

# Leave Me Alone! The Delicate Balance of Privacy and Commercial Speech in the Evolving Do-Not-Call Registry

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## I. INTRODUCTION

Before the do-not-call list was established, the average consumer could expect an unsolicited sales call every two to three days.<sup>1</sup> To give consumers a way to avoid this problem, in 2003 the national do-not-call registry went into effect, prohibiting telemarketers from contacting any consumer who chose to register his or her telephone number on the list. Registering for the list can be done over the phone or on the Internet, literally taking less than one minute. This gave consumers the opportunity to “opt-out” of receiving telemarketing phone calls on the condition that they re-register their phone numbers every five years. The five-year requirement would ensure that the number is still accurate and also that the consumer wanted to remain on the list. Consumers nationwide did not hesitate to jump at such an opportunity. By 2004, more than fifty million phone numbers had been registered,<sup>2</sup> with that number nearly tripling by 2007.<sup>3</sup> Despite, or more likely *because* of, the registry’s popularity, telemarketing firms across the country challenged its validity on the grounds that it was an unconstitutional regulation of commercial speech.<sup>4</sup> The Tenth Circuit has addressed the issue, holding that the regulation adequately satisfied the narrow tailoring requirement in order to remain within the bounds of the Constitution, and ultimately “[upheld] the do-not-call list in its entirety,”<sup>5</sup> resulting in millions of Americans cheering for their privacy.

Fast forward to 2007; about the time fifty million Americans should be thinking about re-registering their numbers on the list. The Federal Trade Commission (FTC) released a statement pledging that it would no longer require consumers to re-register their numbers every five years.<sup>6</sup> The bill was subsequently signed by the President and went into effect on

1. *See*, *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1240 (10th Cir. 2004).

2. *Id.* at 1234.

3. FED. TRADE COMM’N, CURRENT DO NOT CALL REGISTRATIONS BY CONSUMER STATE/TERRITORY (Sept. 30, 2007), <http://www.ftc.gov/bcp/edu/microsites/donotcall/pdfs/DNC-Registrations-10-05-20071.pdf> (listing the total number of registered numbers across the country at 145,498,656).

4. *See, e.g., Mainstream Mktg.*, 358 F.3d at 1236 n.9 (explaining the First Amendment challenge to the do-not-call list).

5. *Id.* at 1236.

6. *See* Press Release, Federal Trade Commission, FTC Pledges Not to Drop Any Numbers From Do Not Call Registry, Pending Final Congressional or Agency Action on Whether to Make Registration Permanent (Oct. 23, 2007), *available at* <http://www.ftc.gov/opa/2007/10/dnctestimony.shtm>.

February 15, 2008.<sup>7</sup> On its face, this does not seem like a big deal, and most people would not think twice about the potential constitutional implications of the decision. However, when attempting to strike the delicate balance between a consumer's right to privacy and the First Amendment's protection of commercial speech, a seemingly trivial change such as this has serious constitutional repercussions.

Section II of this Note explores the origins of the national do-not-call registry—dating back to 1991—and examines each step of the process that brought about the registry. Section III takes a close look at the Tenth Circuit case of *Mainstream Marketing Services v. Federal Trade Commission*,<sup>8</sup> with an eye toward the test used to determine the constitutionality of commercial speech regulations that was elucidated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.<sup>9</sup> Section IV looks at the FTC's proposal to abolish the five-year re-registration requirement and reexamines the constitutional analysis of the do-not-call registry in light of Congress's decision to let numbers permanently remain. This Note concludes by explaining that if the FTC fails to offer more information justifying its decision to remove the re-registration requirement, the do-not-call registry should not pass another constitutional challenge.

## II. THE BEGINNING OF THE NATIONAL DO-NOT-CALL REGISTRY

### A. Telephone Consumer Protection Act

In 1991, Congress adopted the Telephone Consumer Protection Act (TCPA).<sup>10</sup> The TCPA was created to adopt “reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.”<sup>11</sup> It prohibited any person within the U.S. from: (1) making a call using any automated telephone dialing system or an artificial or prerecorded voice to an emergency line, hospital room (or other similar establishment), or any number for which the called party is charged for the call;<sup>12</sup> (2) calling any residential telephone line using an artificial or prerecorded voice without

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7. Do-Not-Call Improvement Act of 2007, Pub. L. No. 110-187, 122 Stat. 633 (codified at 15 U.S.C. §§ 6101 note, 6151-6155).

8. 358 F.3d 1228 (10th Cir. 2004).

9. 447 U.S. 557 (1980).

10. Telephone Consumer Protection Act of 1991, 102 Pub. L. No. 243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227 note (2000)).

11. Telephone Consumer Protection Act § 2(15).

12. 47 U.S.C. § 227(b)(1)(A). It is important to note that this includes mobile and cellular telephones, exempting them from commercial solicitations regardless of whether or not the number is registered on the do-not-call list.

the prior express consent of the called party;<sup>13</sup> (3) sending any unsolicited advertisement to a telephone facsimile machine;<sup>14</sup> or (4) simultaneously engaging two or more telephone lines of a multi-line business with the help of an automatic telephone dialing system.<sup>15</sup>

The TCPA charged the Federal Communications Commission (FCC) with prescribing regulations to implement these requirements.<sup>16</sup> The TCPA also authorized the FCC to establish and operate, if necessary, a “single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.”<sup>17</sup> The FCC, however, did not find a national do-not-call list necessary at that time. Rather, the FCC felt that maintaining company-specific do-not-call lists was “the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations.”<sup>18</sup> The company-specific method required a company to keep a list of individuals who have requested not to be contacted for ten years. While other companies remain free to contact the individual, the company that received the request is prohibited from calling.

#### *B. Telemarketing Consumer Fraud and Abuse Prevention Act*

After recognizing that consumers and others lose an estimated \$40 billion a year due to telemarketing fraud in addition to the countless other forms of telemarketing deception and abuse, Congress decided to enact legislation that would offer consumers protection from such fraud, deception, and abuse.<sup>19</sup> In 1994, Congress passed the Telemarketing Consumer Fraud and Abuse Prevention Act (TCFAP).<sup>20</sup> The TCFAP directed the FTC, which was created to prevent unfair competition in commerce,<sup>21</sup> to define “deceptive telemarketing acts or practices,”<sup>22</sup> and then to prescribe rules prohibiting deceptive and other abusive telemarketing acts or practices.<sup>23</sup>

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13. *Id.* § 227(b)(1)(B).

14. *Id.* § 227(b)(1)(C).

15. *Id.* § 227(b)(1)(D).

16. *Id.* § 227(b)(2).

17. *Id.* § 227(c)(3).

18. Rules and Regs. Implementing the Tele. Consumer Prot. Act of 1991, *Report and Order*, 7 F.C.C.R. 8752, 8765 (1992).

19. *See* 15 U.S.C. § 6101 (2000).

20. Pub. L. No. 103-297, 108 Stat. 1545 (1994) (codified as amended at 15 U.S.C. §§ 6101-6108 (2000)).

21. *See* Fed. Trade Comm’n, Facts for Consumers: A Guide to the Federal Trade Commission (2004), <http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm#bcp>.

22. 15 U.S.C. § 6102(a)(2).

23. *See id.* § 6102(a)(1).

Congress granted the FTC broad authority pursuant to the TCFAP but recommended four components for inclusion in the rules. First, telemarketers should be prohibited from undertaking a pattern of unsolicited telephone calls which the consumer would consider coercive or abusive.<sup>24</sup> Second, unsolicited telephone calls should be restricted to certain hours of the day and night.<sup>25</sup> Third, telemarketers for the sale of goods or services must “promptly and clearly” disclose to the consumer the nature and purpose of the call.<sup>26</sup> Finally, any telemarketer soliciting charitable contributions or donations should also “promptly and clearly” disclose the nature and purpose of the call.<sup>27</sup> Additionally, Congress suggested that the FTC consider recordkeeping requirements.<sup>28</sup>

### *C. Telemarketing Sales Rule and the Do-Not-Call Implementation Act*

In 1995, pursuant to the TCFAP, the FTC adopted the Telemarketing Sales Rule (TSR).<sup>29</sup> The salient portions of the TSR requires telemarketers to clearly disclose: (1) the costs of the subject of the sales offer; (2) all material restrictions, limitations, or conditions of the sales offer; (3) the seller’s refund, cancellation, and exchange policy; (4) the details of any prize promotion, including the odds of winning, that no purchase is necessary, how to participate without making a purchase, and any costs or conditions necessary to receive a prize.<sup>30</sup> Telemarketers were also prohibited from misrepresenting costs, restrictions, or performance of the goods or services being offered.<sup>31</sup> The TSR listed a number of abusive acts or practices that were also prohibited, including violating a company-specific do-not-call list.<sup>32</sup> Finally, the TSR restricted the hours during which telemarketers may call consumers to 8:00 a.m. to 9:00 p.m. local time at the called person’s location.<sup>33</sup>

By 2002, both the FCC and FTC were unhappy with the rules implemented in the 1990s.<sup>34</sup> The FCC, noting that telemarketing practices

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24. *Id.* § 6102(a)(3)(A).

25. *Id.* § 6102(a)(3)(B).

26. *Id.* § 6102(a)(3)(C).

27. *Id.* § 6102(a)(3)(D).

28. *Id.* § 6102(a).

29. 60 Fed. Reg. 43842 (Aug. 23, 1995) (codified as amended at 16 C.F.R. pt. 310 (2008)).

30. *Id.* § 310.3(a)(1).

31. *Id.* § 310.3(a)(1)(iv)-(v).

32. *Id.* § 310.4(b)(1)(ii); *see generally* § 310.4(a)-(b).

33. *Id.* § 310.4(c).

34. *See generally* Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 17 F.C.C.R. 17459 (2002); Telemarketing Sales Rule, 16 C.F.R. pt. 310.

had changed significantly since 1992,<sup>35</sup> proposed to amend the rules made pursuant to the TCPA.<sup>36</sup> Less than a year later, the FCC adopted new rules establishing the national do-not-call registry to be maintained by the FTC, set a maximum rate on the number of abandoned calls, required telemarketers to transmit caller ID information, and modified the facsimile advertising requirements.<sup>37</sup> Similarly, the FTC adopted amendments to the TSR which supplemented the company-specific do-not-call provision with a national do-not-call list maintained by the FTC.<sup>38</sup> While Congress had not yet authorized the FTC to maintain a national do-not-call list, Congress granted that authority immediately after the FTC's authority was challenged in court.<sup>39</sup> Consumers who previously had registered on the do-not-call list could still receive calls from any specific seller by granting express written permission.<sup>40</sup> Likewise, an exception was carved out for a telemarketer who was calling on behalf of a seller who had an "established business relationship" with the consumer.<sup>41</sup> Members would remain on the list for five years, at which time the number would have to be re-registered to ensure both that the individual still owned the line and that he or she wished to remain on the list.

### III. FIRST AMENDMENT PROTECTION OF THE DO-NOT-CALL REGISTRY: *MAINSTREAM MARKETING SERVICES V. FTC*

By its nature, the do-not-call registry restricts only commercial sales calls, and thus is a regulation of commercial speech.<sup>42</sup> First Amendment protection afforded to commercial speech does not rise to the level given to noncommercial speech.<sup>43</sup> "[F]ailure to distinguish between commercial and noncommercial speech 'could invite dilution . . . of the force of the First Amendment's guarantee with respect to [noncommercial] speech.'"<sup>44</sup> Commercial speech, therefore, is protected from unwarranted governmental

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35. Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 17 F.C.C.R. 17459, para. 1.

36. *Id.*

37. See Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, 68 Fed. Reg. 44,144 (July 25, 2003) (codified as amended at 47 C.F.R. pts. 64 and 68).

38. See Telemarketing Sales Rule, 16 C.F.R. pt. 310.

39. See Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991, *Annual Report on the Nat'l Do-Not-Call Registry*, 19 F.C.C.R. 24002, para. 5 (2004) [hereinafter *Annual Report*] (discussing Congress's swift actions to overrule the decision of *United States v. Fed. Trade Comm'n*, 282 F. Supp. 2d 1285 (W.D. Okla. 2003)).

40. Telemarketing Sales Rule, 16 C.F.R. pt. 310.

41. *Id.*

42. See *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 358 F.3d 1228, 1233 (10th Cir. 2004).

43. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463 n.20 (1978).

44. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 n.5 (1980) (quoting *Ohralik*, 436 U.S. at 456) (internal notation omitted).

regulation by the First Amendment as applied to the states through the Fourteenth Amendment.<sup>45</sup>

The interests of American citizens are served only if they are well informed, and “the best means to that end is to open the channels of communication rather than to close them.”<sup>46</sup> Therefore, it would go against the policy reasons behind the First Amendment to give the government complete power to regulate commercial speech. For this reason, it is important that commercial speech still receive First Amendment protection, because “[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”<sup>47</sup> It is this *informational* function of advertising that is the basis for continued First Amendment protection of commercial speech.<sup>48</sup>

On the other hand, for at least 400 years, a man’s home has been recognized as his castle and fortress,<sup>49</sup> and as such, privacy within the home has been enhanced by the common law and the Constitution.<sup>50</sup> The Supreme Court has worked to shape a right to privacy emphasizing the importance of privacy within the home.<sup>51</sup> The Court has referred to the home as “a personal sanctuary that enjoys a unique status in our constitutional jurisprudence.”<sup>52</sup> The Court has held that the ability to avoid intrusions is a special benefit that all citizens enjoy within their walls.<sup>53</sup> Individuals, therefore, are not required to allow unwanted speech into their homes, and further, the government may protect this freedom.<sup>54</sup> The Court has also added that “[t]he unwilling listener’s interest in avoiding unwanted communication . . . is an aspect of the broader ‘right to be let alone.’”<sup>55</sup> However, it is important that we do not use this right to be left alone within

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45. *See id.* at 561.

46. *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

47. *Cent. Hudson*, 447 U.S. at 561-62.

48. *See id.* at 563.

49. *See* Rodney A. Smolla, *The “Do-Not-Call List” Controversy: A Parable of Privacy and Speech*, 38 CREIGHTON L. REV. 743, 747 (2005) (citing *Semayne’s Case*, (1604) 77 Eng. Rep. 194, 195 (K.B.)).

50. *Accord* *United States v. Orito*, 413 U.S. 139, 142 (1973).

51. *See, e.g., Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970) (“The ancient concept that ‘a man’s home is his castle’ into which ‘not even the king may enter’ has lost none of its vitality.”).

52. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1233 (10th Cir. 2004).

53. *See* *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988).

54. *See id.* at 485.

55. *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

our homes as an excuse to ban constitutionally protected commercial speech.

After the enactment of the national do-not-call registry, several telemarketing companies sought to have the Act overturned on constitutional grounds. In one ensuing case, the Tenth Circuit held that the registry did not violate the First Amendment.<sup>56</sup> The court explained that “four key aspects of the do-not-call registry convince us that it is consistent with First Amendment requirements.”<sup>57</sup> First, it restricts only core commercial speech. Second, it targets speech that invades the privacy of the home. Third, it is an opt-in [opt-out]<sup>58</sup> program, offering the choice of whether or not to restrict calls to the consumers. Fourth, it materially furthers the government’s asserted interest. The Supreme Court subsequently denied certiorari.<sup>59</sup>

After deciding that the speech in question was commercial speech, the court in *Mainstream Marketing* used the four-part analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission* to determine whether the registration passed constitutional scrutiny.<sup>60</sup> For a commercial speech regulation to pass constitutional muster, it must (1) concern lawful activity, and not be misleading; (2) possess a governmental interest that is “substantial”; (3) directly advance the state’s interest; and (4) not be more extensive than necessary to serve the asserted interest.<sup>61</sup>

Before deciding the constitutionality of a specific commercial speech regulation, it is necessary to determine whether or not the commercial speech at issue falls within the First Amendment’s protection. The government may ban, without constitutional objection, any commercial speech that is (1) more likely to deceive the public than to inform it, or (2) related to illegal activity.<sup>62</sup> Consider two extreme examples illustrating commercial speech that would not fall within the protection of the First

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56. See *Mainstream Mktg.*, 358 F.3d at 1228.

57. *Id.* at 1233.

58. The court mistakenly refers to the do-not-call registry as an opt-in program, when in fact the members of the registry are deciding to opt-out of receiving telemarketing calls. For a better explanation of the difference between an opt-in and an opt-out program, see *United States v. Playboy Entm’t Group*, 529 U.S. 803, 841-42 (2000) (Breyer, J., dissenting). See also Rules and Regs. Implementing the Tele. Consumer Prot. Act of 1991, 68 Fed. Reg. 44,144 (July 25, 2003) (codified at 47 C.F.R. pts. 64, 68) (explaining the decision not to adopt an “opt-in” approach).

59. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 543 U.S. 812 (2004).

60. See *Mainstream Mktg.*, 358 F.3d at 1236-37. Perhaps because it is not at issue, the court in *Mainstream Marketing* does not specifically address the first prong, and subsequently refers to the analysis as a “three-part test governing First Amendment challenges to regulations restricting non-misleading commercial speech that relates to lawful activity.” *Mainstream Mktg.*, 358 F.3d at 1237.

61. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

62. *Id.* at 563-64.



Amendment. A person proposing to sell illegal drugs to another is not considered lawful activity. This “commercial speech” does not receive any First Amendment protection, and the *Central Hudson* analysis would cease immediately. Similarly, a Web site posing as a charity soliciting donations to help hurricane victims, when it is actually a college student trying to supplement his beer fund, would be considered misleading. This misleading expression would also fail to receive any First Amendment protection, and likewise any further *Central Hudson* analysis would be unnecessary.

In the second prong, the inquiry is whether the asserted governmental interest is substantial. In *Central Hudson*, the Commission offered two state interests, both of which were deemed substantial by the Court.<sup>63</sup> The first was the state’s interest in conserving energy, and the second was the state’s concern that utility rates be fair and efficient.<sup>64</sup> While the Supreme Court’s definition of a “substantial interest” could require a law review article of its own, suffice it to say that the definition is an arbitrary decision that should take into account the totality of the circumstances, and will not likely be at issue. In fact, there have been two cases decided by the Supreme Court using the *Central Hudson* test since 2000. Both cases skipped over the issue of whether the state’s interest was substantial and were decided only on the third and fourth prongs, presumably in an effort to avoid articulating the standards to meet the “substantial interest” requirement.<sup>65</sup> In an almost humorous attempt at avoidance, Justice O’Connor’s opinion in *Thompson v. Western States Medical Center* explains the government’s position that its asserted interest was substantial before changing terminology and referring to the government interest as “important.”<sup>66</sup> She continues to find that the regulations, even assuming the asserted interest was substantial and the regulations directly advanced that interest, did not pass the fourth prong of the *Central Hudson* analysis.<sup>67</sup> This leaves one to speculate that a “substantial” interest lies somewhere in between an “important” interest and a “compelling” interest,<sup>68</sup> and further, that the Court would rather overturn a regulation for some other reason

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63. *Id.* at 568.

64. *Id.* at 568-69.

65. *See* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (stating that none of the petitioners contest the importance of the state’s interest); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371-73 (2002) (holding that the restrictions were more extensive than necessary, even assuming, *arguendo*, that the government’s interest was substantial).

66. *Thompson*, 535 U.S. at 368-69.

67. *See id.* at 374.

68. *See id.* at 368-69; *Lorillard Tobacco Co.*, 533 U.S. at 564 (conceding that the interest was substantial and going further to explain that it may even be compelling).

than to take on the task of explaining why the asserted interest was not “substantial.”

The third and fourth prongs, which are only considered if the first two inquiries “yield positive answers,” focus on the relationship between the state’s interests and the regulation.<sup>69</sup> The third prong requires the regulation to directly advance the asserted governmental interest.<sup>70</sup> For example, if the state’s asserted interest is in conserving energy, a ban on any advertising that promotes the use of electricity would directly advance the state’s interest of energy conservation.<sup>71</sup> The fourth prong requires that the regulation be no more extensive than necessary to serve that interest.<sup>72</sup> Using the example above, a complete ban might include suppression of information about electric services or devices that would cause no net increase in total energy use. While the regulation directly advances the state’s asserted interest, it may be more extensive than necessary by regulating information that need not be regulated.<sup>73</sup> The burden of proof lies on the regulating body to show that a more limited restriction would not adequately serve the asserted interest.<sup>74</sup>

In *Mainstream Marketing*, the government asserted that its interests in protecting the privacy of individuals in their homes, and protecting consumers against the risk of fraudulent and abusive solicitations were both substantial, and the court agreed.<sup>75</sup> The court paid particular attention to the importance of privacy in the context of the home, reiterating the sentiment that “individuals are not required to welcome unwanted speech into their own homes.”<sup>76</sup> Moreover, in concluding that the interest in preventing fraudulent and abusive sales practices was also substantial, the court explained that “[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows *cleanly* as well as freely.”<sup>77</sup>

The court succinctly summarized its position on the last two prongs of the *Central Hudson* test in two sentences:

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69. *Cent. Hudson Gas & Elec.*, 447 U.S. at 566.

70. *Id.*

71. *See id.* at 569.

72. *Id.* at 566.

73. *See id.* at 570.

74. *Id.* (“In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State’s interests.”); *see also* *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002).

75. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n*, 358 F.3d 1228, 1237 (10th Cir. 2004).

76. *Id.* at 1237-38 (quoting *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988)).

77. *Id.* at 1238 (quoting *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993)) (emphasis added).

The do-not-call registry directly advances the government's interests by effectively blocking a significant number of the calls that cause the problems the government sought to redress. It is narrowly tailored because its opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener.<sup>78</sup>

Fortunately, more substance is given to these conclusions in the following two sections of the opinion, giving us material to use when looking toward the future.

The telemarketers argued that the do-not-call list was underinclusive because it applied only to commercial calls, and did not apply to charitable and political callers, thus seriously undermining its effectiveness.<sup>79</sup> The court, however, explained that as long as the regulation materially advanced the asserted state interest, underinclusiveness by itself would not render the regulation unconstitutional.<sup>80</sup> The court went on to explain that commercial calls are the “most to blame” for the problem asserted by the government.<sup>81</sup> The number of complaints regarding unwanted commercial calls is far greater than those regarding political or charitable organizations.<sup>82</sup> Furthermore, commercial callers bear more blame for deceptive and abusive practices. This is seemingly due to the incentive to engage in such practices when a purely commercial transaction is at stake.<sup>83</sup>

An average consumer who is not registered on the do-not-call list can expect to receive 137 unsolicited calls per year.<sup>84</sup> At the time *Mainstream Marketing* was decided, more than fifty million telephone numbers were registered, precluding more than 6.5 billion phone calls annually.<sup>85</sup> Regardless of whether or not the list was underinclusive, the court found that it materially advanced the government's goals—“reducing intrusions upon consumer privacy and the risk of fraud or abuse”—by restricting calls that cause these problems.<sup>86</sup>

The registry was held to be “narrowly tailored because it does not overregulate protected speech; rather, it restricts only calls that are targeted at unwilling recipients.”<sup>87</sup> The court focuses on three main points in coming

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78. *Id.*

79. *See id.*

80. *See id.* at 1238-39.

81. *Id.* at 1241.

82. *Id.* (referencing H.R. REP. NO. 102-317, at 16 (1991)).

83. *See id.*

84. *Id.* at 1240.

85. *Id.*

86. *Id.* at 1241-42.

87. *Id.* at 1242.

to this conclusion. First, opt-out<sup>88</sup> restrictions are less restrictive than laws that directly prohibit speech because the restrictions are based on an individual's private choice.<sup>89</sup> Second, the registry only restricts one avenue through which solicitors can communicate with consumers who have registered for the list.<sup>90</sup> Third, the telemarketers' proposed alternatives could not serve the state's asserted interest with equal effectiveness.<sup>91</sup>

The court cites a plethora of Supreme Court cases holding that opt-out restrictions are less restrictive than laws that prohibit speech directly, including cases that have rejected direct prohibitions of speech on the grounds that opt-in regulations would have been a less restrictive alternative.<sup>92</sup> Thus, the do-not-call registry does not itself prohibit any speech, but rather it blocks "unwanted intrusions" into the homes of consumers who have signed up for the list.<sup>93</sup> To clarify, the registry "permits a citizen to erect a wall . . . that no advertiser may penetrate without his acquiescence."<sup>94</sup>

Further, as illustrated by its name, the do-not-call list restricts only one avenue by which solicitors and registered consumers can communicate. Businesses can still solicit customers through advertising on roadside billboards, through the U.S. Postal Service, television, radio, door-to-door, or any medium other than the telephone. Also, consumers on the registry are free to permit calls from any business with whom they want to communicate.<sup>95</sup> Alternatively, consumers who choose not to register can make company specific do-not-call requests with businesses from whom they do not want to receive calls.<sup>96</sup> Thus, the personalization options enhance the narrow tailoring of the do-not-call list.

The telemarketers offered two less restrictive and (what they considered) equally effective alternatives: (1) continued use of the company-specific lists, and (2) consumer reliance on technological alternatives like caller ID, call rejection services, and electronic devices designed to block unwanted calls.<sup>97</sup> The court quickly dismissed the latter argument because it put the cost of avoiding unwanted telemarketing calls

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88. For an explanation of the court's confusion of the opt-in/opt-out distinction in this case, see discussion *supra*, note 58.

89. *Mainsteam Mktg.*, 358 F.3d at 1242.

90. *Id.* at 1243.

91. *Id.* at 1244.

92. *Id.* at 1243. See e.g., *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 729-30, 738 (1970); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000).

93. *Mainsteam Mktg.*, 358 F.3d at 1243.

94. *Id.* (quoting *Rowan*, 397 U.S. at 738).

95. See *id.* at 1243-44.

96. See *id.* at 1244.

97. See *id.* at 1244-45.

on consumers.<sup>98</sup> The court also offered a number of reasons why the company-specific lists were inadequate. The company-specific rules were “extremely burdensome to consumers,” because they had to repeat their requests to each individual solicitor.<sup>99</sup> Also, after making a company-specific request, consumers had no way to ensure that their numbers had been removed from the calling list.<sup>100</sup> In fact, consumers’ requests to be placed on company-specific lists were often ignored by solicitors.<sup>101</sup> The company-specific rules were also difficult to enforce because consumers were forced to bear the burden of keeping detailed lists of which telemarketers had contacted them, and on which company-specific lists they had chosen to be placed.<sup>102</sup>

After analyzing these two points, the court explained that “[n]o calls are restricted unless the recipient has affirmatively declared that he or she does not wish to receive them.”<sup>103</sup> In October 2007, the FTC vowed to let registration become permanent, thus leaving numbers on the list regardless of whether or not they had been re-registered in the last five years. This decision leaves us to answer the question, is the court’s conclusion that no calls are restricted unless the recipient has explicitly confirmed that he or she does not wish to receive them still true when numbers remain on the list permanently after originally being registered?

#### IV. THE 2008 AMENDMENT TO THE DO-NOT-CALL REGISTRY

##### A. *The Do-Not-Call Registry and Its Subsequent Amendment*

When the national do-not-call registry was first introduced in 2003, the FTC recognized that sixteen percent of all telephone numbers change each year, and twenty percent of Americans move each year.<sup>104</sup> Thus, the FTC concluded that it would be necessary to implement two measures to counteract the potential problem that the registry would, over time, include numbers that had been reassigned even though the new subscribers might not object to receiving telemarketing sales calls.<sup>105</sup> First, the FTC would periodically check all numbers in the registry against national databases and remove from the registry any numbers that had been disconnected or reassigned. Second, the FTC would require those who wished to remain on

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98. *Id.* at 1245 (10th Cir. 2004).

99. *Id.* at 1244.

100. *See id.*

101. *See id.*

102. *See id.*

103. *Id.* at 1245.

104. *See* Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4640 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

105. *See id.* § 310.

the registry to re-register their numbers every five years. This second requirement would ensure that the registered citizens still have the same phone number and that they continue to prefer not to be contacted by commercial telemarketers.<sup>106</sup>

In October 2007, the FTC proposed to amend the TSR to remove the re-registration requirement. Less than four months later, the President signed the Do-Not-Call Improvement Act of 2007,<sup>107</sup> which eliminated the automatic removal of telephone numbers registered on the national do-not-call registry. The FTC will continue to periodically check the numbers against a database that lists all numbers that have been disconnected or reassigned. However, they will only remove numbers from the list that have been both disconnected *and* reassigned, letting numbers that have simply been disconnected remain on the list.<sup>108</sup>

In the amendment's early stages, neither the FCC nor the FTC offered much information in its support. Unfortunately, Congress passed the amendment despite this lack of information. If sufficient information does not surface shoring up any doubts or questions, the battle over the constitutionality of the registry's commercial speech regulations may be much tougher than both commissions expect.

#### B. *Constitutional Analysis of the 2008 Amendment*

The analysis of the first three prongs of the *Central Hudson* test will remain unchanged and not likely be at issue when reconsidering the analysis under the new law. The dispute will turn on the fourth prong: whether the regulation is more extensive than necessary to serve the asserted governmental interest. Restricting only calls directed at consumers who have stated a preference to avoid them seems to be the quintessential definition of narrow tailoring. The decision in *Mainstream Marketing* operates under the broad assumption that "[n]o calls are restricted unless the recipient has affirmatively declared that he or she does not wish to receive them."<sup>109</sup> While this may have been a fair assumption at the time, without keeping the database up to date by requiring users to re-register

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106. *See id.* § 310.

107. Pub. L. No. 110-187, 122 Stat. 633 (codified at 15 U.S.C. §§ 6101 note, 6151-6155).

108. *See Enhancing FTC Consumer Protection in Financial Dealings, with Telemarketers and on the Internet: Testimony Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 110th Cong., at 10, n.19 (2007) (statement of Lydia Parnes, Director, Bureau of Consumer Protection), available at <http://www.ftc.gov/os/testimony/071023ReDoNotCallRuleEnforcementHouseP034412.pdf>, [hereinafter *Statement of FTC*].

109. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 358 F.3d 1228, 1245 (10th Cir. 2004).

every five years it seems that this assumption is no longer a foregone conclusion.

When reanalyzing the constitutionality of the do-not-call registry, the same two rights remain at the forefront of the discussion: the First Amendment protection of commercial speech and an individual's personal right to privacy within his or her own home. Before the change, it was not difficult to determine that the registry was narrowly tailored. It would ensure that people who did not want to participate in the registry would continue to receive telemarketing phone calls by removing numbers that: (1) had failed to re-register in the last five years, (2) been disconnected, or (3) been reassigned. After the proposed change, only numbers that had been both disconnected *and* reassigned would be removed. The registry essentially went from having three mechanisms ensuring that the list was current and up to date to having only one. It would be quite surprising to see a court conclude that this change does not affect the narrow tailoring that the Constitution requires.

If numbers belonging to consumers who wish to remain off of the list are not removed from the list, the inclusion of unwilling participants will continue to grow. If people who wish to hear the commercial speech offered by the telemarketers are denied this right, the list effectively turns into a complete ban on commercial speech, which, according to *Central Hudson*, would be unconstitutional. As explained in *Central Hudson*, restrictions on commercial speech require that the same governmental goals could not be achieved with a less restrictive measure.<sup>110</sup> The registry has proven successful by using a less restrictive alternative, namely requiring members to re-register their numbers every five years. Thus, it would be very difficult to argue that the government's goals could not be equally achieved with a less restrictive alternative.

Additionally, it is important to compare the downside of the amendment to the downside of leaving the regulation in its pre-amendment status. In passing the amendment, Congress is completely relying on the accuracy of the Commission's process of purging numbers. In the case of an error, we face the possibility of withholding constitutionally protected commercial speech from countless willing listeners. These people would be denied their right to hear commercial speech without any say or even knowledge of what they are being deprived of. An individual whose number had inadvertently been left on the registry would be in the dark as to why he was never receiving any telephone sales offers, and therefore would not know how to remedy the problem. On the other hand, with the five-year re-registration requirement intact, the potential downside is

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110. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564 (1980).

merely that an individual will forget to re-register, and will be bothered by an unsolicited commercial sales call. He will be reminded to re-register when he receives a call that he was not anticipating and does not want. Given the simple registration process, he can quickly and easily be back on the list for another five years. In addition to troubling only one consumer at a time, each consumer is aware of the situation, knowing both that they forgot to re-register, and the process to follow in order to get his or her name back on the list. A simple balance shows that denying a potential mass of innocent people the opportunity to hear constitutionally protected speech in one fell swoop is far greater than the possibility that one individual consumer will be inconvenienced by a telemarketer, reminding him or her to re-register on the do-not-call list.

In the event of a mistake in purging obsolete numbers, the five-year re-registry serves as a tool limiting the number of unknowing, innocent victims who may be denied their right to hear commercial speech. Despite the popularity of the registry, it is important to remember that not everybody wishes to avoid calls from telemarketers.<sup>111</sup> With the re-registration requirement in place, if a number that has been reassigned accidentally remains on the list, telemarketers would only be prohibited from contacting that individual for a maximum of five years. Assuming the individual chose not to register, the number would automatically be removed from the list within five years, and the consumer would be free to receive the calls.

In the limited information offered to support the decision, the FTC listed four changes that have taken place since the registry was first established in 2003, only one of which is somewhat convincing.<sup>112</sup> First, the FTC notes the increase in cell phone usage and popularity of number portability. Second, both the Third and Tenth Circuit courts held that the list was constitutional. Third, it is argued that the list has been implemented successfully for five years and the process of removing disconnected or reassigned numbers has been equally successful. The fourth reason offered by the FTC is the unprecedented popularity of the registry. Moreover, the FCC has concluded that the “enhanced consumer privacy protections created by this proposed rule amendment, taken in conjunction with the benefits to the federal government in administering the national registry, outweigh any potential impact.”<sup>113</sup>

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111. *See, e.g.*, H.R. REP. NO. 108-8 at 2 (2003) (citing a study that reports telephone marketing generated \$274.2 billion in sales in 2001 alone). *See also Statement of FTC, supra* note 108, at 2 (citing a 2006 survey showing that 94% of American adults have heard of the registry, but only 76% have signed up for it).

112. *See Statement of FTC, supra* note 108, at 9-10.

113. Rules and Regs. Implementing the Tele. Consumer Prot. Act of 1991, 72 Fed. Reg. 71,099, 71,101 (Dec. 14, 2007) (codified at 47 C.F.R. pt. 64).



## 1. Changes in the Marketplace

In its statement that cell phone usage has risen and number portability has become increasingly popular, the FTC neglects two important facts. Many individuals have both wireless lines and wirelines. Moreover, in the event of a move, regardless of an individual's desire to take his or her telephone number along, the number is only portable if it remains in the same area code.

When the do-not-call registry was created in 2003, the FCC estimated that there were 118.1 million wireline residential telephone lines.<sup>114</sup> While there has been some decrease in the number of wirelines, there were still 107.8 million wireline residential phone lines in 2005.<sup>115</sup> Further, it is difficult to see how this decrease in wirelines justifies precluding telephone calls to consumers who potentially still want to continue to receive the calls. Even if the number of wireline residential telephone lines were to be cut in half, it would not reduce the need to protect an individual's right to receive telemarketing calls if he or she so chooses. This can only be done by ensuring that the registry contains only numbers that belong to consumers who have affirmatively indicated a preference to take part in the registry.

Of equal importance is the fact that regardless of the apparent popularity of number portability, as far as the do-not-call registry is concerned, a number is only portable as long as it remains within the same area code. The most recent report of geographic mobility of Americans considers the number of Americans who moved from 2002 to 2003. The report shows that 14.2% of Americans moved in that year; nearly half of those moves were outside of their previous county.<sup>116</sup> Of the movers who decided to leave their county, only half decided to remain within their state, while the rest left their state.<sup>117</sup> While some counties in rural areas share the same area code, counties in more urban areas often have multiple area codes.<sup>118</sup> The result of these moves was that people who chose to move out of their county would almost certainly not be able to retain their telephone numbers, and even some of those who remained in the same county would also be forced to change numbers due to different area codes. Assuming that every single person who moved within the same area code wanted to keep his or her telephone number, it would still be highly unlikely that any

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114. FCC, TRENDS IN TELEPHONE SERVICE (Feb. 2007), at 7-8, tbl.7.4, *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270407A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270407A1.pdf).

115. *Id.*

116. U.S. CENSUS BUREAU, GEOGRAPHIC MOBILITY: 2002 TO 2003 (Mar. 2004), at 4, tbl.B, *available at* <http://www.census.gov/prod/2004pubs/p20-549.pdf>.

117. *Id.*

118. For example, New York City alone has five area codes, Los Angeles County has eight area codes, and Cook County, Illinois has eleven area codes.

less than seven to eight percent of Americans per year would be forced to change their phone number due to a move.

## 2. Legal Landscape

Next, the FTC argues that the legal landscape surrounding the do-not-call list has become clearer.<sup>119</sup> In support of this argument, the FTC notes its victories in two challenges to the registry's constitutionality.<sup>120</sup> While this is undoubtedly true, this was only because the registry was deemed "narrowly tailored" to achieve the goals of the government. The narrow tailoring ensured that only those who voiced a preference not to receive commercial telemarketing calls would actually avoid receiving such calls. It would be illogical to conclude that because the registry passed constitutional muster before, it would automatically pass again regardless of any changes made to it.

The FTC correctly explains that the courts deciding the cases paid close attention to the care the FTC put into ensuring that the registry included only numbers of consumers who indicated a preference not to receive the calls.<sup>121</sup> However, the FTC incorrectly claimed that the courts did not address the issue of the five-year re-registration requirement. In fact, in addressing the important features of the registry, the Tenth Circuit explained: "[c]onsumer registrations remain valid for five years, and phone numbers that are disconnected or reassigned will be periodically removed from the registry."<sup>122</sup> Simply because the court did not delve into the re-registration requirement in its conclusion that the registry was narrowly tailored does not mean that the requirement was not even considered in its decision. To the contrary, the fact that the court specifically pointed out that feature of the registry leads one to believe that it was in fact taken into account upon rendering the final decision. In the case of another challenge, the court will likely again focus on the issue of whether the registry includes only numbers of consumers who have indicated a preference not to receive commercial telemarketing calls, however, they may not come to the same conclusion without the re-registration requirement.

## 3. Success of the Process of Purging Obsolete Numbers

While this argument is the FTC's strongest, the FTC will need to elaborate on it in order to defeat another constitutional challenge to the do-not-call registry. It is unlikely that the other three reasons offered for the

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119. See *Statement of FTC*, *supra* note 108, at 9.

120. See *id.* at 10 n.18.

121. See *id.*

122. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 358 F.3d 1228, 1245 (10th Cir. 2004).

change will be enough to show that the change did not seriously undermine the narrow tailoring required by the Constitution. Consequently, this is the argument that will require the most detailed support. Even then, the FTC may have to improve the process of purging obsolete numbers in order to pass rigorous constitutional scrutiny.

The FTC explains that this process of purging numbers is subcontracted to a list broker claiming to have information on every telephone number in North America that is updated ten times daily.<sup>123</sup> The subscriber information, including disconnect and reconnect data, is reportedly acquired from every local exchange carrier in America.<sup>124</sup> Once a month, the broker matches the registry against its list of disconnected and reassigned numbers and removes only those numbers that had been both disconnected and reassigned.<sup>125</sup>

This highlights the questions that the FTC will face. Is the broker's claim that its information includes every number in America verifiable? If so, is it possible to verify that the information is always accurate and up to date? Is it possible to verify that every number that has been reassigned will be properly removed from the registry? Why do numbers have to be both disconnected *and* reassigned in order to be removed? If the broker's information does in fact contain every number in America, if it is always accurate and up to date, and if any numbers that have been disconnected and reassigned will be removed from the list every month, the question remains as to whether this single measure is enough for the court to conclude that the regulation is still narrowly tailored. Is removing numbers once a month enough? Could the government's interest be served just as effectively with an alternative that restricts speech less? Is the five-year re-registration requirement needed as a safety net to ensure that any mistakes do not last more than five years?

Unfortunately, neither the FTC nor the FCC has offered answers to many of these questions, but the accuracy of the FTC's removal of obsolete numbers is undoubtedly the issue on which any subsequent constitutional challenge will turn. In order to pass rigorous constitutional scrutiny once again, the FTC will need to show that its process of purging numbers is so accurate that requiring members to re-register on the list would be superfluous. The re-registration burden is minimal, requiring a quick visit to a Web site or a call to a 1-800 number requesting registration. Complete reliance on automatic removal of obsolete numbers surely removes this burden from consumers. However, because the burden of re-registering is

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123. *Statement of FTC, supra* note 108 at 10 n.19.

124. *Id.*

125. *Id.*

so minimal, the court will likely find that any inaccuracy could not be outweighed by the reduced burden on consumers.

#### 4. Popularity of the Registry

It is difficult to see how the FTC can conclude that it is justified in foreclosing a willing listener's ability to hear commercial speech simply because a majority of the population chooses not to hear the commercial speech in question. If seventy-five percent of Americans do not want to receive commercial telemarketing calls, that does not diminish the right of the other twenty-five percent of Americans that do want to hear the constitutionally protected speech.<sup>126</sup> The registry's general popularity among Americans does not give the FTC free reign to revoke the rights of an individual who wants to hear the commercial speech offered by the telemarketers. This is probably the weakest of the FTC's four arguments.

One could find that the registry's popularity actually cuts against the need to amend it. The popularity of the registry illustrates two important points. First, it shows that Americans are aware of its existence. Second, it shows that registration is simple enough for ten million people to sign up in the first three days<sup>127</sup> and fifty million people to sign up within the first year.<sup>128</sup> This, in turn, demonstrates the minimal burden of registration. If fifty million people can sign up in less than a year, it is hard to buy the argument that requiring reregistration every five years is a burden too large to impose on consumers who do not want to receive commercial sales calls.

### V. CONCLUSION

After looking at the evolution of the national do-not-call registry, it is apparent that the registry originated as a method to protect an individual's privacy rights within his or her home. It required the individual to sign up for the registry, and to reiterate his or her desire not to be bothered within their home every five years. The recent changes, however, seem to take the registry in the direction of gradually stopping commercial sales calls altogether. The decision to abandon the five-year re-registration requirement raises a number of serious questions regarding the future of the registry.

As Americans, we greatly value our freedoms, particularly the freedom of speech, and the freedom to be let alone. There is no doubt that if an individual does not want to be bothered within his or her home, he or

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126. *See Id.* at 2 (estimating that seventy-six percent of American adults have signed up for the registry).

127. *Annual Report*, *supra* note 39, at para. 4.

128. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 358 F.3d 1228, 1245 (10th Cir. 2004).

she should be allowed that protection. However, we should not be so forceful in protecting that right that we block another's right to speak, or even hear speech that he or she so chooses. The registry has proven to be extremely popular, probably due in some part to the ease of registration. Considering the popularity, and the ease of registering (and re-registering, for that matter) does it really seem broken? The answer to that question is "no"; therefore, it does not seem that the registry needed to be repaired.

