DO NOT KNOCK? LOVELL TO WATCHTOWER AND BACK AGAIN

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INTRODUCTION

Since Lovell v. City of Griffin was decided in 1938, there has been an ongoing struggle between the courts and those municipalities that have passed laws limiting the ability of

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charitable, political, and religious groups to speak to residents as well as solicit funding for their respective organizations. In 2002, it appeared that the Supreme Court had provided a definitive blow against those municipalities that had been attempting to limit the ability of religious and political groups to go door-to-door and spread their messages. In the case of Watchtower v. Stratton, the Supreme Court stated unequivocally that “[i]t is offensive…to the very notion of a free society that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors.”\(^1\) Even with such strong language, the core of Watchtower has been eroded over the course of the past several years, and new questions have been raised as to its effect.

It is well established in American constitutional jurisprudence that commercial speech is afforded less protection than is non-commercial or pure speech under the First Amendment, but there is no bright line between the two concepts, and determining what level of protection is warranted has proven difficult.

The Supreme Court has not set forth an easily understood or easily applicable definition of commercial speech. This is perhaps because segregating commercial and non-commercial into distinct categories has not proven an to be a simple undertaking. This struggle over definitions has left both practitioners and academics to ask the obvious question: What is commercial speech?\(^2\) In arenas where groups depend on their ability to couple fundraising with political advocacy, the question is of profound importance.

Regardless of the mixed feelings that surround the issue, the commercial speech doctrine is firmly embedded within the

\(^{1}\) *Watchtower v. Stratton*, 536 U.S. 150, 166 (2002).

First Amendment and so it will remain.\(^3\) The purpose of this article is to analyze the distinction between commercial and pure speech as it pertains to political expression that is “inextricably intertwined” with a commercial interest,\(^4\) and to then look at a new trend in lawmaking whereby cities are taking a cue from the federal government to prevent political or religious groups from knocking on their residents’ doors.

This article is divided into six parts. The first section addresses commercial speech generally, and the judicial developments that led to its existence. The second section addresses a recent outgrowth of the commercial speech doctrine, that being the Telemarketing Sales Rule and the “Do Not Call” registry. The third section identifies several of the attempts that have been made to restrict door-to-door advocacy and support for various causes, and how the Supreme Court has dealt with these issues. The fourth section addresses a recent development in Ohio, in which a municipality has attempted to adopt a “Do Not Knock” ordinance, mirrored after the national “Do Not Call” registry. The fifth section highlights a recent case out of the Fourth Circuit, noting the allowable limitations on charitable solicitation. The sixth section concludes the article, and offers some predictions and expectations for the future of this issue.

**COMMERCIAL SPEECH GENERALLY**

The commercial speech doctrine has developed into a bit of a jumble. Not only have courts struggled to come up with a straightforward definition of commercial speech, but the rationale for why commercial speech should be afforded less protection than

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\(^3\) This article will present the necessary and unavoidable history of the commercial speech doctrine, but it is admittedly a duplicative effort. For a thorough recounting of the development of the commercial speech doctrine, see also Alan B. Morrison, *How We Got the Commercial Speech Doctrine: An Originalist’s Recollections*, 54 CASE W. RES. L. REV. 1189 (2004).

pure speech is similarly undeveloped.\(^5\) *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* is the most frequently cited case when courts address commercial speech issues because of the test it provides, but it is not the fountainhead of the doctrine.\(^6\) The separation of commercial speech from other speech with regard to First Amendment protection originally occurred in *Valentine v. Chrestensen*.\(^7\)

The announcement of the commercial speech doctrine by the Supreme Court in *Chrestensen* was almost cavalier. Almost in passing,\(^8\) the Court set forth the general rule that government may not impede a person’s use of public places for the dissemination of ideas, but then opined that “the Constitution imposes no such restraint on government as respects purely commercial advertising.”\(^9\) Little more was said on the matter, however the Court did later submit that *Chrestenson* “obviously does not support any sweeping proposition that advertising is unprotected per se.”\(^10\)

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\(^6\) Central Hudson Gas, supra note 6. See also Thompson v. Western States Medical Center, 122 S.Ct. 1497 (2002).

\(^7\) Valentine v. Chrestensen, 316 U.S. 52 (1942). Where Chrestenson is correctly referred to as the fountainhead, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, infra, has been referred to as the “springboard.” See Alan B. Morrison, How We Got the Commercial Speech Doctrine: An Originalist’s Recollections, 54 CASE W. RES. L. REV. 1189, 1190 (2004).

\(^8\) The court stated in *Chrestenson* that “streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.” Much commentary has been made about the fact that Justice William O. Douglas characterized the creation of the commercial speech doctrine as “casual, almost off-hand.” See Cammarano v. United States, 358 U.S. 498, 513-14 (1959) (Douglas, J., concurring).

\(^9\) Valentine, supra note 7, at 54.

More than 30 years after Chrestenson, the Court extended First Amendment protection to commercial speech through the case of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, and expounded upon the type of regulation that may be placed on speech that does “no more than propose a commercial transaction.” The Court held that time, place, and manner restrictions are justified so long as they serve a significant governmental interest, but the Court also required that there be ample alternative means available for communicating the regulated information. The Court also left states free to proscribe or otherwise regulate commercial speech that is untruthful, deceptive, or misleading.

However, partial-truths were still considered sufficiently within the scope of the commercial speech doctrine so as to warrant some protection, with the Court stating elsewhere that “some accurate information is better than no information at all.” The Court stated that “commonsense differences” between commercial and non-commercial speech suggested that a “different degree of protection is necessary to ensure that the flow of truthful and legitimate commercial information is unimpaired.” Yet there is no such restriction that pure speech be protected only so long as the truth of the speech is not in question. This appears to be an odd conceptual dichotomy, where commercial speech must be true to gain the protection of the First Amendment, but political speech

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11 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Note that there had been several cases between Valentine and Virginia State Board of Pharmacy that addressed the commercial speech doctrine, but there were none that expanded upon the reach or limits of the doctrine. See, e.g. Bigelow v. Virginia, supra note 10; New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Smith v. California, 361 U.S. 147 (1959).


13 Virginia State Bd. of Pharmacy, supra note 11 at 771.

14 Id. at 772.


16 Virginia State Bd. of Pharmacy, supra note 11 at 762.
need not be—one implication being that political truth is, in this sense, subordinate to commercial truth.\textsuperscript{17}

The Court based its newfound acceptance of protections for commercial speech not on the right of the advertiser or speaker to express their ideas, but on the right of the consumer to receive information that relates to their commercial decision-making.\textsuperscript{18} The Court found this rationale to be of particular import, as it is of significant consequence to the poorest members of society, for whom commercial decisions are often their most profound, and for whom it is more difficult to learn “where their scarce dollars are best spent.”\textsuperscript{19}

The Court was far from finished with the issue, and there were a substantial number of gray areas that resulted from the decision in \textit{Virginia State Board of Pharmacy}.\textsuperscript{20} Only four years after that case was decided, the Court announced a test to determine the validity of laws regulating commercial speech in \textit{Central Hudson Gas & Electric Corporation v. Public Service Commission}.\textsuperscript{21} In \textit{Central Hudson}, the Court was confronted with a case in which a governmental commission had ordered all electric utilities in New York to discontinue their use of advertising that encouraged the use of electricity.\textsuperscript{22} The commission reasoned

\textsuperscript{17} It may in fact, only seem odd at first glance. The practical consequences of requiring all political speech to be “true” would be vast, insofar as knowing political “truth” presents far greater epistemological difficulties than does knowing commercial truth. Additionally, the counter-argument can be made that, because so-called pure speech is so valuable, the truth of its content need not be readily ascertainable to still merit constitutional protection, refuting the statement that commercial speech is elevated in this context.

\textsuperscript{18} \textit{Virginia State Bd. of Pharmacy, supra} note 11 at 763.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{See Id.} (holding that a state may not “completely suppress the dissemination of concededly truthful information about entirely lawful activity”). This case left the open the extent to which commercial speech could be restricted, however, as previously stated, held that speech encouraging unlawful activity or misleading speech can be proscribed.

\textsuperscript{21} \textit{Central Hudson Gas, supra note} 6, at 559.

\textsuperscript{22} \textit{Id.}
that advertising advocating electrical use would promote excessive energy consumption, which as a result would lead to higher prices for the consumer.  

The *Central Hudson* test first asked: (1) whether the regulation was targeting truthful, commercial speech for a legal product or service. If it was, the Court then required the government to prove that (2) it had a substantial interest in regulating the speech; (3) the regulation would directly advance that interest; and (4) the restriction on speech must not be more excessive than necessary—it must be narrowly-tailored. This test is a form of intermediate scrutiny, as contrasted with content-based limitations on non-commercial speech, which face strict scrutiny. Any restriction of commercial speech must directly advance the state’s interest.

Regulations may not be sustained if they provide only “ineffective or remote” aid in achieving the government's purpose. Additionally, the Court held that if the governmental interest could be served as well by a more limited restriction on commercial speech, excessive restrictions cannot survive. The Court in *Central Hudson* found that the restriction implemented by the commission banning energy advertising was overbroad, and thus failed part four of the test. It was found to be overbroad because the commission could not show that its interest in conservation could not be protected adequately by a more limited regulation of commercial expression. The Court later

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23 *Id.* at 568.  
24 *Id.* at 564.  
25 Content-neutral limitations may still be placed on fully protected speech so long as they only regulate the time, place, and manner in which the speech is made. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 292 (1984).  
26 *Central Hudson Gas*, supra note 6, at 564.  
27 *Id.*  
28 *Id.*  
29 *Id.* at 571.  
30 *Id.* at 570.
held that the “narrowly-tailored” standard does not require that the
government’s response to protect its substantial interest be the least
restrictive measure available. All that the Central Hudson test
requires is a “proportional response.”

The Central Hudson test might have proven workable had
the Supreme Court produced a specific definition for commercial
speech, however the only definition that has been consistently used
is the one settled on by the Court three years after Central Hudson
in the case Bolger v. Youngs Drug Products Corporation. In
Bolger, the Court did not create a definition so much as settle on
the one currently in use. It referred back to Virginia State Board of
Pharmacy and Pittsburgh Press Co., quoting the statement that the
“core notion of commercial speech” is “speech which does no
more than propose a commercial transaction,” and then proceeded
to use this as the perfunctory definition.

The development of the contours of the commercial speech
doctrine more or less stopped after Bolger, and the court has since
applied the Central Hudson test to arrive at a variety of
incongruous outcomes, due to a general inability to determine
when speech does indeed do more than simply propose a
commercial transaction. One prominent development in the
manner in which commercial speech can be properly regulated
arose in 2003 and has since spawned a legion of scholarly analysis
and debate. This development was the creation of the Federal
Trade Commission’s “Do Not Call” registry and its subsequent
judicial affirmation by the Tenth Circuit in Mainstream Marketing
Services., Inc. v. Federal Trade Commission.

31 Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).
32 Id.
34 Id. at 66.
35 See Alex Kozinski & Stuart Banner, Who’s Afraid of Commercial Speech?, 76
V.A. L. REV. 627, 631 (1990); See also Dissent, Corporate Cartels, and the
36 See Mainstream Mktg. Servs., Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004).
THE “DO NOT CALL” REGISTRY

The history and particulars of the national Do Not Call registry do not need to be addressed here as they have already been thoroughly dealt with elsewhere. However, a brief overview of the registry and its effects will be useful in informing the remainder of this article.

A. THE TELEMARKETING SALES RULE

On January 29, 2003, the Federal Trade Commission (hereinafter “FTC”) promulgated the Telemarketing Sales Rule that established the nationwide Do Not Call registry and prohibited telemarketers from calling phone numbers that were listed by the consumer with the registry. Under the law, telemarketers are prohibited from calling numbers listed on the registry and are required to remove any numbers recently placed on the list by reviewing a new copy of the registry at least every three months. Thus, a national opt-in program was established for all persons desiring not to receive phone calls from telemarketers. The law also requires telemarketers to pay annual fees for access to the registry based on the number of area codes the company accesses.

The Telemarketing Sales Rule does not affect media for promoting commercial transactions outside of telemarketing, such as newspaper, radio, television, and mailed advertisements. It is also important to note that the national Do Not Call registry does not prohibit commercial speech; it simply provides a way for consumers to choose from a number of options.

38 Telemarketing Sales Rule, 16 C.F.R. § 310.
available to consumers include: (1) to place their numbers on the Do Not Call registry; (2) to utilize company-specific no-call provisions, (3) to place their numbers on the Do Not Call registry and give individual companies permission to call, or (4) to receive commercial telemarketing solicitation by doing nothing.\(^{41}\)

However, the consumer's option to block telemarketing calls only applies to commercial solicitations; there is no option to block charitable solicitors or tax-exempt non-profit groups.\(^{42}\) The FTC proffered little evidence to justify the distinction, other than to reference, on several occasions, that charitable phone solicitation is generally less of a nuisance than are commercial calls.\(^{43}\)

Almost immediately after the Telemarketing Sales Rule was enacted, a number of telemarketing companies brought suit challenging the law on First Amendment grounds. Two federal district courts ruled against the FTC (on separate grounds) after which the subsequent appeals were consolidated.\(^{44}\)

**B. MAINSTREAM MARKETING SERVICES, INC. v. FEDERAL TRADE COMMISSION**

The Tenth Circuit held on appeal that the FTC possessed the statutory authority to promulgate the Telemarketing Sales Rule,\(^{45}\) and the court also ruled that the law did not violate the First Amendment.\(^{46}\)

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\(^{42}\) See Telemarketing Sales Rule, 16 C.F.R. § 310.6(a) (2004).

\(^{43}\) Telemarketing Sales Rule 68 Fed. Reg. at 4632, 4637.


\(^{45}\) *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1250 (10th Cir. 2004).

\(^{46}\) See *Id.* at 1246.
In opposition to the Telemarketing Sales Rule, the telemarketing companies involved in the appeal relied heavily on the Supreme Court decision in *City of Cincinnati v. Discovery Network*, in which the Supreme Court applied *Central Hudson* to a previously un-enforced commercial handbill restriction that the city revived for the purpose of banning commercial newsracks throughout the city, in hopes of addressing the problem of “visual clutter.” In *Discovery Network*, the law in question was struck down largely because it was underinclusive in that it only applied to 62 of the city’s 2,000 newsracks, and according to the Court, bore “no relationship whatsoever to the particular interests that the city has asserted.”

The Tenth Circuit found that the national Do Not Call registry would be valid if it was designed to provide effective support for the government’s purposes and if the government did not stifle an excessive amount of speech when “substantially narrower restrictions would have worked just as well.” This is a restatement of the *Central Hudson* test. The court went on to say that those criteria were “plainly established” in this case. It stated that the national Do Not Call registry was designed to “reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation,” and held that the registry directly advances those goals. The Tenth Circuit concluded that the law was not underinclusive, and *Discovery Network* did not apply. The court held the Telemarketing Sales Rule to be narrowly tailored because of its

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47 See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). This case was also seen as a ratcheting-up of the level of scrutiny that would be given to commercial speech since *Central Hudson* came down. See also Emily Erickson, *Disfavored Advertising: Telemarketing, Junk Faxes & the Commercial Speech Doctrine*, 11 COMM. L. & POL’Y 589, 598 (2006).


49 *Mainstream Mktg. Servs., Inc.*, supra note 45 at 1238.

50 *Mainstream Mktg. Servs., Inc.*, supra note 45 at 1240.

51 Id.
opt-in nature, which ensured that it would not prevent speech from reaching a willing listener.\footnote{1238.}

It is noteworthy that the Tenth Circuit emphasized that the state has a particular interest in protecting the unique nature of the home and maintaining its “well-being, tranquility, and privacy.”\footnote{1237 (quoting \textit{Frisby v. Schultz}, 487 U.S. 474, 484 (1988)).} Quoting \textit{Frisby v. Schultz}, the Tenth Circuit stated that the government may protect an individual’s right to prevent unwanted speech from entering their home.\footnote{Id.} This right has similarly been recognized on repeated occasions by the Supreme Court which has held that persons have the right to not have unsolicited speech forced upon them. This right is not absolute, but the protection against unwanted speech is at its strongest when a person is in their home.\footnote{See, e.g., \textit{Frisby v. Schultz}, 487 U.S. 474 (1988).}

After the Tenth Circuit ruled in favor of the government, the telemarketers appealed to the Supreme Court, which denied \textit{certiorari}.\footnote{Mainstream Mktg. Servs., Inc. v. \textit{FTC}, 543 U.S. 812 (2004) (denying cert.).} Thus, the ruling of the Tenth Circuit became the last word on the constitutionality of the Do Not Call registry, but \textit{Mainstream Marketing Services v. FTC} applied only to telemarketers.\footnote{See Emily Erickson, \textit{Disfavored Advertising: Telemarketing, Junk Faxes & the Commercial Speech Doctrine}, 11 COMM. L. & POL’Y 589, 590 (2006).} There were still groups whose activities are not commercial in nature, which were still allowed to contact people by phone and also go door-to-door, canvassing neighborhoods and soliciting donations. These groups that were not affected by the Telemarketing Sales Rule, fall largely into three categories—charitable, religious and political.

The following section addresses how local governments have tried to prevent these non-commercial groups from engaging in door-to-door canvassing and solicitation.
DO NOT KNOCK? RESTRICTIONS ON DOOR-TO-DOOR ADVOCACY

Just as people are given the right to free speech and free expression in public places, the right of free speech extends to non-commercial solicitors who call upon homeowners.

A. DOOR-TO-DOOR ADVOCACY AND THE COURTS

This freedom was first expressly upheld in 1938 in the case of Lovell v. City of Griffin, Georgia. In Lovell, Alma Lovell was challenging a city ordinance that required anyone within the city desiring to distribute literature of any kind to get a permit from the city manager. Ms. Lovell was attempting to distribute religious pamphlets without a permit, and as a result was convicted under the ordinance. The Supreme Court held this ordinance to be invalid on its face due to the belief that it struck “at the very foundation of the freedom of the press by subjecting it to license and censorship.” In something of a foreshadowing of Central Hudson’s narrow-tailoring requirement, the Court in Lovell commented that the ordinance in question was not limited in its application and not restricted to the purposes of maintaining public order or preventing disorderly conduct, or limited strictly to the promotion of an important governmental interest.

The case of Schneider v. State of New Jersey, Town of Irvington was decided the following year and had similar facts to Lovell. In Schneider, the Supreme Court consolidated appeals from challenges to municipal ordinances in Los Angeles, Milwaukee, Worcester, Massachusetts, and Irvington, New

58 Lovell v. City of Griffin, 303 U.S. 444 (1938).
59 Id. at 447.
60 Id.
61 Id. at 451.
62 Id.
63 Schneider v. State, 308 U.S. 147 (1939).
The ordinances being challenged required persons who intended to “canvass the town, solicit funds, distribute pamphlets or call from house to house” to receive a permit from the chief of police. The Court found that the Los Angeles, Milwaukee, and Worcester ordinances being reviewed did not purport to license distribution of informational materials, but “all of them absolutely prohibited it in the streets and, one of them, in other public places as well.”

The Court conceded that people might fraudulently misrepresent themselves to be seeking solicitation for charitable purposes in the attempt to further some criminal endeavor. However, it held that a municipality cannot, in the hopes of preventing such activity, require all persons who wish to disseminate ideas to first go to the police and obtain their approval. The Supreme Court in *Schneider* stated succinctly that although a municipality may enact regulations in the interest of the “public safety, health, welfare or convenience,” these regulations may not interfere with the individual liberties secured by the Constitution to those who wish to “speak, write, print or circulate information or opinion.” The Court held that a person wishing to participate in these activities cannot be punished for acting without a permit.

The Supreme Court continued along similar lines as *Schneider* and *Lovell* in the case of *Martin v. City of Struthers*.

In *Martin*, a woman was convicted of violating an ordinance in the City of Struthers, Ohio, which prohibited any person from distributing “handbills, circulars or other advertisements” by going

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64 *Id.* at 148-50.
65 *Id.* at 152.
66 *Id.* at 151.
67 *Id.* at 152.
68 *Id.*
69 *Id.* at 150.
70 *Id.* at 152.
The woman, Thelma Martin, was delivering leaflets advertising and inviting persons to a meeting of the local congregation of Jehovah’s Witnesses. Martin appealed her conviction, arguing that the ordinance in question was beyond the power of the state of Ohio to enforce because it violated the constitutionally guaranteed rights of freedom of the press and the freedom of religion.

The Supreme Court reversed her conviction and held the ordinance unconstitutional. The Court stated that the freedom to distribute information to every citizen wherever he desires to receive it is “so vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.” The Court also noted the fact that this method of disseminating information has a long history and has proven effective over many years as a means of spreading one’s personal opinions.

While door-to-door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests to its major importance.

The Supreme Court opined that the right of the individual resident to simply refuse to speak with persons such as Thelma Martin was sufficient protection for the privacy of the citizen. All of the preceding cases contain strong language purportedly

\[\text{\textsuperscript{72} Id. at 142.}\]
\[\text{\textsuperscript{73} Id.}\]
\[\text{\textsuperscript{74} Id.}\]
\[\text{\textsuperscript{75} Id. at 147.}\]
\[\text{\textsuperscript{76} Id. at 145.}\]
\[\text{\textsuperscript{77} Id.}\]
sanctifying the right of a person to go door-to-door to spread a particular political or religious message. Still, these cases represented more the opening salvo rather than the final accord of what would turn into years of litigation over door-to-door activism. *Martin* settled the issue as to whether a person could go to door-to-door only seeking to disseminate information, but it did not answer the question of whether a member of a group can rightfully claim First Amendment protection while traveling door-to-door and also attempting to recruit members and solicit donations.

**B. The Charitable Solicitation Trilogy**

The Fourth Circuit in *National Federation for the Blind v. Federal Trade Commission* referred to the following three cases as the Supreme Court’s “trilogy” illustrating that charitable solicitation has not been dealt with as purely commercial speech. In fact, the Supreme Court has repeatedly held that charitable solicitation is empowered with full constitutional protection under the First Amendment.

In 1974, the Village of Schaumburg, Illinois, adopted an ordinance that regulated solicitation by charitable organizations. The ordinance required charitable solicitors to first acquire a permit, and to accede to the ordinance’s requirements which included a curfew on an organization’s canvassing as well a requirement that any charitable group apply at least 75 percent of its contributions directly towards its charitable objectives, rather than toward the administrative costs of running the organization.

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81 Id. at 624.
An environmental advocacy group, Citizens for a Better Environment ("CBE"), requested permission to solicit donations within the Village of Schaumburg through its canvassers, but was denied a permit because the group could not demonstrate that 75 percent of its receipts would be used for charitable purposes.\(^{82}\) CBE then sued the Village of Schaumburg, alleging that the 75 percent requirement violated the First and Fourteenth Amendments.\(^{83}\) CBE alleged in one of its affidavits that its door-to-door canvass was its “single most important source of funds.”\(^{84}\) The District Court awarded summary judgment to CBE, concluding that the 75 percent requirement was a form of censorship on its face, and thus prohibited by the First and Fourteenth Amendments.\(^{85}\) The Court of Appeals for the Seventh Circuit affirmed.\(^{86}\)

In its appeal to the Supreme Court, the Village of Schaumburg urged the court to find the ordinance valid because it only dealt with solicitation and it left any charitable organization free to go door-to-door disseminating information and speaking with residents so long as it did not solicit money.\(^{87}\)

In *Village of Schaumburg v. Citizens for a Better Environment*, the Supreme Court first referred back to its decision in *Schneider v. State*, declaring that a “city could not...subject door-to-door advocacy and the communication of views to a discretionary permit requirement.”\(^{88}\) The Court also cited *Virginia*
Board of Pharmacy as acknowledging the understanding that the solicitation of funds involves interests protected by the First Amendment's guarantee of freedom of speech.\textsuperscript{89} The Court then went on to cite several other cases, all supporting the central theme that the solicitation of funds and the propagation of particular views often involve the same fundamental interests.\textsuperscript{90}

The Court held that prior authority clearly established the rule that the charitable solicitation of funds involves interests that are within the scope of First Amendment protection.\textsuperscript{91} The Court then turned to the actual question of the case; that being whether the Village of Schaumburg had regulated its solicitation in such a way so as to not impinge upon free speech.\textsuperscript{92}

The Court acknowledged that there could be instances where the 75 percent rule regarding the use of contributions could be enforceable, but went on to state that such a rule could not constitutionally be applied against “organizations whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern.”\textsuperscript{93} The Court intimated that these types of organizations cannot be held to such a standard because their purpose inherently requires more organization skill among those in its employ, and thus greater expense, than do groups that operate largely as “conduits for contribution.”\textsuperscript{94}

\textsuperscript{89} Id. at 629 (citing \textit{Virginia State Bd. of Pharmacy}, supra note 11, at 761).
\textsuperscript{90} The cases the Court cites to support this theory include: \textit{Jamison v. Texas}, 318 U.S. 413 (1943); \textit{Murdock v. Pennsylvania}, 319 U.S. 105 (1943); and \textit{Thomas v. Collins}, 323 U.S. 516 (1945), among others, some of which have been referred to supra.
\textsuperscript{91} Village of Schaumburg, supra note 80 at 632.
\textsuperscript{92} Id. at 633.
\textsuperscript{93} Id. at 635.
\textsuperscript{94} Id. (citing \textit{Citizens for a Better Environment v. Village of Schaumburg}, 590 F.2d 220 (7th Cir. 1978)).
In its conclusion, the Supreme Court held that the 75-percent requirement in the village ordinance was not sufficiently related to the governmental interests asserted to justify its intrusion into the First Amendment.\textsuperscript{95} The court did not however hold that charitable solicitation is beyond regulation, but rather that such regulation must be reasonable.\textsuperscript{96} To assess the reasonableness of future regulation the Court once again crafted another test, this time creating two factors to be considered in determining a regulation’s constitutionality. First, the Court asks whether the regulation “serves a sufficiently strong, subordinating interest that the government is entitled to protect,” and secondly, whether the regulation is “narrowly drawn…to serve those interests without unnecessarily interfering with First Amendment freedoms.”\textsuperscript{97}

Four years later, the Supreme Court was again confronted with a statute placing limits on expenses of charitable fundraisers. In \textit{Secretary of State of Maryland v. Joseph H. Munson Company}, the Joseph H. Munson Company, a professional fundraising business, filed suit against the Secretary of State of Maryland seeking injunctive relief to prohibit the state from enforcing Section 103D \textit{et seq.}, Art. 41 of the Maryland Code (1982), which prohibited a group seeking contributions from paying or agreeing to pay as expenses more than 25% of the amount raised to any professional fundraiser.\textsuperscript{98} Upon reaching the merits, the Supreme Court immediately referred to \textit{Schaumburg}, and stated the central question of \textit{Munson} as whether the ordinance at issue in \textit{Schaumburg} (the 75 percent requirement) and the statute at issue in \textit{Munson} were sufficiently distinct to warrant finding the Maryland statute constitutional.\textsuperscript{99}

\textsuperscript{95} \textit{Id.} at 639.
\textsuperscript{96} \textit{Id.} at 632.
\textsuperscript{97} \textit{Id.} at 637.
\textsuperscript{99} \textit{Id.} at 959.
The Court held that the two laws were not sufficiently distinct. The statute in Munson did allow exemptions in certain situations, giving the secretary of state the discretion to waive the requirements of the bill with regard to advocacy groups, however the Court did not find the discretionary power vested in the secretary of state sufficient to safeguard fundamental First Amendment rights. Specifically, and again in reference to Schaumburg, the court found that the Maryland statute was overbroad because it bore no “connection between the percentage limitation and the protection of public safety or residential privacy.”

Another four years after Munson, the Supreme Court decided Riley v. National Federation of the Blind of North Carolina, a case that dealt with the broadly-conceived North Carolina Charitable Solicitations Act (the “Act”), which regulated charitable solicitation by professionals fundraisers. The Act created a three-tiered schedule for determining whether charitable fundraising expenses were “unreasonable,” addressing percentage expenses ranging from 20 percent to 35 percent or more, and set up specific analyses for each range within the law. The law also required professional fundraisers to get a license and to disclose their name, their employer’s name, and the average percentage of solicited funds that the charitable organization actually received during the previous year.

North Carolina’s primary argument in support of the Act was that, because of the three-tiered structure, that it was narrowly-tailored to accomplish its intended objectives without placing any undue restrictions on the freedom of speech. The Court held that the three-tiered structure was irrelevant to the consideration of whether the law works to achieve the proffered goals of these

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100 Id. at 962.
102 Id. at 785.
103 Id. at 786.
kinds of regulation, namely the prevention of fraud. The Court held that there was no “nexus” between the percentage of funds paid out in expenses and the likelihood of fraud.\footnote{Id. at 793.} With regard to the licensing requirement, the court stated that the professional fundraisers were not less entitled to First Amendment protection, but then went on to hold the licensing provision unconstitutional because there was no timeliness aspect of the licensing process that provided for a time period when a license had to be granted.\footnote{Id. at 802.}

These three cases illustrate the point that the Supreme Court views charitable solicitation as being almost on par with pure speech. While the court stated that it would permit reasonable regulation of attempts at charitable solicitation, it was unable to find such reasonableness in the three preceding cases.\footnote{See Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).}

Most recently, the Supreme Court once again struck down a municipal ordinance subjecting a religious group to licensing requirements in \textit{Watchtower v. Stratton}.\footnote{Watchtower v. Stratton, supra note 1.} The petitioners in this case were a society and congregation of Jehovah’s Witnesses that publish and distribute religious materials. They alleged that the ordinance facially violated their First Amendment rights to the free exercise of religion, free speech, and freedom of the press.\footnote{Id. at 154.} The Village of Stratton asserted that the ordinance served the goals of protecting its residents from fraud and crime, and also helped to ensure their privacy.\footnote{Id. at 164-65.} While acknowledging that these objectives were certainly valid governmental interests, it held that the ordinance requiring groups like the Watchtower Society to obtain permits impeded an individual’s right to support a cause and express his or her opinion anonymously.\footnote{Id. at 166 (citing McIntyre v. Ohio Elections Comm’n, 514 U.S., 341-342). \textit{Watchtower} was reaffirmed in 2006 by the Third Circuit in Service Employees
The Court specifically addressed three examples that illustrated the deleterious effects of a permit requirement. First, the Court acknowledged that there are a number of people who support causes anonymously as a means of avoiding “economic or official retaliation,” “social ostracism,” or simply to preserve their privacy. The permit requirement necessitates that a person forego that constitutionally protected anonymity in order to support their chosen cause. Because the Village ordinance in question was a fairly wide-ranging, the protection offered to residents was insufficient to justify the loss of constitutionally protected anonymous speech.

Secondly, the Court found that the simple process of applying for a permit may work disproportionately against members of certain religious groups, who may feel it to be against their beliefs to seek the state’s permission to proselytize, or against patriotic Americans who would prefer silence over speech licensed by a “petty official.”

Finally, the court noted that there is an appreciable amount of spontaneous speech that is likely to be barred by the ordinance. “A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not

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*Intern. Union, Local 3 v. Municipality of Mt. Lebanon*, 446 F.3d 419 (3rd Cir. 2006).

111 *Id.* at 166.


113 *See Watchtower v. Stratton, supra* note 1 at 167.

114 *Id.* Regarding the objection that patriotic Americans might have to a permit requirement, Justice Scalia in his dissent stated that “If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed.” *Watchtower v. Stratton*, 536 U.S. 150, 171 (2002) (Scalia, J., dissenting).

115 *Id.*
begin to pass out handbills until after he or she obtained the required permit.”\textsuperscript{116}

Perhaps most directly relevant to the primary justification offered by the Village in this case, that of preventing fraud, was the Supreme Court’s finding that a criminal, intent on defrauding a resident of the Village, would be unlikely to be deterred from knocking on someone’s door because they lack a permit to do so.\textsuperscript{117} Regardless, the Supreme Court ruled in favor of Watchtower, and struck down the ordinance as being facially invalid.\textsuperscript{118}

After these decisions sanctifying the right of an organization to canvass an area and couple the delivery of a message with the also important objective of fundraising, it would make sense for city councils across the country to stop adopting ordinances that aim to prevent this activity. This has not been the case, and local governments continue to adopt similar ordinances. The change has come in the manner in which they have done so. One particular municipality in Ohio has taken a cue from the Telemarketing Sales Rule, and chosen to adopt ordinances that grant area residents the ability to opt-in in order to gain the protection of the law, and thus prohibit organizations of all kinds from knocking on their doors or soliciting donations.

\section*{II. A Contemporary Uprising: Lessons and Examples from Ohio}

It is unclear why Ohio has been the nexus of the dispute over door-to-door canvassing and solicitation, but much of this legal battle finds its origin there. \textit{Martin v. City of Struthers} comes from the City of Struthers, Ohio, just outside of Youngstown. \textit{City of Lakewood v. Plain Dealer Publishing Company} involved licensing in contravention of the First Amendment in a city outside

\textsuperscript{116} Id. at 168.
\textsuperscript{117} Id. at 169.
\textsuperscript{118} Id. at 169.
of Cleveland.\textsuperscript{119} The latest Supreme Court case on the matter, \textit{Watchtower v. Stratton}, focused on the Village of Stratton, Ohio, just 50 miles south of Struthers. Now, a new version of this same dispute has been taken on by an Ohio political advocacy group that has been grappling with newly minted “No Solicitation laws” in the courts. The group is Ohio Citizen Action, a consumer and environmental advocacy organization active throughout Ohio. Ohio Citizen Action’s (hereinafter “OCA”) stated goal has been to “use the power of community organizing to cause major industries to prevent pollution,” through “door-to-door democracy.”\textsuperscript{120} It is similar in its goals and organization as CBE was in \textit{Schaumburg}.

In lawsuits prior to the enactment of the Telemarketing Sales Rule, OCA was successful in defeating three laws prohibiting solicitation that was coupled with political speech, similar to those laws previously mentioned. In the cases of \textit{Ohio Citizen Action v. City of Avon Lake},\textsuperscript{121} \textit{Ohio Citizen Action v. City of Seven Hills},\textsuperscript{122} and \textit{Ohio Citizen Action v. City of Mentor-on-the-Lake},\textsuperscript{123} the Northern District of Ohio considered and struck down these cities’ “No Solicitation” laws, all three of which had the general purpose of subjecting OCA and other groups to a licensing process and limiting their ability to canvass the cities. In \textit{Mentor-on-the-Lake}, the court found the city’s ordinance to be “facially invalid under the First Amendment free speech clause to the extent that the ordinance prohibited persons from going door to door to communicate their social, political, or religious ideas and positions without first having obtained a license.”\textsuperscript{124}

\textsuperscript{120} \textit{Ohio Citizen Action, About Us, available at http://www.ohiocitizen.org/about/about.htm} (last visited June 5, 2009).
\textsuperscript{124} \textit{Id.} at 679.
The city of Parma, Ohio, has taken a slightly different route. Since the enactment of the Telemarketing Sales Rule in 2003, Parma has adopted its own “No Solicitation” law that includes an opt-in alternative to the blanket laws whereby a resident may prohibit all persons from canvassing or soliciting their home without a license. The opt-in version of the law works similarly to the national Do Not Call registry, whereby local residents can place their address on the list to warn solicitors that they do not want to be visited. Parma enacted its law in 2006, which does not create any exemptions for charitable or other non-commercial groups. The text of that law reads, in pertinent part:

Solicitor means any person who obtains or seeks to obtain funds for any cause whatsoever by traveling door to door either by foot, automobile, truck or any other type of conveyance upon the private residences, including any house, apartment or other dwelling, within the City.¹²⁵

The question now returns to constitutionality. Are these opt-in Do Not Knock laws sufficiently narrow to pass Central Hudson and thus be found to not contravene the First Amendment?

**III. ANALYSIS OF OPT-IN, DO NOT KNOCK ORDINANCES**

Parma has not yet met a judicial challenge on its Do Not Knock ordinance, so there is no judicial record to cite, or opinion to guide this analysis. Recall that the test for constitutionality under Central Hudson first required a determination as to whether the speech in question was commercial,¹²⁶ and that commercial speech is defined by the Supreme Court as “speech which does no more than propose a commercial transaction.”¹²⁷ This definition

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¹²⁶ Central Hudson Gas, supra note 6, at 564.
does not apply where the economic interest involved is incidental to the primary goal of the group. Where the goals of those groups challenging solicitation restrictions are primarily charitable, religious, or political, it becomes difficult to argue that they do no more through canvassing than propose a commercial transaction.

The Supreme Court in *Riley v. National Federation of Blind of North Carolina, Inc.* stated that commercial speech which is “inextricably intertwined” with otherwise fully protected speech, requires that the level of First Amendment scrutiny depend upon “the nature of the speech taken as a whole.”¹²⁸ The Court in *Central Hudson* noted however that advertising which connects a product to a “current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech.”¹²⁹ It is charge of the courts to divine the true motivations of any group engaged in collecting funds.

The speech at issue, namely political and religious expression, is the primary purpose for the door-to-door canvassing that these groups engage in, and fundraising is incidental to that purpose. Courts have acknowledged this fact. In *Ohio Citizen Action v. Mentor-on-the-Lake*, the Northern District of Ohio held that “when a charitable or other non-profit organization incorporates a request for donations or other fund-raising activities with their otherwise fully protected speech, the courts may not parcel out the financial or “commercial” aspect of the speech in order to justify the application of a lower level of scrutiny.”¹³⁰ In consideration of the nature of the political speech of Ohio Citizen Action and the religious speech of groups such as the Watchtower Bible and Tract Society, the scale tips decidedly towards finding that this speech does not fall under the “commercial speech” definition of *Bolger*. But this does not end the analysis.

¹²⁹ *Central Hudson Gas*, supra note 6, at 563.
For restrictions to be valid, they cannot be based on the content of the speech involved.\footnote{Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981).} This presents a problem for opt-in Do Not Knock laws, like Parma’s, where a person can decide which groups to allow to canvass and solicit their homes, and which groups to prohibit. This kind of restriction is necessarily based on the content of the message the restricted groups are attempting to communicate. Any law which permits communication in a certain manner for some but not others creates a danger of content discrimination, and thus subjects the regulation to strict scrutiny.\footnote{City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 763 (1988).}

Even if speech is not commercial under the Bolger definition, it may still be reasonably restricted in the time, place, and manner in which it is made.\footnote{Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).} The government must also show that reasonable alternative channels of communication exist.\footnote{Ohio Citizen Action v. City of Mentor-On-The-Lake, supra note 130 at 683.}

A. Time

These three restrictions have their own share of objections. “Place” restrictions have recently been the subject of both Supreme Court opinion, in International Society for Krishna Consciousness v. Lee, infra, and substantial scholarship, see Thomas P. Crocker, Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence, 75 FORDHAM L. REV. 2587 (2007). Alongside the time, place, and manner test exists another test, known as the O’Brien test. See United States v. O’Brien, 391 U.S. 367, 377 (1968). The O’Brien test pertains to speech regulations where both expressive and non-expressive elements are present. It asks: 1) if the regulation is sufficiently within the constitutional power of the government; 2) if the regulation furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. The O’Brien test and the time, place, and manner test have been applied to the same regulations.
The court in *Ohio Citizen Action v. Mentor-on-the-Lake* undertook an excellent analysis of the time, place, and manner regulation requirements. All time restrictions relating to door-to-door advocacy and solicitation impose some manner of curfew on group activities. The statute at issue in *Mentor-on-the-Lake* involved a five o’clock curfew premised on the promotion of public safety, which the court held to be both overbroad and underinclusive. It was held overbroad because safety concerns at 5:00 p.m. on a summer day are no greater than they are at 2:00 p.m., or at 8:00 p.m. while the sun is still up. Additionally, the ordinance was underinclusive because it exempted a long list of entities. The court agreed that promoting the public safety was indeed a compelling governmental interest, but without some firmer empirical connection to time restrictions in *Mentor-on-the-Lake*, the curfew was unconstitutional.

This isn’t to say that curfews have been deemed *per se* unreasonable either. While no curfew on the canvassing activities of non-profit groups have been upheld, juvenile curfews meant to prevent juvenile crime have been held to be a valid regulation under the time, place, and manner analysis. In *Schleifer v. City of Charlottesville*, the Fourth Circuit upheld a midnight curfew for minors, holding that the state’s authority over children was broader than over like actions of adults, and as a result, intermediate scrutiny was justified, and the ordinance was upheld.

However *Schleifer* isn’t very illustrative as to how a court might rule on the issue of a later curfew restricting the canvassing activities of a non-profit group. *Schleifer* deals with far different

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135 See Id.
136 Id. at 684.
137 Id. Persons or entities exempted included newspaper delivery-persons, dairy-product salesmen, baked goods salesmen, persons offering laundry services, diaper services, and dry cleaning services.
138 Id.
139 See *Schleifer v. City of Charlottesville*, 159 F.3d 843, 855 (4th Cir. 1998).
140 Id. at 847.
issues, and there is no implication of the First Amendment. The crux of time restrictions is reasonableness—is it reasonable to limit charitable solicitation to a curfew of, for example, nine o’clock at night? This of course depends on the governmental interest being advanced. If the interest is in preventing fraud or crime, or protecting the sanctity of the home, the argument goes that since more crime occurs at night, and people are less receptive to persons knocking on their doors after the sun has set, that such a time restriction would be reasonable.

B. PLACE

The Supreme Court dealt with place limitations on solicitation of funds and the dissemination of a religious message in 1992 with the companion cases of International Society for Krishna Consciousness v. Lee, and Lee v. International Society for Krishna Consciousness. These cases dealt with the Krishnas’ use of airport terminals for the solicitation of funds and the spreading of their religious message in a ritual known as sankirtan. The Court held that it was not unconstitutional to prohibit solicitation by the Krishnas in an airport terminal, where the government was acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to license or regulate. However, the court upheld the Krishnas’ right to leaflet and spread their message in the airport in a per curiam decision.

These cases are particularly noteworthy because the court redefines what a “public forum” is under the First Amendment, and divided the “public forum” issue into three relatively indistinct categories. In International Society for Krishna Consciousness,

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the Court distinguished traditional public fora for free expression, such as parks and streets, from so-called “designated public fora” that the state has opened for expressive activity; and then drew a third, broad category, of all other public property. The Court held that it will apply a strict scrutiny analysis for the first and second categories so long as the restriction is content-based. However, if the forum belongs in the very broad and indistinct third category, the Court will only consider whether the regulation in question is reasonable, and that it is not motivated by disagreement with the speaker’s viewpoint.

Both of these cases were limited in their scope, applying only to solicitation within an airport terminal, but the court implies that it may be acceptable for the government to regulate solicitation coupled with the dissemination of a particular message if the solicitation is found to contribute to “pedestrian congestion.” Because the speech primarily addressed in this article takes place in the street, a “traditional public fora,” these holdings are unlikely to ever impede the ability of a group to canvass door to door, but they are an illustration of the courts subtle willingness tolerate limits on speech, especially speech coupled with solicitation.

C. MANNER

The manner in which restriction are placed on canvassing brings the analysis full-circle, with concerns about permits and licensing with regard to charitable solicitation. Any licensing program that regulates the freedom of expression must have

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145 Id. For an in-depth analysis of the First Amendment “place restriction” jurisprudence, see Thomas P. Crocker, Displacing Dissent: The Role of “Place” in First Amendment Jurisprudence, 75 FORDHAM L. REV. 2587 (2007). Crocker poses the uncomfortable question of whether it is conceivable that “public forum” could be defined down into a non-existent place, resulting in the de facto abrogation of the First Amendment?
146 Id. at 684.
constitutionally valid requirements for receiving a permit, insofar as the licensing requirements do not create a content-based regulation. Prior restraints on speech are presumed to be unconstitutional. Additionally, the procedure for being licensed cannot be subject to the “unbridled discretion” of the government officer granting the license or permit. The basic test for determining whether the manner of a regulation is valid is simply whether the state can demonstrate that the restriction furthers an important or substantial government interest.

D. NATIONAL FEDERATION OF THE BLIND AND THE CURRENT CLIMATE

Perhaps the most telling case illustrating where the line is drawn between First Amendment freedoms and the government’s ability to regulate charitable solicitation was National Federation of the Blind v. Federal Trade Commission out of the Fourth Circuit in 2005. In this case, the National Federation of the Blind and the Special Olympics of Maryland challenged the FTC’s restrictions that regulated charitable telemarketers.

In 1994, Congress passed the Telemarketing Consumer Fraud and Abuse Prevention Act (hereinafter “Telemarketing Act”). The law gave the FTC the authority and direction to

147 Curtis Pub. Co. v. Butts, 388 U.S. 130, 149 (1967). “Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated. This may take the form of orders prohibiting the publication or broadcast of specific information.” In re G. & A. Books, Inc., 770 F.2d 288, 296 (2d Cir. 1985). Regulations on time, place, and manner are not considered prior restraints.


“prescribe rules prohibiting deceptive...and other abusive telemarketing acts or practices.”¹⁵² However, phone calls made in an attempt to solicit charitable donations were outside the scope of the Telemarketing Sales Act, as enacted in 1994.¹⁵³ In 1995, the FTC implemented the original Telemarketing Sales Rule, prior to the Do-Not-Call registry, and also issued an advisory statement clarifying that the Telemarketing Sales Rule did not regulate professional telemarketers calling on behalf of non-profit organizations.¹⁵⁴ However, the USA PATRIOT Act, enacted in 2001, amended the Telemarketing Act and included “fraudulent charitable solicitations” in its outline of the types of telemarketing practices that the FTC should regulate.¹⁵⁵ Congress also changed the Act’s definition of “telemarketing” to include charitable solicitations.¹⁵⁶

The FTC asserted that its purpose in promulgating these regulations were to prevent fraud and to protect the privacy of the home pursuant to the 1994 Telemarketing Act.¹⁵⁷ The court held that the regulation requiring callers to identify the purpose of their call advanced the government interest of preventing fraud, and that the time restrictions upon late night and early morning calls advanced the government interest in protecting privacy in the home.¹⁵⁸ The Fourth Circuit, in ruling for the FTC, declared that “[p]rotecting the sanctity of the family environment is important enough to actually serve as a basis for a constitutional right in many different contexts.”¹⁵⁹

¹⁵³ Id.
¹⁵⁴ Id. at 335.
¹⁵⁷ Id. at 336-37.
¹⁵⁸ Id. at 340.
¹⁵⁹ Id.
But the PATRIOT Act did not alter the FTC’s jurisdiction, which did not cover non-profit organizations. “The PATRIOT Act, therefore, expanded what ‘acts and practices’ could be regulated by the FTC under the Telemarketing Act, but it did not change what type of entity was subject to the FTC’s control.”\textsuperscript{160} The Fourth Circuit concluded that, as a result of the changed scope of the Telemarketing Act, without a subsequent change in jurisdiction, that the Telemarketing Sales Rule now applied to for-profit entities that solicit charitable donations, but leaving the rule’s application to charitable groups themselves unaffected.\textsuperscript{161} Thus, these regulations only affected groups that used professional, for-profit fundraisers to solicit contributions over the telephone, while in-house callers from the charities themselves are outside of the jurisdiction of the FTC.\textsuperscript{162} The regulations challenged included those that prohibited the fundraisers from making calls before 8 a.m. of after 9 p.m., restrictions that required the “telefunder” to transmit their name and phone number to caller ID services, and those that required them to immediately disclose the fact that they are seeking funds on behalf of a charity.\textsuperscript{163}

The court found that the telemarketing regulations were narrowly tailored under \textit{Central Hudson} due to the fact that the time restrictions at issue still permitted calls to be made for a 13-
hour period during the day. Under this law, charities are restricted from calling a household if they request that a specific organization not call them. The court in National Federation of the Blind found this to be narrowly tailored because, like the national Do-Not-Call registry, it only prevented calls from reaching unwilling listeners.

This may sound a bit like content-based regulation, but there is a distinction. Content-based regulations or restrictions are presumed to be unconstitutional per se barring a compelling government interest, however these opt-in ordinances are not content-based insofar as the government is prohibiting certain kinds of speech. Rather, the government is merely providing the vehicle by which the individual citizen may make known his or her unwillingness to listen to unwanted speech. The Fourth Circuit ruled on behalf of the FTC, and the restrictions on professional “telefunders” were upheld.

After National Federation of the Blind, it may be that at least some courts would be willing to find a restriction on charitable solicitation reasonable if the goals which it seeks to accomplish include the prevention of fraud and the maintenance of privacy in the home, as long as the regulation leaves open the ability of the group to still solicit from willing listeners. Unwilling listeners who place themselves on an opt-in “Do Not Solicit” list may be able to avoid solicitation, regardless of the medium used.

IV. CONCLUSION

Recall that the Supreme Court held in Frisby v. Schultz that “individuals are not required to welcome unwanted speech into

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165 Id. Note that this is a different approach as opposed to the 2003 version of the Telemarketing Sales Rule, where a person need only place their phone number on the Do-Not-Call registry.
166 Id. at 342.
their homes and that the government may protect this freedom.”\textsuperscript{167} The private and sacred nature of the home has been recognized and upheld throughout the history of the United States, for good reason. How then is the opt-in “Do Not Knock” law to be viewed against the historical backdrop? Is it a form of limitation on pure speech “which might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens?”\textsuperscript{168} Or is it merely analogous to being a large-scale “No Solicitation” sign that people place on their front lawns, and that the Supreme Court has held to be sufficient to prevent unwanted solicitors.\textsuperscript{169} This question remains unanswered.

Virtually all groups that utilize canvassing and door-to-door solicitation to raise funds acknowledge that it is their primary source of funding and recruitment of new members, and that without it they would be lost. It’s interesting in that many of the same people who may claim to not want to be solicited in their homes eventually end up donating to these organizations once they learn about the cause and understand the goals of the group. This means that persuasive speech is useful in promoting ideas, and to limit the ability of a group to couple its advocacy and fundraising efforts would necessarily result in the censorship of those causes which depend upon this method of fundraising.

Given the current make-up of the Supreme Court, the impression of the conscientious onlooker is that, should the issue of an opt-in, “Do Not Knock” ordinance ever reach the Supreme Court, the right of a charitable or non-profit group to canvass a city and solicit donations is likely to give way to the right of the individual to put his or her name on a list, and forever cast out that group’s advocacy. One argument that will likely gain traction on the side of the municipalities is, as stated before, to analogize an

\textsuperscript{169} \textit{Watchtower v. Stratton}, supra note 1 at 168; \textit{Village of Schaumburg v. Citizens for a Better Environment}, supra note 80 at 639.
opt-in list with a large-scale “Do Not Solicit” sign. The conceptual distinction between the two is, at the very least, precarious, and would be difficult for a court to distinguish.

But how could the First Amendment be construed to permit the banning of political speech and fundraising? The preceding sentence may be a *non sequitur*; insofar as proponents of such solicitation ordinances would argue that they are not banning political speech and fundraising so much as they are broadcasting the unwillingness of the recipients to listen. People certainly have an interest in maintaining the privacy of their homes, and there is a definite governmental interest in protecting municipal residents against fraud and criminal endeavors, but there is certainly a balance to be had that does not require the complete exclusion of groups who act on behalf of a charitable, political, or religious interest.

Judge Allyson K. Duncan noted in her dissent in *National Federation for the Blind* that the “ability to raise funds is the lifeblood of a charity.”170 I would end, however, with a quotation by Justice Hugo Black from *Martin v. City of Struthers*, where Justice Black presciently declared: “door to door distribution of circulars is essential to the poorly financed causes of little people.”171 If further restrictions on door-to-door advocacy gain a judicial foothold, those poorly financed causes may cease to be financed at all.

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