

January 2005

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Recommended Citation

Jeffrey E. Santry, Mainstream Marketing Services v. FTC: Privacy Interests Trump Commercial Speech in Upholding the National Do-Not-Call Registry, 82 Denv. U. L. Rev. 559 (2005).

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Mainstream Marketing Services v. FTC: Privacy Interests Trump Commercial Speech in Upholding the National Do-Not-Call Registry

MAINSTREAM MARKETING SERVICES v. FTC: PRIVACY INTERESTS TRUMP COMMERCIAL SPEECH IN UPHOLDING THE NATIONAL DO-NOT-CALL REGISTRY

INTRODUCTION

On February 17, 2004, the Tenth Circuit Court of Appeals delivered an opinion that places privacy interests in the home above the constitutional protections commonly afforded to commercial speech. In *Mainstream Marketing Services, Inc. v. Federal Trade Commission*,¹ the court considered the constitutional validity of a government regulation prohibiting most commercial telemarketers from calling telephone numbers on a national list.²

The Do-Not-Call Implementation Act ("Do-Not-Call Act")³ represents a governmental intervention that paternalistically protects individual privacy against nongovernmental intrusions. The Do-Not-Call Act authorized the Federal Trade Commission ("FTC") to implement, enforce, and administer a national do-not-call registry.⁴ Additionally, the Do-Not-Call Act ordered the Federal Communications Commission ("FCC") to consult and coordinate with the FTC to maximize consistency in the do-not-call regulations of both government agencies.⁵ In *Mainstream Marketing*, the Tenth Circuit consolidated four cases from several jurisdictions challenging various aspects of the national do-not-call registry.⁶ Each challenge was refuted and the Do-Not-Call Act was upheld in its entirety.⁷ Since the Supreme Court denied certiorari for *Mainstream Marketing*,⁸ the constitutional validity of the Do-Not-Call Act has been affirmed, allowing a new means for individuals to prohibit commercial speech in their homes.

"We live in a remarkably commercialized culture, one that has constantly been changing but, for the moment, whose commercialization

1. 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 47 (2004).

2. See *Mainstream Mktg.*, 358 F.3d at 1232.

3. Do-Not-Call Implementation Act, 15 U.S.C.A. 6101 (2003).

4. *Id.*

5. *Id.* at § 4.

6. *Mainstream Mktg.*, 358 F.3d at 1236. Case No. 03-1429 is an appeal from the District of Colorado, which held that the FTC's do-not-call rules were unconstitutional on First Amendment grounds. *Id.* at 1236 n.9. Case No. 03-6258 is an appeal from the Western District of Oklahoma, which held that the FTC lacked statutory authority to enact its do-not-call rules. *Id.* Additionally, Case No. 03-9571 and Case No. 03-9594 regarding the Federal Communications Commission Order were reviewed pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342. *Id.* Case Nos. 03-1429, 03-6258, and 03-9571 involved First Amendment challenges. *Id.* at 1236. Case No. 03-9594 involved challenges to the Federal Communications Commission rule's "established business relationship exception" on administrative law grounds. *Id.*

7. *Id.* at 1236.

8. 125 S. Ct. 47 (2004).

seems inevitable.”⁹ Some ways of living are less commercialized than others, but the “cultural predominance of commercialism” is undeniable.¹⁰ However, at some point, the privacy of consumers becomes a greater concern for Congress than the constitutional protections of an advertiser’s commercial speech. This Article discusses the holding in *Mainstream Marketing*, focusing on the privacy interest of consumers and the commercial speech guarantees of telemarketers that are at odds with each other in this appeal.

Part I of this Article provides a background of the commercial speech protections and privacy interests that frame the constitutional challenges to the national do-not-call registry. Part II examines the Tenth Circuit’s decision in *Mainstream Marketing*. In this part, the legislative history and key aspects of the national do-not-call registry are discussed in detail. Part III provides a critical analysis of the Tenth Circuit’s opinion and Congress’s decision to promulgate legislation leading to the do-not-call registry. Additionally, Part III analyzes the implications toward television commercials in light of technological advances in telecommunications equipment, statutory initiatives directed toward Internet advertising, and the *Mainstream Marketing* holding. This part illustrates how technological advances resulting from convergence in the telecommunications industry could potentially be used for privacy regulations of television commercials at some time in the future. In conclusion, this Article asserts three things: (1) the Tenth Circuit correctly applied the law governing commercial speech regulations to the national do-not-call registry; (2) Congress should have let market forces deal with the privacy concerns of consumers; and (3) Congress’s choice to regulate should be cause for concern among broadcasters and video service providers.

I. BACKGROUND

A. *The First Amendment’s Protection of Commercial Speech*

The First Amendment of the Constitution secures the right of free speech to every individual.¹¹ The protection accompanying this right is afforded to both the speaker and its recipients.¹² While any speech may be regulated, the degree of judicial scrutiny that governmentally regulated speech must satisfy under the First Amendment usually depends on whether the speech “is classified as ‘commercial’ or ‘noncommercial’

9. R. GEORGE WRIGHT, *SELLING WORDS: FREE SPEECH IN A COMMERCIAL CULTURE* 13–14 (1997).

10. *Id.* at 14.

11. U.S. CONST. amend. I. (stating “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances”).

12. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976).

...¹³ “[R]egulation of political speech and other so-called ‘fully protected’ speech must survive strict constitutional scrutiny”¹⁴ However, commercial speech, when regulated, “has usually been subjected to . . . less rigorous” judicial scrutiny.¹⁵

Although a relatively new canon, speech that “propose[s] a commercial transaction” is protected by the First Amendment.¹⁶ In fact, the Supreme Court indicated that commercial speech may be more important to individuals than certain political speech.¹⁷ Additionally, our “predominantly free enterprise economy” actually makes commercial speech pertinent to the political process.¹⁸ The free flow of information, to which commercial speech largely contributes, serves to “enlighten public decisionmaking” in a democratic society.¹⁹ While commercial speech, like other varieties of speech, is protected under the Constitution, the Court has acknowledged that it may be regulated.²⁰

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*,²¹ the United States Supreme Court addressed the issue of when government may regulate commercial speech.²² In *Central Hudson*, the New York Public Service Commission ordered electrical utilities to “cease all advertising” designed to increase demand for electricity.²³ While enacted during a fuel crisis, the New York Public Service Commission sought to continue the order banning promotional advertising after “the fuel shortage had eased”²⁴ *Central Hudson Gas & Electric Corp.* opposed the continued banning of promotional advertising on First Amendment grounds.²⁵ The Court held that the “total ban on promotional advertising” violated *Central Hudson Gas & Electric Corp.*’s First

13. See P. CAMERON DEVORE & ROBERT D. SACK, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE §2:1 (perm. ed., release no. 4 2003).

14. *Id.* Strict scrutiny requires government to prove the regulation has a compelling interest that is directly advanced by the least restrictive means available. *Id.* (referring to *Reno v. Am. Civil Liberties Union*, 588 U.S. 844, 868 (1997)).

15. DEVORE & SACK, *supra* note 13, §2:1; see also *id.* §2:1, at 2–2 n.3 (noting a degree of “intermediate scrutiny” applied to government restrictions on commercial speech).

16. *Va. State Bd. of Pharmacy*, 425 U.S. at 762.

17. *Id.* at 763 (noting that a “particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate”).

18. *Id.* at 765. Spending in a free market society is largely “made through numerous private economic decisions.” *Id.* Therefore, it is a “matter of public interest that those decisions, in the aggregate, be intelligent and well informed.” *Id.* Product advertising, “however . . . excessive it sometimes may seem, is nonetheless dissemination of information.” *Id.* (emphasis added).

19. *Id.* (arguing that commercial speech passes even the most restrictive test, one which requires speech to enlighten public decision making in a democracy before being afforded constitutional protection).

20. *Id.* at 770.

21. 447 U.S. 557 (1980).

22. *Central Hudson*, 447 U.S. at 562–63.

23. *Id.* at 558. The order was based on the New York Public Service Commission’s findings that the utility system in New York State did not have sufficient reserves during a fuel shortage from 1973 to 1976 to meet customer demands. *Id.* at 559.

24. *Id.*

25. *Id.*

Amendment rights and reversed the New York Public Service Commission's order.²⁶

In striking down the New York Public Service Commission's order, the Supreme Court "purported to synthesize the rule of law established" in *Virginia State Board of Pharmacy* and later commercial speech decisions.²⁷ Traditionally, the Court had provided less constitutional protection to commercial speech than the protection afforded other types of expression because commerce in general is an area commonly subject to regulation by the government.²⁸ The constitutional guarantee that does exist is rooted in the First Amendment, which protects commercial speech to safeguard the "informational function of advertisement."²⁹ The extent of constitutional protection available to a "particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."³⁰

In *Central Hudson*, the Supreme Court established a four-part test to determine when the government may regulate commercial speech.³¹ The first element of the *Central Hudson* test is satisfied when the commercial speech sought to be regulated is indeed speech protected by the First Amendment.³² To be protected by the First Amendment, the speech in question must not be misleading or unlawful.³³ The second element of the *Central Hudson* test requires that the government "assert a substantial interest to be achieved" by the speech-banning regulation.³⁴

The third and fourth elements of the *Central Hudson* test "are designed to measure the appropriateness of the . . . regulation in relation to the government's substantial interest."³⁵ The third element of the test requires that the speech-banning regulation directly advance the governmental interest.³⁶ The regulation must do more than provide "only ineffective or remote support" for the government's asserted purpose.³⁷ The

26. *Id.* at 571-72. The Court noted that its holding did not consider the powers that a state may have over utility advertising in emergency situations. *Id.* at 572 n.15.

27. DEVORE & SACK, *supra* note 13, §3:12, at 3-26.

28. *Central Hudson*, 447 U.S. at 562-63.

29. *Id.* at 563 (emphasis added). While many advertisements communicate true but incomplete information, "the First Amendment presumes that some accurate information is better than no information at all." *Id.* at 562. Consequently, there can be no constitutional protection afforded to advertisements relating to unlawful activity or containing misleading information. *Id.* at 563.

30. *Id.* at 563.

31. See generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 11.3.7.3 (2d ed. 2002). The *Central Hudson* test is very similar, if not identical, to "intermediate scrutiny" in evaluating government regulation of truthful advertising. *Id.* The Tenth Circuit articulates the *Central Hudson* test as a three-part test presuming that the first element, only advertising that is not false or deceptive or of illegal activity may be protected, has been met. See *Mainstream Mktg.*, 358 F.3d at 1237.

32. *Central Hudson*, 447 U.S. at 563.

33. *Id.* at 566.

34. *Id.* at 564.

35. See HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW § 3.3.A (1999).

36. *Central Hudson*, 447 U.S. at 566.

37. *Id.* at 564.

fourth and final element of the *Central Hudson* test requires that the speech-banning regulation be narrowly tailored so it does not restrict more speech than necessary.³⁸ “[I]f the governmental interest [can] be served as well by a more limited restriction on commercial speech, [any] excessive restrictions cannot survive” under the First Amendment.³⁹ Essentially, the third and fourth elements of *Central Hudson* test require that a *reasonable* fit exists between the government’s objectives and the means it chooses to accomplish those ends.⁴⁰

B. Residential Privacy

“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”⁴¹ In contemporary American jurisprudence, the right of privacy is sacrosanct within one’s home.⁴² While often subject to unwanted speech in public, individuals enjoy the ability to avoid such intrusions within their own walls.⁴³ This special benefit, the ability to control unwanted speech within the home, is one that the government may protect on behalf of its citizens.⁴⁴

Privacy in the home “was originally conceptualized as a bulwark against the force of the state and is embodied in the Fourth Amendment”⁴⁵ The Fourth Amendment “guarantee[s] the right of the people to be secure in their ‘persons, houses, papers, and effects’ against unreasonable searches and seizures.”⁴⁶ The long history of privacy in one’s home from governmental intrusions “has evolved into a broader concept [of residential privacy] in which the home is [deemed] essential to one’s autonomy”⁴⁷

38. *Id.*

39. *Id.* However, the selected regulation need not be the least restrictive means available to advance the government’s interest. See CHEMERINSKY, *supra* note 31, § 11.3.7.3 (noting that Justice Scalia expressly rejected that the “least restrictive alternative test” be used in commercial speech regulations).

40. See *Central Hudson*, 447 U.S. at 564–65; see also CHEMERINSKY, *supra* note 31, § 11.3.7.3.

41. *Rowan v. United States Post Office*, 397 U.S. 728, 737 (1970).

42. See *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (stressing previous Supreme Court decisions had “repeatedly held that individuals are not required to welcome unwanted speech into their own homes”).

43. *Id.* at 484–85.

44. *Id.*

45. Brief of Amici Curiae of Undersigned Members of the United States Senate Committee on Commerce, Science, and Transportation § I.A, *Fed. Trade Comm’n v. Mainstream Mktg. Serv.*, 358 F.3d 1228 (10th Cir. 2004) (No. 03-1429) [hereinafter *Senate Committee Brief*].

46. *Id.* (citing U.S. CONST. amend. IV).

47. See *id.* The Senate Committee expresses this powerful privacy interest by quoting Judge Jerome Frank’s dissenting opinion in *United States v. On Lee*:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from

In *Frisby v. Schultz*,⁴⁸ the town of Brookfield, Wisconsin, enacted an ordinance making it unlawful for a person to picket at an individual's residence or dwelling.⁴⁹ The primary purpose of the ordinance was to "protect and preserve" the privacy in one's home.⁵⁰ Shultz and others, who were strongly opposed to abortion and wished to picket on a public street outside the Brookfield residence of a doctor who supposedly performed abortions, alleged that the ordinance violated the First Amendment.⁵¹

The Supreme Court first noted that "[t]he antipicketing ordinance operates at the core of the First Amendment" because it prohibits individuals from engaging in expression regarding "an issue of public concern."⁵² Next, the Court focused on the forum that the speaker sought to employ in order to ascertain what limits may be placed on the protected expression.⁵³ In finding that the streets of Brookfield are traditional public fora, the antipicketing ordinance was judged under the most "stringent standards" established for regulations on speech.⁵⁴

The Court determined that the antipicketing ordinance enacted by Brookfield was narrowly tailored, served a significant government interest, and left open "ample alternative channels of communication"⁵⁵ First, the Brookfield ordinance was narrowly tailored to protect unwilling listeners because the picketing ban was specifically directed "at the

public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Id. But cf., Lee C. Milstein, Fortress of Solitude or Lair of Malevolence? Rethinking the Desirability of Bright-Line Protection of the Home, 78 N.Y.U. L. REV. 1789, 1791 (2003) (arguing that declaring scanning activity unconstitutional when it targets a specific area like the home indicates a problematic scheme for identifying unconstitutional searches and should be permitted when little or no intrusion to the individual occurs).

48. 487 U.S. 474 (1988).

49. *Frisby*, 487 U.S. at 474.

50. *Id.*

51. *Id.* at 474, 476.

52. *Id.* at 479. However, the Court qualified that "even protected speech is not equally permissible in all places at all times." *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985)).

53. *Id.* The Court has identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* at 479-80 (quoting *Cornelius*, 473 U.S. at 802). The standards by which limitations on protected expression must be evaluated differ depending on type of forum at issue. *Id.* at 479 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)).

54. *Id.* at 481. "The appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content." *Id.* The Court determined that the antipicketing ordinance was content neutral. *Id.* at 482. Therefore, the appropriate test was to determine "whether the ordinance was 'narrowly tailored to serve a significant government interest' and whether it 'leave[s] open ample alternative channels of communication,'" as opposed to the test for content-based regulations, which would have required the ordinance to be necessary to serve a compelling government interest that is narrowly drawn to achieve that end. *Id.* at 481-82 (citing *Perry Educ. Ass'n*, 460 U.S. at 45).

55. *Id.* at 488.

household, not the public.”⁵⁶ Second, the Court noted that the governmental “interest in protecting the well-being, tranquility, and privacy of the home” is certainly significant as it is “of the highest order in a free and civilized society.”⁵⁷ An “important aspect of residential privacy” is the government’s role in protecting unwilling listeners from unwanted speech in the comfort of their homes.⁵⁸ Although expected to simply avoid speech in many locations, individuals do not have to bear that burden at home.⁵⁹ Third, ample channels of communication were left open because the Brookfield ordinance uses the singular form of the words “residence” and “dwelling” indicating that “the ordinance is intended to prohibit only picketing” targeted at a particular residence.⁶⁰ General dissemination of a message was still permissible under the antipicketing ordinance since protestors had not been barred from the streets of the residential neighborhoods.⁶¹ Thus, the Court concluded, the facial challenge to the antipicketing ordinance failed because the elements required for a constitutionally valid content-neutral regulation speech were met.⁶²

In *Frisby*, the Supreme Court declared that “[t]here simply is no right to force speech into the home of an unwilling listener.”⁶³ This principle of privacy in the home is “reflected even in prior decisions in which [the Court] invalidated complete bans on expressive activity”⁶⁴ Therefore, when the regulatory method to control unwanted speech

56. *Id.* at 485–86 (emphasis added). The Court noted that a complete ban can be narrowly tailored only if each activity within the proscription’s scope is appropriately targeted at the exact source of “evil” sought to be remedied. *Id.* at 485.

57. *Id.* at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)).

58. *See id.*

59. *See id.*

60. *Id.* at 482.

61. *Id.* at 483–84. The traditional public fora of the residential streets and sidewalks are open to protestors, alone or in groups, should they (1) go marching, (2) go door-to-door to proselytize their views, (3) distribute literature door-to-door or by mail, or (4) contact residents by telephone. *Id.* at 484.

62. *See id.* at 488.

63. *Id.* at 485. *But see* Fred H. Cate & Robert Litan, *Constitutional Issues In Information Privacy*, 9 MICH. TELECOMM. & TECH. L. REV. 35, 49 (2002), available at <http://www.mttlr.org/volnine/Cate-Litan.pdf> (stating that many times the Court has upheld the right to speak irrespective of the asserted privacy right) (last visited Mar. 31, 2005).

The First Amendment is . . . also a significant restraint on the government’s power to restrict the publication or communication of information. The Supreme Court has decided many cases in which individuals sought to stop, or obtain damages for, the publication of private information, or in which the government restricted expression in an effort to protect privacy. Virtually without exception, the Court has upheld the right to speak or publish or protest under the First Amendment, to the detriment of the asserted privacy interest. For example, the Court has rejected privacy claims by unwilling viewers or listeners in the context broadcasts of radio programs in city streetcars, R-rated movies at a drive-in theater, [as well as] . . . [striking] down ordinances that would require affirmative opt-in consent before receiving door-to-door solicitations, Communist literature, or even “patently offensive” cable programming.

Id. (footnotes omitted).

64. *Frisby*, 487 U.S. at 485; *see, e.g., Martin v. Struthers*, 319 U.S. 141, 146–47 (1943) (noting that when the door-to-door ban enacted by the city of Struthers was invalidated, it was done on the basis that the home owners could protect themselves from such intrusions by placing an appropriate no-solicitation sign on their doors).

within the home does not involve a complete ban, it is more likely to be constitutionally valid.⁶⁵

II. *MAINSTREAM MARKETING SERVICES, INC. v. FEDERAL TRADE COMMISSION*⁶⁶

In *Mainstream Marketing*, a consolidated appeal of four cases,⁶⁷ the Tenth Circuit Court of Appeals reversed the lower court decisions and held that the national do-not-call registry validly regulated commercial speech.⁶⁸ The Tenth Circuit determined that the Do-Not-Call Act “directly advance[ed] the government’s important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech.”⁶⁹ In terms of the *Central Hudson* test, there was a “reasonable fit between the do-not-call regulations and the government’s reasons for enacting them.”⁷⁰

A. *Facts and Procedural History*

Telemarketing companies provide work for “roughly 5.4 million persons in the United States” and generate approximately “\$275 billion dollars annually”⁷¹ For-profit and non-profit organizations, such as commercial corporations, religious groups, charities, and political parties, “generate revenue by calling individuals in their homes and soliciting sales and donations.”⁷² Most of these organizations hire “telemarketing companies that operate call-centers to make solicitations on their behalf.”⁷³ Congress recognized that the large growth in telemarketers, in conjunction with new telecommunications technologies that permitted telemarketing companies to make a greater volume of calls, raised residential privacy concerns for telephone consumers.⁷⁴ Further, “[s]tudies presented to the Senate Committee on Commerce, Science, and Transportation indicated that only 0.1% of the population likes to receive

65. See *Frisby*, 487 U.S. at 485; see also *supra* text accompanying note 56.

66. 358 F.3d 1228 (10th Cir. 2004).

67. *Mainstream Mktg.*, 358 F.3d at 1232.

68. *Id.* at 1232–33. Judge Ebel also held that (1) the annual access fees that telemarketers were required to pay were a “permissible regulatory measure” to offset projected administrative expenses; (2) the FCC had not acted in an “arbitrary and capricious manner in adopting the established business relationship exception” to the national do-not-call registry; and (3) the FTC had “statutory authority to promulgate” the Do-Not-Call Act regulations. *Id.* at 1248, 1250.

69. *Id.* at 1233.

70. See *id.*

71. *Mainstream Mktg. Services, Inc. v. FTC*, 283 F. Supp. 2d 1151, 1154 (D. Colo. 2003), *rev’d*, 358 F.3d 1228 (10th Cir. 2004). These employment and revenue figures were accurate prior to the Tenth Circuit’s opinion upholding the national do-not-call registry.

72. *Id.*

73. See *id.* at 1154–55.

74. James Sweet, *Opting-Out Of Commercial Telemarketing: The Constitutionality Of The National Do-Not-Call Registry*, 70 TENN. L. REV. 921, 931 (2003).

unsolicited telephone" calls, and many consumers favor some regulation of these unsolicited calls.⁷⁵

Congress was particularly concerned with the privacy issues raised by commercial telemarketers because the record "d[id] not contain sufficient evidence to demonstrate that calls from [charitable and political] organizations should be subject to the restrictions provided for under the bill."⁷⁶ The report proffered by the House Committee included statistics compiled by the National Association of Consumer Agency Administrators which indicated that the "vast majority of complaints [were] about commercial telephone solicitations."⁷⁷ Because the record before Congress suggested that "most unwanted telephone solicitations [were] commercial in nature[.]" Congress found consumer-based support to treat commercial telephone solicitations and charitable and political solicitations differently under its do-not-call regulations.⁷⁸

In response to these consumer concerns, Congress first passed the Telephone Consumer Protection Act of 1991 ("TCPA"), which gave the FCC authority to enact rules to limit the telemarketing sales calls that many telephone subscribers consider an "intrusive invasion of privacy."⁷⁹ "The purpose of the bill . . . is to protect residential telephone subscriber privacy rights by restricting certain commercial solicitation and advertising uses of the telephone and related telecommunications equipment."⁸⁰ Finding the TCPA regulations insufficient, Congress passed the Do-Not-Call Act, which directed the FTC and FCC to promulgate rules that created the national do-not-call registry.⁸¹ This registry is the result of a regulatory effort spanning thirteen years aimed at protecting the privacy rights of consumers.⁸²

The national do-not-call registry is a database containing the telephone numbers of individuals who "do not wish to receive unsolicited

75. Sweet, *supra* note 74, at 932. Although such studies lend support Congress' decision to regulate telemarketers' unsolicited calls, whether the general population likes or dislikes a certain kind of speech is not a persuasive argument in favor of regulation. In fact, the Supreme Court has stated that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). A poll of Texas citizens with respect to flag burning regulations would likely result in similar, if not stronger, support for such a government intervention.

76. Sweet, *supra* note 74, at 932 (quoting the House Committee on Energy and Commerce in H.R. REP. NO. 102-317, at 16).

77. *Id.* The House Committee additionally noted that "noncommercial telephone solicitations [were] more expected, and that noncommercial speech was 'core' First Amendment speech." *Id.* at 933.

78. See *id.* at 932 (quoting the House Committee on Energy and Commerce in H.R. REP. NO. 102-317, at 16).

79. *Mainstream Mktg.*, 358 F.3d at 1235.

80. H.R. REP. NO. 102-317, at 5 (1991). The bill "is designed to return a measure of control to . . . individual residential telephone customers[.]" not "to make all unsolicited telemarketing . . . illegal." *Id.* at 6.

81. *Mainstream Mktg.*, 358 F.3d at 1233-34.

82. *Id.* at 1235.

calls from commercial telemarketers.”⁸³ Once an individual has placed his or her telephone number on the national do-not-call registry, “[c]ommercial telemarketers are generally prohibited from calling” that individual’s telephone number.⁸⁴ By the time this case came before the Tenth Circuit, approximately 50 million telephone numbers had been placed on this registry.⁸⁵ To fund the associated administrative costs of the do-not-call regulations, each commercial telemarketer must pay an annual access fee.⁸⁶

The lead plaintiff in the case, Mainstream Marketing Services, Inc. (“Mainstream”),⁸⁷ filed a complaint in United States District Court for the District of Colorado, seeking an injunction prohibiting the FTC’s application and enforcement of the do-not-call regulations that were to go into effect on October 1, 2003.⁸⁸ Mainstream alleged, *inter alia*, that the national do-not-call registry violated the First Amendment because it unconstitutionally targets commercial speech by telemarketers, but it does not apply to charitable and political callers.⁸⁹ Mainstream asserted that the First Amendment does not permit the FTC “to impose regulations that discriminatorily restrict commercial speech in order to serve an asserted interest *unrelated* to the commercial nature of the speech.”⁹⁰ The district court held that the FTC regulations relating to the do-not-call registry violated the First Amendment’s protection of free speech because the rules created an impermissible content-based distinction between different categories of speech.⁹¹ Because the do-not-call registry created a burden on the speech of commercial telemarketers “without a logical, coherent privacy-based or prevention-of-abuse-based reason

83. *Id.* at 1234.

84. *Id.* Telemarketers are only “generally prohibited from calling telephone numbers” on the national do-not-call registry because they “may call consumers who have signed up for the national registry if [the seller for whom the telemarketer represents] has an established business relationship with the consumer or if the consumer has given that seller express written permission to call.” *Id.* (emphasis added).

85. *Id.*

86. *Id.* Currently, the annual national do-not-call registry fee is \$25 per area code of telephone number data. *Id.* at 1246. However, “the first five area codes are provided free of charge and the maximum annual fee is capped at \$7,375.” *Id.* at 1246–47.

87. *Mainstream Mktg.*, 283 F. Supp. 2d at 1155. Other co-plaintiffs include TMG Marketing, another telemarketing company, and the American Teleservices Association, a national non-profit association of telemarketing companies which represent its members’ commercial interests and engages in self-regulation of the telemarketing industry. *Id.*

88. *Id.* at 1156. The initial complaint was filed on January 29, 2003. *Id.* at 1158. On February 28, 2003, Mainstream Marketing Services filed a motion for a preliminary injunction which was subsequently withdrawn after filing their motion for summary judgment on May 23, 2003. *Id.* On August 5, 2003, the complaint was amended to state claims against the FTC based on the new do-not-call registry fees. *Id.*

89. *Mainstream Mktg.*, 358 F.3d at 1238.

90. *See* Reply to Opp’n to Pet. for a Writ of Cert. at 1, *Mainstream Mktg. Services, Inc. v. FTC*, 125 S. Ct. 47 (No. 03-1552) (2004) (emphasis added). Mainstream Marketing Services argues that the do-not-call regulations should not be evaluated under *Central Hudson*, but rather “evaluated under the standards applicable to regulations of fully protected speech.” *Id.* (quoting *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 436 (1993) (Blackmun, J., concurring)).

91. *Mainstream Mktg.*, 283 F. Supp. 2d at 1168.

supporting the disparate treatment” of the speech of charitable and political telemarketers, the district court concluded that the speech-banning regulations failed the third element of the *Central Hudson* test requiring that the government regulation directly and materially advance the substantial government interest.⁹²

B. Decision

The Tenth Circuit Court of Appeals reversed the district court’s holding.⁹³ The Tenth Circuit held that First Amendment requirements for banning commercial speech under the *Central Hudson* test were satisfied because the do-not-call registry (1) restricted “only core commercial speech[,]” (2) targeted “speech that invades the privacy of the home,” (3) was an “opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers[,]” and (4) “materially further[ed] the government’s interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy [by] blocking a significant number of the calls that cause these problems.”⁹⁴ Further supporting the constitutionality of the FTC’s regulations, Judge Ebel noted:

A number of additional features of the national do-not-call registry, although not dispositive, further demonstrate that the list is consistent with the First Amendment rights of commercial speakers. The challenged regulations do not hinder any business’ ability to contact consumers by other means, such as through direct mailings or other forms of advertising. Moreover, they give consumers a number of different options to avoid calls they do not want to receive. Namely, consumers who wish to restrict some but not all commercial sales calls can do so by using company-specific do-not-call lists or by granting some businesses express permission to call. In addition, the government chose to offer consumers broader options to restrict commercial sales calls than charitable and political calls after finding that commercial calls were more intrusive and posed a greater danger of consumer abuse. The government also had evidence that the less restrictive company-specific do-not-call list did not solve the problems caused by commercial telemarketing, but it had no comparable evidence with respect to charitable and political fundraising.⁹⁵

Just as a homeowner “can avoid door-to-door peddlers by placing a ‘No Solicitation’ sign in his or her front yard,” the national do-not-call registry offers individuals a tool with which they can protect their homes

92. *Id.*

93. *Mainstream Mktg.*, 358 F.3d at 1251. The constitutionality of the national do-not-call registry and its fees under the First Amendment were reviewed de novo by the court of appeals. *Id.* at 1236.

94. *Id.* at 1233.

95. *Id.*

against intrusions that Congress has determined to be particularly invasive.⁹⁶

The national do-not-call regulations are content-based restrictions on commercial speech.⁹⁷ To determine whether the national do-not-call registry was a valid regulation of commercial speech, the circuit court applied the *Central Hudson* test.⁹⁸ Further, the circuit court noted that "[t]he government bears the burden of asserting one or more substantial governmental interests and demonstrating a reasonable fit between those interests and the challenged regulation."⁹⁹ However, the "government is not limited in the evidence it may use to meet its burden[.]" and the national do-not-call registry could "be justified by anecdotes, history, consensus, or simple common sense."¹⁰⁰

Applying the First Amendment's protection to only truthful telemarketing calls,¹⁰¹ the circuit court bypassed the first element of the *Central Hudson* test. The circuit court determined that the government-asserted interests in protecting the "privacy of individuals in their homes" and "protecting consumers against the risk of fraudulent and abusive solicitation" were substantial and justified.¹⁰² Supreme Court cases involving residential privacy have repeatedly recognized that the government's "interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order . . ."¹⁰³ Additionally, the Court has recognized a substantial governmental interest in "preventing abusive and coercive sales practices."¹⁰⁴ Thus, the circuit court concluded that either government-asserted interest "undisputedly" met the second element of the *Central Hudson* test.¹⁰⁵

Moving to the third and fourth elements of the *Central Hudson* test, the circuit court analyzed whether a "reasonable fit" existed between the national do-not-call registry and the governmental interests, "privacy and consumer protection interests[.]" which were advanced on behalf of indi-

96. *Id.*

97. *Id.* at 1236.

98. *Id.* The *Central Hudson* test is perhaps most difficult to apply when the government "seeks to regulate truthful, nondeceptive advertising of legal activities in order to achieve other goals." CHEMERINSKY, *supra* note 31, § 11.3.7.7, at 896. In each instance where the government determines it necessary to regulate commercial speech, the restrictions are based on the premise "that people will be better off with less information." *Id.* This concept is seemingly "at odds with the very core of the First Amendment." *Id.*

99. *Id.* at 1237 (citing Utah Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1069 (10th Cir. 2001)).

100. *See id.* (citing Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)).

101. *See supra* note 31.

102. *Mainstream Mktg.*, 358 F.3d at 1237.

103. *Id.* at 1237-38. The court noted that the Supreme Court has stressed the unique nature of the home and the heightened privacy that exists in the confines of one's home. *Id.* (citing *Frisby v. Schultz*, 487 U.S. 474 (1988); *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970)).

104. *Id.* at 1238 (citing *Edenfield v. Fane*, 507 U.S. 761, 768-69 (1993)).

105. *Id.* at 1237.

viduals who are telephone consumers.¹⁰⁶ Unlike the district court, the Tenth Circuit Court of Appeals concluded that the national do-not-call registry was a reasonable fit because it directly advanced the governmental interests and was narrowly tailored.

The circuit court addressed the telemarketers' argument that the national do-not-call registry is "unconstitutionally underinclusive because [it] does not apply to charitable and political solicitations."¹⁰⁷ The circuit court stressed that "First Amendment challenges based on underinclusiveness face an uphill battle in the commercial speech context."¹⁰⁸ As a matter of common sense, the government cannot be required to "regulate all aspects of a problem before it can make progress on any front."¹⁰⁹ "The underinclusiveness of a *commercial speech regulation* is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further."¹¹⁰ In *City of Cincinnati v. Discovery Network*,¹¹¹ the Supreme Court "struck down a law prohibiting commercial newsracks on public property, purportedly to promote the safety and attractive appearance of its streets and sidewalks."¹¹² The key factual distinction between *Mainstream Marketing* and *Discovery Network* was the effectiveness of the two government regulations.¹¹³ The commercial speech ban in *Discovery Network* applied to "only 62 of the 1,500 to 2,000 newsracks in the city, thus addressing only a 'minute' and 'paltry' share of the problem" that the government asserted it was attempting to remedy.¹¹⁴

In stark contrast, the national do-not-call registry goes to the root of the problem and directly advances the government goal "to reduce intrusions into personal privacy and the risk of telemarketing fraud and abuse that accompany unwanted telephone solicitation."¹¹⁵ While the do-not-call list will not block every unwanted call into the home, a substantial number of unwanted calls will be prohibited by the regulation.¹¹⁶ The circuit court concluded that the national do-not-call registry satisfied the third element of the *Central Hudson* test proclaiming that it is "difficult

106. *Id.* at 1238.

107. *See id.*; *see also* Brief For The Respondent In Opposition at 17, *Mainstream Mktg.* (No. 03-1552) (noting that Mainstream Marketing Service's arguments were mischaracterized as only indicating that the do-not-call registry was "fatally underinclusive").

108. *Mainstream Mktg.*, 358 F.3d at 1238.

109. *Id.* (citing *United States v. Eagle Broad. Co.*, 509 U.S. 418, 434 (1993)). In *Eagle Broad.*, the Supreme Court stated that "[w]ithin the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Eagle Broad.*, 509 U.S. at 434.

110. *Mainstream Mktg.*, 358 F.3d at 1238-39 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (emphasis added)).

111. 507 U.S. 410 (1993).

112. *Mainstream Mktg.*, 358 F.3d at 1239.

113. *See id.*

114. *Id.*

115. *Id.* at 1240.

116. *Id.*

to fathom how the registry could be called an 'ineffective' means of stopping invasive or abusive calls, or a regulation that 'furnish[es] only speculative or marginal support' for the government's interests."¹¹⁷

Next, the circuit court addressed the fourth element of the *Central Hudson* test. A commercial speech regulation is narrowly tailored if it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation."¹¹⁸ Recognizing that the government was not required to use the least restrictive means available, the circuit court considered whether "numerous and obvious alternatives" existed that would limit less speech while serving the "government's interest as effectively" as the national do-not-call registry.¹¹⁹

The fourth element of the *Central Hudson* test was met because the national do-not-call registry did not regulate more constitutionally protected speech than necessary.¹²⁰ The circuit court noted that the national do-not-call registry "restrict[ed] only calls that were targeted at unwilling listeners."¹²¹ The national do-not-call registry prohibited telemarketing calls that were commercial in nature intended for individuals who have "affirmatively indicated that they do not want to receive such calls" in their homes and "for whom such telemarketing calls would constitute an intrusion of their privacy."¹²² Focusing on the opt-in feature of the national do-not-call registry, the circuit court commented that the "Supreme Court had repeatedly held that speech regulations based on private choice . . . are less restrictive than laws that prohibit speech directly."¹²³ In fact, the Court has often reasoned that an opt-in version of a regulation is a way to show that the law in question was not narrowly tailored.¹²⁴

In sum, the national do-not-call registry was a reasonable fit between the government's means and ends because the government's interests were advanced by effectively blocking a significant number of the calls that cause the problems the government sought to redress, and the government did not suppress an excessive amount of speech because the opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener.¹²⁵

117. *Id.*

118. *Mainstream Mktg.*, 358 F.3d at 1240 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

119. *Id.*

120. *Id.*

121. *Id.* (emphasis added).

122. *Id.* (citing *Hill v. Colo.*, 530 U.S. 703, 716-17 (2000)).

123. *Id.*

124. *Mainstream Mktg.*, 358 F.3d at 1240. The court also discusses *Martin v. City of Struthers*, 319 U.S. 141, 147-49 (1943), explaining that there "the Court struck down a city ordinance prohibiting door-to-door canvassing" by reasoning "that the government's interest could have been achieved in a less restrictive manner by giving householders the choice of whether or not to receive visitors."

Id.

125. *Id.*

III. CRITICAL ANALYSIS

In *Mainstream Marketing*, the Tenth Circuit elevated privacy interests in the home to a powerful fundamental right, which can easily trump the constitutional protections courts commonly afford to commercial speech. While the Tenth Circuit's analysis focused primarily on demonstrating that the national do-not-call registry was a valid regulation of commercial speech, *Mainstream Marketing* speaks volumes toward the value placed on privacy in the home. The commercial speech proscribed by the do-not-call registry is substantial.¹²⁶ A victory over a significant commercial enterprise, like the telemarketing industry, shows exactly how strong of a constitutionally protected right privacy in the home has become.¹²⁷ After *Mainstream Marketing*, one's home has almost become sovereign territory into which neither government nor the private sector may enter.

A. The Tenth Circuit's Decision Was a Correct Analysis of Commercial Speech Regulations Involving Telecommunications

Mainstream Marketing was a case of first impression with relation to the First Amendment commercial speech rights of telemarketers. However, other circuit courts have upheld similar telecommunications regulations.¹²⁸ As telecommunications advertising grew exponentially in the 1990s, a variety of regulations were enacted, aimed at regulating the use of rapidly evolving media technology.¹²⁹

In *Missouri v. American Blast Fax, Inc.*,¹³⁰ the Ninth Circuit Court of Appeals concluded that the TCPA provision banning unsolicited fax

126. The do-not-call list not only prohibits a "significant number of commercial sales calls, but also a significant percentage of all calls causing the problems that Congress sought to address (whether commercial, charitable or political)." *Mainstream Mktg.*, 358 F.3d at 1240 (emphasis added to *significant*). "[A]bsent the do-not-call registry, telemarketers would call consumers who have already signed up for the registry an estimated total of 6.85 billion times each year." *Id.*

127. See discussion *supra* Part I.B; see also Michael E. Shannon, Note, *Combating Unsolicited Sales Calls: The "Do-Not-Call" Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 381, 384 (2001) (stating that "reasonable regulation of telemarketing . . . is unlikely to trigger intense constitutional debate" because the "courts have consistently held that an individual's privacy" rights are at the highest in the home).

128. *Mainstream Mktg.*, 358 F.3d at 1246 n.13. The Tenth Circuit specifically points out the Ninth Circuit decisions in *Destination Ventures, Ltd v. FCC.*, 46 F.3d 54 (9th Cir. 1995), and *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995), as consistent with the Tenth Circuit's holding in *Mainstream Mktg. Id.* In both cases, the Ninth Circuit concluded that provisions of the TCPA, the ban on fax advertising in *Destination Ventures* and the prerecorded voice machines in *Moser*, did not violate the First Amendment even though noncommercial speech was causing the same problems as commercial speech. *Destination Ventures*, 46 F.3d at 57; *Moser*, 46 F.3d at 974. The Ninth Circuit indicated that the First Amendment did not require the government to "make progress on every front before it can make progress on any front." *Moser*, 46 F.3d at 974 (quoting *Edge Broad. Co.*, 509 U.S. at 434). Further, the Tenth Circuit identified the Eighth Circuit decision in *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003), as a similarly consistent holding. *Mainstream Mktg.*, 358 F.3d at 1246 n.13.

129. See generally DEVORE & SACK, *supra* note 13, §11:3.

130. 323 F.3d 649 (8th Cir. 2003).

advertisements satisfied the *Central Hudson* test.¹³¹ American Blast Fax, Inc. and Fax.com ("fax companies") provided promotional services for their clients by transmitting advertisements to fax machines of potential customers.¹³² "In response to numerous consumer complaints, [the state of] Missouri sought injunctions and civil penalties against the [fax] companies," alleging that they had violated § 227(b)(1)(C) of the TCPA provision making it unlawful to send unsolicited fax advertisements.¹³³

The fax companies argued that § 227(b)(1)(C) of the TCPA was an unconstitutional restriction on their freedom of speech.¹³⁴ The lower court decided that the legislative record was insufficient to decide the constitutional questions.¹³⁵ After the court ordered an evidentiary hearing and granted the intervention to the United States government, evidence indicated that unsolicited fax advertising shifts costs to the recipients who are forced to contribute ink, paper, wear and tear on their fax machines, as well as personnel time to deal with the unsolicited faxes.¹³⁶ Further, the evidence showed that fax advertisements interfered with the recipient's use of their fax machines by preempting the telephone line used by the fax machine for the time it takes to receive the unsolicited message.¹³⁷

The lower court believed that there was not a substantial governmental interest in restricting unsolicited fax advertising.¹³⁸ Further, even if a substantial governmental interest could be reasoned, the court concluded that the § 227(b)(1)(C) restriction would neither "materially alleviate the asserted harm" nor was the restriction "sufficiently narrow."¹³⁹ Finding that the restriction on commercial speech was unconstitutional under the *Central Hudson* test, the lower court dismissed the action brought by Missouri and the United States.¹⁴⁰ The Eighth Circuit Court of Appeals reversed the lower court's holding that § 227(b)(1)(C) of the TCPA violated the First Amendment.¹⁴¹

The Eighth Circuit found that the government had a substantial interest in restricting unsolicited fax advertisements and need not support its assertions with empirical studies at trial.¹⁴² Because the commercial and noncommercial content was relevant to the asserted governmental

131. *Am. Blast Fax*, 323 F.3d at 660.

132. *Id.* at 652.

133. *Id.* (citing 47 U.S.C. § 227(b)(1)(C)).

134. *Id.*

135. *Id.*

136. *Am. Blast Fax*, 323 F.3d at 652.

137. *Id.*

138. *Id.* at 653 (noting that "empirical data on costs or evidence that the majority of unsolicited fax advertis[ing] involved commercial speech" was missing).

139. *See id.*

140. *Id.*

141. *Id.*

142. *Id.* at 655.

interest, the Eight Circuit distinguished the instant case from *Discovery Network*.¹⁴³ Both the purpose behind proscribing commercial speech and the magnitude of commercial speech as compared to noncommercial speech being proscribed were key facts relevant to the goal of reducing the costs and interference associated with unwanted faxes.¹⁴⁴

In *American Blast Fax*, a complete ban on unsolicited fax advertising was upheld. In contrast, the national do-not-call registry at issue in *Mainstream Marketing* provides an opt-in feature that permits individuals to determine whether or not they wish to ban the commercial speech of telemarketers. The less restrictive regulatory scheme of the national do-not-call registry allows this commercial speech proscription to "easily satisfy" the *Central Hudson* test.¹⁴⁵ Unless the most absurd rationale is provided for a given regulation,¹⁴⁶ the *Central Hudson* test provides almost no First Amendment protection for commercial speakers when individuals, not the government, choose whether to receive the commercial speech.

B. The Problem Addressed by the National Do-Not-Call Registry Should Have Been Left to Market Forces

Irrespective of the constitutional validity of the national do-not-call registry, this government act was superfluous because market forces were in place to solve the same problem as the legislation. The problem that the government sought to remedy was the multitude of annoying calls made by telemarketers to individual's homes.¹⁴⁷ Telephone service providers had created products like Caller ID, which allows consumers to see the number of the caller before they answer the phone, and even more specialized privacy-centric products to solve this same problem of intrusive telemarketing calls.¹⁴⁸ "Public policymakers in the regulatory and legislative arenas have a variety of choices for the telecommunications industry ranging from a total reliance on market forces at one end

143. *Id.*

144. *Id.* at 656.

145. See Brief for Respondent in Opposition at 13–14, *Mainstream Mktg. Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (No. 03-1552). The FTC highlighted that the do-not-call regulations differ significantly from the kinds of laws typically at issue in First Amendment cases because they do not establish a government-imposed ban on speech that some individuals may wish to hear, but rather establish a framework to enforce consumer's own choices about commercial speech and privacy in their own homes. *Id.* Understood in this manner, the do-not-call regulations easily satisfy the standard established in *Central Hudson*. *Id.* at 14.

146. See e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 436 (1993) (striking down a local ordinance prohibiting 62 commercial newsracks out of 1,500 to 2,000 total newsracks for the alleged reason of reducing litter).

147. See *Mainstream Mktg.*, 358 F.3d at 1235; see also Sweet, *supra* note 74, at 922. While both protecting privacy rights of consumers and curbing the risk of telemarketing abuse are identified as the two goals of the national do-not-call registry, stopping telemarketing calls from reaching individuals ostensibly eliminates any possibility of fraud associated with those calls.

148. See e.g., Brian Quinton, *Ameritech Declares War On Telemarketers: Caller ID Feature Lets Customers Turn Away Callers*, TELEPHONY, Sept. 28, 1998, at *1.

of the spectrum to continued reliance on invasive government regulation at the other."¹⁴⁹

Faced with customer dissatisfaction regarding the increasing number of unsolicited telemarketing calls received, telephone service providers designed enhanced services to address the growing problem.¹⁵⁰ For example, Privacy Manager, a feature that compelled callers from blocked or unidentified numbers to identify themselves or have their call rejected, was a product resulting from additional customer demand for privacy.¹⁵¹ By working in tandem with the Caller ID service, unidentified incoming calls were intercepted before they could ring through.¹⁵² The operation of this feature would work to block *all* telemarketers,¹⁵³ not just commercial telemarketers as the national do-not-call registry does.¹⁵⁴

Given that market forces existed, why did Congress proceed with the Do-Not-Call Act? Congress may have believed that the market forces were insufficient, or perhaps their directive was aimed at garnering goodwill from the public and ensuring continued political telemarketing activity.¹⁵⁵ Because consumers are more likely to choose the free

149. William R. Drexel, *Telecom Public Policy Schizophrenia: Schumpeterian Destruction Versus Managed Competition*, 9 VA. J.L. & TECH. 5, 117 (2004) (discussing regulatory efforts in the context of promoting competition between telecommunications carriers).

150. See Quinton, *supra* note 148, at *1.

151. See *id.* "Privacy Manager" is a feature typical of all major telecommunications providers, and privacy-related products are still offered by the major telephone service providers. SBC offers Privacy Manager, Verizon offers Call Intercept, Bell South offers Privacy Director, and Qwest offers Caller ID with Privacy. Privacy Manager, at http://www01.sbc.com/Products_Services/Residential/ProdInfo_1/1_97--6-3-0,00.html (last visited Jan. 27, 2005); Call Intercept, at <http://www22.verizon.com/foryourhome/sas/ProdDesc.asp?ID=6063&state=NY&CategoryID=93> (last visited Jan. 27, 2005); Privacy Director, at <http://www.bellsouth.com/apps/ipc/ICReqDispatcher?userEvent=displaySearchDetailsEvent&offerGroupId=145&segmentId=2> (last visited Jan. 27, 2005); Caller ID with Privacy, at <http://pcat.qwest.com/pcat/productDetail.do?salesChannel=Residential&offerId=6615> (last visited Jan. 27, 2005).

152. Quinton, *supra* note 148, at *1. When a customer with the service receives incoming calls, a recording asked the callers to state their name. *Id.* at *2. If the caller complied, the call was completed, told the customer who was calling, and gave the customer the option to (1) accept the call, (2) reject it politely, or (3) play a recording that explained that the customer did not accept telemarketing calls and wanted to be placed on the telemarketer's company specific "do-not-call" list. *Id.*

153. See *id.* at *2.

154. *Mainstream Mktg.*, 358 F.3d at 1240, 1246. Company-specific do-not-call lists remain for individuals to block to for charitable and political telemarketing calls, although the FTC indicated that the company-specific lists were ineffective in the commercial context.

155. Acknowledging this likely inference, the Senate Committee on Commerce, Science, and Transportation addressed this in its Amicus Curie Brief:

Do-Not-Call is not some newfangled concept rushed into regulation on an impulsive political tide. It is rather a concept that has evolved over time, as Congress and two federal agencies have labored to balance the compelling societal interest in the protection of the privacy of the home with the free speech interests of telemarketers. Congress in 1991 passed the Telephone Consumer Protection Act, 47 U.S. § 227 ("TCPA"). The law was enacted "to protect residential telephone subscribers' privacy rights to avoid telephone solicitations to which they object." The FCC was directed to promulgate regulations that restricted the use of automatic telephone dialing systems.

....

The FTC exempted charitable organizations from the do-not-call requirements. The FTC made this exception partly in deference to the heightened First Amendment protection afforded to charitable speech. The FTC also found that abusive telemarketing practices of

national do-not-call registry over privacy features for which service providers charge a fee,¹⁵⁶ Congress ensured that political and charitable contributions from individuals remained unaffected by the regulation.

There is no questioning the efficacy of the national do-not-call registry,¹⁵⁷ and the national do-not-call registry arguably resolved the problem of excessive and annoying telemarketing calls quicker than would have market forces. However, leaving the problem of annoying telemarketing calls to market forces in the telecommunications industry would have been a better solution than implementing a paternalistic regulation.¹⁵⁸ The Do-Not-Call Act was about combating privacy intrusions, and any reference to fraud reduction objectives of the regulations is, at best, insultingly paternalistic, and, at worst, completely disingenuous. Closing a legitimate access channel to goods and services as a means to combat the fraud of some does not make sense. Would Congress shut down Wal-Mart to protect consumers from fraud by some of the makers of products sold in the retail chain? Would Congress shut down the NYSE because several companies scammed investors out of their retirement savings? No, it would be an absurd application of cause and effect.

American consumers are savvy enough to handle a pushy salesperson on the end of a telephone, just as they are capable of handling a pushy or fraudulent salesperson on a car lot, and did not need the government to step in to protect them. The result of thirteen years of legislative initiatives and taxpayer dollars for reports, orders, briefs, trials, and appeals is that the American citizens no longer have to spend a few seconds a day either ignoring or answering a commercial telemarketing call and saying, "no thank you."

C. Future Implications for Commercial Speech in a Convergent Telecommunications Marketplace

Was the Do-Not-Call Act an anomaly or just the beginning of regulations aimed at commercial speech? As demonstrated in *Mainstream*

the sort the registry sought to combat were more likely to be undertaken by commercial telemarketers than those soliciting charitable and political contributions. The FCC followed suit, ultimately adopting rules that paralleled those of the FTC.

Senate Committee Brief, supra note 45, at 43-44 (internal cites omitted). *But cf. Mainstream Mktg.*, 283 F. Supp. 2d at 1167 (stating this argument to exclude charitable and political telemarketers must fail because there is no evidence before the District Court that abusive and fraudulent practices are more often instigated by commercial telemarketers, and, in fact, the importance of repeat business provides a commercial telemarketer with an incentive to act in a responsible and decorous manner).

156. See *supra* note 151. Each privacy-related product costs between \$5-10 per month, some with an additional \$6-9 installation fee.

157. See *Mainstream Mktg.*, 358 F.3d at 1240.

158. See ROBERT CORN-REVERE, *RATIONALES AND RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA* 10-11 (1997). "Regulation must be applied only as 'a last recourse,' and 'the burden of proof is for the least possible regulation of communication.'" *Id.* This principle is one of four First Amendment visionary Ithiel de Sola Pool proposed to guide freedom of expression into the digital age.

Marketing, residential privacy interests easily trumped commercial speech under the *Central Hudson* test.¹⁵⁹ The most significant fact in the Tenth Circuit's constitutional analysis of the do-not-call registry was that it "is an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers."¹⁶⁰ Further, the Supreme Court appears to be "extremely vigilant in shielding the sanctity of the home from unwanted communications . . . as long as the statutorily approved method of preventing the communication involves some *affirmative action by the homeowner*."¹⁶¹ Technological advances in telecommunications equipment, coupled with the limited First Amendment protections afforded commercial speech, place additional privacy in the home regulations within the reach of Congress.

Compared to the radio broadcast technology that served as the backdrop for the Communications Act of 1934,¹⁶² modern telecommunications equipment provides functionality that gives end-users control of the information they receive. Information is transmitted from one place to another in the form of signals. Digital encoding and packet-switching of signals allow for a more cost efficient telecommunications network.¹⁶³ The destination of packet-switched signals must be known prior to transmission, and the device receiving the packets of information has control over whether it will accept or deny them.¹⁶⁴ Therefore, the information control functionality in modern telecommunications equipment¹⁶⁵ could act as an enabler for additional privacy-related government regulations.

1. The Dawn of the Convergent Telecommunications Industry

Congress passed the landmark Telecommunications Act of 1996¹⁶⁶ ("Telecom Act") representing the most significant overhaul of the Com-

159. See Brief for Respondent in Opposition at 13-14, *Mainstream Mktg. Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (No. 03-1552).

160. See *Mainstream Mktg.*, 358 F.3d at 1233; see also Brief for Respondent in Opposition at 13-14, *Mainstream Mktg. Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (No. 03-1552). Without the opt-in function, the do-not-call registry acts as a prior restraint creating a more significant constitutional hurdle. The government would be forbidding certain communications in advance of the time that such communications are to occur. See generally CHEMERINSKY, *supra* note 31, § 11.2.3.1 (discussing prior restraint concerns).

161. Shannon, *supra* note 127, at 385 (emphasis added) (citing *Rowan v. Post Office Dept*, 397 U.S. 728 (1970)). Regulations that require affirmative action by consumers should survive any constitutional challenges that telemarketers might bring under the First Amendment. *Id.* This argument is equally applicable to constitutional challenges that any commercial broadcast marketer might bring under the First Amendment. See discussion *infra* Part III.C.2.

162. Communications Act of 1934, 47 U.S.C. § 151 (1934).

163. See RAY HORAK, *SYSTEMS & NETWORKS: VOICE, DATA, AND BROADBAND TECHNOLOGIES* 205 (1997).

164. *Id.*

165. See e.g., Matthew Scherb, *Free Content's Future: Advertising, Technology, and Copyright*, 98 NW. U. L. REV. 1787, 1794 (2004). "Interactivity means that consumers have more control over content. More control over content means consumers can more easily manipulate content to avoid . . . advertisements . . ." *Id.*

166. Telecommunications Act of 1996, 47 U.S.C. § 151 (1996).

munications Act since its inception in 1934.¹⁶⁷ The 1996 Act confirmed the transition of the telecommunications industry from a closed system of regulated monopolies to an industry driven by competition and technological advance.¹⁶⁸ “Rather than unleashing the competitive gale of creative destruction, . . . federal regulators again perpetuated a paradoxical regulatory dichotomy between the technologically converging wireless and coaxial cable voice and broadband worlds on the one hand and the twisted pair telephony voice and broadband world on the other.”¹⁶⁹ While varied across certain segments of the telecommunications industry, each provision of the 1996 Act “ha[s] a similar purpose—to bring regulations in line with evolving technological and economic realities.”¹⁷⁰ As a result of changes in the regulatory landscape and technology, cable, wireless, and telephone now compete directly with one another. Furthermore, any company can or will be able to offer telephone, internet, and video products and services over similar digital packet-switched networks.¹⁷¹

In *Turner Broadcasting Systems, Inc. v. FCC*,¹⁷² the Supreme Court acknowledged forthcoming convergence of telecommunications and realized cable companies were in a unique position to benefit from convergence. “Given the pace of technological advancement and the increasing convergence between cable and other electronic media, the cable industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.”¹⁷³ Convergence has become a reality for cable television,¹⁷⁴ but that advantage could become a detriment with

167. Drexel, *supra* note 149, at 6.

168. ZUCKMAN, *supra* note 35, § 9.1.

169. Drexel, *supra* note 149, at 2.

170. See ZUCKMAN, *supra* note 35, § 9.3, at 717 (noting that the regulations imposed on radio and television broadcasting were less drastic than the regulations opening the local telephone market to competition imposed on telephone carriers). For example, the Title II provisions of the 1996 Act recognize that in a “multichannel world of cable television, direct broadcast satellite, and the Internet,” no one provider in the broadcast industry “controls the only source of electronic mass communication.” *Id.* Consequently, regulations based on the premises of “spectrum scarcity and broadcaster power” are becoming obsolete and substantially reduced. See *id.*

171. See 2 FRANK W. LLOYD, CABLE TELEVISION LAW 2003: COMPETITION IN VIDEO, INTERNET AND TELEPHONY 147 (2003). There is a strong economic force for broadband carriers to converge multimedia services into one platform because economies of scale and scope are realized. See *id.*; see also JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 23–30 (2005).

172. 512 U.S. 622 (1994).

173. *Turner*, 512 U.S. at 627.

174. Cable television “was not originally intended to be a general-purpose communications mechanism.” See WALTER CICIORA ET AL., MODERN CABLE TELEVISION TECHNOLOGY: VIDEO, VOICE, AND DATA COMMUNICATIONS 5 (1999). Since its inception, cable television networks have primarily utilized a broadcast architecture—one-way signal transmission from a central location to each customer’s home. *Id.* The signals received at one customer’s home are the same as the signals received by every other customer’s home served by the same central location or distribution point. *Id.* The central location or distribution point in a cable television network is called a headend. *Id.* A cable network’s “primary and often sole purpose is the transportation of entertainment television signals” *Id.* However, recent changes in cable technology from a one-way analog broadcast

significant financial implications should Congress attempt to use the technological advances that accompany convergence to proliferate commercial speech regulations similar to the national do-not-call registry into digital television.¹⁷⁵ In fact, the FCC has implemented regulations intended to hasten the conversion of the nation's television broadcast system from analog to digital television technology.¹⁷⁶ The hastening of a conversion to digital television may be in part Congress's desire to implement further commercial speech regulations.

2. Is a National Do-Not-Advertise Registry Next?

Recognizing the potential regulations that could ensue in the wake of *Mainstream Marketing*, the current FTC administration publicly announced that it would not create a similar national "do-not-spam" registry to control the problem of invasive and fraudulent commercial internet advertisements.¹⁷⁷ Further, the FTC stated that its decision to restrain from such legislation "presents a perfect opportunity for telecom carriers to step up to a leadership position" on this problem.¹⁷⁸ In its report to Congress, the FTC indicated that a national do-not-spam registry, fashioned after the hugely popular national do-not-call registry, would be ineffective and possibly increase spam, yet implied it would be an easily implemented solution for telecommunications service providers.¹⁷⁹ Application of a "do-not-spam" registry rests on identifying the originators of commercial emails or pop-up advertisements.¹⁸⁰ Once the final technological hurdles regarding identification are resolved, a national do-not-

architecture to a two-way hybrid-fiber coax architecture allow digital transmission and permit the electronics at the customer's home to be intelligent devices. *See id.* at 18. "The hybrid fiber-coax (HFC) architecture is an optimized combination of fiber in the trunk and coaxial cable in the [distribution network]" that makes "it possible to cost-effectively increase bandwidth, signal quality, and reliability . . ." *Id.* Two-way signal transmission, communications both from the headend to the home and from the home to the headend, becomes practical with a hybrid-fiber coax network because transmission paths are reduced and signal interference is drastically minimized. *Id.* at 19. These two conditions, shorter transmission paths and low signal interference, enable low-power electronic devices at a customer's home to transmit on the return path back to the headend. *See id.* at 576.

175. *See Scherb supra* note 165, at 1791 (noting that "total television advertising revenue came in at about \$44.8 billion for 2001 . . . [and] [a]bout 44% of that figure went for network spots, about 33% went for broadcast spots, and the remainder, about 23%, went for cable spots").

176. Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, Report and Order, FCC-04-192, Sept. 7, 2004, *available at* <http://www.fcc.gov/headlines2004.html> (last visited Mar. 31, 2005).

177. Vince Vittore, *Spam This*, TELEPHONY, June 21, 2004, at 28.

178. *Id.* This type of regulatory threat is not uncommon. *See e.g.* CORN-REVERE, *supra* note 158, at 46. "Rep. Edward J. Markey (D-Mass.) similarly has described broadcasting regulation as a 'social compact' based on an explicit 'quid pro quo,' and lectured industry witnesses at congressional hearings that broadcasters would be unlikely to receive favorable consideration in legislation to reform communications infrastructure unless the industry supported his 'V-chip' proposal." *Id.*

179. *See Vittore, supra* note 177, at 28; *see also* New System to Verify Origins of E-Mail Must Emerge Before "Do Not Spam" List Can Be Implemented, FTC Tells Congress, *available at* <http://www.ftc.gov/opa/2004/06/canspam2.htm> (last visited Mar. 31, 2005).

180. National Do Not Email Registry: A Report to Congress, *available at* <http://www.ftc.gov/reports/dneregistry/report.pdf> (last visited Mar. 31, 2005).

spam registry would neither be any more complex nor any more of an administrative burden than its do-not-call counterpart.

In *Mainstream Marketing*, the FTC expressed a substantial governmental interest in protecting privacy in the home. Was Congress's goal in promulgating the Do-Not-Call Act to safeguard residential privacy a means to other ends, or a genuine interest in enabling individuals to choose whether or not to be subject to commercial speech within the sanctity of their homes?¹⁸¹ If the answer is the latter, a similar opt-in commercial speech regulation will likely be promulgated against the biggest commercial speech intrusion in one's home, television commercials.¹⁸²

Applying the *Central Hudson* test in the context of an opt-in regulation of television commercials could prove extremely complicated. Courts have found the *Central Hudson* test difficult to apply toward various types of commercial speech.¹⁸³ Following *Central Hudson* and subsequent cases, "the commercial speech doctrine ha[s] been seriously weakened . . . , leaving much, though by no means all, commercial speech vulnerable to governmental regulation."¹⁸⁴ However, the opt-in

181. See CORN-REVERE, *supra* note 158, at 11 (commenting that "the culture of regulation is motivated more by political imperatives than by constitutional values"). As an example, "the special urgency with which the FCC and the White House approached the children's TV issue was not unrelated to the fact that 1996 was a presidential election year." *Id.* The long gridlock in the FCC's proceedings "ended only after the White House scheduled a 'summit' on children's TV and engaged in down-to-the-wire negotiations with the National Association of Broadcasters." *Id.* "These issues . . . were a key part of President Clinton's campaign for reelection, and were incorporated into the Democratic platform." *Id.*

182. The possibility to change the highly commercialized culture of American society exists should Congress wish to implement a bold initiative like a television commercial regulation modeled after the national do-not-call registry.

[W]hat sorts of policy goals or interests count as reasonable in regulating commercial speech? As we suggested, even nondeceptive commercial speech can sensibly be regulated in the name of environmental protection or nutritional education, for example. A more interesting question might center on the claim that a culture of commercial consumption does not promote freedom and well-being as much as we had hoped. Could a government cite that very belief, by itself, as a reasonable grounds for regulating commercial speech?

WRIGHT, *supra* note 9, at 75. After *Mainstream Marketing*, the answer is residential privacy, which by itself provides all the justification necessary for regulating commercial speech.

183. See Deborah J. La Fetra, *Kick It Up A Notch: First Amendment Protection For Commercial Speech*, 54 CASE W. RES. L. REV. 1205, 1216 n.76 (2004) (arguing that a more straightforward and stringent test for assessing the validity of governmental restrictions on commercial speech has been growing in intensity in recent years); see also ZUCKMAN, *supra* note 35, § 3.3.A, at 220 (criticizing the four-part test of *Central Hudson* because "it requires highly subjective judgments by judges as to the substantiality of state's interest in regulation, the efficacy of the particular regulation involved and the permissible breadth of the regulation.").

184. ZUCKMAN, *supra* note 35, § 3.4.C, at 228. The section further discusses the unanswered question "whether the [Supreme] Court would apply the *Central Hudson* test in a conscientious manner or would continue to erode . . . its limited protection in order to permit government to regulate commercial expression concerning admittedly legal products, services and activities which legislatures, administrative agencies and a majority of the justices feel are harmful to the public good." *Id.* With respect to telemarketing calls, the Supreme Court's denial of certiorari would imply that the intrusion to privacy in the home by such a form of advertisement is harmful enough that it be prohibited should an individual choose. See *Mainstream Mktg.*, 125 S. Ct. at 47.

character of a commercial speech regulation ensures that any speech directed at the home of a willing listener will not be inhibited, thereby satisfying the "narrowly tailored" requirement of the *Central Hudson* test.¹⁸⁵

Nevertheless, Congress should stop at the Do-Not-Call Act before further residential privacy regulations do irreparable harm to the non-commercial content supported by advertisements.¹⁸⁶ Although technologically possible and constitutionally valid, the government should refrain from enacting laws that place residential privacy interests above the interest of commercial speakers because the "public's supply of content will diminish, perhaps to the vanishing point[.]" should broadcaster and video service providers lose the advertising revenue that supports free content.¹⁸⁷

CONCLUSION

The national do-not-call registry is a constitutionally valid regulation of commercial speech under the *Central Hudson* test. The *Central Hudson* test provides commercial speakers almost no First Amendment protection in the context of the Do-Not-Call Act's opt-in regulatory scheme, which places the decision to proscribe commercial speech that enters the home in the hands of individuals. However, the do-not-call registry was a superfluous governmental intervention because market forces were in place to solve the privacy concerns of residential telephone consumers. Moreover, it is a paternalistic regulation that provides a diminutive consumer protection benefit.

Privacy in the home is a powerful individual right. The *Mainstream Marketing* decision demonstrates the supremacy that residential privacy has over commercial speech. More so than telephone solicitations, commercial speech enters individuals' homes through television advertising and has little First Amendment protection in that private forum. With a national do-not-call registry in full force and do-not-spam regulations on standby, Congress could take the next logical step and enact opt-in regulations restricting television commercials.

In the convergent telecommunications industry, all media content will be transmitted digitally, and information control functionality in end user equipment allows content to be identified and eliminated prior to

185. See *Mainstream Mktg.*, 358 F.3d at 1238. Several differences between television commercials and telephone and internet solicitations could possibly tip the scales in favor of commercial speech over privacy concerns. For example, regulations on television commercials could be considered as burdening an excessive amount of speech or less of an intrusion to privacy in the home.

186. See Scherb *supra* note 165, at 1791 (commenting that "[w]hether creative or not, whether enjoyable or not, advertisements enable consumer access to an unbelievably large amount of content without charge").

187. See *id.* at 1823.

viewing, whether packetized or encoded in a digital format.¹⁸⁸ With some minor technological adjustments, government-initiated do-not-advertise regulations could empower individuals to assert their privacy right to its fullest and eliminate television commercials in their homes, and along with them, revenues for broadcasters and video service providers that help offset costs for programming content. Congress should restrain from enacting further privacy legislation now enabled by technological advances and allow the marketplace to determine how commercial speech reaches or doesn't reach consumers.

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188. See HORAK, *supra* note 163, at 207-08; ZUCKMAN, *supra* note 35, § 13.4.B.2, at 1115-23 (discussing the V-Chip regulation of programming content); see also Scherb *supra* note 165, at 1795 (describing that as "technology on the consumer end becomes more complex, and there are more possibilities for enhancing, altering, or otherwise customizing" video content and commercials, and that it has "never been so easy for end users and intermediary relayers to remove advertisements from transmitted content").

* J.D. Candidate, 2006, University of Denver Sturm College of Law. The views expressed in this article are solely those of the author and do not necessarily reflect the views of any of the author's current or former employers. To Professor Martin Katz, the Law Review Board, and my friends and colleagues; I greatly appreciate your advice, insight, and devotion to improving this article. Special thanks to my wife, Danielle, for her constant support and encouragement throughout this process.

