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## The Do-Not-Call Registry and Its Overwhelming Support: This Time Congress Really Means It

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### I. INTRODUCTION

Few regulations are as wildly popular as the national do-not-call registry.<sup>1</sup> It is popular because the FTC took aim at one of the most annoying and widely despised practices to ever interrupt dinner: telephone solicitation.<sup>2</sup> Although the do-not-call registry does not halt every unwanted call (charity calls as well as cold calls from those with whom customers do business continue), the registry drastically decreases the number of calls received by households that opt into the FTC's protection.<sup>3</sup>

Despite its popularity, courts must find the balance between two competing forces that pull in opposite policy directions. On one hand, a person's home should not be easily invaded without an invitation. On the other hand, "Congress shall make no law . . . abridging the freedom of speech."<sup>4</sup> The history of the Supreme Court's commercial speech jurisprudence and the do-not-call registry's development guide this comment. The

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1. Julie Dunn, *Firms Skirt No-Call Rules*, DENVER POST, Aug. 23, 2004, at C1 (reporting that more than sixty-two million phone numbers had been registered as of June 2004).

2. *Id.*

3. See Telemarketing Sales Rule, 16 C.F.R. §§ 310.1-310.8 (2004) (implementing 15 U.S.C. §§ 6101-6108).

4. U.S. CONST. amend. I.

background section explains the do-not-call registry and how it came to be. It then breaks down the Supreme Court's commercial speech precedent, which drove the Tenth Circuit's decision to uphold the registry as constitutional. Finally, the background examines how the Tenth Circuit applied that doctrine in the biggest challenge against the registry to date, *Mainstream Marketing v. FTC*. The background leads to an analysis of three important topics. First, this comment will show the registry is constitutional no matter which of the four commercial speech interpretations expressed by current Supreme Court Justices prevails. Second, although such a change is unlikely, the do-not-call registry's clear constitutionality would endure even if commercial speech were protected with the same vigor as that afforded political speech. Finally, the FTC may use similar opt-in regulations in other areas such as Internet spam so long as it stays true to the registry's constitutional model and not merely its form. This comment provides a checklist that future opt-in regulations must follow in order survive constitutional muster.

"Opt-in" regulations, as referred to in this comment, mean those that require consumers to opt-into consumer protection as opposed to "opt-out" regulations, which require consumers to opt themselves off of a list of willing listeners.

## II. HISTORICAL BACKGROUND

### A. Do-Not-Call Registry

The national do-not-call registry began its journey toward commercial speech controversy and *Mainstream Marketing v. FTC* with the Telephone Fraud Consumer Protection Act (TFCPA) of 1991, which authorized the Federal Communications Commission (FCC) to implement a do-not-call list for those entities under its jurisdiction.<sup>5</sup> The twelve-year path from the TFCPA to the Do-Not-Call Implementation Act (DNCIA) in 2003, which gave the Federal Trade Commission (FTC) authority to enforce the latter act in conjunction with the FCC, began as an effort to stop telemarketing fraud that preyed on those susceptible to scams.<sup>6</sup> The TFCPA was a response to widespread abuse specifically targeting the elderly.<sup>7</sup>

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5. Telephone Fraud Consumer Protection Act, 47 U.S.C. § 227(b)(2) (2005). See also Douglas C. Nelson, *The Do-Not-Call Implementation Act: Legislating the Sound of Silence*, 16 LOY. CONSUMER L. REV. 63, 66-68 (2003).

6. Telemarketing and Consumer Fraud and Abuse Protection Act Findings, 15 U.S.C. § 6101 (2004).

7. See Jeffrey Hines, *Symposium on Living Independently: Impact of Science and Technology on the Elderly: Telemarketing Fraud Upon the Elderly: Minimizing its Effects Through Legislation, Law Enforcement and Education*, 12 ALB. L. J. SCI. & TECH. 839, 841 (2002); Jeffrey L. Bratkiewicz, "Here's a Quarter, Call Someone who Cares"; *Who is Answering the Elderly's Call for Protection From Telemarketing Fraud?*, 45 S.D. L. REV. 586,

States also began to crack down on telemarketing fraud against the elderly by imposing a number of penalties ranging from increased monetary damages in New York to registration for all telemarketers in California.<sup>8</sup> Statutory focus then shifted to privacy, which not only protects likely fraud victims averse to receiving calls, but an annoyed public as well.<sup>9</sup> The federal path took its first turn toward privacy in 1994 with the Telemarketing Consumer Fraud and Abuse Prevention Act (TCFAPA), which authorized the FTC to make rules against deceptive telemarketing practices.<sup>10</sup> Congress then granted the FTC rulemaking authority under the Telemarketing Sales Rule (TSR), which only covered those entities under FTC authority.<sup>11</sup> Pursuant to TCFAPA authority, the FTC established the first national do-not-call registry on Dec. 18, 2002.<sup>12</sup>

The alphabet soup of agencies and authorizing statutes provided different regulations for different regulated entities during the 1990s until the Do-Not-Call Implementation Act (DNCIA) consolidated authority for both the FTC and FCC on March 11, 2003.<sup>13</sup> To make the registry work under the FTC's limited jurisdiction, the DNCIA required the FTC to work with the FCC to establish conformity.<sup>14</sup> In accordance with the DNCIA, the FTC initiated the same rules already promulgated by the FCC in 16 C.F.R. Section 310, bringing those regulated by the FTC and FCC under the same umbrella of rules.<sup>15</sup>

Specifically, the FTC and FCC rules now deem the initiation of an outbound telephone call to a person listed on the do-not-call registry as an abusive telemarketing practice.<sup>16</sup> The rule also includes a short list of excep-

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588-89 (2000). *See generally* Leda Mouallem, *Oh No, Grandma has a Computer: How Internet Fraud Will Take the Place of Telemarketing Fraud Targeting the Elderly*, 42 SANTA CLARA L. REV. 659 (2002). Telemarketers targeted the elderly for a variety of reasons, widely reported to be loneliness and longing for social contact, accumulated wealth, a trusting nature, lack of mobility, and general availability during working hours. Hines, *supra* note 7, at 841.

8. Hines, *supra* note 7, at 852.

9. *See, e.g.*, COLO. REV. STAT. § 6-1-301 (West 2004); FLA. STAT. ANN. § 501.059 (West 2004); MICH. COMP. LAWS ANN. §445.111 (West 2005); WYO. STAT. ANN. § 40-12-302 (LexisNexis 2004).

10. Telemarketing and Consumer Fraud and Abuse Protection Act, 15 U.S.C. § 6102 (2005).

11. *Id.*; 16 C.F.R. §§ 310.1-310.9 (2005).

12. *See* Nelson, *supra* note 5, at 69.

13. Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557; 15 U.S.C. § 6102 (2004).

14. *Id.*

15. *See* 16 C.F.R. §§ 310.1-310.9 (2004); H.R. Rep. No. 108-8, at 4 (2003), *reprinted in* 2003 U.S.C.C.A.N. 688, 671.

16. 16 C.F.R. § 310.4(b)(1)(iii)(B) (2004). The rule says an abusive telemarketing act is to initiate "any outbound telephone call to a person when: . . . (B) that person's telephone number is on the 'do-not-call' registry . . ." *Id.*

tions.<sup>17</sup> Anyone whose phone number appears on the registry may receive a call when the solicitor has received express agreement in writing (which may include an electronic or digital signature as recognized under the law) and when the solicitors have an established business relationship with the person listed on the registry.<sup>18</sup>

The DNCIA also allowed the FTC and FCC to collect fees for maintenance of the list.<sup>19</sup> The fee is forty dollars per area code of data per year, but the first five area codes are provided free of charge, and a company may not be charged more than \$11,000, which equals 275 area codes of information.<sup>20</sup> However, the United States has only 317 area codes, and a telemarketing company will not benefit from the cap on payments unless it purchases more than 275 area codes of information.<sup>21</sup>

Consistent with Congressional findings suggesting widespread consumer annoyance, the registry became an instant hit with the American public.<sup>22</sup> More than fifty million American phone numbers appeared on the list

17. 16 C.F.R. § 310.6 (2004).

18. *Id.* § 310.4(b)(1)(iii)(B)(ii) (2004). This section includes a company that “has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section.” *Id.* A company has an established business relationship with a customer who made a financial transaction with the company within eighteen months of the telemarketing call or who inquired about a product within three months of the telemarketing call. *Id.* § 310.2(n). *See also id.* § 310.4 (b)(1)(iii)(B)(i).

19. Do-Not-Call Implementation Act, Pub. L. No. 108-8, 117 Stat. 557; 15 U.S.C. § 6102 (2005). *See also supra* notes 13-15 and accompanying text for an explanation of the registry’s statutory authority.

20. 16 C.F.R. § 310.8(c).

21. FCC Consumer Facts, available at <http://www.fcc.gov/cgb/consumerfacts/Area-code.html>. (last visited Feb. 13, 2005). The FCC reports that there are 317 area codes in the United States as of this writing. *Id.*; *see also* Qwest Dex 2005 phone book, official directory, p. 22 (mapping current area codes). Simple math will show that, if the number of area codes remains the same, the payment cap will rarely be met because the cap would only apply if a company were to purchase 280 area codes (including the five free area codes). At most, then, a company that required every area code in the nation would receive forty-two free of charge (including the five for free) and would pay for 275. However, 52,700 of 60,800 companies that accessed the registry from March 1, 2004 until Feb. 1, 2005 used less than five area codes of information, thus paying no cost. Telemarketing Fees, Notice of Proposed Rulemaking; Request for Public Comment, 70 Fed. Reg. 20848-20852 (proposed April 22, 2005) (to be codified at 16 C.F.R. § 310.8(c) and (d)). Also available at <http://fcc.gov/os/2005/04/-050418tsrfrm.pdf> (last visited May 1, 2005).

22. *See* the Congressional Findings at the beginning of 15 U.S.C. § 6101 (2004), which state:

(1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.

before its implementation and more than sixty-two million stood on the list as of June 18, 2004.<sup>23</sup>

Still, challenges to the list quickly surfaced.<sup>24</sup> The first challenge came in the United States District Court for the Western District of Oklahoma, which held, in *U.S. Security v. FTC*, that Congress had not explicitly given the FTC authority to implement the registry.<sup>25</sup> The court's holding prompted Congress to act with blinding speed, and although the FTC issued a statement that it had authority, Congress did not wait for the appeals process and instead overwhelmingly passed an amendment to the TCFAPA through both houses within six days.<sup>26</sup> The Amendment, which passed 412-

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(2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.

(3) Consumers and others are estimated to lose \$40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

*Id.*

23. 149 CONG. REC. H 8917-02 (daily ed. Sept. 25, 2003). See also Dunn, *supra* note 1, at C1 (noting an increase in American phone numbers on this list).

24. See, e.g., *U.S. Security v. FTC*, 282 F. Supp. 2d 1285, 1294 (W. D. Okla. 2003); *Mainstream Marketing v. FTC*, 283 F. Supp. 2d 1151 (D. Colo. 2003).

25. *U.S. Security*, 282 F. Supp. 2d at 1294.

26. Public Law 108-82. See also Statement by FTC Chairman Timothy J. Muris, available at <http://www.ftc.gov/opa/2003/09/tjmstatement030924.htm>. (last visited Apr. 26, 2005):

Despite this clear legislative direction, the U.S. District Court for the Western District of Oklahoma has ruled that the FTC exceeded its authority in creating the National Do Not Call Registry. This decision is clearly incorrect. We will seek every recourse to give American consumers a choice to stop unwanted telemarketing calls.

*Id.* The *U.S. Security* case was decided on Sept. 23, 2003, and the amendment, titled Public Law 108-82, was signed into law on Sept. 29, 2003. See also Federal Document Clearing House, *George W. Bush delivers remarks at signing of Do-Not-Call Registry Bill*, Sept. 29, 2003. President Bush stated:

Last week, a federal judge objected to the Do Not Call Registry on the grounds that Congress had not authorized its creation. So the House and the Senate authorized its creation. You acted swiftly and I want to congratulate you very much, it's a really good action. The Senate voted 95-0, the House 412-8, this affirmed the decision by the FTC and it's affirmed the wishes of the American people. The Do Not Call Registry is still be-

8 in the House and 95-0 in the Senate, explicitly granted the FTC authority to create the registry.<sup>27</sup> Congressional leaders lashed out at the Oklahoma District Court and quipped, "We should probably call the bill 'This Time We Really Mean It Act' to cure any myopia in the judicial branch."<sup>28</sup>

With the agency authorization hurdle successfully maneuvered, the registry seemed destined to go into effect on its original scheduled enforcement date of Oct. 1, 2003. However, as Congress worked to respond to the *U.S. Security* decision, the United States District Court for the District of Colorado held in *Mainstream Marketing v. FTC (Mainstream I)* that the registry was unconstitutional as a violation of free speech because of its distinction between commercial and charity callers. The United States Court of Appeals for the Tenth Circuit subsequently reversed in *Mainstream Marketing v. FTC (Mainstream II)*, upholding the registry as a constitutional regulation of commercial speech.<sup>29</sup> A clear understanding of the Supreme Court's commercial speech doctrine will clarify the Tenth Circuit's review of the *Mainstream I* decision in *Mainstream II*.

### *B. History of Commercial Speech Protection*

The commercial speech doctrine's historical development from *Central Hudson* to *44 Liquormart* guided the Tenth Circuit's decision in *Mainstream II*. An in-depth look at the development of the Supreme Court's first amendment commercial speech doctrine is necessary to understand the analytical framework that applies to determine whether the do-not-call registry is constitutional. However, that task is difficult because the commercial speech doctrine has become fragmented, as this section will demonstrate.

The Supreme Court first considered commercial speech in 1942 in *Valentine v. Chrestensen*.<sup>30</sup> In *Valentine*, police arrested a Florida citizen for violating a New York sanitation statute because he advertised tours of his

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ing challenged in court. Yet the conclusion of the American people and the legislative branch and the executive branch is beyond question. So today I'm pleased to sign this important piece of legislation into law.

*Id.*

27. *Id.* See also 149 CONG. REC. H8916-02 (daily ed. Sept. 25, 2003).

28. *Id.* The Speaker of the House called the Oklahoma decision "dead wrong" and even scoffed that "a Federal court in Oklahoma, not California, Oklahoma, invalidated the FTC's do-not-call registry." *Id.*

29. Compare *Mainstream Marketing v. FTC*, 283 F. Supp. 2d 1151, 1171 (D. Colo. 2003) [hereinafter *Mainstream I*], with *Mainstream Marketing v. FTC*, 358 F.3d 1228 (10th Cir. 2004, cert. denied, 125 S. Ct. 47 (2004)) [hereinafter *Mainstream II*]. See *infra* notes 101-34 and accompanying text for a complete discussion of the *Mainstream* cases.

30. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 11.3.7.1 (2d ed. 2002); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

Navy submarine.<sup>31</sup> After Valentine was kept from distributing his advertisements, he was told that only political speech could be distributed.<sup>32</sup> Valentine then added a protest against the statute to the back of his advertisement and continued distribution.<sup>33</sup> After being further restrained, Valentine sued the police commissioner, Chrestensen, to enjoin enforcement.<sup>34</sup> The Court held the Sanitation Code constitutional without thorough explanation, but stated baldly that “[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>35</sup> The Court reasoned that advertisers would simply add political speech elements to advertisements in an effort to subvert the laws.<sup>36</sup>

Commercial speech remained unprotected for the next thirty-three years until the Court recognized a limited form of protection in *Bigelow v. Virginia*.<sup>37</sup> Pursuant to a Virginia statute, the Commonwealth of Virginia charged the editor of the Charlottesville, Virginia-based *Virginia Weekly* for publishing an advertisement for abortion services offered in New York.<sup>38</sup> The Court struck the statute down and concluded that commercial speech was not without First Amendment protection.<sup>39</sup> The Court cited *New York Times v. Sullivan*, which protected speech as it appeared in an advertisement chastising the Alabama police department for its treatment of civil rights leaders such as Martin Luther King Jr., to assert the First Amendment was not powerless to protect commercial speech.<sup>40</sup> The majority further reasoned that, although Virginia had an interest in medical care within the Common-

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31. *Valentine*, 316 U.S. at 52-53. The sanitation code deemed advertisement through handbills illegal unless it was devoted solely to “information or a public protest.” *Id.*

32. *Id.* at 53.

33. *Id.*

34. *Id.* at 54.

35. *Id.*

36. *Id.* at 55.

37. *Bigelow v. Virginia*, 421 U.S. 809, 812 (1975). The Virginia statute read:

If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor.

*Id.*

38. *Id.*

39. *Id.* at 818. The Court stated “[o]ur cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in [commercial advertisements].” *Id.* (citing *Pittsburgh Press. Co. v. Human Rel. Comm’n*, 413 U.S. 376, 384 (1973); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

40. *Bigelow*, 421 U.S. at 818 (citing *New York Times*, 376 U.S. at 266) (“[T]he particular advertisement in appellant’s newspaper had commercial aspects or reflected the advertiser’s commercial interests did not negate all First Amendment guarantees.”). Although *New York Times* dealt with libel, the Court drew a parallel and said the state was “not free of constitutional restraint merely . . . because appellant was paid for printing it.” *Id.*



wealth, its authority stopped at the border.<sup>41</sup> Finally, the Court said, "No claim has been made, however, that this particular advertisement in any way affected the quality of medical services within Virginia."<sup>42</sup>

In 1976, the Court further expanded commercial speech protection in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, although commercial speech protection continued to fall short of political speech protection.<sup>43</sup> *Virginia State Board of Pharmacy* involved a ban on pharmacy advertisements of prescription drug prices to the public.<sup>44</sup> The Court relied on *Bigelow v. Virginia* and clarified that speech maintains its protection despite commercial or non-political nature.<sup>45</sup> The justices held the total ban on pharmacy advertisements unconstitutional and declared that Virginia could not keep "the public in ignorance of the entirely lawful terms that pharmacists are offering."<sup>46</sup> The majority cited a desire to facilitate the dissemination of information, preservation of the free market economy, allocation of resources and enlightenment of public decision-making as policy grounds.<sup>47</sup> The Court, however, also offered a caveat that proper restrictions such as time, place and manner restrictions to further a significant government interest would pass constitutional muster so long as alternate avenues of communication remain open.<sup>48</sup>

41. *Bigelow*, 421 U.S. at 827.

42. *Id.*

43. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 760-61 (1976). The Court stated:

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

*Id.*

44. *Id.* at 749-50.

45. *Id.* at 762.

46. *Id.* at 770.

47. *Id.* at 765 ("It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free-flow of commercial information is indispensable.").

48. *Id.* at 771. Time, place and manner restrictions "refer to the ability of the government to regulate speech in a public forum in a manner that minimizes disruption of a public place while still protecting freedom of speech." CHEMERINSKY, *supra* note 30, § 11.4.2.2. *Heffrom v. Int'l Society for Krishna Consciousness*, 452 U.S. 640 (1981) said the Court often allows time, place and manner restrictions "provided that they are justified without reference to the content of the regulated speech, that they serve a significant government interest, and that in doing so they leave open ample alternative channels for communication of the information." *Heffrom*, 452 U.S. at 648 (quoted in CHEMERINSKY, *supra* note 30, § 11.4.2.2).

The *Virginia State Board of Pharmacy* Court recognized commercial speech as protected when it relayed an offer to sell, but legislators had little else to guide them until 1980 when the Court developed the current and dispositive test in *Central Hudson Gas v. Public Service Commission*.<sup>49</sup> *Central Hudson* involved a rule promulgated by the Public Service Commission of New York state that banned advertising that promoted energy use.<sup>50</sup> The regulation was a response to the national energy crisis in the 1970s, and the Commission extended the ban because such advertisements for electricity were deemed against the public policy of conservation.<sup>51</sup> After concluding the Constitution accords lesser protection to commercial speech, the Court reasoned that such protection “turns on the nature both of the expression and of the governmental interests served by its regulation.”<sup>52</sup> Driven by that conclusion, the court articulated a four-part test to determine when commercial speech may be regulated that first looks at the legality of the ad’s content as a threshold issue; then, if the speech is legal, the Court asks whether the government interest is substantial; third, if the interest is substantial, the court looks at whether the regulation directly advances that interest; and finally, the court considers the scope of the regulation.<sup>53</sup>

The Court applied the test and first concluded that the advertisement was legal and unaffected by the provider’s monopolistic characteristic.<sup>54</sup>

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49. CHEMERINSKY, *supra* note 30, § 11.3.7; *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

50. *Id.* at 559.

51. *Id.* at 560.

52. *Id.* at 563. The Court seems to have based its *Central Hudson* test loosely on time, place and manner tests already in effect, and suggested as much four years before *Central Hudson* when it said:

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant government interest, and that in so doing they leave open ample alternative channels for communication of the information.

*Va. State Bd. of Pharmacy*, 425 U.S. at 771.

53. *Central Hudson*, 447 U.S. at 566. The Court articulated the four-part test as follows:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.*

54. *Id.* at 567-68.

The Court next held that energy conservation as well as fair and efficient rates constituted substantial governmental interests to justify regulation.<sup>55</sup> Further, the Court found that the advertising ban had an "immediate connection" with the demand for advertising, and, thus, the regulation directly advanced the government interest.<sup>56</sup> Finally, and most critical to this case, the Court struck the statute down because a complete ban on energy advertising was more extensive than necessary to further the governmental interest.<sup>57</sup>

The wide array of commercial speech cases that followed *Central Hudson* led to a variety of alterations to the basic test, some adopted and others proposed.<sup>58</sup> The differing and inconsistent interpretations applied to the third and fourth prongs of the *Central Hudson* test must be considered before the do-not-call registry's fate can be determined.<sup>59</sup>

The first case to alter *Central Hudson's* application was *Metromedia v. City of San Diego* in 1981.<sup>60</sup> *Metromedia* involved a San Diego ordinance that prohibited advertising display signs with the intent to protect pedestrians and motorists against distracted drivers and in order to preserve San Diego's aesthetic appeal.<sup>61</sup> *Metromedia*, along with other outdoor advertising companies, filed suit to enjoin enforcement.<sup>62</sup> The Court applied the *Central*

55. *Id.* at 568-69.

56. *Id.* at 569.

57. *Id.* at 570. The Court explained its reasoning and even provided examples of proper regulation:

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of *Central Hudson's* advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of *Central Hudson's* advertising.

*Id.* at 570-71 (internal citations omitted).

58. See, e.g., *Metromedia v. City of San Diego*, 453 U.S. 490 (1981); *Posadas De Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

59. See generally *id.* The Court's decision in *44 Liquormart* best illustrates the Court's division on *Central Hudson's* application. *44 Liquormart*, 517 U.S. at 488. Current justices suggest alterations that would lead to a number of possible applications of the *Central Hudson* test. See *supra* note 58 and accompanying text.

60. See *Metromedia*, 453 U.S. at 493 (upholding a San Diego statute that regulated commercial speech).

61. *Id.*

62. *Id.* at 496-97.

*Hudson* test, but concentrated on the third-prong (directly advance).<sup>63</sup> The justices weighed the “reasonableness” of the legislature’s determination that billboards caused traffic safety and aesthetic problems against the remedy sought.<sup>64</sup> Specifically, the Court hesitated to “disagree with the accumulated, commonsense judgments of local lawmakers,” suggesting a deferential approach.<sup>65</sup> Therefore, the Court took a rational-basis-like approach to the third prong in *Metromedia* and held the ordinance constitutional.<sup>66</sup> It then upheld the law in relation to commercial messages, but struck the statute down as it applied to noncommercial speech.<sup>67</sup>

The Court broadened the fourth prong of *Central Hudson* (narrowly tailored) in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, which involved a Puerto Rican regulation that did not allow advertising by casinos, including anything with the word “casino” written on it—even pencils and lighters.<sup>68</sup> The Court reasoned that because the legislature could have banned gambling altogether to avoid its effects on the community, it could also choose the “less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.”<sup>69</sup> The majority left the legislature to determine whether promoting speech to discourage gambling would be as effective as an outright ban on advertising as a less intrusive alternative.<sup>70</sup> The Court, therefore, held in favor of a greater-includes-the-lesser approach, which gives deference to the legislature to limit an action whenever that action could be banned, thus liberally interpreting the narrowly-tailored prong.<sup>71</sup>

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63. *Id.* at 508. The Court quickly applied prongs one, two, and four and then framed the issue as a third-prong analysis as follows:

There can be little controversy over the application of the first, second, and fourth criteria. There is no suggestion that the commercial advertising at issue here involves unlawful activity or is misleading. Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance of the city—are substantial government goals . . . . Similarly, we reject appellants’ claim that the ordinance is broader than necessary and, therefore, fails the fourth part of the *Central Hudson* test . . . . The more serious question, then, concerns the third of the *Central Hudson* criteria: Does the ordinance “directly advance” governmental interests in traffic safety and in the appearance of the city?

*Id.* at 507-508.

64. *Id.* at 512-13, 521.

65. *Id.* at 509.

66. *Id.*

67. *Id.* at 512-13, 521.

68. *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 333 (1986).

69. *Id.* at 346.

70. *Id.* at 344.

71. *Id.* at 346.

*Board of Trustees of the State University of New York v. Fox*, a 1989 case, further broadened the fourth-prong, this time regarding regulation of an entity the legislature could not completely ban, when it held a legislature need not use a least-restrictive means test to reach its goal.<sup>72</sup> *Fox* involved a company that organized "Tupperware parties," gatherings where products were demonstrated and sold, in campus dormitories and advertised on campus. A State University of New York regulation prohibited commercial sales except for certain named exceptions, of which house wares were not included.<sup>73</sup> The issue was whether the regulation could go beyond the least restrictive means to achieve its desired effect.<sup>74</sup> Justice Scalia reasoned for the majority that precedent suggested "a more flexible meaning" for the word "necessary" as explained in *Central Hudson* and, therefore, more leeway for rulemaking.<sup>75</sup> The Court remanded the case with instruction that a least-restrictive means analysis was not to be considered when applying the *Central Hudson* fourth prong, which asks whether the regulation is narrowly tailored.<sup>76</sup> Instead, the Court required a "reasonable fit" between the "legislature's ends and the means chosen to accomplish those ends."<sup>77</sup>

*Cincinnati v. Discovery Network* questioned *Metromedia's* deference to the legislature when applying the third-prong (directly advance), and further held that a Cincinnati ordinance limiting news racks in the city also failed the fourth prong (narrowly tailored) because it was "neither content neutral nor . . . narrowly tailored."<sup>78</sup> *Cincinnati*, motivated by a desire to maintain the city's aesthetic appeal, refused to allow Discovery Network to distribute its commercial publications with freestanding news racks.<sup>79</sup> The Court focused on the *Fox* analysis that a reasonable fit must exist between the regulation and the interest to be served.<sup>80</sup> The Court concluded that removal of only sixty-two news racks while allowing between 1,500 and 2,000 newspaper racks to remain was "minute" and "paltry" rather than a reasonable fit to maintain aesthetic appearance and public safety.<sup>81</sup> Indeed, the Court found that *Cincinnati* justified the regulation with only the bald assertion that commercial speech enjoys less protection.<sup>82</sup> Therefore, the city succeeded only in limiting the number of news racks distributing commercial handbills, not its stated goal of limiting news racks altogether and the

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72. *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989).

73. *Id.* at 472.

74. *Id.* at 471-72.

75. *Id.* at 477.

76. *Id.* at 485-86.

77. *Id.* at 480.

78. *Cincinnati v. Discovery Network*, 507 U.S. 410, 430 (1993).

79. *Id.* at 412.

80. *Id.* at 416-17.

81. *Id.* at 417-18.

82. *Id.* at 428.

regulation was therefore held unconstitutional because it did not directly advance the stated goal.<sup>83</sup>

*44 Liquormart v. Rhode Island* illustrates the different beliefs held on the current Supreme Court bench through a plurality opinion and three concurrences, which complicates future *Central Hudson* applications for commercial speech regulations like the do-not-call registry.<sup>84</sup> The case featured “bold efforts by some members of the Court to alter prevailing commercial speech analysis” toward commercial protection.<sup>85</sup> *44 Liquormart* involved a Rhode Island statute that prohibited liquor stores from advertising alcohol prices, and a plurality opinion held that such a regulation was unconstitutional.<sup>86</sup> The plurality articulated a less deferential approach in *44 Liquormart* than that articulated in *Posadas*.<sup>87</sup> The plurality opinion, written by Justice Stevens, did not defer to Congress and held the total ban on advertising liquor prices in Rhode Island was not a reasonable legislative choice.<sup>88</sup> The Court specifically said the legislature does not have the “broad discretion to suppress truthful, non-misleading information for paternalistic purposes.”<sup>89</sup> The plurality, therefore, balanced the state interest against the burden placed on the regulated entity when it applied the “directly-advance-state-interest” prong in *44 Liquormart*.

*44 Liquormart* overruled *Posadas*’ “greater-includes-the-lesser” approach.<sup>90</sup> However, because only a plurality called *Posadas* “no longer persuasive,” the actual status of *Posadas* remains unclear.<sup>91</sup> Indeed, Chief Justice Rehnquist went against the *Posadas* opinion he authored when he concurred along with Justices O’Connor, Souter and Breyer when O’Connor wrote “Rhode Island’s regulation fails the final prong; that is, its ban is more extensive than necessary to serve the State’s interest.”<sup>92</sup> The four justices agreed the trend in commercial cases favors closer consideration of legisla-

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83. *Id.* at 429.

84. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (Stevens, J., plurality).

85. Arlen W. Langwards, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons From Greater New Orleans Broadcasting*, 37 AM. BUS. L. J. 587, 589-90 (2000).

86. *44 Liquormart*, 517 U.S. at 516 (Stevens, J., plurality).

87. *Id.* (Stevens, J., plurality).

88. *Id.* at 510 (Stevens, J., plurality).

89. *Id.* (Stevens, J., plurality).

90. *Id.* (Stevens, J., plurality). The state argued that precedence established in *Posadas* required the Court to give deference to the state. *Id.* at 508 (Stevens, J., plurality). However, the Court responded that “[a]s the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.” *Id.* at 513 (Stevens, J., plurality).

91. *Id.* at 513 (Stevens, J., plurality).

92. *Id.* at 529 (O’Connor, J., concurring). In *Posadas*, Justice Rehnquist wrote that “it is up to the legislature to decide whether or not such a ‘counter-speech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.” *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 344 (1986).

tive action than *Posadas* allowed, but advocated a more narrow focus on the narrowly-tailored prong than the plurality.<sup>93</sup>

There were two more views articulated in *44 Liquormart*. Justice Scalia, in a very short concurrence, suggested his preference for a historical analysis of legislative practices at the time of the First Amendment's passage at the national and state levels.<sup>94</sup> Justice Thomas, in a commercial-speech friendly concurring opinion, specifically criticized the plurality's balancing approach and advocated the complete elimination of the direct-advancement-of-state-interest prong of the *Central Hudson* test because "[f]aulting the State for failing to show that its price advertising ban decreases alcohol consumption 'significantly,' as Justice Stevens does, seems to imply that if the State had been more successful at keeping consumers ignorant . . . then the restriction might have been upheld."<sup>95</sup>

Justice Thomas also provided another fourth-prong interpretation when he reasoned that the fourth prong, as applied by the plurality, would lead to problems down the road. He said:

Rather than "applying" the fourth prong of *Central Hudson* to reach the inevitable result that all or most such advertising restrictions must be struck down, I would adhere to the doctrine adopted in *Virginia Bd. of Pharmacy* and in Justice Blackmun's *Central Hudson* concurrence, that all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible.<sup>96</sup>

Justice Thomas cited *Discovery Network* as an opinion that followed his reasoning.<sup>97</sup> That case held a ban on news racks for commercial handbills unconstitutional by applying the reasonable-fit analysis without deference to

93. *44 Liquormart*, 517 U.S. at 532 (O'Connor, J., concurring). O'Connor wrote "there must be a fit between the legislature's goal and method, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* at 529 (O'Connor, J., concurring) (internal citation omitted).

94. *Id.* at 517-18 (Scalia, J., concurring). Justice Scalia states his preference for a historical analysis to uncover the legislative intent when the First Amendment was adopted, but acknowledges that "[s]ince I do not believe we have before us the wherewithal to declare *Central Hudson* wrong . . . I must resolve this case in accord with our existing jurisprudence, which all except Justice Thomas agree would prohibit the challenged regulation." *Id.* at 18 (Scalia, J., concurring).

95. *Id.* at 523 (Thomas, J., concurring).

96. *Id.* at 526 (Thomas, J., Concurring).

97. *Id.* at 520 (Thomas, J., Concurring) (citing *Cincinnati v. Discovery Network*, 507 U.S. 410, 418-19 (1993) as a case that rejected the assertion that commercial speech is in a subordinate position to other types of speech). *Posadas de Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 344 (1986).

the legislature.<sup>98</sup> Justice Thomas considered the same policy in advocating a similar blanket rejection of anything “keeping them [consumers] ignorant.”<sup>99</sup> Justice Thomas also relied heavily on *Virginia State Board of Pharmacy* to denounce a paternalistic approach to commercial speech regulation.<sup>100</sup>

*Central Hudson* and its progeny drove the Tenth Circuit to uphold the do-not-call registry as constitutional in *Mainstream Marketing v. FTC*.

### C. Mainstream Cases

The *Mainstream Marketing* decisions break down into two cases, *Mainstream I*, at the district court level, and *Mainstream II*, heard by the United States Court of Appeals for the Tenth Circuit.<sup>101</sup> Both courts applied *Central Hudson* and its progeny to decide the registry’s constitutionality. The Tenth Circuit interpreted the Supreme Court mandate regarding commercial speech presented above to overrule the District Court’s determination that the registry was an unconstitutional regulation of commercial speech.

*Mainstream I* involved many telemarketing companies from Colorado that challenged the do-not-call registry on procedural as well as constitutional grounds.<sup>102</sup> The Federal District Court for the District of Colorado held the registry unconstitutional because it discriminated between commercial and non-commercial speech.<sup>103</sup> Congress had already legislatively overruled the Oklahoma District Court that questioned FTC statutory authority, but the problems presented by the Colorado court would not be as easy to

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98. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

99. *44 Liquormart*, 517 U.S. at 526 (Thomas, J., concurring).

100. *Id.* at 519-20 (Thomas, J., Concurring) (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). Justice Thomas specifically referred to the following language:

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests, if only they are well informed, and that the best means to that end is to open the channels of communication rather than to close them.

*Va. Bd. Of Pharmacy*, 425 U.S. at 748, 769-70.

101. See generally *Mainstream Mktg. v. FTC*, 283 F. Supp. 2d 1151 (D. Colo. 2003) and *Mainstream Mktg. v. FTC*, 358 F.3d 1228, 1250-51 (10th Cir. 2004), cert. denied, 125 S. Ct. 47 (2004).

102. *Mainstream Mktg.*, 283 F. Supp. at 1151.

103. *Id.* at 1168.



hurdle because Congress may not implement legislation that is unconstitutional.<sup>104</sup>

In coming to its decision, the District Court did not reach prongs three or four because it found the registry to be an illegitimate content-based restriction.<sup>105</sup> The district court wrote “the FTC has chosen to entangle itself too much in the consumer’s decision by manipulating consumer choice and favoring speech by charitable over commercial speech.”<sup>106</sup> The District Court’s choice to ignore the clear ruling in *Central Hudson* that commercial speech may be regulated based on its content gave the Tenth Circuit ample ammunition to overrule.<sup>107</sup>

As a result, the United States Court of Appeals for the Tenth Circuit, bound by the Supreme Court’s case-by-case *Central Hudson* test, held the do-not-call registry constitutional across the board in *Mainstream II*.<sup>108</sup> To reach this conclusion, the court first considered the primary issue of “whether the First Amendment prevents the government from establishing an opt-in telemarketing regulation that provides a mechanism for consumers to restrict commercial sales calls but does not provide a similar mechanism to limit charitable or political calls.”<sup>109</sup> Then, the court also upheld the FTC’s authority to charge fees for maintenance of the registry, as well as the business relationship exception and overall statutory authority.<sup>110</sup> In short, the court held that the registry was a constitutional regulation of commercial speech.<sup>111</sup>

The Tenth Circuit cited both *Metromedia* and *Discovery Network* to show that commercial speech remains subject to a content-based restric-

104. *Id.* *Mainstream I* held the do-not-call registry failed to pass constitutional muster because it did not advance the substantial government interest of protecting the peace of the home. *Id.* The court said it failed the third prong of *Central Hudson* because the registry distinguished between commercial and non-commercial speech. *Id.* at 1165-66 (applied as the second prong by the district court); *see also* U.S. Security v. FTC, 282 F. Supp. 2d 1285 (W.D. Okla. 2003). *See also infra* notes 141-69 and accompanying text for a discussion of the constitutionality of the do-not-call registry under any Supreme Court analysis offered.

105. *Mainstream I*, 283 F. Supp. 2d at 1168. The court held the registry failed the third prong (directly advance government interest) because it was a “content-based” regulation. It therefore did not apply the third or fourth prong of *Central Hudson*. *Id.* *See infra* notes 120-132 and accompanying text for a discussion of how the Tenth Circuit applied prongs three and four.

106. *Mainstream I*, 283, F. Supp. at 1168.

107. *Id.* (omitting *Central Hudson*’s acknowledgment that commercial speech may receive content-based regulation); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562-63 (1980) (“[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

108. *Mainstream Marketing v. FTC*, 358 F.3d 1228, 1250-51 (10th Cir. 2004) (overruling *Mainstream I*).

109. *Id.* at 1232.

110. *Id.* at 1250-51.

111. *Id.* at 1246.

tion.<sup>112</sup> In applying *Central Hudson*, the Tenth Circuit disagreed with the Colorado District Court and held the do-not-call registry need not be 100 percent effective to directly advance the substantial government interest in preventing unwanted solicitation of the home and telemarketing fraud.<sup>113</sup> Because the law only recognizes protection for legal and non-misleading advertisements, the Tenth Circuit in *Metromedia II* did not analyze the first prong of the *Central Hudson* test, which asks whether the speech is illegal or misleading. Therefore, the court considered the *Central Hudson* test as three parts with an emphasis on a "reasonable fit" between the government interests and the regulation imposed, leading to two levels of analysis.<sup>114</sup>

### 1. First Level: Substantial Interest

The Tenth Circuit identified the government's interests as "1) protecting the privacy of individuals in their homes, and 2) protecting consumers against the risk of fraudulent and abusive solicitation. Both of these justifications are undisputedly substantial governmental interests."<sup>115</sup> In coming to that conclusion, the court relied on *Rowan v. United States Post Office*, which upheld a homeowner's right to restrict material delivered to the home.<sup>116</sup>

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112. *Id.* at 1236; see *Metromedia v. City of San Diego*, 453 U.S. 490 (1981); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

113. *Mainstream II*, 358 F.3d at 1238-39. The Tenth Circuit said:

As a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front. *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993). "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments." *Id.* 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. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995); see also *Central Hudson*, 447 U.S. at 564 ("If a regulation 'provides only ineffective or remote support for the government's purpose' it cannot be said to bear a reasonable fit with that purported objective"). *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (underinclusiveness provides a basis for a First Amendment claim when it constitutes an "attempt to give one side of a debatable public question an advantage in expressing its views to the people").

*Id.*

114. *Id.* at 1237.

115. *Id.* (internal citations omitted).

116. The Tenth Circuit summarized *Rowan v. U.S. Post Office*, 397 U.S. 729 (1970) when it said:

In *Rowan v. United States Post Office Dep't*, the Supreme Court upheld the right of a homeowner to restrict material that could be mailed to his or her house. The Court emphasized the importance of individual privacy,

The Tenth Circuit also emphasized that when invasive commercial speech enters the home, added protection will be provided to the unwilling listener.<sup>117</sup> The fact that radio waves invade a listener's home weighed heavily in the Court's holding in *FCC v. Pacifica*, which characterized the listener as at the mercy of the intrusive radio.<sup>118</sup> Therefore, the Tenth Circuit considered the government interest even more substantial because telephone solicitation invades the home without an action by the listener to seek the message.<sup>119</sup>

## 2. Second Level: Reasonable Fit

The Tenth Circuit in *Mainstream II* held a "reasonable fit exists between the do-not-call rules and the government's privacy and consumer protection interests if the regulation *directly advances* those interests and is *narrowly tailored*" to meet those interests.<sup>120</sup> Further, in conformity with *Board of Trustees of State University of New York v. Fox*, the Court emphasized the government must deliver a "proportional response."<sup>121</sup>

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particularly in the context of the home, stating that "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." In *Frisby v. Schultz*, the Court again stressed the unique nature of the home and recognized that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." As the Court held in *Frisby*:

One important aspect of residential privacy is protection of the unwilling listener. . . . [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

*Mainstream II*, 358 F.3d at 1237-38 (internal citations omitted) (quoting *Rowan v. United States Post Office*, 397 U.S. 728 (1970); *Frisby v. Schultz*, 487 U.S. 474 (1988)).

117. *FCC v. Pacifica Found.*, 438 U.S. 729, 748 (1978). The Tenth Circuit relied on *Pacifica's* language that, "In the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Mainstream II*, 358 F.3d at 1238 (quoting *Pacifica*, 438 U.S. at 748). The *Pacifica* Court held the explicit language used by a tape of George Carlin's comedy routine over the radio did not need to be determined obscene to justify FCC regulation. *Pacifica*, 438 U.S. at 750-51 ("We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.").

118. *Pacifica*, 438 U.S. at 748.

119. *Mainstream II*, 358 F. 3d at 1238.

120. *Id.* (emphasis added).

121. *Id.* ("In other words, the national do-not-call registry is valid if it is designed to provide effective support for the government's purposes and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would have worked just as well.").

### a) Directly Advances

Telemarketers argued the registry was not proportional because of the immunity granted to political and charitable calls.<sup>122</sup> The Tenth Circuit, however, pointed to the general rule that the “[F]irst Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front.”<sup>123</sup> Telemarketers failed on this point because the *Central Hudson* test inherently allows unequal treatment for commercial speech and the Colorado District Court erred when it used the guise of unfair application to hold the registry unconstitutional.<sup>124</sup>

The Tenth Circuit easily applied the *Central Hudson* test to negate the Colorado District Court’s decision when it concluded the registry directly advanced the interests identified.<sup>125</sup> Although the registry did not purport to stop all intrusive calls, the court found the FTC’s argument persuasive in that it “will prohibit a substantial number of them, making it difficult to fathom how the registry could be called an ‘ineffective’ means of stopping invasive or abusive calls . . . .”<sup>126</sup> The Tenth Circuit, in short, found the registry directly advanced the substantial government interests through commercial-only regulations even though it did not stop 100 percent of intrusive calls.<sup>127</sup>

### b) Narrowly Tailored

The registry’s opt-in feature weighed heavily in the court’s reasoning because those who welcome telephone solicitation may leave their numbers off the list.<sup>128</sup> Opt-in regulations inherently meet the fourth prong’s requirement that it must “be narrowly tailored not to restrict more speech than necessary.”<sup>129</sup> The court further explained that the registry “does not over-regulate protected speech; rather, it restricts only calls that are targeted at unwilling recipients.”<sup>130</sup> The court seemed to find opt-in regulation *per se* narrowly tailored and the Tenth Circuit argued persuasively that the FTC narrowly tailored its rules to protect only those who seek protection.

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122. *Id.* at 1246.

123. *Id.* at 1238.

124. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

125. *Mainstream II*, 358 F.3d at 1238.

126. *Id.* at 1237.

127. *Id.* at 1241-42.

128. *Id.* at 1233, 1238, 1242-43.

129. *Id.* at 1237.

130. *Id.* at 1242.

Telemarketers also argued the fees charged to maintain the registry amount to a "revenue tax on protected speech."<sup>131</sup> However, the Tenth Circuit held that such reasonable charges imposed upon the regulated are consistent with Supreme Court holdings in *Murdock v. Pennsylvania* and *Cox v. New Hampshire*, which held that a licensing fee to take part in a parade was not a revenue tax on speech, but "one to meet the expense incident to the administration of the act . . . ."<sup>132</sup>

Telemarketers next argued in *Mainstream II* that technology such as caller-ID would allow the same limitation while providing a more narrowly tailored alternative.<sup>133</sup> However, the Tenth Circuit countered that such an alternative would transfer the cost of regulation to the consumer and, because technology also assists telemarketers, it refused to sanction a "technological arms race."<sup>134</sup> Ultimately, the Tenth Circuit found the regulation narrowly tailored and held it provided a reasonable fit between the substantial interest in protecting consumers and the regulation.

### III. ANALYSIS

#### A. Introduction

Three questions remain after close historical analysis. First, what would the current Supreme Court do if this case or one like it were to find its way into the Court's hallowed halls? Second, is the registry constitutional only because commercial speech enjoys less protection than political speech? Finally, if the do-not-call registry is constitutional, what are the limits to opt-in regulation? The analysis section offers three arguments to answer those questions. First, the Tenth Circuit in *Mainstream II* conformed to Supreme Court doctrine and could not be overruled by any of the alternative commercial speech interpretations articulated by the current bench. Although the *Central Hudson* analysis for commercial speech has become fragmented, the do-not-call registry would pass constitutional muster under any of the opinions expressed. Second, a ruling to uphold the registry's con-

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131. *Id.* at 1246-47.

132. *Id.* at 1247. The court said:

The record conclusively demonstrates that the do-not-call registry fees are to be used only to pay for expenses incident to the administration of the do-not-call registry, as required by *Murdock* and *Giani*. The FTC explained that the costs of the do-not-call registry fall into three major categories. First are the actual cost of developing and operating the national registry . . . . Second are the costs of enforcement efforts . . . . Third, are the increased costs of agency infrastructure and administration . . . .

*Id.* at 1247-48. See also *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

133. *Mainstream II*, 358 F.3d at 1247.

134. *Id.* at 1245.

stitutionality necessarily follows even if commercial speech enjoyed the same protection given to political speech. Although such a bold change does not seem likely, the registry's legality under even the heaviest scrutiny shows how clearly it passes constitutional muster. Finally, in the wake of the registry's overwhelming constitutionality, future opt-in regulations like the do-not-call registry could apply to a number of other areas. However, limitations on opt-in regulations mean they will function only if the FTC applies them to a controllable medium of communication, they further a substantial government interest, and they do so by requiring regulated entities to pay a reasonable cost.

Before diving into the first question, a quick look at the philosophical options open to the Supreme Court should help the reader understand how the Court would approach the questions. Any of three basic schools of thought could guide the Supreme Court in future alterations of the commercial speech doctrine under the First Amendment.<sup>135</sup> First, some scholars advocate against any protection of commercial speech because it is "remote from the First Amendment's paramount goal of promoting expression regarding self-government."<sup>136</sup> The second school of thought calls for elevation of commercial speech protection "based mainly on the contention that commercial expression . . . cannot be categorically distinguished from non-commercial speech."<sup>137</sup> The third group embraces the Court's current case-by-case analysis "not as unprincipled groping, but as pragmatic development of doctrine in the tradition of common law."<sup>138</sup> These schools of thought drive the analysis section of this comment.

### 1. The Registry is Constitutional No Matter Which *Central Hudson* Interpretation Prevails

44 *Liquormart* reveals four distinct views regarding how to apply *Central Hudson*.<sup>139</sup> However, although each portion of the plurality opinion

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135. Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55, 73-78 (1999).

136. *Id.* at 73. The Supreme Court began its commercial speech jurisprudence with this principle, as articulated in *Valentine*. *Valentine v. Chrestensen*, 316 U.S. 52 (1942). See also *supra* notes 30-36 and accompanying text for a discussion of *Valentine*.

137. Stern, *supra* note 135, at 75. However, the Supreme Court has never given commercial speech more than limited protection. See *Metromedia v. City of San Diego*, 453 U.S. 490 (1981); *Posadas De Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); 44 *Liquormart v. Rhode Island*, 517 U.S. 484 (1996).

138. Stern, *supra* note 135, at 77. This final approach correctly describes the current commercial speech doctrine, which looks to precedent dating back to *Central Hudson* in 1980. See generally *Metromedia*, 453 U.S. 490 (1981); *Posadas De Puerto Rico Assocs. Associates*, 478 U.S. 328 (1986); *Fox*, 492 U.S. 469 (1989); *Discovery Network*, 507 U.S. 410 (1993); 44 *Liquormart*, 517 U.S. 484 (1996).

139. See 44 *Liquormart*, 417 U.S. at 484 (Stevens, J. plurality). Justice Stevens wrote the plurality opinion. *Id.* (Stevens, J., plurality). There were also three separate concurrences,

applies *Central Hudson* differently to the balance between the substantial government interest and the burden placed on the regulated entity, not one of those opinions would defeat the registry were it to come before the Supreme Court.<sup>140</sup> The Tenth Circuit applied the *Central Hudson* test properly, and its decision will stand no matter which of the four views expressed in *44 Liquormart* prevail if another challenge reaches the Supreme Court.<sup>141</sup> Such is the case even though *44 Liquormart* has been described as a decision that “heralded a more protective attitude toward commercial speech.”<sup>142</sup> A look at each balance offered in *44 Liquormart*, as offered below, proves the registry’s constitutionality.

First, the registry survives the plurality’s “special care” analysis as applied by Justice Stevens.<sup>143</sup> The plurality in *44 Liquormart* reviewed Rhode Island’s regulation with “special care” because it was a blanket ban on true, non-misleading advertising information.<sup>144</sup> Such special care, however, would not defeat or even apply to opt-in regulations because they are not blanket bans and do not ban telemarketers from contacting those who do not opt into the regulation.<sup>145</sup> In light of the more deferential approach given to regulations that fall short of a ban, the registry survives the special care applied to Rhode Island’s regulation.<sup>146</sup> Thus, the plurality approach would

one written by Justice Scalia (joined by Justice Thomas), one written by Justice Thomas, and one written by Justice O’Connor (joined by Justices Rehnquist, Souter and Breyer). *Id.* at 517-18, 528.

140. See *infra* notes 170-87 for a discussion of the registry’s constitutionality even if commercial speech enjoyed the same protection allowed for political speech. See also *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (holding that a person’s right to be left alone outweighs the First Amendment rights of an intruder); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding an ordinance that banned residential picketing). See also, Janelle Romp, Comment, *Hello, may I interest you in a Do-Not-Call List? A Comment on the Federal Trade Commission’s Proposal to Amend the Telemarketing Sales Rule*, 71 U. CIN. L. REV. 639, 659 (2002) (“[I]t appears that the telemarketing industry’s First Amendment challenges to the list are unfounded.”).

141. *Mainstream Mktg. v. FTC*, 358 F.3d at 1232-33 (10th Cir. 2004) (“We hold that the do-not-call registry is a valid commercial speech regulation because it directly advances the government’s important interest in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech.”).

142. Stern, *supra* note 135, at 72.

143. *44 Liquormart*, 517 U.S. at 500 (Stevens, J., plurality).

144. *44 Liquormart*, 517 U.S. at 510 (Stevens, J., plurality) (“[A] state legislature does not have the broad discretion to suppress truthful, non-misleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.”).

145. 16 C.F.R. § 310.4(b)(1)(iii)(B) (2004); see also *Mainstream II*, 358 F.3d at 1243 (“Under the circumstances we address in this case, we conclude that the do-not-call registry’s opt-in feature renders it a narrowly tailored commercial speech regulation.”).

146. *44 Liquormart*, 517 U.S. at 501 (Stevens, J., plurality) (“When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices . . . , the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”). In reading *Central Hudson*, the Court found a conclusion that “special care should attend the review of such blanket bans, and . . . in recent years this Court has not approved a blanket ban

subject the do-not-call registry to a reasonable-fit analysis that balances the burden imposed on the regulated entity against the state interest of protecting privacy and fighting fraud.<sup>147</sup>

The registry survives the plurality's balancing approach because the reasonable compliance costs imposed further substantial government interests.<sup>148</sup> As *Mainstream II* points out, the registry directly advanced legitimate government interests in protecting privacy within the home and in preventing fraudulent sales practices.<sup>149</sup> Regarding the other half of the balancing analysis, on the burden felt by the regulated entity, the plurality reasoned clearly that anything short of a total ban will receive considerable deference.<sup>150</sup> The plurality would balance the burden faced by the regulated entities through administration costs (forty dollars per area code of information) against the cost of telephone fraud (forty-billion dollars) and invasion of the sacred home faced by the nation's citizenry.<sup>151</sup>

Second, the registry also survives the analysis provided in Justice O'Connor's concurrence.<sup>152</sup> The concurring justices focused on the narrowly-tailored prong and advocated a narrow focus.<sup>153</sup> Still, the Justices did

on commercial speech unless the expression itself was flawed in some way . . . ." *Id.* at 500 (Stevens, J., plurality) (internal citation omitted).

147. *Id.* at 494.

148. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding an ordinance that banned residential picketing because of the substantial government interest in protecting the unwilling listener). *Frisby* supports a finding that protection of the unwilling listener in the privacy of his or her home is a substantial government interest. *Id.* See also *Mainstream II*, 358 F.3d at 1241 (finding the type of calls prohibited by the registry were those determined by Congress, the FTC and FCC to be most to blame for deceptive and abusive practices, which shows that the government also has a substantial interest in protecting against fraud).

149. *Id.* at 1238.

150. *44 Liquormart*, 517 U.S. at 503 (Stevens, J., plurality). The Court said:

Precisely because bans against truthful, non misleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.

*Id.* (Stevens, J., plurality). The Court also explicitly stated that Rhode Island's blanket ban motivated the Court to review the ban with "special care" because it was not related to consumer protection. *Id.* at 504 (Stevens, J., plurality). Opt-in regulations, on the other hand, allow people to choose for themselves whether to close an avenue of information and clearly include strong consumer protection motivations to protect privacy rights and discourage fraud. See 16 C.F.R. § 310.4(b)(1)(iii)(B) (2004).

151. 16 C.F.R. § 310.8(c). See also *Mainstream II*, 358 F.3d at 1243 ("Under the circumstances we address in this case, we conclude that the do-not-call registry's opt-in feature renders it a narrowly tailored commercial speech regulation.").

152. *44 Liquormart*, 517 U.S. at 528-34 (O'Connor, J., concurring).

153. *Id.* at 529 (O'Connor, J., concurring).



not construe the fourth prong (narrowly tailored) to require the least restrictive means available, but rather a reasonable fit as articulated in *Fox*.<sup>154</sup> Therefore, the do-not-call registry must merely show a reasonable, but not perfect, fit between the legislature's goals of fraud prevention and privacy protection and the burden imposed.<sup>155</sup> Again, the registry satisfies this balancing test because of the regulation's success in protecting unwilling listeners while leaving the willing listener free to hear telemarketing messages.<sup>156</sup>

Third, the registry would prevail under Justice Thomas' analysis, which opposed the narrowly-tailored prong when there is a danger of keeping consumers in the dark.<sup>157</sup> Justice Thomas' reasoning that "all attempts to dissuade legal choices by citizens by keeping them ignorant are impermissible" does not apply to the do-not-call registry because the registry allows those willing to listen to commercial speech the opportunity to do so through non-action.<sup>158</sup> Though Justice Thomas offered the most commercial speech protection in his *44 Liquormart* concurrence, the registry's opt-in feature still passes his guidelines because the only consumers prohibited from hearing the commercial speech are those who choose not to, rendering any ignorance purely bliss.<sup>159</sup>

Fourth, Justice Scalia's proposed historical analysis would not likely reveal that tradition and the First Amendment's legislative history would disallow commercial speech regulation.<sup>160</sup> According to Justice Scalia, legislative intent against commercial speech regulation would be necessary to overturn that regulation, but he concurred in the *44 Liquormart* plurality and vaguely left the question open for another time.<sup>161</sup> A deep look into the legislative history is beyond the scope of this comment. Consideration of what has happened since the First Amendment was passed, however, shows that the Supreme Court has never recognized commercial speech as anything but

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154. *Id.* (O'Connor, J., concurring) (citing *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 492, 480 (1989)).

155. *Id.* (O'Connor, J., concurring); see also *Mainstream II*, 358 F.3d at 1243.

156. 16 C.F.R. § 310.4(b)(1)(iii)(B) (2004); Telemarketing and Consumer Fraud and Abuse Protection Act findings, 15 U.S.C. § 6101 (2004).

157. *44 Liquormart*, 517 U.S. at 523-24 (Thomas, J., concurring).

158. *Id.* at 526 (Thomas, J., concurring).

159. 16 C.F.R. § 310.4(b)(1)(iii)(B).

160. See generally *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (holding that commercial speech was not protected by the First Amendment); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (granting only limited protection to commercial speech); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976) (holding a complete ban on pharmaceutical advertisements unconstitutional, but acknowledging that commercial speech protection remains limited); *Metromedia v. City of San Diego*, 453 U.S. 490 (1981); *Posadas De Puerto Rico Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989); *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993); *44 Liquormart*, 517 U.S. at 488 (Stevens, J., plurality) (1996).

161. *44 Liquormart*, 517 U.S. at 517-18 (Scalia, J., concurring).

partially protected.<sup>162</sup> Indeed, a cursory look at the history shows limited protection followed more than 200 years of non-protection after the country's independence.<sup>163</sup> Therefore, though this comment does not delve into First Amendment legislative history, the fact remains that commercial speech jurisprudence has consistently provided only limited protection, and Justice Scalia remains the only member of the Court to propose a legislative history analysis. Therefore, Justice Scalia's solitary suggestion would not likely sway the current balancing test.<sup>164</sup>

In summary, despite the confusion and judicial divisions over the application of the third and fourth prongs of *Central Hudson*, the *Mainstream II* court applied the analysis as it was meant to be applied and came to the only acceptable and lawful conclusion.<sup>165</sup> Indeed, the Supreme Court faces only two possible departures from the several tests represented in *44 Liquormart*: revert to the less protective, more deferential *Posadas* test or elevate commercial speech to the level of protection enjoyed by political speech.<sup>166</sup> The first possibility, a return to *Posadas*' deference to the legislature approach, would strengthen the registry because Congress made its intention to grant authority to the FTC and FCC crystal clear, as evidenced by the clear words uttered by the Speaker of the House.<sup>167</sup> Prior challenges to the registry's legitimacy have bolstered its legitimacy because those challenges led to blatant Congressional assertions that Congress was serious about the authority it gave to the FTC and FCC to regulate unwanted calls.<sup>168</sup> The second possibility, considered in detail below, would represent a radical new analysis that recognizes protection of commercial speech as equal to that of political speech.<sup>169</sup>

## 2. Even Political-Level Protection for Commercial Speech Would Not Defeat the Do-Not-Call Registry

The second school of thought mentioned above—that commercial speech is not distinguishable from noncommercial speech and should be

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162. See *supra* note 160 for a list of cases that identify commercial speech protection as limited.

163. *Va. State Bd. of Pharmacy*, 425 U.S. at 761-62 (holding for the first time that commercial speech protection receives limited protection).

164. *44 Liquormart*, 517 U.S. at 517-18 (Scalia, J., concurring).

165. *Mainstream II*, 358 F.3d at 1246.

166. See *supra* notes 26-28 and accompanying text for a discussion about Congress' clear expression of intent.

167. 149 CONG. REC. H8916-02 (daily ed. Sept. 25, 2003). See *supra* notes 63-71 and accompanying text to distinguish the *Posadas* analysis from *Metromedia*.

168. 149 CONG. REC. H8916-02 (daily ed. Sept. 25, 2003).

169. Such a proposition, although extremely unlikely, is not impossible in light of Justice Thomas' opinion that "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *44 Liquormart*, 517 U.S. at 522 (Thomas, J., concurring). However, Justice Thomas was the only Justice who expressed such a preference. *Id.* at 516 (Thomas, J., concurring).

equally protected—represents the end of a pendulum the Supreme Court has never explored.<sup>170</sup> Such a drastic shift away from a case-by-case analysis into a more absolute realm of speech protection as a whole would arm commercial speech with the highest speech protection offered by the Supreme Court.<sup>171</sup> No evidence suggests that a majority of the current Supreme Court will adopt the philosophy that commercial speech should enjoy the same level of protection as political speech, and a philosophical change would be unwise because the economic marketplace would ripen with the kind of unacceptable misinformation and outright falsities allowed to stand in the name of free political speech.<sup>172</sup> For that reason, the Supreme Court *will not* likely adopt the philosophy that commercial speech should enjoy the same level of protection granted political speech.<sup>173</sup> History suggests that society has made a decision to accept the slanderous damage done to public figures in order to protect political expression.<sup>174</sup> Society has not, however, decided that false or misleading commercial speech and its destructive effect outweigh the benefits provided.<sup>175</sup> Indeed, American legal history suggests that commercial speech protection is not worth the fraud or misinformation that would inherently accompany its rigorous protection.<sup>176</sup>

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170. See *supra* note 160 for discussion of how the Supreme Court's commercial speech doctrine developed.

171. See *supra* notes 53 and 96 and accompanying text to both notes to contrast the differences between the analysis used in *Central Hudson* to strike down a statute and the free-information analysis Justice Thomas proposed.

172. Thomas Jackson & John Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 18 (1979). The authors argued:

[I]n terms of relevance to political decisionmaking, advertising is neither more nor less significant than a host of other market activities that legislatures concededly may regulate. The decisive point is the absence of any principled distinction between commercial soliciting and other aspects of economic activity . . . . Economic due process is resurrected, clothed in the ill-fitting garb of the First Amendment.

*Id.* See also *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that defamatory content against a public official insufficient without actual malice). See also 44 *Liquormart*, 517 U.S. at 484. Although Justice Thomas advocated such a position, at least seven justices suggested acceptance of lesser protection of commercial speech. *Id.*

173. See *supra* note 167 for a discussion of Justice Thomas' opinion regarding elevated protection for commercial speech.

174. *New York Times*, 376 U.S. at 270. The Court relied upon Learned Hand's conclusion that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *Id.* (citing *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

175. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 764-65 (1976).

176. See *supra* note 159 and accompanying text for a discussion about how the registry's opt-in feature renders consumer ignorance purely bliss.

Also, the Court *should not* elevate commercial speech to the level of protection enjoyed by political speech because unregulated commercial speech would damage the integrity of the marketplace and encourage rampant misinformation and fraud.<sup>177</sup> Imagine a world where price advertisements and commercial transactions, with money changing hands directly, were held to the same standard that allows David Letterman or other comedic performers to speak half-truths and exaggerations with impunity. A commentator may call President George W. Bush a war criminal because the president can enter the dialogue on a grand stage and defend his fitness for office.<sup>178</sup> A wild advertising claim that leads a person to mortgage his or her future for a scam that will never produce a winner only serves to further fraud, erode confidence in the marketplace and injure individual victims.<sup>179</sup>

However, if this highly unlikely elevation were to occur, opt-in regulations like the do-not-call registry could survive because all forms of speech, including political speech, yield to the privacy rights of a person at home.<sup>180</sup> Therefore, even if the Court were to adopt the philosophy that commercial speech deserves political-speech-like protection, the registry would remain constitutional.<sup>181</sup> Barriers such as forum restrictions are readily imposed on political speech, rendering the protection offered even to our most cherished form of speech less than absolute.<sup>182</sup> Although the Supreme Court recognized a “public easement” in public streets and parks for speech, nonpublic government forums and private residences remain unavailable for political speech.<sup>183</sup> Just as political speech must stop at the doorway of a home, the do-not-call registry seeks such privacy protection.<sup>184</sup> Limitations imposed on political speech relegate the speaker to a secondary status when

177. See DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 1:1 (2004) (emphasis added). Professor Pridgen discusses the evolution of consumer protection law from *caveat emptor* to FTC regulation of unfair trade practices. *Id.*

178. *New York Times*, 376 U.S. at 270 (“Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that they may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

179. See Hines, *supra* note 7, at 84. See also Bratkiewicz, *supra* note 7, at 588-89; Moualem, *supra* note 7.

180. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (upholding an ordinance that banned residential picketing because of the substantial government interest in protecting the unwilling listener); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that a radio broadcast of comedian George Carlin’s “Filthy Words” routine need not be obscene to justify protection of the home). See also, Patricia Pattison & Anthony McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin’ On!*, 3 WYO. L. REV. 167, 197-98 (2003).

181. Joseph R. Cox, *Telemarketing, The First Amendment, and Privacy: Expanding Telemarketing Regulations Without Violating the Constitution*, 17 HAMLINE J. PUB. L. & POL’Y 403, 422 (1996).

182. CHEMERINSKY, *supra* note 30, § 11.4.1. See also, *Schneider v. New Jersey*, 308 U.S. 153, 162 (1939); *Frisby*, 487 U.S. at 484; *Pacifica Found.*, 438 U.S. at 726.

183. See *Frisby*, 487 U.S. at 474.

184. See *supra* notes 170-87 and accompanying text for a discussion about the boundaries of political speech.

he or she arrives at someone's home without invitation.<sup>185</sup> Therefore, even the highest constitutional protection afforded commercial speech will not allow commercial messages into the homes of unwilling listeners.<sup>186</sup> Indeed, at least one commentator argues that even opt-out legislation—in which telemarketers must presume they cannot call a home unless that home signs up to receive the call—would be constitutional.<sup>187</sup>

In summary, commercial speech most likely will not, and absolutely should not, be elevated to a status equal to that of political speech. However, if such a philosophical change were to occur, the registry would still pass constitutional muster because the burdens it imposes on the regulated companies do not outweigh the substantial government interests of privacy protection and fraud prevention. So, what would stop Congress from using cookie-cutter legislation to flood the public with opt-in regulations? The next section argues Congress has not found a weapon powerful enough to all unrestricted regulatory power.

### 3. Limitations of Opt-In Regulations Require Case-by-Case Determinations for Future Regulations—A Checklist for Future Opt-In Regulations

The registry's clear constitutionality likely will lead to similar regulations.<sup>188</sup> However, the do-not-call registry mold alone may not guarantee constitutionality in every situation because future commercial speech regulation must further a substantial governmental interest, regulate a controllable mode of communication and do so at a reasonable cost.<sup>189</sup> Therefore, although the model established by the registry clearly passes constitutional muster as shown above, future regulations and the entities they will regulate must be considered individually. The area many commentators assume to be

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185. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Unwittingly, the *Pacifica* Court made the case for a do-not-call registry when it chastised the radio station and wrote:

To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. *One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.*

*Id.* at 748-49 (emphasis added).

186. *Frisby*, 487 U.S. at 484; *Pacifica Found.*, 438 U.S. at 726, 750-51. *See also*, Patison & McGann, *supra* note 180, at 197-98.

187. *See Cox*, *supra* note 181, at 422 (advocating a do-call registry where those willing would consent to calls rather than opt-into a do-not-call list).

188. *See PRIDGEN*, *supra* note 177, § 12:51 ("This new approach to telemarketing regulation has survived several legal challenges, and is now poised to become a model for regulation of other unwanted commercial solicitations, such as junk emails, or SPAM").

189. *See supra* note 148 and accompanying text for Supreme Court precedent regarding substantial government interests.

the next target for opt-in regulation, mass e-mail spamming, provides a perfect case study for future opt-in regulation.<sup>190</sup> Anti-spamming regulation, which was recently rejected by the FTC as impractical, illustrates the limitations inherent in opt-in regulation as well as the proper conditions for implementation.<sup>191</sup> The FTC put off the idea of a do-not-spam list until it could apply the regulation in an effective way, but that does not foreclose future opt-in spam regulation.<sup>192</sup> This example is but one possible future use for opt-in regulation that illustrates how future interests may or may not fit the mold established by the do-not-call registry.<sup>193</sup> The following is a checklist for effective opt-in regulation—applied using Internet spam as an illustration.

First, opt-in regulation requires a controllable, or at least traceable, method of communication.<sup>194</sup> Just as pizza restaurants across the country were often victimized by prank pizza orders before caller-ID and other identification methods became available, most current e-mail holders are helpless to hunt those responsible for commercial messages nestled in an online inbox.<sup>195</sup> Because of such control problems, the FTC determined the Commission would be “largely powerless to identify those responsible for misusing the Registry,” and left the possibility of opt-in regulation for a time when identification methods turn a spotlight on the Internet’s many shadowy corners.<sup>196</sup>

Second, the regulation must further a substantial government interest. A do-not-spam list presents a different list of candidates for the substantial government interests the regulation must further.<sup>197</sup> A do-not-spam list

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190. See PRIDGEN, *supra* note 177, § 12:51; FTC National Do Not Email Report to Congress, June, 2004, available at <http://www.ftc.gov/reports/dneregistry/report.pdf>. (last visited May 1, 2005). The FTC’s report was a response to the CAN-SPAM Act 15 U.S.C.7708 (a)(1)-(3). *Id.*

191. Richard C. Balough, *The Do-Not-Call Registry Is Not The Answer To Spam*, 22 J. MARSHALL J. COMPUTER & INFO. L. 79, 86-87 (2003).

192. FTC National Do Not Email Registry: A Report to Congress, *supra* note 190, at i-ii.

193. See Balough, *supra* note 191, at 89 for a discussion of holding the company that benefits from the advertising provided in spam liable for that spamming. See also Adam Mossoff, *SPAM - Oy! What a Nuisance*, 19 BERKELEY TECH. L. J. 625, 629-30 (2004) (discussing author’s preference for treating spam as a nuisance rather than a trespass).

194. FTC National Do Not Email Registry: A Report to Congress, *supra* note 190, at i (“This report concludes that a National Do Not Email Registry, without a system in place to authenticate the origin of email messages, would fail to reduce the burden of spam and may even increase the amount of spam received by consumers.”).

195. *Id.* See also *supra* note 134 and accompanying text for a discussion of the Tenth Circuit’s decision not to foster a “technological arms race” by placing the burden on the consumer to arm herself with technology to deflect unwanted calls.

196. FTC Do Not Email Report to Congress: A Report to Congress, *supra* note 190, at i. The report also noted that “a Registry-type solution to spam would raise serious security, privacy, and enforcement difficulties.” *Id.*

197. See *supra* notes 143-51 and accompanying text regarding the emphasis placed on the balance between the burden placed on the regulated entity and the substantial government

does not provide the same protection against intrusion on the home provided by the do-not-call registry because e-mail does not ring a telephone within the home, but rather waits patiently in an inbox.<sup>198</sup> However, Congressional findings articulated in the CAN-SPAM Act boldly state that Congress has a substantial government interest in regulating spam.<sup>199</sup> Congress' findings concluded that spam imposes costs on recipients, Internet providers, and educational and non-profit groups for e-mail storage, time spent sorting through e-mails and other costs because anyone who receives spam may miss desired e-mails or may need to upgrade storage space or infrastructure to accommodate the massive amount of incoming data.<sup>200</sup> There also exists an inherent danger that pornographic advertising may become accessible to children or a virus may infect a computer when such messages are sent to an unwilling recipient.<sup>201</sup> Whether or not spam regulation would hold up under *Central Hudson's* requirement that the regulation further a substantial government interest has yet to be determined, but it is difficult to imagine the government does not have an interest in shielding children from pornography in their homes or shield the rest of the population from the many costs and burdens imposed by commercial spamming.<sup>202</sup>

Finally, only reasonable administrative costs may be imposed on regulated entities.<sup>203</sup> Unless the FTC eliminates the impracticalities that led it to recommend against a national spam registry, reasonable administrative costs may be difficult to establish.<sup>204</sup> A comparison between telemarketing regulation and spam regulation illustrates how difficult it would be to reasonably charge spammers for administrative costs. Cost issues loom even over the do-not-call registry, so it follows that a less-controllable medium like spam would present more difficult cost problems.<sup>205</sup> Even do-not-call

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interest in determining the narrowly tailored prong of *Central Hudson*. See also FTC Do Not Email Report to Congress: A Report to Congress, *supra* note 190.

198. See *supra* note 116 and accompanying text for a discussion about the primacy of the home.

199. The CAN-SPAM Act § 2(b)(1), Pub. L. 108-187, 117 Stat. 2699 (2003).

200. *Id.* § 2(a)(3)-(12). See also Mark Simon, Comment, *The CAN-SPAM Act of 2003: Is Congressional Regulation of Unsolicited Commercial E-Mail Constitutional?*, 4 J. HIGH TECH. L. 85, 95 (2004), for a discussion of the Congressional findings.

201. Christopher Scott Maravilla, *The Feasibility of a Law to Regulate Pornographic, Unsolicited Commercial E-Mail*, 4 TUL. J. TECH. & INTELL. PROP. 117, 118, 131 (2002).

202. *Id.*

203. *Mainstream Marketing v. FTC*, 358 F.3d 1228, 1247 (10th Cir. 2004) (applying Supreme Court precedent to allow administrative costs associated with the do-not-call registry).

204. FTC Do Not Email Report to Congress: A Report to Congress, *supra* note 190, at ii ("Before expending resources on the implementation of a Registry, the marketplace should be encouraged and allowed to correct a flaw in the email system's architecture that enables spam—the lack of domain-level authentication").

205. *Mainstream II*, 358 F.3d at 1241. Even though financial burdens placed on telemarketers do not overcome the presumptions against allowing speech of any kind into an unwilling listener's home, the industry has complained that it may have to lay-off as many as fifty percent of workers employed as telephone solicitors. *Id.* However, considered beside Con-

administration costs have increased since *Mainstream II* and telemarketers can legitimately argue their legal speech could cost several thousands of dollars per year even though telephone solicitation operates in a more controllable medium.<sup>206</sup> Spam, on the other hand, remains difficult to control, and would thus produce prohibitive administration costs at present.<sup>207</sup> Therefore, a do-not-spam list will have to wait until the FTC can administer regulations at a reasonable cost before the substantial government interest fight begins.<sup>208</sup>

This third and final requirement proves to be the most difficult to meet because cost problems do not just increase, but amplify drastically when the prospective-regulated entity cannot be easily controlled or traced.<sup>209</sup> At least one author predicts a large-scale technological arms race between spammers and those seeking to limit spam into the foreseeable future until legal and technological coordination bring the problem under enough control to regulate.<sup>210</sup> It stands that any future regulated form of communication that is as difficult to control as spam will face similarly prohibitive costs that would likely take the regulation outside of the reasonable costs tolerated by the nation's courts.<sup>211</sup> Therefore, comparison between telemarketing regulation and possible spam regulation demonstrates how difficult it will be for the FTC to apply the reasonable-cost requirement to future regulated entities, and supports the conclusion that opt-in regulation

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gressional findings that fraudulent telemarketing has cost consumers forty-billion dollars per year, the overhaul must be placed in proper perspective. 15 U.S.C. § 6101 (2004).

206. Compare 16 C.F.R. §310.8(c) (2003), with 16 C.F.R. §310.8(c) (2004). No evidence suggest that such a price hike would render the Tenth Circuit's affirmation of the costs as reasonable administrative expenses moot, but a drastically higher cost associated with a difficult-to-handle mode of communication such as e-mail could raise more issues. See *supra* note 132 and accompanying text for a discussion of the legitimacy of administrative expenses imposed on the regulated entity. See also *supra* note 21 and accompanying text for a discussion of the expenses imposed on regulated telemarketing companies. Indeed, the FTC provided notice and solicited public comment on another proposed rule that would increase the cost again, this time from forty dollars to fifty-six dollars per area code of information with the maximum yearly fee also raised from \$11,000 to \$15,400. Telemarketing Fees, Notice of Proposed Rulemaking, *supra* note 21. The request cited regulation costs of \$21.9 million and an overwhelming number of regulated telemarketing businesses (52,700 of 60,800) that do not pay because they access five or less area codes. *Id.* The FTC set the deadline for public comment for June 1, 2005. *Id.*

207. FTC Do Not Email Report to Congress: A Report to Congress, *supra* note 190.

208. See Balough, *supra* note 191, at 94-95 (concluding that a do-not-spam list in the do-not-call registry mode would not be practical for spam regulation).

209. David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F.L. REV. 325, 330-31 (2001) (discussing the difficulty of controlling the massive number of e-mails sent by spammers). See also FTC National Do Not Email Registry: A Report to Congress, *supra* note 190.

210. Sorkin, *supra* note 209, at 383-84 (concluding that legal and technological coordination is the best answer to the spam problem).

211. *Id.*



cannot be used as cookie-cutter regulation for just any entity, annoying or not.<sup>212</sup>

In sum, opt-in regulations are effective and constitutional provided that they are practical, further a substantial government interest, and charge a reasonable administrative cost. So long as future FTC regulations follow the registry's substance and not merely its form, the agency should enjoy an effective and constitutional method for those areas of communication that meet the checklist's stringent requirements.

#### IV. CONCLUSION

The national do-not-call registry withstands any of the commercial speech interpretations advocated by the current Supreme Court, and it appears here to stay. Indeed, the Supreme Court could not render the registry unconstitutional even if it elevates commercial speech protection to that enjoyed by political speech; an action that is both unlikely and unwise. Some would even argue federal regulatory agencies may intervene further than they have, or tolerate less than they do.<sup>213</sup> Finally, so long as future regulations stay true to the substance of the do-not-call registry and follow the three-part checklist provided, commercial solicitors who annoy a vast portion of the population should expect more opt-in regulations in the future. After all, the American public may still decide that e-mail inbox spam-attacks in the form of Viagra advertisements equal telemarketing's unique ability to interrupt dinner on the national irritation scale. The FTC will be able to further its substantial government interests and act against spam as soon as technology allows Internet identification and administrative costs become reasonable. And if spammers think they can challenge opt-in regulation when that day comes, they should remember that Congress has proven itself willing to join the fight.

JOSEPH DEAN FINDLEY<sup>214</sup>

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212. FTC Do Not Email Report to Congress: A Report to Congress, *supra* note 190.

213. Cox, *supra* note 181, at 422.

214. I dedicate this comment to the memory of my father, Dr. Larry J. Findley, in appreciation for his unending support and in recognition for his long and prestigious legacy in medical research, the innumerable lives he saved, and his status as a hero in my eyes.