comic:

In addition, many of today's callers are engaged in complex scams unrelated to the call itself.[14] A significant volume of bad-faith callers—the "Rachel[s] from Card Services" and those making calls as part of scams unrelated to the calls themselves—use technologies to conceal, and are engaging in scams that do not require them to reveal their identities.[15] That is, they cannot be sued because they cannot be found; and because they cannot be sued, they do not care about the TCPA and make no effort to comply with it.[16] The government does have a compelling interest in curtailing these callers but the TCPA does little to accomplish this goal. Legitimate businesses, however, are constrained by the contours of the law and the market. This is a fundamental difference between the challenges that the TCPA was written to address in 1991 and the challenges that are faced today. The contemporary problem of unwanted telephone calls stems not from those callers who attempt to comply with the TCPA but from those who ignore it.

This article takes a fresh look at the constitutionality of the TCPA.[17] Since it was enacted, the Act has survived numerous



Randall Munroe, *Incoming Calls*, XKCD, https://xkcd.com/2053/ [https://perma.cc/LRL4-QT9E].

[14] Mike Snider, *Don't Say 'Yes' When Robocall Scam Rings*, USA TODAY (Mar. 28, 2017, 8:58 AM ET), https://www.usatoday.com/story/tech/talkingtech/2017/03/27/dont-say-yes-when-robocall-scam-rings/99709634 [https://perma.cc/KS7G-XEKP]; *see also* Fed. Trade Comm'n, Comment Letter on Proposed Rule In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls 5, 7 (July 3, 2017), 2017 WL 2926645, https://ecfsapi.fcc.gov/file/107030687301373/P034412%20FCC%20NPRM%20NOI%20Call%20Blocking%20Comment.pdf [https://perma.cc/9D7A-2VJ4].

[15] *See* FED. TRADE COMM'N, BIENNIAL REPORT TO CONGRESS UNDER THE DO NOT CALL REGISTRY FEE EXTENSION ACT OF 2007 3 (2017), https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-operation-national-do-not/biennial_do_not_call_report_fy_2016-2017_0.pdf [https://perma.cc/EWD4-7846].

[16] *See, e.g.*, *id.*

[17] This article focuses on the TCPA and the FCC's implementing rules. It is worth noting, however, that much of this analysis likely applies to the Do-Not-Call

challenges brought on First Amendment grounds. Courts have consistently found that the Act is subject to and survives intermediate scrutiny. But changes in technology, the market, and the law suggest that this conclusion may no longer be sound. Recent Supreme Court First Amendment precedent raises questions about the grounds on which prior courts have upheld the TCPA, leading some lower courts to subject the TCPA to strict scrutiny.[18] This article argues that these recent cases are only the tip of the constitutional iceberg with which the TCPA is about to collide. In the modern setting, the basic purpose of (and problem with) the Act is that it attempts to curtail an illegitimate and substantially harmful subset of telephone calls using tools that silence a substantial volume of legitimate calls, with little effect on illegitimate speech. Not only does the Act possibly fail under recent strict scrutiny precedent, but it very likely fails even under intermediate scrutiny.

What is more, the TCPA was largely premised on—and has generally been upheld based upon—Supreme Court precedent regarding the sanctity and sanctuary of the home. Over the course of the twentieth century, the Court decided several cases holding, under various factual permutations, that individuals have a strong privacy interest in their homes as a sanctuary from unwanted disturbance from the marketplace of ideas, but that once they leave that sanctuary there is limited right to privacy from unwanted speech, disturbance, and ideas.[19] But since the enactment of the TCPA, house-based landline telephones have been largely displaced by mobile cellular phones. Today, cell phones are a primary means by which individuals engage with one another, the public square, and the marketplace of ideas. Yet the TCPA applies to, and treats, mobile phones basically as a slightly more expensive analogue to traditional landline telephones, effectively extending the constitutional protections afforded to the sanctuary of the home to the sanctuary of the phone. This raises important questions about the ongoing viability of the TCPA as well as difficult questions about the extent to which the Constitution should recognize privacy interests in the modern public sphere.

Implementation Act and the FTC's rules implementing that Act. The Do-Not-Call Act is discussed to some degree below. *See infra* note 56. This article focuses on the TCPA, somewhat to the implicit exclusion of the Do-Not-Call Act, because the TCPA's private cause of action both has significantly amplified concerns about the Act's deleterious impacts on constitutionally-protected speech and also raises important questions about the government's role in regulating speech between private parties that do not arise in the context of the Do-Not-Call list.

[18] *See infra* Sections IV.A. & B.

[19] *See infra* Section III.B.

This article begins in Part I with an overview of the TCPA. Part II then discusses three key types of changes since the TCPA was enacted in 1991: changes in the problem, the technological solutions, and the law itself. Part III turns to the broader questions raised by contemporary application of the TCPA: the propriety of the government's restriction of private speech to address problems the government regulation itself created, and the questions that the principles of privacy underlying TCPA's application in the contemporary setting raise about the distinction between public and private spaces. Parts IV and V analyze the contemporary application of the TCPA in light of current First Amendment law. Part V draws all of these threads together and offers a path forward, arguing that because current technology allows a great deal of flexibility, to both those placing and receiving unsolicited calls, in how those calls are managed, the FCC should encourage adoption of technologies, which give consumers greater control over these calls, instead of directly regulating speech in a continuation of its thus far ill-fated efforts to eliminate unwanted calls.

I. THE TCPA'S LEGISLATIVE, ADMINISTRATIVE, AND FIRST AMENDMENT HISTORY

A. The TCPA's Purpose

The TCPA was enacted in 1991 nominally to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers."[20] In addition to this expressly identified purpose, the legislative history highlights "the use of automated equipment *to engage in telemarketing*" as its motivating concern, and identifies in its preamble the purpose of the legislation as being "to prohibit certain practices involving the use of telephone equipment *for advertising and solicitation purposes*."[21] The TCPA was adopted in response to particular concerns, including the following examples from the Senate Report:

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[20] S. REP. NO. 102-178, at 1 (1991).

[21] *Id.* (emphasis added). "[T]elemarketing calls" and calls "for advertising and solicitation purposes" are the only type of calls identified as problematic by content in the Senate Report, and the report refers throughout back to "these calls" in discussing the purpose, motivation, and structure of the legislation. *Id.* at 1–3, 5, 9. The report also expressly addresses concerns raised by telemarketers and indicates that hearings were held at which telemarketers were invited to testify. *Id.* at 3–6. As discussed in the report, hearings and prior considered legislation addressed "telemarketing" and "[t]elephone [a]dvertising" by name. *Id.* at 6.

- automated calls are placed to lines reserved for emergency purposes, such as hospitals and fire and police stations;
- the entity placing the automated call does not identify itself;
- the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages;
- the automated calls will not disconnect the line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own calls;
- automated calls do not respond to human voice commands to disconnect the phone, especially in times of emergency;
- some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls; and
- unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).[22]

Understanding those concerns requires recognizing the technological setting as it existed in 1991. This was near the end of the era of "Ma Bell"—consumers generally could only get telephone service from a single local exchange carrier, and there was limited (but growing) competition in the long distance market.[23] Residential customers generally had one telephone line (and number) per house, which would ring several phones shared throughout the house when called.[24] Commercially-available Caller ID was not yet available nationwide.[25] Fax machines were an important and state-of-the-art means of communication.[26] Cell phones were only just beginning to enter the consumer market.[27]

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[22] *Id.* at 2.

[23] *See* Andrew Pollack, *Bell System Breakup Opens Era of Great Expectations and Great Concern*, N.Y. TIMES (Jan. 1, 1984), http://www.nytimes.com/1984/01/01/us/bell-system-breakup-opens-era-of-great-expectations-and-great-concern.html [https://perma.cc/3Q5V-V5EV].

[24] *See* Mark Landler, *Multiple Family Phone Lines, A Post-Postwar U.S. Trend*, N.Y. TIMES (Dec. 26, 1995), http://www.nytimes.com/1995/12/26/us/multiple-family-phone-lines-a-post-postwar-us-trend.html [https://perma.cc/ENX4-64NY].

[25] *See* Anthony Ramirez, *Caller ID: Consumer's Friend or Foe?*, N.Y. TIMES (Apr. 4, 1992), http://www.nytimes.com/1992/04/04/news/caller-id-consumer-s-friend-or-foe.html [https://perma.cc/FP2M-D3NY].

[26] Lynn Simross, *The Fax Revolution: At Home and at Work, Facsimile Machines Have Become* the *Essential Business Tools*, L.A. TIMES (Sept. 11, 1991), http://articles.latimes.com/1991-09-11/news/vw-1950_1_fax-machine [https://perma.cc/MQJ4-UZ9A].

[27] Calvin Sims, *All About/Cellular Telephones*; *A Gadget That May Soon Become the Latest Necessity*, N.Y. TIMES (Jan. 28, 1990), http://www.nytimes.com/1990/

The entire consumer-facing side of the telephone system was analog.[28] The last manual exchange in the United States—a system that required speaking to an operator in order to complete a call instead of just being able to dial a phone number—was not retired until the early 1990s.[29] Some telephone customers in the United States relied on "party line" service (i.e., a phone line shared with several other houses), well into the 1980s.[30] The underbelly of the system was also much more primitive: many telephone exchanges still relied on mechanical switches—switches that established phone calls by establishing a physical electrical circuit between telephones—instead of computerized electronic switches.[31] These switches were in many ways inferior to their more modern electronic counterparts. For instance, they would not end a phone call, disconnecting the physical connection between each end, until both parties had hung up their side of the line.[32]

Everything was also much more expensive. Short, domestic, long distance calls could cost several dollars and even local calls sometimes were not free.[33] Cell phones—where they were available—similarly had high usage fees (not to mention that they were the size of a brick or even a briefcase and their batteries

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01/28/business/all-about-cellular-telephones-a-gadget-that-may-soon-become-the-latest-necessity.html [https://perma.cc/WVW8-EMCC].

[28] Note, *The Message in the Medium: The First Amendment on the Information Superhighway,* 107 HARV. L. REV. 1062, 1065 (1994).

[29] *See* Charles Hillinger, *Pulling the Plug: Phone Company to Replace Last Manual Switchboard*, L.A. TIMES (Apr. 8, 1991), http://articles.latimes.com/1991-04-08/news/mn-130_1_manual-switchboard [https://perma.cc/W6KQ-GUEH].

[30] Party Lines were popular in the middle of the century, but by the 1970s were being phased out across most networks. *See* Bill Baird, *AT&T Archives: Party Lines,* AT&T TECH. CHANNEL (June 6, 2012), http://techchannel.att.com/play-video.cfm/2012/6/6/at&t-archives-party-lines [https://perma.cc/RP5H-9RWB]. Some service continued through the 1990s and even into the 2000s. *See, e.g.*, Kelly P. Kissel, *Technology Pulls Plug on Rural Party Lines: West Virginia: Customers Say Farewell to Their Old Telephone System with Mixture of Joy and Nostalgia*, L.A. TIMES (Oct. 22, 1989), http://articles.latimes.com/1989-10-22/news/mn-811_1_telephone-service [https://perma.cc/4Y88-PX8J]; *Party Line Era Ends in State Bell Atlantic Converting Pennsylvania's Final 110 Lines.*, MORNING CALL, (June 27, 2000), http://articles.mcall.com/2000-06-27/business/3301798_1_bell-atlantic-caller-id-party-lines [https://perma.cc/2TMT-X9RS]; Wilson Ring, *The Party's Over for Rural Phone Customers in Green Mountain State*, L.A. TIMES (Jan. 31, 1999), http://articles.latimes.com/1999/jan/31/news/mn-3380 [https://perma.cc/AH6H-FGWF].

[31] HENRY KRESSEL & THOMAS V. LENTO, COMPETING FOR THE FUTURE: HOW DIGITAL INNOVATIONS ARE CHANGING THE WORLD 68–69 (Cambridge University Press, ed. 2007).

[32] *See* S. REP. NO. 102-178, at 13 (1991).

[33] In 1989, calls overseas could cost well over $2.00 (1989 dollars) for the first minute and over $0.50 for each additional minute; calls from the Hawaii to Alaska cost $0.71 per minute; calls from mainland U.S. to Mexico cost $0.66 per minute; and the average call across the Continental U.S. cost $0.33 per minute. *See* FCC, STATISTICS OF COMMUNICATIONS COMMON CARRIERS 217–27 (1990), https://www.fcc.gov/file/11631/download [https://perma.cc/GWX7-UPT7] [hereinafter "1989 Common Carriers Report"].

only allowed a short time of conversation).[34] Most fax machines printed documents on expensive rolls of thermal paper.[35]

At the same time, this was also an era of rapid technological change. Telephone networks were quickly transitioning to digital and computerized technologies, especially in the network core and for long distance service (that is, for everything except the last segment of the network that connected directly to consumers' homes).[36] The cost of calls fell precipitously as well, especially in the increasingly competitive long distance market.[37] And with the growth of the computer and electronics markets, the devices that could connect to the network were increasingly more advanced.[38]

It was these latter changes that gave rise to the problems that the TCPA was meant to address. As explained in the Senate report,

> Over the past few years, long distance telephone rates have fallen over 40 percent, thereby reducing the costs of engaging in long distance telemarketing. The costs of telemarketing have fallen even more with the advent of automatic dialer recorded message players (ADRMPs) or automatic dialing and announcing devices (ADADs). These machines automatically dial a telephone number and deliver to the called party an artificial or prerecorded voice message. Certain data indicate that the machines are used by more than 180,000 solicitors to call more than 7 million Americans every day.[39]

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[34] Sims, *supra*, note 27. The Motorola DynaTAC and MicroTAC were the first commercially available cell phones, costing about $10,000 and $6,000 respectively (adjusted for inflation), and offered thirty and ninety minutes of talk time. The DynaTAC was affectionately known as "The Brick" due to its size. *See* Nina Ruggiero, *A Look Back at Cell Phones—Before the iPhone*, AMNEWYORK (Mar. 9, 2015 11:56 AM), https://www.amny.com/lifestyle/cell-phones-through-the-years-1.7585422 [https://perma.cc/2NGH-CRZE]; *Cell Phone Cost Comparison Timeline*, TECHNOLOGY.ORG (Sept. 18, 2017), https://www.technology.org/2017/09/18/cell-phone-cost-comparison-timeline/ [https://perma.cc/HA2K-XMS5]. Another iconic phone from the time was affectionately known as the "Motorola Bag Phone," because it was carried in a "fashionable leather bag [which] made it quite the catch." *See Motorola Bag Phone*, TOTALLY 90S (Feb. 5, 2014), http://totally-90s.com/motorola-bag-phone/ [https://perma.cc/59WD-QLUL].

[35] Paper Faxes were available but more expensive. Peter H. Lewis, *Personal Computers: New Fax Machines: Getting More for Less*, N.Y. TIMES (Jan. 17, 1989) http://www.nytimes.com/1989/01/17/science/personal-computers-new-fax-machines-getting-more-for-less.html [https://perma.cc/8K3N-ECC6].

[36] *See* Douglas C. Sicker, *The End of Federalism in Telecommunication Regulations?*, 3 NW. J. TECH. & INTELL. PROP. 130, 134–35 (2005).

[37] S. REP. NO. 102-178, at 2 (1991). As an example, a cross-country call in 1980 cost $0.71 for the first minute and $0.51, thereafter, FCC, STATISTICS OF COMMUNICATIONS COMMON CARRIERS 196 (1980), https://www.fcc.gov/file/11642/download [https://perma.cc/L9JP-6C4H], and by 1989 that price had fallen to $0.33 for the first minute and $0.32 thereafter during the day, and $0.175 per minute for the whole call during nights and weekends. 1989 Common Carriers Report, *supra* note 33, at 217.

[38] *See* S. REP. NO. 102-178, at 2 (1991); *see also, e.g.*, Josef Bernard, *Picture Phone*, RADIO-ELECTRONICS, Aug. 1982, at 43, http://www.americanradiohistory.com/Archive-Radio-Electronics/80s/1982/Radio-Electronics-1982-08.pdf [https://perma.cc/EM9K-TFP4].

[39] S. REP. NO. 102-178, at 2 (1991).

On the other side of the equation, while the technology used by telemarketers for placing calls was rapidly advancing, the technology used by consumers receiving calls was relatively stagnant. Indeed, much residential telephone service provided today is using then state-of-the-art technology that was being deployed in the late 1980s.[40]

Importantly, in its initial 1992 order implementing the TCPA, the FCC considered alternative approaches to mitigating the harms of unwanted telephone calls, including ideas such as centralized do-not-call databases, directory markings indicating the classes of callers from which individuals consented to receive calls from, and technological solutions that could be implemented by consumers or within the telephone network to give consumers greater control over the calls that they received.[41] All of these proposals were rejected as likely ineffective or because they were technologically or economically infeasible at the time.[42] These are conclusions that may no longer hold—in particular, as will be seen below, the FCC and telecommunications industry are actively developing technologies to give consumers much greater control over the telephone calls that they receive.

B. Implementation and Evolution of the TCPA

The guiding principle of the TCPA is that telephone calls made with automatic telephone dialing systems or using prerecorded or artificial messages cannot be made without prior express consent.[43] This general rule requiring prior express consent is subject to a few statutory exceptions, including that such calls can be made for emergency purposes and for the purposes of collection of debts on behalf of the government.[44] Even more important, these rules are subject to implementation and interpretation by FCC rulemaking: the TCPA both directs the

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[40] *See* DAVID SIMPSON, FCC, CYBERSECURITY RISK REDUCTION 28 (2017), https://docs.fcc.gov/public/attachments/DOC-343096A1.pdf [https://perma.cc/95DC-B84J] (noting that "the underlying SS7 protocol . . . has been used to set-up and tear-down communications circuits since the 1980s.") This report was rescinded shortly after adoption following a change in the FCC's leadership, on the view of that new leadership that the FCC lacks statutory authority to regulate cybersecurity matters. *See* Public Safety & Homeland Security Bureau White Paper on Cybersecuirty Risk Reduction, Order, 32 FCC Rcd. 1107, 1107 (2017).

[41] 1992 TCPA Order, 7 FCC Rcd. 2736, 2741 (1992).

[42] *Id.* at 2741–42.

[43] S. REP. NO. 102-178, at 4 (1991); 47 U.S.C. § 227(b)(1)(A)–(B) (2012).

[44] 47 U.S.C. § 227(b)(1)(A)–(B) (including emergency exceptions); *id.* § 227(b)(1)(A)(iii)–(b)(1)(B) (government debt collection exceptions).

FCC to make rules implementing the Act and expressly allows the FCC to exempt certain calls from the prohibition of the Act.[45]

Callers who violate the Act can be subject to substantial civil and criminal fines. More important, the Act creates a strict liability private right of action under which individuals receiving calls in violation of the Act can recover statutory damages of $500 per call, an amount that can be tripled if a court finds that the violation of the law was willful.[46] This has given rise to a cottage—but expensive—industry built around bringing class action lawsuits over TCPA violations.[47]

Importantly, the Act draws a number of distinctions. For instance, it addresses *all* calls to cellular telephone services, or other telephone services for which the called party is charged for the call in one section,[48] but it addresses calls to *residential* telephones *to deliver a message* as a separate category of calls in a separate section.[49] It also directs the FCC to consider whether a given call includes unsolicited advertisements in implementing the Act, and thereby distinguishes between calls made merely to deliver informational messages and those made for commercial purposes.[50]

The FCC first implemented its TCPA rules in its 1992 TCPA Order.[51] Under those rules, unsolicited commercial calls generally could not be made to residential telephones using automatic dialers or prerecorded or artificial voices without prior express consent.[52] Informational calls were not subject to this requirement.[53] All calls made to cellular phones (if the party was billed for the call) using automatic dialers or prerecorded or artificial voices, however, required prior express consent.[54]

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[45] *Id.* § 227(b)(1)(B)–(b)(2).

[46] *Id.* § 227(c)(5).

[47] *See, e.g.*, Paul F. Corcoran, Marc J. Rachman & David S. Greenberg, *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 26 INTELL. PROP. & TECH. L.J. no. 10, 2014, at 9, 13–14, http://www.dglaw.com/images_user/newsalerts/113551.pdf [https://perma.cc/4JZ5-5DPS]; 2015 TCPA Order, 30 FCC Rcd. 7961, 8084 (2015) (statement of Commissioner Mike O'Rielly) ("It has been reported that over [two thousand] TCPA class action lawsuits were filed in 2014 alone.").

[48] 47 U.S.C. § 227(b)(1)(A)(iii).

[49] *Id.* § 227(b)(1)(B).

[50] 47 U.S.C. § 227(b)(2) (directing the FCC to consider whether a call includes the transmission of any unsolicited advertisement); *id.* § 227(a)(5) (defining "unsolicited advertisement").

[51] 1992 TCPA Order, 7 FCC Rcd. 8752 (1992).

[52] *Id.* at 8754 ("The TCPA, however, permits the Commission to exempt from the residential prohibition calls which are non-commercial and commercial calls which do not adversely affect the privacy rights of the called party and which do not transmit an unsolicited advertisement.").

[53] *Id.* at 8770–74.

[54] *Id.* at 8775.

In the years since, both the TCPA and the FCC's rules implementing the TCPA have been modified several times.[55] Perhaps the most important development came in 2003 when Congress, the Federal Trade Commission (FTC), and the FCC jointly implemented the National Do Not Call Registry.[56] In implementing the Do Not Call Registry, the FTC adopted a stricter understanding of prior express consent than had previously governed: if an individual's phone number was on the Do Not Call list, telemarketers could only call it if they had *written* prior express consent.[57] In light of this requirement, the FCC followed suit, amending its rules to exempt firms calling phone numbers on the Do Not Call list from liability under the TCPA only if they had written prior express consent to make such calls.[58]

Congress, the FTC, and the FCC have regularly updated this legal framework in response to changing marketing practices, judicial opinions, and market conditions.[59] The most recent major FCC Order, the 2015 Omnibus TCPA Order, summarizes the current state of the FCC's rules:

> The TCPA and the Commission's implementing rules prohibit: (1) making telemarketing calls using an artificial or prerecorded voice to *residential* telephones without prior express consent; and (2) making any non-emergency call using an automatic telephone dialing system ("autodialer") or an artificial or prerecorded voice to a *wireless* telephone number without prior express consent. If the call includes or introduces an advertisement or constitutes telemarketing, consent must be in writing. If an autodialed or prerecorded call to a wireless number is not for such purposes, the consent may be oral or written.[60]

C. First Amendment Doctrine

The TCPA is government regulation of speech. As discussed above, it places restrictions on how certain types of speech are communicated, including imposing significant fines upon those who engage in the prohibited forms of speech. An understanding of First Amendment doctrine is therefore needed prior to discussing the TCPA—particularly given that First Amendment doctrine has continued to evolve since the TCPA was first enacted.

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[55] *See supra* note 10.

[56] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003) (codified as amended at 15 U.S.C. § 6101 (2012)).

[57] 16 C.F.R. § 310.4(b)(1)(iii)(B)(i) (2018).

[58] 2003 TCPA Order, 18 FCC Rcd. 14014, 14043 (2003) ("Consistent with the FTC's determination, we conclude that for purposes of the national do-not-call list such express permission must be evidenced only by a signed, written agreement . . . .").

[59] *See supra* note 10.

[60] 2015 TCPA Order, 30 FCC Rcd. 7961, 7967–68 (2015) (emphasis in original).

The First Amendment prohibits Congress from making any law abridging the freedom of speech.[61] This does not, however, prohibit any law that merely has the effect of abridging speech. To the contrary, the law routinely abridges speech. The canonical example demonstrates the point: the law can prohibit "falsely shouting fire in a theatre."[62] We have laws against defamation, libel, perjury; laws limiting disclosure of trade secrets and dictating the terms of whistleblowing; laws governing the use and copying of various works of authorship; laws governing what can and cannot be said on broadcast television and radio; laws limiting when, where, and how protests and other forms of public speech occur; and many other examples.[63]

Instead, courts evaluate the nature and extent of a law's effect on speech and then weigh those factors against the law's purpose and means of implementation.[64] The most common dichotomy in this framework is between laws that are content-neutral and those that are content-based. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[65] This "narrowly tailored to serve compelling state interests" standard is known as strict scrutiny.[66] Content-neutral laws on the other hand—generally "those that are justified without reference to the content of the regulated speech"[67]—are subject to a less intense intermediate scrutiny requiring that the restrictions on speech be narrowly

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

[62] Schenck v. United States, 249 U.S. 47, 52 (1919). This example, while canonical, is not precisely correct. The Supreme Court overturned *Schenck* in Brandenburg v. Ohio, 395 U.S. 444, 447 (1969), holding that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Regardless, the point remains: even in the case of advocacy—pure political speech that lies at the core of the First Amendment—there are circumstances where speech can be abridged.

[63] *See, e.g.*, 17 U.S.C. § 107 (2012) (fair use exception to copyright law); 47 U.S.C. § 503(b)(2)(C)(ii)(1) (2012) (providing penalties for "broadcast [of] obscene, indecent, or profane language"); MINN. STAT. § 181.932 (2017) (whistleblower statute); OHIO REV. CODE ANN. § 1333.61 (West 2018) (Ohio Trade Secrets Act); 18 PA. CONS. STAT. § 4902 (2018) (criminalizing perjury); TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2017) (elements of libel in a civil action); VA. CODE ANN. §§ 18.2-404–409 (West 2018) (statutes placing limitations on protests or assembly); VA. CODE ANN. § 38.2-504 (West 2018) (statute criminalizing defamation).

[64] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

[65] *Id.* at 2226.

[66] *Id.* at 2226–27.

[67] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (citations omitted).

tailored to serve some important or substantial government interest.[68] Commercial speech has historically been evaluated under a third analytical framework, albeit one that is similar to the intermediate scrutiny standard—though the Court's recent cases call the ongoing vitality of this so-called commercial speech doctrine into question.[69]

Under the traditional approach, courts have generally evaluated laws regulating commercial speech using the four-part *Central Hudson* test.[70] The premise of this test, and the constitutional justification for regulating commercial speech in general, is that such speech is more closely akin to economic activity than it is to substantive speech.[71] The government has broad authority to regulate economic activity, and so—the theory goes—it has greater authority over commercial speech than over other forms of speech. Under the *Central Hudson* test, courts look to four criteria: (1) whether the speech is misleading or related to unlawful activity; (2) whether the restriction serves a substantial government interest; (3) whether the restriction directly advances that interest; and (4) whether the regulation is more extensive than necessary to advance the government interest.[72] Although this test is relatively forgiving compared to those tests evaluating other government regulation of speech, courts nonetheless regularly find that government regulation of commercial speech violates the First Amendment.[73]

Content-neutral regulation of noncommercial speech is evaluated under an intermediate scrutiny standard.[74] This standard, which is similar to the *Central Hudson* test,[75] is most commonly applied to "time, place, and manner" restrictions on

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[68] *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). Note that "narrowly tailored" has different meanings in the contexts of strict and intermediate scrutiny. *Compare Ward*, 491 U.S. at 798 ("[R]egulation of . . . protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests, but that it need not be the least restrictive or least intrusive means of doing so."), *with* United States v. Alvarez, 567 U.S. 709, 729 (2012) (citing Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004) ("[W]hen the Government seeks to regulate protected speech, the restriction must be the 'least restrictive means among available, effective alternatives.'").

[69] *See infra* Section II.C.

[70] Cent. Hudson Gas Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[71] *Id.* at 563.

[72] *Id.* at 566.

[73] *See, e.g.*, Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 LOY. L.A. L. REV. 389, 391 (2012) ("The U.S. Supreme Court has not upheld a commercial speech restriction since 1995.").

[74] *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989).

[75] *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564.

speech. It requires that such "restrictions are 'justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[76] The key factors under both the *Central Hudson* test and intermediate scrutiny are whether the regulation in question serves a significant government interest and whether it is narrowly tailored to accomplish that goal.

The highest form of First Amendment scrutiny, strict scrutiny, is reserved for content-based regulation of speech.[77] A law that treats speakers differently based upon the message being conveyed will generally trigger strict scrutiny.[78] Under this standard of review, a law must be "narrowly tailored to further a compelling government interest,"[79] in "the least restrictive means to further the articulated interest."[80] This standard is harder to meet than that of intermediate scrutiny or of that applied to commercial speech.[81] A compelling government interest is "an interest of the highest order," one that is more substantial than merely a significant interest.[82] Because the regulatory restriction must be implemented using the least restrictive means, it is not sufficient merely to leave open ample alternative channels for communication: the regulation must implement the channel of communication that is *least* restrictive of speech from among any alternatives.

The application of strict scrutiny to laws that differentiate based upon the content of messages explains the importance of the *Central Hudson* test: if the Court in *Central Hudson* had not decided that regulation of commercial speech is more akin to economic regulation than to speech regulation,

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[76] *Ward*, 491 U.S. at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)); *see also* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014))).

[77] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2236 (2015) (Kagan, J. concurring).

[78] *See infra* note 166 (discussing *Reed*).

[79] *Reed,* 135 S. Ct. at 2232 (majority opinion).

[80] Sable Commc'ns. of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

[81] This is captured in the quip that strict scrutiny is "'strict' in theory and fatal in fact," a phrase attributed to Gerald Gunther. *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, *The Supreme Court 1971 Term,* 86 HARV. L. REV. 1, 8 (1972); *see also* United States v. Alvarez, 567 U.S. 709, 731 (2012) (Breyer, J., concurring) (referring to strict scrutiny as "near-automatic condemnation"). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (showing that "strict scrutiny is far from the inevitably deadly test imagined by the Gunther myth").

[82] *Reed*, 135 S. Ct. at 2232 (citing Republican Party of Minn. v. White, 536 U. S. 765, 780 (2002)).

regulation of commercial speech would necessarily be content-based. This would have brought a wide range of speech regulation under the umbrella of strict scrutiny—increasing the likelihood that much of it may be invalidated.

One way we think about whether a law is narrowly tailored is to consider whether it is under or overinclusive. Underinclusive regulations are particularly suspect, "[b]ecause a 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.'"[83] Nor can the restriction be overinclusive, meaning that it cannot "'unnecessarily circumscribe protected expression.'"[84] As explained by the Supreme Court, "[i]t is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.'"[85]

D. The TCPA and the First Amendment: Early Consideration

Since the TCPA was first adopted by Congress, it has been understood that, as a regulation of speech, it raises potential First Amendment issues.[86] These issues were discussed both by Congress at the time of adoption and recognized by the FCC in its first Report and Order implementing rules for the TCPA.[87] Shortly before the law went into effect, the first of several

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[83] *Id.* (citing Republican Party of Minn. v. White, 536 U.S. 765 (2002)); *see also* Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring); *see also, e.g.*, Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 802 (2011); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 189–90 (1999) (legislation banning advertisements for private casino gambling, but not other types of gambling, was not even rationally related to the state's interest in reducing gambling); Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 756 (1996) (law requiring cable operators to block sexual material on leased channels, but not on unleased channels, was underinclusive and not sufficiently tailored to serve the state's compelling interest in protecting children); Rubin v. Coors Brewing Co., 514 U.S. 476, 479, 489 (1995) (ban on alcohol content labels that applied to beer but not to wine and spirits failed to "directly and materially advance its aim" of averting "strength wars" among alcohol producers); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418 (1993).

[84] Republican Party of Minn. v. White, 536 U.S. 765, 775, 780 (2002) (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).

[85] Packingham v. North Carolina, 137 S. Ct. 1730, 1738 (2017) (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)).

[86] *See* S. REP. NO. 102-178, at 4 (1991).

[87] *Id.*; *see also* 1992 TCPA Order, 7 FCC Rcd., 2736, 2737 n.9 (1992) (citing Congress's finding, as stated in the TCPA, that "the Federal Communications Commission should have the flexibility to design different rules [under the TCPA] consistent with the free speech protections embodied in the First Amendment of the Constitution."). *See generally* 1992 TCPA Order, 7 FCC Rcd. 8752 (1992) (discussing "commercial freedom of speech" throughout).

challenges to the TCPA on First Amendment grounds—*Moser v. FCC*—was filed.[88]

The FCC's First Amendment analysis in its Report and Order was straightforward, if brief, and contained three basic arguments. First, that the TCPA is content-neutral regulation, and that as such reasonable time, place, and manner restrictions—such as the Report asserts the TCPA to be—are permissible.[89] This point will be returned to below, as well as throughout the rest of this article, as it is of central importance. Second, the Report noted that "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder"—another critical point that will also be returned to, in Part III, below.[90] Generally, given the technology in use in the early 1990s, this likely was a reasonable conclusion; but in today's technological setting it is a more problematic basis for speech regulation. And third, the Report made an important distinction that there is a difference between prerecorded phone calls and those made by a "live" operator.[91] As with the previous point, this argument likely had significant valence in the 1990s, but may have less today. Perhaps more important is the recognition by Congress that there is a meaningful difference between prerecorded and live calls—one that may suggest previously unconsidered First Amendment problems.[92]

In its first Report and Order implementing the TCPA, the FCC's First Amendment analysis could be called implicit. Drawing from the text of the TCPA, the FCC recognized that Congress had felt that the Commission "should have the flexibility to design different rules [under the TCPA] consistent with the free speech protections embodied in the First Amendment of the Constitution."[93] The Report and Order recognizes that "[i]ndividuals' privacy rights, public safety interests, and commercial freedom of speech and trade must be balanced in a way that protects the privacy of individuals and

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[88] Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995). Other often-cited cases challenging the TCPA on First Amendment grounds include: Gomez v. Campbell-Ewald Co., 768 F.3d 871, 876 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663, 672 (2016)); Van Bergen v. Minnesota, 59 F.3d 1541, 1545 (8th Cir. 1995); Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 196 F. Supp. 2d 920, 927 (E.D. Mo. 2002).

[89] S. REP NO. 102-178, at 4.

[90] *Id.* (alteration in original) (citing FCC v. Pacifica Found., 438 U.S. 726, 748 (1978)); *see also infra* Part III (discussion of the sanctuary of the home).

[91] S. REP NO. 102-178, at 4–5.

[92] *See infra* Section IV.B.1.

[93] *In re* Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 7 FCC Rcd. 2736, 2737 n.9 (1992) (quoting Telephone Consumer Protection. Act of 1991, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394, 2395 (1991)).

permits legitimate telemarketing practices."[94] Beyond recognizing these general concerns, the FCC does not engage in any substantive First Amendment analysis—indeed, it does not even directly mention the First Amendment in its Report and Order. The Report and Order nonetheless contains significant analysis that is relevant to the First Amendment, focusing on various alternative means to implement the requirements of the TCPA before ultimately adopting rules largely similar to those in place in 2018.[95] Alternatives included the use of nationwide do not call databases, industry or firm-specific do not call databases, time of day restrictions, and network-level technological solutions to give telephone users greater control over which calls they want to receive. These alternatives were rejected as being—at the time—technologically infeasible or too costly to implement, and the 1992 Report and Order instead settled on requiring individual companies to maintain and manage their own lists of numbers not to call.[96]

The first legal challenge to the TCPA, *Moser*, was filed by the National Association of Telecomputer Operators, a telemarketing trade group, shortly after the FCC's rules were adopted and shortly before the TCPA went into effect.[97] The United States District Court for the District of Oregon disagreed with Congress's analysis that the TCPA is content-neutral, explaining that

> This court concludes that the TCPA is a content-based regulation, and cannot be justified as a legitimate time, place or manner restriction on protected speech. The statute draws distinctions between the manner in which some speech is delivered (recorded versus live), but also distinguishes between messages on the basis of content (commercial versus noncommercial). Moreover, the government's purpose behind legislating the TCPA's speech restrictions is necessarily related to the content of the prerecorded messages; the statute restricts some speakers because the content of their messages (prerecorded commercial solicitations) is believed to be more invasive of residential privacy than the prerecorded speech of others (noncommercial solicitors).[98]

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[94] 1992 TCPA Order, 7 FCC Rcd. 8752, 8754 (1992) (quoting Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394 (1991).

[95] *See id.* at 8756–68.

[96] *Id.* at 8757–68.

[97] Moser v. FCC, 46 F.3d 970, 972–73 (9th Cir. 1995).

[98] Moser v. FCC, 826 F. Supp. 360, 363 (D. Or. 1993), *rev'd*, 46 F.3d 970 (9th Cir. 1995).

Following this analysis, the district court applied the *Central Hudson* test and concluded that the TCPA failed to advance sufficient interests and was therefore unconstitutional.[99]

This opinion was appealed to and overturned by the United States Court of Appeals for the Ninth Circuit.[100] The circuit court's opinion was brief, bordering on cursory. It began by noting that the underlying challenge was narrow, focusing solely on the statute and not the FCC's rules implementing it.[101] It then noted that the district court had analyzed the case subject to *Central Hudson*. But from there, the circuit court stated that the statute itself did not distinguish between commercial and noncommercial speech—it only authorized the FCC to make such a distinction in its implementation of the statute—and held from that observation in a conclusory way that "[b]ecause nothing in the statute requires the Commission to distinguish between commercial and noncommercial speech, we conclude that the statute should be analyzed as a content-neutral time, place, and manner restriction."[102] The court neither considered the other ways in which the district court said the TCPA makes content-based distinctions, nor offered any analysis of whether the TCPA makes content-based distinctions on its own.

From here, the Ninth Circuit conducted an intermediate scrutiny analysis of whether the TCPA is a permissible content-neutral regulation of speech, asking "whether a ban on automated telemarketing calls is narrowly tailored to the residential privacy interest, and whether ample alternative channels of communication remain open."[103] The court found that it is. Its principal findings were that Congress has a significant interest in residential privacy (noting that petitioners had not contested this), that the underinclusiveness of the statute—that the TCPA did not prohibit *all* calls that encroached upon this privacy interest—was not fatal to the TCPA, and that Congress had considered alternative, less restrictive means of regulation.[104] Of these considerations, the second is most important for purposes of the present discussion. Drawing on Supreme Court precedent that held underinclusive regulations are problematic "only when a regulation represents an attempt to give one side of a debatable public question an advantage in expressing its views to the people," the court found

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99 *Id.* at 364–67.
100 *Moser*, 46 F.3d at 970 (9th Cir. 1995).
101 *Id.* at 973.
102 *Id.*
103 *Id.* at 974.
104 *Id.* at 974–75.

that any underinclusiveness in the TCPA was not a problem because "[t]he ban on automated, prerecorded calls is not an attempt to favor a particular viewpoint."[105] But, as discussed below, this is a confused understanding of the law. Indeed, it is a misstatement of the precedent cited by the Ninth Circuit—the court's opinion says that a regulation is underinclusive *only* when it is an attempt to give advantage to one side of a debate, but the supporting case says merely that such an attempt *may* constitute underinclusiveness.[106]

Regardless, the *Moser* court's opinion stands and is perhaps *the* bedrock opinion on which subsequent First Amendment analysis of the TCPA has been built. Subsequent opinions, until recently, have found that the TCPA is a permissible content-neutral regulation of commercial speech (where the FCC regulations have been under consideration) subject to either intermediate scrutiny or *Central Hudson* analysis of regulation of commercial speech.[107]

Two cases in the United States Court of Appeals for the Eighth Circuit are of interest, in addition to the Ninth Circuit's *Moser* opinion: *Van Bergen v. State of Minnesota* (1995) and *Missouri ex rel. Nixon v. Am. Blast Fax* (2003). *Van Bergen* related to a state-law equivalent to the TCPA—Minnesota's 1987 law that banned the use of autodialers and prerecorded messages.[108] Van Bergen, a candidate for state governor who intended to use autodialers to make campaign calls, challenged the Minnesota law on the grounds that interfered with constitutionally-protected political speech.[109] The Eighth Circuit disagreed, holding that the state law was content-neutral and a permissible time, place, manner restriction.[110] This opinion is notable in part because it makes that holding in the context of pure political speech; it is also notable (and most often cited) for its holding (unrelated to this article) that the TCPA does not preempt, and is indeed complementary to, state laws regulating

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[105] *Id.* at 974 (citations omitted).

[106] *Compare id.* (stating that "'underinclusiveness' may be the basis of a First Amendment violation *only* when a regulation represents an 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'"(emphasis added) (quoting City of Ladue v. Gilleo, 512 U.S. 43 (1994))), *with* City of Ladue v. Gilleo, 512 U.S. 43, 51 (1994) (stating merely that "an exemption from an otherwise permissible regulation of speech *may* represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'" (emphasis added) (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 785–86 (1978))).

[107] *See, e.g.*, Maryland v. Universal Elections, Inc., 729 F.3d 370, 376 (4th Cir. 2013).

[108] Van Bergen v. Minnesota, 59 F.3d 1541, 1545 (8th Cir. 1995).

[109] *Id.* at 1546.

[110] *Id.* at 1551.

the use of autodialers.[111] The opinion is also noteworthy for its discussion of the underlying technology of how autodialed phone calls are made, noting differences in how individuals are able to interact with live callers versus prerecorded messages.[112] In particular, it discusses the difference between contexts like door-to-door solicitations and unwanted postal mail and how giving individual homeowners the ability to indicate whether they were willing to receive such materials is a better way to preserve their privacy interests.[113] As recognized by the *Van Bergen* court, as well as by the FCC in its 1992 TCPA Report and Order, such technologies were not available at the time.[114] But, by implication and as discussed below, that is no longer, or need not be any longer, the case today.[115]

The Eighth Circuit's opinion in *Missouri ex rel. Nixon* is a third canonical case in the genre of First Amendment challenges to the TCPA. This case, relating to the sending of "junk faxes" under the TCPA was heard in the early 2000s, during a period of rapid technological change.[116] It is notable largely because the United States District Court for the Eastern District of Missouri found the TCPA's prohibition on junk faxes problematic on First Amendment grounds and the Eighth Circuit subsequently reversed.[117] As an initial matter, it is critical to note that the district court did not substantially consider the level of scrutiny applicable to the TCPA—rather, the judge noted in a footnote that "[a]dvertisements by definition qualify as commercial speech," and that "the *Central Hudson* test was the proper standard to be used in this cause of action to analyze the restrictions on commercial speech."[118] On appeal, "[t]he parties agree[d] that the fax advertisements in question [were] commercial speech," and the court consequently applied *Central Hudson* without further analysis about the relevant standard of review.[119] More generally, the Eighth Circuit's opinion is notable for its emphasis and reliance on unsolicited

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[111] *Id.* at 1548.

[112] *Id.* at 1554–56.

[113] *Id.* at 1554–55.

[114] *Id.* at 1554; *see also* 1992 TCPA Order, 7 FCC Rcd 8752, 8761–62 (1992).

[115] *See infra* Part III (arguing that in large part FCC regulations themselves have prevented the development of such technologies and that protecting privacy interests such as the sanctuary of the home is better facilitated by promoting technologies that facilitate low transaction cost bargaining between calling and called parties).

[116] Larry Magid, *The Decade in Technology*, CBS NEWS (Dec. 28, 2009, 11:45 PM), https://www.cbsnews.com/news/the-decade-in-technology/ [https://perma.cc/62LJ-8CUA].

[117] Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 196 F. Supp. 2d 920, 934 (E.D. Mo. 2002), *rev'd*, 323 F.3d 649, 660 (8th Cir. 2003).

[118] *Id.* at 927 n.16.

[119] Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 653 (8th Cir. 2003).

commercial faxes' status as commercial speech.[120] Indeed, it is notable that in discussing the government's interest in regulating the transmission of junk faxes under the TCPA, neither the district court nor the circuit court recognize privacy interests as a basis for regulation. Rather, the governmental interests asserted are solely economic—the material costs incurred by printing to fax paper and the disruption owners of fax machines experience in their own ability to use the machines while they are receiving unwanted faxes.[121] While these interests may be sufficient for the regulation of commercial speech under a *Central Hudson*-style intermediate scrutiny analysis, as discussed below it is unclear how they would be considered under a more contemporary analysis.[122]

These three cases—*Moser*, *Van Berger*, and *Missouri ex rel. Nixon*—are canonical examples of how courts have treated the TCPA under the First Amendment. But, while their analysis was at the time reasonably sound, albeit with some imperfection, they were also situated in a particular technological and legal context. In the intervening years—especially since *Moser*—much has changed on both fronts.

II. HOW THE TIMES HAVE CHANGED

The discussion above explains that the TCPA was written in the era of analog technology and landline telephones; it was written to address problems of phone calls disrupting family dinners and filling up tapes on answering machines; it was written to provide basic rules of the road for a new form of communication that was proving problematic. Not even a law review editor would demand a citation for the proposition that things have changed a great deal since 1991.[123] A number of these changes are important to a modern understanding of the constitutionality of the TCPA.

A. The Problem Has Changed

At the time the TCPA was adopted, "the [FCC] received over 2,300 complaints about telemarketing calls [per] year."[124] Today, robocalls are the most common subject of consumer

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[120] *Id.*

[121] *Id.* at 655; *see also Am. Blast Fax, Inc.*, 196 F. Supp. 2d at 928–29.

[122] *See infra* Part III.

[123] At the suggestion of the editors, *see* Rueben Fischer-Baum, *What 'Tech World' Did You Grow Up In?,* WASH. POST (Nov. 26, 2017), https://www.washingtonpost.com/graphics/2017/entertainment/tech-generations [https://perma.cc/438B-SVNX].

[124] S. REP. NO. 102-178, at 1 (1991).

complaints received by the FCC or the FTC. More than 200,000 of the 475,000 complaints that the FCC received in 2016 were about robocalls.[125] The FTC maintains the Do Not Call Registry, so it receives a larger portion of complaints about robocalls: more than five million complaints in 2016.[126] These complaints reflect just a small portion of the problem as evidenced by the estimate of 4.1 billion calls in violation of the TCPA and Do Not Call Registry made in May 2018 alone (and more in subsequent months).[127]

More important than the increase in volume of calls, the *nature* of the calls that generate these complaints has changed substantially over the past decades. When the TCPA was enacted, it was in response to the advent of autodialers and prerecorded messages.[128] When these technologies appeared, there were no norms governing how they should be used, no laws to enforce those norms, and indeed no recognition that they were peculiarly problematic for consumers. Rather, they were an extension of preexisting telemarketing or informational calling campaigns. Instead of paying twenty people to make one thousand calls in a day, a single machine could be used to make one thousand calls in the same amount of time.[129] It was merely a cheaper, more efficient way of reaching people on the phone. Indeed, this was central to the technology's effectiveness: because people were unaccustomed to receiving many calls in the evening, they routinely answered whatever calls they received. This made these calls both particularly effective and also particularly problematic: they worked because they could

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[125] *See* Press Release, Fed. Commc'ns Comm'n, FCC Acts to Confront 'IRS Debt' Scam Robocalls & Malicious Caller-Id Spoofing (Mar. 23, 2017), https://docs.fcc.gov/public/attachments/DOC-344034A1.pdf [https://perma.cc/H39N-7YQ3]; *CGB—Consumer Complaints Data*, FCC – Open Data, https://opendata.fcc.gov/Consumer/CGB-Consumer-Complaints-by-Category/xaun-e99e [https://perma.cc/8QEN-FKCN].

[126] Press Release, Fed. Trade Comm'n, FTC Releases FY 2017 National Do Not Call Registry Data Book and DNC Mini Site (Dec. 18, 2017), https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-national-do-not-call-registry-data-book-dnc [https://perma.cc/6ZPJ-RS77].

[127] FED. TRADE COMM'N ROBOCALL STRIKE FORCE REP. 1 (2016), https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf [https://perma.cc/V9S3-E5TG]; *see also* PATRICIA MOLONEY FIGLIOLA, CONG. RESEARCH SERV. R45070, PROTECTING CONSUMERS AND BUSINESSES FROM FRAUDULENT ROBOCALLS 3, 16 (2018), https://fas.org/sgp/crs/misc/R45070.pdf [https://perma.cc/9NU8-8FPL]; *Robocall Index,* YOUMAIL ROBOCALL INDEX https://robocallindex.com/2018/september [https://perma.cc/P9NS-EGJT] (indicating 4.4 billion robocalls placed in September 2018).

[128] *See supra* Section I.A.

[129] *Compare* Telephone Consumer Protection Act of 1991, S. 1462, 102d Cong., 1st Sess. § 2(3) (1991), as reported in 137 CONG. REC. H11, 307-01 (daily ed. Nov. 26, 1991) (300,000 solicitors making 18 million calls daily), *with* 137 CONG. REC. E793 (daily ed. Mar. 6, 1991) (statement of Rep. Markey) (180,000 solicitors making 7,000,000 calls daily).

take advantage of people's trust that when the phone rang there was someone on the other end who they wanted to talk to.[130]

In the years since adoption of the TCPA, largely in response to the TCPA as well as with the advent of the Do Not Call Registry and technologies like Caller ID, clear frameworks have developed to guide the legitimate use of autodialers and prerecorded messages.[131] Many firms—especially those seeking to do legitimate business with willing customers—try to follow these frameworks.[132] There are plenty of legitimate uses for these technologies, such as sending out text messages reminding people about prescriptions or bill payments, making it easy for individuals to request that information or commercial opportunities be sent to them, or facilitating the use of efficient dialing technologies when trying to contact customers.

There have been several examples of pro-consumer business practices that have been caught in the net of TCPA litigation in recent years. One of the driving factors behind this litigation trend is that the statutory damages provision of the TCPA, allowing a minimum award of $500 per call, operates as a significant damages multiplier in the context of class action litigation. Backed by these statutory damages, even small classes can expose companies using telephones to communicate with their customers to millions of dollars in potential liability. Faced with such large potential liability, few defendants in TCPA cases choose to litigate past motions to dismiss, instead settling any charges to avoid exposure to the full brunt of statutory damages.[133]

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[130] 137 CONG REC. H11,307 (daily ed. Nov. 26, 1991) (300,000 solicitors making 18 million calls); 137 CONG. REC. H11,312 (daily ed. Nov. 26, 1991) (Statement of Rep. Cooper) ("Unwanted calls are tainting the wanted ones and make us cringe at the thought of answering the telephone at night."); 137 CONG REC. E793 (daily ed. Mar. 6, 1992) (Statement of Rep. Markey) ("The telephone is an insistent master—when it rings, we answer it—and many consumers complain bitterly that, when it rings to deliver unsolicited advertising, it is invading their privacy.").

[131] Waller et al., *supra* note 11, at 374–80.

[132] *Id.* at 374–89.

[133] *See* Corcoran et al., *supra* note 47, at 9; *see also* Monica Desai, et al., *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It*, 8 INT'L J. MOBILE MARKETING 75, 75–76 (2013) https://www.mmaglobal.com/files/vol8no1/vol8no1-6.pdf ("The TCPA has become fertile ground for nuisance lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear."); U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, TCPA LITIGATION SPRAWL: A STUDY OF THE SOURCES AND TARGETS OF RECENT TCPA LAWSUITS (2017) (discussing the dramatic increase in TCPA litigation in recent years and noting that "Forty-four law firms are the primary filers of over eighteen hundred (1,826) of all the TCPA cases examined (approximately 60%).") https://www.manatt.com/Manatt/media/Media/PDF/Newsletters/TCPA%20Connect/US-Chamber-TCPA-2017.pdf [https://perma.cc/D2CL-F72D].

One common class of examples is captured by suits against sports venues that allow spectators to send a text message, which may appear on the venue's "jumbotron." A number of venues have faced significant TCPA exposure because they would send texts back to the spectator to confirming receipt of the initial message, potentially in violation of the TCPA's requirement that communications to wireless phones have express prior written consent.[134] More generally, the sending automatic text messages to confirm receipt of a message has been a regular target of TCPA class action litigation.[135]

As another example, pharmacies have faced TCPA exposure for sending patients reminders to refill their prescriptions—reminders that can literally be lifesaving.[136] And cooperative community banks have faced exposure under the TCPA for calling their member-customers—as co-ops, such banks are effectively being sued by themselves for attempting to call themselves.[137] And larger businesses have struggled to develop TCPA-compliant ways to communicate at scale with their customers for legitimate business purposes, such as in a recently-filed case against Wells Fargo.[138]

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[134] *See, e.g.*, Complaint at 4–6, Friedman v. LAC Basketball Club, Inc., No. 2:13-cv-00818-CBM-AN (C.D. Cal. dismissed July 8, 2014); Wojcik v. Buffalo Bills, Inc., No. 8:12-CV-2414-T-23TBM, 2014 WL 11332303, (M.D. Fla. Apr. 17, 2014); Emanuel v. The Los Angeles Lakers, Inc., No. CV 12-9936-GW(SHx), 2013 WL 1719035, (C.D. Cal. Apr. 18, 2013). None of these cases resulted in a final judgment against the defendant. *Emanuel* bucked the trend and ultimately resulted in a dismissal of the case with prejudice after the judge found that consumers sending an initial text to the venue implied consent to receive a response. The other cases resulted in settlements.

[135] *See* cases cited *supra* note 134.

[136] *See* Lowe v. CVS Pharmacy, Inc., 233 F. Supp. 3d 636 (N.D. Ill. 2017); Complaint, Rooney v. Rite Aid Corp., No. 3:14-CV-01249-JAH-NLS (S.D. Cal. dismissed Apr. 15, 2015), https://www.classaction.org/media/rooney-v-rite-aid.pdf. [https://perma.cc/RHM3-9WY2]

[137] *See* Letter from Major L. Clark, Acting Chief Counsel, Office of Advocacy, and Jamie Belcore Saloom, Counsel, U.S. Small Bus. Admin., to Marlene S. Dortch, Sec'y, FCC (Aug. 1, 2018), https://ecfsapi.fcc.gov/file/10801393021926/SBA%20Ex%20Parte_08_01_18.pdf [https://perma.cc/K9JL-2J4Z] (discussing conversations that the SBA conducted with "small credit unions, financial service providers, healthcare service providers, and banks regarding their concerns about TCPA compliance" and noting that "[r]ecent litigation has created uncertainty over what types of technology can be used to contact customers without running afoul of the TCPA."); *see also* Letter from Jim Nussle, President & CEO, Credit Union Nat'l Ass'n, to the House Judiciary Comm. Subcomm. on the Constitution and Civil Justice (June 13, 2017), https://www.cuna.org/uploadedFiles/Advocacy/Actions/Comment_Calls,_Letters_and_Testimonies/2017/Letters/TCPA%20Judiciary%20letter%2020170613(2).pdf [https://perma.cc/4JZ5-5DPS]; s*ee also* Kristian Stout, *The TCPA is a Costly Technological Anachronism*, TRUTH ON THE MARKET (June 15, 2015), https://truthonthemarket.com/2015/06/15/the-tcpa-is-a-costly-technological-anachronism [https://perma.cc/G9WW-QWUC] (discussing PayPal).

[138] *See, e.g.*, Dena Aubin, *Wells Fargo Hit with Lawsuit over Robocalls to Wrong Numbers,* REUTERS (Oct. 26, 2018), https://www.reuters.com/article/us-wells-fargo-robocalls-lawsuit/wells-fargo-hit-with-lawsuit-over-robocalls-to-wrong-numbers-idUSKCN1N02FG [https://perma.cc/VK5Z-JR97].

Such examples may seem trivial to some (putting to the side that potential statutory damages in such cases can easily reach tens or even hundreds of millions of dollars), especially when compared to overwhelming disapproval of robocalls. But most constitutionally-protected speech is mundane—most speech is not the Pentagon Papers[139] or unpopular political speech. But the question asked under the First Amendment is not whether speech is good enough to warrant protection. Quite the contrary, a core function of the First Amendment is precisely to keep the government out of determining what speech is "good"—that is, what speech is permissible or merits protection.[140] Rather, the inquiry is whether certain types of speech are so problematic that they bear exception to the general rule that all speech is protected, no matter how trivial or unmeritorious it may seem.

Of course, not everyone using autodialers is engaged in "good" (or "not bad") speech. Some bad-faith callers engage in scams, trying to trick unsuspecting individuals into giving up sensitive personal or financial information.[141] Others use autodialers to harvest phone numbers for individuals who are likely to answer their phones, so that they can be contacted later (typically by a scam artist) or have their numbers sold.[142] Still other recent scams have attempted to trick the called party into saying words or phrases that can then be used for identity or financial fraud.[143] These calls frequently use technologies that allow them to "spoof" Caller ID, to hide their illegitimate identity or to make it look like they are coming from a legitimate phone number.[144] And many of these calls are made by "lead generation" firms that place

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[139] Niraj Chokshi, *Behind the Race to Publish the Top-Secret Pentagon Papers*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/us/pentagon-papers-post.html [https://perma.cc/N3PT-GW7B].

[140] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015) (explaining that regardless of the "innocent motives . . . [of] a facially content-based statute," the First Amendment prevents "future government officials [from] wield[ing] such statutes to suppress disfavored speech."); NAACP v. Button, 371 U.S. 415, 438–39 (1963) (rejecting the State's assertion that its interest in regulating professional conduct by outlawing litigation based speech of the National Association for the Advancement of Colored People is consistent with the First Amendment).

[141] *See* FTC v. Glob. Mktg. Grp., 594 F. Supp. 2d 1281, 1284–85 (M.D. Fla. 2008).

[142] *See, e.g.*, Aarti Shahani, *Why Phone Fraud Starts with a Silent Call*, NPR (Aug. 24, 2015, 4:35 PM ET), https://www.npr.org/sections/alltechconsidered/2015/08/24/434313813/why-phone-fraud-starts-with-a-silent-call [https://perma.cc/4MBM-WGMD] (describing the common process by which scammers receive phone numbers and other personal information).

[143] *See* Press Release, Fed. Trade Comm'n, Consumer Alert: 'Can You Hear Me' Scams Phone Fraudsters Recording Consumers' Voice Responses (Mar. 27, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344083A1.pdf [https://perma.cc/B3FQ-JTEJ].

[144] *See Spoofing and Caller ID*, FCC, https://www.fcc.gov/consumers/guides/spoofing-and-caller-id [https://perma.cc/83KK-SWEH].

calls on behalf of third parties, using call forwarding to redirect positive leads to a live operator at the contracting firm.[145]

These modern uses of autodialers are fundamentally different from their use by legitimate businesses. As an initial matter, legitimate businesses have reputational concerns and want to maintain positive relationships with their (prospective and, especially, existing) customers. Those making illegitimate uses of autodialers generally do not have these concerns: they are engaged in scams or are faceless middlemen. They have no reputation to lose because they have no identity: they use fake phone numbers that provide no identifying information in their calls. This makes it difficult, if not impossible, for individuals or law enforcement to take action against these callers.

Reassignment of telephone numbers, and of wireless phone numbers in particular, is another relatively recent but challenging problem.[146] At the time of the TCPA's enactment, there were roughly 96.4 million retail subscribers in the United States, less than 0.5 numbers per person in the country.[147] As of the end of 2016, there were over 460 million numbers in service, or about 1.5 numbers per person in the country.[148] This increase has put a dramatic strain on the supply of phone numbers.[149] The vast majority of these new numbers have been assigned to wireless phones—and they are being assigned at a rate far in excess of that at which new (unused) numbers are being released. As a result,

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[145] *See., e.g.*, Press Release, Fed. Trade Comm'n, FTC Announces Crackdown on Two Massive Illegal Robocall Operations (Jan. 13, 2017), https://www.ftc.gov/news-events/press-releases/2017/01/ftc-announces-crackdown-two-massive-illegal-robocall-operations [https://perma.cc/2NG8-AAYQ]. Typically, the contracting firm argues that it does not know that the company doing the calling and generating leads is doing so in violation of the TCPA—and many of these companies that generate leads do so in compliance with the law. However, it is unquestionably the case that many companies contract with lead generating firms precisely to shield themselves from prospective liability that can result from mistakes under the TCPA.

[146] Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Notice of Inquiry, 32 FCC Rcd 6007, 6009 (2017).

[147] *See* FCC, TRENDS IN TELEPHONE SERVICE, AT 12-4, 17-3 (2001), https://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend801.pdf [https://perma.cc/9Y78-UG5D] (indicating 7.5 million wireless telephone subscriptions and 89.4 million households with landline phones in late 1991).

[148] *See* FCC, VOICE TELEPHONE SERVICES: STATUS AS OF DECEMBER 31, 2016, at 2 (2018), https://docs.fcc.gov/public/attachments/DOC-349075A1.pdf [https://perma.cc/8YB2-CF8S] (showing over 460 million retail voice telephone service connections in December 2016).

[149] *See* ED ROSENBERG, NAT'L REGULATORY RES. INST., WHY THE SKY DID NOT FALL: A REGULATORY POLICY SUCCESS STORY CONCERNING NPA AND NANP EXHAUST AND NUMBERING RESOURCE OPTIMIZATION 7 (2002) http://ipu.msu.edu/wp-content/uploads/2016/12/Rosenberg-Sky-Falling-NPA-NANP-02-05-Mar-02.pdf [https://perma.cc/PDJ9-3GF3] ("For some time, the supply of numbers appeared to be essentially limitless, and there were few incentives to make optimal use of numbering resources. More recently, however, telephone numbers have become scarce resources. . . . The demand for telephone numbers has increased dramatically with the growth of wireless telephones and pagers."); *see also* Waller et al., *supra* note 11, at 365–66.

approximately thirty-five million wireless telephones are reported to receive reassigned numbers every year.[150]

Number reassignment is difficult for the TCPA because consent to be called does not transfer with the telephone number and therefore callers have only limited ability to know whether a given phone number has been reassigned.[151] Every call that a caller makes, therefore, is potentially to a number that has been reassigned to a non-consenting party, and therefore might technically violate the TCPA. The FCC attempted to address this issue in its 2015 TCPA Order by creating a single-call safe harbor: if a calling party does not receive affirmative consent upon making a call, it will not face TCPA liability for the call but must assume that the number has been reassigned and discontinue calling it in the future.[152] The United States Court of Appeals for the District of Columbia Circuit has recently set aside the single-call safe harbor as arbitrary and capricious.[153]

B. The Technology Has Changed

There is perhaps no adverb in the English language to adequately capture how dramatically the technology of phone calls has changed since 1991. The FCC rules allowing telephone carriers to provide Caller ID services to customers were not adopted until 1995.[154] One of the major concerns animating the TCPA was that autodialed phone calls would not recognize when a call was answered by an answering machine, so they would fill entire answering machine tapes. Autodialers today are much better at determining when a human is not on the other end of a call; and, of course, the use of answering machines or audio cassettes to record messages has largely been displaced by centrally-stored voicemail services.

From the consumer perspective, the biggest change is, of course, the rise of the cell phone. In 1991 cell phones were exceptionally rare—and expensive.[155] Typically, consumers

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[150] *See* Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Notice of Inquiry, 32 FCC Rcd. 6007, 6009 (2017). Many of these numbers are reassigned multiple times in a given year.

[151] Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Further Notice of Proposed Rulemaking, 2018 FCC LEXIS 907, at ¶ 5. https://ecfsapi.fcc.gov/file/032399073325/FCC-18-31A1.pdf [https://perma.cc/W6B2-VRT5].

[152] 2015 TCPA Order, 30 FCC Rcd. 7961, 8001 n.265 (2015).

[153] ACA Int'l v. FCC., 885 F.3d 687, 706 (D.C. Cir. 2018).

[154] Rules and Policies Regarding Calling Number Identification Serv.—Caller ID, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, 10 FCC Rcd. 11700, 11705 ¶ 12 (1995).

[155] *See* Jim Gustke, *Cell Phone Cost Comparison Timeline*, OOMA BLOG (Aug. 22, 2017), https://www.ooma.com/blog/cell-phone-cost-comparison [https://perma.cc/FWC2-FUCL].

connected to the telephone network via a single telephone line connected to their house, which would in turn be connected to a number of wired telephones.[156] That line was shared between the house, and any phone call would cause each of those telephones to ring. Today, there are more cell phones in service in the United States than there are citizens.[157] Phones are remarkably inexpensive—if they are not included in a service plan for free, basic phones are available for tens of dollars, and there are federal subsidy programs available to make sure that low-income individuals have access to them.[158] The cost of service is also much lower. In the early 1990s, even short calls could cost several dollars;[159] today every service plan currently featured in advertising by each of the major wireless carriers includes unlimited voice and text service.[160] And even the most basic of cell phones today is more feature-rich than the most advanced telephones in 1991, featuring Caller ID displays, programmable ring tones, easy volume controls and mute capabilities, and the ability to seamlessly ignore unwanted calls or send them to voicemail.

The role of the TCPA is notable in today's world of multi-modal communications. In 1991 the telephone was the only form of potentially intrusive on-demand distant communications. Today, we have landline phones, cell phones, text messages, e-mail, telephone-like Voice over Internet Protocol (VoIP) products (some of which allow video, in addition to audio, communications) like Skype and Facetime, other VoIP applications like Google Hangouts, and myriad other messaging applications from Messenger and WhatsApp to AOL Instant Messenger and ICQ. Yet despite this myriad of communications media, and their many common features, only calls to "telephones" are captured by the TCPA. Indeed, some courts have distinguished VoIP platforms

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156 *See* Landler, *supra* note 24.

157 *See supra* note 148.

158 *See Lifeline Program for Low-Income Consumers*, FCC (Aug. 16, 2018) https://www.fcc.gov/general/lifeline-program-low-income-consumers [https://perma.cc/JQ8U-FF9X].

159 *See supra* notes 33–35 and accompanying text.

160 This statement is based on a review of the service plans currently listed on the websites of AT&T, Sprint, T-Mobile, and Verizon. These, and other, carriers continue to offer plans with per minute limits. It is, however, the case that these prices are significantly less than the costs incurred at the time of the TCPA's adoption. Even the most expensive of these plans costs a fraction of the cost incurred by unwanted calls at the time of the TCPA's adoption—and, given the widespread availability of plans with lower per-minute costs and of Caller ID technology, it is unlikely that consumers using these higher-cost plans with incur pecuniary losses from unwanted telephone calls. *See, e.g.*, AT&T, https://www.att.com/plans/wireless.html [https://perma.cc/E5D2-HVLH]; SPRINT, https://www.sprint.com/en/shop/plans.html?INTNAV=TopNav:Shop:AllPlans [https://perma.cc/8SJT-2K29]; T-MOBILE, https://www.t-mobile.com/cell-phone-plans?icid=WMM_TM_Q117TMO1PL_H85BRNKTDO37510 [https://perma.cc/GVD5-3DDB]; VERIZON, https://www.verizonwireless.com/plans/ [https://perma.cc/R6AR-PKTV]

from those covered by the TCPA on the grounds that there is no per call charge.[161]

Less visible to consumers are the myriad changes to the underlying telephone network—and, also, the surprising lack of changes. In 1991 the telephone network was still largely analog, especially in the last mile connections to individual telephones. Even the parts of the network that were digital had limited capabilities. Features like Caller ID, call forwarding, speed dialing, and others were still relatively new. Today, the telephone network is almost entirely digital, and has far more sophisticated capabilities than were possible or even conceivable in the early 1990s. These advances, however, should not be overstated: the telephone system is complex, the industry conservative, and the network subject to highly ossified regulation. Much of the underlying technology—the basic protocols that control how telephone switches communicate and how phone calls are routed, for instance—are still based on systems developed in the 1980s.[162] On the regulatory front, there is active discussion at the FCC today over the role of telephone carriers in blocking calls from callers that are known to be fraudulently using spoofed Caller ID information.[163]

Let that sink in for a moment: the FCC currently prohibits telephone companies from blocking calls that are *clearly fraudulent*—the very calls that make up most of the robocall complaints that the FCC and FTC receive. That is akin to the United States Department of Agriculture requiring supermarkets to sell produce that is known to have listeria in it, or the Consumer Product Safety Commission requiring stores to continue selling products with known defects. Rather than require telephone carriers to take action against these known harms, the FCC has instead clung dearly to its vision of telephone carriers as common carriers—passive conduits through which phone calls flow between active call participants. Rather than allow (let alone require) these carriers to implement solutions that could address the vast majority of the robocall problem, the FCC has instead placed a complex compliance burden on calling parties and the substantial burden of dealing with non-complaint calls on individuals.

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[161] An important point made by editors of the Brooklyn Law Review. *See* Klein v. Commerce Energy, Inc., 256 F. Supp. 3d 563, 581 (W.D. Pa. 2017); Breda v. Cellco P'ship, No. CV 16-11512-DJC, 2017 WL 5586661, at *3–4 (D. Mass. Nov. 17, 2017) (calls via VoIP not subject to TCPA because they are not charged per call), *appeal filed,* (1st Cir. Jan. 11, 2018).

[162] *See, e.g.*, SIMPSON, *supra* note 40, at 28.

[163] *See* discussion *infra* Section III.A. and Part IV.

C. The Law Has Changed

The last set of changes, those to the law, are more recent. The basic contours of First Amendment law described in Part I—commercial speech and content-neutral speech regulation being subject to roughly identical forms of intermediate scrutiny and content-based speech regulation being subject to strict scrutiny—describe the free speech law that most law students have learned since the TCPA was adopted. But in recent years the Supreme Court has redefined these contours, clarifying its understanding of the distinction between content-based and content-neutral speech in ways that suggests both that much speech regulation that has previously been thought of as content-neutral is actually content-based, and that regulation of commercial speech may also be content-based regulation subject to strict scrutiny.[164]

The purpose of the discussion that follows is not to advocate for, or to try to advance understanding of, these recent cases. There is extensive discussion of these cases' meaning and how doctrine in this area will continue to evolve elsewhere.[165] Rather, the goal here is to apply these cases as they are naturally read, and as lower courts have begun to apply them in the context of the TCPA. Generally, these cases (most notably *Reed*) have called into question the lower protection afforded to commercial speech.[166] But as Justice Kagan notes in her concurrence in *Reed*, the Court's approach is concerningly broad and threatens to bring vast swaths of speech regulation under the auspices of strict scrutiny.[167] Even if the argument articulated below, that post-*Reed* the TCPA needs to be scrutinized strictly, fails, this article's analysis of the TCPA's substantive problems remains valid under less probing standards of review.

One of the Court's speech opinions in particular, *Reed v. Town of Gilbert*, has raised questions that are relevant in the context of the TCPA.[168] As discussed in Part IV, some lower courts have interpreted *Reed* to subject the TCPA and state level

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[164] *See infra* Sections IV.A.–B.

[165] *See, e.g.*, Enrique Armijo, Reed v. Town of Gilbert*: Relax, Everybody*, 58 B.C. L. REV. 66, 69 (2017); Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1429–30 (2017); Lee Mason, Comment, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 997–98 (2017); Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1981–82 (2016).

[166] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring).

[167] *See id.* at 2238 (Kagan, J., concurring) ("To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever.").

[168] *See id.* at 2224 (majority opinion).

equivalents of the TCPA to strict scrutiny. Others, including *McCullen v. Coakley* and *Sorrell v. IMS Health*, reflect ongoing development of the Court's understanding of the distinction between content-neutral and content-based regulation. These cases suggest two jurisprudential shifts: first, that much speech regulation that has previously been thought of as content-neutral is actually content-based; and second, that regulation of commercial speech may also be content-based regulation subject to strict scrutiny.

In *Reed*, the Supreme Court invalidated Gilbert, Arizona's Sign Code—a law enacted to regulate the size and placement of signs.[169] The central question in this case was whether this statute was content-based or content-neutral. The Court held that it was content-based, and in so doing it restated the defining characteristics of content-based regulation in a way that arguably redrew the line between content-neutral and content-based regulations.[170] Writing for the majority, Justice Thomas explained:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.[171]

This framing shifts the Court's focus by emphasizing that a regulation is necessarily content-based if it draws distinctions based on the message a speaker conveys. Previously, some courts had focused on whether the purpose or effect of the regulation was content-based—so long as a regulation as "justified without reference to content," even a statute that made content-based distinctions on its face could be deemed content-neutral if those distinctions were incidental to a content-neutral purpose.[172] The

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[169] TOWN OF GILBERT, ARIZ., LAND DEVELOPMENT CODE (Sign Code), ch. 1, § 4.402 (2005).

[170] *Reed*, 135 S. Ct. at 2227.

[171] *Id.* (citations omitted).

[172] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 800–01 (1989); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–95, 297 (1984).

Reed Court expressly rejected this view.[173] Lower courts had interpreted prior cases "as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect."[174] Instead, *Reed* recast the inquiry as one comprising two steps: if a statute or regulation is facially content-based, that ends the inquiry; if it is not, then courts inquire more deeply into its purpose and effects to characterize whether it is content-neutral or content-based.[175]

As discussed below, *Reed* has been used in recent litigation challenging the TCPA and related statutes.[176] Following *Reed*'s instruction that a statute that on its face makes content-based distinctions is necessarily content-based and is therefore subject to strict scrutiny, these courts have broken from past cases that have treated the TCPA as content-neutral.[177]

It is important to recognize that *Reed* is on the leading edge of recent developments in a notoriously tricky area of law—its full meaning and the extent to which it brings speech within the ambit of strict scrutiny and to which commercial speech remains subject to more forgiving analysis are the subject of extensive ongoing scholarly debate.[178] *McCullen*, for instance, also a recent case, reminds us that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."[179] It is unclear how to evaluate such a statute where disproportionate effects are clear on the face of the statute—or, to state the matter more confoundingly, it is unclear what "facial" means. *Reed*, for instance, suggests that strict scrutiny will apply in such cases if "the legislature's speaker preference reflects a content preference," which suggests that content preferences may be found based upon implied congressional intent.[180] Such inference seems a far cry from a facial content preference. On the other hand, *McCullen* tempers analysis in the other direction, explaining that "[a] regulation that serves purposes unrelated to

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[173] *Reed*, 135 S. Ct. at 2227 ("On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.").

[174] *Id.* at 2228.

[175] *Id.*

[176] *See infra* Section IV.A.

[177] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227(b)(2)(B) (2012)) ("[T]he Commission . . . may, by rule or order, exempt . . . calls that are not made for a commercial purpose; and such classes or categories of calls made for commercial purposes . . . .").

[178] *See supra* note 165.

[179] McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014).

[180] *Reed*, 135 S. Ct. at 2230 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994)).

the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[181] This suggests that a central question in deciding whether a statute or regulation that has a disproportionate effect on certain topics is whether such effects where truly incidental to, or were actually an object of, the legislative or regulatory design.

Questions such as this are important for evaluating the TCPA and the FCC's implementing rules. As discussed below,[182] the TCPA disproportionately affects certain speech on certain types of issues. Whether this is incidental to Congress's disapprobation of calls placed using autodialers or prerecorded messages, or rather disapprobation of speech on such issues is the reason for Congress's regulation of autodialers and prerecorded messages, is important to understanding whether the TCPA is best understood as content-neutral or content-based.

III. CONCEPTUAL PUZZLES PROMPTED BY THE TCPA'S REGULATION OF SPEECH

The TCPA was written at a simpler time to address simpler problems created by and using simpler technology. It is unsurprising that it has not aged well. As the uses and users of technology have changed, distinctions that did not seem to implicate the content of communications, or that were made to address legitimate non-content interests by technologically appropriate means, must now be evaluated in a new context and in light of contemporary technology.

This context of technological change raises questions that are more challenging than those relating to the TCPA's ongoing vitality under the First Amendment—questions that also raise more fundamental questions about regulation in technologically dynamic settings. The first question stems from the government's role in regulating the design and capabilities of telecommunications networks: but for government regulation of how telephone networks operate, carriers would likely have long ago implemented network features to resolve much of the robocall problem. Can the government impose speech restrictive rules to address conduct that would be less problematic for the government's own regulation?

A second question considers the privacy rationale supporting adoption of the TCPA—indeed, the idea that the

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[181] *McCullen*, 134 S. Ct. at 2531 (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[182] *See infra* Section IV.B.1.

government has an interest in protecting the sanctity of the home is both the principal legislative justification for the TCPA as well as the most substantive defense offered by the FCC in its TCPA orders.[183] As discussed elsewhere in this article, modern technology already does, and dramatically further could, reduce the privacy-invasive aspect of unsolicited telephone calls.[184] Perhaps more interesting, though framed as protecting the *sanctity of the home*, the TCPA really protects the *sanctity of the phone*. This represents a silent but important shift in the scope of protection, assuring that individuals be free from unwanted contact by third parties not merely when at home but also while out and about in the public world and otherwise engaged in the bazaar of ideas.

A. The Government Cannot Regulate Speech to Curtail a Problem of Its Own Creation

One of the most important, and least appreciated, aspects of the contemporary problem of robocalls is the extent to which it is a problem of the government's own making.[185] The FCC has long regulated the operation of the telephone network, from technology standards to interoperability and interexchange requirements to number assignment.[186] It is due to government regulation that the architecture of the telephone network today is remarkably similar today to the network in use at the time the TCPA was drafted.

Today, the FCC is considering various changes that will improve the resilience of the telephone network to practices such as unwanted phone calls.[187] Authentication technologies like

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[183] *See* 2015 TCPA Order, 30 FCC Rcd. 7961, 7995, 8035 (2015).

[184] *See supra* Section II.B.; *see also infra* Sections III.B., IV.B.4.

[185] *See infra* Part V.

[186] *See, e.g.*, 47 C.F.R. pts. 51–52 (2018) (detailing current FCC rules regarding interconnection and numbering). For other examples of FCC regulation of the operation of the telephone network, drawn from areas relevant to the TCPA, *see also* Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Further Notice of Proposed Rulemaking (Mar. 23, 2018) (discussing proposed creation, at the behest of the FCC, of a database to manage reassigned numbers); Numbering Resource Optimization, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 7574, 7577 (2000) (discussing FCC's regulation of number assignment); Rules and Policies Regarding Calling Number Identification Service – Caller ID, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd. 1764, 1764–65 (1994) ("requir[ing] that common carriers using Common Channel Signalling System 7 (SS7) and subscribing to or offering any service based on SS7 functionality must transmit the calling party number parameter and its associated privacy indicator on an interstate call to connecting carriers."). *See generally* FED. TELECOMM. L. 9346494 (C.C.H.), 2015 WL 9346494 § 10.5 INTERCONNECTION (discussing generally the history of the FCC's relationship to changes in telephone technology and interconnection requirements).

[187] *See* Call Authentication Trust Anchor, Notice of Inquiry, 32 FCC Rcd. 5988, 5988–95 (2017).

SHAKEN/STIR,[188] granting permission to carriers to block known-spoofed numbers,[189] and other technological improvements will, on the one hand, dramatically reduce the ability of these callers to engage in problematic practices and, on the other hand, give consumers greater information about and control over the calls that they receive.

Even as the technology is unquestionably improving, the government's role in these improvements raises questions about the propriety of the underlying TCPA. It would be exceedingly difficult, for instance, for the TCPA to survive review under strict scrutiny: one cannot colorably say that a regulation is the least restrictive means of achieving a government purpose if the government controls alternative, less restrictive means to achieve it.[190]

The more difficult case arises in the context of intermediate scrutiny, under which the regulation must be narrowly tailored but not necessarily the least restrictive means to achieve the government's purpose. Instead of requiring the least restrictive means, intermediate scrutiny requires only that the regulation leave open ample alternative channels for communication.[191] But while it is conceivable in the general case that a regulation where the government controls less restrictive alternatives to curtailing the prohibited speech may survive intermediate scrutiny, it seems unlikely that the TCPA is such a regulation. As a starting point, there likely are no alternative means of communication for much of the speech prohibited by the TCPA. This would be the case, for instance, in the example

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[188] *See id.* at 5989–95. "SHAKEN/STIR" refers to a pair of encryption-based authentication protocols proposed for adoption by the FCC by the Commission's Robocall Strike Force. *See* FCC, ROBOCALL STRIKE FORCE REPORT 1, 4–7 (2016) https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf [https://perma.cc/6DD5-3K3G]. These protocols would effectively implement a new version of Caller ID that ensured authenticated calling, such that phone numbers could not be spoofed. *See id.*

[189] Advanced Methods to Target and Eliminate Unlawful Robocalls, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 9706, 9710 (2017).

[190] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2780–82 (2014) ("The least-restrictive-means standard is exceptionally demanding, and it is not satisfied here. . . . In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs." (citations omitted)); *see also* Turner Broad. Sys., Inc. v FCC, 520 U.S. 180, 238 (1997) ("Moreover, even accepting as reasonable Congress' conclusion that cable operators have incentives to favor affiliated programmers, Congress has already limited the number of channels on a cable system that can be occupied by affiliated programmers. Once a cable system operator reaches that cap, it can no longer bump a broadcaster in favor of an affiliated programmer. If Congress were concerned that broadcasters favored too many affiliated programmers, it could simply adjust the cap. Must-carry simply cannot be justified as a response to the allegedly 'substantial' problem of vertical integration." (O'Connor, J., dissenting) (citations omitted)).

[191] *See supra* Section I.C.

of any system that sends automated messages in response to text messages, or for any business or service built around text messages. Alternative means of communication are also unlikely satisfactory for services such as health-related messages, which have an element of timeliness that cannot be matched by mail and that are often sent to individuals who may not have access to other means of communication. One potential response to this is that one can always avoid liability under the TCPA by avoiding automated dialing systems and prerecorded messages. This may be the case in principle—but in practice these systems are used precisely because they are low cost and highly reliable. One would not, for instance, want to rely on humans to correctly dial hundreds or thousands of phone numbers per day to communicate sensitive health information. Beyond the privacy concerns that this may raise, it creates serious concerns the information could be provided to the wrong person—and therefore not delivered to a person that needs it.

But there is an even greater problem with the approach that has historically been effectively mandated by the FCC's TCPA rules: compared to alternatives, it conflicts with the core privacy rationale proffered by Congress to justify the TCPA. As discussed in more detail below, the core purpose and legal justification for the TCPA is to "protect the privacy interests of residential telephone subscribers."[192] This purpose is supported by longstanding understandings—and matching precedent—that individuals have substantial interests in the sanctuary of their home.[193] The cases supporting this idea, however, offer a more attenuated understanding of the sanctity of the home than simply that it is a sanctuary from the marketplace of ideas. Rather, they more carefully balance the First Amendment rights of individuals to engage in speech against the rights of individuals to be free from unwanted speech in the sanctuary of their home. The key case—cited by the FCC in implementing the TCPA[194]—is *Rowan v. U.S. Post Office Department*, in which the Supreme Court upheld a statute allowing homeowners to require that their names be removed from mailing lists.[195]

Rowan is frequently cited to demonstrate the sanctity of the home against unwelcome speech.[196] But the opinion is more

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[192] S. REP. NO. 102-178, at 1 (1991).

[193] *See infra* Section III.B.

[194] 2015 TCPA Order, 30 FCC Rcd. 7961, 7995–96 (2015).

[195] Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 738 (1970).

[196] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 716–17 (2000) ("The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. . . . The right to avoid unwelcome speech has special force in the privacy of

careful than that simple reading suggests. The statute at issue in *Rowan* allows homeowners to *opt out* of unwanted speech—it is therefore dramatically different from the TCPA, which requires callers to obtain express, sometimes written, consent before placing certain calls.[197] The difference between *Rowan*'s opt-out and the TCPA's opt-in regimes has important First Amendment implications: under *Rowan*, the outside speaker has at least an initial opportunity to speak, but must respect the homeowner's wish for privacy. The Court has not articulated a categorical delineation of the constitutional permissibility or requirements of opt-out vs. opt-in regimes. Subsequent cases, however, continue to express a clear preference that individuals be able to manifest considered expressions of what information they want to receive.[198]

The FCC has approached the telephone network from a different perspective. Rather than thinking about how to design the telephone network to give individuals greater information about and control over the calls that they receive, the Commission has thought of the network as a common carriage

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the home . . . ." (citing, *inter alia, Rowan*, 397 U.S. at 738)); Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("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, the home is different. 'That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.'" (quoting *Rowan*, 397 U.S. at 738)); Carey v. Brown, 447 U.S. 455, 471 (1980) ("Preserving 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. Our decisions reflect no lack of solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick.' 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." (citing, *inter alia, Rowan*, 397 U.S. 728)); FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring) ("Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home. '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.'" (quoting, *inter alia, Rowan*, 397 U.S. at 738)); Cohen v. California, 403 U.S. 15, 21 (1971) ("While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'" (citing *Rowan*, 397 U.S. at 738)).

[197] In *Rowan*, the Court explained that it "has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property," and that under the statute at issue "the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Rowan*, 397 U.S. at 737. Compare this regime, which in effect requires the recipient of communications to "opt out" should she wish to no longer receive them, with the TCPA, which requires the sender of communications obtain consent prior to sending them. *See supra* notes 57–58.

[198] *See infra* Section III.B.

system in which all calls must be carried on a nondiscriminatory basis. In other words, the FCC has focused on the carrier side of the industry, making sure that telecom companies reliably carry all calls, instead of the consumer side of the industry. Of course, these two perspectives are not necessarily in conflict—the FCC could work (and today increasingly is working) to ensure both that carriers carry all legitimate calls and that they deploy technologies that give consumers greater information about and control over those calls.

But therein lies the rub: the TCPA assumes the carrier-centric model in which consumers have only very coarse control over the calls that they receive. When approaching the question from either the perspective of narrow tailoring or from that of *Rowan*'s preference for individuals' control over what information he or she receives, the TCPA is unduly burdensome.

B. The Sanctuary of the Home vs. the Sanctuary of the Phone

The core purpose of, and arguably core legal justification for, the TCPA is to "protect the privacy interests of residential telephone subscribers."[199] The legal basis for this goal is situated in the understanding of the sanctity of the home as a sanctuary. The Supreme Court has long recognized a distinction between the public and private spheres.[200] The life of an American individual in the public sphere is characterized by the marketplace of ideas, a marketplace in which there is no partial participation. But once in the sanctuary of the home, that same individual is shielded from the demands and curiosities of the public. In the American tradition, this protection runs most strongly against intrusion by the government itself.[201] But that

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[199] S. REP. NO. 102-178, at 1 (1991).

[200] *See, e.g.*, Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 657 (2002) ("In short, a central tenet of liberalism is that a boundary must be drawn between the outward realm of the state and the inward life of the individual. And this principle is one of the foundations of the First Amendment doctrine of content neutrality." (footnote omitted)); *see also* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423–28 (1982). This distinction, which is of longstanding importance in Western democratic traditions, has perhaps been most clearly delineated in the Court's Fourth Amendment jurisprudence. *See, e.g.*, Donald R.C. Pongrace, *Stereotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191, 1191 (1985).

[201] *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); *see also* Florida v. Jardines, 569 U.S. 1, 6 (2013) ("[T]he home is first

protection also runs against unwelcome intrusions by private actors. Thus, in *Rowan* the Court upheld a statute requiring advertisers to allow homeowners to opt-out of receiving further mailings from them;[202] in *Martin v. City of Struthers* the Court rejected a statute that prohibited door-to-door solicitation but expressed that a more limited prohibition that required solicitors to abide by "no solicitors" signs is likely constitutionally permissible;[203] in *Meese v. Keene* the Court upheld labelling requirements on certain political mailings;[204] and in *FCC v. Pacifica Found* the Court upheld content restrictions on broadcast radio on the grounds that individuals could not otherwise prevent unwanted content from entering their homes.[205] These and other cases are all premised on the idea that individuals have a right to be secure from unwelcome speech within the sanctuary of the home—and that the government plays an important function in helping to secure that right.

But modern communications technology, including wireless telephones and the internet generally, is arguably eroding the boundaries of the home.[206] It is ever harder to keep a clear delineation between what is outside of and what falls within the boundaries of the home. The internet is akin to the modern public square,[207] but most people access that public square on computers or mobile phones, from the comfort of their couch. And those same devices, especially cell phones—devices that increasingly define much of our private lives—come with many of us wherever we go. One need only watch a few minutes of internet videos of people walking into obstacles or falling into holes while engrossed in the private world of their cell phones to

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among equals. At the [Fourth] Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (citing Silverman v. United States, 365 U.S. 505, 511 (1961))).

[202] *Rowan*, 397 U.S. at 736–38.

[203] Martin v. City of Struthers, 319 U.S. 141, 146–48 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved," but "[a] city can punish those who call at a home in defiance of the previously expressed will of the occupant.").

[204] Meese v. Keene, 481 U.S. 465, 470–71, 78–81 (1987).

[205] FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978).

[206] *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2491 (2014) ("Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is." (emphasis omitted)).

[207] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

understand how completely the experience of these devices can insulate one from the public marketplace of ideas.[208]

Turning first to the question of the sanctity of the home *qua* home, the Court has never recognized the boundaries of the home as inviolate. To the contrary, it has expressly struck down statutes that treat it as such.[209] The balance struck by the Court is rather more nuanced, captured by Justice Black: "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation or a free society that . . . it must be fully preserved."[210] This balance carries two competing factors: the need to be able to distribute information to every citizen, and the ability of the citizen to specify the terms on which she receives it. These factors have an inverse relationship. The less ability individuals have to control how and what information they receive, the greater their need for sanctuary from unwanted information. Thus, and as discussed throughout this article, to the extent that technologies that offer individuals greater control over the telephone calls they received are implemented—and especially to the extent that the government has influence over implementation of such technologies—the less justification there is for the TCPA.

The second question is conceptually more difficult: as Americans increasingly turn from residential landline telephones to personal wireless telephones, the scope of the TCPA's protections changes from the "sanctuary of the home" to the "sanctuary of the phone." This change is far from inconsequential: the defining characteristic of the mobile phone is that it is untethered from the home. This expansion in scope thus expands the protection afforded by the TCPA beyond that which has previously been considered—let alone permitted—by the Court. Making matters even more complicated, while the immediate response may be to assume that this is problematic (anything falling outside of the sanctuary of the home generally being seen as fair game in the public sphere), the Court has offered some hints that the protection afforded inside the home may not be confined to the home's walls. For instance, the Court has noted that "radio [listened to in the home] can be turned off,

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[208] *See, e.g.*, ABC News, *Texting While Walking Accidents: Video*, YOUTUBE (May 14, 2012), https://www.youtube.com/watch?v=wl0JojWH1rQ [https://perma.cc/5X48-XKTW]. This phenomenon curiously demonstrates how the delineation between public and private spheres is breaking down in both directions, with the public sphere breaking into the sanctuary of the home at the same time that we are able to bring that private sanctuary with us into the public sphere.

[209] *See* Bolger v. Youngs Drug Prod. Corp., 463 U.S. 60, 72–73 (1983).

[210] Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943).

but not so the billboard."[211] And in discussing its holding in *Pacifica*, the Court in *Bolger* explained that mail delivered to the home (as in *Rowan*) is "far less intrusive and uncontrollable" than the broadcast programming in *Pacifica*.[212] Importantly, while *Pacifica* was expressly concerned with the receipt of programming within the home, concerns about "intrusive[ness] and uncontrollab[ility]" apply strongly to wireless phones wherever they are located.[213] Just as one may retreat to the sanctuary of the home to escape the public sphere, one may also retreat to the public sphere to escape the banality of the living room TV—but with the mobile phone, it may follow us no matter which sphere we transiently occupy, so the intrusion of unwanted calls is inescapable. Just as the receipt of mail is less intrusive than the receipt of broadcast television, the receipt of broadcast television (which one experiences only in their home and while watching a powered-on television) is less intrusive than the receipt of unwanted telephone calls on a mobile phone (which one almost always has by their side and almost always is powered on).

This, of course, is an overstatement—just like the radio or television, one may turn off their phone or leave it at home when they go out. But this is a high cost to pay, at least for some, to avoid unwanted telephone calls. The modern phone, in particular, is more than a telephone.[214] It is a constant connection to the modern public square. One could argue that the time has come to redelineate the boundaries of an individual's life, adding a "connected sphere" to the public and private spheres. Just as one should have sanctuary in their home, one should not be forced to disconnect from their online, connected-sphere, life to avoid the burden of intrusive and uncontrollable invasions. Alternatively, one could treat the mobile phone as an extension of the home—surely that is how many implicitly think of it.

On the other hand, one is exposed to intrusive, uncontrollable, and unwanted invasion any time they leave the sanctuary of the home. That is the nature of the public sphere. It

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[211] Erznoznik v. City of Jacksonville, 422 U.S. 205, 221 (1975) (Burger, C.J., dissenting) (quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)).

[212] *Bolger*, 463 U.S. at 74; Rowan v. U.S. Post Office Dep't, 397 U.S. 728, at 736 (1970).

[213] *Id.* ("In *FCC v. Pacifica Foundation* this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children. At the same time, the majority 'emphasize[d] the narrowness of our holding,' explaining that broadcasting is 'uniquely pervasive,' and that it is 'uniquely accessible to children, even those too young to read.' The receipt of mail is far less intrusive and uncontrollable." (citations omitted)).

[214] *See* Riley v. California, 134 S. Ct. 2473, 2489 (2014) (recognizing that the modern cell phone is better characterized as a small computer capable of making a phone call than as a mere telephone).

is a chaotic bazaar of distraction and ideas. The fact that one vector by which these distractions may vie for one's attention is their mobile phone—a device that is readily ignored and that provides at least minimal information indicating the character of a given call[215]—seems an insufficient basis for reconceptualizing the relationship between the public and private spheres.

The central issue in both of these questions is, ultimately, one of control: to what extent does the individual whose privacy we are interested in protecting have the ability to control what information she receives in a way that is not intrusive upon her privacy, but also allows her to remain a participant in the connected sphere? Where that ability is low, there is greater need for prescriptive rules to control how and who is able to intrude upon her privacy. But where there is greater ability for the calling and called parties to coordinate in a way that does not unduly burden the called party, there is less need for prescriptive rules beyond those that require the use of efficient coordination mechanisms.[216] But there is yet another layer to this analysis: where the law is endogenous to the ability of the parties to coordinate—that is, the law has some ability to affect the transaction costs of negotiation—then we should adopt rules that tend to decrease these costs to facilitate interactions between the parties.[217]

This discussion is framed here in the normative terms of law and economics—but it also reflects the technological reality of the First Amendment and unwanted phone calls. For most of the time since the TCPA was adopted, there was relatively little that could be done (legally or technologically) to facilitate coordination between calling and called parties. As such, the TCPA's strong, prescriptive rules were both reasonably tailored and the least restrictive approach that could be taken to address the problem of unwanted calls. But with modern technology much more can be done. As such, today there are less restrictive means that can be

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[215] As is the case, e.g., with Caller ID. Even if a number is blocked or spoofed, this provides useful information that the call is *not* from a recognized number.

[216] This amounts to a statement familiar in law and economics that when transaction costs are high the law should prescribe liability rules in favor of the party least able to avoid harm but where they are low the law should prescribe property rules in favor of the party least able to engage in bargaining. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–07 (1972); *see also* Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV 1151, 1159–61 (2006).

[217] This again reflects a standard law and economics perspective, amounting to a restatement of the so-called Coase Theorem, that in the absence of transaction costs legal rules do not matter, but because transaction costs are omnipresent, legal rules should be adopted to minimize them. *See, e.g.*, Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1672 (1989) ("Now, the questions are whether significant transaction costs are present and, if so, which social arrangement will most effectively minimize the incurrence of costs associated with the encounter of transaction costs.").

technologically implemented and that would accomplish the goals of the TCPA in a more narrowly tailored way.[218]

IV. FIRST AMENDMENT ANALYSES OF THE TCPA

Because the TCPA regulates speech, the First Amendment has been, and almost certainly will continue to be, the primary legal lens through which the TCPA is assessed. Early First Amendment challenges to the TCPA were discussed in Part I.[219] The discussion now turns to contemporary challenges to the TCPA in light of the various changes that have occurred since those earlier cases. It begins in Section IV.A with a discussion of recent cases, in particular those that have been brought since *Reed* was decided by the Supreme Court. The general trend of those cases, which have focused on narrow content distinctions made in the TCPA or its state-law equivalents, has been for courts to find that, under *Reed*, these laws are content-based and subject to strict scrutiny—but to then find sufficiently compelling need in each given case to satisfy strict scrutiny. The focus is expanded in Section IV.B, to consider a broader critique of the purposes and justifications of the TCPA in light of current law and technology.

A. Recent First Amendment Analysis of the TCPA

In recent years, First Amendment challenges to the TCPA have been reinvigorated. This is in part out of concern arising from the substantial increase in TCPA class actions in recent years; it is in part due to recent changes in the Commission's substantive TCPA rules and the changed factual setting surrounding the use of automatic telephone dialers; and it is in part due to changes in First Amendment caselaw. The second and third factors are discussed below.

The highest profile recent challenge to the FCC's TCPA rules is *ACA International v. FCC*, decided by the United States Court of Appeals for the District of Columbia Circuit in March 2018 nearly a year and a half after oral arguments.[220] This case challenged the FCC's 2015 TCPA Omnibus Order on a wide range of grounds and led to its partial rejection by the D.C. Circuit Court of Appeals.[221] This case did include a First Amendment challenge to the FCC's Order—however it was one of many issues in the case and was framed in relatively narrow

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[218] *See infra* Part V.
[219] *See supra* Section I.D.
[220] ACA Int'l v. FCC, 885 F.3d 687, 687 (D.C. Cir. 2018).
[221] *Id.* at 691–92.

terms.[222] Rather than focus on the First Amendment issues, the core foci of this challenge and the court's ultimate opinion were the Commission's overbroad definition of what constitutes an "autodialer" for purposes of the TCPA and the Commission's single-call safe harbor for reassigned numbers.[223] The court rejected the 2015 Order's definition of autodialer as overbroad—the Order effectively said any device with the capability of being programmed to place automated calls (which would include any modern smartphone) was an autodialer for the purposes of TCPA enforcement.[224] And the court rejected the single-call safe harbor as arbitrary and capricious because the Commission did not articulate why a single call was a better or worse threshold than any particular alternatives.[225]

While *ACA International* is the most significant recent challenge related to the TCPA, the case does not significantly feature the First Amendment. Other challenges to the TCPA have been brought, however, following on the heels of *Reed*. In one such case involving South Carolina's state-law equivalent of the TCPA, *Cahaly v. LaRosa*, the United States Court of Appeals for the Fourth Circuit drew upon *Reed* in its First Amendment analysis of the law.[226] The court began by noting *Reed*'s explanation "that 'the crucial first step in the content-neutrality analysis' is to 'determin[e] whether the law is content neutral on its face,'" and noted that this abrogates the circuit's prior approach to content-neutrality analysis.[227] Applying *Reed*, the court went on to "find that South Carolina's anti-robocall statute [was] content based because it [made] content distinctions on its face. . . . Here, the anti-robocall statute applie[d] to calls with a consumer or political message but [did] not reach calls made for any other purpose."[228]

Based on *Reed*, the Fourth Circuit found that the South Carolina TCPA-equivalent statute is subject to strict scrutiny.[229] It then went on to invalidate the statute, finding that (assuming the government does have a compelling interest in regulating unsolicited calls at all) the statute's approach was not the least restrictive means of accomplishing the government's purpose, that the statute was overinclusive (burdening non-problematic

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[222] *Id.*

[223] *Id.* at 693–94.

[224] *Id.* at 703.

[225] *Id.* at 706–08.

[226] Cahaly v. LaRosa, 796 F.3d 399, 405 (4th Cir. 2015).

[227] *Id.* (alterations in original) (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015)).

[228] *Id.*

[229] *Id.*

speech in addition to problematic speech) and underinclusive (failing to address substantial amounts of problematic speech within the ambit of the statute).[230]

It is important not to read cases such as *Cahaly* too broadly, as they are addressing state-equivalents of the TCPA, which often have important differences from the federal TCPA.[231] For instance, *Cahaly* related to political messages, which by and large are not problematic under the federal TCPA. Moreover, *Cahaly* was decided on a record in which the government did not present contrary arguments to demonstrate that the statute in question was, in fact, the least restrictive means to address the interest at issue.

Post-*Reed* cases challenging the federal TCPA are, however, beginning to appear. For instance, Facebook has recently raised a First Amendment defense based on *Reed* in a series of Ninth Circuit cases. In these cases, Facebook is facing TCPA violations relating to text messages it sent out as birthdate reminders to its users.[232] In one of these cases, *Brickman v. Facebook*, Facebook moved to dismiss the case on the grounds that the TCPA violates the First Amendment.[233] In a move that surprised nearly everyone, the United States District Court for the Northern District of California applied *Reed* and found that the TCPA is subject to strict scrutiny, but also found that the statute *survives* such analysis.[234] In his opinion, the judge considered the same arguments made in *Cahaly*—that the statute was not the least restrictive means to accomplishing its goals, and was both over and underinclusive—and reached the opposite conclusion.[235] The judge, however, certified Facebook's motion for interlocutory appeal to the Ninth Circuit on the question of whether the TCPA survives strict scrutiny.[236]

A final post-*Reed* case bears discussion: *Mejia v. Time Warner Cable*, decided in the United States District Court for

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[230] *Id.* at 405–06.

[231] *See* Gresham v. Rutledge, 198 F. Supp. 3d 965, 967, 973 (E.D. Ark. 2016).

[232] Brickman v. Facebook, Inc., 230 F. Supp. 3d 1036, 1039 (N.D. Cal. 2017), *appeal filed,* (9th Cir. May 9, 2017); Holt v. Facebook, Inc., 240 F. Supp. 3d 1021, 1024 (N.D. Cal. 2017); Franklin v. Facebook, Inc., No. 1:15-CV-00655-LMM, 2015 WL 7755670, at *4 (N.D. Ga. Nov. 24, 2015).

[233] Facebook, Inc.'s Notice of Motion and Motion to Dismiss Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Memorandum in Support at 1, Brickman v. Facebook, Inc., 230 F. Supp. 3d 1036 (N.D. Cal. 2017) (No. 16-cv-00751-TEH), 2016 WL 6196203, ECF No. 29.

[234] *Brickman*, 230 F. Supp. 3d at 1044, 1049.

[235] *Id.* at 1044, 1046–49.

[236] Brickman v. Facebook, Inc., No. 16-CV-00751-TEH, 2017 WL 1508719, at *1–*3 (N.D. Cal. Apr. 27, 2017) (interlocutory appeal was also certified on the question of whether Facebook's activities fall within the definition of automatic dialing).

the Southern District of New York in August 2017.[237] This was a class action filed in 2015 by former Time Warner Cable customers. These customers alleged that Time Warner Cable repeatedly called them using automatic telephone dialers after they cancelled their cable service in an attempt to get them to resume that service. In late 2016, Time Warner Cable moved for summary judgment on the proceedings, arguing that, post-*Reed,* the TCPA is facially unconstitutional.[238] Focusing on the exemption from TCPA liability for calls made in an effort to collect upon debts guaranteed by the United States, the court, like the *Brickman* court, found that the TCPA made content-based distinctions and therefore was subject to strict scrutiny.[239] In this case, "'[i]n determining content neutrality, the government's purpose is the controlling consideration'"—but, the court responded,

> The Supreme Court's decision in *Reed* . . . roundly forecloses this argument. The Court in *Reed* made clear that "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[240]

The district court, however, also went on to follow the same path as the *Brickman* court in finding that the TCPA survives strict scrutiny.[241] Focusing on the debt-collection provision—the provision at issue in the case that the court found to trigger strict scrutiny[242]—the court found it to serve a compelling interest, to be narrowly tailored, and the least restrictive means of accomplishing at interest.[243]

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[237] Mejia v. Time Warner Cable, Inc., No. 15-cv-6518 (JPO), 2017 WL 3278926, at *1 (S.D.N.Y. Aug. 1, 2017).

[238] Defendant Time Warner Cable Inc.'s Memorandum of Law in Support of Its Motion for Judgment on the Pleadings at 5, 7, Mejia v. Time Warner Cable Inc., 2017 WL 3278926 (No. 15-cv-6518 (JPO)), 2016 WL 10574254, ECF No. 53.

[239] *Mejia*, 2017 WL 3278926 at *12–17.

[240] *Id.* at *15 (alteration in original) (citations omitted) (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).

[241] *Id.* at *17.

[242] The court rejected claims that the statute triggered heightened scrutiny merely because the FCC had authority to adopt rules that could be problematically content-based, and the challenge before the court did not consider any specific rules that had been adopted by the Commission. *Id.* at *15 ("The mere fact that the FCC *could* exercise this authority in a manner that runs afoul of the First Amendment does not imply that the grant of authority is itself unconstitutional." (footnotes omitted)).

[243] *See id.* at *15–17.

B. A New First Amendment Analysis of the TCPA

As discussed above, the recent cases that challenge the TCPA on First Amendment grounds demonstrate some of the contemporary First Amendment concerns about the Act.[244] Until recently, it was generally understood that the TCPA was a content-neutral regulation of primarily commercial speech and that it was a permissible means to the important end of protecting consumers from privacy-invading phone calls. But as law and technology have continued to evolve, and as the FCC has worked to adapt a law written to address a problem defined in terms of 1980s-era technology to the modern setting, this accepted wisdom is increasingly suspect.

Recent cases like *Facebook* and *Time Warner Cable* have called this conventional wisdom into question through surprisingly conventional means. The plaintiffs in *Facebook* and *Time Warner Cable* successfully argued that the TCPA's exemption for collectors of government-backed debt was a content-based distinction.[245] The plaintiffs in *Cahaly* did the same thing using exemptions from state TCPA-equivalents for political calls.[246] As discussed above, neither challenged the overall structure of the TCPA, but in both cases the content-based *exceptions* to that basic structure were enough to bring strict scrutiny to bear.

But the TCPA's First Amendment infirmities run much deeper than these arguments suggest. The Act and the FCC's implementing rules are fundamentally structured around an entire series of content-based distinctions. Moreover, as technology has changed, the privacy interests that initially justified the Act have all but vanished; today, the Act's primary purpose is to disadvantage disfavored speech.[247] To the extent that the Act does continue to promote a legitimate government interest, it does so poorly by dramatically burdening desired speech in a laughably ineffective attempt to reign in the modern plight of illegitimate robocalls. Finally, advances in telecommunications technology since the adoption of the TCPA have produced numerous tools that are less restrictive means of addressing the problems the TCPA was meant to address—the greatest impediment to adoption of these technologies is the government itself.

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[244] *See supra* Section IV.A.

[245] *See* Brickman v. Facebook, Inc., 230 F. Supp. 3d 1036, 1044 (N.D. Cal. 2017); *Mejia*, 2017 WL 3278926, at *14.

[246] Cahaly v. LaRosa, 796 F.3d 399, 405 (4th Cir. 2015).

[247] *See infra* notes 263–268 and accompanying text.

1. The TCPA Makes Content-Based Distinctions That May Subject It to Strict Scrutiny

The Eighth and Ninth Circuits found that the TCPA survived under *Central Hudson*'s intermediate scrutiny style test in *Moser*, *Van Bergen,* and *Missouri ex rel. Nixon*.[248] These are canonical among the cases at the foundation of the modern understanding of the TCPA as permissible regulation of commercial speech. In fact, neither circuit even questioned that this was the correct approach: the *Moser* court accepted the District court's determination that the statute should be analyzed under *Central Hudson*,[249] and the parties stipulated to this approach in *Missouri ex rel. Nixon*.[250] Today it seems likely that these cases got it wrong—that the TCPA's content-based distinctions subject it to strict scrutiny.[251]

More recent Supreme Court precedents, such as *Reed*, suggest that the TCPA and FCC rules are content-based.[252] Arguably, *Moser* says so itself. There, the circuit court relied on the district court's determination that the TCPA should be evaluated under *Central Hudson*—but the district court reached this conclusion by following logic that is likely incorrect today.[253] Specifically, the district court started by "conclud[ing] that the TCPA is a content-based regulation, and cannot be justified as a legitimate time, place or manner restriction on protected speech."[254] Under *Reed*, that ends the matter, but the Court went on to evaluate the government's purpose, finding that it did not intend to regulate the content of the expression—only the manner in which that content is expressed.[255] But as *Reed*

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[248] *See* Missouri *ex rel.* Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 660 (8th Cir. 2003); Moser v. FCC, 46 F.3d 970, 975 (9th Cir. 1995); Van Bergen v. Minnesota, 59 F.3d 1541, 1556 (8th Cir. 1995).

[249] *Moser*, 46 F.3d at 973.

[250] *Nixon,* 323 F.3d at 653.

[251] *Compare* discussion of cases in Section I.D., *supra*, *with* discussion of cases in Section IV.A. of the TCPA, *supra*.

[252] *See supra* Section II.C.

[253] *See supra* Section I.D. Note that the circuit court arguably (and independently) determined that the TCPA's regulation of commercial speech was content-neutral "[b]ecause nothing in the statute requires the Commission to distinguish between commercial and noncommercial speech." *Moser*, 46 F.3d at 973. Rather, the statute only regulated the *manner* in which any calls using autodialers or pre-recorded messages were made. *See id.* To the extent that this is a correct analysis, it highlights that the FCC's rules, which do distinguish between commercial and noncommercial speech (as expressly authorized by the statute) are facially content-based.

[254] Moser v. FCC, 826 F. Supp. 360, 363 (D. Or. 1993).

[255] *Moser*, 46 F.3d at 974.

explains, the idea "that a government's purpose is relevant even when a law is content based on its face. . . . is incorrect."[256]

The TCPA and FCC rules make several distinctions, many of which are best characterized as content based—some facially, others as a result of the regulation's disproportionate effect. They distinguish between calls that use autodialers or prerecorded messages and those that use a human hand and voice. They distinguish between commercial and noncommercial calls.[257] They distinguish between calls made to wireless and residential wireline telephones.[258] They draw distinctions between calls made with and without prior express consent, and between different forms of expressing that consent.[259] And the FCC's 2015 Order (since rejected by the D.C. Circuit) distinguished between calls made (only to wireless phones) to numbers that have been reassigned and those that have not.[260]

Distinctions such as these demonstrate the soundness of the recent trend of subjecting the TCPA to strict scrutiny. In part, they lend further support to this conclusion under *Reed*. But they also reveal that, as telephone technology has changed—particularly as the wireless phone has ascended to become most individuals' primary telephone—the impact of the TCPA has become more substantial and less evenly distributed (that is, neutral) at the same time as the privacy concerns justifying the TCPA have increasingly diminished.

For instance, a ban on autodialers as a means of communication disparately affects certain kinds of information and is therefore effectively content-based. While autodialers and prerecorded or artificial voice messages can certainly be used in problematic ways, there are some types of messages that are better conveyed using these technologies than manually dialed or (especially) live operator engagement. Informational and transactional calls, especially those relating to personal financial or health information, may be better made using artificially-generated voices—indeed, such technologies substantially reduce the privacy invasion of having another

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[256] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015). The opinion's discussion continues, concluding "we have repeatedly 'rejected the argument that "discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas."' We do so again today." *Id.* at 2229 (quoting City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)).

[257] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2395 (codified as amended at 47 U.S.C. § 227(b)(2)(B)(i) (2012)).

[258] 2003 TCPA Order, 18 FCC Rcd. 14014, 14113–16 (2003).

[259] *FAQs on Robocalls*, FCC (Feb. 23, 2016), https://transition.fcc.gov/cgb/consumerfacts/robocalls.pdf [https://perma.cc/8WEJ-KUQF].

[260] 2015 TCPA Order, 30 FCC Rcd. 7961, 7999–8000 (2015); *see also* discussion *supra* Section IV.A. (discussing the DC Circuit's recent opinion in *ACA International v. FCC*).

person reviewing and discussing sensitive personal information. And the cost of using these technologies can dramatically reduce firms' costs of doing business—especially in the modern mass-scale era where a single firm may do business across the United States or world—which can in turn redound in price benefits and other savings to customers. Different types of messages are simply better suited to delivery using different technologies, depending upon their *content*. Under *Reed*, disparate regulatory treatment of these technologies is therefore arguably content-based and subject to strict scrutiny, whether the government intended such disparate results or not.

The clearest distinction that the TCPA and FCC rules make is between commercial and noncommercial speech.[261] This is a clear, facial, content-based distinction. Early First Amendment challenges, such as those discussed above, to the TCPA treated this TCPA's regulation of telemarketing as a regulation of commercial speech, and therefore applied *Central Hudson* intermediate scrutiny.[262] But *Sorrell* and *Reed* suggest that "[c]ommercial speech is no exception" to the rule that where regulation is "designed to impose a specific, content-based burden on protected expression. . . . heightened judicial scrutiny is warranted."[263] Indeed, *Sorrell* involved a law that restricted the disclosure of prescription information for marketing purposes—a situation closely related to the TCPA's regulation of telemarketing calls—and subjected that law to strict scrutiny.[264] The fact that the speech was of a commercial nature was of no concern to the Court in light of the clear content-based nature of the law. To the contrary, the Court noted that "[a] 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.'"[265]

Indeed, it is important to recall that the very purpose of the TCPA was "to prohibit certain practices involving the use of telephone equipment *for advertising and solicitation purposes*" and that the statute was written in response to "[t]he use of automated equipment *to engage in telemarketing*."[266] Although the statutory purpose sounds in privacy concerns, this is a

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[261] Michael O'Rielly, *TCPA: It is Time to Provide Clarity*, FCC BLOG, (Mar. 25, 2014, 2:10 PM), https://www.fcc.gov/news-events/blog/2014/03/25/tcpa-it-time-provide-clarity [https://perma.cc/A6X3-NQHX] (In this article, the commissioner reminds the reader that the goal of the TCPA is to regulate commercial calls/texts/faxes).

[262] *See supra* Section I.D.

[263] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565–66 (2011). *But see* Note, *supra* note 165, at 1982 (arguing that "*Reed* does not displace existing commercial speech doctrine.").

[264] *Sorrell*, 564 U.S. at 557.

[265] *Id.* at 566 (quoting Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977)).

[266] S. REP. NO. 102-178, at 1 (1991) (emphasis added).

statute in which the legislative history expressly states both a speaker preference (disfavoring telemarketers) and a content preference (disfavoring advertising and solicitations). The TCPA, in other words, is not a case in which "a facially neutral law . . . become[s] content based simply because it may disproportionately affect speech on certain topics"[267]—rather, it is a case in which "the legislature's speaker preference reflects a content preference."[268] Under *Reed*'s two-part analysis, the TCPA should be subject to strict scrutiny at both steps: on its face it makes content-based distinctions; and even were this not the case, the statute's legislative history reveals a clear preference both for certain types of content and for speakers whose speech reflects a certain type of content.

This, of course, is an obvious conclusion. Few would object to receiving an unexpected (and therefore unconsented-to) call placed using either an automatic dialer or prerecorded message that carried with it welcome information. Welcome information about friends or family (e.g., notifications from an airline that a family member's flight is delayed); information about a financial windfall (for instance, about a substantial award in a class settlement); reminders about important medical information (e.g., prescription refills); or civic information (e.g., about voting dates of polling locations). Rather, it is telemarketing solicitations—and especially scams and other illegitimate calls—that are the subject of our, and Congress's, ire.[269] Primarily clothed in the guise of privacy concerns—concerns that were perhaps legitimate given the technology at the time—the TCPA prohibits all calls made using certain technologies *in order to curb a certain class of calls*. A law that imposes a rule to restrict one sort of content is content-based, even if that rule is applied equally to all speakers.[270] Indeed, the fact that it applies broadly,

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[267] McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014).

[268] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2223 (2015) (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994)).

[269] *See, e.g.*, Pai, *supra* note 1; *see also Lawsuit Abuse and the Telephone Consumer Protection Act: Hearing Before the Subcomm. on the Constitution and Civil Justice,* 115th Cong. 3 (2017) (statement of Rep. Steve Cohen), https://judiciary.house.gov/hearing/lawsuit-abuse-telephone-consumer-protection-act [https://perma.cc/G62D-T4ET]. ("[T]his should be in the Criminal Law Subcommittee, in my opinion, because I think anybody that violates this probably shouldn't be sued and shouldn't necessarily pay civil damages. They should be sentenced to a life in a small room with one telephone that rings constantly with recorded messages. I detest these calls. And now that we have cell phones, my landline, which resides in Memphis, Tennessee, in my home with my cat, who is probably disturbed as well by the calls that come when I'm not there.").

[270] *See* Matal v. Tam, 137 S. Ct. 1744, 1766 (2017) ("The Government . . . . argues, to begin with, that the law is viewpoint neutral because it applies in equal measure to any trademark that demeans or offends. This misses the point. A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not

restricting not only disfavored speech but also other, desirable, constitutionally-protected speech merely demonstrates that the rule in question is overbroad and not narrowly tailored.[271]

There are also substantial demographic differences between wireless and wireline telephone subscribership that further suggest that disparate regulation of the two should be subject to strict scrutiny. For instance, wireless-only telephone subscribers are more likely to be young, single, lower-income, and renters.[272] "Get out the vote" calls to wireless and wireline telephone subscribers are, therefore, very likely to involve discussion of very different topics and serve very different functions (e.g., informing politically disengaged individuals about the fact of an election and their polling place locations as opposed to reminding politically engaged individuals to vote in a known election). The TCPA and FCC rules are also, therefore, likely to facilitate the provision of election-related information to known demographics of voters (e.g., homeowners with residential landlines), and to impose higher burdens of obtaining such information on other known demographics (e.g., renters, who are more likely to be wireless-only).[273] Importantly, the fact that a law may have disparate effects on certain speakers or messages does not mean that that law is necessarily content-based.[274] But "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry."[275] The statute may nonetheless be subject to strict scrutiny if the "speaker preference reflects a content preference,"[276] or the "inevitable effect of a statute on its face" is unconstitutional.[277]

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viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so."); *cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831–32 (1995) ("The . . . declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways").

[271] *See infra* Section IV.B.3.

[272] *See* STEPHEN J. BLUMBERG & JULIAN V. LUKE, NAT'L CTR. FOR HEALTH STATISTICS WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY-DECEMBER 2016 at 2, 3 (2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf [https://perma.cc/J2XA-4EXK].

[273] *Id.* at 4.

[274] McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014) ("But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, '[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.' The question in such a case is whether the law is 'justified without reference to the content of the regulated speech.'" (quoting Ward v. Rock Against Racism, 491 U.S 781, 791 (1989), then quoting Renton v. Playtime Theatres, Inc. 475 U.S. 41, 48 (1986))).

[275] Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230–31 (2015).

[276] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 658 (1994).

[277] Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011) (quoting United States v. O'Brien, 391 U.S. 367, 384 (1968)).

The consensual relationship that exists between calling and called parties in some calls regulated by the TCPA creates a further problem that demands strict scrutiny: we are no longer regulating how the calling party places calls, but also how the called party can receive those calls. This is particularly problematic, as will be discussed below, in the context of the FCC's reassigned number rule. This rule places a difficult—arguably an impossible—burden on individuals who have consented to or even requested that they be called.

2. The Government Has No Interest in Doing Much of What the TCPA Does

The purpose of the TCPA—that is, the governmental interest that it was intended to serve—was nominally

> to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers.[278]

As discussed above, the legislative history also expresses open animus towards telemarketers and the legislation was adopted to prohibit telephone-based advertisements and solicitations.[279] Even taking the privacy and related interests at face value, however, the scope of the underlying harm to privacy interests that the TCPA was meant to address has diminished greatly since the TCPA was adopted. What is more, the Act has in some cases come to stifle the interstate commerce it was intended to facilitate and to regulate activity that the government has no legitimate interest in controlling.

Unquestionably, the government has a compelling interest in regulating and acting in response to truly harmful telephone calls—such as those conducted as part of scams, initiated under false pretexts, or made using deceptive information such as spoofed Caller ID information. But the TCPA does not even purport to narrowly regulate such calls: it purports to regulate all calls made using autodialers or prerecorded messages.

a. The TCPA Does Not Meaningfully Advance Privacy Interests

The TCPA was written at a time when robocalls created substantial privacy concerns and other tangible costs to those

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[278] S. REP. NO. 102-178 at 1 (1991).

[279] *See id.* at 1–3; *see also supra* note 266 and accompanying text.

receiving them, and did so in a way that the receivers could not avoid. Unsolicited calls would pour in every evening, disrupting households and families, rendering telephones unusable (including in the case of emergencies), filling answering machine tapes, and incurring per minute charges on wireless phones.

None of these issues ring true today. The non-privacy issues—which are not at the core of the government's asserted interests in the TCPA, but nonetheless have played a prominent role in its defense—are all largely moot. Autodialer technology has improved, such that lines are no longer blocked for any meaningful period of time. Answering machines are increasingly a thing of the past. Cell phones no longer incur per minute charges. And Caller ID (when not interfered with by legitimately bad callers), selective ring tones, easily controlled phone volume, and other technologies have dramatically reduced the privacy impact of these calls.

A defining structural element of the TCPA is its disparate treatment of calls to wireless and residential wireline telephones. Given the statutory emphasis of this distinction, it is necessary to consider whether a legitimate government interest supports it. Today there is no legitimate reason to treat wireless phones differently than wireline phones. The only reason identified for such treatment at the time the TCPA was enacted, and the only reason encoded in the Act itself, is that wireless users incur costs when they receive calls where wireline users do not.[280] This is no longer the case: every service plan currently marketed by each of the major wireless carriers includes unlimited voice and text service.[281] To be sure, some plans are still offered that do not offer unlimited calling or even have per minute fees—but per minute costs of even these plans are substantially less than those which justified adoption of the TCPA, and these plans are rapidly disappearing.[282] This is not to say that there is no reason to be concerned about, and possibly to regulate, unsolicited calls to wireless phones. But neither the

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[280] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2396 (codified as amended at 47 U.S.C. § 227(b)(1)(A)(iii) (2012).

[281] *See AT&T Unlimited Data Plans Give You More with Free Live TV*, AT&T, https://www.att.com/plans/unlimited-data-plans.html [https://perma.cc/2FCA-K5GS]; *Cell Phone Plans | Family Plans | Compare Cell Phone Plans | T-Mobil*e, T-MOBILE, https://www.t-mobile.com/cell-phone-plans?icid=WMM_TM_Q117TMO1PL_H85BRNKTDO37510 [https://perma.cc/K9XF-K8YH]; *Cell Phone Plans*, SPRINT, https://www.sprint.com/en/shop/plans.html?INTNAV=TopNav:Shop:AllPlans [https://perma.cc/8FQE-M4RK] *Unlimited Data Plans for Talk & Text*, VERIZON WIRELESS, https://www.verizonwireless.com/plans/ [https://perma.cc/V79Z-4GS6].

[282] *See, e.g.*, Thomas W. Hazlett, David Porter & Vernon Smith, *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, 54 J. L. & ECON. S125, S139 (2011) (figure 1 showing a fall in per minute cellular prices in the United States between 1993 and 2009).

TCPA nor the FCC make a sufficient case for disparate treatment of wireless and residential wireline telephones.

To the contrary, today there is reason to impose *lighter* regulations on wireless phones than on residential wireline phones.[283] Telephone calls to residential wireline telephones present a far greater privacy burden on individuals than to calls to wireless phones. First, at a conceptual level, wireless phones are not used exclusively in the home. This is an important difference between them and residential wireline phones. Indeed, the fact that courts have long recognized a governmental interest in protecting the seclusion of the home from unwanted intrusion is one of the key justifications that the FCC cited in its 2015 Order for its treatment of wireless calls.[284] But this interest is at least weakened, if not entirely abrogated, once an individual has left the protective sanctuary of the home and—phone in hand—ventured into the public world where they may encounter all forms of ideas and expressions, wanted and unwanted.

Moreover, wireline phones do not enjoy many of the privacy-enhancing benefits of wireless phones. They are generally shared between multiple people in a household, and there are often multiple phones connected to each number. This means that it is very difficult to "silence" a wireline phone during times that calls may be unwanted, especially as compared to a wireless phone (most of which have easy to use volume controls and silent-mode features). It also means that calls to residential wireline phones necessarily disrupt entire households whereas the impact of calls to wireless phones are more narrowly contained to individuals, such that the privacy intrusion of calls to residential wireline phones is greater than that of calls to wireless phones. Almost all wireless phones incorporate Caller ID features, whereas many wireline phones do not. When a call is received on a wireline phone, the user needs to ambulate in order to answer it, whereas wireless phones are generally carried around so are more easily checked. Wireless phones also often include programmable features that let subscribers associate different ring tones with different callers, making it far easier with wireless phones to know which calls to answer (or ignore) than with wireline phones—further reducing the privacy burden of unwanted calls. Additionally, wireless phones support text messaging, which under FCC rule is treated the same as a

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[283] *See supra* Section III.B.

[284] 2015 TCPA Order, 30 FCC Rcd. 7961, 7995–96 (citing Rowan v. United States Post Office Dep't, 397 U.S. 728, 737–38 (1970)).

wireless phone call,[285] and which has minimal privacy impact. These and other features give wireless users far greater ability to control and mitigate the privacy concerns at the core of the TCPA than wireline phone subscribers have. It is questionable whether the government has any interest at all in regulating them, let alone a compelling one—and, surely, if anything, the interest is less than whatever interest the government may have in regulating wireline phone calls.

The counterargument to this concern is that unwanted calls to wireless phones actually present a greater privacy harm than calls to landline telephones. Because individuals often carry their wireless phones with them wherever they go—wireless phones are by our sides in our homes, in our cars, at work, as we walk the streets, eat at restaurants, and even on our bedstands while we sleep—calls to them have the potential to be substantially more intrusive than calls to residential wireline phones. Our ability to control these calls on our cellphones, however, is substantially greater. This reduces the burden imposed by these potential intrusions and shifts part of that burden to the call recipient. Perhaps more important, however, is the longstanding recognition—recognized both by the courts and, as noted above, the FCC in its implementation of the TCPA—that any expectation of privacy is substantially diminished once we leave the sanctuary of the home.[286]

b. The TCPA Interferes with Commerce

A secondary purpose of the TCPA—one that is often forgotten—is to facilitate interstate commerce through restrictions on problematic uses of autodialers and other devices.[287] As it is applied today, however, the Act has the contrary effect of stifling legitimate commerce and little-to-no effect on limiting illegitimate use of technologies that harm commerce.

In reality, the TCPA has given rise to a substantial industry of plaintiff's attorneys who specialize in using the TCPA to engage in predatory litigation.[288] Very frequently this

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[285] *See id.* at 8016–22.

[286] *See id.* at 7995–96.

[287] S. REP. NO 102-178, at 1 (1991).

[288] *See supra* note 47; *see also* Desai et al., *supra* note 133, at 75–76 ("The TCPA has become fertile ground for nuisance lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear."); U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 133 (discussing the dramatic increase in TCPA litigation in recent years and noting that "[f]orty-four law firms are the primary filers of over eighteen

litigation targets firms that are attempting to engage in legitimate business in compliance with the TCPA. But the TCPA is a strict liability offense with substantial statutory penalties.[289] This puts firms attempting to engage in TCPA-compliant activity in a precarious situation.[290]

What is more, as discussed previously, the TCPA does little to curtail the activity of firms making illegitimate use of autodialers and prerecorded messages. It is these calls, and not those making legitimate uses of these technologies, that substantially harm individuals receiving them. This ineffectiveness is problematic in its own right and calls into question whether the TCPA is an appropriate means to address the harm it is intended to regulate at all. But it also has the subsidiary effect of undermining the TCPA's statutory purpose of facilitating interstate commerce. A consequence of the TCPA and FCC rules' inability to address these truly substantial calls is that individuals have widely come to view *all* calls as illegitimate, unwanted, and harmful. The shadow of those engaging in illegitimate business practices looms large over their good-faith counterparts.

The FCC's 2015 Omnibus Order imposed rules—since rejected by the D.C. Circuit—interfered with interstate commerce in an even more problematic way: in attempting to address the problem of calls made to reassigned telephone numbers, the Commission imposed nearly impossible burdens on individuals' ability to interact with other individuals and firms of their choosing.[291]

Reassignment of telephone numbers creates a problem for the TCPA: when an individual with a given phone number has given a calling party consent to call that number, but the number is subsequently reassigned to a new wireless telephone, the calling party does not necessarily know about that reassignment and therefore has no way to know whether the subscriber to whom a given number is assigned at a given time is in fact the subscriber who has offered consent.

In its 2015 Order, the Commission attempted to address this issue by saying that consent follows the called party, not the

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hundred (1,826) of all the TCPA cases examined (approximately 60%)."). The problem of nuisance and abusive class litigation is of course not limited to this context. *See, e.g.*, Eric Goldman, *The Economics of Privacy: The Irony of Privacy Class Action Litigation*, 10 J. ON TELECOMM. & HIGH TECH. L. 309, 314 (2010).

289 *See supra* note 47.

290 *See supra* notes 134–142 and accompanying text.

291 *See infra* Sections IV.B.4, V.B; *see supra* notes 220–225 and accompanying text.

called number.[292] This means that a calling party does not have consent to call a reassigned number unless the party newly-assigned to that number has offered such consent—a circumstance that will never occur except in the rarest and most serendipitous of circumstances. In effect, under the 2015 Order, calling a reassigned number is almost necessarily a violation of the TCPA. Recognizing that calling parties do not have an effective way to determine whether a given number has been reassigned, the FCC adopted (in a show of extreme understanding and compassion) a safe harbor: calling parties are permitted a single call to a reassigned number—if that call does not result in an affirmation of consent, the calling party must assume that the number has been reassigned and that consent for further calls does not exist.[293] It was this single-call safe harbor that led the D.C. Circuit to reject the FCC's approach to reassigned numbers in the 2015 Order, on the grounds that the Commission had not articulated a reason that a single call was the appropriate threshold to establish as a liability shield.[294]

To the extent that the FCC rationalized its approach to number reassignment and the one-call safe harbor, it did so as an effort to balance the interest of calling parties and the privacy interests of parties that do not want to be called. The D.C. Circuit faulted the Commission for having failed to provide a basis for why a single-call safe harbor was reasonable.[295] But the Commission also did not consider a more important tradeoff at issue: the rights of parties who do want to be called, and who have provided consent to be called, against the rights of the subset of individuals who have received a reassign phone number on which they are receiving unwanted calls. That omission should be fatal to the FCC's approach on First Amendment grounds, as well. It is inherently overinclusive, curtailing the speech between parties who have expressly consented to receiving calls and it is woefully underinclusive, doing nothing to address the greater problem of illegitimate and scam robocalls. What is more, as discussed below, it is neither narrowly tailored nor the least restrictive means to addressing concerns created by reassigned numbers—to the contrary, the problem of reassigned numbers is one largely under the FCC's direct control, such that the Commission itself is in a better

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[292] 2015 TCPA Order, 30 FCC Rcd. 7961, 7989–90 (2015).
[293] *Id.* at 7999–8000.
[294] *See supra* note 225 and accompanying text.
[295] *Id.*

position both to mitigate and to respond to the underlying problem than legitimate callers.

It is important to recognize that the FCC's rule placed a substantial burden on *both* calling parties and the parties that have consented to the calls. In effect, parties that have given such consent must actively answer every call that they receive, otherwise they risk an imputation that they have withdrawn consent to receive further calls. This is an incredible burden: it is both impossible and dangerous. No one is ever in a position to answer every call that they receive—that is why we have answering machines and voicemail. Moreover, callers *should not* answer every call that they receive, given the overwhelming number of harmful and scam robocalls that proliferate today. This can also be understood as another example of the relative benefits of adopting technologies that facilitate bargaining between calling and called parties as compared to trying to directly regulate calling parties' conduct.[296]

3. The TCPA Is Hardly Tailored at All, Let Alone Narrowly

In order to survive either strict or intermediate scrutiny, a statute must be narrowly tailored.[297] At the time it was enacted, the TCPA may have met that standard. Today it is hardly tailored at all, let alone narrowly. To the contrary, as currently implemented the TCPA simultaneously significantly fails to stop the calls that it intends to curtail while curtailing (or sanctioning) constitutionally-protected speech that should fall outside of the ambit of the Act.

Perhaps the most fatal critique of the TCPA is its failure to address in any meaningful way the modern problem of illegitimate robocalls. The TCPA and FCC rules impose substantial burdens on firms and individuals that seek to be compliant with the TCPA and otherwise to engage in valuable speech activities but do little to address the pervasive illegitimate conduct that underlies modern concern about robocalls. Such "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."[298]

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[296] *See supra* Section III.B.

[297] *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015); Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989).

[298] Fla. Star v. B.J.F., 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring) (quoting Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979)).

And on the other side of the equation, the TCPA not only curtails but places significant liability upon those who would engage in constitutionally-protected speech. To recount some of the examples discussed previously, the TCPA has been used against sporting venues using text messages for entertainment purposes, against pharmacies communicating important healthcare information, and services that match consumers with contractors.[299] To be narrowly tailored, a statute "must target and eliminate no more than the exact source of the 'evil' it seeks to remedy"—"[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[300] The TCPA is thus problematically tailored coming and going, both substantially failing to prevent the problematic speech it is intended to curtail and curtailing other speech that the government has no interest in limiting.

It is ill-tailored in other ways, as well. For instance, one of the TCPA and the FCC rules' basic distinctions is between commercial and noncommercial speech. But both informational and commercial calls impose the same privacy burden on those receiving the calls. The relevant characteristic is not whether the call is commercial, but whether it is *desired*. The TCPA's and FCC's rules place no consent burden on informational calls to residential landline phones but do place consent burdens on any calls to wireless phones and all commercial calls. This disparate treatment necessarily implies at least one of two things: either the lack of restrictions on informational calls to residential wireline phones is underinclusive, or the consent requirements for other calls is overinclusive.

There can be little doubt that it is the restrictions on calls for which consent has been given that is overinclusive. The basis in *Central Hudson* for subjecting commercial speech to a lower standard of scrutiny than noncommercial speech is that there is a "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[301] But where the called party has already consented to being called—as it must have under the TCPA—we are already beyond the point of "proposing" a commercial transaction. The parties have already agreed that one may call the other for the purposes of conducting that transaction. This is not unsolicited commercial speech but

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[299] *See supra* notes 134–137 and accompanying text.

[300] Berger v. City of Seattle, 569 F.3d 1029, 1041 (9th Cir. 2009) (quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988)); Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

[301] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562 (1980) (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

rather consensual speech between parties who have indicated a willingness and desire to engage with one another.

The arbitrariness of the FCC's approach to consent under the TCPA is demonstrated by the differential consent requirement for information and commercial calls to wireless phones. The purpose of the different consent regimes is not to narrowly tailor the implementation of the TCPA to minimize the impacts on speech. It is to harmonize the FCC's TCPA rules with the FTC's telemarketing rules, which require written consent prior to placing telemarketing calls to any number on the Do Not Call list.[302] There are certainly virtues in harmonizing regulations, but those virtues do not relate back to or otherwise advance the privacy interests that underlie the TCPA.

The FCC's reassigned numbers rule was similarly arbitrary. As described above, this rule implicitly preferences the rights of those who have been given a reassigned telephone number over the rights of those who have consented to receiving calls on their (non-reassigned) telephone number. In adopting this rule, the Commission did not so much as acknowledge that its rule affects individuals who have consented to receive calls, let alone attempt to quantify the relative effects this rule has on those who have been given a reassigned number and receive unconsented-to calls as a result compared to the effects on those will lose the opportunity to engage with those from whom they have consented to receive calls because of the one-call safe harbor. The failure to even consider these relative effects—had the D.C. Circuit not already rejected the rule on other grounds[303]—should be problematic on First Amendment grounds.

4. There Are, and the Government Controls, Less Restrictive Means of Addressing Robocalls

At the time it was enacted, the TCPA very likely addressed substantial government interests—indeed, likely even compelling ones—in an appropriately narrow way. The most clearly problematic distinction in the TCPA as initially drafted was its carve-out for different treatment for wireless phones. But given the different cost structure of wireless service, even that was very likely reasonable. Most of the problems with the TCPA laid out above are the result of either: changing technology mooting the

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[302] *See* 2012 TCPA Order, 27 FCC Rcd. 1830, 1837 (2012).

[303] *See supra* notes 220–225 and accompanying text (discussing *ACA International v. FCC*).

concerns addressed by and creating new ones unaddressed by the TCPA or problematic implementation of the TCPA by the FCC.

And today, unwanted phone calls continue to be a bane and a plight. The government very likely has a compelling interest reining in a vast majority of the calls that lead to consumer complaints. Many of these calls are undesired; many result from reassigned numbers; many are scams and frauds; many result from unscrupulous lead-generation services. The government should do something about these calls.

In the early 1990s, there was little that the government could do, short of the blunt instrument adopted in the TCPA. This is no longer the case today. Technology has advanced considerably, and myriad tools could be implemented or developed today that would dramatically reduce the burdens of robocalls to individuals in ways far less burdensome to those making legitimate calls. To its credit, the FCC has begun making serious progress on this front in the past year.

One simple thing that the Commission can do—which it mercifully *is* in the process of doing—is to allow telecommunications companies to block known scam calls.[304] Scam calls regularly use spoofed Caller ID information, transmitting a fake phone number instead of the caller's real number. Telephone carriers can easily identify most of these faked phone numbers and could easily block them at the network level.[305] This solution is feasible today, lacking only the FCC's permission to be implemented.[306]

To emphasize the point: carriers today are not blocking known harmful calls because the FCC does not allow them to do so. Changing this policy, and thereby addressing a substantial portion of the robocall problem, is fully within the government's control. There can be no question that any restriction on speech that the government's own action could render unnecessary is not the least restrictive means to address a problem.

Similarly, the problem of reassigned phone numbers is fully within the FCC's control—indeed, it is a problem of the FCC's own making. Telephone carriers reassign phone numbers when they do not have previously-unassigned numbers to assign customers. Previously-unassigned numbers are doled out to carriers by the North American Numbering Plan Administration (NANPA), an entity operated under contract for the FCC.[307]

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[304] *See* Advanced Methods to Target and Eliminate Unlawful Robocalls, Final Rule, 83 Fed. Reg. 1566 (Jan. 12, 2018) (codified at 47 C.F.R. § 64.1200(k) (2018)).

[305] *Id.* at 1572.

[306] *Id.*

[307] *See* Advanced Methods to Target and Eliminated Unlawful Robocalls, Second Further Notice of Proposed Rulemaking, 83 Fed. Reg. 17631, 17635, F.C.C. 18-

NANPA and the FCC determine who gets new phone numbers and at what time.[308] They also have the authority to regulate the use of those numbers, including their reassignment.[309] In other words, the government itself could largely address the reassigned number problem by allocating more new numbers or imposing rules to govern how numbers are reassigned. Here, too, the FCC is taking positive steps, having recently adopted and undertaken efforts to implement a database of reassigned numbers that would be updated on a daily basis.[310]

Other technological solutions to the robocall problem would require technological changes to the architecture of the telephone network. Over the past decade many in the telecommunications industry have sought to transition the traditional Public Switched Telephone Network—which today is largely the same as it was at the time the TCPA was adopted—to a modern, IP-based, digital network.[311] This process has been dramatically slowed by the FCC itself and by advocacy groups seeking to preserve the legacy network for various interests.[312]

Fortunately, here too the FCC has recently embraced proposals to modernize aspects of the telephone network in light of, and to address concerns about, the robocall problem, having recently adopted a Notice of Inquiry soliciting comments on new authentication technologies that would make it dramatically

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31, CG Docket No. 17-59, n.63 (proposed Mar. 23, 2018), https://docs.fcc.gov/public/attachments/FCC-18-31A1.pdf [https://perma.cc/YAM4-A7G6]. For NANPA information, *see* Numbering Resource Optimization, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 7574, 7577 (2000) https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/2000/fcc00104.pdf [https://perma.cc/PU63-KJ8A] ("Section 251(e) of the Communications Act of 1934 (Communications Act), as amended, grants this Commission plenary jurisdiction over the North American Numbering Plan (NANP) and related telephone numbering issues in the United States.").

[308] *See* 47 C.F.R. pt. 52; 47 C.F.R. § 52.12 (2018) ("The NANPA . . . will conduct their respective operations with oversight from the Federal Communications Commission"); 47 C.F.R. § 52.13(b) (2018) ("The NANPA shall administer the numbering resources identified in paragraph (d) of this section. It shall assign and administer NANP resources . . . consistent with industry-developed guidelines and Commission regulations. It shall support the Commission's efforts to accommodate current and future numbering needs. It shall perform additional functions [discussed in this section]."). CRAIG STROUP & JOHN VU, FCC, , INDUS. ANALYSIS AND TECH. DIV., WIRELINE COMPETITION BUREAU, NUMBERING RESOURCE UTILIZATION IN THE UNITED STATES 2, 5 (2013) https://docs.fcc.gov/public/attachments/DOC-319997A1.pdf [https://perma.cc/VT8H-58DX].

[309] *See* 47 C.F.R. § 52.13 (2018).

[310] *See* Advanced Methods to Target & Eliminate Unlawful Robocalls, Second Further Notice of Proposed Rulemaking, 83 Fed. Reg. 17,631, 17,631 (Apr. 23, 2018).

[311] *See* AT&T, Inc., Comment Letter on the Transition from the Legacy Circuit-Switched Network to Broadband, *In re* International Comparison and Consumer Survey Requirements in the Broadband Data Improvement Act (Dec. 21, 2009), http://newnetworks.com/ATTharms.pdf [https://perma.cc/UY9R-TPBQ].

[312] *See The Evolution of Wired Communications Networks: Hearing Before the H. Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. 98–99 (2013) (statement of Harold Feld, Senior Vice President, Public Knowledge).

more difficult to forge Caller ID information and that would give called parties much more control over the calls that they receive.[313] A modernized network could incorporate myriad features that would help address the problem of robocalls without the need for blunt regulations like the TCPA. For instance, it could enable strong authentication of calling parties, such as what is now under consideration by the FCC—a super-Caller ID of sorts, that prevents spoofing but that also provides authenticated text-based identification of a caller. It could enable coding of calls, so that callers could signal the nature of the call (e.g., friend/family, professional, political, informational, customer service, commercial offer, etc.) in a way that would minimize any privacy impact on call recipients. Or it could even incorporate brief text descriptions of the purpose of a call into the call information itself, allowing called parties to know the purpose of the call without needing to answer it. None of these technologies is particularly sophisticated or complicated—arguably, the FCC should have mandated their adoption years ago. Instead, it has stepped in the way of the market, preventing such technologies from being developed and deployed.

Any of these technologies would present less restrictive means to addressing the problem of robocalls, either in whole or in part. By and large, the only reason that they have not already been implemented is because the government itself has not allowed them to be. Needless to say, a government regulation cannot be the least restrictive means to addressing a problem that a government regulation itself has caused and that the government itself has the ability to directly remedy. This point is redoubled by the fact that the FCC is, in fact, actually working to implement many of these technologies.

V. A BETTER APPROACH

None of this is to say that there is nothing that the government can or should do to address the very real problem of robocalls. The discussion above, which focused on the less restrictive means available to the government as ways of addressing the problem of unwanted robocalls, begins to catalog the range of better options available to the government. For instance, there are content-neutral rules that could be put in

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[313] Press Release, FCC, *Chairman Pai Welcomes Call Authentication Recommendations from the North American Numbering Council* (May 14, 2018), https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0514/DOC-350690A1.pdf [https://perma.cc/VXS4-P3ZA]; Call Authentication Trust Anchor, 32 FCC Rcd. 5988, 5988–95 (2017).

place; the government can regulate speech that is not protected by the First Amendment; and there are non-speech regulations that could be put in place.

Two such approaches are discussed below. The first articulated approach is the adoption of a specific, technology-neutral, rule against unsolicited communications. Unlike the TCPA, this rule would be framed in terms of preventing a specific type of harm (privacy-invading communications that impose real costs on the recipient), as opposed to clumsily targeting a specific technology as a means of curtailing a disfavored type of speech. The second approach is more general, arguing that regulation of unsolicited calls should focus, at least in part, on improving the technological state of the art in order to reduce the underlying problems of unwanted calls instead of taking the current state of technology as static, and developing rules that are dictated by its current capabilities and limitations. The purpose of this discussion is not to be exhaustive or to put forward specific policy proposals. Rather, it is to demonstrate the scope and viability of regulations to address the contemporary problem of robocalls that can be implemented in ways that are not onerously burdensome of protected speech.

A. Technology-Neutral Prohibition on Unsolicited Costly Communications

As a starting point, any regulation should be neutral as to both technology and content. The TCPA presents a story of how technologies can develop over time to be more or less suitable for different uses, such that different technologies become associated with different types of content. That is, different ways of making phone calls—residential landline versus wireless voice versus text message—may ultimately become akin to the signs regulated by the Sign Code at issue in *Reed*.[314] Where it may be appropriate to regulate specific technologies in different ways today, such differentiation should be framed in terms of the specific factors requiring such treatment, not in terms of specific technologies that possess such factors today. Thus, for instance, the TCPA would have been better written if it was more restrictive of "phone calls or communications in which the called party bears the cost of the communication" instead of specifically targeting wireless telephone calls. There is a far more compelling case to be made that the government has an interest in regulating unsolicited

[314] *See supra* notes 168–177 and accompanying text.

speech that imposes unavoidable and direct costs on the party receiving it than that it has an interest in regulating unsolicited calls to cellular telephone.

There may also be a strong case to be made for the regulation of unsolicited calls generally, as discussed below. Such regulation, however, should not subject different calls to different treatment based upon the content of the call—indeed, following *Sorrell* and *Reed*, it is questionable whether such regulations can even subject clearly commercial speech to differential treatment. The greatest challenge for regulation of unsolicited calls is the requirement—under any level of scrutiny—that the rules be narrowly tailored and use an appropriately restrictive technological means of regulation. Prescribing such rules in light of a rapidly changing technological landscape is a fraught task, particularly where the government itself plays a direct role in regulating the development and implementation of the relevant technologies.

In order to ensure that government regulation of unsolicited calls is implemented by appropriate means, any enforcement action against a caller premised on the manner in which they made the call should be subject to a defense challenging the constitutionality of the manner in which the rule regulates speech. Importantly, this effectively precludes private causes of action that are premised upon the means by which a call was made—any suit challenging the manner of speech would need to be brought by the government (or provide for government involvement in challenging the defense). To take one example, prior to the advent of the Do Not Call Registry, autodialers may have been inherently problematic; but subsequent to the advent of the Do Not Call Registry autodialers that ignore the Registry are inherently problematic, whereas those that do adhere to it are far less problematic. Yet nothing about the TCPA or the FCC's implementation of it has incorporated this fundamental change in the landscape—from the FCC's perspective, all autodialers are the same no matter whether a given one makes use of the Do Not Call Registry.

This does not mean that there can be no private cause of action for problematic calls. For instance, fraudulent or deceptive calls likely are not constitutionally-protected speech. Such calls could include calls using spoofed Caller ID information, made without consent to individuals on the Do Not Call Registry, or made under pretextual circumstances to fraudulently establish consent. The most important role for the government to play in ensuring against such harms, either

through government or private action, is to ensure development of both structural and conduct remedies to protect against them. This may include, for instance, criminalizing the spoofing of Caller ID or other authentication information except where necessary to protect the caller from certain delineated harms. But it would also include requiring the development and implementation of more robust network-level identification and authentication mechanisms.

B. Make It Easier to Coordinate Desirability of Communications

By and large, the clearest role for the government in addressing the problem of problematic phone calls is using its authority to regulate telecommunications services to ensure that those services are designed and implemented in ways that give individuals and telecommunications carriers the tools needed to identify and respond to unwanted calls. The central theoretical conundrum of the TCPA is one of transaction costs and Coasean bargaining.[315] At the time of the TCPA's enactment, it was technologically difficult (if not even impossible) for unsolicited callers to communicate about the intent or nature of their calls without establishing a complete call. The high costs of bargaining between calling and called parties prior to a call therefore justified a strong liability rule entitling a called party to significant damages.[316] But as technologies change, the viability of pre-call bargaining changes too, such that the legal rules should change as well. And, importantly, whatever legal rules exist can affect the development of new technologies—in the case of the TCPA, a too strong prohibition on unsolicited calls can stymie the development of technologies that would facilitate desirable unsolicited calls.

As discussed in Part IV, the TCPA can be criticized on the ground that the government is regulating speech in order to address problems with how the telephone network is used, when the government could instead directly address the problems through regulation of how the network is operated or designed.[317] Fortunately, as discussed there, the FCC in recent years has been working to address some of these operational and design aspects of the network. This is an overwhelmingly positive development—and one that should be continued and expanded upon.

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[315] *See supra* notes 216–217 and accompanying text.
[316] *See supra* notes 216–217 and accompanying text.
[317] *See supra* Section IV.B.4.

The most basic and most startling part of the robocall problem is that these calls persist because the telephone network facilitates them.[318] Given the state of the technology as it existed at the time the TCPA was adopted, there was little better that could be done. In its 1992 TCPA Order, the Commission considered alternative technological and regulatory approaches to mitigating the impacts of robocalls and came up empty-handed.[319] But as technology has advanced dramatically in the years since, the FCC has continued to think about robocalls from the technological mindset as it existed in 1991. Indeed, the FCC itself has prevented the networks from taking action against callers that are known to be problematic—it has not been until the past year that the Commission has seriously considered allowing telephone carriers to implement technology that blocks known harmful callers or to empower called parties to take greater control of the time, place, and manner in which calling parties can intrude upon their solitude by making their phones ring.[320]

The flipside of this observation is that the government should endeavor never to prohibit or interfere with consensual calls. Rather, a more productive (and, incidentally, constitutional) task would be to facilitate the development of more sophisticated features to allow both calling and called parties to establish, demonstrate, and revoke consent. Again, these are features that are best implemented at the network level, and they are therefore well within the FCC's core competencies to work with industry to develop and implement.[321]

Such an approach requires a fundamentally different regulatory philosophy than what has been on display in the Commission's previous TCPA rules. This is perhaps best on display with the Commission's attempted approach in the 2015 Order on reassigned numbers.[322] This problem is, first and foremost, the responsibility of the FCC to address. The FCC oversees the North American Numbering Plan (NANP) and the NANP Administration (NANPA). And, indeed, the problem of number reassignment in many ways results from FCC and NANPA's decision to allocate carriers smaller blocks of new numbers.[323] Yet the Commission's approach to the problem of individuals on reassigned numbers receiving unconsented-to

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[318] Waller et al., *supra* note 11, at 355–57.

[319] 1992 TCPA Order, 7 FCC Rcd. 8752, 8758–68 (1992).

[320] *See supra* notes 187–188 and accompanying text.

[321] *See* SIMPSON, *supra* note 40, at 28–29 (discussing SS7 & Robocalls).

[322] *See* 2015 TCPA Order, 30 FCC Rcd. 7961, 8006–12 (2015).

[323] *See* Numbering Resource Optimization, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 7574, 7625, ¶ 122 (2000).

calls was to burden the speech of callers and the consenting intended recipients of those calls. The better approach to the problem of reassigned numbers—both pragmatically and in view of the First Amendment—would be for the Commission to regulate the process by which telecommunications carriers reassign numbers. Rather than put the burden of addressing the problems created by number reassignment on the speech of consenting parties, the FCC should place the burden where it belongs: on the networks and number reassignment procedures that create the problem. For instance, the NANPA could alter how it allocates new numbers to better take the volume of number reassignment into account. The FCC could impose rules that, for instance, prevent numbers from being reassigned for some period of time, in order to facilitate callers learning that numbers have been disconnected and screening of disconnected numbers that receive inordinate numbers of calls (and, therefore, should not be reassigned). Finally, the FCC could oversee the creation of a reassigned-numbers database that autodialers could consult to learn about number reassignments and discontinue calls.

CONCLUSION

Unwanted phone calls are one of the most detested common occurrences in modern American life. With as many as 4.1 billion robocalls placed monthly, each telephone customer in the United States is likely to receive well over ten of these calls every month, with some receiving far more.

Understandably, most people want these calls to stop—and the TCPA was put in place to realize that goal. Unfortunately, the TCPA has proven entirely ineffective at accomplishing it. A strong majority of the most problematic calls are made using technologies that make enforcement difficult, hiding the identities of the caller. Many of these calls are outright scams, where the call is a pretext to acquiring information to be use as part of some other scheme. At the same time, legitimate businesses that use telephone calls for socially desirable purposes are often caught up in the TCPA's web of strict liability and statutory damages—a web that has given rise to a substantial industry of class action attorneys that often prey on innocent mistakes of companies that seek to be TCPA compliant. And the TCPA surely keeps other productive uses of the telephone from ever making it off of the drawing board—all in a vain attempt to stifle illegitimate callers who are largely undeterred by the TCPA.

This article has revisited the First Amendment challenges to the TCPA in light of legal and technological change since the law was adopted in 1991. Recent Supreme Court precedents suggest that the law is better evaluated under strict scrutiny than intermediate scrutiny. Changes in technology substantially weaken the privacy interests that the government has asserted as the constitutional basis for the TCPA. The statute has proven to abridge socially valuable speech and has proven wholly ineffective at curtailing undesirable and harmful speech. And, perhaps most audacious, the government itself pervasively regulates the telephone network—as such, it can implement technologies that better address these problems. But rather than facilitating their development, it has historically limited what telephone carriers could do to combat these universally detested phone calls. (Fortunately, the FCC has recently begun exploring new regulations to reverse this trend.) Regardless, a law that regulates speech to address a problem that is itself better addressable directly by the government is facially not narrowly tailored.

The simple fact is that consumers do not dislike these phone calls because of the technological nature of the calls. They dislike them because they bear unwanted messages. An automatically-dialed prerecorded message informing someone that they have received a financial windfall, or that a family member has arrived at the airport, or that a prescription has been filled may will be received warmly. A call made using the same technology that is part of a scam, or advertising unwanted services, is likely disfavored. This is true regardless of whether the calls were consented to or expected, and regardless of the technology by which they were made.

Rather than regulate speech—trying to prohibit certain types of callers from transmitting certain types of unwanted messages—a better statutory and regulatory approach is to encourage the development of consumer-facing technologies that empower them to control who can call them and for what purposes. At the time the TCPA was adopted such technologies were infeasible. Today they are not—indeed, the FCC is actively exploring many of them. The advent and implementation of these technologies would—and, hopefully, will—render the TCPA an unnecessary statute. Today, however, the fact remains that many legitimate businesses and individuals acting in good faith and attempting to comply with the TCPA have been caught in its web of liability, and that few of the bad actors intended to be targeted by the statute are deterred by it. It is time we stop silencing Peter in this vain attempt to quiet Paul.