

NOTE

**REGULATING ROBOCALLS: ARE
AUTOMATED CALLS THE SOUND OF, OR A
THREAT TO, DEMOCRACY?**

*Jason C. Miller**

Cite as: Jason C. Miller, *Regulating Robocalls:
Are Automated Calls the Sound of, or a Threat to, Democracy?*
16 MICH. TELECOMM. TECH. L. REV. 213 (2009),
available at <http://www.mttl.org/volsixteen/miller.pdf>

INTRODUCTION	214
I. THE NATURE AND CONTROVERSY OF ROBOCALLS.....	216
A. <i>The Good: Talking To, Turning Out, and Taking Cues from Voters.</i>	216
B. <i>The Bad: Name-Calling, Noise, and Nastiness.</i>	220
1. The Vicious Arts.	220
2. New Hampshire Nastiness	221
3. Confusion in North Dakota.....	222
C. <i>The Ugly: Vote Suppression and Dirty Tricks</i>	223
1. Hillary's Evil Robocall	224
II. THE EXISTING REGULATORY STRUCTURE	225
A. <i>Federal Regulations</i>	225
B. <i>The Varied State Laws</i>	227
III. THE PROBLEM OF PATCHWORK STATE REGULATION AND NATIONAL CAMPAIGNS	230
IV. PROPOSED CHANGES.....	232
A. <i>Federal Legislation</i>	232
B. <i>State Proposals to Regulate Robocalls</i>	233
C. <i>Problems with These Proposals</i>	234
D. <i>The Problem with Politicians</i>	238
V. FIRST AMENDMENT ANALYSIS OF ROBOCALL REGULATION....	239
A. <i>The Regulation of Robocalls as a First Amendment Issue</i>	239
B. <i>Free Speech Interests Balanced Against the Home</i>	240
C. <i>Content-Neutral Time, Place, and Manner Restrictions</i> ...	242

* J.D., University of Michigan 2009. Law clerk to the Honorable Deborah L. Cook, United States Court of Appeals for the Sixth Circuit. The views expressed in this Note are the author's alone. Thank you to Professor Ellen Katz for her support of this project and reviewing this Note and to Professor Eugene Volokh for his valuable initial feedback on the topic. Addition thanks to Jon Boguth, Laura Davis, Hannah Murray, Randy Wood and the *MTTLR* Volume 16 staff.

214 *Michigan Telecommunications and Technology Law Review* [Vol. 16:213

D. <i>The Application of Content-Neutral Analysis to Robocalls</i>	244
1. Outright Bans on Robocalls.....	244
2. Regulation Short of an Outright Ban	245
E. <i>State Constitutionalism</i>	246
IV. PROPOSAL: NATIONAL ROBOCALL REGULATION THAT RESPECTS THE RIGHT TO SPEAK.....	247
A. <i>A National Proposal: Speech, Transparency, and Accountability</i>	247
B. <i>The Proposal Applied</i>	251
C. <i>The Proposal's Limits</i>	252
CONCLUSION: DEMOCRACY IS NOISY	252

INTRODUCTION

African-American voters receive a phone message implying that they are not registered to vote.¹ Others hear “an almost threatening male voice,”² a “fake New York accent,”³ factual distortions about legislation,⁴ false endorsements from controversial groups,⁵ calls promoting one candidate claiming to be from his opponent,⁶ and a constant barrage of annoying phone calls designed to make voters think a different candidate was sponsoring them.⁷ These messages were delivered through automated political telephone calls, also known as robocalls.⁸ Robocalls are

1. Elections Board Hunting Robocaller, http://projects.newsobserver.com/under_the_dome/elections_board_hunting_robotcaller (Apr. 28, 2008, 16:45 EST).

2. Joan Barron, *State Gets Obama Calls Complaint*, CASPER STAR-TRIBUNE, Feb. 20, 2008, <http://www.trib.com/articles/2008/02/19/news/wyoming/2dbfa4a4fe948522872573f40006b4e3.txt>.

3. Jared Miller, *Campaign Calls Draw Scrutiny*, CASPER STAR-TRIBUNE, Nov. 15, 2006, http://www.casperstartribune.net/articles/2006/11/15/news/top_story/5b8049cf645aba39872572270005e758.txt.

4. Bob Reuteman, *Legislators Should Ban “Robo-Calls”*, ROCKY MOUNTAIN NEWS, May 12, 2007, <http://www.rockymountainnews.com/news/2007/May/12/breutemanb-legislators-should-ban-robo-calls/>.

5. Tim Skubick, *Phantom Pro-Gay Endorsements Made in 93rd*, MIRS CAPITOL CAPSULE (Aug. 7, 2006), <http://www.mirsnews.com/capsule.php?gid=549#8754%20> (reporting that Republican primary voters in a socially-conservative area received calls touting a fake endorsement by “Gay and Lesbian Coalition”).

6. Lisa Wangness, *Dirty Tricks in North Dakota?*, BOSTON GLOBE, Feb. 2, 2008, http://www.boston.com/news/politics/politicalintelligence/2008/02/dirty_tricks_in.html.

7. Eric Moskowitz, *Repeat Calls not from Hodes*, CONCORD MONITOR, Nov. 5, 2006, <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20061105/REPOSITORY/611050397>.

8. The terms “robocall” or “robo-call” or “automated call” are used to describe the same phenomenon. I have chosen to use “robocall” because this is how politicians spell it. See Josephine Hearn, *A Hangup About Robocalls*, POLITICO, Feb. 28, 2008, <http://www.politico.com/news/stories/0208/8742.html>. See also Wikipedia, *Robocall*, <http://en.wikipedia.org/wiki/robocall> (last visited Nov. 10, 2008).

cheap and efficient—one can deliver a pre-recorded message through 100,000 automated phone calls in one hour for only \$2000.⁹ Consequently, robocalls have become one of the most-used political campaign tools.¹⁰ This Note calls for a national regulation of robocalls that allows for their continued use, but attempts to curb specific abuses.

There are a variety of problems and benefits associated with robocalls. Beyond being used to deceive and abuse voters, robocalls are also uniquely annoying and invasive.¹¹ The federal regulatory regime currently excludes political robocalls from most telemarketing regulations.¹² Unsurprisingly, Congress and many states are considering banning or regulating robocalls because of the associated problems with its current use.¹³ At the same time, robocalls allow candidates to communicate with voters cost effectively,¹⁴ provide a cheap way to “get out the vote”,¹⁵ free up staff and volunteer time,¹⁶ and open up opportunities for under-funded candidates.¹⁷ Robocalls are also widely used in mainstream campaigns.¹⁸

Political speech is core speech¹⁹ and, even where state law bans or regulates robocalls, few states are willing to enforce the laws against political campaigns, “partly out of fear that they violate free speech

9. Dennis Cauchon, *States Try to Pull Plug on “Robo-Calls”*, USA TODAY, Jan. 18, 2008, http://www.usatoday.com/news/politics/election2008/2008-01-17-robocall_N.htm. Robocalls are cheaper than direct mail and television advertising, which is why campaigns use them. *Id.* One reason robocalls and other such devices are cheap is that it shifts the tangible and intangible costs from the campaigns to the recipients. R. Michael Hoefges, *Telemarketing Regulation and the Commercial Speech Doctrine*, 32 J. LEGIS. 50, 90 (2005).

10. Pew Research Center for the People and the Press, *Robo-Calls Now Top Type of Campaign Outreach*, Pew Research Center Publications, Apr. 3, 2008, <http://pewresearch.org/pubs/785/robo-calls-election-2008> [hereinafter Pew Research Center April 2008 Robocall Publication].

11. Dennis Cauchon, *Once Novel, ‘Robo-Calls’ Now More of a Nuisance*, USA TODAY, Jan. 18, 2008, http://www.usatoday.com/news/politics/election2008/2008-01-17-roboside_N.htm.

12. See *infra* Part II.A.

13. See *infra* Part III.

14. Cauchon, *supra* note 9.

15. See *infra* Part II.A.

16. *Robo Calls: Advocacy Tool or Harassment?*, NP ACTION, <http://www.npaction.org/article/articleview/758> (last visited July 7, 2008).

17. See example of micropolling *infra* Part I.A.

18. See the use of robocalls by Barack Obama and John McCain as discussed *infra* Part III. Robocalls are also a bipartisan tool, as the examples in this Note show, despite some claims that robocalls are “particularly popular among Republican candidates.” But see Jordan Stringer, Comment, *Criminalizing Voter Suppression: The Necessity of Restoring Legitimacy in Federal Elections and Reversing Disillusionment in Minority Communities*, 57 EMORY L.J. 1011, 1037 (2008), describing examples of robocalls being especially popular among Republican candidates in the 2006 election.

19. See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (stating that political speech occupies “the core of the protection afforded by the First Amendment” and enjoys broadest protection).

protections.”²⁰ The current regulation has not only failed to stop false or misleading calls, but it has also exposed national campaigns to unintentional violations of state law and patchwork state regulation. Without a uniform approach, compliance with robocall regulation will remain to be difficult for candidates and campaign groups. Accordingly, this Note proposes a national regulation of robocalls that pre-empts state laws, restricts the time of day of calls, and focuses primarily on disclosure. This regulation would address the problems that robocalls present while preserving their beneficial uses and complying with First Amendment requirements.

This Note examines the good (campaign messaging and polling), the bad (nasty, negative campaigning), and the ugly (vote suppression) uses of robocalls in Part I. Part II discusses the existing regulatory structure for robocalls. Part III examines proposals to amend the structure and problems with those proposals. Part IV examines the First Amendment concerns in regulating robocalls. Finally, Part V recognizes the need for a national solution to protect political speech by preventing patchwork state regulation, and proposes a solution to support the non-abusive use of political robocalls.

I. THE NATURE AND CONTROVERSY OF ROBOCALLS

Robocalls are prerecorded phone calls used to deliver messages to targeted lists. As they are now delivered with computer-based technology, the volume capacity of robocall firms has become large—one firm bragged of calling 10 to 20 percent of the U.S. population on a single day.²¹ Because robocalls are also cheap,²² they have become a frequently used tool in political campaigns—80% of the Iowa caucus voters had received a robocall before the 2008 caucuses.²³

A. *The Good: Talking To, Turning Out, and Taking Cues from Voters.*

Robocalls can be used as a basic campaign tool to promote positive messages and boost a candidate’s name recognition among voters.²⁴ Ro-

20. Cauchon, *supra* note 9.

21. Hearn, *supra* note 8.

22. See Email from Winning Calls to Jason Miller (May 20, 2009, 19:47 EST) (stating the company’s cheapest robocall option is a 30 second call for \$.03 per call) (on file with author)[hereinafter Email from Winning Calls].

23. Cauchon, *supra* note 9.

24. See, e.g., Kathleen Gray, *Knollenberg and Peters in Tough Fight for Congress Seat*, DETROIT FREE PRESS, Aug. 21, 2008, available at <http://www.freep.com/apps/pbcs.dll/>

bocalls can be used for non-election purposes, like grassroots lobbying efforts to turn voters against a proposal or turn out constituents to local government hearings.²⁵ Campaigns also use robocalls to “get out the vote” because robocalls can quickly and inexpensively reach an entire list of their prospective voters for a particular election.²⁶ In close races, the effectiveness of a “get out the vote” operation can easily determine the winner. Because the caller is able to select its intended recipients, robocalls can reach its targeted audience more effectively than broadcast messages.²⁷ This makes robocalls particularly useful when dealing with gerrymandered districts that overlap multiple communities and media markets.²⁸

Automated calling systems can also be programmed to record voter responses for polling and micropolling purposes. Rasmussen Reports, a national polling firm, uses exactly such a system.²⁹ Rasmussen argues that using robocalls for polling actually increase the accuracy of polls because “the automated technology insures that every respondent hears exactly the same question, from the exact same voice, asked with the exact same inflection every single time.”³⁰ Many people, however, are skeptical of Rasmussen’s methods and consider conventional polling to

article?AID=/20080821/NEWS15/808210349/0/NEWS03 (stating that Congressman Joe Knollenberg employed “automated phone calls touting his record in Congress.”).

25. See Danny Reiter, *Republican PAC Files Complaint Over GOP Central Committee Robocall*, POLITICKERMD (Nov. 21, 2008), <http://www.politicker.com/maryland/10731/republican-pac-files-complaint-over-gop-central-committee-robocall>.

26. See generally Tim Skubick, *Lieberman, Arpaio on RoboCalls*, MIRS Capital Capsule (Jan. 15, 2008), <http://mirsnews.com/capsule.php?gid+911#14089>.

27. Direct mail and door-to-door campaigning are also targeted to specific audiences like robocalls; however, radio and television advertising almost always require campaigns to pay money in order to reach people who are not voters and/or not voters in the relevant district.

28. A robocaller can select exactly who to call. Television or radio broadcast advertising selects targeted media markets but that may require inefficiently spending a great deal of money to reach only a few voters in a district if the district is gerrymandering to cover multiple communities and multiple media markets. For instance, as of 2008, to advertise district-wide in Michigan’s 7th Congressional District, ads would have to run in the Detroit, Lansing, Toledo (OH), and Grand Rapids/Kalamazoo/Battle Creek media markets. Most of the advertising dollars would be reaching viewers outside of the district. Broadcast advertising in that district is expensive and somewhat inefficient, whereas robocalls would be cheap and targeted. See Posting of Fitzy to Walberg Watch, <http://www.walbergwatch.com/2008/07/7th-district-media-markets.html> (July 8, 2008, 18:02 EST).

29. Rasmussen Reports Methodology, http://www.rasmussenreports.com/public_content/about_us/methodology (last visited Oct. 6, 2008). It is unclear how Rasmussen conducts the polls without violating certain state laws as discussed *infra* Part II.B. Presumably, Rasmussen simply violates the laws and hopes that the First Amendment will protect them or that scientific polls reach too few people to be annoying enough to generate the kind of outrage that a state-wide robocall would.

30. *Id.*

be more accurate.³¹ Robocall polling methods generally involve asking voters a limited number of questions within a pre-recorded, automated call and recording their responses.³² For small or poorly funded campaigns, robocall-operated micropolls are the only viable way to conduct polling.

“Conventional polling has become a routine part of large campaigns—those costing \$100,000 or more—but at a cost of \$8000 and up it’s useless for thousands of low-budget candidates running for county commissioner, district judge, or school board.”³³ Mark Grebner is a respected Democratic political consultant in Michigan whose firm has conducted dozens of “cheap little polls” using robocalls because “it doesn’t make sense for a candidate spending \$10,000 of his own money to run for township supervisor to spend \$5000 of it on polling.”³⁴ Grebner’s polls cost only \$400.³⁵ Though Grebner admits these polls have substantial limitations, they can generate a snapshot of the race and may influence a candidate’s strategic decision-making.³⁶

Some are skeptical about the effectiveness of robocalls in general. Political scientists suggest that robocalls do not work.³⁷ However, political scientists do not think like actual politicians. Campaigns do not use robocalls in a vacuum; they are used in combination with other campaign messaging and targeted to specific lists of voters. Furthermore, robocalls are employed for a variety of particular uses: automated polling, attacking opponents, offering instant responses to an opponent’s

31. Rasmussen polls are frequently criticized as being less reliable. For example, a research methodologist said that Rasmussen does not “have a clue who’s responding—it could be your 7-year-old who wants to push some numbers,” and the automated responses made it harder to consider the poll scientifically valid. Anne Ryman, *Is McCain Well Ahead in Arizona? 2 Polls Paint Different Pictures*, THE ARIZONA REPUBLIC at 1, Oct 1, 2008, <http://www.azcentral.com/arizonarepublic/news/articles/2008/10/01/20081001newpoll1001.html>.

32. Posting of Mark Grebner to Michigan Liberal, <http://www.michiganliberal.com/showDiary.do?diaryId=12838> (June 29, 2008, 16:04 EST).

33. *Id.*

34. *Id.*

35. *Id.*

36. Such as whether to invest more money into a campaign or to cut losses, *id.* Grebner used exactly such a micro-poll to track the movement in the February, 2009 Detroit mayoral primary. Posting of Mark Grebner to Michigan Liberal, <http://michiganliberal.com/showDiary.do?jsessionid=3A68DC637C4AA91C5E0742501416A126?diaryId=14397> (Feb 8, 2009, 17:09 EST).

37. See Ricardo Ramirez, *Giving Voice to Latino Voters: A Field Experiment on the Effectiveness of a National Nonpartisan Mobilization Effort*, 601 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 77 (2005) (stating that the effect of robocalls is “not statistically distinguishable from zero” and noting that “other field experiments using automated calls have found them to be ineffective.”).

attacks,³⁸ and effectuating “get out the vote” tactics by reaching every voter instantly. If the automated calls did not work at all, political consultants and campaign staff would stop using them. And even if robocalls do not work, it is within the discretion of candidates to decide on their appropriate campaign tactics, not outsiders.³⁹ The candidate, or any speaker, knows better than anyone the tactic that will most clearly articulate his or her views.⁴⁰

Although voters will often publicly say that negative advertisements do not affect their opinions, they may be more likely to admit, in private, that such ads do in fact influence their decisions. This is perhaps why candidates continue to employ “mudslinging” as a standard tactic.⁴¹ Both John McCain⁴² and Barack Obama⁴³ targeted each other with negative robocalls in the 2008 Presidential Election. In general, robocalls serve a good and necessary purpose where they provide an inexpensive and effective way for political candidates to connect with voters during the campaign process.

38. Supporters of Barack Obama even used robocalls to respond to John McCain’s robocalls by attacking McCain for making “sleazy” robocalls. Jill Lawrence, *Battle of the “Robo-calls”: Obama vs. McCain*, USA TODAY, Oct. 23, 2008, http://www.usatoday.com/news/politics/election2008/2008-10-22-robocalls_N.htm.

39. See, e.g., *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 791 (1988) (“To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.”).

40. However, as Professor Volokh points out, the speaker does not always have a constitutional right to select the means. Though many restrictions on the means used to speak are constitutionally permissible, even when the speaker thinks another means would be more effective. See Eugene Volokh, *Freedom of Speech and Speech about Political Candidates: The Unintended Consequences of Three Proposals*, 24 HARV. J.L. & PUB. POL’Y 47, 61 (2000).

41. Mark Penn, *Negative Ads: They Really Do Work*, POLITICO Aug. 11, 2008, <http://www.politico.com/news/stories/0808/12455.html>.

42. One of McCain’s calls stated: “Hello. I’m calling for John McCain and the RNC because you need to know that Barack Obama has worked closely with domestic terrorist Bill Ayers, whose organization bombed the U.S. Capitol, the Pentagon, a judge’s home, and killed Americans. And Democrats will enact an extreme leftist agenda if they take control of Washington. Barack Obama and his Democratic allies lack the judgment to lead our country. This call was paid for by McCain-Palin 2008 and the Republican National Committee at 202-863-8500.” The National Do Not Contact Registry—Stop Political Calls BLOG, <http://thinkdodone.typepad.com/ccd/2008/12/the-top-13-political-robocalls-of-2008.html> (Dec. 22, 2008, 23:55 EST) [hereinafter Stop Political Calls BLOG].

43. One of Obama’s calls stated: “Hi, my name is Joe Martinez and I am a plumber for [sic] Denver, Colorado, calling for Barack Obama’s campaign for change. During this week’s debate, Barack Obama talked about cutting taxes for middle class families like mine, lowering the health care costs of everyone, and bringing the change we need in Washington. John McCain ignored the issues and used the debate to launch false attacks against Barack Obama. In fact, McCain for the third debate in the [sic] row didn’t even say the words middle class. So take it from Joe the plumber. If you want a President who will put middle class families first, join me in voting for Barack Obama. Paid for Colorado Democratic Party and authorized by Obama for America.” *Id.*

B. *The Bad: Name-Calling, Noise, and Nastiness.*

1. The Vicious Arts.

The arsenal of dirty political tactics, “the vicious arts [] by which elections are too often carried,”⁴⁴ is increasingly utilizing robocalls. As an inexpensive, pervasive tool that can criticize a candidate instantly, and sometimes anonymously, robocalls are great for negative attacks. Some attacks are clearly political, such as the distortions made in an attack on former Michigan Supreme Court Chief Justice Cliff Taylor during the election year.⁴⁵ The potential for abuse of robocalls increases as negative advertisements stray further away from political roots and move closer to sinister tactics. For example, an elected prosecutor’s personal financial woes (home foreclosure and unpaid taxes) were targeted in anonymous robocalls possibly to generate political pressure against a high-profile prosecution.⁴⁶ Elsewhere, a business lobbyist used deceitful robocalls to generate opposition to legislation the home-builders disapproved of by calling the legislators’ constituents.⁴⁷

Negative robocalls may purposely use a particular name as the sponsoring organization to confuse its recipients.⁴⁸ Such deception may change the outcome of the race. The campaign for Gary Trauner, a Democratic candidate who moved to Wyoming from New York, reported “someone using a fake New York accent to misrepresent Trauner’s position on key issues.”⁴⁹ Trauner says that these calls may have had an

44. THE FEDERALIST NO. 10, at 59 (James Madison) (The Lawbook Exchange, 2005).

45. At least that call was not anonymous. *Dems Hit Taylor With Robo-Call*, MIRS CAPITOL CAPSULE (Apr. 30, 2008), <http://www.mirsnews.com/capsule.php?gid=985>. The robocall message was: “The headline in Tuesday’s Lansing State Journal tells you all you need to know about Michigan Supreme Court Justice Cliff Taylor. Two little girls hit by a drunk driver, one killed and the other crippled for life. Like he’s done to other people killed or maimed, Cliff Taylor slammed the courthouse door on their family, denying them their day in court. How many children have to die before Cliff Taylor cares? Call him at 517-373-8635 and tell him what you think about him putting insurance companies ahead of our kids. Paid for the by the Michigan Democratic State Central Committee.” *Id.*

46. These calls were targeted against Wayne County prosecutor Kym Worthy during the prosecution of Detroit Mayor Kwame Kilpatrick for perjury. Ben Schmitt & Joe Swickard, *Kym Worthy’s home is in foreclosure*, DETROIT FREE PRESS, Aug. 21, 2008, available at http://www.wzzm13.com/news/news_story.aspx?storyid=97390#.

47. Reuteman, *supra* note 4.

48. See *The Robo Who Done It*, MIRS CAPITOL CAPSULE (Oct. 25, 2006), <http://www.mirsnews.com/capsule.php?gid=605> (“Michigan Working Families” attack robocall against Democratic candidate for not supporting union families was not placed by the union groups).

49. Miller, *supra* note 3.

impact on his close race (approximately 1,000 vote difference out of approximately 200,000 cast).⁵⁰

2. New Hampshire Nastiness

New Hampshire Democratic Party field offices received phone calls and emails from upset voters who thought Democratic candidate, Paul Hodes, was making repeated robocalls in an effort to unseat Republican Charley Bass.⁵¹ These calls started by saying, “Hello, I’m calling with information about Paul Hodes.” The disclaimer saying that the calls were paid for by the National Republican Congressional Committee (“NRCC”) came at the end of the message. The timing of the disclaimer may have been ineffective as research shows that many voters, upset at receiving such calls, hang up on robocalls within the introduction.⁵² For Hodes, this proved to be true as many voters believed the calls came from the Hodes campaign.⁵³ At least one voter wrote a letter to the editor of the local paper saying she would support Bass because Hodes was pestering her with calls.⁵⁴

The NRCC spent almost \$20,000 to pour hundreds of thousands of robocalls into the district in New Hampshire.⁵⁵ Because the calls were independent expenditures, they could not be coordinated with nor approved of by the incumbent Republican candidate.⁵⁶ Even after Congressman Bass asked for the calls to stop, the party committee refused, saying that cessation would require illegal coordination.⁵⁷ Hodes used his own robocalls, claiming that the 16,000 recipients targeted were not on the Do Not Call Registry.⁵⁸ One call attempted to recruit volunteers, and the other was a prerecorded call from New Hampshire

50. Joan Barron, *State Gets Obama Calls Complaint*, CASPER STAR-TRIBUNE, Feb. 19, 2008, available at <http://www.trib.com/articles/2008/02/19/news/wyoming/2dbfa4a4fe948522872573f40006b4e3.txt>.

51. Moskowitz, *supra* note 7.

52. Pew Research Center April 2008 Robocall Publication, *supra* note 10 (finding that 65% of voters normally hang up on robocalls and 24% of those who hung up were angry); see also Hearn, *supra* note 8.

53. Moskowitz, *supra* note 7.

54. *Id.*

55. *Id.* The *Concord Monitor* estimates that \$20,000 could pay for more than 300,000 robocalls. They were considering the price at \$.06 per call. However, based on the volume discounts in the quote I obtained, see *Email from Winning Calls*, *supra* note 22, the NRCC could have purchased approximately 500,000, assuming they were not able to negotiate even larger volume discounts, which they probably could accomplish.

56. Moskowitz, *supra* note 7.

57. *Id.*

58. *Id.*

Governor John Lynch urging support for Hodes.⁵⁹ In the end, Hodes won the election.⁶⁰

The Hodes-Bass race shows how robocalls can be used effectively, how it can be abused, and how the media can potentially correct the abuses by reporting on the sponsoring entity. Though general election campaigns generally grab more headlines, robocalls are used in intra-party races as well.

3. Confusion in North Dakota

Just before the GOP caucuses, a recorded caller with a strong Hispanic accent claiming to be from the Romney campaign rang up households to say positive things about John McCain.⁶¹ Voters received both annoying live and recorded calls, supposedly from Romney's campaign, that were already in mid-sentence when the recipient answered the phone.⁶² Through Caller ID and a reverse directory search, Romney's campaign traced the calls to a McCain operative's office in Michigan.⁶³

A complaint was filed with the North Dakota Attorney General.⁶⁴ The Attorney General concluded that it would take a "significant" investment to identify the source of the calls.⁶⁵ The McCain campaign recognized that North Dakota law bans robocalls⁶⁶ and denied making any robocalls into the state. They claimed that they only made live, positive voter-identification and "get out the vote" calls.⁶⁷ McCain's campaign pointed out that its own North Dakota supporters were "receiving a large number of bothersome calls from callers purporting to be

59. *Id.*

60. State General Election Results, New Hampshire Secretary of State (Nov. 7, 2006), available at <http://www.sos.nh.gov/general2006/congress2%202006.htm>.

61. Wangsness, *supra* note 6.

62. Letter from Benjamin L. Ginsberg and Kathryn Biber Chen, Mitt Romney Presidential Campaign, to Wayne Stenehjem, N.D. Attorney General (Feb. 2, 2008), available at <http://sayanythingblog.s3.amazonaws.com/02-08/Romney.pdf>. Some of the worst came from live callers. They requested the voters attend Romney campaign events that did not exist or laughed at the voters. *Id.*

63. Wangsness, *supra* note 6. The actual staffers involved in this North Dakota conflict trace their animosity back to Michigan and a long-standing internal-party political struggle that apparently spilled over into national politics. For a full discussion, see Mark Hemmingway, *High Noon in Michigan: The McCain-Romney Shootout*, THE WEEKLY STANDARD, Vol. 11 Iss. 40, July 3, 2006, <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/368gtpeb.asp?pg=1>.

64. Wangsness, *supra* note 6.

65. John Barnes, *McCain Robo-Calls Traced to Kent GOP Chair*, GRAND RAPIDS PRESS (Feb. 16, 2008), http://blog.mlive.com/grpress/2008/02/mccain_robocalls_traced_to_ke.html.

66. N.D. CENT. CODE § 51-28-02 (2007).

67. Letter from Trevor Potter, General Counsel McCain Campaign, to Wayne Stenehjem, N.D. Attorney General (Feb. 3, 2008), available at <http://sayanythingblog.s3.amazonaws.com/02-08/McCain.pdf>.

from the Romney campaign.”⁶⁸ McCain’s campaign offered the explanation that voters were confused as to the origin of the calls because of a Caller ID backlog resulting from the volume of calls coming from Romney, or that perhaps both campaigns were the victim of hackers.⁶⁹ The McCain campaign may have been lying, but it is entirely possible that, given the sheer volume of calls, voters may have been confused as to which call is coming from which candidate. Some negative calls are weird but harmless,⁷⁰ though others have the potential to confuse and deceive voters. Voter confusion opens the door to abuse and the ugliest campaign tactics sow confusion to suppress votes.

C. *The Ugly: Vote Suppression and Dirty Tricks*

Ugly calls are intended to confuse voters. For instance, in Texas, negative robocalls were made in the middle of the night (between 11 PM and 2 AM) criticizing a Democratic candidate to a list of mostly Republican recipients.⁷¹ The calls appeared as if they came from the Republican campaign, though they did not, and made voters angry with the Republican candidate.⁷² In South Carolina, robocalls making a false endorsement were actually programmed to make another candidate’s phone number show up on the recipient’s Caller ID.⁷³ A political operative was actually arrested over that incident.⁷⁴ Another South Carolina robocall offered a false endorsement from a gay rights organization as an attempt to hurt the candidate endorsed in the call.⁷⁵ One of the most infamous robocalls of 2008 did not confuse voters about which candidate was making the call, but instead confused them about whether they were eligible to vote at all.

68. *Id.*

69. *Id.*

70. One call declared that “Hillary treats women like they are invisible; can you trust her?” Another claimed that Congressman “Mike Thompson has been a baaaaaad boy.” Stop Political Calls BLOG, *supra* note 42.

71. Rick Casey, *Recycled Sewage was Last Hurrah*, HOUSTON CHRONICLE, Dec. 18, 2008, <http://www.chron.com/dispatch/story.mpl/metropolitan/casey/6172603.html>.

72. *Id.*

73. Karen Daily, *Charges Brought in Robocall Case*, AIKEN STANDARD, Dec. 16, 2008, <http://www.aikenstandard.com/local/1216Allen>.

74. *Id.*

75. Posting of Tim Kelly to Indigo Journal, <http://www.indigojournal.com/showDiary.do?diaryId=166> (Oct. 29 2008, 11:42 EDT). “Hi, this is Allison calling from the Alliance for the Advancement of Gays and Lesbians. We are a pro-gay rights, pro-choice grassroots organization. I am calling to let you know that we are supporting Mandy Powers Norrell in the state Senate [sic] A proven Democrat, Mandy Powers Norrell supports homosexual unions and abortion rights.” Stop Political Calls BLOG, *supra* note 42.

1. Hillary's Evil Robocall

In the days before the North Carolina democratic primary, a controversial robocall made headlines.⁷⁶ The robocall allegedly targeted African-Americans with a male African-American caller instructing the recipients to register to vote.⁷⁷ The “calls seemed to heavily skew to African-Americans, including many women who had already registered, causing them to question whether they were eligible to vote in the primary on Tuesday.”⁷⁸ These calls, criticized by some as a “turnout-suppression conspiracy,” came from a nonprofit for promoting voter registration among unmarried women.⁷⁹

The nonprofit, Women's Voices, Women Vote, was linked to Hillary Clinton through its staff and consultants.⁸⁰ The operation “sounds like a classic example of vote suppression: sowing confusion in order to drive down turn-out.”⁸¹ The group was linked to problematic robocalls in other states as well.⁸² Women's Voices, Women Vote denied any wrongdoing.⁸³ The calls were received in African-American homes after the 2008 presidential voter registration deadline had already passed,⁸⁴ but coincidentally while Hillary Clinton was still locked in a close fight for the nomination against an African-American candidate.⁸⁵

76. See, e.g., Shailagh Murray, *Women's Voices, Women Vote: Did the Outreach Overreach?*, WASHINGTON POST, May 4, 2008, at A10.

77. Bob Hall, executive director of Democracy North Carolina, said the call was targeting African-Americans. *Elections Board Hunting Robocaller*, *supra* note 1. The actual message was: “Hello, this is Lamont Williams. In the next few days, you will receive a voter registration packet in the mail. All you need to do is sign it, date it, and return your application. Then you will be able to vote and make your voice heard. Please return the voter registration form when it arrives. Thank you.” *Id.*

78. Murray, *supra* note 76.

79. *Id.* One wonders why, if this were a legitimate call to encourage all women to vote, they would be using the voice of a male African-American.

80. See Sue Sturgis, *Center for Investigate Reporting Follows Women's Voices' Political Connections*, THE INSTITUTE FOR SOUTHERN STUDIES (May 02, 2008), <http://southernstudies.org/facingsouth/2008/05/center-for-investigative-reporting.asp> (last visited July 7, 2008).

81. Peter Overby, *Group with Clinton Ties Behind Dubious Robocalls*, NATIONAL PUBLIC RADIO (May 1, 2008), <http://www.npr.org/templates/story/story.php?storyId=90114863>.

82. *Id.*

83. Peter Overby, *Non-Profit President Responds to Robocall Charges*, NATIONAL PUBLIC RADIO (May 7, 2008), <http://www.npr.org/templates/story/story.php?storyId=90114863>.

84. Overby, *supra* note 81. The calls also coincided with similarly-confusing follow-up mailings. *Id.*

85. See Ellen D. Katz, *Barack Obama, Margarita Lopez Torres, and the Path to Nomination*, 8 ELECTION L.J. 369 (2009).

Vote suppression does not just come from robocalls.⁸⁶ However, among all the other various forms for which vote suppression may occur, robocalls bring something extra to the table—they can do it quicker and cheaper. The reasons for why campaigns may prefer robocalls to other forms of communication for ‘bad’ and ‘ugly’ uses are the same reasons for why we want to encourage the use of robocalls for the ‘good’ purposes: it is a quick and cheap way to gather and distribute information.

II. THE EXISTING REGULATORY STRUCTURE

A. Federal Regulations

Political robocalls are exempted from much of the federal regulations on telemarketing. The FTC notes that “calls from or on behalf of political organizations, charities, and telephone surveyors” are outside the Do Not Call Registry.⁸⁷ Courts have upheld this distinction,⁸⁸ and while some may see a legitimate distinction between political calling and commercial solicitations, cynics see it as politicians protecting their own.

86. For example, printed fliers were used to tell African-Americans they could not vote if they have been guilty of a traffic violation, informing voters that having registered to vote through the NAACP was illegal, and telling voters after they answered an informal survey that they no longer needed to go to the polls as their vote had been recorded. Stringer, *supra* note 18, at 1011–12. A paid phone bank of live callers were used to jam Democratic offices to shut down a “get out the vote” operation in New Hampshire in 2002, but the Republican operative was ultimately acquitted of criminal wrongdoing. *U.S. v. Tobin*, 480 F.3d 53, 59 (1st Cir. 2007), *rev’d* *U.S. v. Tobin*, Criminal No. 04-cr-216-01-SM, 2005 U.S. Dist. LEXIS 31116 (D.N.H. Nov. 5, 2005) (district judge unduly extended phone harassment statute to allow criminal charges); *see also* *U.S. v. Tobin*, 545 F. Supp. 2d 189 (2008) (on remand, judgment of acquittal granted). See description in Stringer, *supra* note 18, at 1031–36. After losses in court, the government ultimately decided to drop the charges. Judy Harrison, *Court Ends Bangor Man’s Legal Saga in Phone-Jamming Case*, BANGOR DAILY NEWS, May 27, 2009, <http://www.bangordailynews.com/detail/106972.html>. A live caller allegedly directed a Wyoming woman to an incorrect polling place after she disclosed her support for the Democratic candidate for governor in Wyoming. Miller, *supra* note 3.

87. Fed. Trade Comm’n, Q & A: The National Do Not Call Registry, <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt107.shtm> (last visited July 7, 2008). *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Second Order on Reconsideration, 20 F.C.C.R. 3788, *6–7 (Feb 10, 2008) (does not cover “surveys, market research, political and religious speech calls.”). The regulatory definition of telemarketing does not include political robocalls, 16 C.F.R. § 310.2, and charitable contribution solicitations are further exempted, 16 C.F.R. § 310.6. Arguably the FTC does not have jurisdiction over noncommercial activities such as polling for nonprofits and campaign robocalls. Hoefges, *supra* note 9, at 54 n.33. “The FTC does not have jurisdiction over non-profit organizations calling for noncommercial purposes.” *Id.* (internal citations omitted). Otherwise, one is generally prohibited from making unsolicited calls to numbers in the registry. 16 C.F.R. § 310.4(b)(1)(iii)(B).

88. *Mainstream Mktg. Servs. Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004) (upholding Do Not Call Registry as constitutional under intermediate scrutiny / *Central Hudson* analysis).

As the Do Not Call Registry was being adopted, Senator John McCain is reported to have sarcastically remarked: “We certainly wouldn’t want to deprive political operatives of their ability to operate as usual.”⁸⁹ In 2008, when the Colorado legislature killed an anti-robocall bill, Colorado’s Attorney General John Suthers remarked, “I understand that banning robocalls is not in the interest of politicians, political parties, and political operatives that profit from them, but I hope the public interest will eventually prevail”⁹⁰

Robocalls, however, are subject to a variety of federal regulations, including those established through Telephone Consumer Protection Act of 1991. These regulations were put in place on automated calls, in part, because of a “special concern that certain automated systems endangered public safety by tying up phone lines of hospitals, emergency responders, and law enforcement agencies.”⁹¹ All prerecorded or automated calls must state the “individual, or other entity that is responsible for initiating the call.”⁹² Messages must also include a contact phone number, though this can be played at the end of the message.⁹³ Cell phones are off limits from automated calls.⁹⁴ Political robocalls are exempted from time restrictions (9 PM to 8 AM) and Do Not Call Registry regulations that apply to commercial prerecorded calls.⁹⁵ Vote suppression is itself illegal⁹⁶ and repeatedly calling a number for harassment purposes may constitute a criminal act.⁹⁷

89. Reuteman, *supra* note 4.

90. *Proposal Would Have Banned Automated Dialing Systems* THE DENVER CHANNEL, Feb. 13, 2008, <http://www.thedenverchannel.com/print/15296237/detail.html>.

91. Jennifer Williams, Note, *Faxing It In: How Congress Failed Consumers with the Junk Fax Prevention Act of 2005*, 72 BROOK. L. REV. 345, 350–52 nn.30 & 33 (2006) (citing legislative history and debates).

92. 47 C.F.R. § 64.1200(b)(1). Note that there is no private right of action for violating this provision. *Worsham v. Ehrlich*, No. 1442, 2008 Md. App. LEXIS 113, *8–9. (Md. Ct. Spec. App. Sept. 15, 2008).

93. 47 C.F.R. § 64.1200(b)(2).

94. 47 C.F.R. § 64.1200(a)(iii). However, a person is not liable for calling a cellular phone if the call was “not knowingly made to a wireless number” 47 CFR 64.1200(a)(iv).

95. 47 C.F.R. § 64.1200(c).

96. 42 U.S.C. § 1971(b) (making it illegal to “threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose.”); 18 U.S.C. § 241 (making it a criminal act to conspire to injure, oppress, threaten, or intimidate a person from enjoying their constitutional rights). This section requires specific intent to violate constitutional rights and that this be the “predominant purpose.” *United States v. Ellis*, 595 F.2d 154, 162 (3rd Cir. 1979); *United States v. Guest*, 383 U.S. 745, 753–54, 760 (1966).

97. 47 U.S.C. § 223(a)(1)(D) (makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number). But an actual purpose of harassing is required, *see United States v. Tobin*, 480 F.3d 53, 61 (1st Cir. 2007); *remanded to United States v. Tobin*, 545 F. Supp. 2d 189, 193 (D.N.H. 2008) (“to violate subsection 223(a)(1)(D), one must have a specific purpose to cause emotional upset in a person at the telephone number called.”).

The federal legislation that regulates automated and prerecorded calls explicitly contains a savings clause to prevent pre-emption, thus allowing states to go further in regulating robocalls.⁹⁸ This has opened the door to uncertain and varied state laws.

B. *The Varied State Laws*

Some states already ban or regulate robocalls, and many more are considering similar prohibitions.⁹⁹ These regulations vary significantly state to state. Louisiana law prohibits public opinion polling on Sundays and state holidays.¹⁰⁰ Massachusetts requires local phone companies to maintain a Do Not Robocall list.¹⁰¹ The penalties vary too, from \$500 for violating Indiana's law¹⁰² to \$2500 in Montana,¹⁰³ and from up to thirty days imprisonment in South Carolina¹⁰⁴ to six months in Wyoming.¹⁰⁵ Wyoming law actually prohibits robocall "[p]romoting or any other use related to a political campaign."¹⁰⁶ The Indiana statute does not mention political calls,¹⁰⁷ though the Indiana Supreme Court has recently interpreted state law to reach robocalls.¹⁰⁸

Some states implement exceptions to the general prohibition of automated calls. North Dakota prohibits robocalls unless the recipient

98. 47 U.S.C. § 227(e)(1) ("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 on, or which prohibit . . . (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages . . ."). In contrast, the European Union bans the use of automated calling systems for direct marketing purposes Europe-wide. Council Directive 2002/58/EC, art. 13, 2002 O.J. (L201) 37, 45–46. On October 13, 2009, an attorney for the American Future Fund Political Action requested an advisory opinion from the FEC, arguing that federal campaign finance law preempted the application of robocall laws to federal candidate's and committees. The request is available at: <http://saos.nictusa.com/aodocs/1087771.pdf>. While state laws that directly restrict the campaign expenditures of federally regulated committees are likely preempted, state laws that regulate robocalls from federal candidates as phone calls—rather than campaign expenditures—are probably not preempted.

99. Cauchon, *supra* note 9.

100. LA. REV. STAT. ANN. § 45: 811(3) (2009).

101. MASS. GEN. LAWS ANN. ch. 159, § 19C (2009).

102. IND. CODE ANN. § 24-5-0.5-8 (2009).

103. MONT. CODE ANN. 45-8-216(3)(2007).

104. S.C. CODE ANN. § 16-77-445(F)(2008).

105. WYO. STAT. ANN. § 6-6-104(c)(2009). *See also* ARK. CODE ANN. § 5-63-204(b) (2009) (misdemeanor).

106. WYO. STAT. ANN. § 6-6-104(a)(v)(2009). *See also* MONT. CODE ANN. § 45-8-216(1)(e)(2009).

107. IND. CODE ANN. § 24-5-14-3(a)(2) (2009) ("The purpose of the call is to solicit the purchase or the consideration of the purchase of goods or services by the subscriber.").

108. *State v. Am. Family Voices, Inc.*, No. 31S00-0803-CV-139, 2008 Ind. LEXIS 1188 (Ind. Dec. 23, 2008) (applying statute to political robocalls). The Attorney General had attempted to enforce it against political callers. Meagan Ingerson, *Court Hears Political Robocall Case*, INDIANAPOLIS STAR, June 17, 2008, at 3.

“has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber’s consent before the message is delivered.”¹⁰⁹ South Carolina’s ban includes an exception for robocalls coming at the express request of the recipient or situations where there is a prior relationship between the caller and the recipient.¹¹⁰ Oregon also prohibits calls except when there is an established business relationship.¹¹¹ Oregon defines an established business relationship as “a previous transaction or series of transactions between a caller and a subscriber that occurred within the 18 months preceding a call.”¹¹² North Carolina’s regulation of automated phone calls depends on who makes the call and how. Political candidates, political parties, and nonprofit charitable groups are automatically permitted to use robocalls; others can only use robocalls if a live caller comes on first.¹¹³ New Hampshire allows live political calls, but limits political robocalls if made by a vendor.¹¹⁴

States vary on what information must be disclosed during the calls. Idaho requires that the name of the caller, purpose of the message, and contact information be played at the start of a call.¹¹⁵ Connecticut requires the candidate’s name and voice to be included in the robocall.¹¹⁶ Calls made in Florida and Virginia must include a disclaimer stating who paid for the call.¹¹⁷ Oklahoma does not have a state law on robocalls but it does enforce federal disclosure requirements.¹¹⁸ As provided by these

109. N.D. CENT. CODE § 51-28-02 (2009) (constitutionality upheld and preemption argument rejected). State *ex rel.* Stenehjem v. FreeEats.com, Inc., 712 N.W.2d 828 (N.D. 2006), *cert. denied* 127 S.Ct. 383 (2006).

110. S.C. CODE ANN. § 16-77-446(B) (2008).

111. OR. REV. STAT. § 646A.372 (2007).

112. OR. REV. STAT. § 646A.370(5) (2007).

113. It would seem that an individual who is neither a candidate nor operating as a tax-exempt political committee would not be able to place a robocall personally without first creating an organization to be the official sponsor. See N.C. GEN. STAT. ANN. § 75-104 (2009).

114. N.H. REV. STAT. ANN. § 359-E:7(XI)(e) (2009). However, one vendor, WinningCalls.com, offers to sell New Hampshire candidates the equipment to make calls themselves. Winning Calls.com: America’s Voice Broadcasting Experts, <http://www.winningcalls.com/statelaws.html> (last visited Sep. 24, 2009).

115. IDAHO CODE ANN. § 48-1003C (2009).

116. CONN. GEN. STAT. § 9-621(3) (2008).

117. FLA. STAT. ANN. § 106.147(1)(a) (2009); VA. CODE ANN. § 24.2-959 (2009); FLA. STAT. ANN. § 106.1475(1) (2009) (stating that anyone making paid telephone calls into Florida must also appoint a registered agent).

118. See Oklahoma *ex rel.* Edmondson v. Pope, 516 F.3d 1214 (10th Cir. 2008). See also Joseph Sanscrainte, *States Enforce Limits on Robocalls*, DM NEWS, Oct. 26, 2006, <http://www.dmnews.com/States-enforce-limits-on-robocalls/PrintArticle/93215>. See generally Frisby v. Schultz, 487 U.S. 474, 479 (1988). The Attorney General also threatened a presidential campaign. Okie Campaigns, <http://okiecampaigns.blogspot.com/2008/02/edmondson>

examples, state laws are numerous and varied when it comes to robocall legislation. Such inconsistencies make it difficult, if not impossible, for political candidates to be aware of them all.¹¹⁹

The difference between the approaches is seen most clearly in the different perceptions of state regulation. The Connecticut Attorney General's office found in 2006 that only six states actually regulated political campaigns.¹²⁰ Another report in 2006 stated that twenty-three states regulated robocalls.¹²¹ *USA Today* claimed that nineteen states regulated robocalls as of 2008.¹²² A different report from 2008 found that twelve states regulated robocalls.¹²³ Politico claimed ten states limited robocalls.¹²⁴ Stateline calculated a tally of robocall legislation in more than a dozen states, including the Oregon law that took effect in January of 2008.¹²⁵ *Campaigns and Elections Magazine*, one of the leading publications in the industry, stated that more than ten states had some restrictions on robocalls.¹²⁶ In preparing a survey of all fifty states and the District of Columbia for robocalls vendor, Winning Calls, in July 2009, I found twenty-eight states that had some kind of regulation of political robocalls, when using the broadest definition for "regulation."¹²⁷

orders-mccain-campaign-to.html (Feb. 4, 2008, 22:25 CST) The most controversial enforcement by Democrat Attorney General Drew Edmondson has been against Republican Tim Pope, which Pope alleges was politically motivated. A settlement was reached for a \$4500 fine. The AG had originally asked for \$10,000,000. See Press Release, Office of Oklahoma Attorney General, Former State Representative Accused of Auto-Dial Violations (May 3, 2006), available at <http://www.oag.state.ok.us/oagweb.nsf/search> (search for "Former State Representative Accused of Auto-Dial Violations").

119. Van Bergen v. Minnesota, 59 F.3d 1541, 1546 n.3 (8th Cir. 1995) ("A majority of the states have enacted regulation of [automated] calls, some restricting only commercial solicitation [automated] calls, and others restricting all [automated] calls."). See, e.g., IND. CODE ANN. § 24-5-14-1 et seq (2009); ARK. CODE ANN. § 5-63-204 (2009); MINN. STAT. § 325E.27 (2008), constitutionality upheld in *Van Bergen* 59 F.3d at 1541; S.C. CODE ANN. § 16-17-446 (2008); MONT. CODE ANN. § 45-8-216 (2007).

120. Sandra Norman-Eady, *Application of State Do-Not-Call Laws to Campaign Calls*, OLR RESEARCH REPORT, Nov. 29, 2006, <http://www.cga.ct.gov/2006/rpt/2006-R-0717.htm>.

121. Sanscrainte, *supra* note 118.

122. Cauchon, *supra* note 9.

123. *Senate Bill Would Regulate Robocalls During Election Campaigns*, OBM WATCH (Feb. 20, 2008), <http://www.obmwatch.org/node/3614>.

124. Hearn, *supra* note 8.

125. Vicki Ekstrom, *States Target Political Robo-Calls*, STATELINE, May 22, 2008, <http://www.stateline.org/live/printable/story?contentId=311742>.

126. Shane D'Aprile, *AAPC Launches Fundraising Appeal to Fight Robocall Bills*, CAMPAIGNS AND ELECTIONS' POLITICS MAGAZINE, Mar. 30, 2008, <http://politicsmagazine.com/web-stories/aapc-launches-fundraising-appeal-to-fight-robocall-bills/>.

127. The results of this fifty-state survey are available at <http://winningcalls.com/statelaws.html>. To reach the number of 29, I excluded regulations that only applied to commercial calls and included a regulation such as Kentucky's that provided only a limited regulation of automated polls, but did not otherwise regulate automated political calls. See KY. REV. STAT. ANN. § 367.461 (2009) (Automated calls made "for conducting polls, for soliciting information, or for advertising goods, services, or property" must identify the name and

Such varied results are likely due to a number of factors: different interpretations used on the application of autodialer and telephone regulation for political campaigns, the lack of enforcement in some states, ignorance on behalf of political journalists, and the sheer difficulty of conducting a nationwide survey when almost every state with some regulation defines and regulates robocalls differently.

Even within the four categories, the laws are different. Both New York and Pennsylvania have disclosure requirements¹²⁸ but Pennsylvania requires that the caller state a “call-back” phone number at the beginning of the message;¹²⁹ New York law requires the caller to include the “call-back” phone number at the end of the end of the message.¹³⁰ Differences like these in the patchwork of state laws for robocall legislation make it difficult for national campaigns to comply with state laws.

III. THE PROBLEM OF PATCHWORK STATE REGULATION AND NATIONAL CAMPAIGNS

Though many states do not enforce their robocall laws,¹³¹ the possibility of enforcement can catch campaigns and political groups off-guard.

The patchwork of state laws has caused many national candidates and campaigns to unintentionally violate Wyoming’s prohibition on robocalls. Right to Life’s national organization made automated campaign calls into Wyoming to support the incumbent Republican Congresswoman in 2006 without realizing that such calls were illegal in Wyoming. Although they later apologized,¹³² Wyoming’s Secretary of State considered turning this matter over to prosecutors.¹³³ The National Rifle Association has also made the same mistake in Wyoming.¹³⁴ Home-grown Wyoming candidates who ordered robocalls also had to halt them after realizing that they were illegal.¹³⁵ Barack Obama’s presidential

telephone number of the caller within the first 25 seconds of the message and at the end of the call, provide a phone number that is actually staffed during business hours, and be made only between 8:00 AM and 9:00 PM). One could probably review the same data and come up with a different count. That list also includes many state laws which are apparently not enforced.

128. For a color-coded map of the various state laws, see *WinningCalls.com*, <http://www.winningcalls.com/statelaws.html> (last visited Nov. 29, 2009). Both New York and Pennsylvania are the same color on this map, although the disclosure laws are different.

129. 52 PA. CODE § 63.60(b)(2) (2009).

130. N.Y. GEN. BUS. § 399-p (McKinney 1996 & Supp. 2009).

131. Ekstrom, *supra* note 125.

132. Miller, *supra* note 3.

133. *Id.* He also stated that the robocall statute was “not effective” and designed for telemarketers, not political organizations. *Id.*

134. *Id.*

135. *Id.* Both Democrats and Republicans have made this mistake in Wyoming. *Id.*

campaign illegally made robocalls in Wyoming before the state's Democratic caucuses.¹³⁶

Varying state regulations are a problem for national campaigns running national efforts.¹³⁷ Both Clinton and Obama illegally robocalled Oregon voters before the May Primary, not realizing the Oregon statute against robocalls.¹³⁸ If sophisticated campaigns have trouble following state laws, then how can less-sophisticated citizen advocacy groups successfully navigate through the maze of laws? Though the presidential election is the only official national campaign, many interest groups and PACs operate nationally, as do the national political party committees.

Robocalls should be regulated at the federal level because they are distinct from other election-related practices and states are regulating them as a part of telecommunication regulation. Generally, state law regulates state political campaigns—such as who can give what, how it must be disclosed, and what kind of disclaimer must be included in campaign materials—and federal law regulates federal campaigns.¹³⁹ Robocall legislation applies to the call, not to the campaign. Thus, it makes sense for federal campaigns to be concerned primarily with federal regulations. Federal campaigns, like President Obama's, that are accustomed to complying with only federal laws when it comes to disclosure requirements find themselves in unfamiliar territory when facing state regulation of robocalls. There is less of a legal tradition for state regulation of robocalls because such regulations have primarily existed within a federal context.

Current federal legislations over robocalls are ineffective. The existence of the federal Do Not Call Registry and the exemption for political campaigns further facilitate campaign confusion. The registry and exemption for political campaigns offer a simple, easy answer and distract candidates from making a more thorough investigation of every state's statute and enforcement routine. If it were not for the specific exemption of political calls, the federal Do Not Call Registry would already ban most robocalls. Most states do not regulate or ban robocalls at all, and most states that do have regulations rarely enforce them, further adding

136. Barron, *supra* note 2. The Obama campaign said that the calls were intentional, which one assumes means that they the campaign did not realize they were breaking Wyoming's law. *Id.*

137. Though one can say that a state should be able to regulate election laws for state candidates, in the case of a federal election using the instrumentalities of interstate commerce (phone lines), the state's interest in regulating these areas seems weak compared to the burden it places on compliance for a national effort.

138. Ekstrom, *supra* note 125.

139. See, e.g., 2 U.S.C. § 431 (2006) (Federal law regulating disclosure of federal campaign committees); MICH. COMP. LAWS § 169.203 (2005) (Michigan law regulating disclosure of Michigan campaign committees).

to the confusion. Further, the regulations could get even more complex if some of the proposed changes are adopted.

IV. PROPOSED CHANGES

A. Federal Legislation

Representative Lofgren's proposed Quelling of Unwanted Intrusive and Excessive Telephone Calls (QUIET Calls) Act of 2007 makes it a crime to call between the hours of 9 PM and 9 AM, to not disclose the "identity of the sponsor, endorser, or originator of the call" at the very beginning of the call, and allows state attorneys general to seek injunctive relief.¹⁴⁰ Lofgren has argued that new regulation is needed because "many voters responded to the deluge of robocalls by disengaging from the election entirely."¹⁴¹ Two house bills, Representative Foxx's Robo Calls Off Phones (Robo COP) Act¹⁴² and a similar bill by Representative Stupak,¹⁴³ would prohibit robocalls to the Do Not Call Registry.¹⁴⁴ Representative Foxx has also voluntarily pledged not to call anyone whose number is in the online registry, stoppoliticalcalls.org.¹⁴⁵

Senators Specter and Feinstein have offered the Robocall Privacy Act of 2008.¹⁴⁶ According to Feinstein, "[s]omething must be done about the worst of these calls."¹⁴⁷ The bi-partisan bill plans to implement a number of restrictions on robocalls: ban robocalls after 9 PM or before 8 AM, limit calls to no more than two per organization to the same phone number on the same day, require disclosure at the beginning of a phone call, require the caller to identify the call as pre-recorded, require that the number of the person making the robocall come up on the caller ID of the recipient, empower the FEC to seek civil fines, and allow a private cause of action to enjoin the violations. The bill would not apply to volunteer phone banks and live calls, and only covers the period thirty days prior to a primary or sixty days prior to a general election.¹⁴⁸

140. H.R. 1383, 110th Cong. (2007).

141. *Senate Bill Would Regulate Robocalls During Election Campaigns*, *supra* note 123.

142. H.R. 248, 110th Cong. (2007).

143. H.R. 4298, 110th Cong. (2007).

144. *Senate Bill Would Regulate Robocalls During Election Campaigns*, *supra* note 123.

145. *Id.*

146. S. 2624, 110th Cong. (2008). See also discussion in *Senate Bill Would Regulate Robocalls During Election Campaigns*, *supra* note 130.

147. United States Senate Committee on Rules and Administration, *Chairman Feinstein, Senator Specter Introduce Measure to Regulate Robocalls*, Feb. 12, 2008, http://rules.senate.gov/public/index.cfm?FuseAction=InNews.MajorityNews&ContentRecord_id=3d8a02c9-7e9c-9af9-78d6-f84a54a33905&Region_id=&Issue_id=

148. See discussion in *Senate Bill Would Regulate Robocalls During Election Campaigns*, *supra* note 123.

B. State Proposals to Regulate Robocalls

Many state legislators have proposed bills to regulate or ban robocalls.¹⁴⁹ These proposals include banning such calls,¹⁵⁰ exposing them to the regulations that already cover commercial calls,¹⁵¹ prohibiting automated political calls to numbers on the Do Not Call Registry,¹⁵² or simply imposing disclosure and time of day requirements.¹⁵³ In prior years, proposals included creating a new state Do Not Robocall list,¹⁵⁴ increasing disclosures in robocalls,¹⁵⁵ requiring a caller to have prior written consent from the candidate the call intends to support,¹⁵⁶ and banning robocalls entirely.¹⁵⁷ Even at the state level, First Amendment concerns animate the discussion about robocall regulations. A committee of the Colorado legislature voted to kill a proposed ban on robocalls because of concerns that the bill would violate free speech rights.¹⁵⁸ The Colorado Attorney General had supported the bill, but this was not enough to get it passed over those concerns.¹⁵⁹

149. Susan Saulny, *States Seek Limits on 'Robocalls' in Campaigns*, N.Y. TIMES, Apr. 25, 2007, <http://www.nytimes.com/2007/04/25/us/politics/25calls.html>.

150. S.B. 146, 96th Gen. Assem. (Ill. 2009).

151. See H.B. 2217, 2009 Leg. (Kan. 2009).

152. S.B. 65, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009) (also imposing other regulations).

153. H.B. 4985, 2009 Leg. (Mich. 2009).

154. See S.3, 94th Leg., Reg. Sess. (Mich. 2007), available at <http://legislature.mi.gov/doc.aspx?2007-sb-0003>. As of October 2008, this bill had passed the state Senate unanimously but had not come up for a vote in the state House. See also H.R. 4467, 94th Leg., Reg. Sess. (Mich. 2007); S. 284, 94th Leg., Reg. Sess. (Mich. 2007).

155. *Bill Aims to Stop Anonymous Robocalls*, MIRS CAPITOL CAPSULE (Feb. 18, 2009), <http://www.mirsnews.com/capsule.php?gid=3018> (reporting that H.B. 4232 would ban anonymous robocalls and impose one year in jail on violators). See also S. 2, 94th Leg., Reg. Sess. (Mich. 2007), available at <http://legislature.mi.gov/doc.aspx?2007-sb-0002> (requiring disclosures in the call and to the Secretary of State); H.R. 4333, 94th Leg., Reg. Sess. (Mich. 2007) (including 9 PM to 9 AM restrictions).

156. S. 307, 81(R) Leg., Reg. Sess. (Tex. 2009), available at <http://www.capitol.state.tx.us/tlodocs/81R/billtext/html/SB00307L.htm>. This bill would apply to all political calls (live or automated), would prohibit callers from implying that the call is from nonexistent persons or represents a person that the caller does not in fact represent, and requires the prior written consent of a candidate (if supporting that candidate) or his or her opponent (if opposing the candidate). *Id.* This proposal was designed to resolve the problem of the Texas robocalls described above. See *supra* Part I.C.

157. H.R. 6323, 96th Leg., Reg. Sess. (Ill. 2008), available at <http://www.ilga.gov/legislation/default.asp> (use "search by number" box at left); S. 146, 66th Leg., 2d Reg. Sess. (Colo. 2008), available at <http://www.leg.state.co.us/clics/clics2008a/csl.nsf/> (enter "146" in the search box); H.R. 4238, 94 Leg. Reg. Sess. (Mich. 2007), available at <http://legislature.mi.gov/doc.aspx?2007-hb-4238>.

158. *Proposal Would Have Banned Automated Dialing Systems*, *supra* note 90. The bill was before the State Veterans and Military Affairs committee. *Id.*

159. *Id.*

C. Problems with These Proposals

As previously discussed, any state regulation of phone calls is problematic because compliance with fifty different regimes may be difficult for national campaigns, pollsters, and interest groups, as well as in-state campaigns hiring out-of-state consultants.

The proposed federal legislations do not fare much better. The federal proposals are not, at first appearance, sweeping or radical, likely because of First Amendment concerns.¹⁶⁰ None of the federal proposals mentioned earlier take the necessary step of pre-empting state law. The proposal to apply the existing Do Not Call Registry to robocalls also has a variety of problems.

While the Do Not Call Registry makes sense when it comes to preventing unwanted commercial solicitations, it is not appropriate when used for political calls. In signing up for the Do Not Call Registry to avoid telemarketing, voters have not necessarily made clear a desire to avoid getting Rasmussen public opinion polls or “get out the vote” phone calls on election day. Further, even if public opinion polling was exempted and treated differently from candidate-endorsing robocalls,¹⁶¹ it is difficult to differentiate between a legitimate public opinion poll—seeking only to measure the public’s thought—and a “push” poll that uses a survey to influence voter opinions¹⁶² without making minute distinctions based on content and the intent of the speaker.¹⁶³ States that

160. “The First Amendment limits restrictions on such messages, which may explain why proposals to require the call recipient to press a specific button in order to play the recorded message do not appear in any of the congressional proposals.” *Senate Bill Would Regulate Robocalls During Election Campaigns*, *supra* note 123.

161. The Robo Calls Off Phones (Robo COP) Act uses a definition that would not cover public opinion polling but would cover an attempt to promote a candidate. Robo Calls Off Phones Act, H.R. Res. 248, 110th Cong. (2007).

162. For an example of a push poll, see the questions asked by the Republican Jewish Coalition in a recent call to self-identified Jewish voters. The poll asked them if they would be more likely or less likely to vote for Barack Obama if they knew he was endorsed by a Hamas leader, supported by Louis Farrakhan, attended a Church with anti-Israel and anti-American views, had close ties to Palestinian leaders, etc. Niraj Warikoo, *Phone Poll Questions Irk Some Mich. Jewish Voters*, DETROIT FREE PRESS, Sept. 18, 2008, at 9A.

163. However, the bill currently before the Texas State Senate seems to have found a creative way to make this distinction. The bill regulates calls except those “conducted for the purpose of polling respondents concerning a candidate, officeholder, or measure that is a part of a series of similar telephone calls that consists of fewer than 1,000 completed calls if the average duration of the calls is longer than two minutes.” S. 307, *supra* note 156. For a push poll to be effective, it must reach enough voters to have an influence, whereas a genuine poll needs only a sample large enough for scientific purposes. Requiring a call to be over two minutes would also increase the costs for push polls. These regulations, though, might hurt genuine polls that seek larger samples or are very short, and political push polls might find a way to adjust their behavior to fit within this exception.

have tried to distinguish between “push” and legitimate polls have created even more regulations that vary from state to state.¹⁶⁴

Adding robocalls to the Do Not Call Registry or banning them entirely eliminates robocalls as a useful political tool and takes away any advantage that the calls may offer. Applying the existing Do Not Call Registry to robocalls would have the same effect as an outright ban. The 150 million numbers in the Do Not Call Registry make up a substantial chunk of potential robocall lists.¹⁶⁵ Banning robocalls would hurt poor, underfunded candidates the most because robocalls are cheaper than broadcast advertising or mailings. Class conflicts are as old as the republic itself.¹⁶⁶ While robocalls are annoying to the rich and poor alike, banning them will limit poor candidates and increase the price of “get out the vote” operations. Such limitations may ultimately hurt voter turnout among minorities and those below the poverty line.

Any regulation that bans or limits the effective use of robocalls is bound to have some unintended and undesirable consequences. By increasing the cost of robocalls, campaigns may look to other cheaper but socially costly alternatives; for example, campaigns may look to direct mailing, a less environmentally-friendly alternative to carbon-free robocalls. More expensive campaign tactics require more campaign dollars to power them. If lawmakers ban robocalls, and candidates choose to use television advertisements or another more expensive medium to reach voters, then more campaign dollars will be required. To the extent that money has a corrupting influence on politics,¹⁶⁷ restricting robocalls requires more money to enter politics and could lead to more corruption. By increasing the cost to campaign (effectively imposing a tax on

164. Some states, like Louisiana (which presumes fewer than 1500 calls is a legitimate poll), look at the number of calls made. LA. REV. STAT. ANN. § 18:1463.1(B)(3) (2009). New Mexico, on the other hand, treats 500 or more completed calls as a push poll. N.M. STAT. ANN. § 1-19-26.3(A)(1) (2008). Maine’s push poll statute is much more complex, looking to criteria like whether “pollster or polling organization does not collect or tabulate survey results” to determine if it is a push poll. ME. REV. STAT. ANN. 21-A, § 1014-B(1)(C) (2008). Nevada is even fuzzier. NEV. REV. STAT. ANN. § 294A.341(2) (2009) (defining a push poll as “the canvassing of persons, by means other than an established method of scientific sampling, by asking questions or offering information concerning a candidate which is designed to provide information that is negative or derogatory about the candidate or his family”).

165. Hearn, *supra* note 8. Three quarters of adults in the United States have signed up for the Do Not Call Registry. Harris Poll, *National Do-Not-Call Registry: Three-Quarters of U.S. Adults Are Registered*, Harris Interactive (Jan. 12, 2006), http://www.harrisinteractive.com/harris_poll/index.asp?PID=627.

166. “But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society.” Madison, *supra* note 44.

167. *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (explaining that the primary purpose of campaign finance laws is “to limit the actuality and appearance of corruption resulting from large individual financial contributions . . .”).

candidacies), such restrictions may cause a minor decrease in the number of candidates and, in combination with other restrictions, decrease the choices available to voters.

Furthermore, an absolute ban on robocalls would only affect legitimate robocalls. The ability to deliver calls with Voice Over IP technology means that the worst abuses (such as vote suppression efforts) may still continue from offshore locations, outside of the practical jurisdiction of U.S. law enforcement, or through other anonymous means to avoid detection.¹⁶⁸ When robocalls are outlawed, only outlaws will have robocalls. Even if these problems could be eliminated—with a voluntary opt-in list for fully informed voters who can distinguish between covered calls, without driving up the cost of campaigns, and without being subverted by unlawful calls—a regulation of robocalls that sought to end them is still a bad idea.

Applying the Do Not Call Registry or another such device to political robocalls could lead to other proposals to protect voters from the annoyance of participating in democracy. What stops the government from establishing a Do Not Mail List to avoid political junk mail?¹⁶⁹ Political emails could be limited as well.¹⁷⁰ As media becomes more focused and on-demand, Internet and broadcast advertising may likewise become more targeted to individual voters. This means that individual voters may be excluded too in a Do Not Advertise List—presently unrealistic but nevertheless possible.

While most people may find robocalls uniquely intrusive in a way that other tools of campaign speech are not, tastes vary. While one person may find robocalls annoying, another may be bothered by negative

168. For instance, illegal robocalls that originated in Romania were made in a Montana State Senate race. Tom Lutey, *Political Attacks Came from Romania*, BILLINGS GAZETTE, Oct. 23, 2008, http://billingsgazette.com/news/local/article_474286ee-1720-55e0-a942-c54f1900b239.html. Electronic autodialers that can work with VOIP technology can be purchased for as little as \$299. See Voicent Communications, <http://www.voicent.com/autodialers.php> (last visited Oct. 25, 2008).

169. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 736-37 (1970) (“Weighing the highly important right to communicate . . . against the very basic right to be free from signs, sounds, and tangible matter we do not want, it seems to us that a mailer’s right to communicate must stop at the mailbox of an unreceptive addressee.”) The statute at issue in *Rowan* allowed a person who received a sexually provocative mailing to request that the Postmaster order the sender to remove the person from the mailing list. It was not a categorical ban on all direct mail solicitations, but allowed customers to object to one specific objectionable type of mailing. Do Not Mail lists motivated by environmental concerns are already being implemented; see discussion in *DMA Responds to Consumer Popularity of ‘Do Not Mail’ Lists*, <http://www.melissadata.com/eneews/marketingadvisor/articles/0801b/1.htm> (last visited Nov. 10, 2008).

170. Vivek Arora, Note, *The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem*, 39 COLUM J.L. & SOC. PROBS. 299, 300–01 (2006) (proposing additional regulation on political emails).

ads during college football broadcasts, yet another by environmental concerns related to junk mail, or a voter may find door-to-door campaigning the most intrusive. Some may find that, while robocalls are the worst, all campaign rhetoric is useless and should be ignored.

While political campaigns do not have the right to confront people with information they do not want, the government should not actively enforce a person's desire to ignore this information (such as with a Do Not Robocall list that would impose penalties under law) unless it reaches the level of nuisance or trespass. The government should not create opt-in lists that restrict core speech especially where information can only be dispersed upon the public's choice to sign up. Though an opt-in list does not restrict the rights of a willing speaker to reach a willing listener, it reduces the volume of political debate in this country and encourages apathy and ignorance. Voters may wish to remain ignorant—and may do so by their own free choice—but the government should not willingly assist in impoverishing our democracy.

Senator Feinstein's proposal does not go as far as outright bans or the Do Not Call Registry, which has the same effect as an outright ban. The American Association of Political Consultants working group on robocalls regulation has also come up with a framework for federal regulations.¹⁷¹ The principles included "disclaimers within the first 10 seconds of a call," the ability to opt-out from future calls by that campaign by pressing a button, Caller ID, and time of day regulation.¹⁷² The Feinstein bill, though similar to the industry's recommendations, does not offer the right solution.

Requiring a disclaimer at the beginning of a phone call and requiring a statement that it is a prerecorded phone call would make robocalls less effective and cause more voters to hang up within seconds of picking up the call.¹⁷³ Making the number of the calling organization available on the recipient's Caller ID would be difficult as it is usually an out-of-state vendor, not the actual campaign, placing the phone call. By only regulating the period immediately prior to a primary or general election, Feinstein's bill would not protect voters from abusive practices at other times¹⁷⁴ and would make robocalls less effective as a legitimate political

171. D'Aprile, *supra* note 126.

172. *Id.*

173. A lengthy disclaimer would increase the likelihood that the voter would hang-up the phone before hearing any meaningful message. Consider whether a voter would stay on the line after hearing, "Hello, this call is paid for by the National Republican Campaign Committee. It is a prerecorded call."

174. For instance, calls made during local government elections that do not coincide with federal elections, calls made by lobbyists to influence legislation, and calls made the day before the window created in this bill. *See, e.g.,* Lynda Waddington, *Huckabee Robocalls Iowans to Discuss Abortion, Request Money*, IOWA INDEPENDENT, Nov. 21, 2008,

tool during the time when they are needed most.¹⁷⁵ The most problematic proposal, perhaps, is creating a private cause of action in robocall violations. Instead of fighting each other in the media, with negative advertising, and perhaps even robocalls, candidates will have a new cause of action to bring their disputes into the courthouse and drag courts into highly political battles.

D. *The Problem with Politicians*

No robocall regulation will be perfect because it must invariably go through the approval of self-interested politicians. Given the cynicism that others have expressed about politicians self-regulating,¹⁷⁶ one might wonder why politicians would want to ban or regulate robocalls at all. In part, politicians support such regulations because it is good politics. Robocalls are unpopular¹⁷⁷ and banning robocalls appeals to constituents who dislike the annoying calls. Anti-robocall activist Shaun Dakin says that politicians introduce anti-robocall bills for publicity purposes only to let them die later in committee.¹⁷⁸

More sinister motives may also be possible—sinister in the sense that laws reflect the interests of those who drafted them. Laws that regulate campaigns are likely to be incumbent-protecting laws.¹⁷⁹ By

<http://iowaindependent.com/8875/huckabee- robo-calls-iowans-to-discuss-abortion-request-money> (showing calls made shortly after an election).

175. If a campaign were making a get-out-the-vote phone call to a targeted list, it might wish the message to be simple, “Today is Election Day, please go vote. For more information on your polling place, please call” Instead, during critical “get out the vote” calls, Feinstein’s bill would require an initial disclaimer and notice that it is a prerecorded message, meaning that most people would hang up before being reminded of their civic duty to vote.

176. See Senator McCain and the Colorado Attorney General quoted, *supra* Part II.A.; see also Hearn, *supra* note 8 (featuring a voter commenting: “Political calls should be added to the Do Not Call list. But what politician would ever add an amendment to such legislation when they are the culprit?”); “Elected officials are rarely willing to restrict any opportunity that would allow them to reach more voters in such a cost-effective manner.” Arora, *supra* note 170, at 328 (referring to email spam).

177. See, e.g., *Voters Want Lawmakers To Halt Robo Calls*, MIRS CAPITOL CAPSULE (Oct. 24, 2006), <http://www.mirsnews.com/capsule.php?gid=604> (October, 2006 poll showing that by a margin of 68 to 25 voters wanted these calls made illegal).

178. Ekstrom, *supra* note 125; see also *The National Political Do Not Contact Registry—Stop Political Calls BLOG*, <http://thinkdodone.typepad.com/ccd/2008/12/it-is-teasing-time-for-state-representatives-robocall-bills-are-introduced-and-then-taken-away.html> (Dec. 2, 2008, 10:38 CST). Dakin’s point seems to have some truth to it at both the federal and state level.

179. See Posting of Ilya Somin to Volokh Conspiracy, <http://volokh.com/posts/1214628280.shtml> (June 28, 2008, 00:44 EST). Somin points out, “[i]f voters were knowledgeable to tell the difference between ‘good’ campaign finance laws and Trojan horses that benefit incumbents, there would probably be no need to worry about campaign finance in the first place.” *Id.* Moreover, “ignorance makes it highly unlikely that voters will know enough to punish politicians who enact incumbent-protecting campaign finance reforms.” *Id.* The same motivations that make campaign finance laws drafted by incumbents more likely to protect

depriving potential opponents of a tool that allows for cost-effective, targeted, critical messaging and simultaneously appeases its constituents, incumbent politicians can use banning robocalls as a winning campaign issue.¹⁸⁰

Of course, if voters really hated robocalls, a simple way for voters to stop robocalls would be to stop voting for candidates who use them.¹⁸¹ Shaun Dakin's National Political Do Not Call Registry, www.stoppoliticalcalls.org, has signed up tens of thousands of people as of early 2008.¹⁸² A couple of Congressmen have agreed to a voluntary Do Not Robocall pledge using Dakin's list.¹⁸³ Voluntary regulation does not implicate the First Amendment, but it has fallen short of effectively stopping the bad and the ugly robocalls. Some kind of regulation is necessary, and any regulation of speech will have to be analyzed under the First Amendment.

V. FIRST AMENDMENT ANALYSIS OF ROBOCALL REGULATION

A. *The Regulation of Robocalls as a First Amendment Issue*

In 2006, a nonprofit organization based out of Washington, D.C., American Family Voices, made robocalls into Indiana against a Republican Congressman.¹⁸⁴ The Republican Attorney General brought an action against the caller under the state's strict autodialer law. Both the Indiana Republican and Democratic parties filed briefs opposing the Attorney General's enforcement action.¹⁸⁵ The Democratic Party chairman framed the issue as "the right of a candidate to try to get their message out before an election"¹⁸⁶ The Indiana Supreme Court upheld the action.¹⁸⁷ Though the Indiana Supreme Court recognized that significant constitutional questions were raised by robocall regulations, the court ultimately

incumbents would also make laws regulated campaign tactics and devices by incumbents more likely to protect incumbents.

180. It's more surprising then that robocall bans have not been enacted more quickly. It may just be legislative inertia, or perhaps concerns that the laws would be struck down as unconstitutional are genuinely guiding legislators. See *Proposal Would Have Banned Automated Dialing Systems*, *supra* note 90.

181. The now-defunct New York Sun remarked: "If Attorney General Carter can't stand the phone calls let him turn down the volume of his ringer, or take the phone off the hook, or vote only for political candidates who forswear robo-calls." Editorial, *Indiana and the First*, N.Y. SUN, June 17, 2008, <http://www.nysun.com/editorials/indiana-and-the-first/80147/>.

182. Hearn, *supra* note 8.

183. D'Aprile, *supra* note 126.

184. Ingerson, *supra* note 108.

185. *Indiana and the First*, *supra* note 181.

186. *Id.*

187. *State v. Am. Family Voices, Inc.*, 898 N.E.2d 293 (Ind. 2008).

concluded that the constitutional issues were not before them and thus, the justices expressed no opinion on that issue.¹⁸⁸

The American Association of Political Consultants is fighting against the new legislation to regulate robocalls and has created the First Amendment Legal Defense Fund to get consultants to fund a legal fight.¹⁸⁹ They have framed the fight as a First Amendment issue and retained an attorney “to challenge certain state laws on constitutional grounds”¹⁹⁰

Election law cases, especially campaign finance matters, are largely disputes about the breadth and limit of the First Amendment.¹⁹¹ Courts must also make difficult decisions where First Amendment rights bump into other constitutionally protected areas. In Indiana, one justice commented that the robocall statute “seems to be not about political speech or commercial speech, but about the sanctity of one’s home . . . the right to have peace and quiet and tranquility in their home.”¹⁹²

B. *Free Speech Interests Balanced Against the Home*

Free speech is not an unlimited right—its value may sometimes be subordinated to other values and considerations.¹⁹³ For example, the use of megaphones, loudspeakers, and bullhorns may be banned in certain situations.¹⁹⁴ However, the Supreme Court has kept a city from banning political yard signs, finding that alternatives such as passing out handbills or advertising in newspapers were inadequate substitutes for the yard signs.¹⁹⁵ Of course, some would argue that protecting the right to do what you will with your home differs from the right of a politician to

188. “As can be easily inferred from the presence of the Democratic and Republican State Central Committees as amici in this case, this litigation raises questions as to the extent to which the Autodialer Law limits and may constitutionally limit the use of autodialers to convey political messages. However, all parties agree that no such questions are before this Court at this stage of the litigation and we express no opinion with respect thereto.” *Id.* at 295.

189. D’Aprile, *supra* note 126.

190. *Id.* (stating that they “believe in our clients’ first amendment rights to communicate with voters.”) (emphasis original).

191. Eugene Volokh, *Pragmatism vs. Ideology in Free Speech Cases, Symposium on the Rehnquist Court*, 99 *Nw. U.L. REV.* 33, 36 (2004) (stating that the Court’s campaign finance decisions are “filled with debates about basic First Amendment principles.”) (citing *FEC v. Beaumont*, 539 U.S. 146 (2003); *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Colo Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996)).

192. *Indiana and the First*, *supra* note 181.

193. See, e.g., *Dennis v. United States*, 341 U.S. 494, 503 (1951) (“[N]ot an unlimited, unqualified right, but that the societal value of speech must, on occasion, be subordinated to other values and considerations.”).

194. *California v. LaRue*, 409 U.S. 109, 118 n.4 (1972); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

195. *City of Ladue v. Galleo*, 512 U.S. 43, 56 (1994).

invade your home.¹⁹⁶ In another case, the Court has recognized that the most effective way to bring literature to people is to distribute it at their home.¹⁹⁷

At the same time, the Court has recognized something special about the home.

The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.¹⁹⁸

Robocalls are particularly intrusive because the recipient cannot simply tell the caller to go away,¹⁹⁹ and the caller, rather than the recipient, selects the time and manner that the message arrives.²⁰⁰

Any meaningful analysis of restrictions on robocalls will include some balancing of the different interests involved—the private interest of

196. The Court has not had much sympathy for a purported-First Amendment right to invade another's home. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (stating “the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.”). “One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.” *Id.* at 749. The public may share this opinion.

You believe that you have a right to come into my home at any time you choose and speak out. You must think my home is a public hall. You're wrong. It's my home. My home is private. It's my domain. You have violated my privacy. You have usurped the sanctity of my home. You have demonstrated that you have no regard for me, that you and winning the election are your only concerns.

Norman Prady, Op-Ed, *Hey, Politicians, if You Want my Vote, Don't Call*, DETROIT FREE PRESS, July 8, 2008, at 11. available at <http://www.freep.com/apps/pbcs.dll/article?AID=/20080708/OPINION02/807080323/0/OPINION02>.

197. *Schneider v. Irvington*, 308 U.S. 147 (1939); *Martin v. Struthers*, 319 U.S. 141, 145–47 (1943). *See also* *Hynes v. Mayor & Council of Oradell*, 425 U.S. 610 (1976) (holding that defendant could not require door-to-door literature distributors to register themselves).

198. *Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988)(citations omitted). “The First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.” *Id.* at 487.

199. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554–55 (1995)(contrasting robocalls with *Martin v. City of Struthers*, 319 U.S. 141 (1943), because a resident can tell a pamphleteer to go away and never come back but a robocall does not register a response, thus making it worse).

200. “In addition, door-to-door and telephone solicitations may implicate privacy concerns to a higher degree than mail or e-mail. For instance, a knock at the door or ringing telephone demands immediate attention, while mail and e-mail can be opened and read whenever the recipient chooses to do so.” Hoefges, *supra* note 9, at 58–59. Mass media, such as newspapers where a reader chooses which publications to read, is further distinguished from direct marketing, where the publisher chooses which reader to send to. *Id.* at 58–59.

citizens, the government interest in protecting that peace and privacy, and the constitutional right to free expression.²⁰¹ Of course the home is a special place, but judges can often “identify some constitutionally protected ‘interest’ supporting an abridgement of a constitutionally protected right.”²⁰² Phone lines are not a traditional public forum because they are private, not public, property.²⁰³ Regulations on robocalls will thus be judged under the intermediate scrutiny applied to content-neutral time, place, and manner restrictions.²⁰⁴

C. Content-Neutral Time, Place, and Manner Restrictions

Because content-neutral restrictions are not as dangerous to free expression, they receive less exacting analysis and are subject to intermediate scrutiny.²⁰⁵ The “government may impose reasonable restrictions on the time, place or manner of engaging in protected speech provided that they are adequately justified ‘without reference to the content of the regulated speech.’”²⁰⁶ On the other hand, “if a governmental regulation is based on the content of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited ‘merely because public officials disapprove the speaker’s view.’”²⁰⁷ A court’s initial inquiry is thus whether the rule in question is content based.

201. Though perhaps it should not. As the *New York Sun* mused: “Funny, we checked the Bill of Rights, and found a protection for free speech, but none, other than the one against unreasonable search and seizure, guaranteeing quiet and tranquility in the home. If there were such a protection, no child would be safe, never mind robo-calls.” *Indiana and the First*, *supra* note 181.

202. Volokh, *supra* note 40, at 51–52. Professor Volokh describes an approach he calls the “Constitutional Tension Method” where judges identify some constitutionally protected interest on each side of the dispute to lead the opinion towards a particular result. *Id.* at 52–55.

203. See *Van Bergen*, 59 F.3d at 1552 (finding telephone system a nonpublic forum because it is privately owned and operated); Pope, 505 F. Supp. 2d at 1105 (Telephones are a “privately created and operated, albeit heavily regulated, channel of communication.”) (emphasis original), *rev’d on other grounds*, 516 F.3d 1214 (10th Cir. 2008); see generally *Frisby*, 487 U.S. at 479.

204. *Van Bergen*, 59 F.3d at 1553 (applying intermediate scrutiny to restrictions on robocalls as content-neutral time, place and manner restrictions).

205. See, e.g., *TBS, Inc. v. FCC*, 520 U.S. 180 (1997). Intermediate scrutiny applies when the government’s purposes is not the suppression of speech, the law is within the power of the government to enact, it furthers an important or substantial government interest, the government interest is not the suppression of speech, and the restriction is no greater than essential to enforce that interest. See, e.g., *Tool Box v. Ogden City Corp.*, 355 F.3d 1236 (10th Cir. 2004) (applying *United States v. O’Brien*, 391 U.S. 367 (1968)).

206. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293)).

207. *U.S. Postal Serv. v. Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981) (upholding federal statute prohibiting the placing of unstamped mail in mailboxes)(quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951)).

This first question is whether the government adopted the restriction on the speech without reference to the content of the speech.²⁰⁸ “[R]egulation of expressive activity is content-neutral so long as it is ‘justified without reference to the content of the regulated speech.’”²⁰⁹ The government must show a reasonable basis for believing its policy will further the substantial government interest that justified the regulation, and that the regulation is narrowly tailored to further that interest.²¹⁰ “Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”²¹¹ While the U.S. Postal Service may ban all political or nonpolitical solicitation on its premises as a content-neutral restriction,²¹² a residential anti-picketing ordinance that defined picketing based on the purpose of the picketing may be an unconstitutional limitation by the government.²¹³

The government’s justification for regulating robocalls is not based on the messages that robocalls deliver.²¹⁴ Restrictions on robocalls are justified because of their potential to invade into private homes and annoy recipients. Accordingly, with a few exceptions,²¹⁵

208. See, e.g., *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994).

209. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Id.*; see also *Bartnicki v. Vopper*, 531 U.S. 990 (2001).

210. *Ward*, 491 U.S. at 800; *Artistic Entm’t, Inc. v. City of Warner Robins*, 331 F.3d 1196 (11th Cir. 2003).

211. *Ward*, 491 U.S. at 799.

212. *U.S. v. Kokinda*, 497 U.S. 720 (1990).

213. *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) (“It is impossible to tell whether a stander, marcher, patroller, etc., is ‘picketing’ without analyzing whether he or she intends to convey a ‘persuasive’ message or to ‘protest some action, attitude or belief.’”).

214. The exception being regulations against fraud or voter harassment and intimidation, which would be analyzed differently, but ultimately upheld.

215. Wyoming’s robocall law appears to regulate robocalls based on the content of the call:

(a) No person shall use an automated telephone system or device for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number, for purposes of:

- (i) Offering any goods or services for sale;
- (ii) Conveying information on goods or services in soliciting sales or purchases;
- (iii) Soliciting information;
- (iv) Gathering data and statistics; or
- (v) Promoting or any other use related to a political campaign.

WYO. STAT. ANN. § 6-6-104 (2009). Montana’s law is basically identical. MONT. CODE ANN. § 45-8-216 (2007). A call encouraging the public to support more charter schools in Wyoming would appear to be outside the ban, but a call encouraging voters to support pro-charter school candidates or a robocall poll of public opinion about charter schools would be banned based on the content of the message. Content-based restrictions like that would receive

robocalls-regulation will be analyzed as a content-neutral regulation.²¹⁶

D. *The Application of Content-Neutral Analysis to Robocalls*

1. Outright Bans on Robocalls

The government's interest in protecting citizens from annoyance and invasions of their privacy may be sufficient to support a statute under intermediate scrutiny.²¹⁷ The government's interest in protecting the home is substantial and justified without reference to the content of the speech.²¹⁸ It is reasonable to assume that banning robocalls would help the government achieve the policy goal of decreasing the volume of unwelcome noise and solicitations in the home. An outright ban on robocalls, though, would not be a narrowly-tailored way to facilitate that policy.

Not all robocalls are annoying. The government does not have an interest in stopping a public opinion poll from Rasmussen, or a "get out the vote" reminder from the voter's identified political party. An outright ban would frustrate and block such informative uses of robocalls. A statute cannot "foreclose an entire medium of expression."²¹⁹ The availability of other ways to deliver campaign messages may not save an outright

strict scrutiny. *See* *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). However, most robocall legislation does not make this kind of distinction based on content.

216. *Okla. ex rel. Edmondson v. Pope*, 505 F. Supp. 2d at 1105 ("Because the TCPA technical requirements [requiring disclosure in robocalls] apply to all calls that contain a pre-recorded message to residences, regardless of the message conveyed, and a professed legislative purpose was to protect consumers from unwarranted and intrusive pre-recorded calls, those requirements may be characterized as content-neutral.").

217. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (1995); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)(substantial interest protecting against unwelcome noise).

218. Regulating the use of telephone lines, an instrumentality of interstate commerce, would also be within the power of the federal government. *Gonzales v. Raich*, 545 U.S. 1, 16–17 (2005) ("Congress has authority to regulate . . . the instrumentalities of interstate commerce."). States could do so in the exercise of their police power pursuant to the savings clause in 47 U.S.C. § 227(e)(1)(2005).

219. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994)("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression."). Of course the question would be whether telephone calls in general, or robocalls, were the medium of expression. I would suggest that the differences in how the calls are conducted, price, and speed would make robocalls distinctively different even though they both use telephone lines. Both handbills and direct mail use printed materials, but they are distinct methods of communicating. Former New Hampshire Attorney General Tom Rath said the different standards for live calls and robocalls was a "complicated legal question" of free speech and federalism. Moskowitz, *supra* note 7.

ban.²²⁰ In *Martin*²²¹ and *Village of Schaumburg*²²² the Court invalidated broad restrictions on door-to-door solicitation. “The lesson from the door-to-door solicitation cases . . . is that failure to preserve the ability of willing speakers to communicate with willing recipients can be constitutionally fatal to a regulatory scheme aimed at protecting unwilling recipients.”²²³ Many willing recipients would be eliminated by an outright ban and it could not meet the burden required to sustain an outright ban. “A complete ban can be narrowly tailored but only if each activity within the proscription’s scope is an appropriately targeted evil.”²²⁴

2. Regulation Short of an Outright Ban

Less restrictive regulations on robocalls may satisfy the narrowly-tailored requirement. If calls coming too late or too early in the evening are disturbing voters, restrictions on the time of day may be narrowly-tailored to advance that interest.²²⁵ Other narrowly-tailored regulations may include: prohibiting deceptive calls as to who was making the call, preventing callers from blocking a receiver’s Caller ID, mandating callers to disconnect after a recipient has hung up, restricting the volume of the calls or a slight limitation on the frequency of the calls to prevent harassment.²²⁶ While such regulations would invariably burden all calls—the good, the bad, and the ugly—and some ill-intended calls could still get through, only a slight burden would fall on speech unrelated to the goal. While certain regulations short of an outright ban would certainly be unconstitutional, some regulation of robocalls is permissible under the First Amendment.

220. *City of Ladue*, 512 U.S. at 57 n.16 (“Even assuming that flags are nearly as affordable and legible as signs, we do not think the mere possibility that another medium could be used in an unconventional manner to carry the same messages alters the fact that Ladue has banned a distinct and traditionally important medium of expression.”)(overturning statute banning yard signs).

221. *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943).

222. *Village of Schaumburg v. Citizens for a Better Env’t.*, 444 U.S. 620, 637 (1980).

223. Hoefges, *supra* note 9, at 90.

224. *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)).

225. Though the *New York Sun* “searched the First Amendment and couldn’t find the language that says the constitutional guarantee of free speech only applies between 9 a.m. and 8 p.m.” *Indiana and the First*, *supra* note 181.

226. See *Oklahoma ex rel. Edmondson v. Pope*, 505 F. Supp. 2d 1098, 1106 (2007)(finding that current robocall disclosure requirements “curtail no more speech, or compel no more speech, than is necessary to accomplish their purpose.”).

E. State Constitutionalism

Although the First Amendment limits the actions of state governments,²²⁷ the Supreme Court has recognized that state constitutions can grant broader free speech protections than the First Amendment,²²⁸ and indeed, some states do go further.²²⁹ For instance, Georgia requires that the “least restrictive means” be employed to regulate content-neutral speech.²³⁰ The least restrictive means are those that “suppress no more speech than is necessary to achieve the . . . goals.”²³¹ A ban on all robocalls to protect the public against vote suppression or nasty, annoying, anonymous, unaccountable campaigning would also suppress legitimate speech and access to informative robocalls.²³² A complete prohibition on robocalls would thus not be the least restrictive means to achieve the government’s goals. Even if a state law banning or regulating robocalls passed constitutional muster under the First Amendment, it may still be invalidated under that state’s constitution.

227. The First Amendment is applied against states through the due process protections of the Fourteenth Amendment. *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

228. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (California state constitution conferred speech right to engage in publicly expressive activities in a shopping mall); Armando Flores, *Free Speech and State Constitutional Law: Recent Developments*, 26 *RUTGERS L.J.* 1000, 1026 (1995) (“State courts wishing to ensure the maximum protection of free expression for its citizens have undertaken thoughtful analysis of state constitutional free speech provisions and, in some cases, have provided greater protection than that provided by the First Amendment.”).

229. *See, e.g.*, *Gerawan Farming, Inc. v. Lyons*, 12 P.3d 720, 736 (Cal. 2000) (explaining that California’s state constitution is unlimited in scope, unlike the First Amendment); *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 346–47 (Cal. 1979), *aff’d*, 447 U.S. 74 (1980); *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners’ Ass’n*, 192 N.J. 344, 355–56, 929 A.2d 1060 (N.J. 2007) (New Jersey’s “constitutional guarantee of free expression ‘is an affirmative right, broader than practically all others in the nation.’” (quoting *Green Party v. Hartz Mountain Indus., Inc.*, 164 N.J. 127, 145, 752 A.2d 315 (2000))).

230. *Coffey v. Fayette County*, 610 S.E.2d 41, 42 (2005); *Statesboro Publ’g Co. v. City of Sylvania*, 516 S.E.2d 296, 299 (1999). *See also* Judge Pryor’s opinion for a discussion of Georgia law in *Camp Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1280 (2006).

231. *Statesboro Publ’g Co.*, 516 S.E.2d at 299.

232. Actions short of outright bans may also face the same problem such as preventing robocalls to state residents on the Federal Do Not Call List, which people signed up for to avoid telemarketers, not necessarily to avoid “get out the vote” phone calls. However, requiring a disclaimer or identification may be the least restrictive means to prevent a lack of accountability.

IV. PROPOSAL: NATIONAL ROBOCALL REGULATION THAT RESPECTS THE RIGHT TO SPEAK

A. A National Proposal: Speech, Transparency, and Accountability

A single, national standard would prevent state constitutionalism from complicating the analysis and prevent patchwork state regulation. A national solution means more uniformity, knowledge, and compliance from campaign and advocacy groups. This means more speech, fewer accidental violations, and less fear of navigating through the unclear maze of state laws.

The problems associated with patchwork state regulations may have created the ideal environment for a national solution. National campaigns like those of Senators Clinton and McCain and President Obama, as well as powerful interest groups like Right to Life and the National Rifle Association, have run into legal trouble. Facing outright bans in some states, political consultants have the right incentive to push their clients in Congress for a national system. The patchwork state regulation and legal threats against national campaigns have shifted the situation in Washington, D.C. to allow for a viable, meaningful regulation of political calls.

Telephone systems, as an instrument of interstate commerce, are particularly appropriate for federal regulation.²³³ By statute, states are authorized to regulate robocalls above and beyond the federal standards, so a change must be done through Congressional action rather than just rule-making.²³⁴ Though repealing the statute empowering state regulation and delegating rule-making authority to the FTC or the FEC may reach the same result as establishing a national standard through statute, rule-making is unnecessary. Given the present ability to examine the good, the bad, and the ugly use of robocalls, a concrete, single, national standard can be adopted directly by Congress.

We are willing to tolerate bad robocalls, but not the ugly ones that rely on voter confusion to be effective. The law should avoid burdening or disrupting the effectiveness of campaign speech; the law should limit bad calls and keep them from becoming ugly, but should not prohibit any and all calls that could have a mere potential for abuse—because, as discussed earlier, all robocalls have a potential for abuse when in the wrong

233. *Gonzales*, 545 U.S. at 16 (2005).

234. 47 U.S.C. § 227(e)(1) (2005).

hands.²³⁵ A federal robocall standard should focus first on transparency, which means including a disclaimer indicating the sponsoring person or entity. Disclosure allows rival campaigns and the media to spot and report bad calls sooner, hopefully *before* an election. When a disclaimer is offered within the robocall should be at the discretion of the caller. If the caller chooses to reference a candidate other than himself or herself, the caller should be required to state the identity of the caller prior to stating the other candidate's name.²³⁶ As provided in the examples discussed earlier, this requirement is necessary where deceptive campaigning takes advantage of the annoying nature of robocalls and creates the impression that an adversary is placing the call in order to channel voter anger towards that candidate.

Another part of this Note's proposal concerns transparency from campaigning groups. The company placing the robocall should not block the recipient's Caller ID from recognizing the number. While the number of the vendor will not necessarily identify the campaign itself, and a voter who returns a phone call would not likely be connected with a real person, it would nevertheless provide the first link in an attempt to trace the origin of the call if it had otherwise violated the law.

Time of day limitations—limiting calls to the hours of 8 AM to 9 PM—are a good idea and would be uncontroversial.²³⁷ Limiting the number of calls to a householder per organization per day is unnecessary where there is transparency. A campaign will not call voters to the level of *severe* annoyance or harassment when its receivers are fully informed of the call's origin.

The worst ways that robocalls can be abused—intentional harassment and interference with the voting rights of another person—are already illegal. However, United States Attorneys throughout the country should be better informed of the existing provisions. Federal prosecutors are not elected, unlike most state attorneys general, and may not be as likely to bring enforcements for purely political purposes.

235. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone." *Vill. of Schaumburg v. Citizens for a Better Envtl.*, 444 U.S. 620, 637 (1980) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

236. For instance, one phone call from the 2008 election starts "Hello. I'm calling for John McCain and the RNC, because you need to know that Barack Obama has worked closely with domestic terrorist Bill Ayers . . ." Peter Overby, *Campaigns Take Flack for Using Robocalls*, NATIONAL PUBLIC RADIO (Oct. 20, 2008), <http://www.npr.org/templates/story/story.php?storyId=95913085>. Regardless of the merits of this call, the recipient is immediately put on notice as to who is making the call.

237. By using the 9 PM to 8 AM limitation, political automated calls would be subject to the same time-restriction as non-political automated calls. *See* 47 C.F.R. § 64.1200 (2008). Political calls should not face more significant burdens than commercial calls.

Punishments for violations of robocall law should also vary. First-time violations for transparency and time-of-day requirements should be subject to fines. Repeated violations of such offenses should involve criminal sanctions to prevent campaigns from treating fines as a “cost of doing business.” The FEC should be able to bring civil cases if they can show a mental state of at least recklessness²³⁸ and should disseminate information on the regulations on its website. State attorneys general should be allowed to bring suit to enjoin abuses as necessary to protect the peace and tranquility of their state’s citizens.

With clear, national rules, robocall vendors will be able to help their clients follow the law. Rather than coming up with different guesses as to what state robocall laws are, the media would be able to report more accurately on the law and catch violators. Compliance will be easier, and more likely. A federal law allows for a national solution, recognizes the traditional federal regulation of interstate telecommunication systems, and forms a companion to the federal Do Not Call Registry.

Requiring an opt-out option from further calls in prerecorded messages may sound appealing but it is not practical. Because national campaigns are mostly temporary short-term operations, opt-out options do little to curb robocalls for all future campaigns. Putting aside the technical impracticalities behind this option, an opt-out device would not reach all telephone campaigns, such as live calls.²³⁹ Furthermore, with proper disclosures, opt-out provisions would be unnecessary as candidates and campaign groups would be wary of annoying or provoking their voters.

Prior consent requirements to robocalls would also be problematic. It would favor large, entrenched interest groups and incumbents over

238. The FEC and the U.S. Attorneys should be required to show that the individual or entity either knew of the regulations or should have known. In the case of large, sophisticated entities (like the National Republican Campaign Committee) this will be easy to show. Small campaigns for local office that only negligently fail to observe these regulations should not face fines for a first-time violation. However, as more information is disseminated about the rules, fewer organizations will be able to claim that they did not know or have reason to know of the rules.

239. It is difficult enough to opt out of live calls from campaigns, even though a live person may seem easier to work with. *See Van Bergen v. Minnesota*, 59 F.3d 1541, 1552 (8th Cir. 1995) (suggesting that with live calls the person calling you can remove you from the list). However, political volunteers making live calls do not necessarily follow-up to remove the recipient from the list. Many volunteer calls are using paper lists that the candidates may never get back, not complicated computer systems that the volunteer can use to remove a person from future callings. *See Barack Obama’s use of paper lists in Invesco Dems Text, Call en Masse*, USA TODAY, Aug. 28, 2008, http://www.usatoday.com/news/politics/election2008/2008-08-28-invesco-tech_N.htm; *see also* Posting of Justin Wilkins to Chattanooga Times Free Press Political Blog, <http://www.timesfreepress.com/news/2008/aug/24/political-blog-getting-ready-denver-and-change/> (last visited on Aug. 24, 2008).

challengers.²⁴⁰ Established campaigns have lists of supporters and members that they could call; challengers do not. Furthermore, it is difficult to determine what a prior existing relationship is in the political context. Does registering to vote as a Democrat establish a prior relationship with the state Democratic Party? What about the Democratic National Committee or local officials? Does becoming a paid member of the Republican National Committee establish a relationship with the National Republican Congressional Committee, the Young Republicans, or the individual Republican candidates? Even requiring express written consent to receive robocalls implicates the same question, once a voter has consented to robocalls from the party, can the candidates make those same calls?

An outright ban on robocalls, although simpler, would not pass constitutional muster. If the First Amendment will not permit you to criticize an incumbent Congressman, then what good is it? As previously discussed, applying the Do Not Call Registry to robocalls would have the effect of being an outright ban. Congress could, however, create a registry exclusively for robocalls, but this too would be inadvisable. Because most campaigns would not have the technical capacity to ensure their compliance with the Do Not Robocall list,²⁴¹ the burden would likely fall on the calling centers.²⁴² Over time, this registry could end up containing most of America's telephone numbers and similarly turn into an outright ban. It is one thing for a citizen to choose not to accept certain phone calls or refuse to listen to certain messages; it is quite another thing entirely to use government power to enforce that choice.

My proposal is superior to the Feinstein-Specter bill because it strikes the right balance of limiting abusing practices and requiring transparency without burdening more speech than necessary or substantially decreasing the effectiveness of robocalls as a campaign tool.

240. If the noncommercial exemption was removed from the federal regulations on automatic prerecorded calls, then only candidates with the "prior express consent of the called party" could use robocalls. See 47 C.F.R. § 64.1200 (2008). The proposed federal bills also use a prior consent requirement, as do several state laws and proposals. See *supra* Part IV.

241. Certainly the Republican National Committee or Obama for America could scrub their lists to comply with do not call requirements, but most candidates and campaigns are much smaller and less sophisticated. A state representative in a marginal seat or city council candidate in a small town will probably have a very basic campaign. See Grebner, *supra* note 32, at 10–11.

242. This, in turn, would raise the cost of placing calls and, as any marginal cost, would make it less affordable and available to candidates.

B. The Proposal Applied

A re-examination of the cases discussed in Part I demonstrates how the abuses for robocalls would have been avoided with the solutions proposed in this Note.

The voter confusion in the Hodes-Bass New Hampshire Congressional race would have been avoided had callers' been required to identify themselves before mentioning their opponents' names. If the NRCC had started calls by saying "Hi, I'm calling from the Republican Party with information about Paul Hodes," rather than "I'm calling with information about Paul Hodes," voters might have vented their frustration at the correct party. A meaningful disclosure requirement would have stopped the fake New York accent calls that bugged Gary Trauner in Wyoming, and might have avoided the problems that Mitt Romney reported in North Dakota.

Time of day restrictions and transparency requirements would have stopped the deceptive late-night calls in Texas. Requiring that the Caller ID of the robocall vendor not be blocked would have made it easier for voters in North Dakota to figure out who had placed which call, and it also would have assisted the North Dakota Attorney General in investigating into the source of the calls without a significant investment of resources.

Preventing the North Carolina primary vote suppression phone call is a more difficult matter. The call began by the caller identifying himself as Lamont Williams. Apparently, Lamont Williams is the actual name of the voice-over artist on the objectionable call.²⁴³ Even if the name of the nonprofit entity was required to be disclosed somewhere in the message, it would not have altered the effect of the call to the recipients. It was not fraudulent outside of its context (if the voter registration it was referring to was the general election, that deadline was still in the future), and it did not meet the requirements for phone harassment or criminal vote suppression.

Hillary Clinton's supporters and her campaign suffered a strong backlash from those calls.²⁴⁴ She lost both the North Carolina race and the Democratic nomination. While individual voters who may have been disenfranchised by the deceptive phone calls were injured, the calls may have done more damage than good to the Clinton campaign. The ties between the nonprofit and the Clinton campaign would have been more quickly identified had full disclosure and transparency been required. In turn, the heat would have been more quickly turned on the Clinton campaign. My proposal might not stop all potentially abusive robocalls

243. Overby, *supra* note 83 at 25.

244. See, e.g., Overby, *supra* note 81, 25; Murray, *supra* note 76, at 23.

entirely, but by enforcing an uniform disclosure and transparency regime to create accountability, it might deter such abuses.

C. The Proposal's Limits

Campaign committees are easy to form, and when below certain dollar thresholds, organizations may not have to file any reports or documents.²⁴⁵ By spreading money among a series of small committees—none of whom individually meet the reporting threshold—an interest group may still be able to make what works out to be anonymous inexpensive robocalls sponsored by “Friends of Good Government” or some other name that prevents real accountability. Time restrictions and preventing the candidate’s name from being deceptively mentioned first may thwart the worst of these calls. Stopping the robocall vendor from blocking its Caller ID means that, if the calls did cross the line, the vendor could be more easily subpoenaed to identify who sponsored the call. Of course, the inability to coordinate campaigns in certain situations, as discussed in the Hodes-Bass race, makes it difficult to hold a candidate accountable for annoying calls made by outside groups even if the groups are properly identified.

My proposal is limited to the problem of robocalls, but live calls annoy citizens too.²⁴⁶ However, some problems associated with live calls are the product of human error—reading the wrong information off the wrong list, or unintentionally using a volunteer who has a threatening voice. By permitting robocalls to continue as an effective campaign tool, my proposal allows for standardized calls and reduces the potential for human error.

CONCLUSION: DEMOCRACY IS NOISY

A unified regulatory regime can prevent most problematic robocalls by increasing transparency, applying national standards, and bringing prosecutions to make examples of severe offenders. Laws and regulations will not take away the inherently annoying quality of robocalls. For example, grumpy voters may still complain about getting automated calls during dinner or coming home from work to an answering machine full of politicians’ sound bites. Senator Feinstein says that robocalls may

245. See, e.g., 2 U.S.C. § 431(4) (2006) (Federal law does not require entities spending less than \$1000 to register as a committee); Mich. Comp. Laws § 169.203(4) (2009) (Michigan does not require entities spending less than \$500 to register as a committee). That is assuming that the robocalls are used for express advocacy. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 475 (2007) (campaign finance regulations only apply to express advocacy).

246. See the anecdote about responses to live calls in Hearn, *supra* note 8, at 3.

hurt democracy because they “can turn people away from the political process itself”²⁴⁷ The California Senator misses one important argument—*any* campaign message or device that voters dislike has the potential to turn people off.

Voters may also complain about political television advertising (especially negative ads), door-to-door campaign solicitors,²⁴⁸ campaign workers standing near polling places,²⁴⁹ and a never-ending campaign cycle that dominates the news media with quantity, rather than quality, of coverage. Robocalls—welcomed or unwelcomed—are the price we pay to live in a participatory democracy.²⁵⁰ Receiving campaign messages is a part of being a voter, and delivering those messages, or at least attempting to, is a protected First Amendment right. A functional democracy is noisy, rowdy, and sometimes annoying.²⁵¹ Robocalls, however, are “the *sound* of democracy in action.” Silencing or limiting speech invariably protects the incumbent power structure. Rather than being concerned about the disturbing noise of the ringing phone, we should be alarmed at the potential for silence.

247. Ekstrom, *supra* note 125, at 42–43.

248. The New York Sun sarcastically remarked that if one was going to ban robocalls: “One might as well ban political leaflets delivered to doorsteps and mailboxes or door-to-door campaigning by politicians. Or television commercials transmitted to home-based televisions.” *Indiana and the First*, *supra* note 181, at 67–68.

249. *Hammel Wants Campaign Workers Further Back*, MIRS CAPITOL CAPSULE (Sept. 11, 2008), <http://www.mirsnews.com/capsule.php?gid=1077> (Michigan state representative expressing concern that voters may not vote because they are scared to walk by the campaign workers that are currently allowed to stand in the parking lot of polling places).

250. As the Ohio Supreme Court noted, a “citizen must accept the inconvenience of political proselytizing as essential to the preservation of a republican form of government.” *Bowling Green v. Lodico*, 11 Ohio St. 2d 135, 140 (Ohio 1967).

251. *Indiana and the First*, *supra* note 181, at 67–68 (emphasis added).