Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem

I. INTRODUCTION

If you have a telephone in your home, it is likely you have been interrupted at a highly inopportune moment by an overeager telemarketer's "courtesy" call.[1] You are in good company—in 1990, Congress found that eighteen million Americans received telephone solicitation pitches each day.[2] While these calls generate substantial revenue[3] for telemarketers and those who employ them, many homeowners consider them to be anything but courteous.[4] According to one journalist, "unwanted calls . . . have transformed Alexander Graham Bell's marvelous invention into an instrument of torture in

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1. *See* VS Maniam, *Letter From America: Tightrope Walk for Bush*, STATESMAN (India), Jan 23, 2001, *available in* 2001 WL 4381410 (noting that the American Dialect Society chose "courtesy call," meaning "an unsolicited call from a telemarketer," as the most euphemistic term of 2000 at its January 2001 meeting). In using this terminology, commercial telephone solicitors would apparently have homeowners believe that calling them just as they sit down to dinner is a great favor, for which consumers should be thankful. In an episode of his NBC sitcom, however, comedian Jerry Seinfeld suggested otherwise. Consider the "Seinfeld method" for dealing with telemarketers:

> UNIDENTIFIED ACTRESS: Well, I . . .
> [SEINFELD]: I'm sorry. Excuse me one second.
> (PHONE RINGING)
> Hello.
> [TELEMARKETER]: Hi. Would you be interested in switching over to TMI long-distance service?
> SEINFELD: Oh, gee, I can't talk right now. Why don't you give me your home number and I'll call you later?
> (LAUGHTER)
> [TELEMARKETER]: Well, I'm sorry. We're not allowed to do that.
> SEINFELD: I guess you don't want people calling you at home.
> [TELEMARKETER]: No.
> SEINFELD: Well, now you know how I feel.

CNN Today: Several States Considering Legislation That Would Restrict Telemarketing (CNN television broadcast, Jan. 12, 2001) (transcript *available in* LEXIS, News, Transcript # 01011211V13) [hereinafter *CNN Today*].

2. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(3), 105 Stat. 2394, 2394. The entire Congressional Statement of Findings from the Telephone Consumer Protection Act is reprinted in a note following the codified version of the Act. *See* 47 U.S.C. § 227 note (1994).

3. Telemarketing generated more than $612 billion in sales last year. *See CNN Today*, *supra* note 1 (citing industry sources).

4. Studies show that only .1% of the population likes to receive unsolicited calls and 69% of people find telemarketing offensive. *See* Hilary B. Miller & Robert R. Biggerstaff, *Application of the Telephone Consumer Protection Act to Intrastate Telemarketing Calls and Faxes*, 52 FED. COMM. L.J. 667, 686 (2000) (citations omitted).

many households."[5]

The telephone has been called "a uniquely invasive technology" because it essentially "allows solicitors to come 'into' the home."[6] Many homeowners are particularly annoyed by telemarketing calls because, unlike junk mail or television commercials, the telephone cannot be ignored at leisure. It demands sudden, undivided attention—no matter how busy the consumer might happen to be when the phone rings.[7] Although some recipients of these calls do purchase the tele-peddled wares, many others have found the intrusion serious enough to warrant calls to governmental agencies. Bob Crawford, who heads Florida's Department of Agriculture and Consumer Services, has said that "'[c]omplaints about telephone solicitation calls are among the top consumer complaints received by our office.'"[8]

The consumers may be frustrated by telemarketing calls,[9] but this does not necessarily mean that the government can ban them. Any remedy to the problem of undesired unsolicited calls must balance the privacy interests of homeowners against the free expression interest of telemarketers.[10] According to Sherrie Marshall, a former commissioner at the Federal Communications Commission (FCC), "'[t]elemarketing, by its very nature, presents policymakers with two seemingly conflicting interests: those of responsible telemarketers trying to conduct their business, and those of consumers with legitimate expectations of privacy in their . . . homes . . . .'"[11] With this in mind, various governmental bodies—and even some private groups—have attempted to appease those consumers who are fed up with sales calls without infringing upon the rights of telemarketers. This Note examines what can be done, what is being done, and what *ought* to be done to help quell consumer unrest without arbitrarily crippling the telemarketing efforts of legitimate businesses.

While there may be no easy answer to the telemarketing problem, this Note argues that recent legislative efforts by states to compile lists of consumers who do not wish to

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5. Timothy B. Wheeler, *Bill Aims to Disconnect Telephone Solicitors: State Would Maintain a Do-Not-Call List*, BALT. SUN, Feb. 6, 2000, at 1A, *available in* 2000 WL 4858490 [hereinafter Wheeler, *Bill Aims to Disconnect Telephone Solicitors*].

6. Joseph R. Cox, Note, *Telemarketing, the First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL'Y 403, 420 (1996).

7. *See id.* at 404.

8. Matt Moore, *State Can Block Some Telemarketers - for a Price*, NEWS HERALD, Jan. 22, 1998, *available in News Herald: Local News* (visited Oct. 16, 2000) <http://www.newsherald.com/archive/local/tm012298.htm>.

9. *See, e.g.*, Al Martinez, *Sorry, Wrong Number*, L.A. TIMES, Jan. 7, 2001, at B1, *available in* 2001 WL 2450212 ("We're under assault . . . because all those cash-hungry companies out there don't give a rat's kazoo how much they intrude, as long as they make money. They don't care about our privacy, our safety, our stress rate or our homicidal tendencies.").

10. *See* Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 101 (1986).

11. *Communications, FCC Privacy Rules Will Balance Consumer, Business Interests, Marshall Says*, BNA DAILY REPORT FOR EXECUTIVES, May 20, 1992, *available in* LEXIS, News, BNA Daily Report for Executives.

receive unsolicited sales calls ("do-not-call lists") are a step in the right direction.[12] Part II briefly discusses the constitutional background of telemarketing regulation. Part III outlines current regulations and their drawbacks. Part IV focuses specifically on the do-not-call list solution, including the practical and potential constitutional limitations of no-call laws. Finally, Part V provides a summary and concludes that do-not-call legislation, while not a panacea for the telemarketing problem, offers greater promise than existing alternatives.

II. BACKGROUND ON THE REGULATION OF TELEMARKETING

Although a majority of the population favors restrictions on telemarketing,[13] and while some would probably applaud the eradication of the industry, any potential remedy must be fair to the interests and rights of telemarketers as well as consumers. Congress recognized as much when it enacted the Telephone Consumer Protection Act of 1991 (TCPA).[14] According to the related congressional findings, "[i]ndividuals' privacy rights . . . and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[15] This balancing of constitutional interests is surveyed in a 1986 article by Professor Mark Nadel.[16]

Professor Nadel begins his discussion by noting that the "constitutional right to privacy supports regulation protecting individuals against undesired unsolicited phone calls."[17] At the same time, the First Amendment protects the commercial speech of telemarketers.[18] Because free speech interests are at stake, the Supreme Court is unlikely "to tolerate broad bans on unsolicited [sales] calls."[19] Nevertheless, Nadel states, it is "possible that less drastic solutions exist."[20] One possible answer to consumer frustration might be to allow homeowners to somehow notify telemarketers that they do not wish to be called.[21] This solution would be similar to efforts by homeowners, cited with approval by the judiciary, to avoid being contacted by door-to-door solicitors.[22] Although

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12. These lists are referred to as "do-not-call" or "no-call" listings throughout this Note; states with do-not-call laws mandate that telemarketers obtain and honor them.

13. *See, e.g.*, Miller & Biggerstaff, *supra* note 4, at 686 (noting that published studies indicate that 75% of people favor telemarketing restrictions).

14. 47 U.S.C. § 227 (1994).

15. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394.

16. *See generally* Nadel, *supra* note 10, at 101–06 (discussing the interplay between privacy rights and the freedom of expression).

17. *Id.* at 101.

18. *See id.* (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

19. *Id.* at 105.

20. *Id.*

21. The TCPA and state no-call statutes, both discussed *infra*, are presumptively legal under this rationale.

22. The Supreme Court, in dicta, has distinguished between local ordinances that impose total bans on

the Supreme Court has invalidated blanket restrictions on door-to-door canvassing, it has noted that ordinances providing for the prosecution of canvassers who ignored "no solicitors" signs erected by homeowners are presumptively constitutional.[23]

Reasonable regulation of telemarketing—and door-to-door solicitation, for that matter—is unlikely to trigger intense constitutional debate. According to Professor Nadel, "[c]ourts have consistently held that an individual's privacy right is paramount when he is at home."[24] Furthermore, the Court has stated that "'in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.'"[25] While telemarketers do have a legitimate interest in marketing their products and services, that interest is probably insufficient to outweigh the consumer's privacy interest[26]—provided that he is using a private telephone line within his own home.[27]

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door-to-door solicitation and those that merely give individual homeowners the right to notify solicitors that they do not wish to be bothered. In *Martin v. City of Struthers*, the Court struck down a Struthers, Ohio ordinance that made it unlawful for solicitors """distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing."'" Martin v. City of Struthers, 319 U.S. 141, 142 (1943) (quoting city ordinance). The Court recognized that the law traditionally "punishes persons who enter onto the property of another after having been warned by the owner to keep off," *id.* at 147, but found that the Struthers ordinance was unconstitutional because it "makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away," *id.* at 148.

In its opinion, the *Martin* Court noted that "[t]he National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed." *Id.* Although the Court reserved judgment as to the wisdom or validity of that specific proposal, *see id.* at 148 n.13, it found no general problem with such proposals because "[t]his or any similar regulation leaves the decision as to whether [solicitors] may lawfully call at a home where it belongs—with the homeowner himself" *Id.* at 148. According to the Court, "[a] city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . ." *Id.* Similar to these no-solicitation ordinances, do-not-call legislation enables a governmental body to punish solicitors who telephone homeowners in defiance of their previously expressed will. Under the Court's logic in *Martin*, do-not-call proposals aimed at curbing telephone solicitation appear reasonable.

23. *See* Nadel, *supra* note 10, at 105 n.34 (citing Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 639 (1980)). In *Village of Schaumburg*, the Court struck down an ordinance that prohibited door-to-door or on-street solicitation of charitable contributions by charities that did not use at least 75% of the donations they received for charitable purposes. The Court did so because the challenged legislation was "not directed to the unique privacy interests of persons residing in their homes because it applie[d] not only to door-to-door solicitation, but also to solicitation on 'public streets and public ways.'" *Village of Schaumburg*, 444 U.S. at 638–39. Nevertheless, the Court noted, "[o]ther provisions of the ordinance, which [were] not challenged . . . , such as the provision permitting homeowners to bar solicitors from their property by posting signs reading 'No Solicitors or Peddlers Invited,' . . . suggest the availability of less intrusive and more effective measures to protect privacy." *Id.* at 639 (citing Rowan v. Post Office Dep't, 397 U.S. 728 (1970); Martin v. City of Struthers, 319 U.S. at 148).

24. Nadel, *supra* note 10, at 102 (citations omitted).

25. *Id.* (quoting FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (citing Rowan v. Post Office Dep't, 397 U.S. 728 (1970)).

26. *See id.* at 104 (noting that "privacy interests may prevail over speech interests in the homes of recipients").

27. Current legislation does not restrict telemarketers from calling businesses. *See Private Citizen, Inc.* -

Telephone calls may be a relatively cheap and effective way of marketing products to consumers.[28] Nevertheless, the Ninth Circuit has said "'[t]hat more people may be more easily and cheaply reached . . . is not enough to [call forth] constitutional protection for what those charged with public welfare reasonably think is a nuisance . . . when easy means of publicity are open.'"[29] Accordingly, the Constitution would not seem to bar legislative efforts to rein in telemarketers.[30] In fact, just the opposite seems true. According to Jennifer Radner, "[t]he [Supreme] Court appears to be extremely vigilant in shielding the sanctity of the home from unwanted communications . . . as long as the statutorily approved method of preventing the communication involves some affirmative action by the homeowner."[31] All of the regulations discussed *infra* require affirmative action by consumers and, therefore, should survive any constitutional challenges that telemarketers might bring under the First Amendment.

III. CURRENT ATTEMPTS AT TELEMARKETING REGULATION

Telemarketing is now "a booming national industry."[32] According to Congress, "[t]he use of the telephone to market goods and services to . . . home[s] . . . has become pervasive" due to increasingly "cost-effective telemarketing techniques."[33] The resulting increase in telemarketing activity in recent years[34] has spurred numerous efforts to protect consumer privacy—some of which have been more successful than others. Thus far,

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The Telephone Consumer Protection Act of 1991: A Consumer's View (last modified Mar. 6, 2001) <http://www.private-citizen.com/tcpa.html> [hereinafter *A Consumer's View of the TCPA*]. Professor Nadel notes that it does not seem desirable to regulate unsolicited telemarketing calls to businesses because there is a lesser degree of privacy at the workplace, and because receptionists can screen out undesired calls. *See* Nadel, *supra* note 10, at 109.

28. *See* Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Statute or Law Pertaining to Telephone Solicitation*, 44 A.L.R. 5th 619, 627 (1999).

29. Shari A. Kolnicki, Comment, *The Telephone Consumer Protection Act and Its Burden on Small Business: An Evaluation of the Law and Its Ramifications on Telecommunication Advances*, 28 CAP. U. L. REV. 223, 229 (1999) (quoting Moser v. FCC, 46 F.3d 970, 975 (9th Cir. 1995) (quoting Kovacs v. Cooper, 336 U.S. 77, 88–89 (1949)).

30. Congress concluded as much in 1991, when it found that "[t]he Constitution does not prohibit restrictions on commercial telemarketing solicitations." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(8), 105 Stat. 2394, 2394.

31. Jennifer L. Radner, Comment, *Phone, Fax, and Frustration: Electronic Commercial Speech and Nuisance Law*, 42 EMORY L.J. 359, 384 (1993).

32. Warren Fiske, *A Call To Limit Telemarketers: Lawmakers See More Support for "No-Call" Legislation*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, Va.), Jan. 23, 2000, at A1, *available in* 2000 WL 5109844.

33. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(1), 105 Stat. at 2394; *see also* Ross D. Petty, *Marketing Without Consent: Consumer Choice and Costs, Privacy, and Public Policy*, 19 J. PUB. POL'Y & MARKETING 42, 45 (2000) ("[T]echnological innovations, combined with the lowering of relative costs of telephoning compared with alternatives such as mass media advertising or door-to-door sales, have led to invasion of the telephone by marketers and the imposition of attendant costs on consumers.").

34. Congress found that 300 thousand solicitors were engaged in telemarketing in 1990. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(3), 105 Stat. at 2394. In the decade since 1990, that figure has increase by more than ten times; the telemarketing industry currently provides 3.5 million jobs. *See* Fiske, *supra* note 32.

telemarketers, consumer groups, Congress, and state legislatures have all tried to address consumer frustration with unsolicited calls.

A. Voluntary Self-Regulation by the Industry

The Direct Marketing Association (DMA), a New York-based national trade organization serving the direct marketing field, offers a free service to consumers who wish to block commercial telephone solicitations.[35] As part of its effort to preempt legislative action in the area of telemarketing, the DMA created the Telephone Preference Service (TPS).[36] Consumers may write to DMA and ask to be included on the TPS no-solicitation list,[37] which is used by approximately 4800 member businesses nationwide.[38] According to DMA lobbyist Pat McHenry, businesses that belong to the DMA ordinarily heed consumer requests not to be called.[39]

The DMA's efforts in this area seem logical enough. Many commentators believe it is in the industry's best interest to avoid calling those consumers who are bothered by telemarketing calls.[40] As Professor Nadel points out, "sellers do not have unlimited amounts of time and telephone calls are not free."[41] Nevertheless, nothing compels a particular telemarketing firm to use the TPS list or to honor the wishes of those consumers who have contacted the DMA and asked to be included. According to Nadel, "the TPS is informally run and compliance is voluntary."[42] The only penalty a DMA member who ignores consumer requests faces is that of expulsion from the association.[43] As these limitations indicate, the TPS list is an incomplete solution to the unsolicited sales call explosion.

The incomplete protection that the TPS affords consumers is further evidenced by the DMA's description of its own service: the DMA asserts only that the TPS will *assist* participating consumers in decreasing the number of national commercial calls these

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35. *See* Wheeler, *Bill Aims to Disconnect Telephone Solicitors*, *supra* note 5.

36. *See* Nadel, *supra* note 10, at 119.

37. *See id.*; *see generally How to Get Off a Telephone List - Consumer Assistance* (last modified Feb. 14, 2000) <http://www.the-dma.org/consumers/offtelephonelist.html>.

38. *See* Wheeler, *Bill Aims to Disconnect Telephone Solicitors*, *supra* note 5. Another industry group, the American Telemarketing Association ("ATA"), also supports the TPS. The ATA recommends that its 1200 members use the TPS no-solicitation list for removing consumers who do not wish to receive telephone solicitations. *See* STAFF OF SUBCOMM. ON TELECOMMUNICATIONS AND FINANCE, HOUSE COMM. ON ENERGY AND COMMERCE, 103D CONG., 2D SESS., REPORT CARD ON COMPLIANCE WITH THE TELEPHONE CONSUMER PROTECTION ACT OF 1991 BY TOP COMPANIES IN THE TELEMARKETING INDUSTRY 10 (draft Comm. Print 1994), *available in Filed Comment of Rep. Markey: Notice Filed in Proceeding 92-90* (received by FCC Dec. 2, 1994) <http://www.fcc.gov/searchtools.html> [hereinafter MAJORITY REPORT].

39. *See* Wheeler, *Bill Aims to Disconnect Telephone Solicitors*, *supra* note 5.

40. *See, e.g.*, Joseph P. Fried, *Telemarketers Get an Earful of Rejection*, N.Y. TIMES, Nov. 13, 2000, at B1, *available in* LEXIS, News, The New York Times (noting that some telemarketers welcome no-call lists because they reduce time-wasting calls to people who will be unreceptive to attempts at solicitation).

41. Nadel, *supra* note 10, at 123.

42. *Id.* at 120.

43. *See* Wheeler, *Bill Aims to Disconnect Telephone Solicitors*, *supra* note 5.

consumers receive.[44] The FCC has also recognized this difficulty. According to the FCC, registration with the DMA should reduce the number of unsolicited calls placed to a consumer's home, but may not stop all unwanted calls.[45] This limitation should be particularly evident given that the combined membership of the DMA and the American Telemarketing Association (many of whose members also use the TPS list) includes only 6000 companies,[46] whereas Congress found ten years ago that more than 30,000 businesses engage in telemarketing.[47] Admittedly, some of these other businesses may be notified of consumers' wishes to be left alone through the efforts of consumer groups.

B. The Role of Consumer Groups

A 1994 congressional staff report[48] recommended that telemarketers use the do-not-call list compiled by Private Citizen, Inc. as an edit against their own no-call lists,[49] adding any names to their company's list that appear on Private Citizen's. Private Citizen, the self-described first and largest organization in America specializing in cutting junk calls and junk mail, maintains a no-solicitation directory and provides consumer members with a newsletter and information on telemarketing laws.[50] The Private Citizen directory, sent to the headquarters of over 1500 local and national telemarketing firms, is designed to provide telemarketers with the information they need to avoid calling people on the list[51] in a way that prevents telemarketers from using it as solicitation list.[52] According to Private Citizen, its members report a huge drop in commercial solicitation calls.[53]

The decrease in sales calls experienced by Private Citizen members could be due, in part, to the likelihood that most reputable telemarketing firms will honor consumer re-

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44. *See How To Get Off a Telephone List - Consumer Assistance*, *supra* note 37.

45. *See Consumer News: What You Can Do About Unsolicited Telephone Marketing Calls and Faxes* (last modified Oct. 27, 1998) <http://www.fcc.gov/ccb/consumer_news/unsolici.html> [hereinafter *Consumer News*].

46. *See supra* note 38 and accompanying text.

47. *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(2), 105 Stat. 2394, 2394.

48. *See* MAJORITY REPORT, *supra* note 38, at 9.

49. Individual telemarketers, under federal law, must maintain lists of customers who have specifically requested not to be called. *See infra* Part III.C (discussing the requirements of the TCPA and the FCC's Telemarketing Sales Rule).

50. *See Private Citizen, Inc. - Home Page* (last modified Mar. 11, 2001) <http://www.private-citizen.com>.

51. *See Private Citizen, Inc. - The Do-Not-Call Directory* (last modified Mar. 6, 2001) <http://www.private-citizen.com/directory.htm>.

52. The organization's website suggests that some telemarketers actually use the DMA's TPS list as a solicitation tool, which is possible in light of the detailed information consumers must provide to be included on the TPS list. *See The DMA - A.K.A. the Discourteous Marketing Association* (last modified Oct. 6, 1998) <http://www.private-citizen.com/lobby.htm>. Such misuse is potentially prosecutable under the Telephone Consumer Protection Act of 1991 and the Telemarketing Sales Rule. *See generally infra* Part III.C.

53. *See Private Citizen, Inc. - Home Page*, *supra* note 50.

quests to be left alone.[54] For these firms, the simple fact that a consumer has made the effort to have his or her name listed in a no-solicitation directory such as Private Citizen's is enough to dissuade the firm from calling that consumer. Of course, there is no guarantee that *all* telemarketers will cease calling consumers out of kindness alone. There will always be some telemarketers that give their colleagues a bad name.[55] Accordingly, current federal law[56] provides penalties for telemarketers who fail to heed no-call requests from specific consumers.[57] Private Citizen uses the federal law to its members' advantage, providing them with information about their legal rights against intrusive telemarketers.[58] Apparently, those efforts have been paying off: Private Citizen members have collected $700,000 in fines and settlements from telemarketers since 1996.[59]

While some consumers have been able to block calls from certain telemarketers by writing to the DMA or joining a group such as Private Citizen,[60] these no-call lists have not been enough to satisfy a public fed up with sales calls. Not every telemarketer, after all, belongs to the DMA, and not every citizen pays membership dues to Private Citizen. Even if everyone *did* belong to Private Citizen, people would continue to receive calls from telemarketers to whom the organization had not sent directories. Federal legislative efforts allow consumers to notify telemarketers directly of their desire not to be called, but, as the next section will show, federal telemarketing laws are not without their weaknesses.[61]

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54. *See, e.g., supra* note 39 and accompanying text.

55. *See, e.g.*, Nadel, *supra* note 10, at 120 (citing one telemarketer's concern that "[t]here will always be sweatshop type operations which will continue to hurt the credibility of the rest of us until the regulators step in").

56. Private Citizen's compiles its directory with the Telephone Consumer Protection Act in mind; inclusion on the list establishes a member's do-not-call request pursuant to the TCPA. *See Private Citizen, Inc. - The Do-Not-Call Directory*, *supra* note 51.

57. Telemarketers who call an individual within 12 months a do-not-call request may have to pay up to $500 in damages. If a court finds that a telemarketer willfully or knowingly violated the TCPA, it may award triple damages of up to $1500. *See* Robin Leonard, *Making Telemarketers Pay You* (last modified Mar. 14, 2001) <www.nolo.com/encyclopedia/articles/ctim/nn199.html>; 47 U.S.C. § 227(c)(5) (1994).

58. *See supra* note 50 and accompanying text. The group also offers a book on how to sue telemarketers at a reduced price to its members. *See 'So You Want to Sue a Telemarketer' - A Book by Private Citizen, Inc.* (last modified Dec. 1, 2000) <http://www.private-citizen.com/book.htm>.

59. *See Private Citizen, Inc. - Home Page*, *supra* note 50. While Private Citizen compiles a no-call list and mails it to telemarketers, members themselves are ultimately responsible for prosecuting solicitors who do not heed their do-not-call requests. See *infra* Part III.C for discussion of the federal statutes that make this possible.

60. Getting one's name included in the Private Citizen directory is not free: the organization charges a $20 membership fee. *See Private Citizen, Inc. - Home Page*, *supra* note 50.

61. Private Citizen's website calls the federal Telephone Consumer Protection Act of 1991 "more silliness than substance" and asserts that "it has so many loop-holes . . . [that] telemarketers can drive a boiler-room through it." *A Consumer's View of TCPA*, *supra* note 27. The Telemarketing Sales Rule, because its provisions relating to the establishment of do-not-call lists are similar to those of the TCPA, arguably suffers from the same deficiencies. *See generally infra* Part III.C.2.

C. Federal Law on Telemarketing

In 1991, Congress found that consumers were "outraged over the proliferation of intrusive . . . nuisance calls to their homes from telemarketers."[62] Since then, the federal government has taken two significant actions to protect consumer privacy from sales calls. These forays in federal telemarketing regulation are the TCPA[63] and the Federal Trade Commission's Telemarketing Sales Rule.[64] Although the regulations focus on a number of telemarketing-related problems,[65] both include provisions designed to empower consumers who wish to stop repeated calls from individual solicitors.

1. The Telephone Consumer Protection Act of 1991[66]

In enacting the TCPA, "Congress took the first significant step in curbing what many perceived as an onslaught of telemarketing that had invaded American homes."[67] An issue of particular concern at the time was the use of automated, prerecorded telephone calls to private residences.[68] Congress responded by making it a violation of federal law for any person "to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . . ."[69] While live-operator sales calls are likely just as annoying to consumers as prerecorded messages,[70] Congress chose not to impose similar blanket restrictions on these calls. Instead, it authorized the FCC to initiate a rulemaking proceeding to determine the best way to protect residential privacy rights from potential

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62. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(6), 105 Stat. 2394, 2394.

63. 47 U.S.C. § 227 (1994).

64. 16 C.F.R. pt. 310 (2000).

65. The TCPA, for example, regulates the use of automatic telephone dialing systems and unsolicited facsimiles. *See* 47 U.S.C. § 227(b)(1). The Telemarketing Sales Rule includes provisions related to deceptive telemarketing practices, *see* 16 C.F.R. § 310.3, and various abusive telemarketing acts, *see* 16 C.F.R. § 310.4. Repeatedly calling a consumer who has requested to be placed on a no-call list is only one of the contemplated abusive acts. *See* 16 C.F.R. § 310.4(b)(1).

66. See *Telephone Consumer Protection Act* (last modified Jan. 19, 1999) <http://www.fcc.gov/ccb/consumer_news/tcpa.html> for more information, including instructions on where and how to file complaints; *see also FCC Consumer Facts: What You Can Do About Unsolicited Telephone Marketing Calls and Faxes* (last modified Jan. 8, 2001) <http://www.fcc.gov/cib/consumerfacts/Nofaxes.html>.

67. Miller & Biggerstaff, *supra* note 4, at 668.

68. According to the congressional findings accompanying the TCPA, Congress determined that telephone subscribers "considered automated or prerecorded telephone calls . . . to be a nuisance and an invasion of privacy." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(10), 105 Stat. 2394, 2394.

69. 47 U.S.C. § 227(b)(1)(B) (1994). Exceptions to the prohibition on using prerecorded messages include instances when the third party has consented to receiving the message, there is an emergency, or the FCC creates an exemption pursuant to its rulemaking authority under the statute. *See id.*

70. As one author put it, "[l]ittle has been done to restrict the practice of *live* operators calling private residences. While recorded messages may be deemed a particularly insidious annoyance, the individual's privacy interest is no less invaded if the operator is live." Cox, *supra* note 6, at 404.

infringement by these objectionable calls.[71]

The TCPA gave the FCC discretion to consider a number of methods and procedures for regulating live-operator unsolicited sales calls. These options included, but were not limited to, "the use of electronic databases, telephone network technologies, special directory markings, [and] industry-based or company-specific 'do-not-call' systems . . . ."[72] Congress specifically left open the possibility that the FCC might require the creation of a single national database "to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations . . . ."[73] Ultimately, the FCC declined to adopt this potential solution, opting instead to require that individual telemarketers keep their own lists of consumers who request not to be called.[74] Under current federal law, a person or entity engaged in telemarketing "must maintain a record of a caller's request not to receive future telephone solicitations" and honor that request for ten years.[75] Those making telephone solicitations must have a written policy, available on demand, for maintaining their do-not-call lists.[76] Furthermore, businesses must train their personnel about the existence and use of such lists.[77] A telemarketer's failure to follow these requirements may subject him to suit under the TCPA.

The TCPA provides two remedies: a private right of action and a state right of action. Under 47 U.S.C. § 227(b)(3), individuals may sue telemarketers in state court to recover actual damages or receive up to $500 in damages for each violation, whichever is greater.[78] Treble damages for knowing or willful violations are also available at a court's discretion.[79] Nevertheless, to recover at all, an individual must usually receive two calls from the same telemarketer within a twelve-month period.[80] Even if the same

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71. *See* 47 U.S.C. § 227(c)(1).

72. *Id.* § 227(c)(1)(A).

73. *Id.* § 227(c)(3).

74. According to Andrew Barrett, who was Commissioner of the FCC in 1992, "the current record clearly supports the company-specific do-not call lists as the most effective, most easily implemented and the least costly of the methods proposed to curb unwanted telephone solicitations." *In re* Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8794 (1992) (statement of Comm'r Andrew C. Barrett).

75. 47 C.F.R. § 64.1200(e)(2)(vi) (2000).

76. *See id.* § 64.1200(e)(2)(i) ("Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.").

77. *See id.* § 64.1200(e)(2)(ii) ("Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.").

78. *See* 47 U.S.C. § 227(b)(3)(B) (1994) (A person or entity may bring in state court "an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater . . . .").

79. *See id.* § 227(b)(3) ("If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, at its own discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under [§ 227(b)(3)(B)].").

80. *See id.* § 227(c)(5) ("A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may . .

entity contacts a consumer twice in violation of his request not to be called, the TCPA may provide an affirmative defense for the offending telemarketer. According to § 227(c)(5)(C), a telemarketer may escape liability if "the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed" by the TCPA.[81] Similar provisions apply to the authority of state attorneys general to sue telemarketers on behalf of state residents. Whenever a state attorney general "has reason to believe that any person has engaged . . . in . . . a pattern or practice of telephone calls . . . in violation of [the TCPA], the State may bring a civil action" for an injunction, actual damages, or both in a federal district court.[82]

The federal limitations on telemarketing made possible by the TCPA are useful, but the law is far from ideal from the standpoint of many consumers. According to one author, there are two key difficulties with the statute: "First, most people are uninformed. They are unaware of 'do-not-call' lists and . . . do not know how to protect themselves. [Second], even citizens who are aware of the lists and who request to be put on them will be bothered at least once by every telemarketer."[83] Similar limitations are contained in another recent federal attempt to control telemarketing abuses, the Federal Trade Commission's Telemarketing Sales Rule.[84]

2. *The Telemarketing Sales Rule*[85]

In 1994, Congress found that interstate telemarketing fraud had become such a problem that the resources of the Federal Trade Commission (FTC) were not sufficient to ensure adequate protection to consumers.[86] By enacting the Telemarketing and Consumer Fraud and Abuse Prevention Act,[87] Congress hoped to offer consumers necessary safeguards from telemarketing deception and abuse.[88] To this end, the Act empowered the FTC to prescribe rules prohibiting abusive telemarketing acts or practices.[89] Con-

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. [bring an action in state court] . . . ."). In essence, telemarketers have to ignore a consumer's request not to be called again twice within the same year before they will be subject to liability under the TCPA.

81. *Id.* § 227(c)(5).

82. *Id.* § 227(f)(1).

83. Cox, *supra* note 6, at 424.

84. 16 C.F.R. pt. 310 (2000).

85. *See Telemarketing Sales Rule* (last modified August 22, 2000) <http://www.ftc.gov/bcp/rulemaking/tsr/index.html> for more information, including tips on compliance. Unlike the TCPA, the Telemarketing Sales Rule focuses primarily upon telemarketing fraud. Nevertheless, the provisions relating to maintenance of do-not-call lists are strikingly similar to those provided in the TCPA and the subsequent FCC regulations under that statute.

86. *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 2, 108 Stat. 1545, 1545 (1994) (codified at 15 U.S.C. § 6101(2) (1994)).

87. 15 U.S.C. §§ 6101–6108 (1994).

88. *See* Pub. L. No. 103-297, § 2(5), 108 Stat. at 1545.

89. *See* 15 U.S.C. § 6102(a)(1) ("The [Federal Trade] Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices.").

gress specifically called on the FTC to include in its rules "a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy."[90] The FTC responded by adopting the Telemarketing Sales Rule ("the Rule").[91]

The Rule regulates a number of fraudulent activities by telemarketers—one of which is a pattern of abusive calls.[92] According to the FTC, it is an abusive telemarketing practice to initiate an outbound telephone call to a person who has stated that he or she does not wish to receive calls from the seller.[93] Similar to the TCPA,[94] the Rule provides an affirmative defense for telemarketers who accidentally call those consumers who have expressed a desire not to be contacted. A seller is not liable for a Rule violation if it has (1) established and implemented written procedures to comply with do-not-call requests, (2) properly trained its personnel, (3) maintained its list to comply with the law, and (4) subsequently called the consumer in error.[95]

Assuming that a telemarketing entity cannot prove that it has satisfied the requirements of the affirmative defense, it faces potential liability to either a state attorney general or a private citizen who files notice with the FTC and sues in court.[96] The consequences of non-compliance can be costly: according to the FTC, the fine for calling a consumer who has previously requested not to be called may reach $10,000 per violation.[97]

While both the TCPA and the Rule do allow consumers to recover—sometimes handsomely—from telemarketers who refuse to stop calling, these regulations are not the only limitations on unwanted solicitation calls. The states have also adopted a number of different restrictions on the telemarketing industry.

D. State Telemarketing Laws

Due to a savings clause within the TCPA, states retain the authority to regulate tele-

90. *Id.* § 6102(a)(3)(A).

91. *See* Alison Garfinkel, *Telemarketing Compliance in the Year 2000: How to Make Cold-Call Solicitations and Stay Within the Law*, WSTA TICKER, July/Aug. 1999, *available in WSTA Article – August 1999* (last modified Aug. 31, 1999) <http://gateway2.callcompliance.com/WSTA.htm> (noting that the Telemarketing Sales Rule is "often referred to as 'The Rule'").

92. Also included in the Telemarketing Sales Rule are provisions regulating credit card laundering, *see* 16 C.F.R. § 310.3(c), threats and intimidation, *see id.* § 310.4(a)(1), telemarketers' failure to disclose certain information, *see id.* § 310.4(d), and the hours during which telemarketers may contact consumers at their homes, *see id.* § 310.4(c).

93. *See id.* § 310.4(b) ("It is an abusive telemarketing act . . . for a telemarketer to engage in . . . [i]nitiating an outbound telephone call to a person . . . that . . . previously has stated he or she does not wish to receive an outbound telephone call made by . . . the seller whose goods or services are being offered.").

94. Under the TCPA, "[i]t is an affirmative defense . . . that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations . . . ." 47 U.S.C. § 227(c)(5) (1994); *see supra* note 81 and accompanying text.

95. *See* 16 C.F.R. § 310.4(b)(2).

96. *See id.* § 310.7(a).

97. *See* Garfinkel, *supra* note 91.

telemarketing within their borders. The clause provides that nothing in the TCPA "shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits . . . the making of telephone solicitations."[98] This provision has not gone unnoticed: according to one source, "[l]egislation and regulation of the industry at the state level is coming at a frightning [sic] pace."[99] More than 150 bills designed to regulate telemarketing were introduced during the first half of 1999 alone.[100] Although a handful of states have taken the dramatic step of creating statewide databases that contain the names and phone numbers of consumers who object to receiving telemarketing calls,[101] most state laws are probably less objectionable to the telemarketing industry.[102]

The typical state statute contains regulations similar to those present at the federal level. For example, many require telemarketers to maintain their own (company-specific) do-not-call lists of those consumers who have specifically asked them not to call again.[103] Others force solicitors to hang up promptly if a consumer voices disinterest in continuing the conversation.[104] At least one state directs telemarketers to obtain and utilize the DMA's TPS no-call list,[105] a proposal that has also been made at the federal level.[106] As is the case with federal law, these state statutes provide little comfort to "irate consumers, [who can only] shield their homes from unwanted calls by canceling one company at a time."[107] Accordingly, state legislatures have been considering—and some have passed—legislation forbidding telemarketers to call consumers whose names appear in statewide no-solicitation databases of one kind or another.[108] Part IV of this Note attempts a lengthier examination of such laws, which many Americans may find appealing in today's era of telemarketing expansion.

E. The Inadequacy of Current Remedies

Now that telemarketing has become the largest piece of the direct marketing industry and is expected to grow by eight to ten percent annually through the twenty-first century,[109] it is hardly surprising that numerous states and the federal government have

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98. 47 U.S.C. § 227(e)(1) (1994).

99. Garfinkel, *supra* note 91.

100. *See id.*

101. *See infra* Part IV.B.

102. For a relatively recent, state-by-state listing of telemarketing regulations, see *List of State Legislation* (visited Mar. 20, 2001) <http://gateway2.callcompliance.com/statelist.asp>.

103. *See, e.g.*, NEB. REV. STAT. § 86-1212 (1999); ME. REV. STAT. ANN. tit. 10, § 1499 (West 1997); R.I. GEN. LAWS § 5-61-3.5 (1999); S.C. CODE ANN. § 16-17-445 (West Supp. 2000).

104. *See* KAN. STAT. ANN. § 50-670 (1994 & Supp. 1999); MISS. CODE ANN. § 77-3-603 (1999).

105. *See* ME. REV. STAT. ANN. tit. 10, § 1498 (West 1997 & Supp. 2000).

106. *See* Majority Report, *supra* note 38, at 9.

107. Fiske, *supra* note 32.

108. *See infra* Part IV.B.

109. *See* Leslie Gornstein, *Turning the Tables: Savvy Consumers Use Regulations to Ring Up Court Awards Against Telephone Marketers*, FT. WORTH STAR-TELEGRAM, Dec. 8, 1996, at 1 (citing DMA esti-

considered adopting do-not-call legislation to protect consumer privacy from telemarketers. Few would dispute that those engaged in the business have a right to pursue their trade; nevertheless, many consumers report that they have been overwhelmed by the recent flood of sales calls to their homes.[110] While the past decade has seen a number of private organizations and legislative bodies attempt to address consumer concerns, most of these efforts have proven unsuccessful or incomplete. According to one commentator,

> The existing regulations do not absolve the evils inherent to any kind of telemarketing: the uninvited solicitors can get you while you are sleeping, when you are showering, when you are eating dinner, or during your favorite television show. They can wake your baby and they can get you even if you have an unlisted number.[111]

Moreover, despite the highly intrusive nature of telemarketing calls,[112] homeowners cannot escape the nuisance of sales calls as easily as other forms of direct marketing solicitation.[113] Do-not-call laws—the focus of the remainder of this Note—offer a potentially effective remedy to these problems.

IV. DO-NOT-CALL LEGISLATION

As discussed *supra*, the Supreme Court has indicated that homeowners may protect themselves from unwanted door-to-door canvassers by erecting "no solicitors" signs on their property.[114] Nevertheless, if a traveling salesman encounters such a sign outside a home, he may contact the inhabitant by simply dialing up that residence on a cellular phone from across the street instead.[115] This discrepancy led one commentator to conclude that "[t]elemarketing should be banned until technology is available to put 'no solicitation' sign on your phone number as well."[116]

Although hardly a technological advance, the enactment of no-call legislation may permit just what was has been suggested—placement of virtual "no solicitation" signs on those phone numbers included in a centrally-stored, globally-utilized database.[117] The

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mates), *available in* Leslie Gornstein, *Savvy Consumers Use Regulations to Ring Up Court Awards Against Telemarketers* (visited Mar. 20, 2001) <http://consumer.net/telemarketing/savvy.asp>.

110. *See, e.g., supra* note 8 and accompanying text.

111. Cox, *supra* note 6, at 424.

112. *See* Nadel, *supra* note 10, at 103 (explaining that "[u]nsolicited calls are intrinsically more intrusive than mail and other forms of visual communication" because they reach the individual in her home and are aural rather than visual).

113. *See, e.g., supra* notes 6–7 and accompanying text; *infra* note 216 and accompanying text.

114. *See supra* note 22 and accompanying text.

115. *See* Cox, *supra* note 6, at 424. This assumes that the homeowner has not already asked that salesman or his company not to contact her through one of the channels discussed in *supra* Part III.

116. Cox, *supra* note 6, at 424.

117. According to Missouri Att'y Gen. Jay Nixon, "[e]ver since the founding of this country you've been able to put a no-trespassing sign on your property . . . . With the invention of telemarketing, that no-trespassing zone no longer includes your dinner table." Craig Savoye, *States Spare Residents from Telemarketers*, CHRISTIAN SCI. MONITOR, Dec. 22, 2000, at 2, *available in* 2000 WL 4433175. Missouri's new no-call law,

basic idea behind do-not-call statutes is to allow consumers a preemptive strike against telemarketers, to permit them to notify practically all potential telephone solicitors[118] that their calls are not welcome *before* those calls can be made. While states are beginning to pass do-not-call laws,[119] the FCC has—thus far—been unwilling to adopt a *national* database approach.[120]

A. Debate Over a National Do-Not-Call Database

The idea of implementing a national no-call list goes a step beyond current federal regulations, which generally allow telemarketers to make an initial contact with a consumer—at which time the consumer may ask to be placed on that telemarketer's in-house no-call list. According to the FCC, each time a consumer receives a call from a different person or entity, the consumer must request that person or entity not call again.[121] While this may not please proponents of global "no solicitation" signs for telephones, the FCC has concluded that establishment of a national do-not-call database is "not an efficient, effective, or economic means of avoiding unwanted telephone solicitations."[122]

1. The FCC's Argument Against National Do-Not-Call Regulations

The FCC explained its rationale for opposing a national do-not-call database in the report accompanying its 1992 order implementing the TCPA.[123] According to that report, a majority of commentators do not favor the national database option because it would be "costly and difficult to establish and maintain."[124] Commentators estimated that initial implementation of the database would cost between $20 million and $80 million; moreover, maintenance could cost another $20 million each year thereafter.[125] As the TCPA does not allow consumers to foot the bill for any regulations the FCC may

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however, enables Missouri residents the option of putting a "no trespassing" sign around their dinner tables. *See* Bill Bell Jr., *Missourians May Sign Up for No-Call List to Block Some Telemarketers*, ST. LOUIS POST-DISPATCH, Dec. 14, 2000, at B1, *available in* 2000 WL 3566312.

118. Subject, of course, to any class of telemarketers exempted by a particular law.

119. *See Telephony*, COMM. DAILY, Jan. 3, 2001, *available* in 2001 WL 5052285 ("To date, 9 states have put no-call list laws into effect -- Ala., Alaska, Ark., Conn., Fla., Ga., Ky., Ore., Tenn. In addition, Ida., Mo., and N.Y. will be putting no-call laws passed in their 2000 legislative sessions into effect by midyear."). See *infra* Part IV.B for a discussion of state-based do-not-call laws.

120. *See infra* Part IV.A.1.

121. *See Consumer News*, *supra* note 45 (providing a good overview of federal telemarketing regulations and consumers' rights under federal law).

122. *In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8761 (1992).

123. *See generally id.* at 8758–61 (examining the national database approach).

124. *Id.* at 8758. The appendix to the FCC's report lists the parties who filed comments with the Commission during the rulemaking proceeding, the vast majority of whom were companies that engage in telemarketing. *See id.* at 8785–89.

125. *See id.* (citing comments of AT&T).

adopt to implement the Act,[126] businesses would initially be forced to shoulder these substantial costs. This, the report notes, could severely disadvantage small businesses, which might not be able to afford to participate in a national database.[127] Ultimately, consumers could end up bearing the costs of a national database, either because telemarketers would charge correspondingly higher prices or because taxpayers would be forced to subsidize any difference between the cost of the database and the fees that the database administrator actually collects from telemarketers.[128] These financial concerns were not all the FCC cited to support its decision against establishing a national do-not-call list.

In addition to the difficulty it foresaw in financing a national database, the FCC worried that consumers would be unhappy with the final result. Numerous commentators, the FCC's report noted, argue that consumers would be disappointed if they signed up for the database but continued to receive sales calls.[129] This result would be possible if there were any lag between the time a consumer made her do-not-call request and when telemarketers received an updated copy of the national directory.[130] Furthermore, consumers would continue to receive calls from organizations exempted from using the database,[131] such as a not-for-profit groups or political campaigns.[132] Just as some consumers might be dissatisfied that they could not block all telemarketing calls by signing onto the list, others might not like having to make the all-or-nothing choice that doing so would entail. Citing comments by the DMA, the FCC report notes that consumers would have to "either reject all telemarketing calls, even those which the consumer might like to receive, or accept all telemarketing calls, including those which the consumer does not wish to receive."[133] Finally, the report indicates, commentators have questioned whether a widely-accessible national database would offer sufficient privacy protections for telephone subscribers. Some believe a database might be misused to compile solicitation lists.[134] This would not only defeat the purpose of the database, but would "de-

126. *See id.* at 8760 n.23 (noting that 47 U.S.C. § 227(c)(2) prohibits any alternative which would charge residential subscribers a fee for participation).

127. *See id.* at 8758 (citing comments of Securities Industry Association). Commentators suggest that a small business would either have to invest in computer hardware and software (if the list were computerized) or hire additional personnel to review paper versions of the national list (if the list were distributed in hard-copy). *See id.* (citing comments of National Retail Federation).

128. *See In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. 8753, 8758 (1992).

129. *See id.* at 8758 (citing comments of SafeCard Services, Inc. and Sprint).

130. *See id.* Quarterly or semiannual updates, some commentators have said, would be too infrequent to avoid obsolescence or satisfy consumer expectations. *See id.* at 8759 (citing comments of Sprint).

131. *See id.* at 8758–59 (citing comments of SafeCard and Sprint).

132. *See, e.g.*, Wheeler, *Bill Aims to Disconnect Telephone Solicitors*, *supra* note 5 (noting that politicians and charities are exempt from any limitations because "[c]ourts have ruled that they have a constitutional right to call and ask for your money or your vote").

133. *In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. at 8759 (citing comments of Direct Marketing Association).

134. *See In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R.

stroy the confidentiality of subscribers having unpublished or unlisted numbers."[135]

After what it called "careful consideration of the costs and benefits of creating a national do-not-call database," the FCC concluded that the disadvantages of doing so outweighed any possible advantages.[136] Rather than implementing a system that might threaten small businesses and burden consumers, the FCC settled on a less radical solution. The company-specific do-not-call list alternative, the FCC decided, "is the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations."[137] A 1994 congressional report, however, took issue with this conclusion and called on the FCC to reexamine its decision against the background of new congressional findings and increasing calls from consumers for a national database.[138]

2. A Dissenting View from Congress

One year after passage of the TCPA, a House subcommittee asked over fifty of the nation's largest telemarketing companies to provide detailed information on what internal steps they had taken regarding implementation of the Act and the FCC's regulations.[139] After reviewing industry responses, the majority staff of the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance concluded that industry compliance with the TCPA was generally "poor and extremely inconsistent."[140] In addition to suggesting that the FCC give serious consideration to fine-tuning its rules to make them more consumer-friendly, the subcommittee report recommended the maintenance of a national do-not-call list.[141]

According to the report, after the FCC's rules were adopted, constituents continued to write to their elected representatives to complain about the nuisance of unwanted telemarketing calls. Americans asked their congressmen to support legislation that would establish a national do-not-call system, rather than company-specific lists.[142] "A national database allowing consumers to sign up only once while requiring telemarketers to match their list regularly with it," according to subcommittee staff, "would be more foolproof, remedy weaknesses, and close loopholes in the TCPA."[143] While industry groups raised various arguments against such a database during the FCC's implementation proceedings, the subcommittee staff determined that company-specific lists did not constitute "as effective an alternative to a national database . . . as it was origi-

8752, 8759 (1992) (citing comments of Consumer Bankers Association).

135. *Id.* (citing comments of J.C. Penney Company, Inc.).

136. *Id.* at 8760.

137. *Id.* at 8765.

138. *See* MAJORITY REPORT, *supra* note 38, at 16.

139. *See id.* at 2.

140. *Id.* at 4.

141. *See id.* at 14.

142. *See id.* at 14–15.

143. *Id.* at 16.

nally contended they would be."[144]

The subcommittee staff based its conclusion, in part, on what it called the "inadequate or nonexistent" written do-not-call policies and training materials of numerous telemarketers.[145] A uniform national policy, the report concluded, could replace an "ineffective policy of company-specific [do-not-call lists] and help reduce a continuing chorus of consumer complaints about an industry of vital importance to the American economy."[146]

3. Evaluating the Arguments

Disagreements such as those between the FCC and congressional staff are typical with respect to telemarketing law. There is a sharp divide in opinion over whether adopting a database approach—or even a less-restrictive solution—would unduly hamper legitimate businesses. Texas State Representative Frank Corte Jr., for example, argues that legislation to set up a do-not-call database in Texas "would impede free enterprise and increase business costs that will be passed on to consumers."[147] Supporters, Corte continues, ignore that it would be simpler to hang up the phone: "'They want government to do those little things we should do for ourselves.'"[148] Not everyone feels this way.[149] On the other side of the chasm are those arguing for enhanced consumer privacy protections—of a type that could severely restrict the industry. According to one author, "[t]he telephone does not need to be used as a vehicle for advertising. Alternative, traditional means of advertising are available and the vast majority of those companies utilizing telemarketing will survive without it."[150] Most people's sentiments likely fall somewhere in between hard-line pro-business stance and the idea that telemarketing should be banned in the interest of protecting consumer privacy.

A common view was recently voiced by Harvey Morgan, a member of the Virginia House of Delegates: "It's maddening for people to get all these calls that always seem to come at dinner time, and I'd love to be able to do something about it, but it has to be a reasonable measure."[151] According to Morgan, "[t]he telemarketing lobby has made

144. *Id.*

145. *Id.* at 24.

146. *Id.*

147. Scott S. Greenberger, *No-Call List Gets House Approval*, AUSTIN AM.-STATESMAN, May 11, 1999, at B1, *available in* 1999 WL 7412093.

148. *Id.* (quoting Rep. Corte). *But see* Radner, *supra* note 31, at 386 ("The ringing telephone is an inescapable disturbance unless one wishes to unplug the phone or turn off the ringer; the first option denies one complete use of the phone . . . , and the second prevents desired calls from coming in.").

149. *See, e.g.*, Marjie Lundstrom, *State Bill Would Help Us Say: Bye-Bye, MCI!*, Scripps Howard News Service, Jan. 11, 2001, *available in* LEXIS, News, Scripps Howard News Service ("It is arrogant to suggest that simply hanging up on unwanted telemarketers is a one-size-fits-all solution. For the Miss Manners adherents among us, hanging up on virtually anyone is not an option.").

150. Cox, *supra* note 6, at 423. Cox supports the imposition of a wholesale ban on telemarketing. *See supra* note 116 and accompanying text.

151. Fiske, *supra* note 32.

some persuasive arguments against this type of legislation."[152] That telemarketers have vociferously challenged the establishment of a national do-not-call database is undeniable.[153] Whether their arguments are persuasive in anything more than a purely *political* sense, however, seems far less certain.[154] This section examines the arguments that opponents of do-not-call legislation have advanced and attempts to determine whether free enterprise interests outweigh consumer protection concerns in this area.

Database opponents worry that do-not-call legislation is ill-conceived because it would be costly and restrict the ability of businesses to make first-time contacts with potential consumers. It would, opponents believe, force consumers to decide whether they wanted to receive all telemarketing calls or no telephone solicitations—with no room for consumer choice between the two extremes. A large no-solicitation list could be unmanageable and might quickly become outdated. Furthermore, its opponents say, it would threaten consumer privacy and disappoint people who expect such legislation to block all telemarketing calls. Finally, some industry sources argue, a do-not-call database is unnecessary because telemarketing is valuable to consumers as well as businesses. While the do-not-call solution may not be a perfect one, many of the arguments against it are hardly compelling—especially those that maintain that consumers value telemarketing.

a. The value of telemarketing to consumers

There is no question that telemarketing is valuable to the businesses who employ this sales method. One need only look at the industry's sales figures—over $600 billion annually—to determine this much.[155] Industry lobbyists, however, argue that consumers consider it valuable as well. "Sure, some people don't like to receive telemarketing calls," one industry source said, "but it's obviously valuable to consumers. There are a lot of people out there who are buying."[156] Nevertheless, that some people do purchase

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152. *Id.*

153. *See, e.g., Archived Issue Briefs: Privacy Issues* (Jan. 2000) <http://www.the-dma.org/cgi/issuearchive> [hereinafter *Privacy Issues*] (noting that the DMA lobbies actively in every state where do-not-call legislation is under consideration for the position that no-call lists are "redundant and unnecessary in light of federal law and industry self-regulation").

154. *See, e.g., The DMA - A.K.A. the Discourteous Marketing Association*, *supra* note 52. Private Citizen has called the TCPA "the best law telemarketing firms could buy," noting further that the DMA and its members give millions to state and federal legislators to help assure that no effective laws are passed. *Id.* The TCPA, Private Citizen's web site says, "was attacked by the DMA and its members so successfully that a US House Subcommittee majority staff report found that the resulting law and regulations were actually counterproductive to consumer privacy." *Id.*

155. *See supra* note 3. Nevertheless, the majority of this revenue is derived from *consumer-initiated* calls to businesses. *See* Petty, *supra* note 33, at 45 (noting that "70% of all telemarketing revenues are generated from consumer-initiated calls, not from marketer-initiated calls").

156. Fiske, *supra* note 32 (quoting Tyler Prochnow, attorney for the American Teleservice Association). *But see* Fried, *supra* note 40 (quoting New York Governor George E. Pataki's concern that "telemarketers often dupe consumers into buying products they don't want or can't afford").

goods and services from telemarketers does not change the fact that many consumers are fed up with sales calls.[157] The DMA calls consumer antipathy toward telemarketers the "'leave me alone' syndrome" and notes that it is spreading.[158] At least twenty-seven states were expected to consider do-not-call legislation in 2000.[159]

While proponents of no-call legislation can find plenty of people willing to provide testimonials,[160] telemarketing lobbyists are made to infer from telemarketing sales that people favor telephone solicitation. Perhaps there are American consumers who like to receive sales calls.[161] Assuming that is true, the esteem in which consumers hold telemarketers is not altogether relevant to the creation of a do-not-call database. There is no indication, for example, that the existence of a database would preclude telemarketers from reaching people who value telephone solicitations. Several states have already enacted do-not-call legislation and allow consumers, on a voluntary basis, to include their numbers in state databases. One need not jump to the conclusion that all those residents who have not signed up particularly value telemarketing; however, that many people *have* is probably good evidence that they do not value sales calls. Moreover, the fact that inclusion in a no-call database is voluntary also illustrates the frailty of a related argument against do-not-call legislation—the all-or-nothing decision concern.

b. Stopping all sales calls v. stopping none

If telemarketers had their way, restrictions on their businesses would be no harsher than those already imposed by the FCC. They note that current federal law empowers consumers to decide which calls to accept and which calls not to accept.[162] No-call laws, the industry argues, are troublesome because they "force people into an all-or-nothing decision."[163] Such reasoning once again fails to account for the fact that consumers need not sign onto a no-call list. If company-specific do-not-call lists are as effective as industry sources claim, the existence of national or statewide databases should not concern

157. *See, e.g.*, *supra* notes 8–9 and accompanying text.

158. *Privacy Issues*, *supra* note 153.

159. *See id.*

160. *See, e.g.*, Fiske, *supra* note 32 (relaying the experience of Virginia State Sen. Leslie Byrne, who received a spontaneous ovation at a town hall meeting after telling constituents about a state do-not-call proposal).

161. *See, e.g.*, Betsy Cahill, *South Dakota Fraud Squad Offers Tips To Avoid Telemarketing Scams*, ABERDEEN AM. NEWS (S.D.), Dec. 13, 2000, *available in* 2000 WL 30570726 (noting that, while he might be one of the very few, Chris Weseloh, business manager of an Aberdeen-based telemarketing firm, claims to like receiving telemarketing calls); *supra* note 4 (noting that .1% of the population likes to get telemarketing calls). If telemarketers' claims that American consumers really do like sales calls are to be taken seriously, however, it might help the industry's cause to solicit comments from average Americans, rather than telemarketing executives.

162. *See* Fiske, *supra* note 32. To illustrate this point of view, Fiske quoted Tyler Prochnow, who argued that current law would allow a homeowner to decide that he wanted to receive calls from lawn companies, but not banks. *See id.*

163. *Id.* (quoting Tyler Prochnow); *see also supra* note 119 and accompanying text.

telemarketers. Those consumers that want to hear from lawn care companies but not banks, for example, could simply decline to register for a database and continue to follow the current system.[164] If a bank called, consumers could ask that bank to place them on its own do-not-call list; if a lawn care company phoned, they could do business.

Given that no-call legislation increases consumer options to select who may (or may not) call them, one might wonder what is truly worrying the telemarketing industry. The answer is likely that Americans, in large numbers, might consciously choose not to receive any sales calls at all. The congressional report discussed *supra* foreshadowed as much. According to subcommittee staff,

> consumers resent being forced to tell each and every telemarketer who calls not to call back. The high number of names on "in-house" lists . . . not only debunks industry arguments that "*some* . . . consumers view such calls as an annoyance," or that consumers really do not mind being bothered at all, but also indicates strong interest in a national [do-not-call list].[165]

According to the report, anecdotal evidence demonstrates that consumers are looking for just the sort of global exemption from sales calls that telemarketers suggest people would find unacceptable.[166] Probably because they realize how attractive the prospect of joining a nationwide do-not-call database would be to many Americans, some telemarketing interests put forth a different argument. They warn that a national database would be unmanageable and would quickly become outdated.

c. Database obsolescence

Database opponents note that one-fifth of all telephone numbers change each year.[167] Accordingly, they argue, any do-not-call database "would be continuously obsolete and would require constant updates in order to remain accurate."[168] Semiannual or even quarterly updates would be too infrequent to rectify this problem and, hence, would not accommodate consumer expectations, the industry explains.[169] While it is probably true that requests to be included in a database could not be carried out immediately—unlike company-specific do-not-call requests—this is hardly a persuasive argument in favor of rejecting the database approach. The use by some telemarketers of the

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164. *Cf. supra* note 162. No one suggests that adoption of a database approach would necessitate the repeal of current regulations requiring telemarketers to keep their own do-not-call lists. Furthermore, even if the FCC were to withdraw these rules, telemarketers would be perfectly within their rights to continue to use such lists voluntarily.

165. MAJORITY REPORT, *supra* note 38, at 12.

166. *See id.* at 8–9.

167. *See In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8759 (1992) (citing comments of AT&T).

168. *Id.*

169. *See supra* note 130 and accompanying text.

DMA's no-solicitation list[170] would seem to raise the same issues of timeliness and obsolescence because the DMA only updates the TPS list on a quarterly basis as well.[171]

People do move and change their phone numbers; some might even decide to remove their number from a do-not-call database.[172] Despite such realities, a mandatory statewide or national do-not-call list would be no more outdated than the DMA's list or even a local telephone directory. Even if a national database were only updated once each year, like a telephone book, opponents only argue that twenty percent of the numbers included would be outdated.[173] Eighty percent of database participants, therefore, would experience no such problems in a given year. Given the choice between a do-not-call system with this level of effectiveness and a company-specific system that requires consumers to notify every company not to call them individually, it would seem that Americans prefer the former approach.[174] While they may admit that the database approach appeals to consumers in theory, however, industry sources argue that the reality of such a system would prove disappointing to people who signed up for a do-not-call list but did not succeed in blocking all sales calls to their homes.

d. Incomplete relief

A common refrain from those opposed to the creation of a mandatory do-not-call system is that it would backfire when consumers find that it does not stop all telemarketing calls from reaching them.[175] John Astle, a Maryland State Senator, justified his recent vote to kill a no-call measure in his state on the basis that such legislation would "'create a false expectation in people's minds'" that telemarketers would no longer bother them.[176] People would "'still be getting lots of calls,'" he said, "because charities and politicians are constitutionally exempt from any restrictions on their fund-raising efforts and other exemptions were written into the measure."[177]

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170. *See supra* text accompanying notes 35–38.

171. Both the DMA's Telephone Preference Service and do-not-call databases operate on the same general principle: a consumer who does not wish to receive additional telemarketing calls contacts an agency or organization and asks that her name be added to a no-solicitation list. In the case of the TPS, the DMA updates its file four times each year and then makes it available to telemarketers who choose to use it. *See How to Get Off a Telephone List - Consumer Assistance*, *supra* note 37.

172. *See In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. at 8759 (noting that "AT&T states that a national database would contain millions of names and addresses, and that at least 20 percent of those would change ever year as people move, change telephone numbers, disconnect service, or simply decide to enter or leave the database").

173. *See supra* notes 167, 172 and accompanying text.

174. *See, e.g.*, *supra* note 142 and accompanying text.

175. *See* Wheeler, *Curb on Telemarketers Dies in Senate Panel; 'Do-Not-Call' List Opposed by Business*, BALT. SUN, Feb. 23, 2000, at 1B, *available in* 2000 WL 4859072 [hereinafter Wheeler, *Curb on Telemarketers Dies in Senate Panel*]; *see also supra* notes 129, 131–32 and accompanying text.

176. Wheeler, *Curb on Telemarketers Dies in Senate Panel*, *supra* note 175. Sen. Astle voted against the Maryland no-call bill even though he had been one of its co-sponsors, citing fears that it would create false expectations in the minds of consumers. *See id.*

177. *Id.* Astle thought people would be angered by the false perception as they continued to receive calls

Do-not-call legislation enacted in other states also exempts various non-profit and businesses organizations.[178] An extreme example of this practice is Kentucky's no-call law,[179] which has been estimated to exempt ninety-five percent of all businesses or non-profit organizations that conduct telemarketing sales within that state.[180] The Kentucky statute, however, is atypical among state do-not-call laws.

A stronger state statute is Florida's, which reportedly eliminates seventy to eighty percent of sales calls in the Sunshine State.[181] Section 501.059 of the Florida Statutes provides that "[n]o telephone solicitor shall make or cause to be made any unsolicited telephonic sales call to any residential . . . number if the number for that telephone appears in the then-current quarterly listing published by the [Department of Agriculture and Consumer Services]."[182] The law includes only a handful of exemptions. Included among them are calls made: (1) in response to an express request to be called, (2) in connection with an existing debt or contract, (3) to any person with whom the solicitor has a prior or existing business relationship, or (4) by a newspaper publisher in connection with its business.[183] Floridians seem pleased with the results. According to Brodie White of the Better Business Bureau of Northwest Florida, the list and the legislation enacting it are the best weapons against telephone solicitations that he has seen in a long time.[184]

While there is always the possibility that people will be angered by the ineffective-

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from exempted organizations. *See id.*

178. For a particularly business-friendly statute, *see* KY. REV. STAT. ANN. § 367.46951(2) (Banks-Baldwin Supp. 2000) (exempting from the statutory definition of "telephone solicitation" the following: real estate brokers; investment advisors; insurance agents; employment agencies; newspaper and cable television solicitors; merchants regulated by the Public Service Commission; merchants soliciting the sale of food in orders of less than $100; businesses that issue catalogs to at least 250,000 customers; businesses regulated by the Department for Financial Institutions; merchants subject to control or licensing by the FCC; book, video, or record clubs; merchants who call only to set up a face-to-face meeting to continue the solicitation; Kentucky businesses that have operated under the same name for at least two years and which derive most of their revenue from sales of products or services at a retail establishment; and merchants who are publicly traded corporations).

179. KY. REV. STAT. ANN. § 367.46955(15) (Banks-Baldwin Supp. 2000) (It is a prohibited telephone solicitation act or practice for any telemarketing company to engage in "[m]aking or causing to be made an unsolicited telephone solicitation call if the number for that telephone appears in the current publication of the 'no telephone solicitation calls' list maintained by the Office of the Attorney General, Division of Consumer Protection. . . .").

180. *See Telemarketing No-Call List* (last modified Feb. 5, 2001) <http://www.law.state.ky.us/cp/ no-call.htm> ("Only companies 'engaged primarily in the business of conducting telephone solicitations' are prohibited from calling consumers on the no-call list. Thus, companies and non-profit organizations who conduct their own telemarketing sales calls will not be affected since they are not engaged *primarily* in the business of making telephone solicitations."); *see also supra* note 178 for a list of exemptions to the Kentucky no-call rules.

181. *See* Moore, *supra* note 8 (quoting Terence McElroy of the Florida Department of Agriculture and Consumer Services).

182. FLA. STAT. ANN. § 501.059(4) (West Supp. 2001).

183. *See* FLA. STAT. ANN. § 501.059(1)(c) (West Supp. 2001).

184. *See* Moore, *supra* note 8.

ness of a database approach fraught with exemptions, the Florida example indicates that this need not necessarily be so. Provided that any exceptions to a do-not-call requirement are sensible and narrowly-tailored, consumers are likely to favor such a law.[185] An eighty percent reduction in sales calls[186]—like an eighty percent accuracy rate in a national no-solicitation list[187]—might not be perfect, but, to consumer privacy advocates, it represents a drastic improvement upon the status quo.[188] Nevertheless, database opponents advance still another argument against no-call laws—this one calculated to appeal to these same privacy advocates.

e. The effect of a no-solicitation database on consumer privacy

According to the FCC, several commentators question whether the confidentiality of those who place their names on do-not-call listings could be adequately protected from unscrupulous telemarketers.[189] A widely-accessible database, it has been argued, might be used by some firms as a solicitation list, rather than for its intended purpose.[190] Such a development could render no-call legislation useless—or, worse, make it counterproductive. Despite these concerns, no-call legislation need not be drafted in a way that would invite misuse of do-not-call lists.

According to Private Citizen, the DMA sells names, addresses, and phone numbers from its do-not-call list to telemarketers—ostensibly to facilitate compliance with do-not-call requests.[191] It is plausible, however, that a "discourteous"[192] telemarketer might prefer to take his chances calling numbers from an information-laden, fairly inexpensive no-solicitation list, as opposed to obtaining its solicitation list through other channels.[193]

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185. *See, e.g.*, Wheeler, *Curb on Telemarketers Dies in Senate Panel*, *supra* note 175 (citing comments by Maryland Sen. Jean Roesser that Sen. Astle's "false perception" argument is a red herring—"'[d]on't sell the public short,' she said, '[t]hey would have known what the score is'").

186. *See supra* note 181 and accompanying text.

187. *See supra* text accompanying note 173.

188. *See, e.g.*, Moore, *supra* note 8 (quoting Brodie White, who calls the Florida statute a significant law, with teeth behind it, because it warns unwelcome telemarketers: "if you call this person you are bound to be prosecuted"). Consider the thoughts expressed in a recent Missouri editorial:

> Like thousands of Missourians, I plan to get my name on [Missouri's] list of people who do not want to be called by telemarketers. Not that I expect the calls to end, since some, like telephone and insurance companies and members of not-for-profit agencies are not included in the ban. What thrills me most is the satisfaction of knowing that a limitation can be placed on some of the nuisances and irritations that we have been forced to accept as commonplace. I've always resented the fact that I have to pay a monthly bill for a telephone that I had installed for my personal convenience and then have it usurped by people I don't want to be in communication with.

Rose M. Nolen, Editorial, *Rude Awakening: Telemarketers Rang In This Era of Incivility*, ST. LOUIS DISPATCH, Jan. 21, 2001, at B3, *available in* 2001 WL 4440204.

189. *See supra* note 134 and accompanying text.

190. *See id.*

191. *See The DMA - A.K.A. the Discourteous Marketing Association*, *supra* note 52.

192. *Id.*

193. Private Citizen reports that it is aware of at least one firm that claims to have used the DMA's no-

Such misuse is possible if consumers, to join a no-call list, are required to provide their names, street addresses, and so forth.[194] The more information a telemarketer possesses, the easier it is for that telemarketer to target his call to a particular person in a specific neighborhood. Private Citizen, for its part, has responded to this potential problem by developing a no-call directory that provides the names, locations, and phone numbers of members in separate listings. Accordingly, telemarketers will not know which numbers belong to which member.[195] The DMA of England requires even less information: all a Briton must provide to join the British Telephone Preference Service is her phone number.[196] According to Private Citizen, phone numbers are really all an effective do-not-call list need contain.[197]

Concerns expressed by telemarketers that no-call lists may be abused are likely exaggerated and may reflect little more than an attempt by database opponents to thwart meaningful regulation of the industry.[198] After all, a powerful benefit of do-not-call legislation is that it permits registrants to hold non-exempted telemarketers who call them accountable for their transgressions.[199] Moreover, one would expect most telemarketers to heed do-not-call requests in the first place.[200] According to one telemarketing firm, it makes little business sense to waste resources contacting people who are antagonistic to the firm's efforts.[201] That being so, it seems that the strongest arguments against no-call legislation are that it would be costly, overly restrictive, and might disproportionately affect small businesses.

f. Financial and regulatory burdens

A main reason the FCC declined to establish a do-not-call database pursuant to its rulemaking power under the TCPA was the perceived cost and its impact on smaller telemarketers.[202] Initial setup costs could range from $20 million to $80 million, and database maintenance might require annual expenditures of up to $20 million more.[203]

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solicitation list as a *mailing* list. *See supra* note 52.

194. *See, e.g., How to Get Off a Telephone List - Consumer Assistance*, *supra* note 37 (requiring those who wish to register for the DMA's TPS list to send their name, home address, home telephone number, and signature to the DMA in a letter or on a postcard).

195. *See The Private Citizen Directory* (last modified Mar. 6, 2001) <http://www.private-citizen.com/directory.htm> (explaining that the directory's layout prevents its use as a telemarketing or junk mailing list).

196. *See The DMA - A.K.A. the Discourteous Marketing Association*, *supra* note 52.

197. *See id.*

198. It is interesting that the industry, on the one hand, claims that it is responsible enough to self-regulate through the use of the DMA's TPS and company-specific no-call listings while, on the other hand, warns that a mandatory no-call database would be misused by the same responsible telemarketers.

199. *See*, e.g., supra note 188.

200. *See supra* notes 40–41 and accompanying text.

201. *See* MAJORITY REPORT, *supra* note 38, at 14.

202. *See In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8758 (1992).

203. *See supra* note 125 and accompanying text. While these figures may seem exorbitant in the abstract,

Forcing small businesses that engage in telemarketing to bear part of this burden, some commentators say, may overwhelm them.[204] Nevertheless, the language of the TCPA demonstrates that Congress considered this issue.

Congress took care in adopting the TCPA to ensure that the FCC's database regulations—if a database were implemented—would not overly burden small businesses. For instance, Congress would require the FCC to consider the costs of do-not-call lists to small businesses and to develop different fee schedules for businesses serving differently-sized markets.[205] Accordingly, fears that no-call legislation would cripple smaller telemarketers are probably unwarranted. The FCC's suggestion that "[r]egional or local telemarketers could be required to purchase a national do-not-call database even if they made no solicitations beyond their states or regions,"[206] for example, is undercut by the prescriptions of the TCPA.[207]

Another financial consideration for small businesses, the FCC has said, relates to internal compliance measures. According to the FCC, most small businesses would need to invest in computer software and hardware to grapple with computerized lists,[208] which would impact small or start-up businesses more than larger, established firms.[209] These concerns may have been relevant when the FCC issued its report, but they seem antiquated less than one decade later.[210] All but the smallest of businesses are likely to

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it is worth noting that the telemarketing industry now provides 3.5 million jobs in the United States. *See supra* note 34. Consider a system under which telemarketing firms contributed to a database maintenance fund in proportion to the number of solicitors they employed. After the implementation of the system, if each telemarketing firm were to devote the equivalent of one hour's salary at the federal minimum wage for each of its solicitors, it would have practically fulfilled its proportional share of the estimated annual cost of maintaining the database ($5.25 times 3.5 million employees equals $18,375,000).

204. *See In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. at 8758.

205. According to 47 U.S.C. § 227(c)(4), if the FCC adopts the database approach, it shall:

> (A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;
>
> (B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—
>
> (i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;
>
> (ii) reflect the relative costs of providing such lists of paper or electronic media; and
>
> (iii) not place an unreasonable financial burden on small business . . . .

47 U.S.C. § 227(c)(4) (1994).

206. *In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. at 8760.

207. *See* 47 U.S.C. § 227(c)(4); *supra* note 205.

208. *See supra* note 127.

209. *See In re* Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991, 7 F.C.C.R. 8752, 8760 (1992).

210. *Cf.* Mark Hummels, *State Lawmaker Plans Consumer-Privacy Proposals*, SANTA FE NEW MEXICAN, Jan. 21, 2001, at B1, *available in* 2001 WL 6315047 ("[T]imes have changed since 1991. The revolution in information technology has made is possible for companies to compile, swap and sell consumer data in ways never before contemplated.").

have adequate computer hardware to view and sort a no-call list today. Moreover, while the price of obtaining appropriate software or purchasing a do-not-call list might conceivably appear steep for a few smaller telemarketers, by using do-not-call lists, these companies may actually *save* money.[211] According to the majority staff of the House subcommittee discussed *supra*, using do-not-call lists increases telemarketers' cost effectiveness.[212] Because "individuals on those lists have a pre-determined propensity not to buy,"[213] a telemarketer can spend his or her time attempting to contact consumers who have not already indicated that calling them would be unproductive.

Despite the potential benefits of a mandatory no-call system, former FCC Commissioner Sherrie Marshall called the national database approach "extremely regulatory and intrusive" because it "denies companies the opportunity to make a first-time contact with a potential customer."[214] This argument ignores the reality that people who might desire to purchase telemarketed goods or services may choose not to join a database; furthermore, it does not explain how calling a self-identified unreceptive consumer would do anything but waste a telemarketer's time and money. While telemarketers may feel that do-not-call regulations are intrusive, many Americans have a similar perception of sales calls.[215] According to one commentator, "[t]elemarketing calls are especially intrusive because they are the electronic equivalent of 'junk mail,' not wanted by the vast majority of recipients, but, unlike junk mail, they cannot easily be disposed of."[216]

There are numerous arguments against the creation of a national no-solicitation database, but most of them seem to be little more than token efforts by businesses to avoid extra regulation. Nevertheless, the FCC cited many of these arguments in support of its

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211. *See* Paul Choiniere, *New Law Gives Connecticut Residents Chance To Curb Calls from Telemarketers*, DAY (New London, Conn.), Jan. 1, 2001, *available in* LEXIS, News, Knight Ridder/Tribune Business News (citing Pat Faley of the DMA, who says that because it is that unlikely consumers who place their names on no-call lists would ever buy a product from a telemarketer, not calling these consumers will save telemarketers time and money).

212. *See* MAJORITY REPORT, *supra* note 35, at 23.

213. *Id.*

214. *Communications, FCC Privacy Rules Will Balance Consumer, Business Interests, Marshall Says*, *supra* note 11. Proponents of no-call legislation may appreciate the business interests involved, but many feel that these interests must yield to people's desire to be left alone in this circumstance. Persistent telemarketing calls, one journalist says, "have become a scourge of American life" and have become "a rare object of loathing that cuts across gender, class, and culture." Fred Kaplan, *Demands for Privacy Curb Telemarketers*, BOSTON GLOBE, Dec. 26, 2000, at A1, *available in* 2000 WL 3356952. Because the intrusiveness of these calls affects and annoys so many people, Washington State Sen. Bob Morton believes telemarketing jobs must take a back seat to will of the majority. *See* Richard Roesler, *Bills Target Telephone Solicitors*, SPOKESMAN-REVIEW (Spokane, Wash.), Jan. 24, 2001, at A1, *available in* 2001 WL 7044834. According to California State Sen. Liz Figueroa, "'[t]here is a time and place for government to step in, and this is one of the those times . . . .'" Lundstrom, *supra* note 149. *But see* Jacob Sullum, *They Had This Number*, WASH. TIMES, Nov. 23, 2000, at A17, *available in* LEXIS, News, The Washington Times (opining that no-call laws may not be an appropriate use of government power).

215. *See, e.g.*, Martinez, *supra* note 9 ("Short of monitoring every call, ripping the phone out of the wall or hunting down and torturing every unwanted caller, laws are the only means we have of protecting ourselves against America's corporate effort to drive us all crazy.").

216. Zitter, *supra* note 28, at 627–28.

decision not to adopt a database approach in 1992.[217] Whatever the position of the FCC and telemarketing interests, consumers are largely unpersuaded. To this end, Americans have been pressuring their state representatives to pass no-call legislation at the state level.

B. Do-Not-Call Laws at the State Level

Whereas the FCC has not exercised its statutory power to create a national no-telephone-solicitations database,[218] at least twelve states[219] have already seized upon the TCPA's savings clause[220] to enact similar restrictions of their own. Consumers have been quick to sign on to state do-not-call lists, but not all statutes are created equal. Depending on the number of telemarketers exempted from a particular statute's prescriptions and the vigor with which these laws are enforced, results have varied across the country. Notwithstanding the strength of any particular law, doubts linger about the constitutionality of states attempting to enforce their laws against out-of-state telemarketers. Ultimately, consumers' best defense against unwanted sales calls may be to convince Congress to require a nationwide do-not-call system.

1. The No-Call Landscape at the Close of the Twentieth Century

In response to consumer complaints about telemarketing calls[221] and a growing belief among citizens that federal regulation of telephone solicitation is too lax,[222] several states have passed legislation implementing statewide do-not-call lists.[223] According to

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217. Congressional staff later accused the FCC of acceding to industry persuasion with respect to its decision not to implement the database provision of the TCPA. *See* MAJORITY REPORT, *supra* note 35, at 16.

218. *See supra* note 74 and accompanying text.

219. *See supra* note 119.

220. *See supra* note 98 and accompanying text.

221. *See, e.g.*, Ken Miller, *Sick of Telemarketers? Sign Up for 'No-Call' List*, IDAHO STATESMAN, Nov. 17, 2000, at 1, *available in* 2000 WL 28733365 ("Gripes about telemarketers are consistently among the top 10 areas of complaints to the [Idaho Consumer Protection Unit's] consumer affairs office."); Resler, *Measure Has Nice Ring to It*, MILWAUKEE J. SENTINEL, Dec. 4, 2000, at 10A, *available in* 2000 WL 26099517 ("Only three years ago, gripes about telemarketers ranked 29th in volume among all written complaints received by [Wisconsin] state consumer protection officials. Last year, telemarketing complaints had zoomed to No. 7 on the list and this year will probably break the top 5.").

222. *See* Petty, *supra* note 33, at 46.

223. *See* Jerry Markon, *Take Me Off Your List! (Pretty Please?)*, STAR TRIB. (Minneapolis-St. Paul), Dec. 27, 2000, at 1D, *available in* 2000 WL 7003353. According to Markon,

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

one journalist, that momentum for these laws has built so quickly across the nation is "a signal of how unpopular telemarketing has become among Americans."[224] Indeed, the majority of state no-call laws enacted before 2001—as the following table illustrates—have become effective within the past two years.

State	Compilation Method for Do-Not-Call Requests	Effective
Alabama	database operated by the Public Service Commission[225]	2000
Alaska	Identification in telephone directory[226]	1996
Arkansas	database operated by the Attorney General[227]	2000
Connecticut	"no sales solicitation calls" listing maintained by the Department of Consumer Protection[228]	2001
Florida	"no sales solicitation calls" listing updated by the Florida Public Service Commission[229]	1997
Georgia	database operated by the Public Service Commission[230]	1999
Idaho	"no telephone solicitation contact" list published by the Attorney General[231]	2001
Kentucky	"no telephone solicitation calls" list maintained by the Office of the Attorney General[232]	1998

Id.

224. Savoye, *supra* note 117.

225. *See* ALA. CODE § 8-19C-2 (Supp. 2000).

226. *See* ALASKA STAT. § 45.50.475 (Michie Supp. 2000); *see generally "No Call List" (Alaska's Black Dot Law)* (visited Mar. 20, 2001) <http://www.law.state.ak.us/consumer/tele_stop.html>.

227. *See* ARK. CODE. ANN. § 4-99-404 (Michie Supp. 1999); *see generally Do Not Call - Arkansas Telemarketing Removal List Information* (last modified Dec. 7, 2000) <http://www.donotcall.org>.

228. CONN. GEN. STAT. ANN. § 42-288a(b) (West Supp. 2001); *see generally DCP Telemarketing NO CALL List* (last modified Mar. 17, 2001) <http://www.state.ct.us/dcp/nocall.htm>.

229. FLA. STAT. ANN. § 501.059 (West Supp. 2001); *see generally Florida Division of Consumer Services: No Sales Solicitation* (visited Mar. 20, 2001) <http://www.800helpfla.com/~cs/nosales.html>.

230. *See* GA. CODE. ANN. § 46-5-27 (Supp. 2000); *see generally Georgia No-Call List Web Site* (last modified Nov. 12, 1998) <http://www.ganocall.com>.

231. IDAHO CODE § 48-1003A (Michie Supp. 2000); *see generally Idaho No Call List Registration* (visited Mar. 20, 2001) <https://www.accessidaho.org/secapps/ag/nocall/register.html>.

232. KY. REV. STAT. ANN. § 367.46955 (Banks-Baldwin Supp. 2000); *see generally Telemarketing No-Call List* (last modified Feb. 5, 2001) <http://www.law.state.ky.us/cp/nocall.htm>.

Missouri	database established by the Attorney General[233]	2001
New York	registry maintained by the Consumer Protection Board[234]	2001
Oregon	database maintained by an administrator pursuant to contract with the Attorney General[235]	1999
Tennessee	database established by the Tennessee Regulatory Authority[236]	2000

While no-call legislation may be a relatively recent phenomenon,[237] Americans are rushing to take advantage of it wherever possible.[238] More than 1.6 million people had signed up for state-sponsored no-call lists or databases by the end of 2000.[239] In Missouri, 110,000 residents joined during the first week of registration[240]—50,000 in the first two days alone.[241] Tennessee's database includes 535,000 telephone numbers,[242] and 430,000 New Yorkers have already sought inclusion in the Empire State's registry, which becomes effective April 1, 2001.[243] According to one New York official, the do-not-call registry is "'one of the fastest growing state programs ever.'"[244] While no-call laws may be popular among consumers,[245] however, critics say these statutes are far

233. *See* MO. ANN. STAT. § 407.1101 (West Supp. 2001); *see generally Missouri No Call Law* (last modified Jan. 2, 2001) <http://www.ago.state.mo.us/nocalllaw.htm>.

234. *See* N.Y. GEN. BUS. LAW § 399-z (McKinney Supp. 2001); *see generally Do Not Call Preregistration* (last modified Oct. 27, 2000) <https://www.consumer.state.ny.us/prereg.htm>.

235. *See* OR. REV. STAT. § 646.574 (Supp. 1999); *see generally Oregon "No Call" List Website* (last modified Jan. 20, 2000) <http://www.ornocall.com>.

236. *See* TENN. CODE ANN. § 65-4-405 (Supp. 2000); *see generally TRA Do Not Call List* (last modified Mar. 9, 2001) <http://www2.state.tn.us/tra/nocall.htm>.

237. *See* Jim Bencivenga, *Resolved: One, Two*, CHRISTIAN SCI. MONITOR, Jan. 4, 2001, at 11, *available in* 2001 WL 3732806 (noting that do-not-call laws are in their infancy).

238. So popular is the Missouri law, in fact, that people from bordering states have been calling Missouri officials in hopes of being placed on the Missouri no-call list. *See* Savoye, *supra* note 117 (quoting Rosie Head, an administrative assistant for the state).

239. *See* Markon, *supra* note 223.

240. *See* Savoye, *supra* note 117.

241. *See* Bell, *supra* note 117.

242. *See* Karin Miller, *Tire Recall Voted Tennessee's Top Business Story for Year 2000*, CHATTANOOGA TIMES, Dec. 27, 2000, at C1, *available in* LEXIS, News, Chattanooga Times / Chattanooga Free Press.

243. *See Change of Jobs amid Bid Probe*, TIMES UNION (Albany, N.Y.), Jan. 22, 2001, *available in* 2001 WL 6287690.

244. Paula Voell, *Help for Victims of Scams, Telemarketers*, BUFF. NEWS, Dec. 5, 2000, at 1C, *available in* 2000 WL 5701878 (quoting Jon Sorensen, spokesman for the New York Consumer Protection Board).

245. *See, e.g.*, Choiniere, *supra* note 211 (calling Connecticut's no-call law "tremendously popular with a public that has become increasingly annoyed with . . . unsolicited [calls]"); Miller, *supra* note 221 (quoting Idaho Att'y Gen. Al Lance, who called the Idaho statute the most popular piece of legislation with which he has ever been involved).

from perfect. As one journalist has pointed out, a myriad of exemptions and lax enforcement in many states threaten their ultimate effectiveness.[246]

2. Exemptions

No-call laws can offer consumers the ability to opt out of most unwanted sales calls,[247] provided that they are not burdened by exemptions for too many types of solicitors. While some statutes are fairly effective, and some are merely adequate, still others have enough loopholes to render them practically unenforceable.[248] In each state, according to one journalist, "the statutes are layered with exemptions for charities, political groups, and companies that already have a relationship with the consumer."[249]

Statutes that go only this far are the more effective ones. Oregon's no-call law, for example, permits just four exemptions:

> If you ask a business to call you about a product, they're allowed to make the call. If the telemarketer is calling on behalf of a charity you've donated to in the past, the call is allowed. Similarly, if you've done business with a company in the past, they're allowed to call you. Finally, you can be called by someone doing a public opinion survey, but only if it's not connected to selling a service or product.[250]

New York officials predict their new no-solicitation law will be one of the strongest in the nation[251] because it also includes very few exceptions to the statutory definition of *unsolicited telemarketing calls*.[252] Similarly, Florida law—discussed *supra*[253]—allows a mere four exemptions[254] and purportedly eliminates 70% to 80% of unwanted sales calls to Florida homeowners.[255] Nevertheless, not all states have legislation that offers this

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246. *See* Markon, *supra* note 223.

247. *See* Bencivenga, *supra* note 237.

248. *See id.*

249. Markon, *supra* note 223.

250. Margie Boule, *Telling Telemarketers Where To Go*, PORTLAND OREGONIAN, Dec. 14, 2000, at E01, *available In* 2000 WL 27112653. *See* OR. REV. STAT. § 646.557 (Supp. 1999).

251. *See* Fried, *supra* note 40 (citing Jon Sorensen).

252. *See* N.Y. GEN. BUS. LAW § 399-z(1)(j) (McKinney Supp. 2001), defining an "unsolicited telemarketing sales call" as any telemarketing sales call other than a call made:

> (i) in response to an express written or verbal request of the customer called; or
> (ii) in connection with an established business relationship, which has not been terminated by either party; or
> (iii) to an existing customer, unless such customer has stated to the telemarketer that such customer no longer wishes to receive the telemarketing sales calls of such telemarketer; or
> (iv) in which the sale of goods and services is not completed, and payment or authorization of payment is not required until after a face-to-face sales presentation by the telemarketer or a meeting between the telemarketer and customer.

Id.

253. *See supra* notes 181–84 and accompanying text.

254. *See* FLA. STAT. ANN. § 501.059(1)(c) (West Supp. 2001).

255. *See supra* note 181.

level of protection from telemarketing calls.

According to Robert Blumash, founder of Private Citizen, laws in other states may only reduce telemarketing by 15% or 20% because they allow for so many exceptions.[256] In reality, statistics from certain states are more ominous than that. Twenty-two categories of telemarketers can ignore Kentucky's do-not-call list, making the Kentucky law one of the weakest in the nation.[257] Some consumer advocates label the law a "farce"[258] because, due to its numerous exemptions, the statute blocks only 5% of would-be telemarketing calls to Kentucky homes.[259] The effectiveness of no-call legislation, it seems, has much to do with how broad the statutory coverage happens to be in a given state. It also depends on how well the states actually enforce their no-call laws.

3. Enforcement

Part of the reason that telemarketing call volume has decreased so negligibly in many states is that solicitors are violating the law without being punished.[260] According to a recent editorial, "[a]lthough telemarketers who ignore . . . 'do not call' lists could . . . face heavy fines, most states have gone easy" on them.[261] Consider the situations in Alaska and Arkansas, for example. No Alaska telemarketer has been fined since passage of no-call legislation in 1996. Arkansas has yet to fine anyone either—probably because the state allows telephone solicitors eight to ten free violations.[262] Even states that do fine telemarketers do not necessarily do so to the full extent the laws allow. Florida, while it has exacted approximately $450,000 in fines for illegal calls, often settles with telemarketers for $1000, rather than the maximum allowable penalty of $10,000.[263] This is not to say, however, that other states are not vigorously prosecuting telemarketers who violate no-call laws.

In Oregon, the Attorney General's office is going after telemarketers who violate the state's two-year-old no-call law.[264] Thus far, Oregon has collected $90,000—all during a three-month period.[265] The state settled cases with twenty telemarketers in No-

256. *See* Markon, *supra* note 223.

257. *See Dateline NBC: Consumer Alert, Call of the Wild; Telemarketers Invading Americans' Homes* (NBC television broadcast, Dec. 5, 2000) (transcript *available in* LEXIS, News, Transcripts) [hereinafter *Dateline NBC*]; *see also supra* note 178.

258. *See Dateline NBC*, *supra* note 257.

259. *See supra* note 180 and accompanying text.

260. *See* Choiniere, *supra* note 211 (noting that Private Citizen "estimates that because of both violators and the many no-call exceptions telemarketing calls have been trimmed by as little as 20 percent in some states"); *see also Curbing Telemarketers: A New Bill Might Reduce the Irritation*, RECORD (N. N.J.), Jan. 7, 2001, at 02, *available in* 2001 WL 5232632 ("The problem that many . . . states have faced is an utter lack of enforcement.").

261. *Curbing Telemarketers*, *supra* note 245.

262. *See* Markon, *supra* note 223.

263. *See id.*

264. *See* Boule, *supra* note 250.

265. *See* Voell, *supra* note 244.

vember of 2000[266] and fifteen more in early January 2001. In addition to paying fines to the Department of Justice Consumer Protection and Education Fund, violators pledged to change their operating procedures to comply with the no-call law.[267] Probably not surprisingly, the Oregon law is working.[268] According to one Oregonian who signed up for the state's database in May of 2000, "[i]t was not more than two or three weeks, and the calls just stopped coming . . . . It was absolutely great."[269] Such are the potential results when a resident invokes his statutory right not to receive telemarketing calls in a state that offers a strong no-call statute[270] and has an attorney general willing to enforce it.

While consumers are largely excited by the prospect of reducing interrupting sales calls via state legislation, it remains to be seen whether current state no-call laws pass constitutional muster.

4. Constitutional Questions Untested[271]

Although the telemarketing industry has yet to take its case to court, state do-not-call laws may not be constitutional.[272] In fact, there appear to be at least two potential impediments to state regulation. The first is whether the TCPA and the FCC's rules implementing that law preempt state no-call laws. The second is the so-called "dormant" aspect of the Commerce Clause, which limits states from enacting laws that have the purpose or effect of discriminating against interstate commerce in some way, even in the absence of congressional action.

a. Federal preemption

The United States Court of Appeals for the Eighth Circuit briefly addressed the issue of potential state-law preemption by the TCPA in *Van Bergen v. Minnesota*.[273] At

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266. According to reporter Margie Boule,

> court actions were filed against telemarketing companies trying to sell, among other things, hearing aids, auto glass, vacation time shares, bottled water and the ubiquitous vinyl siding to people on the no-call list. The state worked out settlements with those companies, which now will pay fines of over $100,000. That money will cover the cost of running the program.

Boule, *supra* note 250.

267. *See* Sherri Buri McDonald, *Oregon Accuses 15 Companies of Violating Telemarketing No-Call Law*, REGISTER GUARD (Eugene, Or.), Jan. 3, 2001, *available in* 2001 WL 2835522.

268. *See* Boule, *supra* note 250.

269. *See id.* (quoting Oregon resident Richard Koonce).

270. *See, e.g.*, *supra* notes 235–40 and accompanying text (discussing the no-call laws of Oregon, New York, and Florida).

271. These issues may merit more in-depth treatment elsewhere; this Note attempts only to indicate in a cursory manner that there may be a constitutional battle on the horizon over state no-call laws.

272. *See* Fiske, *supra* note 32.

273. Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995). Van Bergen, a candidate for governor, instituted his suit claiming, in part, that because the Minnesota statute imposed less restrictive requirements on

issue in *Van Bergen* was the constitutionality of a Minnesota statute that regulated the use of automatic dialing-announcing devices, which Congress had already restricted in the TCPA. According to the *Van Bergen* court, "[f]ederal law can preempt state law without an express statement by Congress when the federal statute implies an intention to preempt state law or when state law directly conflicts with federal law."[274]

Congress provided in the TCPA that "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations . . . ."[275] Thus, the states may impose stricter rules upon in-state telemarketers who call residents of the same state.[276] What remains unclear is whether state regulations that have the effect of restricting out-of-state telemarketers are permitted under the TCPA or in light of Congress's general power to regulate interstate commerce. Although there is no express statement in the TCPA that indicates Congress wanted to preempt state laws that affect interstate telemarketing, a court might conclude that the statute *implied* that intent.[277]

Even if the states can prevail on the issue of preemption, no-call laws might also be attacked as being in violation of the Commerce Clause. It is this second concern that would seem to present the more serious impediment to the validity of state do-not-call laws.[278]

b. Commerce Clause concerns

The Commerce Clause, for one thing, grants Congress the positive power to regu-

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the use of automatic dialing-announcing devices than did the TCPA, the TCPA preempted the statute. *See id.* at 1547. This argument failed to persuade the court, which found that the TCPA's "savings clause . . . does not state that all less restrictive requirements are preempted; it merely states that more restrictive requirements are not preempted. The TCPA, therefore, does not expressly preempt the Minnesota statute." *Id.* at 1547–48. The potential constitutional challenge regarding state no-call laws, however, presents a different issue—that is, whether a state can reach across its border to regulate the behavior of telemarketers calling its residents in light of Congress's Commerce Clause power, exercised through Congress's passage of the TCPA and the FCC's promulgation of the related regulations.

274. *Id.* at 1548 (citations omitted).

275. 47 U.S.C. § 227(e)(1) (1994) (emphasis added); *see also supra* note 98 and accompanying text.

276. State no-call laws are a perfect example: their constitutionality is not challenged to the extent that they regulate purely intrastate telemarketing calls.

277. According to § 2(7) of the TCPA, although states have statutes restricting various telemarketing practices, "telemarketers can evade their prohibitions through interstate operations." Pub. L. No. 102-243, § 2(7), 105 Stat. 2394, 2394 (1991). This, in fact, was a main reason why Congress passed the TCPA. *See id.* (stating "therefore, Federal law is needed to control residential telemarketing practices"). Based upon this language, telemarketers might argue that Congress thought state laws such as those at issue here were preempted by federal law. This might explain why Congress felt it was necessary to craft the savings clause exception for intrastate requirements.

278. Courts have invalidated "a large number of state regulations affecting interstate commerce" on Dormant Commerce Clause grounds. Charles R. Topping, Note, *The Surf is Up, But Who Owns the Beach?—Who Should Regulate Commerce on the Internet?*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 179, 206 (1999).

late commerce among the several states.[279] Moreover, the Supreme Court has ruled that the Commerce Clause operates on a negative basis to prevent state laws that unduly burden interstate commerce.[280] This negative implication is often referred to as the Dormant Commerce Clause.[281] As one author explains,

> [t]he U.S. Supreme Court has held that the clause not only empowers Congress to regulate interstate commerce, but also thwarts the states' power to enact laws that interfere with interstate commerce. . . . In *General Motors Corp. v. Tracy*, the Court stated that "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" Thus, a state regulation found to be discriminatory or unduly burdensome to interstate commerce will be invalidated, even though it might concern an area that Congress has chosen not to regulate.[282]

Although there is no direct precedent on the Dormant Commerce Clause as it applies to telephone solicitation, recent decisions in cases involving state-based regulation of the Internet may provide insight into how courts would rule on challenges to no-call legislation.[283] In *American Library Ass'n v. Pataki*,[284] for example, the United States District Court for the Southern District of New York found that a New York statute designed to keep people from transmitting harmful material to children over the Internet violated the Constitution.[285] According to the district court, "the practical impact of the New York Act results in the extraterritorial application of New York law to transactions involving citizens of other states."[286] Because the Act, "[b]y its terms, . . . applies to any communication, intrastate or interstate, that fits within the prohibition" against transmitting harmful materials to minors,[287] Judge Preska wrote, the statute was "per se violative

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279. *See* U.S. CONST. art. I., § 8, cl. 3.

280. *See* General Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997) (citing Reeves, Inc. v. Stake, 447 U.S. 429, 437 (1980)).

281. *See id.*

282. Topping, supra note 278, at 205–06 (citations omitted).

283. *See generally* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 788–94 (2001) (reviewing Dormant Commerce Clause principles and describing their application to state-based regulation of the Internet).

284. 969 F. Supp. 160 (S.D.N.Y. 1997).

285. The statute made it a felony for an individual,

> [k]nowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, [to] intentionally use[] any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

Id. at 163 (quoting the New York statute).

286. *Id.* at 183.

287. *Id.* at 169–70.

of the Commerce Clause."[288]

Similar to the state's prior attempt at Internet regulation, New York's do-not-call law includes no provision to prevent its extraterritorial (interstate) enforcement.[289] Were a court to apply reasoning similar to that employed in *Pataki*, it might find that New York's do-not-call law violates the Commerce Clause as well.[290] Furthermore, because the language of other state no-call laws is similar to New York's, those laws could also face constitutional obstacles when subjected to judicial review.[291]

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288. *Id.* at 183–84. *But see* James E. Gaylord, Student Article, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1127 (1999) (concluding that "the history of extraterritoriality suggests that courts will ultimately be forced to withdraw from the absolute prohibition of state regulation of the Internet announced in [*Pataki*]"). According to Gaylord, caselaw indicates that courts may retreat from an absolute ban on state-based Internet regulation "by finding a nexus requirement in the dormant Commerce Clause." *Id.* Under this requirement, Gaylord hypothesizes, "the test employed by future courts might simply inquire into the strength of the connection between the state's regulatory interest and the enterprise sought to be regulated." *Id.* Gaylord believes such a test would permit states to "enact zoning legislation targeted at actors who knowingly aim their conduct toward the state." *Id.* If this assumption is correct, courts could eventually give states the green light to regulate out-of-state telemarketers who knowingly target their solicitation calls to residents of a particular state as well.

289. The New York law provides that "[n]o telemarketer or seller may make or cause to be made any unsolicited telemarketing sales call to any customer more than thirty days after the customer's name and telephone number or numbers appear on the then current quarterly no telemarketing sales calls registry . . . ." N.Y. GEN. BUS. LAW § 399-z(3) (McKinney Supp. 2001). The statutory definition of "telemarketer" is not limited to in-state callers, but includes "any person who, for financial profit or commercial purposes in connection with telemarketing, makes telemarketing sales calls to a customer when the customer is in this state or any person who directly controls or supervises the conduct of a telemarketer." *Id.* § 399-z(1)(g).

290. *But see* People v. Hsu, 99 Cal. Rptr. 2d 184 (Cal. Ct. App. 2000) (rejecting defendant's constitutional challenge to state statute that criminalized distribution or exhibition of lewd material to a minor over the Internet). The California court employed the Dormant Commerce Clause test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), and determined that state-based Internet regulation did not violate the Commerce Clause. *See Hsu*, 99 Cal. Rptr. 2d at 190. Under the *Pike* test,

> [w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [Citation.] If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. (citing *Pike*, 397 U.S. at 142). The California court, applying this test, noted that "the state's abiding interest in preventing harm to minors" outweighed any effect the statute may have on interstate commerce. *Id.* The precedential value of this opinion to states that might attempt to ward off constitutional challenges to their no-call laws is dubious; telemarketers would likely seek to distinguish it by arguing that any governmental interest in protecting consumers from inconvenient telephone calls is far less substantial than the interest a state has in protecting the safety of children within its borders.

291. Despite the potentially broad implications of the *Pataki* ruling, the Supreme Court of Washington has recently handed down an opinion in a cyberlaw case that proponents of do-not-call legislation will welcome. At issue in *Washington v. Heckel*, 24 P.3d 404 (2001) (en banc), was whether Washington's statute governing misleading subject lines in unsolicited commercial electronic mail ("spam") imposed an unconstitutional burden on interstate commerce. After an out-of-state resident sent spam containing arguably misleading subject-line information to Washington residents, the state supreme court distinguished *Pataki* and upheld the regulation. According to the court, "[i]n contrast to the New York statute, which could reach all content posted

The constitutional issues surrounding state no-call legislation have yet to be litigated, but that may soon change. Industry lawyer Tyler Prochnow warns that, although it has thus far been easier for out-of-state telemarketers to pay small penalties to avoid amassing hefty legal bills by contesting the fines in court, the increasing number of state no-call laws may lead to a courtroom showdown.[292] The outcome of such a fight would likely decide the fate of no-call laws in general: if the states were not permitted to address the problem of out-of-state telemarketers calling state residents, only Congress or the FCC could enact effective do-not-call legislation—something for which neither body has shown much inclination to date.

5. A Better Solution?

Even if state no-call laws are constitutional, they still may not offer the best possible solution to the problem of undesired telemarketing calls. While telemarketing interests generally oppose any form of no-call legislation, there may ultimately be calls from the industry itself for the FCC to adopt a national database. After all, as states continue to pass these laws, it will only become more difficult for telemarketers to keep up. According to a recent article, "[t]rying to juggle no-call lists from a dozen states, along with updates, creates a logistical nightmare for call centers, many of them small-budget operations."[293] Industry personnel have already voiced concern; some would support the creation of "a comprehensive list from all states and universal telemarketing rules" to make compliance easier.[294] Provided that there are no successful challenges to the constitutionality of state no-call laws and that states keep passing similar legislation,[295] then, it might behoove the FCC to reconsider its stance against a national do-not-call data-

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on the Internet and therefore subject individuals to liability based on unintended access, the [Washington] Act reaches only those deceptive [spam] messages *directed to* a Washington resident . . . ." *Id.* at 412–13 (emphasis added). After making this distinction, the court concluded that the statute provided local benefits that outweighed any conceivable burden it imposed upon senders of spam and, accordingly, that it did not violate the Dormant Commerce Clause. *See id.* at 413. No-call statutes could be construed similarly by reviewing courts.

292. *See* Fiske, *supra* note 32.

293. *See* Savoye, *supra* note 117.

294. Choiniere, *supra* note 211; *cf.* Nadel, *supra* note 10, at 116 (noting that "one advantage of a national model act is that the industry might be more receptive to proposals by a single, national group with special experience in telecommunications").

295. It appears that states will pass additional no-call laws. The Mississippi Senate recently passed Senate Bill 2362, which would establish a no-call list, but, as of early February 2001, the legislation had yet to go to the House. *See Telephony*, COMM. DAILY, Feb. 9, 2001, *available in* 2001 WL 5052538. On February 12, 2001, the Indiana House unanimously approved House Bill 1222, which, unlike the version that failed in the 2000 legislative session, would not require residents to pay a fee to have their numbers placed on a state do-not-call list. Indiana Attorney General Steve Carter, who would administer the law, says he supports it. *See* Martin DeAgostino, *Senate Approves Changing Kindergarten Start Date*, S. BEND TRIB. (Ind.), Feb. 13, 2001, at D3, *available in* 2001 WL 7305373. Numerous other states are currently considering similar legislation.

Because this Note does not reflect the results of this year's legislative sessions within the several states, readers may wish to consult the web site of the National Conference of State Legislatures for the most recent listing of state do-not-call laws. *See State Do-Not-Call Statutes* (visited June 26, 2001) http://www.ncsl.org/programs/lis/CIP/donotcall.htm>.

base.[296]

V. SUMMARY AND CONCLUSION

Advances in communications technology have led to an erosion of citizens' fundamental right to be left alone.[297] This fact is especially evident when it comes to the booming industry of commercial telephone solicitation. Telemarketing calls made to American homes have increased dramatically in recent years, and the public has made its disapproval known. While consumer groups, businesses, and politicians may quibble over how to best balance the interests of consumers weary of receiving sales calls and businesses eager to generate revenue and provide jobs, the Constitution does not prohibit restrictions on commercial telemarketing. Current regulation of telemarketing practices comes from many sources: the states and the federal government have adopted a variety of restrictions, the industry has tried to self-regulate so that it might prevent further government intervention, and consumer groups have instituted their own plans to facilitate maximum consumer benefit from the statutes currently in force.

Despite past attempts at regulation of the telemarketing industry, many Americans remain dissatisfied. A hot topic in recent years, therefore, has been whether the states or the federal government should strengthen consumer privacy rights by adopting do-not-call legislation and setting up databases for consumers who wish to opt out of receiving sales calls. Although Congress suggested that the FCC consider adopting a national database approach almost a decade ago, the FCC ultimately rejected that idea, directing telemarketers to keep company-specific no-call lists instead. At least twelve states have already done what the FCC would not. Depending on the state and the specific loopholes in its no-call system, this legislation has generally been popular and reasonably effective. Nevertheless, questions regarding the constitutionality of some state telemarketing legislation remain untested; it may be that states must confine their regulation to calls made from within their borders. There is an indication that, as lawsuits to enforce these no-call laws increase in frequency, telemarketers may stop paying the fines and take their case to court.

If it turns out that only Congress can regulate interstate telemarketing calls, out-of-state telemarketers may easily sidestep the dictates of state no-call legislation. Given this possibility, as well as the burden that complying with numerous and varied state statutes may cause telemarketers, a national do-not-call system may be the most uniform and cost-efficient way to reduce unwanted telemarketing calls.[298] In the meantime, residents of states with no-call legislation continue to take advantage of it.[299] Do-not-call laws

296. *See supra* note 138 and accompanying text.

297. *See* Radner, *supra* note 31, at 376.

298. *See* Kolnicki, *supra* note 29, at 246.

299. Many state legislators do not seem bothered by the potential constitutional problems with state-based databases, either. *See, e.g.*, Fiske, *supra* note 32 (noting that Virginia "General Assembly members seeking tighter restrictions on telemarketers say it is worth taking a chance on the constitutionality of a new

may not be perfect, but, in the minds of many, they offer more promise to frustrated consumers than the current less-restrictive alternatives.[300]

Michael E. Shannon[*]

state law").

300. *See, e.g.*, Michael Booth, *Group To Push Call-Block Measure: Legislation Targets Telemarketers*, DENV. POST, Jan. 13, 2001, at A01, *available in* 2001 WL 6740370 (noting that, according to lobbyist Rutt Bridges, "'[w]e can't let the perfect be the assassin of the good'").

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