2005

The "Do-Not-Call List" Controversy: A Parable of Privacy and Speech

Rodney A. Smolla
Washington and Lee University School of Law

THE "DO-NOT-CALL LIST" CONTROVERSY: A PARABLE OF PRIVACY AND SPEECH

RODNEY A. SMOLLA†

I. INTRODUCTION

The controversy surrounding the constitutional challenge to the federal telemarketing "Do-Not-Call List" is a revealing parable of modern American life. The questions of First Amendment policy and doctrine posed by the challenge to the list are interesting in their own right. The real interest lies, however, not in the doctrinal chess moves themselves, but in the patterns of the larger match those moves reveal.

The "Do-Not-Call List" is the popular nickname for a national Registry maintained by two federal agencies, the Federal Trade Commission ("FTC") and Federal Communications Commission ("FCC"), permitting consumers to opt-in to place their phone numbers on a national list of consumers who do not wish to be called on telephones by telemarketers.[1] Consumers can register their personal phone numbers for the list either by phone or online. Most commercial telemarketers are prohibited from phoning consumers on the list, and face severe penalties for violations. There is an exception provided for telemarketers who have an "established business relationship" with the consumer.[2] The purpose of the list is to protect privacy, sheltering consumers who opt-in from the hassle and intrusion of unwanted phone calls. The list does not apply, however, to political or charitable callers,[3] and thus discriminates in its operation based upon the message and the messenger, a discrimination that places the program in arguable tension with First Amendment principles.

---

† Dean and Allen Professor of Law, University of Richmond School of Law.

1. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B) (2004) (FTC rule); 47 C.F.R. § 64.1200(c)(2) (2004) (FCC rule).

2. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i-ii); 47 C.F.R. § 64.1200(f)(9)(i-ii). The term "telemarketing" refers to commercial sales calls made to induce purchases of goods or services. The "established business relationship" exception allows businesses to call customers with whom they have conducted a financial transaction or to whom they have sold, rented, or leased goods or services within 18 months of the telephone call. 47 C.F.R. § 64.1200(f)(3).

3. 16 C.F.R. §§ 310.4(b)(1)(iii)(B), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), 64.1200(f)(9).

When a federal district judge in Denver struck down the Do-Not-Call List,[4] finding that the discrimination it visited against commercial telemarketers was a violation of the First Amendment, the decision torched an enormous political firestorm.[5] One might have thought the judge had struck down Social Security, Medicaid, Medicare, the Oscars, the Super Bowl, and the World Series in one fell swoop. With exceptional speed, Congress geared up to fight the court's decision,[6] and the world of radio and television talk shows were ablaze with protest.[7] The fire was put out, however, when the United States Court of Appeals for the Tenth Circuit reversed the District court, upholding the Do-Not-Call List and rejecting the First Amendment challenge in *Mainstream Marketing Services, Inc. v. Federal Trade Commission.*[8] In October of 2004, the United States Supreme Court declined review.[9]

We are in the midst of a new struggle to find an appropriate place for the legal protection of privacy in American life. The quest for the recapture of privacy is the civil rights struggle of this new century. Balancing the protection of privacy against other compelling social interests, such as national security or freedom of speech, will be one of the profound challenges to our legal system in the coming decade. In recent times, privacy has not usually fared well in legal and political face-offs with other social values. In the "Do-Not-Call" list story, however, privacy won. The victory may be an important portent of a shift in national mood; a harbinger of future triumphs.[10]

---

4. Mainstream Mktg. Serv., Inc., v. Fed. Trade Comm'n, 283 F.Supp.2d 1151 (D. Colo. 2003).

5. Caroline E. Mayer, *Do-Not-Call List Blocked Court; FTC Overstepped Role, Judge Says*, WASH. POST, Sept. 25, 2003, at A1.

6. A prior judicial setback to Do-Not-Call was a decision on September 23, 2003 by the United States District Court for the Western District of Oklahoma. U.S. Sec. v. Fed. Trade Comm'n, 282 F. Supp. 2d 1285 (W.D. Okla. 2003). In *U.S. Security*, the district court held that the FTC lacked the statutory authority to create its national Registry. Whereas Congress had clearly given the FCC the green light to adopt a national Registry enacting the TCPA, the district court reasoned that no similar explicit authority existed under the TCFAP granting parallel authority to the FTC. *Id.* at 1291. In reaching this judgment, the District Court was unmoved by the fact that the Implementation Act appeared to tacitly endorse the FTC's national Registry, holding that Congress' appropriation and fee-authorizing legislation was not a "ratification" of the FTC's actions sufficient to constitute statutory authorization for the Registry. *Id.* at 1292. Congress reacted with extraordinary swiftness to cure the alleged defect relied upon by the district court in *U.S. Security*. Within days of the decision, Congress passed, and President Bush signed into law, a statute explicitly and unequivocally granting the FTC authority to enforce the Do-Not-Call Registry.

7. Dan Gorenstein, *Court Ruling Shelves State's Do Not Call List* (NH Public Radio news broadcast, Sept. 26, 2003)

8. 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 47 (October 4, 2004).

9. Mainstream Marketing Services, Inc. v. F.T.C., 125 S.Ct. 47 (2004).

10. The decision of the Tenth Circuit in *Mainstream Marketing* was thus consistent with other decisions in recent years approving similar telecommunications regulations.

II. THE BACKGROUND STORY: CONGRESS, TELEMARKETERS, THE FTC AND FCC

Congress passed the Telephone Consumer Protection Act ("TCPA") in 1991.[11] The law was enacted "to protect residential telephone subscribers' privacy rights to avoid telephone solicitations to which they object."[12] The FCC was directed to promulgate regulations that restricted the use of automatic telephone dialing systems.[13] In 1992, the FCC adopted rules pursuant to the TCPA, but declined to create a national "Do-Not-Call" list. Instead, the new rules required telemarketers to adopt company-specific Do-Not-Call lists. Under this system, a consumer who did not wish to receive telephone solicitations from a particular company could request that the telemarketer remove that consumer's telephone number from the telemarketer's list. By 2002, however, the FCC appeared to realize that its company-specific approach had failed to provide adequate privacy protection to consumers, and the Commission issued a Notice of Proposed Rulemaking requesting comment on whether the Commission should revisit its decision regarding the establishment of a national Do-Not-Call Registry.[14]

Three years after the enactment of the TCPA, Congress in 1994 enacted a second important piece of legislation, the Telemarketing and Consumer Fraud and Abuse Prevention Act ("TCFAP").[15] The law instructed the Commission to promulgate rules prohibiting deceptive and other abusive telemarketing acts or practices and to include in such rules a definition of deceptive telemarketing acts or practices.[16] The TCFAP, enforced by the FTC, did not apply to activities that were outside of the jurisdiction of the FTC, such as certain financial institutions, common carriers, air carriers and nonprofit organizations, or insurance companies. In 1995, the FTC adopted rules

See Missouri v. Am. Blast Fax, Inc., 323 F.3d 649, 652, 660 (8th Cir.2003) (upholding regulations prohibiting unsolicited commercial fax advertising); *Destination Ventures, Ltd., v. F.C.C.*, 46 F.3d 54 (9th Cir.1995) (same); *Moser v. F.C.C.*, 46 F.3d 970, 972-75 (9th Cir.1995) (upholding ban on prerecorded commercial telemarketing).

11. Telephone Consumer Protection Act, 47 U.S.C. § 227 (1991).

12. *Id.* § 227(c)(1).

13. *Id.* § 227(b)(1).

14. The company-specific Do-Not-Call regulations required that a company must respect a consumer's request not to receive calls from or on behalf of that particular business. *See* 16 C.F.R. § 310.4(b)(1)(iii)(A) (1992); 47 C.F.R. § 64.1200(d)(3) (1992). There was evidence that as to commercial callers, the company-specific program had not been effective. *Mainstream Marketing*, 358 F.3d at 1233 ("[t]he government also had evidence that the less restrictive company-specific do-not-call list did not solve the problems caused by commercial telemarketing, but it had no comparable evidence with respect to charitable and political fundraising").

15. Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108 (1994) ("TCFAP").

16. *Id.* § 6102(a) (1), (2).

implementing this legislation, rules that did not contain any national Do-Not-Call Registry.

By 2002, however, the FCC appeared to realize that its company-specific approach had failed to provide adequate privacy protection to consumers, and the Commission issued a Notice of Proposed Rulemaking requesting comment on whether the Commission should revisit its decision regarding the establishment of a national do-not-call list. In January 2002, the FTC issued a Notice of Proposed Rulemaking that recommended the creation of a national Do-Not-Call Registry, to be maintained by the FTC, as well as rules that addressed the problem of "abandoned calls" resulting from the use of predictive dialers by telemarketers. In January 2003, the FTC promulgated final rules establishing a nationwide Do-Not-Call Registry and specified requirements for the use of "predictive dialers." The FTC decided that the previous company-specific Do-Not-Call rules, which permitted a consumer to request that his name be removed from a company's call list, were insufficient to protect consumers from unwanted calls. The FTC found that telemarketers interfered with consumers' attempts to be placed on company-specific lists by hanging up on them or ignoring their request. The FTC noted that the prior practice placed too much burden on consumers who had to repeat their Do-Not-Call request with every telemarketer who called, that the company-specific list continually exposed consumers to unwanted initial calls which had significantly increased in numbers since adoption of the original FTC rules, and that consumers had no method to verify that their name had been removed from the company's list. Congress strongly supported these efforts.[17]

The FTC exempted charitable organizations from the do-not-call requirements. The FTC made this exception partly in deference to the heightened First Amendment protection afforded charitable speech. The FTC also found that abusive telemarketing practices of the sort the Registry sought to combat were more likely to be undertaken by commercial telemarketers than those soliciting charitable and political contributions. The FCC followed suit, ultimately adopting rules that paralleled those of the FTC.

Congress strongly endorsed this movement in 2003, enacting the Do-Not-Call Implementation Act.[18] The Implementation Act provided, among other things, that the FTC could promulgate regulations

17. Among other steps, Congress has directed the FCC to coordinate its efforts with the FTC in order to maximize consistency between the agencies' do-not-call regulations. Do-Not-Call Implementation Act, Pub.L. No. 108-10, 117 Stat. 557 (2003).

18. *Id.*

establishing fees sufficient to implement and enforce the provisions of its national Do-Not-Call Registry.[19]

III. THE CONSTITUTIONAL CHALLENGE TO DO-NOT-CALL

A. THE PROTECTION OF PRIVACY

The Do-Not-Call Registry poses a conflict between two sacred American values, both of constitutional dimension, the right of privacy and freedom of speech. Privacy may be the most important emerging right of this new century. As new technologies make it increasingly difficult for Americans to maintain their privacy, evolution in administrative, statutory, and constitutional law is necessary to keep pace, preserving privacy as an essential element of human dignity. Just as we make adjustments for inflation in cost-of-living indexes, we may need to think of "escalation clauses" in our legal protection for privacy. As the ability of the outside world to impinge on individual privacy increases, legal principles must escalate to meet the challenge, preserving the power of the average person to fight back against unwelcome intrusions.[20]

How significant are the privacy interests implicated by telemarketing? One might dismiss the privacy interests as relatively trivial. The consumer, after all, may simply hang up. It is plain, however, that to a large number of Americans, the privacy intrusions posed by telemarketing were deemed substantial. Over 50 million Americans signed up with the Do-Not-Call list within the first few months of its existence—roughly the number of voters who vote in a typical American presidential election.[21] Uninvited telephone solicitations are highly intrusive, particularly when they come during family time such as dinner and early evenings in the home.

In turn, the privacy of the home has always been at the core of English and American conceptions of privacy. The sacredness of the home as a "castle," a fortress of privacy surrounded with moats of constitutional and common-law protection, is legendary and centuries old.[22] William Pitt, in a speech before Parliament, declared the home

---

19. *See supra* note 7 and accompanying text.

20. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment's guarantee against unreasonable searches extended to cover electronic eavesdropping, even though the framers of the Constitution could not have contemplated such an electronic search, because the Fourth Amendment was intended to protect "people, not places").

21. *Mainstream Marketing*, 358 F.3d at 1234 ("So far, consumers have registered more than 50 million phone numbers on the national do-not-call Registry.").

22. *See Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1604) ("the house of every one is to him as his castle and fortress"); WILLIAM CUDDIHY & B. CARMON HARDY, A MAN'S HOUSE WAS NOT HIS CASTLE: ORIGINS OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 37, 400 (1980) (noting that the belief that "a man's house is his

a sanctuary against the force of government, demarking the line at which the brute power of the state must yield to the principle of privacy: "The poorest man may, in his cottage, bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the king of England may not enter; all his force dares not cross the threshold of the ruined tenement."[23]

This tradition was the backdrop of the Fourth Amendment, and its guarantee of the right of the people to be secure in their "persons, houses, papers, and effects" against unreasonable searches and seizures.[24] This solicitude for the home, originally conceptualized as a bulwark against the force of the state, has evolved into a broader concept, in which the home is seen as an essential to one's autonomy and privacy, a place of respite from the cruel world. In the words of Judge Jerome Frank: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."[25]

Indeed, in a decision with many parallels to the Do-Not-Call Registry, decided in a simpler time in our history and dealing with old-fashioned land mail, the Supreme Court acknowledged the right of the consumer to reject unwanted mail. In *Rowan v. United States Post Office Department*,[26] the Court upheld a statute that allowed an addressee to refuse mail from any sender of "erotically arousing or sexually provocative" material by notifying the local postmaster, who then instructed the sender to remove the addressee's name and address

---

castle" is found as an expression at least as early as the sixteenth century in English jurisprudence).

23. *See* CUDDIHY & HARDY, *supra* note 22, at 386 (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 299, n.3 (1868)); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES 223 (photo. reprint 1967) (1769) ("And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity . . . . For this reason no doors can in general be broken open to execute any civil process; though, in criminal cases, the public safety supersedes the private").

24. U.S. CONST. amend. IV; *see also* Silverman v. United States, 365 U.S. 505, 511 (1961) ("[t]he Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion") (citing Boyd v. United States, 116 U.S. 616, 626-30 (1886)); Entick v. Carrington, 19 Howell's State Trials 1029, 1065 (C.P. 1765).

25. United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting).

26. 397 U.S. 728 (1970).

from its mailing list under penalty of law. Noting that the purpose of the statute was to eliminate governmental involvement in any determination concerning the content of the materials, allowing the addressee complete and unfettered discretion in electing what speech he or she desired to receive, the Court sustained the law. The First Amendment right to speak, the Court reasoned, was only circumscribed by the addressee's affirmative act in giving notice that he or she no longer wished to receive mail from the sender. Most importantly, the Court categorically rejected the argument that a vendor has the right to send unwanted material into the home of another.

The court in *Mainstream Marketing* agreed with this rationale when it held that restrictions on speech determined by the individual are less onerous than those determined by the government.[27] Privacy interests are also upheld when consumers concerned with the possibility of telephone fraud are able to deny unsavory commercial callers the chance to victimize them.[28] Considering that consumers were losing 40 billion dollars a year to fraudulent telemarketing before the implementation of Do-Not-Call, this ability is extremely useful.[29]

1. *Protection of Commercial Speech*

The vital privacy interests that animate the Do-Not-Call Registry must be balanced against the competing First Amendment protection for freedom of speech, a protection that often is dependent upon the ability of the speaker to initiate the message, making a preliminary attempt to engage the listener or reader, even though the message may not have been invited.

Commercial telemarketing is a form of "commercial speech." Contemporary commercial speech doctrine is governed by a four-part test first articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[30] where the Court stated:

> [A]t 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

27. *Mainstream Mktg.*, 358 F.3d at 1242.
28. *Id.* at 1243.
29. *Id.* at 1235.
30. 447 U.S. 557 (1980).

asserted, and whether it is not more extensive than is necessary to serve that interest.[31]

The arc of modern commercial speech jurisprudence is unmistakable: in decision after decision, the Supreme Court has advanced protection for advertising, repeatedly striking down regulations grounded in paternalistic motivations.[32]

2. *Content-Based Distinctions and the Charitable Speech Exception*

General First Amendment doctrine outside the commercial speech arena strongly condemns discriminating against speech on the basis of its content or viewpoint.[33] This non-discrimination principle is not entirely invisible in the context of commercial speech. Perhaps the single most important commercial speech case evidencing sensitivity to the non-discrimination principle is *Cincinnati v. Discovery Net-*

---

31. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).

32. *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 364 (2002) (striking down restrictions on pharmaceutical advertising); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001) (striking down some and sustaining some restrictions on tobacco advertising); Greater New Orleans Inc., v. United States, 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996) (striking down liquor advertisement restrictions); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down beer advertising regulations); Ibanez v. Fla. Dep't of Bus. and Prof. Reg., 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) (striking down restrictions on news racks for commercial flyers and publications); Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990) (regulation banning lawyer advertisement of certification by the Nat'l Bd. of Trial Advocacy as misleading unconstitutional); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (regulation banning solicitation for legal business mailed on a personalized or targeted basis to prevent potential clients from feeling undue duress to hire the attorney unconstitutional); Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626 (1985) (striking down some and upholding some restrictions on lawyer advertising); Bolger v. Youngs Drug Product Corp., 463 U.S. 60 (1983) (statute banning unsolicited mailings advertising contraceptives to aid parental authority over teaching their children about birth control unconstitutional); *In re* R.M.J., 455 U.S. 191 (1982) (regulations limiting the precise names of practice areas lawyers can use in ads and identifying the jurisdictions lawyer is licensed in as misleadingly unconstitutional); Cent. Hudson Gas & Elect. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); *In re* Primus, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); (regulation banning placement of "for sale" signs in the front lawns of houses in order to prevent the town from losing its integrated racial status unconstitutional); Virginia State Bd. of Pharmacy v. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (striking down restrictions on pharmaceutical advertising); Bigelow v. Virginia, 421 U.S. 809 (1975) (striking down restrictions on abortion advertising).

33. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

work, Inc.[34] In *Discovery Network*, the Supreme Court struck down an ordinance that engaged in content-based distinctions similar to those in the Do-Not-Call Registry. In this case, the city of Cincinnati enacted an ordinance prohibiting the distribution of commercial handbills on public property. The ordinance effectively granted distributors of traditional "newspapers," such as the *Cincinnati Post*, *USA Today*, or *The Wall Street Journal*, access to public sidewalks through news racks, while denying equivalent news rack access to the distributors of commercial magazines and handbills, such as publications for apartment or house rentals or sales. The ordinance was designed to reduce the visual and spatial clutter of news racks. The constitutional difficulty, however, was that no principled distinction could be drawn between the clutter caused by a *USA Today* news rack and one caused by a real estate magazine. Clutter was clutter, a news rack was a news rack, and the content of the speech inside the rack bore no relation to the city's environmental or aesthetic interests. Indeed, the ordinance was applicable only to roughly 3% of the racks in the city, those containing commercial magazines and handbills, while exempting racks holding traditional newspapers. The Supreme Court struck down this content-discrimination, as it should have, for there was absolutely no relationship between the traffic or aesthetic harms caused by racks and the content of the material inside them. The Supreme Court pointedly rejected the notion that government could simply "pick on" commercial speech, making such speech bear a disproportionate burden, *merely* because the *Central Hudson* test contemplates somewhat reduced constitutional protection for commercial speech. The harm the government sought to address simply had nothing to do with the commercial or non-commercial character of the speech that was regulated.[35]

The First Amendment principles forbidding content-discrimination, and the specific commercial speech principles that forbid discriminating against commercial speech on grounds that are unrelated to the commercial content of the speech, are well-entrenched and laudable components of our current constitutional jurisprudence. There are sound reasons why courts look with great skepticism at content-based distinctions, and sound reasons why these principles apply to advertising and commercial speech. There is probably no principle more central to our First Amendment tradition than the notion that the government ought not to "pick and choose" among messages, particularly when the values it seeks to vindicate bear no demonstrable relationship to the content of those messages.

34. 507 U.S. 410 (1993).
35. Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 435 (1993).

The District Court in *Mainstream Marketing* applied this reasoning to strike down Do-Not-Call.[36] An unwanted telephone call during dinner is an unwanted telephone call during dinner. An abusive or overbearing or fraudulent call is an abusive or overbearing or fraudulent call. Whether the caller is a commercial vendor, a solicitor for a charity, or a political fundraiser, the essential hit on privacy interests remains the same. Similarly, the District Court could find nothing in the record before it to support the supposition that commercial telemarketers as a class are more prone to abuse or fraudulent practices than non-commercial telemarketers.[37]

Following the straightforward logic of *Discovery Network*, the District Court thus struck down the Do-Not-Call Registry.[38] The District Court in *Mainstream Marketing* did not hold that *any* form of do-not-call Registry would be unconstitutional. Indeed, the District Court explicitly acknowledged that the protection of privacy was a substantial government interest sufficient to satisfy the second prong of *Central Hudson*, and also acknowledged that the Registry directly and materially advanced that interest, satisfying the third prong of the test. Rather, the District Court rested its decision on a non-discrimination principle that cuts across many First Amendment areas, a principle that generally looks with great skepticism at content-based distinctions. The District Court distinguished *Rowan* largely on the ground that, in *Rowan,* Congress left to the addressee the power to make the content judgments to block mail from senders.[39]

3. *Reconciling Privacy and Speech—Striking the Proper Balance*

The United States Court of Appeals for the Tenth Circuit reversed the District Court and upheld the constitutionality of the Do-Not-Call List in *Mainstream Marketing Services, Inc. v. Federal Trade Commission.*[40] The Tenth Circuit got it right.[41]

---

36. Mainstream Mktg. Serv., Inc., v. Fed. Trade Comm'n, 283 F. Supp.2d 1151 (D. Colo. 2003).

37. *Mainstream Mktg.*, 283 F. Supp.2d at 1167.

38. *Id.* at 1168.

39. The court further acknowledged:

> Were the Do-Not-Call Registry to apply without regard to the content of the speech, or to leave autonomy in the hands of the individual, as in *Rowan*, it might be a different matter. As the amended Rules are currently formulated, however, 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. The First Amendment prohibits the government from enacting laws creating a preference for certain types of speech based on content, without asserting a valid interest, premised on content, to justify its discrimination. Because the Do-Not-Call Registry distinguishes between the indistinct, it is unconstitutional under the First Amendment.

Id. at 1168

40. 358 F.3d 1228 (10th Cir. 2002), *cert. denied*, 125 S.Ct. 47 (2004)

In one sense, the tension between privacy and speech posed by Do-Not-Call may be distilled in the tension between the ruling in *Rowan* and the ruling in *Discovery Network*. Who has the better of the constitutional trumps? For a number of reasons, the anti-discrimination speech principle of *Discovery Network* ought not to be deemed enough to offset the privacy principle of *Rowan*.

First, there was content discrimination in *Rowan* itself—the law in *Rowan* was limited to sexually explicit advertising material that would normally have been protected by the First Amendment. Yet the Supreme Court in *Rowan* held that the free speech protection afforded the material stopped at the mailbox. Second, in *Discovery Network* it was the *government* acting as the direct discriminator. The government banned the commercial news racks, interfering with communication between otherwise willing publishers and readers. With Do-Not-Call, however, the government is not the active censor. The law empowers the private citizen to bar certain speech from penetrating the integument of the home, but sovereignty over the decision rests with the consumer, not any government official. This renders Do-Not-Call similar to *Rowan*, and different from *Discovery Network*. Third, viewed both quantitatively and qualitatively, the connection between the governmental interests vindicated by Do-Not-Call and the regulatory mechanism employed by the current FTC and FCC regulations is direct, material, and reasonably tailored.[42] Employing the sort of analysis invited by *Central Hudson*, Do-Not-Call is easily defensible as a government response to invasion of privacy. This stands in stark contrast to the regulation in *Discovery Network*, in which there was a complete "disconnect" between the object of the government regulation—reduction of physical and visual clutter—and the ban on commercial kiosks.

---

41. In a subsidiary holding, the Tenth Circuit ruled that the First Amendment was not violated by a provision of Do-Not-Call that requires telemarketers to pay a modest fee to obtain the phone numbers of consumers who have signed up for the national do-not-call Registry. *Id.* at 1247-48. As the court noted, it is well-established that the First Amendment protects against the imposition of charges, such as a license taxes, for the enjoyment of free speech rights. *See* Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943). However, the government is allowed to exact a fee in order to offset the cost of genuine regulations, even though such a fee could have an incidental burden on speech. *Id.* at 114 n. 8; Cox v. New Hampshire, 312 U.S. 569, 577 (1941) (upholding license fees of up to $300 to take part in a parade or procession because the fee was held "to be not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed"); American Target Adver., Inc. v. Giani, 199 F.3d 1241, 1246, 1248-49 (10th Cir. 2000) (upholding Utah law that required charitable fundraisers to register with the state and pay $250 for a permit—because that fee offsets increased regulatory costs associated with the act).

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

The protection of the privacy of the home is plainly a "substantial" governmental interest, and Do-Not-Call, by eliminating between 40% and 60% of telemarketing calls, is manifestly a program that will directly and materially advance that interest. Moreover, the final prong of *Central Hudson*, the requirement that there be a "reasonable fit" between ends and means, is simply a demand of proportionality, not a requirement of a "perfect" or even "best" fit.[43] The First Amendment's commercial speech jurisprudence does *not* normally require "all or nothing." Rather, "[w]ithin the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments."[44] As the history of Do-Not-Call demonstrates, the Congress, the FCC, and the FTC evolved in their collective legislative and administrative judgments. The initial attempts to protect privacy through the company-specific Do-Not-Call did not accomplish the desired privacy objective. When the new option of a national Do-Not-Call Registry was introduced, Americans responded in droves, with over 50 million persons putting themselves on the Registry. While First Amendment cases are not decided by plebiscite, the tidal dimension of this overwhelming public response *does* speak with great probity to the strength of the governmental interests serviced by Do-Not-Call, and to the degree of pent-up public frustration and dissatisfaction with prior attempts to limit the invasions of privacy caused by telemarketing. Moreover, while the Do-Not-Call Registry empowered consumers to block unwanted phone solicitations, the Registry had no impact on the ability of advertisers to reach consumers through other media.[45]

Significantly, there was content-based regulation in *Rowan*. Indeed, if anything, the content discrimination was more pointed in *Rowan* than here. *Rowan*, remember, involved a restriction on advertising limited to one narrow band of speech—the federal statute at issue applied to advertisements that offered for sale matter which the addressee in his sole discretion believed to be "erotically arousing or sexually provocative."[46]

---

43. *See* Bd. of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989); United States v. Edge Broad. Co, 509 U.S. 418, 427-28 (1993). Fundamental to these concepts is the notion that government may attack difficult problems through incremental steps.

44. *Edge Broad.*, 509 U.S. at 434. The First Amendment simply does not require "that the Government make progress on every front before it can make progress on any front."

45. *Mainstream Mktg.*, 358 F.3d 1228 (10th Cir. 2002) ("[t]he challenged regulations do not hinder any business' ability to contact consumers by other means, such as through direct mailings or other forms of advertising").

46. Rowan v. U.S. Post Office, 397 U.S. 728, 730 (quoting 39 U.S.C. § 4009(a) (1964 ed., Supp. IV)).

Thus, while the Do-Not-Call Registry applies to all telemarketing, the postal law in *Rowan* singled out a subset of advertising, dealing with erotic material. The existence of this content-discrimination in *Rowan* is enormously important, for when one focuses on it, the driving principles animating the decision in *Rowan* are far more brightly illuminated. Those principles were privacy and consumer choice. The confluence of those two values powered the engine in *Rowan*. *Rowan* makes sense only in light of the combination of *Rowan*'s reference for the privacy within the home and the fact that the consumer, not the government, made the ultimate blocking decision. Indeed, any other explanation of *Rowan* would be incoherent, then and now.

For *Rowan*, it must be remembered, did not involve "obscene" speech, which of course would have been entitled to no constitutional protection whatsoever and could have been banned outright from the mail.[47] Rather, this was sexually explicit but not obscene speech, expression that was *within* the protection of the First Amendment. Both at the time *Rowan* was decided and today, it would have been plainly unconstitutional for the government to ban by its own fiat the transport of such sexually explicit (but not obscene) material through the mails or the channels of interstate commerce.[48] Thus, the *only* factors that plausibly explain *Rowan* were the fact that the statute was enacted to reinforce the sovereignty of individuals to shut off the entry of the advertising into the home, and the fact that it was the consumer, not the government, who operated the shut-off valve.

How then, does *Rowan* fare when placed head-to-head with *Discovery Network*? The principle of *Discovery Network* is logical and important as far as it goes. Nevertheless, it only goes so far. In *Discovery Network,* the government did the censoring. It was the government in *Discovery Network* that banned the commercial news racks. The government directly intervened in the marketplace of ideas, frustrating an otherwise willing publisher from reaching an otherwise willing reader. And this intervention by the government took place in the open spaces of city streets and sidewalks, quintessential public fora traditionally open to the free flow of public discourse, commercial and non-commercial alike. Under the Do-Not-Call regime, however, *no consumer* willing to receive a message is prevented from receiving one, and no messages are blocked by anyone in the open arenas of public discourse and commercial marketing. As the

47. At the time *Rowan* was decided, obscenity was not protected under the First Amendment. The leading case was *Roth v. United States,* 354 U.S. 476 (1957). The basic principle that the First Amendment does not protect obscene speech remains good law, though the test for obscenity first set forth in *Roth* was modified slightly by the subsequent decision in *Miller v. California,* 413 U.S. 15 (1973).

48. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

Tenth Circuit found in 2004, the *only* decision-maker who can block a message is the consumer, and the consumer may block the message only at the threshold of the home.[49]

These distinctions vacuum the oxygen from the First Amendment assault on Do-Not-Call. The central First Amendment antipathy toward content-discrimination by government, an antipathy that has always been driven primarily by a fear that government will censor messages that it finds offensive or disagreeable, simply is not implicated. Once again, a comparison to *Rowan* is pivotal. For the attack on Do-Not-Call to hold water, it must treat *Rowan* as essentially overruled by *Discovery Network*. If under *Discovery Network* distinctions between commercial and non-commercial speech are not permissible, let alone distinctions *within* the universe of commercial speech such as those in *Rowan*, then the statute in *Rowan* would necessarily be unconstitutional were that case to come before the Supreme Court in a post-*Discovery Network* world. Not only is there nothing in *Discovery Network* to indicate that anything so radical was intended, but as previously explained, even without *Discovery Network* the discrimination that existed in *Rowan* would have been plainly unconstitutional if it had been a government official (such as the Postmaster General) who had been empowered to block the mail to consumers. *Rowan*, however, established the hierarchy of constitutional trumps. Privacy and consumer choice trump freedom of speech when it is the consumer and not the government controlling what speech enters the home and what speech does not.

It is also exceedingly important that the Do-Not-Call List does not partake of the paternalism that has been such a red flag in commercial speech cases in which government regulations have been found to violate the First Amendment.[50] In all of these cases, it was the government acting as censor, the government deciding that it new better

49. *Mainstream Mktg.*, 358 F.3d at 1245.

50. *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 364 (2002) (striking down restrictions on pharmaceutical advertising); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-555 (2001) (striking down some and sustaining some restrictions on tobacco advertising); Greater New Orleans Inc., v. United States, 527 U.S. 173 (1999) (striking down casino gambling advertising limitations); 44 Liquormart, Inc., v. Rhode Island, 517 U.S. 484 (1996) (striking down liquor advertisement restrictions); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down beer advertising regulations); Ibanez v. Fla. Dep't of Bus. and Prof. Regulation, 512 U.S. 136, 147 (1994) (striking down restrictions on accountancy advertising); Edenfield v. Fane, 507 U.S. 761 (1993) (striking down commercial speech limitations on accountants); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (striking down restrictions on advertising statements by public utilities); *In re* Primus, 436 U.S. 412 (1978) (striking down restrictions on solicitation of legal business on behalf of ACLU); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (regulation banning lawyer advertisement of prices for routine legal services as misleadingly unconstitutional).

than consumers what was good for them. This is the kind of over-regulation of the free marketplace that acts as a drag on the economy, and the kind of over-regulation of the marketplace of ideas that acts as a drag on the free flow of commercial information protected by the First Amendment.

Do-Not-Call does not fit this picture. Do-Not-Call does not place the government in the censor seat. Do-Not-Call is not about paternalism, but privacy, and that difference changes the constitutional calculus.[51] Do-Not-Call is not a paternalistic usurping of consumer choice; it is an *empowerment* of consumer choice, in aid of the tranquility of the home.[52] Just as the traditional law of trespass empowers the home dweller to bar an unwanted physical visitor, Do-Not-Call empowers the home dweller to bar an unwanted electronic visitor. As the Supreme Court noted in *Rowan*, the law has long recognized "the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property."[53] "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."[54]

With Do-Not-Call, government is not paternalistically skewing the marketplace of ideas. With Do-Not-Call, consumers are sovereign. With Do-Not-Call, the government is simply reinforcing the ancient shelter the law has provided for privacy within the home, vindicating the ancient wisdom that the home is one's castle. The Registry is the electronic equivalent of placing a "No Solicitation" sign in front of that castle.[55] Viewed both quantitatively and qualitatively, the justification for the distinctions drawn in *Discovery Network* were far weaker than the justifications for the distinctions drawn in Do-Not-Call. In the traditional parlance of *Central Hudson* and commercial speech doctrine, the "fit" between ends and means, almost non-existent in *Discovery Network*, is plainly "reasonable" for Do-Not-Call.

In *Discovery Network*, there was absolutely no relationship between the content of the material inside the news rack and the capacity of the news rack to pose a traffic impediment or contribute to aesthetic clutter. The *physical characteristics* of the news rack were the source of 100% of the perceived harm. The content of the message

51. *See* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 164-65 (2002) (observing that the protection of "residents' privacy" was among the "important interests that the Village may seek to safeguard through some form of regulation of solicitation activity").

52. Frisby v. Schultz, 487 U.S. 474, 484 (1988) ("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").

53. *Rowan*, 397 U.S. at 737.

54. *Id.* at 737.

55. *Mainstream Mktg.*, 358 F.3d at 1233.

inside the news racks had *zero* connection to that harm. Moreover, commercial news racks were the least significant offenders, constituting the smallest percentage of racks, yet bearing the entire brunt of the regulation. Commercial news racks constituted only three percent of the offending physical objects, but bore 100% of the regulatory burden.

In the case of telemarketing phone calls, however, the matter is much more complex. The identity of a caller and the content of the phone call *do* matter to people. Not all phone calls are created equal. Some are more vexatious, irritating, and invasive than others. Congress, the FTC, and the FCC are entitled to attack these problems with a dose of realism.[56] Do-Not-Call is not merely about the trill of the phone and the hassle of getting up from the dinner table to contend with a call. Congress and the enforcing agencies could quite justifiably conclude that for most Americans the sheer quantity of the invasions was also a factor. Quantity alone can alter the nature and order of the privacy invasion.[57] In *Mainstream Marketing*, the court notes that without the protection afforded by Do-Not-Call, telemarketers would be calling consumers who had already opted-in approximately 6.85 *billion* times a year.[58]

Moreover, political and charitable callers do not have a "free pass" under the existing regime. They too may be barred by a consumer, under the system of caller-specific blocking.[59]

---

56. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995).

57. *See* Bland v. Fessler, 88 F.3d 729, 732 (9th Cir. 1996) (noting that "sheer quantity" of calls generated by automatic dialing and announcing devices increases the invasion of privacy).

58. *Mainstream Mktg.*, 358 F.3d at 1240.

59. As the Tenth Circuit noted in its decision granting a stay of the District Court's order:

> [B]efore the FTC amended its Telemarketing Sales Rule, certain charitable organizations asked the agency not to include non-commercial callers in any do-not-call list (neither a national do-not-call list nor a company-specific do-not-call list). Although the FTC decided not to include charitable callers in a national do-not-call list, it was unwilling to exclude them from its company-specific do-not-call list if particular homeowners wanted to designate them specifically. In this context, the FTC stated that charitable callers, in addition to commercial callers, had an effect on homeowners' privacy, and thus should not be completely immune from a consumer-initiated restriction. The FTC stated that "the encroachment upon consumers' privacy rights by unwanted solicitation calls is not exclusive to commercial telemarketers" and it therefore concluded that some regulation was appropriate even in the non-commercial context. 68 Fed. Reg. 4637. However, the FTC never found that commercial and non-commercial callers affected homeowners' privacy interests to the *same* degree. Rather, it emphasized "fundamental differences" between commercial and charitable solicitation that make commercial callers more likely to "engage in all the things that telemarketers are hated for." *Id.* Because of this distinction, the FTC found it appropriate to subject commercial telemarketers to the national do-not-call Registry, but to regulate charitable callers only under the less burdensome company-specific do-not-call rules. *Id.*

Thus, in the case of Do-Not-Call, commercial telemarketers comprise the majority of telephone solicitations, and unlike *Discovery Network,* do not in actuality bear the entire brunt of the regulation. Political and charitable callers may be excluded, but such callers are excluded on a more caller-specific basis. In the calculus of *Central Hudson*, in short, the "fit" between the regulatory mechanism and the governmental interest is much stronger for Do-Not-Call, and the extreme "disconnect" in quantitative terms that existed in *Discovery Network* does not exist.

The disruption caused by a bevy of multiple calls during quality family time is undoubtedly an issue that matters to most people. In a world in which commercial telemarketers are by percentage the worst offenders, Congress and the two federal agencies could sensibly conclude that empowering consumers to block all commercial telemarketers with one swoop, and to selectively block other specific telemarketers as needed, would be the optimal adjustment of the competing interests.[60] By concluding that telemarketers cannot turn to the First Amendment in order to force unwelcome commercial speech into the home, the court in *Mainstream Marketing* supported the conclusions of those federal bodies.[61]

The "targeting blocking" aspects of Do-Not-Call dovetail well with the fact that it is the consumer, not the government, making the ultimate choice. This consumer empowerment is a favored device, not a disfavored one, in terms of First Amendment values.[62] Once again, the analysis loops back to *Rowan*. *Rowan* heavily emphasized the element of individual choice, and the "opt-in" feature of the mail blocking system, a feature analytically identical to the opt-in feature of Do-Not-Call.[63]

Fed. Trade Comm'n v. Mainstream Mktg. Serv., Inc., 345 F.3d 850, 854 n.5 (10th Cir. 2003) (Order of October 7, 2003 staying preliminary injunction of the District Court).

60. *See* Missouri v. Am. Blast Fax, Inc., 323 F.3d 649, 655-56 (8th Cir. 2003) (ruling, in the context of faxes, that a bar on unsolicited commercial faxes in the Telephone Consumer Protection Act was a reasonable fit with the substantial governmental interest of reducing costs and intrusion, because commercial faxes could be properly classified as more intrusive than non-commercial faxes).

61. *Mainstream Mktg.*, 358 F.3d at 1236.

62. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000) (observing that a system of consumer-initiated blocking is "less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests").

63. The Supreme Court thus strongly endorsed the fact that the home dweller was the "exclusive and final judge of what will cross his threshold." Rowan, 397 U.S. at 736. *See also* Anderson v. Treadwell, 294 F.3d 453, 462-63 (2d Cir. 2002) (applying commercial speech standards, the court held that in assessing what is or is not a "reasonable fit," a resident-activated solicitation restriction was narrowly tailored and of the kind "endorsed by the Supreme Court in *Rowan*"); Pearson v. Edgar, 153 F.3d 397, 404 (7th Cir. 1998) (striking down a regulation under the "reasonable fit" prong as paternalistic,

IV. CONCLUSION: WHAT THE PARABLE TEACHES

Privacy and freedom of speech are often in tension in American society. When these values are both implicated in a legal regulation, the constitutional principles protecting the free flow of information must at times be tempered to vindicate privacy interests that are also of ancient vintage and vital importance.[64]

because, unlike *Rowan*, "[h]ere, the state, not the homeowner, has made the distinction between real estate solicitations and other solicitations without a logical privacy-based reason").

64. *See* Bartnicki v. Vopper, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).