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# The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional

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## INTRODUCTION†

Six weeks ago, feeling generous, you decided to make a donation to your local hospital. Since then, you have been besieged by calls from other charitable organizations seeking donations. Subsequently, you also decided to take advantage of a special TV offer to purchase a "unique collection" of your favorite songwriter's greatest hits. This, too, resulted in a flood of calls from other vendors with "once-in-a-lifetime special offers." Tonight, during a relaxing meal at home with your family, you are interrupted for the umpteenth time by a ringing phone. Reluctantly, you get up from your chair to answer the call.[1] When you

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† As this issue was going to press, the Supreme Court announced its decision in *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, 1996 WL 241709 (U.S. May 13, 1996). An effort has been made to incorporate the decision into the body of the Note, and the author believes that the Note's analysis remains accurate.

In *Liquormart*, the Court struck down a complete ban on the price advertising of liquor. The Court applied the traditional *Central Hudson* test for evaluating the constitutionality of commercial speech regulations. 1996 WL 241709, at *12-13 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557 (1980)). Several Justices, however, expressed some doubt about whether and when commercial speech should be treated differently than fully protected speech. Justices Stevens, Kennedy, and Ginsburg suggested that commercial speech should receive less First Amendment protection only when the speech is regulated to preserve "a fair bargaining process." 1996 WL 241709, at *10. Justices Scalia and Thomas suggested that perhaps commercial speech should not receive less protection than noncommercial speech. 1996 WL 241709, at *18-19 (Scalia, J., concurring); 1996 WL 241709, at *21 (Thomas, J., concurring). Despite the doubts that the Justices expressed, the Court did not overrule *Central Hudson*. Further, any commercial speech regulation that fails *Central Hudson* intermediate scrutiny — like the regulation at issue in this Note — would not survive heightened scrutiny should the Court decide to apply it.

1. Nearly everyone responds to a telephone's command. One suicide jumper on the ledge of a building ready to plunge to his death allegedly crawled back into the building to answer a ringing telephone. *See* James A. Albert, *The Constitutionality of Requiring Telephone Companies To Protect Their Subscribers from Telemarketing Calls*, 33 SANTA CLARA L. REV. 51, 52 (1993) (citing MYRON BENTON, THE PRIVACY OF INVADERS 176 (1984)); *see also* Consuelo Louda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy* (pt. 2), 5 LOY. CONSUMER L. REP. 104, 105 (1993) ("[Telemarketing] calls often are made at dinnertime or on the week-

pick up the phone, you hear the hum of a recorded voice on the other end of the line. Even before listening to the recording, you are annoyed by the unwanted intrusion into the privacy of your home. But, does the content of the message — be it seeking a charitable donation or a commercial sale — affect the type of harm the call causes? It is important to think about the answer to this question because the FCC regulations implementing the Telephone Consumer Protection Act of 1991 (TCPA)[2] prohibit *commercial* recorded messages while permitting other types of recorded messages. In order for these regulations to survive constitutional scrutiny, therefore, the FCC must demonstrate that the type of harm a phone call causes indeed does depend on the content of the phone call.[3]

Congress passed the TCPA in response to consumer complaints[4] with the hope that it would balance residential telephone subscribers' desire for privacy with telephone solicitors' right to free speech and consumers' right to information.[5] One provision of the Act specifically

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end, times when consumers are most likely to be at home. However, these are also times that many people want to relax and 'escape the hurly-burly of the outside business and political world.' " (quoting Gregory v. City of Chicago, 394 U.S. 111, 118 (1969) (Black, J., concurring))).

2. Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227 (1994)).

3. The FCC itself recognized that "exempting calls made for political and charitable solicitation or survey research purposes from regulations applicable to commercial sales calls would also appear to raise serious constitutional questions in the absence of significant practical differences between unsolicited commercial and noncommercial calls." *See In re* Unsolicited Tel. Calls, 77 F.C.C.2d 1023, 1035 (1980).

4. *See* COMMERCE, SCIENCE, AND TRANSP. COMM., AUTOMATED TELEPHONE CONSUMER PROTECTION ACT, S. REP. NO. 178, 102d Cong., 2d Sess. 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 ("The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective.").

The following story provides an example of the type of behavior that spawned complaints: A hair stylist and the owner of a man-to-man dating service in Iowa purchased an autodialer, prerecorded three different messages on it, and programmed it to call local numbers with the Drake University prefix twenty-four hours a day. Students were roused out of bed in the middle of the night before exams by messages such as, "If I had hair as ugly as yours, I'd call Jerry Frick, hair stylist, immediately," and "Are you lonely and looking for someone to romp with you on your waterbed?" *See* Victoria Benning, *D.M. Hair Stylist Vows To Fight Latest Legal Snag*, DES MOINES REG., Apr. 7, 1988, at 3M; Tom Carney, *Phone Dialer Reaches Out and Annoys People*, DES MOINES REG., Jan. 15, 1988, at 1M.

5. Representative Edward Markey, the chief sponsor of the House version of the bill, explained, "I believe that telemarketing can be a powerful and effective business tool, but the nightly ritual of phone calls to the home from 'strangers' and 'robots' has many Americans fed up." Cindy Skrzycki, *Lawmakers Put Nuisance Calls on Hold to Some Phone Lines; Consumers Must Give Prior Consent to Firms*, WASH. POST, Nov. 28, 1991, at D13.

addresses the technological revolution in telemarketing brought about by the development of autodialers and recorded-message players.[6]

The no-recorded-message provision makes it unlawful for callers "to initiate *any telephone call* to any residential telephone line *using an artificial or prerecorded voice* to deliver a message without the prior express consent of the called party."[7] An exemption provision, however, permits the Federal Communications Commission (FCC) to *exempt* from the ban those messages that *do not include "unsolicited advertisements."*[8] FCC regulations implemented this exception and now outlaw only those recorded messages that include an unsolicited advertisement.[9]

Although some residential-telephone subscribers may applaud the congressional effort to protect their privacy, the regulations implementing the no-recorded-message provision raise constitutional questions by singling out commercial speech for particularly strict regulation. One federal district court found the statutory no-recorded-message provision unconstitutional and granted a preliminary injunction staying enforcement.[10] The Ninth Circuit reversed, holding that the statutory provision satisfies constitutional requirements because the statutory exemption to the broad ban on recorded messages is "permissive, not mandatory. It

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6. *See* 47 U.S.C. § 227(b)(1)(B) (1994). Hereinafter this Note refers to this provision as the "no-recorded-message provision."

Autodialer recorded-message players (ADRMPs) vastly increase the efficiency of telephone solicitation because they enable computers to dial consecutive phone numbers and transmit a preprogrammed sales message. An autodialer dials the home-telephone numbers listed on the computer system and plays a recorded message; when the message ends, the autodialer dials the next number and continues the cycle. *See* Albert, *supra* note 1, at 52; Kertz & Burnette, *supra* note 1, at 105. ADRMPs thus outpace human dialers, reaching — and possibly disturbing — a much larger number of households.

7. 47 U.S.C. § 227(b)(1)(B) (1994) (emphasis added).

8. 47 U.S.C. § 227(b)(2)(B)(ii)(II) (1994) (emphasis added).

9. No person may "[i]nitiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1200(c) of this section." 47 C.F.R. § 64.1200(a)(2) (1995). The exemptions section defines "telephone call" to exclude a call

> [t]hat is not made for a commercial purpose; [t]hat is made for a commercial purpose but does not include the transmission of any unsolicited advertisement; [t]o any person with whom the caller has an established business relationship at the time the call is made; or [w]hich is a tax-exempt nonprofit organization.

47 C.F.R. § 64.1200(c) (1995).

10. *See* Moser v. FCC, 826 F. Supp. 360 (D. Or. 1993), *revd.*, 46 F.3d 970 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995). Commentators also argued that the statutory provision violates the First Amendment. *See, e.g.*, Howard E. Berkenblit, Note, *Can Those Telemarketing Machines Keep Calling Me? — The Telephone Consumer Protection Act of 1991 After* Moser v. FCC, 36 B.C. L. REV. 85 (1994).

in no way requires the FCC to adopt such exemptions by regulations, order or otherwise."[11]

In its opinion upholding the statute, the Ninth Circuit specifically indicated that it was not passing on the FCC's implementing regulations,[12] suggesting that the regulations, which clearly mandate a distinction between commercial and noncommercial messages, would present a different problem. The Ninth Circuit dismissed a later challenge to the regulations for lack of subject matter jurisdiction because the challenge failed to meet the sixty-day time limitation for review of final agency orders.[13] Although the regulations can no longer be challenged directly, a defendant can raise the constitutionality of the regulations as a defense in any FCC enforcement proceeding.

This Note considers the constitutionality of the FCC's regulations implementing the no-recorded-message provision of the 1991 TCPA and concludes that they violate the First Amendment because they impermissibly distinguish between commercial and noncommercial speech. Part I explains the structure of the FCC's recorded-message regulations and demonstrates that the regulations explicitly distinguish commercial recorded messages from other recorded messages. Part II examines First Amendment protection for commercial speech in light of three 1993 Supreme Court decisions[14] that restructured commercial speech doctrine by holding that the government can single out commercial speech for regulation only in response to a distinct harm arising from the speech. Part III applies the modern commercial speech test to the FCC regulations implementing the no-recorded-message provision of the TCPA and concludes that the FCC regulations violate the First Amendment protections accorded commercial speech because they are not reasonably related to any distinct harm caused by commercial speech, nor are they narrowly tailored.

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11. Moser v. FCC, 46 F.3d 970, 973 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995).

12. *See* 46 F.3d at 973 ("[W]e do not review here the FCC's regulation that exempts noncommercial automated calls from its ban.").

13. *See* Moser v. FCC, No. 94079835 (9th Cir. May 5, 1995). Title 28, § 2344 of the U.S. Code, which governs judicial review of agency orders, provides that "[a]ny party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order." 28 U.S.C. § 2344 (1994). All of the circuits that have considered the question have found that this restriction constitutes a jurisdictional limit on the power of the courts of appeals to review agency actions. *See, e.g.*, Western Union Tel. Co. v. FCC, 773 F.2d 375, 378 (D.C. Cir. 1985).

14. *See* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993); Edenfield v. Fane, 507 U.S. 761 (1993); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

## I. THE FCC'S RESTRICTIONS ON COMMERCIAL RECORDED MESSAGES

Because commercial speech receives different treatment under the First Amendment than fully protected speech,[15] a First Amendment analysis of the regulations implementing the no-recorded-message provision of the TCPA requires a determination of what type of speech the regulations affect. This Part examines the structure of the regulations implementing the TCPA and determines that the FCC explicitly distinguishes commercial speech from noncommercial speech. Section I.A introduces the regulations. Section I.B discusses the Court's definition of commercial speech and concludes that the regulations implementing the no-recorded-message provision impose unique burdens on commercial speech.

### A. *The Regulations Implementing the No-Recorded-Message Provision*

The TCPA outlaws the use of recorded messages by all telephone solicitors calling residences, but this restriction permits specific exemptions.[16] The provision provides:

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15. *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-15, at 896 (2d ed. 1988) (recognizing that commercial speech receives less protection than political speech). At least two Justices have suggested that it may be time to reconsider *Central Hudson* itself because they are not certain that commercial speech should be treated differently than noncommercial speech. *See* 44 Liquormart, Inc. v. Rhode Island, No. 94-1140, 1996 WL 241709, at *19 (U.S. May 13, 1996).

16. The TCPA also includes other provisions that deal with various aspects of telephone solicitation. The major provisions of the TCPA all fit into two categories: technical requirements and restrictions limiting the permissible uses of autodialed or recorded messages.

The Act includes three primary nontechnical restrictions on the use of automated telephone equipment not including the no-recorded-message provision. First, the TCPA forbids all callers from using automatic-dialing devices or artificial and prerecorded messages to call emergency telephone lines, health-care facilities, and numbers assigned to services for which the called party is charged for calls received. *See* 47 U.S.C. § 227(b)(1)(A) (1994). This provision applies equally to all callers, thus avoiding the constitutional questions caused by placing exceptional burdens on one type of message. Second, the Act prohibits callers from sending unsolicited advertisements to telephone facsimile machines. *See* 47 U.S.C. § 227(b)(1)(C) (1994). This provision presents similar constitutional problems as the no-recorded-message regulations because it distinguishes between commercial messages and noncommercial messages. *See* Jennifer L. Radner, Comment, *Phone, Fax, and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 379-81 (1993) (suggesting the TCPA's prohibition on unsolicited advertisements via facsimile violates the First Amendment). Third, the Act disallows the use of automatic-dialing machines if they tie up two or more lines of a multiline business at one time. *See* 47 U.S.C. § 227(b)(1)(D) (1994). Because this provision applies to all callers, it also avoids constitutional infirmities.

> It shall be unlawful for any person within the United States to initiate *any telephone call* to any residential telephone line *using an artificial or prerecorded voice* to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).[17]

In paragraph (2)(B) Congress delegated rulemaking authority to the FCC to exempt only certain calls from the prohibition on recorded solicitations.[18]

Following Congress's lead, the FCC adopted regulations that codify the congressional exceptions to the no-recorded-message provision. The exemptions section of the regulations defines the prohibited telephone calls to exclude calls

> [t]hat [are] not made for a commercial purpose; [t]hat [are] made for a commercial purpose but [do] *not include the transmission of any unsolicited advertisement;* [t]o any person with whom the caller has an estab-

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The TCPA also sets out technical and procedural standards applicable to all telemarketing equipment. *See* 47 U.S.C. § 227(d) (1994). The sections of the TCPA governing artificial or prerecorded voice systems now require that recorded messages release the line after the called party hangs up the phone. *See* 47 U.S.C. § 227(d)(3)(B) (1994). This requirement should prevent callers from blocking telephone access and ensure that phone lines remain available for use in emergencies.

The TCPA also demands that solicitors include certain minimum information in all messages so that recipients can avoid harassing phone calls. *See* 47 U.S.C. § 227(d)(3)(A) (1994). Because the disconnection requirement and the minimum-information provision apply to all recorded messages, they do not raise the constitutional problems posed by the prohibition on recorded messages containing an unsolicited advertisement.

Congress developed these benchmarks in response to consumers' public-safety concerns about telemarketing. In an often-cited story, a recorded message almost caused dire consequences when it remained on the line after the recipient had hung up on the message. The message tied up the phone line and prevented a mother from dialing out for emergency medical assistance for her child. The child survived because her mother ran to a neighbor's house to summon an ambulance. *See, e.g.*, James Barron, *'Junk' Phone Calls: Danger on the Line?*, N.Y. TIMES, May 21, 1988, at A36. In a similar case in Michigan, an autodialer tied up the line, making it impossible for a family to call an ambulance when the father suffered a sudden injury. *See* Thom Kupper, *Call for Regulation: Congress Targets Automated Phone Pitches*, NEWSDAY, Sept. 4, 1991, at 41.

17. 47 U.S.C. § 227(b)(1)(B) (1994) (emphasis added).

18. The Commission can make exceptions for calls that "*do not include the transmission of any unsolicited advertisement.*" 47 U.S.C. § 227(b)(2)(B)(ii)(II) (1994) (emphasis added); *see* 47 U.S.C. § 227(a)(4) (defining the term "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission").

The exemptions section also exempts calls that "are *not made for a commercial purpose;* and (ii) such categories or classes of calls made for a commercial purpose as the Commission determines (I) will not adversely affect the privacy rights that this section is intended to protect." 47 U.S.C. § 227(b)(2)(B)(i) (1994) (emphasis added).

> lished business relationship at the time the call[s] [are] made; or [w]hich is a tax-exempt nonprofit organization.[19]

The regulations, when coupled with their exemptions, definitively prohibit only recorded messages containing an unsolicited advertisement.

The statutory regime underlying the regulations categorizes recorded calls on the basis of the information included in the message and subjects certain types of solicitations to more restrictive regulation.[20] Congress denied the FCC the option to exempt any calls containing an unsolicited advertisement from the ban on recorded messages. The FCC regulations quoted above perpetuate the congressional distinction between messages that contain an advertisement and those that do not. Differentiating a recorded unsolicited advertisement from other recorded messages raises First Amendment questions about the level of protection accorded to advertisements.

### B. *The FCC Regulations as a Commercial Speech Restriction*

The regulations implementing the no-recorded-message provision, which prohibit calls containing an unsolicited advertisement, constitute a restriction on commercial speech because of their broad definition of "advertisement." In the First Amendment context, commercial speech remains a somewhat ambiguous concept.[21] The Court has oscillated between different definitions of commercial speech depending on the facts of the case, and even the limited definitions on which the Court relies are rather vague. Regardless of the definition used, however, the FCC's restriction on unsolicited advertisements is a commercial speech regulation.

In the first case to extend constitutional protection to commercial speech, the Court characterized commercial speech as that "which does 'no more than propose a commercial transaction.' "[22] In later cases, the

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19. 47 C.F.R. § 64.1200(c)(2) (1995).

20. *See* 47 U.S.C. § 227(a)(2)(B) (1994).

21. *See, e.g.*, TRIBE, *supra* note 15, § 12-15, at 896 (stating that the distinction between commercial and noncommercial speech "has not provided reliable guidance for resolution of individual cases"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 648 (1990) (asserting that "[w]e have a distinction, then, with no basis in the Constitution, with no justification in the real world, and that must often be applied arbitrarily in any but the easiest cases"); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359, 382-83 (1990) (discussing the Court's failure to articulate a coherent vision of commercial speech).

22. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Commn. on Human Relations, 413 U.S. 376, 385 (1973)).

Court developed a more expansive notion of commercial speech, describing it as "expression related solely to the economic interests of the speaker and its audience."[23] The Court continues to use both definitions, as well as combinations of the two,[24] preferring to rely on the "common sense" difference between commercial and noncommercial speech.[25] The Court recently admitted that the distinction between commercial and noncommercial speech was "only a matter of degree."[26]

The regulations implementing the TCPA, however, differentiate commercial speech from noncommercial speech under either definition because the regulations' focus on "unsolicited advertisements" meets even the Court's narrowest definition of commercial speech. The regulations provide that any telephone call that does not include an "unsolicited advertisement" is exempt from the ban on recorded-message players.[27] Under the regulations, an unsolicited advertisement means "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."[28] Thus, the FCC prohibits recorded messages that propose commercial transactions — the narrow definition of commercial speech — because such messages necessarily involve information about the "commercial availability or quality of property, goods, or services."[29]

The regulations implementing the no-recorded-message provision thus draw a line between commercial speech and noncommercial

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23. Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 561 (1980) (striking down a complete ban on electric-utility advertising). In *Central Hudson,* the Court also referred to commercial speech as speech proposing a commercial transaction. *See* 447 U.S. at 562, 563 n.5. The Court appeared to adopt the broader definition when it refused to extend full First Amendment protection to advertising that included claims related to political-social issues.

24. *Compare* Board of Trustees v. Fox, 492 U.S. 469, 473 (1989) (describing commercial speech as speech that "propose[s] a commercial transaction" (quoting *Virginia State Bd.,* 425 U.S. at 762)) *and* Bolger v. Youngs Drugs Prods. Corp., 463 U.S. 60, 64-68 (1983) (explaining that not all "informational" material contained in a commercial advertisement constitutes commercial speech) *with In re* R.M.J., 455 U.S. 191, 204 n.17 (1982) (accepting *Central Hudson*'s definition of commercial speech as expression related solely to the economic interests of the speaker and the audience).

25. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423 (1993). The Court reiterated its reliance on the "commonsense distinction" between commercial speech and noncommercial speech in Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1589 (1995).

26. *Discovery Network,* 507 U.S. at 423.

27. *See* 47 C.F.R. § 64.1200(a)(2), (c)(2) (1995).

28. 47 C.F.R. § 64.1200(f)(5) (1995).

29. The regulations clearly countenance the broadest definition of commercial speech because they apply to messages related to the economic interests of the caller and the listener, the broadest categorization of commercial speech.

speech because they definitively prohibit recorded advertisements. By defining an advertisement broadly, the Act effectively forbids the FCC from exempting calls made for a commercial purpose under either the broad or narrow definition of commercial speech.[30]

## II. THE COMMERCIAL SPEECH TEST

Three commercial speech cases decided in 1993 — *City of Cincinnati v. Discovery Network, Inc.*,[31] *Edenfield v. Fane*,[32] and *United States v. Edge Broadcasting Co.*[33] — clarify the role of commercial speech in the First Amendment hierarchy. Read as a group, these cases emphasize that commercial speech garners less constitutional protection than fully protected speech only when Congress regulates it in response to its unique harms. Congress cannot target commercial speech for regulation simply on the basis of its content.

The Court's most recent commercial speech case, *44 Liquormart, Inc. v. Rhode Island*,[34] is consistent with this understanding of the 1993 cases. In *Liquormart* the Court struck down a state law on the price advertising of liquor, stating "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."[35] Justice Stevens's plurality opinion thus recognized that all commercial speech regulations cannot be evaluated in the same manner. The level of scrutiny depends on the justification for and breadth of the regulation.

The 1993 cases can therefore be understood as beginning the process of bringing commercial speech doctrine into line with the Court's

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30. The regulations theoretically include a loophole for calls made for a commercial purpose that do not include an unsolicited advertisement. *See* 47 C.F.R. § 64.1200(c)(2) ("The term 'telephone call' . . . shall not include a call that is made for a commercial purpose but does not include the transmission of any unsolicited advertisement."). The loophole suggests that some messages related to the economic interests of the parties do not include an "unsolicited advertisement." In fact, this loophole is illusory because of the expansive definition of unsolicited advertisement. Any messages that pertain only to the economic interests of the speaker and the listener will necessarily include information about the commercial availability or quality of property, goods, or service — the definition of an unsolicited advertisement that cannot be exempted according to the statute, 47 U.S.C. § 227(a)(4) (1994), and the regulations, 47 C.F.R. § 64.1200(c)(2) (1995).

31. 507 U.S. 410 (1993).

32. 507 U.S. 761 (1993).

33. 509 U.S. 418 (1993).

34. No. 94-1140, 1996 WL 241709 (U.S. May 13, 1996).

35. 1996 WL 241709, at *9.

traditional distinction between content-based and effects-based regulation. When Congress regulates speech on the basis of its general subject matter or on the basis of its particular viewpoint, the Court uses strict scrutiny to evaluate the regulation and requires both a compelling interest to justify the regulation and regulatory means narrowly tailored to fit the ends. When Congress regulates speech on the basis of the effects that it produces, the Court engages in a balancing process to ensure that the regulation does not unduly restrict speech.[36]

After recognizing that even speech that did no more than propose a commercial transaction warranted First Amendment protection,[37] the Court, in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[38] set forth the factors that lower courts should use to evaluate the constitutionality of commercial speech regulations. The test consists of four prongs, each of which must be met for a regulation to be found valid: (1) the commercial speech must concern lawful activity; (2) the government interest underlying the regulation must be substantial; (3) the regulation must directly advance the interest asserted; and (4) the regulation must be reasonably related to the interest asserted. The Court distinguished this test from the usual strict-scrutiny standard by suggesting that even content-based commercial speech regulations garnered only intermediate scrutiny rather than the strict scrutiny usually applied to content-based regulations.[39]

During the 1993 Term, however, the Court's decisions in three commercial speech cases[40] developed the doctrine such that a commercial speech regulation earns intermediate scrutiny only when the governmental purpose underlying the regulation relates to the unique secondary effects of the speech.

This Part examines the modern commercial speech test developed in the 1993 commercial speech cases and demonstrates that post-1993 Supreme Court cases support the expansive protection these cases provide for commercial speech. Despite its increased protection for com-

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36. TRIBE, *supra* note 15, at § 12-2. Professor Tribe refers to these two approaches as track one and track two. Track-one regulations are presumptively unconstitutional while track-two regulations are presumptively constitutional.

37. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (striking down a statute that prohibited pharmacists from advertising prescription-drug prices). Interestingly, the consumer recipients of information brought suit in this case, not the pharmacists, clearly indicating the value of commercial information to the public.

38. 447 U.S. 557 (1980).

39. *See* 447 U.S. at 562-63 & n.5.

40. United States v. Edge Broadcasting Co., 509 U.S. 418 (1993); Edenfield v. Fane, 507 U.S. 761 (1993); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

mercial speech, the modern commercial speech test continues to require that commercial speech regulations meet the four criteria set out in *Central Hudson.*[41] This Part discusses the modern approach to the substantial interest, direct advancement, and reasonable relationship prongs of the *Central Hudson* test.[42]

### A. *The Substantial-Interest Prong of the* Central Hudson *Test*

To justify a commercial speech regulation, Congress first must assert a substantial interest deserving of protection.[43] This prong of the *Central Hudson* test is less burdensome than the test applied to content-based regulation of fully protected speech, which requires Congress to assert a compelling interest in order to justify a speech regulation.[44] The substantial interest prong of the *Central Hudson* test has remained unchanged since its inception.[45] If the government demonstrates that a substantial interest underlies the regulation, the Court then will consider the relationship between the government's interest and the regulation under the next two prongs of the test. The Court has explained that the next two factors essentially amount to a consideration of the " 'fit' between the legislature's ends and the means chosen to accomplish those ends."[46]

### B. *The Direct-Advancement Prong of the* Central Hudson *Test*

Commercial speech regulations must pass the direct-advancement prong of the *Central Hudson* test, which requires that the regulation

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41. At least some members of the Court have indicated a willingness to reconsider the *Central Hudson* test, suggesting that commercial speech should not be treated differently from fully protected speech. *See supra* note 15.

42. The first prong of the *Central Hudson* test demands that the regulation concern lawful, nonmisleading speech. Because that prong is rarely at issue in commercial speech cases, this Note does not analyze it in depth.

43. *Central Hudson,* 447 U.S. at 566.

44. TRIBE, *supra* note 15, § 12-3, at 799 (quoting Perry Educ. Assn. v. Perry Local Educators Assn., 460 U.S. 37, 45 (1983)). The difference between a compelling interest and a substantial interest is elusive, but the Court simply uses the two terms to suggest that it will give more deference to the legislature in the case of a substantial interest than in the case of a compelling interest.

45. *Compare Central Hudson,* 447 U.S. at 564 (asserting that the "State must assert a substantial interest to be achieved by restrictions on commercial speech") *with* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1590 (1995) (arguing that "our analysis focuses on the substantiality of the interest behind [the statute at issue]") *and* Ibanez v. Florida Dept. of Bus. & Prof. Regulation, 114 S. Ct. 2084, 2088-89 (1994) (citing *In re* R.M.J., 455 U.S. 191, 203 (1982) (asserting that the "state can regulate commercial speech if it shows that it has a 'substantial interest' ")).

46. *Rubin,* 115 S. Ct. at 1591 (quoting Posada de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 341 (1986) (internal quotation marks omitted)).

"directly and materially advances" the state interest.[47] The direct-advancement requirement also has remained relatively consistent since the inception of the commercial speech test. In *Central Hudson,* the Court declared that "the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[48] This prong demands that the government demonstrate the relationship between its goal and the challenged regulation by examining the effectiveness of the regulation. In 1995, the Court reaffirmed its commitment to this standard, requiring the government to produce actual evidence and not mere "speculation or conjecture" that its regulation directly and materially advances its goals.[49] The final prong of the *Central Hudson* test considers the reasonableness of the regulation by examining the scope of the regulation.[50]

### C. *The Reasonable-Relationship Prong of the* Central Hudson *Test*

The 1993 Supreme Court commercial speech cases clarified the reasonable-relationship prong of the *Central Hudson* test for commercial speech regulations. They require that a statute survive a two-step analysis to meet the reasonable-relationship prong. First, as discussed in section II.C.1, the government must justify the statute by identifying a distinct harm arising specifically from the regulated speech. The legislature cannot single out commercial speech for stricter regulation simply

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47. *See Ibanez,* 114 S. Ct. at 2088.

48. *Central Hudson,* 447 U.S. at 564. The Court described the direct-advancement standard similarly in 1993, saying, "[a] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." Edenfield v. Fane, 507 U.S. 761, 770-71 (1993). In a 1994 case describing the direct-advancement standard, the Court said, "[A] regulation will not be sustained if it 'provides only ineffective or remote support for the government's purpose.' " *Ibanez,* 114 S. Ct. at 2088-89 (quoting *Central Hudson,* 447 U.S. at 566).

49. *See Rubin,* 115 S. Ct. at 1592 (quoting *Edenfield,* 507 U.S. at 770 (internal quotation marks omitted)). In *Rubin* the Court said that the direct advancement requirement could not be satisfied by "anecdotal evidence" and "educated guesses." 115 S. Ct. at 1593. In *Edenfield,* the Court suggested that "anecdotal evidence" might be enough to meet the direct advancement requirement. It also indicated that it would look at studies and literature on the relationship between the regulation and its goal. *See Edenfield,* 507 U.S. at 771-73.

50. It can be difficult to tell the difference between the direct-advancement prong and the reasonable-relationship prong, but each reflects a different aspect of the relationship between the regulation and the government interest underlying the regulation. The direct-advancement prong considers the effectiveness of the regulations without comparing it with other alternatives. The reasonable-relationship prong considers the effect of the regulation in light of the scope of the problem and the possible alternatives.

because it believes commercial information holds less value than other types of speech. Second, as discussed in section II.C.2, the statute's scope must be in proportion to the government interest it serves. The 1993 cases reassert that intermediate scrutiny applies to this aspect of the reasonable-relationship requirement.

### 1. *The Unique-Harm Requirement*

The unique-harm requirement elucidated in the 1993 commercial speech cases, which demands that commercial speech regulations address the unique impact of commercial speech, creates three tiers of protection for commercial speech. The lowest level of protection, rational-basis scrutiny, applies to regulation of false commercial speech.[51] An intermediate level of protection, intermediate scrutiny, applies to commercial speech regulation that can be justified based on a distinct harm arising from the speech. The greatest protection, strict scrutiny,[52] applies to commercial speech regulations that cannot be justified based on a distinct harm arising from the speech.[53]

The Court created a test that considers unique harmful effects as the touchstone for the constitutionality of regulations that single out commercial speech in the first commercial speech case of the 1993 Term, *City of Cincinnati v. Discovery Network, Inc.*[54] In that case, commercial publishers sued the City of Cincinnati to prevent enforcement of an ordinance prohibiting the distribution of commercial handbills. Cincinnati had used the ordinance to remove newsracks containing commercial newspapers from the city's sidewalks, claiming that the newsracks interfered with its safety and aesthetic goals. The city argued

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51. *See Central Hudson*, 447 U.S. at 563-64; Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

52. This test is the same as that applied to content-based regulations. *See* TRIBE, *supra* note 15, § 12-13, at 798-99 (discussing the level of scrutiny applied to content-based regulations).

53. The unique commercial harm test thus should serve as a predicate to the *Central Hudson* test. The Court, however, has not adopted this methodology outright but rather has treated the unique harm test as an element of the *Central Hudson* reasonable-relationship requirement. In its most recent commercial speech case, 44 Liquormart, Inc. v. Rhode Island, No. 94-1140, 1996 WL 241709 (U.S. May 13, 1996), the Court indicated that it may be taking steps toward using this structure as a predicate rather than incorporating it into the *Central Hudson* test as the Court did in *Discovery Network*. In *Liquormart*, the Court held that "special care" should attend the review of "regulations that entirely suppress commercial speech in order to pursue a nonspeech related policy." 1996 WL 241709, at *9. The Court noted that the level of scrutiny a commercial speech regulation receives does depend on the justification for and breadth of the regulation.

54. *See* 507 U.S. 410 (1993).

that it could remove commercial newsracks but not noncommercial newsracks posing identical safety and aesthetic problems because of the lower value of commercial speech.[55] The Court rejected this "lower-value" argument, stating that the commercial speech doctrine provides that commercial speech can be regulated to *prevent commercial harms* but not merely because it possesses an inherently lower value than noncommercial speech.[56]

The unique-harm test the Court adopted is similar to the government-purpose-secondary-effects test developed in *City of Renton v. Playtime Theatres, Inc.*[57] Taken together, *Discovery Network* and *Renton* indicate that the Court will allow more restrictive speech regulation when the speech's secondary effects raise issues of particular public concern.[58] *Renton* is a time, place, and manner case — meaning a case in which the government regulated the mode of communication but not the content of the message — in which the Court declined to apply strict scrutiny[59] to a zoning regulation applicable to adult theaters. In that case, the Court treated the regulation as content-neutral, and therefore deserving of intermediate scrutiny, even though it affected only theaters showing certain types of productions. Intermediate scrutiny applied because the municipality justified the ordinance as aimed at the secondary effects of the films.[60] The Court examined the government's

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> The major premise supporting the city's argument is the proposition that commercial speech has only a low value. Based on that premise, the city contends that the fact that assertedly more valuable publications are allowed to use newsracks does not undermine its judgment that its aesthetic and safety interests are stronger than the interest in allowing commercial speakers to have similar access to the reading public.

507 U.S. at 418-19.

56. *See* 507 U.S. at 426 (concluding that "Cincinnati has not asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech").

57. 475 U.S. 41 (1986).

58. The Court compared the theaters in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), with the newsracks in *Discovery Network,* saying that, "[i]n contrast to the speech at issue in *Renton,* there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks." *Discovery Network,* 507 U.S. at 430 (analyzing *Renton*).

59. In the past, the Court applied strict scrutiny to statutes affecting speech in a content-discriminatory manner. The Court traditionally looked at the face of a statute and its application to see if the legislature differentiated speech based on content. *See* Boos v. Barry, 485 U.S. 312, 335-36 (1988) (Brennan, J., concurring in part and concurring in the judgment).

60. *See Renton,* 475 U.S. at 47-48 (stating that "the *Renton* ordinance is aimed not at the *content* of the films shown at 'adult motion picture theatres,' but rather at the *secondary effects* of such theaters on the surrounding community").

objective rather than the law's application or its language to determine if the law should be classified as content-neutral.

In *Discovery Network,* the Court in fact claimed not to decide whether a regulation directed at a government interest beyond the content of commercial speech or its particular adverse effects receives the same strict scrutiny as a regulation applicable to fully protected speech. The Court instead found that Cincinnati's antihandbill regulation failed even the intermediate-level means-ends analysis of the *Central Hudson* test.[61] Despite the lower courts' confusion,[62] the Court's reasoning in *Discovery Network* demonstrates that a commercial speech regulation

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> For if commercial speech is entitled to 'lesser protection' only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech. Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand [intermediate scrutiny], we need not decide whether that policy should be subject to more exacting review.

*Discovery Network,* 507 U.S. at 416 n.11.

Based on this language, at least one district court has suggested that a statute regulating commercial speech not " 'aimed at the content of the speech or the particular adverse effects stemming from that content,' probably should be scrutinized under the criteria applicable to protection of fully protected speech." Kentucky Div., Horsemen's Benevolent & Protective Assn. v. Turfway Park Racing, 832 F. Supp. 1097, 1101-02 n.7 (E.D. Ky. 1993) (quoting *Discovery Network,* 507 U.S. at 416 n.11), *revd.,* 20 F.3d 1406 (6th Cir. 1994) (alteration in original)). That court, however, like the Supreme Court in *Discovery Network,* determined that the statute at issue in the case failed even the means-ends analysis of the intermediate scrutiny test, so the court did not have to rely on the higher level test. *See Kentucky Division,* 832 F. Supp. at 1102 ("Whatever standard is used, however, the statute cannot withstand constitutional scrutiny."). No court has been confronted yet with a statute that limits commercial speech for reasons unrelated to its content or the unique effects resulting from it that survives *Central Hudson* scrutiny but fails strict scrutiny. Although the *Kentucky Division* opinion suggests this possibility remains, the reasonable-relationship test developed in *Discovery Network* and *Edenfield* in fact precludes this scenario because it requires unique secondary effects.

62. One court summarized the level of protection provided to commercial speech after *Discovery Network* by asserting that "the Supreme Court . . . accords [commercial speech] a high value unless it is false or misleading or causes distinctive adverse effects which directly flow from the commercial speech regulated." Hornell Brewing Co. v. Brady, 819 F. Supp. 1227, 1239 (E.D.N.Y. 1993).

Another court simply admitted that it was confused about how to analyze a content-based restriction on commercial advertising:

> [U]ntil very recently it would have been clear that the appropriate test was the four-part intermediate scrutiny analysis laid out by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission.* More recent cases, however, have questioned the continued vitality of *Central Hudson* as it applies to content-based restrictions on commercial speech. Our resolution of this case renders it unnecessary to decide which standard applies, but we note the existence of the debate to inform counsel and future panels.

earns intermediate scrutiny only when the government regulates commercial speech in response to its distinct harms.

In *Edenfield v. Fane*,[63] the second commercial speech case of the 1993 Term, the Court again emphasized the unique-harm test. The Court explained that the government must link commercial speech regulations to its interest in protecting consumers and commerce.[64] The state's power to regulate commercial transactions gives the state its power to regulate commercial expression.[65] This reasoning reaffirms the Court's decision in *Discovery Network:* the state cannot justify a commercial speech regulation merely by claiming that commercial speech deserves less protection than noncommercial speech.[66]

Although the final commercial speech case decided in 1993, *United States v. Edge Broadcasting Co.*,[67] at first seems a surprising blow to commercial speech protection, it is in fact consistent with *Discovery Network* and *Edenfield.* The Court upheld a regulation outlawing radio broadcasts of lottery advertising by stations located in nonlottery states and stated that the Constitution offers less protection to commercial speech than to noncommercial speech.[68]

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MD II Entertainment, Inc., v. City of Dallas, 28 F.3d 492, 495 (5th Cir. 1994) (footnote omitted); *see also supra* note 61.

63. 507 U.S. 761 (1993) (rejecting Florida's ban on in-person solicitation by certified public accountants because the Court determined that the law threatened consumers' interest in acquiring complete and accurate information).

64. *See* 507 U.S. at 767 ("[T]he State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. For this reason, laws restricting commercial speech unlike laws burdening other forms of expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.") (citation omitted).

65. Justice Blackmun consistently argued that only the governmental interest in protecting consumers from fraudulent, misleading, or coercive sales techniques justifies restrictive regulation of commercial speech. *See, e.g., Discovery Network,* 507 U.S. 410, 438 (1993) (Blackmun, J., concurring); Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 573 (1980) (Blackmun, J., concurring in the judgment). Justice Blackmun did not join the majority opinion in *Edenfield* because he thought the case did not go far enough in asserting that fraud, duress, and unlawful activity provide the only justifications for regulating commercial speech. He limited the state's interest in commercial transactions to these situations. *See Edenfield,* 507 U.S. at 777-78 (Blackmun, J., concurring).

66. After *Discovery Network* and *Edenfield,* some Court observers determined that the boundary between commercial speech and noncommercial speech appeared to be disintegrating because the Court's decisions acknowledged the high value of commercial speech. *See, e.g.,* Marcia Coyle et al., *Court: Commercial Speech Deserves Protection,* NATL. L.J., Apr. 5, 1993, at 5.

67. 509 U.S. 418 (1993).

68. *See* 509 U.S. at 426 (" 'Our decisions, however, have recognized the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of

*Edge* does not explicitly or implicitly reject the unique-commercial-harm test enunciated in *Discovery Network* and *Edenfield*.[69] The logic of the case indicates that the Court emphasized the lower value of commercial speech in *Edge* because of the particular activity underlying the speech: the sale of lottery tickets in nonlottery states.[70] The state's interest in commercial transactions, particularly involving lottery tickets moving across state lines, justifies its involvement in speech about the sale of lottery tickets. The Court's anticommercial speech statements must be understood in the context of the case; antilottery statutes command a long history of judicial support.[71] The government and the judiciary have expressed particular concern about the harmful effects of the sale of lottery tickets in a federalist system in which some states support lotteries and others oppose them.[72]

Even under *Discovery Network*, commercial speech receives less constitutional protection when the government has an interest in the commercial transaction underlying commercial speech.[73] *Edge* protects such an interest — the government's compelling interest in regulating the sale of lottery tickets.[74]

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speech.' The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.") (citation omitted).

69. Some commentators argue that commercial speech law remains "in flux" after the 1993 cases. *See, e.g.*, Robert H. Freilich et al., *The Supreme Court in Transition: Consensus Building or Ducking the Issues and Other Developments in Urban, State and Local Government Law*, 25 URB. LAW. 697, 715 (1993). *But see* Peter J. Tarsney, Note, *Regulation of Environmental Marketing: Reassessing the Supreme Court's Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533 (1994) (discussing the 1993 commercial speech cases and coming to similar conclusions as this Note).

70. 509 U.S. at 429-30.

71. *See, e.g.*, Champion v. Ames, 188 U.S. 321 (1903) (upholding an 1895 Act of Congress forbidding the transport of lottery materials in interstate or foreign commerce); *In re* Rapier, 143 U.S. 110 (1892) (rejecting a First Amendment challenge to a federal law forbidding the advertisement of lotteries in newspapers); *Ex parte* Jackson, 96 U.S. 727 (1878) (rejecting a First Amendment challenge to a federal law prohibiting the use of the mail for any letter concerning lotteries).

72. *See, e.g.*, Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1591 (1995) (Stevens, J., concurring in judgment) (emphasizing the unique concerns at issue in *Edge* and stating that "[u]nlike the situation in *Edge Broadcasting*, the policies of some States do not prevent neighboring States from pursuing their own alcohol-related policies within their respective borders").

73. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 422 (1993) (explaining that commercial speech is subject to greater regulation to prevent commercial harm).

74. The Court's commercial speech cases since 1993 have not developed the reasonable-relationship concept more explicitly. In the first 1995 case, *Rubin*, the Court did not reach the reasonable-relationship problem because the Court decided that the statute at issue failed the third prong of the test, the direct-advancement requirement. *See Rubin*, 115 S. Ct. at 1592. In his concurring opinion, however, Justice Stevens argued that the commercial speech doctrine should be restricted to cases in which the

### 2. *Do the Means Fit the Ends?*

The reasonable-relationship prong also requires that the legislature adopt means tailored to the ends served by the regulation. The 1993 cases definitively assert that intermediate scrutiny governs this means-ends analysis.[75]

In *Discovery Network,* the Court emphasized that it takes seriously the requirement that the legislature have "carefully calculated" the means-ends fit to ensure that the regulation burdens no more speech than necessary.[76] The Court evaluated the city's other options to reduce

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government's justification for regulation is "tailored to the special character of commercial speech." 115 S. Ct. at 1594. Justice Stevens criticized *Central Hudson* because its "four-part test is not related to the reasons for allowing more regulation of commercial speech than other speech." 115 S. Ct. at 1595. Justice Stevens's opinion ignores the Court's recent development of the *Central Hudson* doctrine, which takes account of exactly his concerns.

The second 1995 case, Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995), also did not address the question because the Florida Bar rules at issue applied to commercial solicitation by lawyers within thirty days after an accident, and they were designed to respond to the harm arising from aggressive commercial solicitation.

75. Until the 1993 cases, the level of deference accorded to the legislature's judgment that the regulation burdened no more speech than necessary had been unclear. In two earlier cases, a majority of the Court accepted Congress's judgment that a regulation was reasonably related to the government's interest without requiring the state to produce evidence. *See* Board of Trustees v. Fox, 492 U.S. 469, 478-81 (1989) (majority claiming that it was "loath to second guess the Government's judgment"); Posada de P.R. Assocs. v. Tourism Co., 478 U.S. 328, 343-44 (1986) (applying a level of scrutiny similar to that of the rational-basis test in considering whether the means was reasonably related to the ends and concluding "that it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising"). In *Posada,* Justice Brennan, joined by Justices Marshall and Blackmun, dissented because he believed that the Court abdicated its responsibility by failing to evaluate alternative methods and simply deferring to the legislature's judgment. *See* 478 U.S. at 357 (Brennan, J., dissenting) (arguing that "the government [must] *prove* that more limited means are not sufficient to protect its interests, [it is] for a *court* to decide whether or not the government has sustained this burden").

These cases used a standard akin to the rational-basis test. Under the rational-basis test, the Court does not require the government to produce any evidence that the regulation actually furthers its interest. *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483 (1955). This standard was used despite the fact that *Central Hudson* mandates more than a rational relationship. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 570 (1980) (rejecting the Commission's argument that a complete ban on promotional advertising by an electric utility is no more extensive than necessary to further New York's interest in energy conservation: "[N]o showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests").

76. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 (1993) (reasoning that "[t]he fact that the city failed to address its recently developed concern about newsracks by regulating their size, shape, appearance, or number indicates that it

newsrack blight and determined that the city failed to adopt several less restrictive means of dealing with its safety and aesthetic concerns.[77] The majority reiterated the Court's rejection of the rational-basis test, implicitly repudiating the analysis in earlier cases that conflicted with *Central Hudson.*[78]

In *Edenfield,* the Court repeated its commitment to the intermediate standard of review of the means-ends analysis of commercial speech regulations.[79] Although the Court did not reach the question of reasonable fit under the *Central Hudson* test, it reached the same question under the time, place, and manner test. The Court often relies on language explicating the narrowly drawn prong of the time, place, and manner test when it considers reasonable fit under *Central Hudson;* the Court treats the two tests as highly analogous.[80] In *Edenfield,* the Court determined that a time, place, and manner restriction is reasonable only when the restriction on speech shares a "close and substantial relation" with the government interest asserted.[81] This stands in contrast to the rational-basis test, which requires only that it be conceivable that the regulation could further the government's interest.[82]

In *Edge,* the Court appeared to reverse its approach by suggesting that it once again would rely on a rational-basis test. The Court explained that a regulation meets the reasonable-relationship test if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[83] The federal government's prohibition on lottery advertising reasonably related to its interest in ensuring that both lottery and nonlottery states could pursue their policies "even if . . . there were only marginal advancement of that interest."[84] This language is clearly inconsistent with the Court's approach in *Discovery Network* and *Edenfield.* The Court went on, how-

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has not 'carefully calculated' the costs and benefits associated with burden on speech imposed by its prohibition" (quoting *Fox,* 492 U.S. at 480)).

77. *See* 507 U.S. at 417.

78. *See* 507 U.S. at 417 n.13 (stating that "[s]o too have we rejected mere rational-basis review"). The Court tried to reconcile its analysis with the earlier cases, but, as commentators have noted, *Discovery Network* signals a new, more in-depth analysis of the means-ends fit. *See, e.g.,* Robert T. Cahill, Jr., Casenote, City of Cincinnati v. Discovery Network, Inc.: *Towards Heightened Scrutiny for Truthful Commercial Speech,* 28 U. RICH. L. REV. 225, 245-46 (1994).

79. *See* Edenfield v. Fane, 507 U.S. 701, 773 (1993).

80. *See, e.g.,* United States v. Edge Broadcasting Co., 509 U.S. 418, 429 (1993); *Fox,* 492 U.S. at 477.

81. *See Edenfield,* 507 U.S. at 773.

82. *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955).

83. *Edge,* 509 U.S. at 430 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (internal quotation marks omitted)).

84. *See* 509 U.S. at 429.

ever, to demonstrate that the regulation more than marginally advanced the federal government's policy.[85] The Court analyzed the means-ends fit consistently with the intermediate-scrutiny requirements of *Central Hudson* in spite of its language to the contrary. Further, the precedential value of *Edge* remains debatable because of the government's special interest in regulating lotteries and protecting federalist values by allowing lottery and nonlottery states to pursue their policies.

Despite *Edge,* the Court reiterated its repudiation of the rational-basis test in 1995.[86] The Court relied on *Discovery Network,* saying that it did not equate the reasonable-relationship test "with the less rigorous obstacles of rational basis review."[87] As a whole, Supreme Court precedent since 1993 demonstrates that intermediate scrutiny must be applied to the means-ends fit in commercial speech cases. Even if the Government can show that a regulation addresses the unique harms of commercial speech, to meet the reasonable relationship prong, it must also show that the regulation bears a close relationship to the end and does not burden substantially more speech than necessary.

## III. Applying the Commercial Speech Test to the Regulations Implementing the TCPA

This Part applies the modern commercial speech test to the FCC regulations implementing the no-recorded-message provision of the TCPA and concludes that they violate the First Amendment because they distinguish commercial speech from noncommercial speech without reference to the unique harms of the commercial speech. Section III.A examines the government interest underlying the FCC regulations and determines that it survives scrutiny under the *Central Hudson* test. Section III.B demonstrates that it is unclear whether the regulation satisfies the direct-advancement test. Section III.C concludes that the regulations fail the reasonable-relationship prong of the *Central Hudson* test, and therefore are unconstitutional.

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85. *Edge,* 509 U.S. at 432 ("[A]pplying the statutory restriction to Edge would directly serve the statutory purpose of North Carolina's antigambling policy by excluding invitations to gamble from 11% of the radio listening time in the nine-county area. Without more, this result could hardly be called either 'ineffective,' 'remote,' or 'conditional'.").

86. Florida Bar v. Went For It, Inc., 115 S. Ct. 2371, (1995).

87. *Florida Bar,* 115 S. Ct. at 2380.

### A. *The FCC Regulations and the Substantial-Interest Prong of the* Central Hudson *Test*

Congress justifies the no-recorded-message provision of the TCPA by asserting its interest in protecting residential privacy.[88] This interest meets the requirements of the substantial-interest prong of the *Central Hudson* test[89] because the Supreme Court has recognized the preservation of privacy as a valid governmental objective.[90]

Generally, the strength of the privacy interest deserving of protection depends on the nature of the communication and its forum; citizens enjoy the greatest right to privacy at home.[91] Further, the Court agrees that aural communications may be more intrusive than visual ones because it is more difficult to block them out. Aural invasions therefore justify more restrictive regulation of free expression.[92] Thus, the fundamental problem with the regulations implementing the TCPA lies not with their stated justification but with the method by which they seek to protect privacy.[93]

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88. *See* S. REP. NO. 178, *supra* note 4, at 3, *reprinted in* 1991 U.S.C.C.A.N. at 1970.

89. The first prong of the *Central Hudson* test demands that the regulation concern lawful, nonmisleading speech. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557, 566 (1980); *see also supra* note 42. The no-recorded-message provision applies to lawful, nonmisleading commercial speech, so the provision easily meets the first prong of the test.

90. *See, e.g.*, Breard v. Alexandria, 341 U.S. 622 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949). The Court has specifically acknowledged that the protection of potential consumers' privacy against invasions by overly aggressive solicitors constitutes a legitimate state goal. "Even solicitation that is neither fraudulent nor deceptive may be pressed with such frequency or vehemence as to intimidate, vex, or harass the recipient." Edenfield v. Fane, 507 U.S. 761, 769 (1993). The case referred to commercial solicitation, but there is no reason to believe that the state would not also have an interest in protecting citizens from intimidating, vexing, or harassing noncommercial solicitation.

91. *See* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (stating that "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder" (citing Rowan v. United States Post Office Dept., 397 U.S. 728 (1970))); *see also Florida Bar*, 115 S. Ct. at 2376 (asserting that "[t]he State's interest in protecting the well-being, tranquillity, and privacy of the home is certainly of the highest order in a free and civilized society" (quoting Carey v. Brown, 447 U.S. 455, 471 (1980) (internal quotation marks omitted))); Kertz & Burnette, *supra* note 1, at 104.

92. *See Kovacs*, 336 U.S at 86-87 (Reed, J., plurality opinion).

93. It could be argued that these regulations are similar to the statute at issue in Carey v. Brown, 447 U.S. 455 (1979). In *Carey*, the Court considered the constitutionality of a statute that prohibited residential picketing on privacy grounds but exempted labor picketing of places of employment. The Court determined that the exemption for labor picketing defeated the state's claimed interest in residential privacy. *See* 447 U.S. at 465; *see also* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2043-44 (1994) (finding that exemptions in an ordinance diminished the credibility of the government's rationale for re-

### B. *The FCC Regulations and the Direct-Advancement Prong of the* Central Hudson *Test*

The direct-advancement prong of the test requires a clear goal and an established relationship between the goal and the regulation.[94] It is unclear whether the FCC regulations satisfy this prong because it is unclear what type of invasion of privacy motivated Congress.

The legislative history of the TCPA suggests that two goals underlie the no-recorded-message provision and the FCC exemptions. First, Congress designed the provision to deal with the invasion of residential privacy caused by *unexpected, unwanted telemarketing calls generally.* If Congress wanted to deal with the invasion of privacy caused by all telemarketing calls — recorded or live — the results of this regulation are indeterminate because it is unclear how many calls the regulation eliminates.[95] Second, Congress intended to address the invasion resulting only from *recorded solicitations.*[96] If Congress claims an interest only in preventing invasive telephone calls from recorded messages, the regulation can withstand the direct-advancement prong of the *Central Hudson* test because the provision eliminates a substantial number of recorded-message calls.

The TCPA may or may not directly advance its objective if the goal of the Act is to reduce generally the number of phone solicitations to which Americans are subjected. The findings included in the Act estimate that more than 300,000 solicitors call more than eighteen million Americans every day.[97] In the legislative history, Congress found that autodialer recorded message players and autodialer announcing devices allow 180,000 solicitors to call more than seven million Americans every day.[98] If the no-recorded-message provision succeeded in reducing the total number of calls by 39% — seven million out of the total eighteen million — the Court likely would conclude that the regulation di-

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stricting speech). Because this argument is intimately related to the direct-advancement prong of the test, in which the government must show the strength of relationship between its justification and the regulation, this Note does not consider it separately.

94. *See supra* section II.B.

95. *See infra* notes 100-01 and accompanying text.

96. *See infra* note 112 and accompanying text.

97. *See* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 note (1994) (Congressional Statement of Findings).

98. *See* S. REP. NO. 178, *supra* note 4, at 2, *reprinted in* 1991 U.S.C.C.A.N. at 1970. Not all the language in the Senate Report is consistent with this broad claim. At times, Congress seemed to suggest that the Act would have a minimal effect. The statute "may have a minimal economic impact on the telemarketing industry" because "most telemarketers do not place unsolicited telephone calls to residential customers using artificial or prerecorded messages." *Id.* at 8, *reprinted in* 1991 U.S.C.C.A.N. at 1976.

rectly advanced its goal of protecting privacy.[99] One court evaluating the provision, however, found that recorded solicitations of the type banned by the TCPA constitute only three percent of the telemarketing calls received by Americans.[100] A three percent reduction in the total number of calls cannot be considered a material advancement in privacy sufficient to justify a presumptive ban on recorded commercial messages.[101]

Alternatively, the regulations promulgated under the TCPA may be considered a direct advancement of privacy if the goal of the Act is specifically to alleviate the harms caused by recorded solicitations.[102] Congress explained that it differentiated recorded speech from live speech because recorded messages constitute a greater invasion of privacy than calls made by live persons.[103] Congress provides only one justification possibly related to privacy for its distinction: "These automated calls cannot interact with the customer except in preprogrammed ways [and]

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99. The Court has not indicated exactly what evidence satisfies the direct-advancement standard. The Court frequently says regulations that "directly advance" the government's interest meet the standard, while those that provide only "ineffective or remote" support fail the test. *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 770 (1993), *construed in* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1591 (1995). The Court has indicated that "studies" could provide the basis for a judgment that a regulation materially advances privacy. *See Edenfield*, 507 U.S. at 771. In *Central Hudson*, the Court suggested that the direct-advancement requirement was satisfied by a "direct link" between the regulation and the government interest. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Commn., 447 U.S. 557, 569 (1980). Considering these terms, if the TCPA really generates a 39% decrease in the number of telephone calls, it would appear to meet the direct-advancement standard.

100. *See* Moser v. FCC, 46 F.3d 970, 974 n.4 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995) (citing both statistics from the district court estimating that 3% of all solicitations are taped and statistics from the FCC indicating that 17% to 30% of all solicitations are automated). Relying on a separate expert, the district court in New Jersey also found that recorded messages constitute 3% of all telemarketing calls. *See* Lysaght v. New Jersey, 837 F. Supp. 646, 651 (D.N.J. 1993).

101. In *Discovery Network*, the Court held that the removal of 62 out of 2000 newsracks — approximately 3% — could not be considered to advance materially the state's goal. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417-18 (1993).

102. The Ninth Circuit appeared to accept this justification in its opinion upholding the statute on other grounds. The court said, "We conclude that Congress accurately identified automated telemarketing calls as a threat to privacy." *Moser*, 46 F.3d at 974.

103. *See* S. REP. NO. 178, *supra* note 4, at 4, *reprinted in* 1991 U.S.C.C.A.N. at 1972 (arguing that "[i]n addition, it is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons"). Not all of the legislative history supports this result. A House report that includes a survey from Bell Atlantic indicates that when consumers were asked about annoyance calls, 35% to 49% mentioned "sales/solicitation" calls while only 13% to 21% mentioned "computer advertising" calls. *See* H.R. REP. NO. 317, 102d Cong., 1st Sess. 8-9 (1991).

do not allow the caller to feel the frustration of the called party."[104] Congress does not make clear exactly how this frustration justification relates to residential privacy,[105] but First Amendment jurisprudence generally permits the legislature to make this type of judgment about the time, place, and manner of speech.[106] The government could single out recorded messages based on concerns about the manner of speech, rather than the content. Adopting this rationale, one state supreme court determined that the quality of intrusion from recorded speech differs from nonrecorded speech though the degree of invasion from both types of calls is the same.[107] Assuming recorded messages uniquely invade privacy, limiting commercial recorded messages directly advances the governmental goal of protecting privacy because it decreases the number of calls from recorded messages.[108] Congress, however, provides no

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104. *See* S. REP. NO. 178, *supra* note 4, at 4, *reprinted in* U.S.C.C.A.N. at 1972. Congress relied on testimony from Steve Hamm, Administrator of the South Carolina Department of Consumer Affairs, who testified that

> one of the constant refrains I hear . . . from consumers and business leaders who have gotten these kinds of computerized calls is they wish they had the ability to slam the telephone down on a live human being so that the organization would actually understand how angry and frustrated these kinds of calls make citizens and slamming down a phone on a computer just does not have the same sense of release.

*Id.* at 4 n.3, *reprinted in* U.S.C.C.A.N. at 1972 n.4 (quoting *Hearings on S. 1410, S. 1462, and S. 857 Before Subcomm. on Communications*, 102d Cong., 1st Sess. 22 (1991)).

105. The fact that the relationship between consumer frustration and privacy is not clear may also present a problem for the FCC. According to *Edenfield*, a court evaluating a commercial speech regulation is required to "identify with care the interests [Congress] itself asserts" and is not "permit[ted] to supplant the precise interests put forward by [Congress] with other suppositions." Edenfield v. Fane, 507 U.S. 761, 768 (1993) (citing Board of Trustees v. Fox, 492 U.S. 469, 480 (1989)). The FCC will have to show that frustration indeed relates to privacy.

106. This argument suggests that different kinds of invasions of privacy occur after a consumer picks up the telephone. Although Congress can determine that recorded messages are more invasive of privacy because of how they occur, Congress cannot determine that commercial messages are more intrusive unless it makes an argument that is not based on the value of the speech. The First Amendment permits Congress to make regulations based on the content of speech only if they survive strict scrutiny. *See supra* section II.C.1. Congress, however, can restrict the manner of speech under the intermediate-scrutiny time, place, and manner test as long as the regulation is not directed at its communicative impact. *See* TRIBE, *supra* note 15, § 12-2.

107. *See* State v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 890 (Minn. 1992) (stating that "[t]he quality of intrusion by commercial telephone solicitation initiated by a live operator differs from that of an ADAD generated call although the degree to which privacy is invaded by an particular call may be the same"), *cert. denied*, 507 U.S. 1006 (1993).

108. The Ninth Circuit appeared to accept this line of argument in its opinion upholding the statute on other grounds. *See* Moser v. FCC, 46 F.3d 970 (9th Cir.), *cert. de-*

justification for singling out one type of recorded message, raising problems at the reasonable-relationship stage of the test.

The regulations' effectiveness remains indeterminate because the government's vision of how they relate to residential privacy lacks clarity. If Congress sought to address the invasion of privacy that results from all unsolicited calls — recorded or live — the impact of the provision depends on the number of calls it eliminates, which is in dispute. If Congress wanted to protect residents only from recorded calls, the provision would probably pass the direct-advancement test. In either case the success of the provision depends on its relationship to the governmental goal underlying the regulation. Even if Congress clarified its goal and provided evidence that the regulation furthered this goal, the regulation would still have to pass the reasonable relationship prong of *Central Hudson.*

### C. *The FCC Regulations and the Reasonable-Relationship Prong of the* Central Hudson *Test*

The FCC regulations banning the use of recorded advertisements contravene both parts of the reasonable-relationship test as elucidated in the 1993 cases. Commercial messages do not generate unique commercial harms, and the means — a presumptive ban on commercial recorded messages — do not bear a reasonable relationship to the end of protecting residential privacy.

#### 1. *The FCC Regulations and the Unique-Harm Requirement*

*Discovery Network* precludes the FCC from singling out commercial speech for regulation simply because it believes that commercial speech deserves less protection:[109] the FCC must demonstrate that commercial recorded messages cause unique harms that justify their curtailment while noncommercial solicitors continue to enjoy unrestricted access to residential-telephone subscribers. If all recorded messages cause a similar invasion of privacy, the FCC cannot single out some messages for regulation on the basis of content.[110] Neither the FCC regulations nor the legislative history of the Act, however, demonstrate that commercial solicitations uniquely invade privacy. The legislative history of the TCPA and its findings state that Congress designed the Act to re-

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*nied,* 115 S. Ct. 2615 (1995). The Court said, "Congress could regulate a portion of [automated telemarketing calls] without banning all of them." 46 F.3d at 974.

109. *See supra* text accompanying notes 54-62.

110. This is the lesson of *Discovery Network. See supra* text accompanying notes 54-62.

spond to consumers' demand for protection of residential privacy.[111] To satisfy the unique-commercial-harm test, the FCC must demonstrate that recorded commercial advertisements cause problems different from the problems caused by other recorded messages.

Congress suggests three content-related justifications for regulating commercial messages. Ultimately, none of the congressional justifications meets the unique-harm test *Discovery Network* mandates to justify distinguishing between commercial speech and noncommercial speech. First, Congress relies on statistics that indicate that consumers complain more frequently about commercial telemarketing than charitable-solicitation calls.[112] Even if consumers complain more frequently about commercial telemarketing calls, Congress cannot single out commercial speech because some listeners consider this type of speech more offensive or bothersome than other types of speech.[113] The Court has said, "Listeners' reactions to speech are not . . . 'secondary effects.' "[114] The Court also rejected this line of argument in an earlier case involving the government's right to cut off certain commercial mailings to consumers

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111. *See* H.R. REP. NO. 317, *supra* note 103, at 5.

112. *See id.* at 16 (relying on data from the National Association of Consumer Agency Administrators showing that complaints about commercial calls composed from 80% to 99% of complaints in nine states while complaints about charitable-type calls made up the remainder). It should be noted that it is not clear that this survey defines commercial calls in the same way as Congress defines them in the TCPA. The survey categorizes calls as "commercial" and "charitable." The subheading of the Report suggests that the "charitable" category includes only calls from tax-exempt organizations, which would mean that the "commercial" category could include consumer complaints about political solicitation and market-research calls.

113. One court struck down similar state legislation for this reason. *See* City of Lysaght v. New Jersey, 837 F. Supp. 646, 651-52 (D.N.J. 1993) (arguing that "the Supreme Court rejected the government's reliance on its interest in protecting the public from 'offensive' speech, and specifically declined 'to recognize a distinction between commercial and noncommercial speech that would render this interest a sufficient justification for a prohibition of commercial speech' " (footnote omitted) (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71-72 (1983))).

114. Boos v. Barry, 485 U.S. 312, 321 (1988) (O'Connor, J., plurality opinion) (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)). The plurality explained that consumer complaints do not constitute distinct secondary effects like those referred to in *Renton* because the very purpose of the distinct harm test is to ensure that regulations are not content-based, and considering consumer complaints as distinct secondary effects would allow consumers to complain and remove certain speech from the marketplace of ideas. Acceptable distinct secondary effects include increased crime, as in *Renton,* or a danger to federalism, as in *Edge.* The Court indicated that the distinct harm test could not be applied when the justification for the regulation "focuses *only* on the content of the speech and the direct impact speech has on its listeners." *Boos,* 485 U.S. at 321.

based on the government's assertion that consumers found the content of the advertisements offensive.[115]

Second, Congress claims that consumers complain more frequently about commercial calls because of their greater volume and their more unexpected nature.[116] These two theories seem to conflict: If commercial calls occur in much greater numbers, they should not be so unexpected. Further, Congress neglects to substantiate this claim with concrete numbers.

Analyzing each statement independently shows that, even if the rationales did not conflict and were statistically supported, they would not support the FCC's differentiation of commercial and noncommercial recorded messages. Congress claims commercial solicitations result in a greater invasion of privacy than noncommercial solicitations because consumers do not expect them. This raises the question of what the invasion of privacy is — the ringing of the telephone or having to listen to the message. Privacy is a nebulous concept, but the legislative history of the bill indicates that the invasion of privacy occurs when the telephone rings. Comments by the congressmen sponsoring the bill indicate that the ringing of the telephone, not the nature of the call, makes the telephone an "insistent master."[117] Many commentators agree that all telephone solicitations similarly invade a home dweller's privacy.[118] A federal court evaluating the TCPA said, "[b]oth [commercial and nonprofit] telemarketing calls trigger the same ring of the telephone;

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115. *See Bolger*, 463 U.S. at 72. Courts express particular sympathy to free speech rights in cases involving the mail because of the small burden placed on the consumer seeking to avoid the offensive speech. Walking from the mailbox to the garbage can "is an acceptable burden, at least so far as the Constitution is concerned." Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y.), *affd.*, 386 F.2d 449 (2d Cir. 1967), *cert. denied*, 391 U.S. 915 (1968). Similarly, hanging up the telephone is a small burden.

116. *See* H.R. REP. NO. 317, *supra* note 103, at 16 (stating that "[t]he two main sources of consumer problems — high volume of solicitations and unexpected solicitations — are not present in solicitations by nonprofit organizations").

117. *See* 136 CONG. REC. H5820 (daily ed. July 30, 1990) (statement of Rep. Markey) ("The telephone is an insistent master — when it rings we answer it." (speaking in support of H.R. 2921, 101st Cong., 2d Sess. (1990), which proposed an opt-off mechanism for unsolicited telephone advertisements)). A state court evaluating legislation similar to the TCPA found that "[t]he necessity for protecting residential privacy is driven not so much by offensiveness of the content of the message as by the coupling of commercial telephone solicitation with a startlingly efficient and indiscriminate medium of distribution." State v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 888 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993); *see also supra* note 107 and accompanying text. The court relied on congressional comments about the TCPA in making this judgment that the ringing of the telephone rather than the content of the messages disturbed residents. *See* 491 N.W.2d at 888 n.4.

118. *See, e.g.*, Albert, *supra* note 1, at 88; Radner, *supra* note 16, at 380.

both kinds of calls invade the home equally, and both risk interrupting the resident's privacy equally."[119] When the telephone rings and the called party picks up the phone, an interruption in privacy occurs regardless of who speaks on the other end of the call. The invasion in privacy that consumers complain of stems from the nature of the medium rather than the nature of the message.[120] The invasion of privacy occurs before the consumer knows who is on the phone. The unexpected nature of the caller has nothing to do with the invasion of privacy Congress wanted to address.

Congress also claims that commercial calls uniquely proliferate.[121] If statistics supported this, it would be the government's strongest argument for upholding the statute under the *Discovery Network* unique-harm test because the government could claim proliferation constitutes a unique harm.[122] The government could make a macroprivacy argument that limiting the calls most likely to proliferate increases the total level of privacy.[123] Ultimately, this argument fails the *Central Hudson* test because each individual phone call causes the same invasion of privacy. The harm caused by the individual commercial message remains indistinguishable from the harm caused by the noncommercial message. Commercial calls may invade a consumer's privacy more *frequently*, but the frequency of invasion does not change the *nature* of the invasion. Each phone call, whether commercial or noncommercial, similarly interrupts residents.[124]

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119. Moser v. FCC, 826 F. Supp. 360, 366 (D. Or. 1993), *revd.*, 46 F.3d 970 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995). The only state court to consider a state law similar to the TCPA specifically recognized that the nature of the telephone itself makes such messages intrusive. *See Casino*, 491 N.W.2d at 888 ("The telephone is unique in its capacity to bring those outside the home into the home for direct verbal interchange — in short, the residential telephone is uniquely intrusive. . . . [T]he shrill and imperious ring of the telephone demands immediate attention.").

120. In the early 1980s, when considering similar regulations, the FCC itself said all autodialer-recorded-message solicitations involve similar invasions of privacy. *See In re* Unsolicited Tel. Calls, 77 F.C.C.2d 1023, 1035 (1980) (stating that the "[a]ll solicitation calling — whether for charitable, political or business purposes — involves similar privacy implications").

121. *See supra* note 116.

122. The government also could make a successful harmful effects claim if it could show that commercial recorded messages cause unique fraud problems that could not be attributed to noncommercial messages.

123. The Supreme Court of Minnesota accepted this justification in upholding a Minnesota statute requiring that a live operator introduce all recorded commercial messages. *See* State v. Casino Mktg. Group, Inc., 491 N.W.2d 882, 889 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993). The court decided the case before *Discovery Network*, however.

124. Assuming commercial recorded messages call residential subscribers more frequently than noncommercial recorded messages, this situation reverses the facts of

Finally, Congress alleges that the invasion of privacy caused by a phone call with a commercial message differs qualitatively from the invasion of privacy caused by a call with a noncommercial message, as indicated by the greater number of consumer complaints about commercial calls. In making this argument, Congress presumes the content of commercial speech is inherently less valuable than other kinds of speech, a presumption that is impermissible. Congress cannot show that commercial recorded messages invade consumers' privacy more than noncommercial recorded messages. In fact, the congressional findings preceding the TCPA show exactly the opposite. Congress states that "residential telephone subscribers consider automated or prerecorded telephone calls, *regardless of the content or the initiator of the message,* to be a nuisance and an invasion of privacy."[125] The original Senate bill outlawed all unsolicited recorded messages.[126]

The privacy justifications Congress provided for restricting commercial solicitations thus apply equally to noncommercial solicitations. *Discovery Network* precludes the FCC from singling out commercial speech for regulation simply because it believes that commercial speech deserves less protection.[127] Under the reconstituted *Central Hudson* test, Congress cannot discriminate among speakers and address the privacy problem in a piecemeal fashion that impacts only certain solicitors without a showing that consumers suffer unique harms from these messages.

### 2. *The FCC Regulations and the Means-Ends Fit*

This section argues that even if Congress enacted the TCPA with the permissible objective of preventing the intrusion caused by all types of recorded messages, the FCC regulations violate the *Central Hudson* requirement that the means fit the ends.[128] The Court describes this test

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*Discovery Network.* In *Discovery Network,* commercial newsracks accounted for only a small part of the safety and aesthetic problems plaguing the city. Here, commercial recorded messages would account for a greater percentage of the problem. The *Discovery Network* analysis still should apply, however, because each phone call invades privacy, not just the proliferation of calls. "[T]he city's primary concern, as argued to us, is with aggregate number of newsracks on its streets. On that score, however, all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993).

125. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 § 2(10), 105 Stat. 2394, 2394 (codified at 47 U.S.C. § 227 note (Supp. V. 1993)) (emphasis added).

126. *See* S. 1462, 102d Cong., 1st Sess. (1991); S. REP. No. 178, *supra* note 4, at 3-4, *reprinted in* 1991 U.S.C.C.A.N. at 1970-71.

127. *See supra* text accompanying notes 54-62.

128. *See* Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1591 (1995).

as something less than a least-restrictive-means test but something more than a rational-basis test.[129] The regulation should not "burden substantially more speech than is necessary to further the government's legitimate interests."[130]

The regulations implementing the no-recorded-message provision operate in a highly restrictive fashion because they virtually ban one means of communication: the recorded message. The provision authorizes an opt-on mechanism that requires prior approval from consumers.[131] Telephone solicitors using recorded messages can contact only those consumers who give "prior express invitation or permission."[132] This opt-on mechanism places the burden on consumers who must contact every solicitor they wish to receive messages from and creates a presumption against the use of recorded messages. The Court rejected prior-approval statutes in a similar situation in which the Post Office proposed that a drug company sending controversial advertisements obtain the prior consent of all households receiving the advertisements.[133] The Court found that the prior-approval statute imposed too large a burden on householders.[134] The opt-on requirement of the FCC regulations implementing the TCPA similarly places too great a burden on consumers.

The opt-on mechanism also violates the intermediate-scrutiny test by disregarding less burdensome means of protecting consumers' privacy. To evaluate the fit between the ends and the means, the Court often relies on cases expounding the narrowly drawn requirement of

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129. *See* Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (describing the test as requiring a "fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served" (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982))).

130. 492 U.S. at 478 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (internal quotation marks omitted) (interpreting the narrow tailoring requirement of time, place, and manner restrictions)).

131. *See* 47 C.F.R. § 64.1200(f)(5) (1995). In another case involving an opt-on mechanism for recipients of unsealed mail containing a communist political message, the Court said that an opt-on mechanism was "almost certain to have a deterrent effect" on the information received by postal patrons. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965). "[I]nhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government." 381 U.S. at 309 (Brennan, J., concurring).

132. *See* 47 C.F.R. §§ 64.1200(c)(2), (f)(5) (1995).

133. *See* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

134. *See* 463 U.S. at 80 (Rehnquist, J., concurring in the judgment) (arguing that "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular viewpoints. . . . Although this restriction [the prior-approval requirement] directly advances weighty governmental interests, it is somewhat more extensive than is necessary to serve those interests").

time, place, and manner restrictions.[135] The Court explained this standard in a frequently cited passage: "The requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' "[136] Even under this standard, however, legislators cannot draw substantially excessive regulations, disregarding "far less restrictive and more precise means."[137] The FCC no-recorded-message regulations fall into the substantially excessive category because they presume that all residents object to receiving telemarketing calls despite the fact that it is possible to identify those residents who actually object.[138] The Court has recognized that a ban on speech to protect privacy may be too restrictive when the legislature can identify the specific individuals who object.[139] By regulating the medium, the current no-recorded-message regulations restrict the flow of information to all consumers.

Although the reasonable-fit factor does not require that legislators adopt the least-restrictive alternative, the Court demands that the legislative body choose a reasonable alternative.[140] A White House spokesperson in the Bush administration admitted that, prior to the signing of the TCPA, the administration had not been shown that less-drastic administrative remedies would be insufficient to protect residential privacy.[141] In 1980, the FCC itself said that "a complete ban on unsolicited calls or a prohibition on such calls to subscribers who have not affirma-

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135. *See supra* note 80 and accompanying text.

136. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)). The Court decided this case before 1993, so it is not clear that the language still describes the reasonable-fit requirement. In *Edenfield,* the Court determined that a time, place, and manner restriction is reasonable only where a restriction on speech shares a "close and substantial relation" with the government interest asserted. *See Edenfield v. Fane,* 507 U.S. 701, 773 (1993).

137. Board of Trustees v. Fox, 492 U.S. 469, 479 (1989) (quoting Shapero v. Kentucky Bar Assn., 486 U.S. 466, 476 (1988) (internal quotation marks omitted)).

138. Several states have adopted legislation that enables solicitors to identify those consumers who object to their calls. *See, e.g.,* FLA. STAT. Ch. 501.059(3) (1995) (providing that consumers who do not want to receive solicitation calls can identify themselves in the local phone book); OR. REV. STAT. § 646.569 (1995) (same).

139. *See* Consolidated Edison Co. v. Public Serv. Commn., 447 U.S. 530, 542 n.11 (1980) (citing Rowan v. United States Post Office Dept., 397 U.S. 728 (1970)).

140. *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993) (stating that "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable"); *see also* text accompanying notes 74-77.

141. *See House Considers Restriction on Advertising by Telephone and Fax,* N.Y. TIMES, July 31, 1990, at A13.

tively indicated a desire to receive them would probably be unlawful."[142]

The FCC regulations implementing the no-recorded-message provision of the TCPA fail the *Central Hudson* test because they do not meet the reasonable-relationship test. The regulations cannot be justified as an attempt to single out commercial speech to deal with a unique commercial harm. Further, by creating a presumption against the use of one medium of communication — the recorded message — the regulations take an unnecessarily drastic step.

## CONCLUSION

An analysis of the regulations implementing the no-recorded-message provision of the TCPA, which prohibits telemarketers from conveying unsolicited advertisements via recorded messages without the prior express consent of the called party, demonstrates the subtleties of modern commercial speech jurisprudence. After the 1993 Supreme Court commercial speech cases, a valid commercial speech regulation must directly advance a substantial governmental interest, address unique harms attributable only to the regulated speech, and survive an intermediate-scrutiny means-ends test. The no-recorded-message provision unconstitutionally distinguishes between commercial speech and noncommercial speech because the regulation fails to respond to a unique commercial harm, and the means do not fit the ends.

Although the FCC cannot address the invasion of privacy that unexpected phone calls cause by singling out commercial messages, the FCC could adopt a mechanism that would permit residents to contact a central clearinghouse and opt off *all* unsolicited, nonpersonal calls regardless of whether the calls were commercial or noncommercial. An opt-off mechanism would survive constitutional scrutiny under the time, place, and manner test, which tolerates regulations that balance the conflicting liberty interests of speakers and listeners as long as they are content-neutral, narrowly drawn, serve a significant governmental interest, and leave open ample alternative channels of communication.[143]

An opt-off mechanism would permit residents to block out a larger sector of speech than the current ban applicable only to commercial solicitations. It first appears strange that a more widely applicable mecha-

142. *In re* Unsolicited Tel. Calls, 77 F.C.C.2d 1023, 1035 (1980).

143. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

nism passes constitutional muster when a narrower provision fails.[144] But as this Note has demonstrated, the narrower ban impermissibly differentiates speech based on its content. The Court has expressed particular concern about provisions that restrict speech in this manner. An opt-off mechanism, by contrast, functions in a less-restrictive manner than a mandatory ban. It presumes that consumers prefer to receive information and places the burden of action on them if they want to avoid certain kinds of speech. The pro-communication posture inherent in an opt-off mechanism more accurately reflects the values underlying the First Amendment, which creates a presumption in favor of free speech, than the current opt-on mechanism.

144. It is even possible to argue that Congress could do something more drastic by outlawing all recorded messages, regardless of content. The Eighth Circuit recently upheld a Minnesota statute that outlaws all recorded messages regardless of content. *See* Van Bergen v. Minnesota, 59 F.3d 1541, 1546 (8th Cir. 1995). The court determined that the statute was content-neutral and evaluated it under the time, place, and manner test. The court upheld that statute because it determined that the statute was narrowly tailored and left open ample alternative channels for communication. *See* 59 F.3d at 1555-56; *see also* Bland v. Fessler, 79 F.3d 942 (9th Cir. 1996) (upholding a statute held narrowly tailored and largely content neutral); TRIBE, *supra* note 15, § 12-3, at 800 (arguing that the concept of equality among views "may sometimes result, perhaps ironically, in the *reduced* protection of speech, since one method of 'equalizing' is not to permit more speech but rather to adopt even more suppressive content-neutral regulations" (citing Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 205 (1983))).