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Telemarketing, Technology, and the Regulation of Private Speech

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Abstract

This article considers the viability of the Telephone Consumer Protection Act (TCPA) in light of recent Supreme Court First Amendment precedent (such as *Reed v. Town of Gilbert* and *Sorrell v. IMS Health*) and technological & regulatory developments (such as the FCC's ongoing consideration of rules that would allow or require prospective callers to implement technologies that obviate many of the TCPA's concerns). The TCPA is the primary law prohibiting "robocalls" – phone calls made using autodialers or pre-recorded messages without the consent of the call recipient. In recent years robocalls have become one of the primary consumer protection issues facing regulators – with more than 2.4 billion of these calls placed each month, consumer concern about them dominate complaints received by both the FCC and FTC.

The TCPA includes a strict private cause of action with statutory damages. This has given rise in recent years to an enormous class action industry that has grown from just 14 suits in 2007 to nearly 5,000 in 2016. These suits frequently target firms that attempt to comply with the TCPA in good faith but are caught in its strict net through innocent, or even no, mistake.

Because the TCPA regulates speech, it has been subject to repeated First Amendment challenges since it was enacted in 1991. Those challenges have consistently been reviewed subject to intermediate scrutiny, under which the statute has consistently survived. Recent developments in First Amendment precedent, however, suggest that such challenges would likely be subject to strict scrutiny today. Moreover, recent technological and regulatory developments suggest that the statute is not sufficiently tailored to survive application of intermediate scrutiny, let alone its stricter cousin. Given the sharp increase in TCPA suits and this legal evolution, this article provides analysis relevant to certainly-forthcoming challenges to the TCPA's validity.

The TCPA also raises difficult questions beyond the traditional First Amendment analysis. For instance, the government itself regulates many aspects of the architecture of the telephone network. In this role, it is slowed or prevented the adoption of technologies that could dramatically reduce the problems the TCPA curtails speech to (ineffectively) address. And the TCPA is largely premised on the government's important interest in protecting the sanctity of the sanctuary of the home as a place in which individuals can be free from intrusions from the outside world. But as mobile telephones increasingly displace residential wireline telephones, the TCPA's effect has grown *sub silentio* from protecting the sanctuary of the home to protecting the sanctuary of the phone. Both of these issues – the regulation of speech to address problems of the government's own making and the *sub silentio* expansion of protection of the home – are discussed in the latter parts of this Article.

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Telemarketing, Technology, and the Regulation of Private Speech

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Introduction

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

Unfortunately for this new breed of telemarketers, their business was problematic for both consumers and the architecture of the telephone industry. The calls often came in the evening as families were sitting down to dinner or watching prime-time television – it was a different era, remember – and seemed a grotesque invasion of their privacy.[4] Because they had no way to differentiate wanted calls from unwanted ones – this was before the introduction of Caller ID – these calls were deceptive, placing consumers in the impossible position of either missing calls from friends and family or answering calls from marketers. These calls were also problematic due to the technical and economic features of the telephone network itself: they could tie up business and residential phone lines for hours at a time, fill up answering machine tapes, and even impose consequential costs on cell phone or fax machine owners.

Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA) in response to these concerns.[5] The TCPA provided general legal principles to govern the use of automatic telephone dialing systems and artificial or prerecorded messages,[6] and directed the Federal Communications Commission (FCC) to further develop these principles into rules.[7] The lodestone principle of the TCPA is that, subject to certain exceptions, it is unlawful to use automatic dialing systems or prerecorded messages to make phone calls except with the *prior express consent* of the called party. In the past 26 years, Congress and the FCC have revisited the TCPA and the rules made pursuant to it numerous times, but both bodies have remained faithful to this principle.[8]

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As every modern telephone owner knows, the TCPA has not eliminated the scourge of unwanted telephone calls. To the contrary, today there are over 2.4 billion robocalls placed each month, 59% of which are made using technologies that falsify or mask the identity of the caller.[9] Who has not received a call from "Rachel from Cardholder Services?"[10] But while the basic problem today seems similar to that of 1991, so much about the ecosystem has changed that the underlying problems are almost all fundamentally different. To consider just a few examples: today, these calls come throughout the day, mostly to cell phones; Caller ID is pervasive; the U.S. Government has developed a comprehensive (if ineffective) Do-Not-Call regime; callers use complex tricks to make called parties think they are talking to a human; and automatic dialers are far smarter, such that they are far less likely to tie up phone lines for more than a few seconds (if the call goes unanswered).

In addition, many of today's callers are engaged in complex scams unrelated to the call itself.[11] The majority of bad-faith callers – the "Rachels from Cardholder Services" and those making calls as part of scams unrelated to the calls themselves – use technologies to conceal, and are engaging in scams that do not require them to reveal, their identities.[12] That is, they cannot be sued because they cannot be found; they do not care about the TCPA and make no efforts to comply with it. The government does have a compelling interest in curtailing these callers but the TCPA does little to accomplish this goal. Legitimate businesses, however, are constrained by the contours of the law and the market. They need not be subject to such blunt or draconian a tool as the TCPA, and subjecting their speech to such a tool exceeds the bounds of what is permissible under the First Amendment. This is a fundamental difference between the challenges that the TCPA was written to address in 1991 and the challenges that are faced today. The contemporary problem of unwanted telephone calls stems not from those callers who attempt to comply with the TCPA but from those who ignore it.

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

The starting point for this argument is the Supreme Court's recent First Amendment jurisprudence. Courts have historically found that the TCPA does not make content-based distinctions and therefore is subject only to intermediate scrutiny. But recent cases such as *Reed*, *Sorrell*, suggest that the TCPA does, in fact, make content-based distinctions and, therefore is subject to strict scrutiny.[13] This casts serious the TCPA's prior affirmations in the Circuit Courts of Appeal. When thrown into crucible of strict scrutiny, the TCPA quickly turns to dross.

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Even more challenging, changes in telephone technology and the market for calls regulated by the TCPA call into question whether the government has any interest in regulating these calls at all, let alone a compelling one. The TCPA and FCC's implementing rules are woefully under- and over-inclusive, capturing vast amounts of constitutionally-protected speech while doing little to address the contemporary problem of unwanted calls (e.g., "Rachel from Cardholder Services"). And even if these concerns weren't fatal to the TCPA's constitutional structure, the rules implemented by the FCC and authorized by the TCPA are not the least restrictive means to address the problem on unwanted commercial calls.[14] They may have been less problematic in the early 1990s due to limitations on the state of the art in telephone technology, but that is no longer the case. The TCPA was adopted even before basic Caller ID was commercially available – and contemporary technology can empower callers with a much wider range of tools to manage both wanted and unwanted telephone calls.

The First Amendment analysis of the TCPA gives rise to a pair of broader, more conceptually challenging issues. First, it turns out that in the contemporary context much of the need for the TCPA arises from the government's own regulation of the telecommunications industry. There are various technologies available – which the FCC has historically not allowed telecommunications carriers to implement – that would substantially increase the control that consumers have over the phone calls that they receive. This raises a foundational question of whether the government can curtail otherwise-Constitutionally-protected speech to address problems that are of the government's own making. The answer to that question is "clearly not." The question in the contemporary context is particularly interesting because it arises as a function of technological change: at the time of the TCPA's enactment, it was likely a Constitutionally-permissible approach to addressing a legitimate problem, even under contemporary First Amendment standards; it is only because technology has continued to advance while regulations controlling implementation of that technology have not kept pace that those standards are problematic today.

The second more conceptually challenging issue is the underlying privacy values that the TCPA was enacted to protect – a rare instance in which the government regulates speech between private parties. One of the TCPA's two core justifications was to prevent intrusions upon the sanctuary of the home – an important government interest predicated upon a thin but important line of cases. But today, unwanted phone calls impose upon individuals outside the sanctuary of the home, and arguably are (or could be, subject to less restrictive government regulation of the telephone network) significantly less intrusive upon individuals while in the sanctuary of the home. Technological change has, therefore, silently changed the understanding of the boundaries of the sanctuary of the home – or what we may think of as the "private sphere." Rather than protect the sanctuary of the home, the TCPA rather protects the sanctuary of the phone. Such a reconceptualization warrants skepticism – if it stands, it would fundamentally alter the traditional American concept of the distinction between public and private spaces.

This article begins in Part I with an overview of the TCPA. Part II then discusses three key types of changes since the TCPA was enacted in 1991: changes in the problem, the technological solutions, and the law itself. Parts III and IV analyzes the TCPA in light of these changes. Part V turns to the broader questions raised by this analysis: the propriety of the government's restriction of private speech to address problems created by government regulation itself, and the questions that the principles of privacy underlying application of the TCPA in the contemporary setting raise about the distinction between public and private spaces.

I. The TCPA's Legislative, Administrative, and First Amendment History

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The TCPA's Purpose

The TCPA was enacted in 1991 nominally to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers."[15] In addition to this expressly identified purpose, the legislative history highlights "the use of automated equipment *to engage in telemarketing*" as its motivating concern, and in its preamble identifies the purpose of the legislation as being "to prohibit certain practices involving the use of telephone equipment *for advertising and solicitation purposes*."[16] It was adopted in response to particular concerns, including the following examples from the Senate Report:

- automated calls are placed to lines reserved for emergency purposes, such as hospitals and fire and police stations
- the entity placing the automated call does not identify itself
- the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages
- the automated calls will not disconnect the line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own calls
- automated calls do not respond to human voice commands to disconnect the phone, especially in times of emergency
- some automatic dialers will dial numbers in sequence, thereby tying up all the lines of a business and preventing any outgoing calls; and
- unsolicited calls placed to fax machines, and cellular or paging telephone numbers often impose a cost on the called party (fax messages require the called party to pay for the paper used, cellular users must pay for each incoming call, and paging customers must pay to return the call to the person who originated the call).[17]

Understanding those concerns requires recognizing the technological setting as it existed in 1991. This was near the end of the era of Ma Bell – consumers generally could only get telephone service from a single local exchange carrier, and there was limited (but growing) competition in the long distance market.[18] Residential customers generally had one telephone line (and number) per house, which would ring several phones shared throughout the house when called.[19] There was no caller ID.[20] Fax machines were an important and state-of-the-art means of communication.[21] Cell phones were only just beginning to enter the consumer market.[22] The entire consumer-facing side of the telephone system was analog.[23] The last manual exchange in the United States – a system that required speaking to an operator in order to complete a call instead of just being able to dial a phone number – was not retired until the late 1980s.[24] Some telephone customers in the United States relied on "party line" service – i.e. a phone line

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shared with several other houses – well into the 1990s.[25] The underbelly of the system was also much more primitive: many telephone exchanges still relied on mechanical switches – switches that established phone calls by establishing a physical electrical circuit between telephones – instead of computerized electronic switches.[26] These switches were in many ways inferior to their more-modern electronic counterparts. For instance, they would not end a phone call, disconnecting the physical connection between each end, until both parties had hung up their side of the line.[27]

Everything was also much more expensive. Long distance calls could cost dollars per minute and even local calls sometimes were not free.[28] Cell phones – where they were available – could cost dollars per minute for all calls (not to mention that they were the size of briefcases and their batteries only allowed about 30 minutes of conversation).[29] Fax machines printed documents on expensive rolls of thermal paper.[30]

At the same time, this was also an era of rapid technological change. Telephone networks were quickly transitioning to digital and computerized technologies, especially in the network core and for long-distance service (that is, for everything except the last segment of the network that connected directly to consumers' homes).[31] The cost of calls was falling precipitously as well, especially in the increasingly competitive long distance market.[32] And with the growth of the computer and electronics markets, the devices that could connect to the network were increasingly more advanced.[33]

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

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

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

Importantly, in its initial 1992 order implementing the TCPA, the FCC considered alternative approaches to mitigating the harms of unwanted telephone calls, including ideas such as centralized do-not-call databases, directory markings indicating the classes of callers from which individuals consented to receive calls from, and technological solutions that could be implemented by consumers or within the telephone network to give consumers greater control over the calls that they received. All of these proposals were rejected as likely ineffective or because they were technologically or economically

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infeasible at the time. These are conclusions that may no longer hold – in particular, as will be seen below, the FCC and telecommunications industry are actively developing technologies to give consumers much greater control over the telephone calls that they receive.

Implementation and Evolution of the TCPA

The guiding principle of the TCPA is that telephone calls made with automatic telephone dialing systems or using prerecorded or artificial messages cannot be made without prior express consent.[34] This general rule requiring prior express consent is subject to a few statutory exceptions, including that such calls can be made for emergency purposes and for the purposes of collection of debts on behalf of the government.[35] Even more important, it is subject to implementation and interpretation by FCC rulemaking: the TCPA both directs the FCC to make rules implementing the Act and expressly allows the FCC to exempt certain calls from the prohibition of the Act.[36]

Callers who violate the Act can be subject to substantial civil and criminal fines. More important, it creates a strict liability private right of action under which individuals receiving calls in violation of the Act can recover statutory damages of $500 per call. This has given rise to a cottage – but expensive – industry built around bringing class action lawsuits over TCPA violations.[37]

Importantly, the Act draws a number of distinctions. For instance, it addresses *all* calls to cellular telephone services, or other telephone service for which the called party is charged for the call in section (b)(1)(A); but it addresses calls to *residential* telephones *to deliver a message* as a separate category of calls in section (b)(1)(B). It also directs the FCC to consider whether a given call includes unsolicited advertisements in implementing the Act, and thereby distinguishes between calls made merely to deliver informational messages and those made for commercial purposes.[38]

The FCC first implemented its TCPA rules in its 1992 TCPA Order.[39] Under those rules, unsolicited commercial calls generally could not be made to residential telephones using automatic dialers or prerecorded or artificial voices without prior express consent.[40] Informational calls were not subject to this requirement.[41] All calls made to cellular phones (if the party was billed for the call) using automatic dialers or prerecorded or artificial voices, however, required prior express consent.

In the years since, both the TCPA and the FCC's rules implementing the TCPA have been modified several times.[42] Perhaps the most important development came in 2003 when Congress, the Federal Trade Commission (FTC), and the FCC jointly implemented the national Do-Not-Call registry.[43] In implementing the Do-Not-Call registry, the FTC adopted a stricter understanding of prior express consent than had previously governed: if an individual's phone number was on the Do-Not-Call list, telemarketers could only call it if they had *written* prior express consent.[44] In light of this requirement, the FCC followed suit, amending its rules to exempt firms calling phone numbers on the Do-Not-Call list from liability under the TCPA only if they had written prior express consent to make such calls.

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Congress, the FTC, and the FCC have regularly updated this legal framework in response to changing marketing practices, judicial opinions, and market conditions.[45] The most recent major FCC Order, the 2015 Omnibus TCPA Order, summarizes the current state of the FCC's rules:

> The TCPA and the Commission's implementing rules prohibit: (1) making telemarketing calls using an artificial or prerecorded voice to *residential* telephones without prior express consent; and (2) making any non-emergency call using an automatic telephone dialing system ("autodialer") or an artificial or prerecorded voice to a *wireless* telephone number without prior express consent. If the call includes or introduces an advertisement or constitutes telemarketing, consent must be in writing. If an autodialed or prerecorded call to a wireless number is not for such purposes, the consent may be oral or written.[46]

First Amendment Doctrine

The First Amendment prohibits Congress from making any law abridging the freedom of speech.[47] This does not, however, prohibit any law that merely has the effect of abridging speech. To the contrary, the law routinely abridges speech. The canonical example demonstrates the point: the law can prohibit "falsely shouting fire in a theatre."[48] We have laws against defamation, libel, perjury; laws limiting disclosure of trade secrets and dictating the terms of whistleblowing; laws governing the use and copying of various works of authorship; laws governing what can and cannot be said on broadcast television and radio; laws limiting when, where, and how protests and other forms of public speech occur; and many other examples.[49]

Instead, courts evaluate the nature and extent of a law's effect on speech and then weigh those factors against the law's purpose and means of implementation.[50] The most common dichotomy in this framework is between laws that are content-neutral and those that are content-based. "Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[51] This "narrowly tailored to serve compelling state interests" standard is known as strict scrutiny.[52] Content-neutral laws on the other hand – generally "those that are justified without reference to the content of the regulated speech"[53] – are subject to a less intense intermediate scrutiny requiring that the restrictions on speech be narrowly tailored to serve some important or substantial government interest.[54] Commercial speech has historically been evaluated under a third analytical framework, albeit one that is similar to the intermediate scrutiny standard, but – though the Court's recent cases call the ongoing vitality of this so-called commercial speech doctrine into question.[55]

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Under the traditional approach, courts have generally evaluated laws regulating commercial speech using the four-part *Central Hudson* test.[56] The premise of this test, and the constitutional justification for regulating commercial speech in general, is that such speech is more closely akin to economic activity than it is to substantive speech.[57] The government has broad authority to regulate economic activity, and so – the theory goes – it has greater authority over commercial speech than over other forms of speech. Under the *Central Hudson* test, courts look to four criteria: 1) whether the speech is misleading or related to unlawful activity, 2) whether the restriction serves a substantial government interest, 3) whether the restriction directly advances that interest, and 4) whether the regulation is more extensive than necessary to advance the government interest.[58] Although this test is relatively forgiving of government regulation of speech, courts nonetheless regularly find that government regulation of commercial speech violates the First Amendment.

Content-neutral regulation of non-commercial speech is evaluated under an intermediate scrutiny standard.[59] This standard, which is similar to the *Central Hudson* test,[60] is most commonly applied to "time, place, and manner" restrictions on speech. It requires that such restrictions are "justified without reference to the content of the regulated speech," that they are "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[61] The key factors under both the *Central Hudson* test and intermediate scrutiny are whether the regulation in question serves a significant government interest and whether it is narrowly tailored to accomplish that goal.

The highest form of First Amendment scrutiny, strict scrutiny, is reserved for content-based regulation of speech.[62] A law that treats speakers differently based upon the message being conveyed will generally trigger strict scrutiny. Under this standard of review, a law must be "narrowly tailored to further a compelling government interest,"[63] in "the least restrictive means to further the articulated interest."[64] This standard is harder to meet than that of intermediate scrutiny or applied to commercial speech.[65] A compelling government interest is "an interest of the highest order," one that is more substantial than merely a significant interest.[66] Because the regulatory restriction must be implemented using the least restrictive means, it is not sufficient merely to leave open ample alternative channels for communication: the regulation must implement the channel of communication that is *least* restrictive of speech from among any alternatives.

(The application of strict scrutiny to laws that differentiate based upon the content of messages explains the importance of the *Central Hudson* test: if the Court in *Central Hudson* had not decided that regulation of commercial speech is more akin to economic regulation than to speech regulation, regulation of commercial speech would necessarily be content-based. This would bring a wide range of speech regulation under the umbrella of strict scrutiny – likely leading much of it to being invalidated.)

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One of ways in which we think about whether a law is narrowly tailored is to consider whether it is under- or over-inclusive. Underinclusive regulations, those which leave "appreciable damage to [the government's] interest unprohibited,"[67] are particularly suspect, because "a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited."[68] Nor can the restriction be overinclusive, meaning that it cannot "unnecessarily circumscribe protected expression."[69] As explained by the Supreme Court, "It is well established that, as a general rule, the Government may not suppress lawful speech as the means to suppress unlawful speech."[70]

The TCPA and the First Amendment: The Early Cases

[[[This section discusses canonical prior First Amendment analysis of the TCPA, including that offered in the legislative history, the FCC's 1992 TCPA Order, and by the 8th and 9th Circuits (*Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995); *Missouri Ex Rel. Nixon v. American Blast Fax, Inc.*, 196 F. Supp. 2d 920 (E.D. Mo. 2002); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995); *Gomez v. Campbell-Ewald Co*., 768 F.3d 871, 876 (9th Cir. 2014), *aff'd on other grounds,* 136 S. Ct. 663, 672 (2016)).]]]

II. How the Times have Changed

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

The problem has changed

At the time the TCPA was adopted, the FCC received more than 2,300 complaints about telemarketing calls per year.[71] Today, robocalls are the most common subject of consumer complaints received by the FCC or the FTC. More than 200,000 of the 475,000 complaints that the FCC received in 2016 were about robocalls.[72] The FTC maintains the Do-Not-Call registry, so it receives a larger portion of complaints about robocalls: more than 5 million complaints in 2016.[73] These complaints reflect just a small portion of the problem, with over 2.4 billion calls in violation of the TCPA and Do-Not-Call registry estimated made per month.

More important than the increase in volume of calls, the *nature* of the calls that generate these complaints has changed substantially over the past decades. When the TCPA was enacted, it was in response to the advent of autodialers and pre-recorded messages. When these technologies appeared, there were no norms governing how they should be used, no laws to enforce those norms, and indeed no recognition that they were peculiarly problematic for consumers. Rather, they were an extension of preexisting telemarketing or informational calling campaigns: rather than paying 100 people to make 1,000 calls in an hour, a machine could be used to make 10,000 calls in the same amount of time. It was

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merely a cheaper, more efficient way of reaching people on the phone. Indeed, this was central to the technology's effectiveness: because people were unaccustomed to receiving many calls in the evening, they routinely answered whatever calls they received. This made these calls both particularly effective and also particularly problemati c: they worked because they could take advantage of people's trust that when the phone rang there was someone on the other end who they wanted to talk to.

In the years since, largely in response to the TCPA as well as with the advent of the Do-Not-Call registry and technologies like Caller-ID, clear frameworks have developed to guide the legitimate use of autodialers and pre-recorded messages. Many firms – especially those seeking to do legitimate business with willing customers – try to follow these frameworks. There are plenty of legitimate uses for these technologies, such as sending out text messages reminding people about prescriptions or bill payments, making it easy for individuals to request that information or commercial opportunities be sent to them, or facilitating the use of efficient dialing technologies when trying to contact customers.[74]

There have been a number of shocking examples of pro-consumers business practices that have been caught in the net of TCPA liability in recent years. One common class of examples is captured by suits against sports venues that allow spectators to send a text message that may appear on the venue's "jumbotron." A number of venues have faced significant TCPA liability because they would send texts back to the spectator to confirming receipt of the initial message, in violation of the TCPA's requirement that communications to wireless phones have express prior written consent.[75] More generally, the sending automatic text messages to confirm receipt of a message has regularly triggered TCPA liability.[76]

As another example, pharmacies have faced TCPA liability for sending patients reminders to refill their prescriptions – reminders that can literally be life-saving.[77] And cooperative community banks have been found liable under the TCPA for calling their member-customers – as co-ops, such banks are effectively being sued by themselves for attempting to call themselves.

The TCPA can foreclose entire categories of pro-consumer businesses, most notably any business model built around coordinating services via text message. For instance, services that match consumers with home-services contractors (e.g., law care, plumbers, &c), easily face TCPA liability.[78] This is particularly troubling for two reasons. First, such services would be perfectly legal if they used non-telephone technologies – such as e-mail, Instance Messaging apps, or proprietary smartphone apps – to send their messages. And, second, this the TCPA disproportionately disadvantages those who are unfamiliar with, or do not have access to, such technologies. Put bluntly, this makes it harder for the poor and elderly – who are less likely to have access to or to be comfortable with such technologies, but who likely do have a cell phone with text-messaging capabilities – to avail themselves of "sharing economy"-style services.

Such examples may seem trivial to some, especially when compared to overwhelming disapproval of robocalls. But most Constitutionally-protected speech is mundane – most speech is not the Pentagon Papers or unpopular political speech. But the question of the First Amendment is not whether speech is good enough to warrant protection. Quite the contrary, a core function of the First Amendment is precisely to keep the government out of determining what speech is "good" – that is, what speech is permissible or merits protection. Rather, the inquiry is whether certain types of speech are so problematic that they bear exception to the general rule that all speech is protected, no matter how trivial or unmeritorious it may seem.

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Of course not everyone using autodialers is engaged in "good" (or "not bad") speech. Some bad-faith callers engage in scams, trying to trick unsuspecting individuals into giving up sensitive personal or financial information. Others use autodialers to "harvest" phone numbers for individuals who are likely to answer their phones, so that they can be contacted later (typically by a scam artist) or have their numbers sold.[79] Still other recent scams have attempted to trick the called party into saying words or phrases that can then be used for identity or financial fraud.[80] These calls frequently use technologies that allow them to "spoof" Caller-ID, to hide their illegitimate identity or to make it look like they are coming from a legitimate phone number.[81] And many of these calls are made by "lead generation" firms that place calls on behalf of third parties, using call-forwarding to redirect positive leads to a live operator at the contracting firm.[82]

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

Reassignment of telephone numbers, and of wireless phone numbers in particular, is another relatively recent but challenging problem. At the time of the TCPA's enactment, there were roughly 130 million assigned phone numbers in the United States, roughly 0.5 numbers per person in the country. Today there are over 460 million numbers in service, or about 1.5 numbers per person in the country. This increase has put a dramatic strain on the supply of phone numbers. The vast majority of these new numbers have been assigned to wireless phones – and they are being assigned at a rate far in excess of that at which new (unused) numbers are being released.[83] As a result, over 37 million wireless telephones are reported to receive reassigned numbers every year.[84]

Number reassignment is difficult for the TCPA because consent to be called does not transfer with the telephone number and callers have no way of knowing whether a given phone number has been reassigned. Every call that a caller makes, therefore, is potentially to a number that has been reassigned to a non-consenting party, and therefore might technically violate the TCPA. The FCC addressed this issue in its 2015 TCPA Order by creating a single-call safe harbor: if a calling party does not receive affirmative consent upon making a call, it will not face TCPA liability for the call but must assume that the number has been reassigned and discontinue calling it in the future.[85] In addition to the First Amendment considerations considered below,[86] this approach to reassigned numbers is under review by the DC Circuit Court of Appeals,[87] and under further consideration by the FCC.[88]

The technology has changed

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There is perhaps no adverb in the English language to adequately capture how dramatically the technology of phone calls has changed since 1991. The FCC rules allowing telephone carriers to provide Caller-ID services to customers were not adopted until 1995. One of the major concerns animating the TCPA was autodialed phone calls wouldn't recognize when a call was answered by an answering machine so would fill entire answering machine tapes. It is trivial for autodialers today to determine when a human isn't on the other end of a call; and, of course, the use of answering machines or audio cassettes to record messages has largely been displaced by centrally-stored voice mail services.

From the consumer perspective, the biggest change is, of course, the rise of the cell phone. In 1991 cell phones were exceptionally rare – and expensive.[89] Typically, consumers connected to the telephone network via a single telephone line connected to their house, which would in turn be connected to a number of wired telephones.[90] That line was shared between the house, and any phone call would cause each of those telephones to ring. Today, there are more cell phones in service in the United States than there are citizens. Phones are remarkably inexpensive – if they are not included in a service plan for free, basic phones are available for tens of dollars, and there are federal subsidy programs available to make sure that low-income individuals have access to them.[91] The cost of service is also much lower. In the early 1990s, calls could cost dollars per minute; today every service plan currently featured in advertising by each of the major wireless carriers includes unlimited voice and text service.[92] And even the most basic of cell phones today is more feature-rich than the most advanced telephones in 1991, featuring Caller-ID displays, programmable ring-tones, easy volume controls and mute capabilities, and the ability to seamlessly ignore unwanted calls or send them to voicemail.

Less visible to consumers are the myriad changes to the underlying telephone network – and, also, the surprising lack of changes. In 1991 the telephone network was still largely analog, especially in the last-mile connections to individual telephones. Even the parts of the network that were digital had limited capabilities. Features like Caller-ID, call-forwarding, speed-dialing, and others were still relatively new. Today, the telephone network is almost entirely digital, and has far more sophisticated capabilities than were possible or even conceivable in the early 1990s. These advances, however, should not be overstated: the telephone system is complex, the industry conservative, and the network subject to highly ossified regulation. Much of the underlying technology – the basic protocols that control how telephone switches communicate and how phone calls are routed, for instance – are still based on systems developed in the 1980s.[93] On the regulatory front, there is active discussion at the FCC today over whether telephone carriers should be allowed to block calls from callers that are known to be fraudulently using spoofed Caller-ID information.

Let that sink in for a moment: the FCC currently prohibits telephone companies from blocking calls that are *clearly fraudulent* – the very calls that make up most of the robocall complaints that the FCC and FTC receive. That's akin to the USDA requiring supermarkets to sell produce that is known to have listeria in it, or the CPSC requiring stores to continue selling products with known defects. Rather than require telephone carriers to take action against these known harms, the FCC has instead clung dearly to its vision of telephone carriers as common carriers – passive conduits through which phone calls flow between active call participants. Rather than allow (let alone require) these carriers to implement solutions that could address the vast majority of the robocall problem, the FCC has instead placed a

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complex compliance burden on calling parties and the substantial burden of dealing with non-complaint calls on individuals.

The law has changed

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

The purpose of the discussion that follows is not to advocate for, or to try to advance understanding of, these recent cases. There is extensive discussion of these cases' meaning and how doctrine in this area will continue to evolve.[94] Rather, the goal here is to apply these cases as they are naturally read, and as lower courts have begun to apply them in the context of the TCPA. Generally, these cases (most notably *Reed*) have called into question the lower protection afforded to commercial speech.[95] But as Justice Kagan notes in her concurrence in *Reed*, the Court's approach is concerningly broad and threatens to bring vast swaths of speech regulation under the auspices of strict scrutiny.[96] Even if the argument articulated below, that post-*Reed* the TCPA needs to be scrutinized strictly, fails, this article's analysis of the TCPA's substantive problems remains valid under less probing standards of review.

The most recent of the Court's speech opinions, *Reed v. Town of Gilbert*, has raised particular questions that are relevant in the context of the TCPA. As discussed in Part III, in the past year some lower courts have interpreted *Reed* to subject the TCPA and state-level equivalents of the TCPA to strict scrutiny. Others, including *McCullen v. Coakley* and *Sorrell v. IMS Health*, reflect ongoing development of the Court's understanding of the distinction between content-neutral and content-based regulation. These cases suggest two jurisprudential shifts: first, that much speech regulation that has previously been thought of as content-neutral is actually content-based; and second, that regulation of commercial speech may also be content-based regulation subject to strict scrutiny.

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

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

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> speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.[97]

This framing shifts the Court's focus by emphasizing that a regulation is necessarily content-based if it draws distinctions based on the message a speaker conveys. Previously, some courts had focused on whether the purpose or effect of the regulation was content-based, such that even a statute that made content-based distinctions on its face could be deemed content-neutral if those distinctions were incidental to a content-neutral purpose. The *Reed* court expressly rejected this view.[98] Other Courts had interpreted prior cases "as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect."[99] Instead, *Reed* recast the inquiry as one comprising two steps: if a statute or regulation is facially content-based, that ends the inquiry; if it is not, then courts inquire more deeply into its purpose and effects to characterize whether it is content-neutral or content-based.[100]

As discussed below, *Reed* has been used in recent litigation challenging the TCPA and related statutes. Following *Reed*'s instruction that a statute that on its face makes content-based distinctions is necessarily content-based and is therefore subject to strict scrutiny, these courts have broken from past cases that have treated the TCPA as content-neutral.[101]

It is important to recognize that *Reed* is on the leading edge of recent developments in a notoriously tricky area of law – its full meaning and the extent to which it brings speech within the ambit of strict scrutiny and to which commercial speech remains subject to more forgiving analysis are the subject of extensive ongoing scholarly debate.[102] *McCullen*, for instance, also a recent case, reminds us that "a facially neutral law does not become content base simply because it may disproportionately affect speech on certain topics."[103] It is unclear how to evaluate such a statute where disproportionate effects are clear on the face of the statute – or, to state the matter more confoundingly, it is unclear what "facial" means. *Reed*, for instance, suggests that strict scrutiny will apply in such cases if "the legislature's speaker preference reflects a content preference," which suggests that content preferences may be found based upon implied Congressional intent.[104] Such inference seems a far cry from a facial content preference. On the other hand, *McCullen* tempers analysis in the other direction, explaining that "a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."[105] This suggests that a central question in deciding whether a statute or regulation that has disproportionate effect on certain topics is whether such effects where truly incidental to, or were actually an object of, the legislative or regulatory design.

Questions such as this are important for evaluating the TCPA and there FCC's implementing rules. As discussed below,[106] the TCPA disproportionately effects certain speech on certain types of issues. Whether this is incidental to Congress's disapprobation of calls placed using autodialers or prerecorded messages, or rather disapprobation of speech on such issues is the reason for Congress's regulation of

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autodialers and prerecorded messages, is important to understanding whether the TCPA is best understood as content-neutral or content-based.

III. Recent First Amendment Analyses of the TCPA

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

The highest profile challenge to the FCC's TCPA rules is *ACA International v. FCC*.[107] This case, which is currently pending in the DC Circuit Court of Appeals, challenges the FCC's 2015 TCPA Omnibus Order on a wide range of grounds. This case includes a First Amendment challenge to the FCC's Order – however it is one of many issues in the case and is framed in relatively narrow terms.[108] The focus of this challenge is on the meaning of "called party" in the context of the Commission's rules relating to calls placed to reassigned wireless numbers. As discussed below, this argument is reasonably strong: if petitioners do not obtain their requested relief on other grounds, the arguments below suggest that court is likely side with them on this First Amendment issue. There are, however, a wide range of other potential First Amendment challenges to the TCPA – both to the TCPA as implemented in FCC rules and to facially to the TCPA itself.

The more substantial First Amendment challenges, however, follow from *Reed*. As explained by the Fourth Circuit in *Cahaly v. Larosa*, a case considering South Carolina's state equivalent of the TCPA:

> In *Reed*, the [Supreme] Court explained that "the crucial first step in the content-neutrality analysis" is to "determin[e] whether the law is content neutral on its face." … This formulation conflicts with, and therefore abrogates, our previous descriptions of content neutrality . … Our earlier cases held that, when conducting the content-neutrality inquiry, "[t]he government's purpose is the controlling consideration." But *Reed* has made clear that, at the first step, the government's justification or purpose in enacting the law is irrelevant.
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> Applying *Reed*'s first step, we find that South Carolina's anti-robocall statute is content based because it makes content distinctions on its face. *Reed* instructs that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Here, the anti-robocall statute applies to calls with a consumer or political message but does not reach calls made for any other purpose.[109]

Based on *Reed*, the Fourth Circuit found that the South Carolina TCPA-equivalent statute is subject to strict scrutiny. It then went on to invalidate the statute, finding that (assuming the government does have a compelling interest in regulating unsolicited calls at all) the statute's approach is not the least restrictive means of accomplishing the government's purpose, that the statute is over-inclusive (burdening non-problematic speech in addition to problematic speech) and under-inclusive (failing to address substantial amounts of problematic speech within the ambit of the statute).

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It is important not to read cases such as *Cahaly* too broadly, as they are addressing state-equivalents of the TCPA, which often have important differences from the federal TCPA.[110] For instance, *Cahaly* related to political messages, which by and large are not problematic under the federal TCPA. Moreover, *Cahaly* was decided on a record in which the government did not present contrary arguments to demonstrate that the statute in question was, in fact, the least restrictive means to addressing the interest at issue.

Post-*Reed* cases challenging the federal TCPA, are, however, beginning. For instance, Facebook has recently raised a First Amendment defense based on *Reed* in a series of Ninth Circuit cases. In these cases, Facebook is facing TCPA violations relating to text messages it sent out as birthdate reminders to its users. In one of these cases, *Brickman v. Facebook*, Facebook moved to dismiss the case on the grounds that the TCPA violates the First Amendment.[111] In a move that surprised nearly everyone, the District Court applied *Reed* and found that the TCPA is subject to strict scrutiny, but also found that the statute *survives* such analysis. In his opinion, the Judge considered the same arguments made in *Cahaly* – that the statute was not the least restrictive means to accomplishing its goals, and was both over- and under-inclusive – and reached the opposite conclusion.[112] The Judge, however, has recently certified Facebook's motion for interlocutory appeal on the question of whether the TCPA survives strict scrutiny to the Ninth Circuit.[113]

A final post-*Reed* case bears discussion: *Mejia v. Time Warner Cable*, which is currently pending in the Southern District of New York. This is a class action filed in 2015 by former Time Warner Cable customers. These customers allege that Time Warner Cable repeatedly called them using automatic telephone dialers after they cancelled their cable service in an attempt to get them to resume that service. In late 2016 Time Warner Cable moved for summary judgement on the proceedings, arguing that post-*Reed* the TCPA is facially unconstitutional.[114] The Department of Justice has since entered this case as an intervenor and briefing is ongoing.[115]

Between the Facebook and Time Warner Cable litigation, there are now two currently pending challenges to the TCPA in two separate Circuits.[116] Both of these cases are based on the same basic arguments. First, post-*Reed* the TCPA is subject to strict scrutiny because it treats different types of calls and callers differently. In both cases, this argument specifically highlights the most recent Congressional amendments to the TCPA, 2015 changes that exempt calls relating to the collection of government-backed debts from the TCPA.[117] But both also cite to the FCC's ability to exempt additional calls and callers from coverage of the Act as demonstrating that the Act is content-based under *Reed*. In both cases, the parties then argue that the TCPA fails strict scrutiny on three grounds: that it does not adopt the least restrictive means to accomplish the goal of prohibiting unwanted calls and that the approach that it does take is both over- and under-inclusive.[118] In making these arguments, both Facebook and Time Warner Cable both focus largely on the 2015 amendments. For instance, both argue that the privacy concerns that make up the TCPA's core purpose are implicated just as much by government debt-collection calls as by other calls, such that by exempting those calls the statute is necessarily under-

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inclusive.[119] They also argue that there are less restrictive means to accomplishing the TCPA's purpose – both as a matter of how the Act is structured and as to the need to exempt some types of calls or callers from its scope – such that the act unduly and over-inclusively burdens protected speech.[120]

IV. A New First Amendment Analysis of the TCPA

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

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

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

The TCPA makes content-based distinctions that may subject it to strict scrutiny

The 9th and 8th Circuits found that the TCPA survived under *Central Hudson*'s intermediate-scrutiny style test in *Moser*, *Van Buren,* and *Missouri ex rel Nixon*.[121] These are canonical among the cases at the foundation of the modern understanding of the TCPA as permissible regulation of commercial speech. In fact, neither circuit even questioned that this was the correct approach: the *Moser* court accepted the District court's determination that the statute should be analyzed under *Central Hudson*, and the parties stipulated to this approach in *Missouri ex rel Nixon*.[122] Today it seems likely that these cases got it wrong – that the TCPA's content-based distinctions subject it to strict scrutiny.[123]

More recent Supreme Court precedent suggests that the TCPA and FCC rules are content based. Arguably, *Moser* says so itself. There, the Circuit Court relied on the District Court's determination that

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the TCPA should be evaluated under *Central Hudson* – but the District Court reached this conclusion following logic that is clearly incorrect today.[124] Specifically, the District Court starts by "conclud[ing] that the TCPA is a content-based regulation, and cannot be justified as a legitimate time, place or manner restriction on protected speech." Under *Reed*, that ends the matter, but the Court goes on to evaluate the government's purpose, finding that it doesn't intend to regulate the content of the expression – only the manner in which that content is expressed. But as *Reed* explains, the idea "that a government's purpose is relevant even when a law is content based on its face [] is incorrect."[125]

The TCPA and FCC rules make a number of distinctions, many of which are best characterized as content based – some facially, others as a result of the regulation's disproportionate effect. They distinguish between calls that use autodialiers or prerecorded messages and those that use a human hand and voice. They distinguish between commercial and non-commercial calls. They distinguish between calls made to wireless and residential wireline telephones. They draw distinctions between calls made with and without prior express consent, and between different forms of expressing that consent. And the FCC's 2015 Order distinguishes between calls made (only to wireless phones) to numbers that have been reassigned and those that have not.

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

For instance, a ban on autodialers as a means of communication disparately affects certain kinds of information and is therefore effectively content-based. While autodialers and pre-recorded or artificial-voice messages can certainly be used in problematic ways, there are some types of messages that are better conveyed using these technologies than manually-dialed or (especially) live operator engagement. Informational and transactional calls, especially those relating to personal financial or health information, may be better made using artificially-generated voices – indeed, such technologies substantially reduce the privacy invasion of having another person reviewing and discussing sensitive personal information. And the cost of using these technologies can dramatically reduce firms' costs of doing business – especially in the modern mass-scale era where a single firm may do business across the United States or world – which can in turn redound in price benefits and other savings to customers. Different types of messages are simply better suited to delivery using different technologies, depending upon their *content*. Under *Reed*, disparate regulatory treatment of these technologies is therefore arguably content-based and subject to strict scrutiny, whether the government intended such disparate results or not.

The clearest distinction that the TCPA and FCC rules make is between commercial and non-commercial speech. This is a clear, facial, content-based distinction. Early First Amendment challenges to the TCPA treated this TCPA's regulation of telemarketing as a regulation of commercial speech and therefore applied *Central Hudson* intermediate scrutiny. But *Sorrell* and *Reed* suggest that "commercial speech is no exception" to the rule that where regulation is "designed to impose a specific, content-based burden on protected expression … heightened judicial scrutiny is warranted." [126] Indeed, *Sorrell* involved a law that restricted the disclosure of prescription information for marketing purposes – a situation closely

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related to the TCPA's regulation of telemarketing calls – and subjected that law to strict scrutiny.[127] The fact that the speech was of a commercial nature was of no concern to the Court in light of the clear content-based nature of the law. To the contrary, the Court noted that "A consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue."

Indeed, it is important to recall that the very purpose of the TCPA was "to prohibit certain practices involving the use of telephone equipment *for advertising and solicitation purposes*" and that the statute was written in response to "the use of automated equipment *to engage in telemarketing.*" Although the statutory purpose sounds in privacy concerns, this is a statute in which the legislative history expressly states both a speaker preference (disfavoring telemarketers) and a content preference (disfavoring advertising and solicitations). The TCPA, in other words, is not a case in which "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics"[128] – rather, it is a case in which "the legislature's speaker preference reflects a content preference."[129] Under *Reed*'s two-part analysis, the TCPA should subject to strict scrutiny at both steps: on its face it makes content-based distinctions; and even were this not the case, the statute's legislative history reveals a clear preference both for certain types of content and for speakers whose speech reflects a certain type of content.

This, of course, is an obvious conclusion. Few would object to receiving an unexpected (and therefore unconsented-to) call placed using either an automatic dialer or prerecorded message that carried with it welcome information. Welcome information about friends or family (e.g., notifications from an airline that a family member's flight is delayed); information about a financial windfall (for instance, about a substantial award in a class settlement); reminders about important medical (e.g., prescription refills) or civic information (e.g., about voting dates of polling locations). Rather, it is telemarketing solicitations – and especially scams and other illegitimate calls – that are the subject of our, and Congress', ire.[130] Clothed in the guise primarily of privacy concerns – concerns that were perhaps legitimate given the technology at the time – the TCPA prohibits all calls made using certain technologies in order to curb a certain class of calls. The constitutionally relevant portion of the last statement is the end – "in order to curb a certain class of calls." A law that imposes a rule to restrict one sort of content is content based, even if that rule is applied equally to all speakers.[131] Indeed, the fact that it applies broadly, restricting not only disfavored speech but also other, desirable, constitutionally-protected speech merely demonstrates that the rule in question is overbroad and not narrowly tailored.[132]

There are also substantial demographic differences between wireless and wireline telephone subscribership that further suggest that disparate regulation of the two should be subject to strict scrutiny. For instance, wireless-only telephone subscribers are more likely to be young, single, lower-income, and renters.[133] "Get out the vote" calls to wireless and wireline telephone subscribers are, therefore, very likely to involve discussion of very different topics and serve very different functions (e.g., informing politically-disengaged individuals about the fact of an election and location of their polling places as opposed reminding politically-engaged individuals to vote in a known election). The TCPA and FCC rules are also, therefore, likely to facilitate the provision of election-related information to known demographics of voters (e.g., homeowners with residential landlines) and to impose higher

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burdens of obtaining such information on other known demographics (e.g., renters, who are more likely to be wireless-only).[134] Importantly, the fact that a law may have disparate effects on certain speakers or messages does not mean that that law is necessarily content-based.[135] But "[c]haracterizing a distinction as speaker based is only the beginning—not the end—of the inquiry."[136] The statute may nonetheless be subject to strict scrutiny if the "speaker preference reflects a content preference,"[137] or the "inevitable effect of a statute on its face" is unconstitutional.[138]

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

The government has no interest in doing much of what the TCPA does

The purpose of the TCPA – that is, the governmental interest that it was intended to serve – was nominally to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers."[139] As discussed above, the legislative history also expresses open animus towards telemarketers and the legislation was adopted to prohibit telephone-based advertisements and solicitations.[140] Even taking the privacy and related interests at face value, however, the scope of the underlying harm to privacy interests that the TCPA was meant to address has diminished greatly since the TCPA was adopted. What's more, the Act has come to stifle the interstate commerce it was intended to facilitate and to regulate activity that the government has no legitimate interest in controlling.

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

The TCPA does not meaningfully advance privacy interests

The TCPA was written at a time when robocalls imposed substantial privacy and other tangible costs on those receiving them, and did so in a way that those receiving them could not avoid. Unsolicited calls would pour in every evening, disrupting households and families, rendering telephones unusable (including in the case of emergencies), filling answering machine tapes, and incurring per-minute charges on wireless phones.

None of these issues ring true today. The non-privacy issues – which are not at the core of the government's asserted interests in the TCPA, but nonetheless have played a prominent role in its

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defense – are all largely moot. Autodialer technology has improved, such that lines are no longer blocked for any meaningful period of time. Answering machines are increasingly a thing of the past. Cell phones no longer incur per-minute charges. And Caller-ID (when not interfered with by legitimately bad callers), selective ring-tones, easily-controlled phone volume, and other technologies have dramatically reduced the privacy impact of these calls.

A defining structural element of the TCPA is its disparate treatment of calls to wireless and residential wireline telephones. Given the statutory emphasis of this distinction, it is necessary to consider whether it is supported by a legitimate government interest. Today there is no legitimate reason to treat wireless phones differently than wireline phones. The only reason identified for such treatment at the time the TCPA was enacted, and the only reason encoded in the Act itself, is that wireless users incur costs when they receive calls where wireline users do not. This is no longer the case: every service plan currently offered by each of the major wireless carriers includes unlimited voice and text service. This is not to say that there is no reason to be concerned about, and possibly to regulate, unsolicited calls to wireless phones. But neither the TCPA nor the FCC make a sufficient case for disparate treatment of wireless and residential wireline telephones.

To the contrary, today there is reason to impose *lighter* regulations on wireless phones than on residential wireline phones.[141] Telephone calls to residential wireline telephones present a far greater privacy burden on individuals than to calls to wireless phones. First, at a conceptual level wireless phones are not used exclusively in the home. This is an important difference between them and residential wireline phones. Indeed, the fact that courts have long recognized a government interest in protecting the sanctuary of the home from unwanted intrusion is one of the key justifications that the FCC cites in its 2015 Order for its treatment of wireless calls.[142] But, as discussed in more detail in Part V, this interest is at least weakened, if not entirely abrogated, once an individual has left the protective sanctuary of the home and – phone in hand – ventured into the public world where they may encounter all forms of ideas and expressions, wanted and unwanted.

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

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The counterargument to this concern is that unwanted calls to wireless phones actually present a greater privacy harm than calls to landline telephones. Because individuals often carry their wireless phones with them wherever they go – wireless phones are by our sides in our homes, in our cars, at work, as we walk the streets, eat at restaurants, and even on our bedstands while we sleep – calls to them have the potential to be substantially more intrusive than calls to residential wireline phones. Our ability to control these calls on our cellphones, however, is substantially greater. This reduces the burden imposed by these potential intrusions and shifts part of that burden to the call recipient. Perhaps more important, however, is the longstanding recognition – recognized both by the courts and, as noted above, the FCC in its implementation of the TCPA – that any expectation of privacy is substantially diminished once we leave the sanctuary of the home.[143]

The TCPA interferes with commerce

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

In reality, the TCPA has given rise to a substantial industry of plaintiff's attorneys who specialize in using the TCPA to engage in predatory litigation. Very frequently this litigation targets firms that are attempting to engage in legitimate business in compliance with the TCPA. But the TCPA is a strict-liability offense with substantial statutory penalties. This puts firms attempting to engage in TCPA-compliant activity in a precarious situation.[144]

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

The FCC's 2015 Omnibus Order imposes rules that interfere with interstate commerce in an even more problematic way: in attempting to address the problem of calls made to reassigned telephone numbers, the Commission imposes nearly impossible burdens on individuals' ability to interact with other individuals and firms of their choosing.

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

In its 2015 Order, the Commission addressed this issue by saying that consent follows the called party, not the called number. This means that a calling party does not have consent to call a reassigned number unless the party newly-assigned to that number has offered such consent – a circumstance that

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will never occur except in the rarest and most serendipitous of circumstances. In effect, under the 2015 Order, calling a reassigned number is almost necessarily a violation of the TCPA. Recognizing that calling parties do not have an effective way to determine whether a given number has been reassigned, the FCC adopted (in a show of extreme understanding and compassion) a safe-harbor: calling parties are permitted a single call to a reassigned number – if that call does not result in an affirmation of consent, the calling party must assume that the number has been reassigned and that consent for further calls does not exist.

Despite this rule, callers still have no way to know whether a given number has been reassigned. The effect of this rule, therefore, is that any time a calling party does not get through to the called party on a given phone call, it must assume that the phone number has been reassigned even in cases where it has not been reassigned.

This rule places a substantial burden on *both* calling parties and the parties that have consented to being called. In effect, parties that have given such consent must actively answer every call that they receive, otherwise they risk an imputation that they have withdrawn consent to receive further calls. This is an incredible burden: it is both impossible and dangerous. No one is ever in a position to answer every call that they receive – that is why we have answering machines and voice mail. Moreover, callers *should not* answer every call that they receive, given the overwhelming number of harmful and scam robocalls that proliferate today.

The FCC rationalizes its approach to number reassignment and the one-call safe harbor as an effort to balance the interest of calling parties and the privacy interests of parties that do not want to be called. But it does not consider the more important tradeoff at issue: the rights of parties who do want to be called, and who have provided consent to be called, against the rights of the subset of individuals who have received a reassign phone number on which they are receiving unwanted calls. That omission should be fatal to the FCC's approach. It is inherently over-inclusive, curtailing the speech between parties who have expressly consented to receiving calls and it is woefully under-inclusive, doing nothing to address the greater problem of illegitimate and scam robocalls. What is more, as discussed in Part IV, it is neither narrowly tailored nor the least restrictive means to addressing concerns created by reassigned numbers – to the contrary, the problem of reassigned numbers is one largely under the FCC's direct control, such that the Commission itself is in a better position both to mitigate and to respond to the underlying problem than legitimate callers.

The TCPA is hardly tailored at all, let alone narrowly

In order to survive either strict or intermediate scrutiny, a statute must be narrowly tailored.[145] At the time it was enacted, the TCPA may have met that standard. Today it is hardly tailored at all, let alone narrowly. To the contrary, as currently implemented the TCPA simultaneously significantly fails to stop the calls that it intends to curtail while curtailing (or sanctioning) Constitutionally-protected speech that should fall outside of the ambit of the Act.

Perhaps the most fatal critique of the TCPA is its failure to address in any meaningful way the modern problem of illegitimate robocalls. The TCPA and FCC rules impose substantial burdens of firms and individuals that seek to be compliant with the TCPA and otherwise to engage in valuable speech activities, but do little to address the pervasive illegitimate conduct that underlies modern concern

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about robocalls. Such "a law cannot be regarded as protecting an interest of the highest order … when it leaves appreciable damage to that supposedly vital interest unprohibited."[146]

And on the other side of the equation, the TCPA not only curtails but places significant liability upon those who would engage in Constitutionally-protected speech. To recount some of the examples discussed previously, the TCPA has been used against sporting venues using text messages for entertainment purposes, against pharmacies communicating important healthcare information, and services that match consumers with contractors.[147] To be narrowly tailored, a statute "must target and eliminate no more than the exact source of the 'evil' it seeks to remedy" – "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[148]

The TCPA is thus problematically-tailored coming and going, both substantially failing to prevent the problematic speech it is intended to curtail but curtailing other speech that the government has no interest in limiting.

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

There can be little doubt that it is the restrictions on calls for which consent has been given that is over-inclusive. The basis in *Central Hudson* for subjecting commercial speech to a lower standard of scrutiny than non-commercial speech is that there is a "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech."[149] But where the called party has already consented to being called – as it must have under the TCPA – we are already beyond the point of "proposing" a commercial transaction. The parties have already agreed that one may call the other for the purposes of conducting that transaction. This is not unsolicited commercial speech but rather consensual speech between adults who have indicated a willingness and desire to engage with one another.

The arbitrariness of the FCC's approach to consent under the TCPA is demonstrated by the differential consent requirement for information and commercial calls to wireless phones. The purpose of the different consent regimes is not to narrowly tailor the implementation of the TCPA to minimize the impacts on speech. It is to harmonize the FCC's TCPA rules with the FTC's telemarketing rules, which require written consent prior to placing telemarketing calls to any number on the Do-Not-Call list.[150] There are certainly virtues in harmonizing regulations, but those virtues do not relate back to or otherwise advance the privacy interests that underlie the TCPA.

The FCC's reassigned numbers rule is similarly arbitrary. As described above, this rule implicitly preferences the rights of those who have been given a reassigned telephone number over the rights of those who have consented to receiving calls on their (non-reassigned) telephone number. In the Order

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adopting this rule, the Commission does not so much as acknowledge that its rule affects individuals who have consented to receiving calls, let alone attempt to quantify the relative effects this rule has on those who have been given a reassigned number and receive unconsented-to calls as a result compared to the effects on those will lose the opportunity to engage with those from whom they have consented to receive calls because of the one-call safe harbor. The failure to even consider these relative effects should be fatal to the FCC's rule.

There are, and the government controls, less restrictive means of addressing robocalls

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

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

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

One simple thing that the Commission can do – which it mercifully *is* in the process of doing – is to allow telecommunications companies to block known scam calls.[151] Scam calls regularly use spoofed Caller-ID information, transmitting a fake phone number instead of the caller's real number. Telephone carriers can easily identify most of these faked phone numbers and could easily block them at the network level. This solution is feasible today, lacking only the FCC's permission.

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

Similarly, the problem of reassigned phone numbers is fully within the FCC's control – indeed, it is a problem of the FCC's own making. Telephone carriers reassign phone numbers when they do not have previously-unassigned numbers to assign customers. Previously-unassigned numbers are doled out to carriers by the North American Numbering Plan Administration (NANPA), an entity operated under contract for the FCC. NANPA and the FCC determine who gets new phone numbers and at what time. They also have the authority to regulate the use of those numbers, including their reassignment. In other words, the government itself could largely address the reassigned number problem by allocating more new numbers or imposing rules to govern how numbers are reassigned. Here, too, the FCC is

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taking positive steps, having recently adopted a Notice of Inquiry soliciting comments on a proposal to implement a database of reassigned numbers that would be updated on a daily basis.[152]

Other technological solutions to the robocall problem would require technological changes to the architecture of the telephone network. Over the past decade many in the telecommunications industry have sought to transition the traditional Public Switched Telephone Network – which today is largely the same as it was at the time the TCPA was adopted – to a modern, IP-based, digital network.[153] This process has been dramatically slowed by the FCC itself and advocacy groups seeking to preserve the legacy network for various interests.[154]

Fortunately, here too the FCC has recently embraced proposals to modernize aspects of the telephone network in light of, and to address concerns about, the robocall problem, having recently adopted a Notice of Inquiry soliciting comments on new authentication technologies that would make it dramatically more difficult to forge caller ID information and that would give called parties much more control over the calls that they receive.[155] A modernized network could incorporate myriad features that would help to address the problem of robocalls without the need for blunt regulations like the TCPA. For instance, it could enable strong authentication of calling parties such as now under consideration by the FCC – a super-Caller-ID of sorts, that prevents spoofing but that also provides authenticated text-based identification of a caller. It could enable coding of calls, so that callers could signal the nature of the call (e.g., friend/family, professional, political, informational, customer service, commercial offer, etc.) in a way that would minimize any privacy impact on call recipients. Or it could even incorporate brief text descriptions of the purpose of a call into the call information itself, allowing called parties to know the purpose of the call without needing to answer it. None of these technologies is particularly sophisticated or complicated – arguably the FCC should have mandated their adoption years ago. Instead, it has stepped in the way of the market, preventing such technologies from being developed and deployed.

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

V. Conceptual Puzzles Prompted by the TCPA's Regulation of Speech

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

This context of technological change raises questions that are more challenging than those relating to the TCPA's ongoing vitality under the First Amendment – question that also raise more fundamental questions about regulation in technologically dynamic settings. The first question stems from the government's role in regulating the design and capabilities of telecommunications networks: but for government regulation of how telephone networks operate, carriers would likely have long-ago

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implemented network features to resolve much of the robocall problem. Can the government impose speech-restrictive rules to address conduct that would be less problematic for the government's own regulation?

A second question considers the privacy rationale supporting adoption of the TCPA – indeed, the idea that the government has an interest in protecting the sanctity of the home is both the principal legislative justification for the TCPA as well as the most substantive defense offered by the FCC in its TCPA orders.[156] As discussed above, modern technology already does, and dramatically further could, reduce the privacy-invasive aspect of unsolicited telephone calls. Perhaps more interesting, though framed as protecting the *sanctity of the home*, the TCPA really protects the *sanctity of the phone*. This represents a silent but important shift in the scope of protection, assuring that individuals be free from unwanted contact by third parties not merely when at home but also while out and about in the public world and otherwise engaged in the bazaar of ideas.

Both of these issues – the regulation of speech to address problems of the government's own making and the *sub silentio* expansion of protection of the home – are discussed below.

[NOTE: The discussion that follows is still an early draft. Feedback is very welcome!]

The government cannot regulate speech to curtail a problem of its own creation

As discussed above, one of the most important, and least appreciated, aspects of the contemporary problem of robocalls is the extent to which it is a problem of the government's own making.[157] The FCC has long regulated the operation of the telephone network, from technology standards to interoperability and interexchange requirements to number assignment. It is thanks to government regulation that aspects of the telephone network relevant to the problems the TCPA is intended to address is remarkably similar today to the network in use at the time the TCPA was drafted.

Today the FCC is considering various changes that will improve the resilience of the telephone network to practices such as unwanted phone calls. Authentication technologies like STIR/SHAKEN, permission to block known-spoofed numbers, and other technological improvements will, on the one hand, dramatically reduce the ability of these callers to engage in problematic practices and, on the other hand, give consumers greater information about and control over the calls that they receive.

Even as the technology is unquestionably improving, the fact of the government's role in these improvements raises questions about the propriety of the underlying TCPA. It would be very difficult, for instance, for the TCPA to survive review under strict scrutiny: one cannot colorably say that a regulation is the least restrictive means to achieving a government purpose if the government controls alternative, less restrictive means, to achieve it.[158]

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

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

But there is an even greater problem with the approach that has historically been effectively mandated by regulation: compared to alternatives it conflicts with the core privacy rationale proffered by Congress to justify the TCPA. As discussed in more detail below, the core purpose and legal justification for the TCPA is to "protect the privacy interests of residential telephone subscribers." This purpose is supported by longstanding understandings – and matching precedent – that individuals have substantial interests in the sanctuary of their home.[159] The cases supporting this idea, however, offer a more attenuated understanding of the sanctity of the home than simply that it is a sanctuary from the marketplace of ideas. Rather, they more carefully balance the First Amendment rights of individuals to engage in speech against the rights of individuals to be free from unwanted speech in the sanctuary of their home. The key case – the one cited by the FCC in its orders implementing the TCPA – is *Rowan v. U.S. Post Office Department*, in which the Supreme Court upheld a stature allowing homeowners to require that their names be removed from mailing lists.

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

The FCC has approached the telephone network from a different perspective. Rather than thinking about how to design the telephone network to give individuals greater information about and control over the calls that they receive, the Commission has thought of the network as a common carriage system in which all calls are to be carried on a non-discriminatory basis. In other words, the FCC has focused on the carrier side of the industry, making sure that telecom companies reliably carry all calls, instead of the consumer side of the industry. Of course, these two perspectives are not necessarily in conflict – the FCC could work (and today increasingly is working) to ensure both that carriers carry all legitimate calls and that they deploy technologies that give consumers greater information about and control over those calls.

But therein lies the rub: the TCPA assumes the carrier-centric model in which consumers have only very coarse control over the calls that they receive. Approaching the question from either the perspective of

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narrow tailoring of that of *Rowan*'s preference for individuals' control over what information he or she receives, the TCPA is unduly burdensome.

The sanctuary of the home vs. the sanctuary of the phone

The core purpose of, and arguably core legal justification for, the TCPA is to "protect the privacy interests of residential telephone subscribers."[160] The legal basis for this goal is situated in the understanding of the sanctity of the home as sanctuary. The Court has long recognized a distinction between the public and private spheres. The life of the American individual in the public sphere is characterized by the marketplace of ideas, a marketplace in which there is no partial participation. But once in the sanctuary of the home, that same individual is shielded from the demands and curiosities of the public. In the American tradition this protection runs most strongly against intrusion by the government itself.[161] But that protection also run against unwelcome intrusions by private actors. Thus, in *Rowan* the Court upheld a state requiring advertisers to allow homeowners to opt-out of receiving further mailings from them; in *Martin v. City of Struthers* the Court expressed that a statute requiring solicitors to abide by "no solicitors" is Constitutionally permissible; in *Meese v. Keene* the Court upheld labelling requirements on certain political mailings; and in *Pacifica* the Court upheld content restrictions on broadcast television on the grounds that individuals could not otherwise prevent unwanted content from entering their homes.[162] These and other cases are all premised on the idea that individuals have a right to be secure from unwelcome speech within the sanctuary of the home – and that the government plays an important function in helping to secure that right.

But modern communications technology, including wireless telephones and the Internet generally, is arguably eroding the boundaries of the home.[163] It is ever harder to keep a clear delineation between what is outside of and what falls within the boundaries of the home. The Internet is the modern public square,[164] but most people access that public square on computers or mobile phones, from the comfort of their couch. And those same devices, especially cell phones – devices that increasingly define much of our private lives – come with many of us wherever we go. One need only watch a few minutes of Internet videos of people walking into obstacles or falling into holes while engrossed in the private world of their cell phones to understand how completely the experience of these devices can insulate one from the public marketplace of ideas.[165]

Others have endeavored to explore how our changing technological reality alters the legal distinctions drawn between the public and private spheres.[166] But technology has continued to change, including in sometimes dramatic ways, since even the most recent of these efforts has been undertaken and new, or perhaps ongoing, attention is needed – attention beyond that which can be fully offered here.[167]

The focus here is necessarily cabined to the "sanctuary of the home" justification for the TCPA.

Turning first to the question of the sanctity of the home *qua* home, the Court has never recognized the boundaries of the home as inviolate. To the contrary, it has expressly struck down statutes that treat it

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as such.[168] The balance struck by the Court is rather more nuanced, captured by Justice Black: "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation or a free society that … it must be fully preserved."[169] This balance carries two competing factors: the need to be able to distribute information to every citizen, and the ability of those citizens to specify the terms on which he receives it. These factors have an inverse relationship. The less ability individuals have to control how and what information they receive, the greater their need for sanctuary from unwanted information. Thus, and as discussed above, to the extent that technologies that offer individuals greater control over the telephone calls their received are implemented – and especially to the extent that the government has influence over implementation of such technologies – the less justification there is for the TCPA.

The second question is conceptually more difficult: as Americans increasingly turn from residential landline telephones to personal wireless telephones, the scope of the TCPA's protections are changed from the "sanctuary of the home" to the "sanctuary of the phone." This chance is far from inconsequential: the defining characteristic of the mobile phone is that it is untethered from the home. This expansion in scope thus expands the protection afforded by the TCPA beyond that which has previously been considered – let alone permitted – by the Court. Making matters even more complicated, while the immediate response may be to assume that this is problematic (anything falling outside of the sanctuary of the home generally being seen as fair game in the public sphere), the Court has offered some hints that the protection afforded inside the home may not be confined to the home's walls. For instance, the court has noted that "radio [listened to in the home] can be turned off, but not so the billboard." And in discussing its holding in *Pacifica*, the Court in *Bolger* explained that mail delivered to the home (as in *Rowan*) is "far less intrusive and uncontrollable" than the broadcast programming in *Pacifica*. Importantly, while *Pacifica* was expressly concerned with the receipt of programming within the home, concern about "intrusive[ness] and uncontrollab[ility]" apply strongly to wireless phones wherever they are located. Just as one may retreat to the sanctuary of the home to escape the public sphere, one may also retreat to the public sphere to escape the banality of the living room TV – but with the mobile phone, it may follow us no matter which sphere were transiently occupy, so the intrusion of unwanted calls is inescapable. Just as the receipt of mail is less intrusive than the receipt of broadcast television, the receipt of broadcast television (which one experiences only in their home and while watching a powered-on television) is less intrusive than the receipt of unwanted telephone calls on a mobile phone (which one almost always has by their side and almost always is powered on).

This, of course, is an overstatement – just like the radio or television, one may turn off their phone or leave it at home when the go out. But this is a high cost to pay, at least for some, to avoid unwanted telephone calls. The modern phone, in particular, is more than a telephone.[170] It is a constant connection to the modern public square.[171] One could argue that the time has come to redelineate the boundaries of an individual's life, adding a "connected sphere" to the public and private spheres. Just as one should have sanctuary in their home, one should not be forced to disconnect from their online, connected-sphere, life to avoid the burden of intrusive and uncontrollable invasions. Alternatively, one could treat the mobile phone as an extension of the home – surely that is how many implicitly think of it.

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On the other hand, one is exposed to intrusive, uncontrollable, and unwanted invasion any time they leave the sanctuary of the home. That is the nature of the public sphere. It is a chaotic bazaar of distraction and ideas. The fact that one vector by which these distractions may vie for one's attention is their mobile phone – a device that is readily ignored and that provides as least minimal information indicating the character of a given call[172] – seems insufficient basis for reconceptualizing the relationship between the public and private spheres.

VI. A Better Approach

None of this is to say that there is nothing that the government can or should do to address the very real problem of robocalls. For instance, there are content-neutral rules that could be put in place; the government can regulate speech that is not protected by the First Amendment; and there are non-speech regulations that could be put in place. Several such approaches are discussed below. The purpose of this discussion is not to be exhaustive or to put forward specific policy proposals. Rather, it is more modestly to demonstrate the scope and viability of regulations to address the contemporary problem of robocalls that can be implemented in ways that are not onerously burdensome of protected speech.

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

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

In order to ensure that government regulation of unsolicited calls is implemented by appropriate means, any enforcement action against a caller premised on the manner in which they made the call should be subject to a defense challenging the constitutionality of the manner in which the regulation regulates speech. Importantly, this effectively precludes private causes of action that are premised upon the means by which a call was made – any suit challenging the manner of speech would need to be brought by the government (or provide for government involvement in challenging the defense). To take one

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example, prior to the advent of the Do-Not-Call registry, autodialers may have been inherently problematic; but subsequent to the advent of the Do-Not-Call registry autodialers that ignore the registry are inherently problematic, whereas those that do adhere to it a far less problematic. Yet nothing about the TCPA or the FCC's implementation of it has incorporated this fundamental change in the landscape – from the FCC's perspective all autodialers are the same no matter whether a given one makes use of the Do-Not-Call registry.

This does not mean that there can be no private cause of action for problematic calls. For instance, fraudulent or deceptive calls likely are not constitutionally protected speech. Such calls could include calls using spoofed Caller-ID information, made without consent to individuals on the Do-Not-Call registry, or made under pretextual circumstances to fraudulently establish consent. The most important role for the government to play in ensuring against such harms, either through government or private action, is to ensure development of both structural and conduct remedies to protect against them. This may include, for instance, criminalizing the spoofing of Caller-ID or other authentication information except where necessary to protect the caller from certain delineated harms. But it would also include requiring the development and implementation of more robust network-level identification and authentication mechanisms.

By and large, the clearest role for the government in addressing the problem of problematic phone calls is using its authority to regulate telecommunications services to ensure that those services are designed and implemented in ways that give individuals and telecommunications carriers the tools needed to identify and respond to unwanted calls. The most basic and most startling part of the robocall problem is that these calls persist because the telephone network facilitates them. Given the state of the technology as it existed at the time the TCPA was adopted, there was little better that could be done – in its 1992 TCPA Order, the Commission considered alternative technological and regulatory approaches to mitigating the impacts of robocalls and came up empty-handed. But as technology has advanced dramatically in the years since, the FCC has continued to think about robocalls from the technological mindset as it existed in 1991. Indeed, the FCC itself has prevented the networks from taking action against callers that are known to be problematic – it has not been until the past year that the Commission has seriously considered allowing telephone carriers to implement technology to block known harmful callers or to empower called parties to take greater control of the time, place, and manner in which calling parties can intrude upon their solitude by making their phones ring.

The flipside of this observation is that the government should never prohibit or interfere with consensual calls. Rather, a more productive (and, incidentally, constitutional) task would be to facilitate the development of more sophisticated features to allow both calling and called parties to establish, demonstrate, and revoke consent. Again, these are features that are best implemented at the network level, and they are therefore well within the FCC's core competencies to work with industry to develop and implement.[173]

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

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

Conclusion

Unwanted phone calls are one of the most detested common occurrences in modern American life. With over 2.4 billion robocalls placed monthly, each customer is likely to receive about 10 of these calls every month, with some receiving far more.

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

The TCPA is a law that regulates speech. As such it is subject to First Amendment scrutiny. Historically the statute and the FCC's regulations implementing it have survived this scrutiny. Cases affirming the TCPA have generally done so under intermediate scrutiny, finding that the government had in significant interest in its asserted goal of protecting consumers from the privacy invasion of unwanted phone calls, and finding the statute and regulations sufficiently tailored given the technological and economic architectures of the telephone network.

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

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

Beyond the traditional First Amendment problems the TCPA faces, it raises other concerns. The modern problem of unwanted calls is particularly pernicious because the telephone network has not been permitted by the FCC to keep technological pace with other communications technologies – and conversely it could be largely mitigated through the adoption of relatively common contemporary security technologies. The FCC's role in regulating the telephone network means that the TCPA works by restricting speech in order to remedy a problem largely of the government's own design. This is clearly problematic. And as technology has changed, the conception of privacy that animates the TCPA – the idea of the sanctity of the home – has silently transformed into a privacy right far broader than anything that has been previously recognized.

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