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# Hanging Up on Commercial Speech: *Moser v. FCC*

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# HANGING UP ON COMMERCIAL SPEECH: *MOSER V. FCC*

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*Abstract*: The Ninth Circuit Court of Appeals in *Moser v. FCC* upheld the constitutionality of provisions in the Telephone Consumers Protection Act which prevent the commercial use of devices that deliver a pre-recorded sales message to home telephones. This Note examines the history of the U.S. Supreme Court's treatment of commercial speech and argues that the Ninth Circuit decision failed to apply criteria reflective of the Court's conception of the significant role played by commercial speech in our economy and society.

During the past thirty years the U.S. Supreme Court has increased the protection granted to commercial speech under the First Amendment of the Constitution. Although such profit-oriented speech still does not enjoy the full level of freedom that has been upheld for political and artistic speech, the trend of Court decisions has nevertheless been toward demanding more compelling and precisely justified state interests before statutes impinging on commercial speech are upheld against the rights of vendors to advertise their wares.

In an era in which products are developed and improved with ever accelerating speed and when economic well-being depends more and more on communication between service providers and consumers, the Court has understood that "significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day."[1]

In response to this realization, the Court has concluded that commercial speech now needs greater freedom than it has been afforded in the past. But, the very technological innovation about which consumers need increased information has also increased the speed and capacity with which information is disseminated—ironically to the point of overload. The relentless barrage of television, radio and print advertising, door-to-door solicitors and the intrusive electronic chirp of the phone call that brings an unwanted, recorded sales pitch, "interrupting a meal, a restful soak in the bathtub, even intruding on the intimacy of the bedroom,"[2] have come to be seen as symptomatic of a

1. Bates v. State Bar, 433 U.S. 350, 364 (1977).

2. State v. Casino Mktg. Group, 491 N.W.2d 882, 888–89 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993).

hectoring modern world from which people cannot even escape into the privacy of their own homes.

It was to address citizens' concerns about telephone solicitation that Congress in 1991 passed the Telephone Consumer Protection Act (TCPA) which, among other things, bans the use of some—though not all—prerecorded telephone messages.[3] Similar state measures have met a mixed fate in the courts;[4] the provisions of the federal act relating to recorded commercial solicitations were upheld by the Ninth Circuit Court of Appeals in *Moser v. FCC*,[5] which overturned a federal trial court decision declaring the TCPA to be in violation of the First Amendment.[6]

This Note argues that *Moser* was incorrectly decided. Part I examines the recent trends in U.S. Supreme Court cases considering the free speech rights of commercial communicators. Part II examines the specific test which the Court has developed for determining whether governmental regulations unconstitutionally abridge commercial speech rights. Part III analyzes the *Moser* decision in the context of those trends. Part IV identifies areas in which *Moser* departs from Supreme Court doctrine and suggests that the district court opinion applied a more correct interpretation of the law.

## I. EVOLUTION OF COMMERCIAL SPEECH DOCTRINE

### *A. First Amendment Protections*

It is axiomatic that the First Amendment guarantee of free speech is not absolute;[7] government may restrict speech rights to the extent that they are used to subvert its ability to prevent "substantive evils,"[8] an idea succinctly exemplified by Justice Holmes's well-known comment that the right to free speech may not be extended to protect one who falsely

3. Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 (West Supp. 1994)). *See infra* notes 94–95 and accompanying text for relevant portions.

4. *Compare Casino Marketing.*, 491 N.W.2d 882 (upholding state ban) *with* Lysaght v. New Jersey, 837 F. Supp. 646 (D.N.J. 1993) *and* Moser v. Frohnmayer, 845 P.2d 1234 (Or. 1993) (both overturning state bans).

5. 46 F.3d 970 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2615 (1995).

6. Moser v. FCC, 826 F. Supp. 360 (D. Or. 1993).

7. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 430 (1989); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942); Schaefer v. United States, 251 U.S. 466, 474 (1920).

8. Schenck v. United States, 249 U.S. 47, 52 (1919) (upholding ban on anti-draft agitation during World War I).

cries fire and causes panic in a theatre.[9] Certain categories of speech have been denied First Amendment protection altogether as a matter of their content.[10] The Court has held that obscenity,[11] libel and slander,[12] fighting words,[13] and incitement to violence,[14] as well as speech of the type indicated in Justice Holmes's example, all lie outside the bounds of the First Amendment guarantee.

Speech which is entitled to First Amendment protection may not be abridged on the basis of its content; it may, however, be subjected to reasonable regulations based on the time, place or manner in which it is expressed.[15] The Court applies a three-prong test to determine the constitutional validity of a regulation purporting to be a time, place, or manner regulation: first, the regulation must be content-neutral; second, it must further a "significant governmental interest"; and third, it must "leave open ample alternative channels" through which the regulated speech can find expression.[16]

### *B. The Commercial Speech Exception*

In 1940, F.J. Chrestensen owned and exhibited for profit a former U.S. Navy submarine which he had docked at a state pier in New York City.[17] When he attempted to advertise the attraction on handbills distributed in the city streets, he ran afoul of a municipal ordinance preventing such distribution of "commercial and business advertising matter."[18] Upon learning that handbills devoted solely to information or public protest could be lawfully distributed, Chrestensen printed a new run, one side of which featured his ad for the sub and the other a protest against the city's refusal to grant him a berth for the display of his vessel at a city dock, which he apparently would have preferred to the state-run facility.[19] Informed by the police that his double-sided handbill could not be distributed, he brought suit to enjoin their interference and succeeded

9. *Id.*
10. *Chaplinsky*, 315 U.S. at 571–72.
11. Roth v. United States, 354 U.S. 476 (1957).
12. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
13. *Chaplinsky*, 315 U.S. at 572.
14. Brandenburg v. Ohio, 395 U.S. 444 (1969).
15. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
16. Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981).
17. Valentine v. Chrestensen, 316 U.S. 52, 52–53 (1942).
18. *Id.* at 53.
19. *Id.*

through the level of the Second Circuit Court of Appeals.[20] The Supreme Court, however, refused to sustain the injunction that had been granted below, abruptly refusing to "indulge nice appraisal based upon subtle distinctions" of the sort that had caused the appeals court to ponder the difficulty in separating "what is of public interest and what is for private profit."[21] While noting that states and municipalities could not unduly burden opinion and information, the Supreme Court pronounced itself "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising."[22] Chrestensen's attachment of a political protest apparently did not, in the Court's view, introduce any protectable impurities into his intent to advertise. The so-called "commercial speech exception" was born, effectively placing advertising, along with obscenity, fighting words, and incitement to violence in the class of speech denied First Amendment protection.

A decade later, in *Breard v. City of Alexandria*, the Court upheld a municipal ordinance prohibiting door-to-door solicitation against complaints that it violated the First Amendment.[23] The item being sold—magazine subscriptions—gave the Court (and particularly Justice Black, who, joined by Justice Douglas, dissented)[24] some pause because the magazines themselves were clearly entitled to First Amendment protection. But Justice Reed, writing for the majority and noting that "[o]nly the press or oral advocates of ideas could urge this point," which was "not open to the solicitors for gadgets or brushes,"[25] distinguished the method of sale from the product and determined that the constitutional question turned on a balance between the privacy of the householder and the publisher's right to distribute in an effective manner.[26]

Privacy was of great concern to Justice Reed, who discussed the "rapid concentration" of post-war housing patterns as it affected solicitation and householders' reaction to solicitation.[27] Where the isolated rural dweller of the past might welcome the occasional drummer

20. Valentine v. Chrestensen, 122 F.2d 511 (2d Cir. 1941).

21. 316 U.S. at 55.

22. *Id.* at 54.

23. 341 U.S. 622 (1951) (also rejecting challenges based on the Due Process and Commerce Clause).

24. *Id.* at 649–50 (Black, J., dissenting).

25. *Id.* at 641.

26. *Id.* at 644.

27. *Id.* at 626.

who came with news and new products, door-to-door salesmen had now become largely a nuisance.[28] The majority found the balance tilted in favor of privacy, concluding that the right of communities to ensure the privacy of their residents did not abridge the First Amendment.[29]

The *Breard* opinion still embodies the notion that "purely commercial" speech is to be distinguished from information and opinion and is beyond the perimeters of First Amendment protection.[30] Although this notion would soon change, the right of communities to legislate on behalf of their citizens' privacy has retained its force as one of the compelling state interests that have been effectively opposed to the right of free speech.[31]

In 1964, in the renowned *New York Times v. Sullivan* case, the Court sustained First Amendment protection for a paid political advertisement against a challenge that the ad, attacking Alabama authorities' opposition to the civil rights movement, was "commercial" and therefore not entitled to such protection.[32] The Court distinguished *Chrestensen*, maintaining the distinction between purely commercial ads and ads which "communicated information, expressed opinion, recited grievances, protested claimed abuses and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[33] Although, as the above language indicates, the commercial advertisement remained a more or less contemptible form of expression in the Court's 1964 jurisprudence, history had already shown that the contemptible might come to garner sufficient respect to merit First Amendment protection.

In 1952, such protection had been upheld for commercial motion pictures, even though "their production, distribution and exhibition is a large-scale business conducted for private profit."[34] Analogizing films to printed publications, which did not lose protection just because they were

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28. *Id.*

29. *Id.* at 645. Prefiguring the "ample alternative channels" prong of the time, place or manner test, Justice Reed noted that those who wanted a subscription to the magazines in question had means other than door-to-door solicitation by which to obtain it. *Id.* at 644.

30. Even Justice Black, who would have extended First Amendment protection to magazine subscription solicitors, was careful to include a footnote making it clear that he intended no such protection for a "merchant . . . selling pots." *Id.* at 650 (unnumbered note) (Black, J., dissenting).

31. *See* Rita Marie Cain, *Call Up Someone and Just Say "Buy"—Telemarketing and the Regulatory Environment*, 31 Am. Bus. L.J. 641, 644 & n.22 (1994).

32. 376 U.S. 254, 265–66 (1964).

33. *Id.* at 267.

34. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

sold for a profit,[35] the Court overruled a 1915 decision which had rejected the idea that "motion pictures and other spectacle" should be compared to the free press.[36] The Court reasoned that "the judicial sense, supporting the common sense of the country is against the contention" and that "[i]t cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit."[37]

In *Burstyn*, the distinction between profit-oriented speech and informative or opinion-giving speech no longer seemed quite so pure and simple, at least in the case of movies, which probably reflects the greater credibility as an art form that films had attained between 1915 and 1952.[38] This extension of old protections to a new form of communication laid the groundwork for further expansion of the categories of communication that would be held to convey protected information and opinion. It also reflected a growing tendency to recognize that profit-seeking and information-providing are not necessarily mutually exclusive. But the expansion was a slow one, and it took another quarter century before the Court was willing to conclude that advertisements, the most purely and simply commercial of all communication, could convey protectable information.

### C. *Increasing Protection For Commercial Speech*

In 1975, in *Bigelow v. Virginia*,[39] the Court, picking up the strands of a theme that had been raised in earlier cases,[40] limited the significance of *Chrestensen* to upholding only "a reasonable regulation of the manner in which commercial advertising could be distributed."[41] Writing for the majority, Justice Blackmun emphasized that *Chrestensen* "obviously does not support any sweeping proposition that advertising is

35. *Id.* at 501–02.

36. Mutual Film Corp v. Industrial Comm'n, 236 U.S. 230 (1915).

37. *Id.* at 244.

38. *Compare Burstyn* 343 U.S. at 501 ("It cannot be doubted that motion pictures are a significant medium for the communication of ideas.") *with* the supercilious attitude of *Mutual Film Corp.*, 236 U.S. at 244 ("other spectacle").

39. 421 U.S. 809 (1975).

40. *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 314 n.6. (1974) (Brennan, J., dissenting); Cammarano v. United States, 358 U.S. 498, 514 (1959) (Douglas, J., concurring). Justice Douglas had been part of the *Chrestensen* majority.

41. *Bigelow*, 421 U.S. at 819.

unprotected per se."[42] *Bigelow* upheld First Amendment protection for an ad placed in a Virginia paper by a New York abortion-referral agency on the ground that, in addition to proposing a commercial transaction, it contained factual material of wider significance.[43] The Court stressed that information contained in the ad could be of general public interest (e.g., to those seeking change in Virginia laws which prohibited abortion) beyond its specific commercial interest to those who might want to avail themselves of the paid service offered by the referral agency.[44]

The following year, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,[45] the Court finally dispensed entirely with the commercial speech exception in striking down a Virginia law that forbade pharmacists from advertising the prices of prescription drugs. What is striking about the reasoning of the decision is a new attitude toward the value of advertising which stands in sharp contrast to the previous derision. Gone is the distinction between a category of valuable information and opinion (from which the publication of information purely about products offered for sale is by its very nature excluded) and an inferior category deemed to be of less public value. Advertising is now seen per se to occupy an important part in the life of the nation, such that:

> [N]o line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and

42. *Id.* at 820.

43. *Id.* at 822.

44. *Id.* In his dissent, Justice Rehnquist was unimpressed with Blackmun's reasoning:

> If Virginia may not regulate advertising of commercial abortion agencies because of the interest of those seeking to reform Virginia's abortion laws, it is difficult to see why it is not likewise precluded from regulating advertising for an out-of-state bucket shop on the ground that such information might be of interest to those interested in repealing Virginia's "blue sky" laws.

*Id.* at 831 (Rehnquist, J., dissenting).

45. 425 U.S. 748 (1976).

> well informed. To this end, the free flow of commercial information is indispensable.[46]

In reaching this opinion, the Court relied explicitly on the free-speech theories of Alexander Meiklejohn, which emphasized the importance of information availability to the democratic political process.[47] The Court's reasoning also implicitly reflects the anti-Keynesian, neo-classical economic theories (with their emphasis on market-driven decision making and the necessity of accurate information to make that process efficient) which had come to the fore in the 1970s.[48] This sensitivity to contemporary economic attitudes is analogous to the change that occurred in the Court's attitude toward movies between 1915 and 1952 in that it too reflects evolving opinion.

Despite abandoning the commercial speech exception, the Court was not willing to overlook what it called the "commonsense differences" between commercial speech and "other varieties."[49] Specifically mentioned are two features which the Court finds particular to commercial speech and which give it strength to withstand regulation: the greater ease with which its truth (as contrasted with the truth of "news reporting or political commentary") is able to be verified (because the disseminator can be presumed to know more about its product than anyone else) and the centrality of advertising to commercial profitability.[50] The latter attribute is sufficient, in the Court's view, to insure the vigor and persistence of commercial speech, so that "there is little likelihood of its being chilled by proper regulation and forgone entirely."[51]

The door is thus still open for government to encumber commercial speech with restrictions that would not be tolerated if placed on political speech; and while it may seem that not much has in fact changed beyond the semantics of dropping "commercial speech exception" from the

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46. *Id.* at 765. The Court exerted considerable effort to discuss the value of full information in the contex of drug price availability. *Id.* at 763–65, and nn.18, 20.

47. *Id.* at 765 n.19. The Court mentioned with approval Meikeljohn's 1948 book *Free Speech and Its Relation to Self-Government.* For a discussion of Meiklejohn's influence on free speech jurisprudence, see Edwin P. Rome & William H. Roberts, *Corporate and Commercial Free Speech* 201–04 (1985).

48. *See, e.g.*, Milton Friedman, *Capitalism and Freedom* 16–21 (1962) (urging the interconnectedness of free speech and free markets). In 1976, the year of the *Virginia Pharmacy* decision, Friedman won the Nobel Prize for Economics. *World Almanac and Book of Facts* 316 (1995).

49. *Virginia Pharmacy*, 425 U.S. at 771 n.24.

50. *Id.*

51. *Id.*

judicial lexicon, the change in attitude is significant. Restrictions are now permissible because commercial speech is seen to be vital and capable of bearing up under the challenge and, in the aggregate, a public benefit—not because it is despicable and unworthy of protection. The practical result of this changed attitude is a willingness, manifest in the decisions which followed *Virginia Pharmacy*, to give advertisers greater freedom to have their say. The door allowing governmental restriction is still open, but not as wide as it once was; and the Court is prepared to exercise judicial scrutiny to assure that First Amendment guarantees are preserved.

In the new attitude toward commercial speech there is, moreover, a concomitant new attitude toward the consuming public, which had been largely ignored in the pre-*Virginia Pharmacy* consideration of commercial First Amendment cases, although there are hints at it in Bigelow's conception of a general public interest that overlays the particular commercial interest of the advertiser.[52] The Court now emphasizes that the issue is not only the advertiser's right to disseminate information, but also the public's right and need to receive it; and the Court criticizes the "highly paternalistic approach," evidenced by Virginia's assumption that its regulation protected consumers against the threat that they would be duped by the blandishments of advertising into sacrificing the benefits of "professional" pharmacists' advice in exchange for low prices.[53] The "alternative" attitude, which the Court finds enacted in the First Amendment, is "to assume . . . that people will perceive their own best interests if only they are well enough informed."[54] If there is a choice to be made "between the dangers of suppressing information, and the dangers of its misuse if it is freely available," the First Amendment has already made that choice and decided that the greater danger lies in suppression.[55]

## II. THE CONTOURS OF COMMERCIAL SPEECH RIGHTS

In the years following *Virginia Pharmacy*'s enunciation of a policy emphasizing greater Constitutional protection for commercial speech, the Court decided a series of cases in which it developed general guidelines

52. Bigelow v. Virginia, 421 U.S. 809, 822, 829 (1975). *See supra* text accompanying note 43.

53. *Virginia Pharmacy*, 425 U.S. at 770.

54. *Id.*

55. *Id.*

for applying the policy and, inter alia, specifically considered the conflict between free speech and privacy rights.

### *A. The* Central Hudson *Test*

In *Central Hudson Gas & Electric v. Public Service Commission*, the Court examined the history of its commercial speech cases and concluded that "a four-part analysis has developed."[56] The four-step process outlined in *Central Hudson* remains the touchstone for assessing whether government regulation of commercial speech exceeds the bounds of First Amendment protection:

> At the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[57]

In *Central Hudson*, the issue in dispute was whether the state Public Service Commission could ban an energy company's advertising aimed at promoting energy use by the consuming public.[58] The ban, initially implemented to forestall a threatened energy shortage in the winter of 1973–74, was extended by the Commission in 1977, apparently in response to public opinion.[59] Applying the four-step analysis, the Court found no fault either with the legality of Central Hudson's activity or with the two interests—energy conservation and fair rates—advanced by the state; nor did it deny that the ban directly advanced conservation.[60] But the Court found the Commission's claim that the ban also promoted rate equity to be too "tenuous" and "remote" to justify the suppression of advertising.[61] Thus, the Court went on to apply the fourth part of the test only in regard to the conservation interest, and found the ban, which "reaches all promotional advertising, regardless of the impact . . . on overall energy use," too broad to withstand constitutional scrutiny,

56. 447 U.S. 557, 566 (1980).

57. *Id.*

58. *Id.* at 558.

59. *Id.* at 559.

60. *Id.* at 566–69.

61. *Id.* at 569.

especially because the Commission had not shown that a less restrictive ban would be inadequate to achieve its conservation interest.[62]

### *B. Privacy*

On the same day that it handed down *Central Hudson*, the Court also announced its decision in *Consolidated Edison Co. v. Public Service Commission*, which struck down another New York Public Service Commission restriction, this one banning insert ads discussing "political issues" which the utility included in customer bills.[63] Although the New York State Court of Appeals had upheld the prohibition on the grounds that it protected the privacy of individuals upon whom the utility might be imposing its unwanted views, the Supreme Court rejected this "captive audience"[64] reasoning, noting that the government had a right to protect privacy by banning speech only when "substantial privacy interests are being invaded in an essentially intolerable manner."[65] Justice Powell, writing for the majority, declined to find any such major intrusion where "[t]he customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket."[66] Moreover, he concluded that even if there had been a compelling state interest in protecting customers against overtly intrusive bill inserts, the state could have advanced it by requiring Consolidated Edison to stop sending the inserts to customers who objected;[67] in other words, by adopting a less restrictive ban.

The speech at issue in *Consolidated Edison* was related to important public policy considerations and therefore protected by the full measure of First Amendment coverage; but the case is in line with a series of decisions which suggest that the receipt of information by mail, including commercial solicitations, does not usually amount to a

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62. *Id.* at 569–71. In his dissent, Justice Rehnquist, renewing themes also displayed in his *Bigelow* and *Virginia Pharmacy* dissents, criticized the majority for "improperly substitut[ing] its own judgment for that of the State in deciding how a proper ban on promotional advertising should be drafted," and complained more generally that the fourth prong of the newly delineated test would undermine legislatures' ability to promote local interests. *Id.* at 585 (Rehnquist, J., dissenting). *See also* Bigelow v. Virginia, 421 U.S. 809, 829–36 (discussed *supra* text accompanying note 43); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 781–90 (1976).

63. 447 U.S. 530, 532 (1980). The inserts promoted the use of nuclear power.

64. *Id.* at 541–42 (overturning 390 N.E.2d 749 (N.Y. 1979)).

65. *Id.* at 541 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

66. *Id.* at 542.

67. *Id.* at 542 n.11.

substantial invasion of the privacy interest. The trend of the Court's thinking in this area suggests that the threat to privacy becomes substantial enough to merit government protection of the individual's interest in either of two circumstances: when the individual cannot reasonably avoid an unwanted message or when the message is delivered in a situation containing the potential for manipulation or coercion of the recipient by the communicator.

*1. Unavoidability*

The classic example of the first type of invasion is found in *Kovacs v. Cooper*, in which the court dismissed a First Amendment challenge to a Trenton, N.J., ordinance that, in deference to citizens' desire for peace and quiet, forbade sound trucks emitting "loud and raucous noises" from the city streets.[68] In *Lehman v. City of Shaker Heights*, the Court upheld a ban on political advertising in street cars as an invasion of the privacy of passengers who couldn't avoid the message if they wanted to use the transportation.[69] But, as the Court noted in *Consolidated Edison*, these are unusual situations and do not invalidate the usual doctrine, which holds that the need to protect privacy is not compelling enough to justify abridgment of free speech when those seeking privacy can help themselves to avoid the offensive message.[70] In *Consolidated Edison*, the Court cited its 1971 decision in *Cohen v. California*, which overturned the disturbing the peace conviction of a man who had worn a jacket bearing an obscene anti-war message in the corridors of a Los Angeles courthouse, rejecting an appeal to the privacy interests of the "women and children" who might see it and be offended because they could "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[71]

The same emphasis on a "self-help" solution had been implicit in the Court's reasoning when it addressed the issue of home privacy in 1943 in *Martin v. City of Struthers*.[72] In *Martin*, an Ohio municipality's ordinance, enacted to protect citizens' privacy, forbade people to "ring the doorbell, sound the door knocker, or otherwise summon" residents in

68. 336 U.S. 77, 78, 85 (1949).

69. 418 U.S. 298 (1974).

70. *Consolidated Edison*, 447 U.S. at 539–42.

71. *Id.* at 542 (citing *Cohen*, 403 U.S. 15, 21, 22 n.4 (1971)).

72. 319 U.S. 141 (1943).

order to give them "circulars or other advertisements."[73] The Court conceded the validity of the objective, but concluded that the decision to exclude unwanted communications should "depend upon the will of the individual master of each household, and not upon the determination of the community."[74]

### 2. *Coercion*

In 1977, following the principles that had been set out in Virginia Pharmacy, the Court, in *Bates v. State Bar*, voided an Arizona rule that banned lawyer advertising.[75] The contention of the Arizona Bar Association that an ad ban encouraged professionalism—a legitimate state interest—was rejected as "severely strained."[76] The Court, again applying its antipaternalism reasoning, found that the public's interest in receiving information and its ability to make informed commercial decisions outweighed any possible harm that advertising might cause.[77]

The next year, however, the Court upheld state disciplinary action against an Ohio lawyer named Ohralik for violating the state code of professional responsibility by soliciting the business of two young accident victims—one of whom he approached and induced to retain his services while she lay in traction in her hospital bed.[78] Ohralik challenged the regulation on First Amendment grounds, relying on *Bates*.[79] The Court rejected his argument, drawing the distinction that "in-person solicitation," as opposed to the newspaper ad that had been at issue in Bates, "may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection."[80] The Court further reasoned that such pressure was detrimental to the informed decision-making which had been the cornerstone of its decision to strike down the bans in *Virginia Pharmacy* and *Bates*.

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73. *Id.* at 142.

74. *Id.* at 141. The Court emphasized that the ordinance was subject to the First Amendment because it was not directed solely at commercial advertising. *Id.* at 141 n.1. *Cf.* Breard v. City of Alexandria, 341 U.S. 622, 642–43 (1951) (distinguishing *Martin* under the commercial speech exception), discussed *supra* at notes 23–31 and accompanying text.

75. 433 U.S. 350 (1977).

76. *Id.* at 368.

77. *Id.* at 374–75.

78. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

79. *Id.* at 455.

80. *Id.* at 457–58.

By contrast, in *Edenfield v. Fane*, the Court struck down a Florida regulation which prevented certified public accountants (CPAs) from making in-person solicitations (defined to include live telephone calls), noting that, unlike a lawyer, "a CPA is not 'a professional trained in the art of persuasion'. A CPA's training emphasizes independence and objectivity, not advocacy."[81] Moreover, the CPA's prospective clients would be "sophisticated and experienced business executives who understand well the services that a CPA offers" and, unlike the accident victims approached by Ohralik "at a moment of high stress and vulnerability," the executives, "[i]f they are unreceptive to his initial telephone solicitation, [they] need only terminate the call. Invasion of privacy is not a significant concern."[82]

In *Zauderer v. Office of Disciplinary Counsel*, the Court, voiding a bar association rule under which a lawyer had been disciplined for a newspaper advertisement soliciting clients, distinguished Ohralik and again emphasized the difference between printed ads and the in-person solicitation that "justified a prophylactic rule prohibiting lawyers from engaging in such solicitation for pecuniary gain."[83] The Court took note also of the "coercive force of the personal presence of a trained advocate."[84] The lesser coercive power of non-personal solicitations was once more emphasized in a 1988 decision, *Shapero v. Kentucky Bar Ass'n*,[85] overturning a state ban on personalized solicitation letters sent by lawyers to prospective clients who were targeted specifically because they faced the threat of home mortgage foreclosure. Although conceding that recipients of the letters were in a vulnerable position, the Court found that the relevant inquiry was not simply whether the "condition" of the message recipients made them peculiarly susceptible to undue influence, "but whether the mode of communication" employed by the solicitor implied a capacity for exploiting that susceptibility.[86] The written solicitation did not expose the recipient to a mode of communication comparable in exploitative potential to that which existed when he had "a badgering advocate breathing down his neck."[87]

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81. 507 U.S. 761, 775 (1993) (quoting *Ohralik*, 436 U.S. at 465).

82. *Id.* at 775–76.

83. 471 U.S. 626, 641 (1985).

84. *Id.* at 642.

85. 486 U.S. 466 (1988).

86. *Id.* at 474.

87. *Id.* at 475.

The Court's reasoning in these cases indicates that providing commercial information will not be deemed an invasion of privacy unless it is undertaken in circumstances in which the speaker can exercise superior professional knowledge or persuasive skill to exploit the ignorance or emotional distress of a vulnerable hearer, or when the hearer is deprived of the opportunity to reflect and consider. The distinction between lawyers and accountants which the Court drew in *Edenfield* suggests that the potential for exploiting a form of communication that is susceptible to such exploitation is also dependent on the persuasive expertise of the communicator.[88]

## III. *MOSER V. FCC*

### *A. Facts and Procedural History*

In 1989, Kathryn and Ronald Moser set up a chimney sweep business in Salem, Oregon. Experience in Utah had taught them that the most effective method of finding customers was through the use of an Automatic Dialing Announcing Device (ADAD), a telecomputer which dials preprogrammed phone numbers to deliver a recorded message.[89] After successfully litigating to overturn an Oregon statute that banned the use of such devices for commercial purposes,[90] the Mosers sought to enjoin enforcement of those sections of the federal Telephone Consumer

88. *But cf.* Florida Bar v. Went For It, Inc., 115 S.Ct. 2371 (1995) (upholding a 30–day ban on lawyer solicitation letters targeted directly to accident victims or their survivors). Over a strong dissent by Justice Kennedy, the 5-4 majority ignored the previous distinctions between in-person and written solicitations and distinguished *Shapero* on the grounds that its "treatment of privacy was casual" and that the asserted state interest in the case was not privacy at all but "the special dangers of overreaching inhering in targeted solicitations"—an interest which failed because of the State's failure to advance credible evidence of its claim. *Id.* at 2378. In *Went For It*, by contrast, the Court found the evidence sufficient to justify the Florida Bar's contention that targeted solicitation letters sent within 30 days of an accident constituted an invasion of privacy which the State could prohibit. *Id.* at 2377–78. This opinion represents a divergence from the "in-person" reasoning of the earlier cases, suggesting, in contrast to *Shapero*, that the vulnerability of the message recipient can be as significant a concern as the "mode of communication" in determining whether an invasion of privacy is intolerable. More importantly, *Went For It* suggests that "outrage and irritation"—there was no suggestion that the letters were coercive—will be added to unavoidability and the possibility of coercion in determining whether privacy rights have been invaded in a manner that merits governmental protection. *Id.* at 2379. Significantly, the Court rejected the efficacy in this instance of the self-help remedy of throwing out the offending letters on the ground that the outrage to the bereaved or injured was complete once the letter was seen. *Id.*

89. Brief for Appellees at 3–4, Moser v. FCC, 46 F.3d 970 (9th Cir. 1995) (No. 93–35686).

90. Moser v. Frohnmayer, 845 P.2d 1284 (Or. 1993).

Protection Act (TCPA) which ban the commercial use of ADADs.[91] The district court granted an injunction;[92] the Ninth Circuit reversed.[93]

## *B. THE NINTH CIRCUIT DECISION*

The TCPA provides, in relevant part, that:

> It shall be unlawful for any person within the United States . . .
>
> . . . .
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission under paragraph (2)(B).[94]

Paragraph (2) orders the FCC to prescribe implementing regulations, enables it to consider extending the ban on artificial or prerecorded calls to businesses, and states that it:

> (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—
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> (i) calls that are not made for a commercial purpose; and
>
> (ii) such classes or categories of calls made for commercial purposes as the Commission determines—
>
> (I) will not adversely affect the privacy rights that this section is intended to protect; and
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> (II) do not include the transmission of any unsolicited advertisement . . . .[95]

On its face, then, the statute creates at least two distinctions between the types of messages which may be exempted and those which may not. First, § 227(b)(2)(B)(i) separates non-commercial calls into a separate

91. 47 U.S.C.A. § 227 (West Supp. 1994).

92. Moser v. FCC, 826 F. Supp. 360 (D. Or. 1993).

93. 46 F.3d 970 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995).

94. 47 U.S.C.A. § 227(b)(1) (West Supp. 1994).

95. 47 U.S.C.A. § 227(b)(2) (West Supp. 1994).

category from commercial calls; second, § 227(b)(2)(B)(ii) creates a distinction between commercial calls that will or will not adversely affect privacy rights.[96] The statute empowers the FCC to create exemptions for recordings that deliver a non-commercial message or a commercial message that the FCC deems not to have an adverse effect on privacy rights, but forbids it from making such exemptions for recordings that deliver either commercial ads or other commercial messages it deems to invade privacy.[97]

In striking down the section, the district court concluded that the statute was content-based because it "established a distinction between commercial and non-commercial speech in the implementing instructions it provides to the FCC."[98] The government had argued that the statute itself was a reasonable, content-neutral time, place or manner restriction because it banned all automated calls and left it to the FCC to implement any exemptions.[99] The trial court rejected this contention, however, noting a House Committee Report that indicated legislative intent to distinguish "the speech of charitable and political organizations" from "commercial speech," on the supposition that restrictions on the latter were less likely to run afoul of the First Amendment, and that the former presented less of a privacy problem.[100]

On appeal, the Ninth Circuit ignored both the plain meaning of the statute and the evidence of legislative intent to rule that "[t]he statute does not distinguish between commercial and noncommercial calls, except as it makes a reference to calls not made for a commercial purpose that the FCC is granted permission to exempt by regulation under conditions it may prescribe."[101] The court went on to explain the inherent contradiction in the above sentence by explaining that the language of the statute "is permissive, not mandatory. It in no way requires the FCC to adopt such exemptions by regulation, order or

96. It is uncertain whether unsolicited advertisements are conceived per se to fall into the category of commercial calls that adversely affect privacy rights or whether they comprise yet a third distinct category. The point, however, is not how many categories of distinction are made but that they are made at all and that they are made on the basis of the content of the message delivered. *See supra* note 15 and accompanying text.

97. The FCC implemented regulations exempting calls "not made for a commercial purpose," 47 C.F.R. § 64.1200(c)(1) (1995) and calls by "a tax-exempt non-profit organization," 47 C.F.R. § 64.1200(c)(4) (1995).

98. Moser v. FCC, 826 F. Supp. 360, 362 (D. Or. 1993).

99. *Id.* at 363.

100. *Id.* at 362–63 (quoting H.R. Rep. No. 317, 102d Cong., 1st Sess., 17 (1991)).

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

otherwise."[102] The court cites no authority for its reliance on a juxtaposition between mandatory and permissive grants of power to support its conclusion that statutory permission for a government agency to prescribe regulatory exemptions for one group but not for another creates no distinction between the two groups.[103]

## IV. CRITIQUE OF THE DECISION

The Ninth Circuit erred in its analysis of the First Amendment consequences of the ADAD ban under the TCPA by failing to assess correctly the content-based nature of the restrictions which the statute imposes on commercial speech alone among all the types of messages that can be delivered by means of an ADAD. The court also failed to properly apply the principles regarding protection of commercial speech which the U.S. Supreme Court has developed and to give proper regard to the way in which the Court has analyzed and resolved the conflicts that have arisen between free speech and privacy.

### *A. The Content Neutrality Determination*

Having concluded that the relevant provisions of the TCPA do not distinguish between commercial and noncommercial calls, the Ninth Circuit rejected the district court's application of the four-part *Central Hudson* test for commercial speech in favor of analyzing the statute as a content-neutral regulation of the time, place and manner for "all automated telemarketing calls without regard to whether they are commercial or noncommercial."[104] The court minimized the difference between the two approaches, calling the tests for each "essentially identical," on the authority of *Board of Trustees of the State University of New York v. Fox.*[105] This was, however, a misapplication of Fox, in which the Court used the words "substantially similar,"[106] quoting its own statement in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, which had limited the similarity to the particular

102. *Id.*

103. The Government's brief similarly cites no authority to support the proposition and alleges—but does not argue the point—that the TCPA sections should be judged as content-neutral. Appellant's Brief at 14, Moser v. FCC, 46 F.3d 970 (9th Cir. 1995) (No. 93-35686).

104. 46 F.3d at 973.

105. *Id.* (citing 492 U.S. 469 (1989)).

106. *Fox*, 492 U.S. at 477.

facts of that case.[107] In *Fox*, the reference to a similarity between the tests concerned the rejection of a standard for judging the possible overbreadth of government regulation of commercial speech (least restrictive means) which would be more stringent than the "narrowly tailored" criterion applied to "core political speech."[108] The Ninth Circuit's interpretation created a broader proposition than the Court intended and overlooked significant distinctions in the way that commercial speech restrictions and content-neutral speech restrictions have been treated by the Court. The government is permitted to impose restrictions on the time, place or manner of protected speech if those restrictions are justified without reference to content, advance a significant governmental interest, and if they leave open ample alternative channels for communication.[109] In contrast, the Supreme Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."[110]

Upon adopting the starting point that the TCPA is content-neutral, the Ninth Circuit proceeded to an analysis heavily weighted by the finding that the Act's restrictions "leave open many alternative channels of communication."[111] The court determined that the availability of live solicitation, taped messages introduced by live speakers, and taped messages to which consumers had previously consented left open the required ample alternative channels of communication.[112] This entire analysis side-steps the issue presented by the Mosers' case—that the use of ADADs remains available to noncommercial users while it is proscribed for commercial users. Moreover, in its discussion of the alternative channels available, the Ninth Circuit dismissed the substantial

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107. 483 U.S. 522, 537 n.16 (1987). In *San Francisco Arts*, a congressional grant of trademark rights to the United States Olympic Committee for the term "Olympic" was challenged by a group seeking to promote a "Gay Olympic Games." *Id.* at 525. The would-be promoters argued that their intent in using the term was not simply commercial exploitation, but also to express a political statement about gay rights. *Id.* at 535. In the context of determining whether the grant's "incidental restrictions" on First Amendment rights were greater than necessary to further the government's interest in rewarding the U.S.O.C., the Court indicated that, given the facts of the case, the inquiry into the effect on both commercial and political speech rights was sufficiently similar that the two could be considered together. *Id.* at 535–38.

108. 492 U.S. at 476–78.

109. *See supra* note 16 and accompanying text.

110. Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 541 n.10 (1980) (including a list of cases); reiterated in City of Cincinnati v. Discovery Network, 507 U.S. 410, 430 (1993).

111. Moser v. FCC, 46 F.3d 970, 975 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995).

112. *Id.*

cost difference between ADADs and the supposedly appropriate alternative channels, again based on the supposition of the statute's content neutrality.[113]

In dealing with a content-based restriction, particular care is required in establishing the balance between the government's interest and the means chosen to advance it. This is not to imply that the inquiry into a content-neutral restriction shouldn't also be conducted with care, but rather that when a particular type of speech is singled out for exclusion on the basis of its content, the required degree of vigilance must be higher because the very decision to apply restrictions on a selective basis contains within it a greater possibility for discrimination against that content and, consequently, a greater need for courts to search for indications of discrimination. The evolving history of decisions in the area of commercial speech underscores the Supreme Court's sensitivity to this possibility, and to the possibility that the importance of commercial speech will be undervalued by government.[114]

In adopting a content-neutral analysis and emphasizing the availability of communicative channels other than the ADAD, the Ninth Circuit's consideration of the conflict between the constitutional protection accorded commercial speech and the government's interest in preserving privacy failed to respond adequately to the concern for protecting commercial speech underlying the Supreme Court's jurisprudence. As detailed in part II of this Note, the Supreme Court has given an increasing emphasis to the significance of commercial speech in maintaining the vibrancy of our economic system by providing product and pricing information which are essential to enlightened consumer choices.[115] The Ninth Circuit's adoption of a content-neutral analysis, and its consequent assertion that alternative means of communication

113. *Id.* The court cited Kovacs v. Cooper, 33 U.S. 77, 88–89 (1949), which rejected an argument based on the comparative cheapness of a sound truck compared to handbills and other forms of political communication; it ignored the Court's statement in Metromedia v. City of San Diego, 453 U.S. 490, 516 (1981) that when "other forms of advertising are insufficient, inappropriate and prohibitively expensive," the ample alternative channels requirement is not met. An ADAD costs about $1800; "predictive dialers," machines capable of integrating a live speaker who introduces a recorded message, start at $48,000 (more than 2500% more) and, of course, entail labor costs which an ADAD user can avoid. This adds a substantial, often insurmountable burden to the advertising costs of small and start-up businesses. Brief for Appellees at 7, Moser v. FCC, 46 F.3d 970 (9th Cir. 1995) (No. 93-35686). *Kovacs* is a prototype of the content-neutral time, place or manner test that developed from its progeny; *Metromedia* is a commercial speech case to which the *Central Hudson* test was applied.

114. *See City of Cincinnati*, 507 U.S. at 418–19.

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

will compensate for the inability to use ADADs in commercial solicitation—without consideration that the cost differences entailed by those alternative means will, in many cases, eliminate vendors' ability to disseminate information of potential use to consumers—underscores its insensitivity to the factors that the Court has deemed to be important in looking at commercial speech restrictions. In failing to apply the *Central Hudson* test, the Ninth Circuit has cut itself off from the reasoning of those cases which have specifically considered the issue of commercial speech restrictions and so has ignored the policy choices that have guided the Supreme Court's protection of commercial speech.

### *B. Balancing Privacy and Freedom of Commercial Speech*

A general inquiry into the balance between the competing interests of privacy and free speech as applied to ADADs is implied by the third and fourth steps of the *Central Hudson* test.[116] While the district court examined the balance in detail,[117] the Ninth Circuit, under the rubric of its time, place or manner evaluation, was content to rely on the questionable results presented in congressional reports without any discussion of the assumptions and findings underlying those reports.[118] Although noting that deference to congressional fact-finding does not "foreclose the court's independent judgment of the facts bearing on an issue of constitutional law,"[119] the Ninth Circuit nevertheless declined to exercise such independent judgment.

The key question under the third step of the *Central Hudson* test is whether the TCPA directly advances a significant governmental interest. Preservation of people's privacy in their own homes is clearly a significant governmental interest[120] and the plaintiffs did not dispute that it is. The question of whether that interest is directly advanced by the TCPA provisions relating to ADADs is more problematic. As indicated above, the Supreme Court has been reluctant to sustain an invasion of privacy rationale for the imposition of speech restrictions unless the

116. *See supra* note 57 and accompanying text.

117. Moser v. FCC, 826 F. Supp. 360, 365–66 (D. Or. 1993).

118. *Moser*, 46 F.3d at 972, 974.

119. *Id.* at 974.

120. *See supra* note 31 and accompanying text.

invasion is "essentially intolerable"[121] either because it is unavoidable or because it presents the opportunity for coercion.[122]

### *1. Unavoidability*

The Court found sound trucks in a residential neighborhood,[123] ads on public carriers,[124] and direct mailings received by the injured or bereaved[125] to be examples of unavoidable invasions which merited government's protection. Obscene messages displayed in public[126] and inserts included with utility bills[127] were held to be avoidable and thus to constitute no intolerable invasion of privacy. The distinction lies in the ability of the message recipient easily to shun unwanted speech.

A telephone call adds an interesting twist to the avoidability problem because, unlike other methods of communication, it intrudes upon the listener in two ways. First is the ring, which may or may not represent an unwanted intrusion, depending upon the hearer's predisposition at the time it occurs. Second is the message, which, again, may or may not be welcome. The two are clearly separable and independent in their desirability: the ring may be unwelcome as it drags you out of the shower but the message very welcome when you learn that Ed McMahon is on the line with your $10 million prize. Courts considering the TCPA ban have not effectively distinguished the ring from the message.[128] The Ninth Circuit repeated this mistake and, by implying that the purpose of the ban is to reduce the number of rings that interrupt residents' privacy, concluded that the ban directly advances a significant governmental interest. But this conclusion misses the point because the ban singles out a specific type of message as the means of reducing the number of rings. The First Amendment analysis is more properly directed to the invasive properties of the message itself, and whether hearers can easily avoid an unwanted message, not whether they can avoid unwanted rings. As the Supreme Court noted in *Breard v. City of Alexandria*, the law has traditionally treated a knocker on the front door as an "invitation or

121. Cohen v. California, 403 U.S. 15, 21 (1971). *See supra* note 65 and accompanying text.

122. *See supra* part II.B.

123. Kovacs v. Cooper, 336 U.S. 77 (1949).

124. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

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

126. Cohen v. California, 403 U.S. 15 (1971).

127. Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980).

128. *See, e.g.*, State v. Casino Mktg. Group, 491 N.W.2d 882 (Minn. 1992), *cert. denied*, 507 U.S. 1006 (1993).

license to attempt an entry," which the homeowners can withdraw by their notice or order;[129] similarly a phone number—a listed phone number at any rate—is an invitation to ring which can be withdrawn by unlisting the number.

Once an individual has answered the phone, the question becomes whether the message is itself an intolerable invasion that cannot be avoided. It is not. Just as the Consolidated Edison customer can toss out any unwanted message that comes with a bill, the hearer of an unwanted phone solicitation message can avoid it simply by hanging up. The Supreme Court has already suggested that the availability of this self-help measure vitiates an invasion of privacy concern.[130]

### 2. *Coercion*

The Supreme Court has found a legitimate state interest in preventing coercion strong enough to overcome a First Amendment challenge only where trained persuaders have the opportunity to exercise their skills during the course of an in-person dialogue.[131] The Court rejected the possibility of manipulative persuasion occurring via the telephone in Edenfield,[132] but, in as much as the Court had judged that the soliciting party—a CPA—lacked as a matter of professional training the advocacy skills necessary to make the possibility of coercion a viable threat, the decision does not stand for the proposition that solicitation via telephone would never furnish sufficient opportunity for coercion to merit regulation.

Only one circuit court has considered the problem of telephone solicitation in this context. The Fourth Circuit,[133] applying the *Central Hudson* test to a West Virginia statute that banned door-to-door and live telephone sales of "preneed" funeral services, rejected a First Amendment challenge, noting that while salespeople are less persuasive over the phone than in person, they nevertheless retain the ability to

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129. 341 U.S. 622, 626 (1951) (upholding ban on door-to-door solicitors because of low value then assigned to commercial speech); *see supra* notes 23–31 and accompanying text. In contrast, the Court had already stricken down an Ohio ban on door-to-door distribution of religious pamphlets, holding that First Amendment rights prevailed over a municipality's desire to insure the peace and quiet of its residents. Martin v. City of Struthers, 319 U.S. 141 (1943).

130. Edenfield v. Fane, 507 U.S. 761, 775–76 (1993).

131. *See supra* notes 78–87 and accompanying text.

132. 507 U.S. at 775. *See supra* note 81 and accompanying text.

133. National Funeral Servs, Inc. v. Rockefeller, 870 F.2d 136 (4th Cir.), *cert. denied*, 493 U.S. 966 (1989).

"adapt to a consumer's responses" and change their sales pitch "to exploit particular vulnerabilities."[134] This reasoning is entirely consistent with the psychology implicit in the Court's discussion of the issue.[135] The Fourth Circuit explicitly declined to extend its reasoning to "the issue of whether telemarketing performed by an automated message player would pose the same risks."[136]

### C. *Crafting a More Reasonable Fit*

The final prong of the *Central Hudson* test mandates an inquiry into whether there is a reasonable fit between the governmental interest served by a regulation and the means by which it is advanced. The Court has held that a restriction need not be the least restrictive possible, but that it must be "no more extensive than reasonably necessary" to advance the substantial governmental interest.[137] At this stage the test is substantially similar to the time, place or manner test announced by the Ninth Circuit in that it too seeks to determine if a statute is overly broad.[138] The appeals court did not, however, apply the test with any rigor; rather, it merely noted the trial court's finding that Congress had "considered and rejected less restrictive forms of regulation" and moved on to adjudicate based on the matter of alternative channels of communication.[139]

The restrictions rejected by Congress were in fact more narrowly tailored to serve the interests of preserving home privacy without placing a complete ban on the commercial use of ADADs. Measures considered included maintaining a mandatory, comprehensive opt-off list for individuals who did not wish to be bothered by automated sales calls.[140] The TCPA authorizes the maintenance of a national database of those who do not wish to be solicited by phone, but automated calls are specifically omitted from this form of less restrictive regulation in favor of the complete ban.[141] This form of opt-off list has been upheld in regard

134. *Id.* at 144.

135. *See supra* notes 81–87 and accompanying text.

136. *National Funeral Services*, 870 F.2d 136, 143 n.13.

137. Board of Trustees of the State University of New York v. Fox, 492 U.S. 469, 477 (1989) (quoting *In re* R.M.J., 455 U.S. 191, 207 (1982)).

138. *Fox*, 492 U.S. at 477. *See supra* text accompanying note 108.

139. Moser v. FCC, 46 F.3d 970, 975 (9th Cir.) (citing Moser v. FCC, 826 F. Supp. 360, 365 (D. Or. 1993)), *cert. denied*, 115 S.Ct. 2615 (1995).

140. H.R. Rep. No. 317, 102d Cong., 1st Sess., 19–20 (1991).

141. 47 U.S.C.A. § 227(c)(3), (6) (West Supp. 1994).

to a postal regulation requiring the maintenance of such a list to protect those who wish to avoid receiving sexually-oriented mail.[142] The availability of an opt-off procedure for other forms of telemarketing suggests strongly that a similar measure might have served for regulating ADAD calls in a manner short of a complete ban.

Other suggested methods of keeping unwanted messages from hearers include obtaining their consent to hear the message by pressing one of the buttons on their phone if, after a brief introduction, they are willing to hear the message.[143] Prosecution and private rights of action for multiple or otherwise excessively bothersome calls present another less restrictive avenue for protecting privacy rights,[144] as do time-of-day limits to prevent calling during dinner and evening hours.[145]

## V. CONCLUSION

The U.S. Supreme Court's view of commercial speech has evolved from the contempt and hostility displayed in *Breard* and *Chrestensen* into the respectful understanding of its place in the free enterprise system that informed the decision in *Virginia Pharmacy*. The TCPA, with its outright ban on the commercial use of Automatic Dialing Announcing Devices, violates the spirit of the Court's appraisal that commercial speech provides the information necessary for responsible consumer choices as well as the letter of the law set out in the *Central Hudson* test. An overbroad set of regulations that unfairly singles out the commercial use of recorded phone messages fails to substantially advance the government's interest in protecting home privacy and excludes measures that would address privacy concerns in an even-handed manner without unduly burdening the First Amendment rights of small businesses.

The Supreme Court noted in *Struthers* that "door to door distribution of circulars is essential to the poorly financed causes of little people."[146]

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142. Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970).

143. Ann Marie Arcadi, Note, *What About the Lucky Leprechaun?: An Argument Against "The Telephone Consumer Protection Act of 1991"*, 1991 Colum. Bus. L. Rev. 417, 430–31 (noting that a device capable of doing this is already on the market and arguing that current and future technological innovations for solving the problem of unwanted solicitations are precluded by the TCPA's complete ban).

144. The TCPA already provides for state, 47 U.S.C.A. § 227 (f)(1)–(2), and private, 47 U.S.C.A. § 227 (c)(5), civil action against permitted telemarketing which fails to abide by the opt-off regulations.

145. Current FCC regulations prevent otherwise permitted types of telemarketing calls before 8 a.m. and after 9 p.m. 47 C.F.R. § 64.1200(e) (1995).

146. Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

By failing to apply the *Central Hudson* test for its examination of the TCPA in *Moser*, the Ninth Circuit has shut down a useful informational avenue for the poorly financed small and start-up businesses that need to inform consumers of their innovative products and efficiently priced services, and it has foreclosed the opportunity for those consumers to receive information that may be of value to them.