

TELEMARKETING REGULATION AND THE COMMERCIAL SPEECH DOCTRINE

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I. INTRODUCTION

The national do-not-call registry was established in 2003 for consumers to utilize and block many commercial telemarketing calls. The registry was authorized by Congressional legislation and is being enforced by rules enacted by the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC").¹ However, before the registry went into effect, telemarketers filed legal challenges on First Amendment grounds, and these cases have now worked their way through the appeals process.

In 2004, the United States Court of Appeals, Tenth Circuit, upheld the do-not-call registry as constitutional in *Mainstream Marketing Services, Inc. v. Federal Trade Commission*, a ruling the Supreme Court allowed to stand by denying *certiorari* later that year.² In *Mainstream Marketing*, the Tenth Circuit concluded that the registry was supported by substantial regulatory goals of protecting consumer privacy and preventing fraudulent and abusive telemarketing calls.³ In addition, the appeals court concluded the do-not-call registry comprised an effective and narrow means of addressing these regulatory goals under the *Central Hudson* analysis,⁴ a controversial form of intermediate constitutional scrutiny utilized in commercial speech cases.⁵ In previous cases, federal district and appeals courts had utilized the *Central Hudson* analysis to uphold a federal ban on unsolicited telefax advertising.⁶

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1. The amalgam of federal legislation and FCC and FTC rules will be referred to collectively in this article as a whole regulatory scheme known as the "national do-not-call registry," which was the approach taken by the United States Court of Appeals, Tenth Circuit, in *Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228, 1234 n.4 (10th Cir. 2004). When relevant to the analysis and discussion, the separate do-not-call rules of the FCC and FTC will be mentioned individually.

2. See *Mainstream Mktg., Servs., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), *cert. denied*, 543 U.S. 812 (2004).

3. *Id.* at 1237.

4. *Id.* at 1246.

5. See, e.g., *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999).

6. See *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003); *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995); *Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997). These cases are covered in more detail in a subsequent section of this article.

Technological advances in modes of communication delivery allow precise targeting of commercial messages to individual recipients more so than ever before. These advances include robust computerized databases of consumer information that allow advertisers and marketers to develop lists of consumers whose parameters are tailored to the particular product or service under promotion. In addition, over the years, technological advances have increased the available modes of delivery for targeted messages from door-to-door and direct mail solicitation, and to solicitation by telephone, telefax and electronic mail. Similarly, technological advances now allow advertisers and marketers to better accommodate the preferences of individual consumers not to receive their commercial communications. The national do-not-call registry is perhaps the best current example of these phenomena, given the reliance on technology to create and maintain the national database, and requires compliance by telemarketers with registry requirements to utilize the database to scrub telephone numbers from their calling databases.

This article explores in detail the constitutional issues raised by government regulation of targeted communications and telemarketing specifically. The first section of the article provides an overview of the federal legislation and administrative rules relevant to the creation and enforcement of the national do-not-call registry. Next, the article identifies and explains the First Amendment implications of regulation in this context. In light of the constitutional issues, the third and fourth sections of the article then provide an overview of constitutional challenges to regulations banning unsolicited telefax advertising and the federal do-not-call registry requirements. The final section provides a summary and conclusions.

II. TELEMARKETERS AND DO-NOT-CALL: REGULATORY AND LEGISLATIVE LANDSCAPE

The concept of a centralized do-not-call registry is not new. For instance, the Direct Marketing Association ("DMA"), a trade association for the direct marketing industry, has maintained a voluntary do-not-call database for its members since 1985 called the Telephone Preference Service ("TPS").⁷ Consumers must subscribe to the TPS do-not-call list, which DMA members use to periodically "scrub" their telemarketing lists.⁸ However, as pointed out by the FTC when it began proceedings on a proposed national do-not-call registry in 1999, the DMA is an industry-based organization with voluntary membership and no legal authority to enforce do-not-call

7. Meeting Notice, 64 Fed. Reg. 66,124, 66,125 n.12 (FTC Nov. 24, 1999) (noting that "the idea of a central 'no call' list is not new" and noting that the DMA had maintained its no-call database called the "Telephone Preference Service"). See generally Patricia Faley, *Doing the Right Thing: The Case for the Teleservices Industry*, 21 J. PUB. POL'Y & MKTG. 332 (2002) (arguing that the national do-not call registry was not needed because of the Telephone Preference Service maintained by the Direct Marketing Association and free for consumers who desired to cut down the number telemarketing calls they received from DMA members).

8. Direct Marketing Association, *Getting off telephone call lists/Telephone Preference Service*, at <http://www.dmaconsumers.org/cgi/offtelephone> (last visited Jan. 20, 2005). The TPS database is updated monthly and some companies have chosen to receive the list monthly. *Id.* Consumers can register online for a \$5 fee or by mail for free. *Id.* Some non-member companies utilize the DMA's TPS database. *Id.* The DMA TPS database does not list business telephone numbers, and the list does not prevent "sequentially dialed automated recorded message (computerized) calls." *Id.*

requirements.⁹

Ultimately, both the FTC and FCC enacted do-not-call rules in 2003 that banned unsolicited commercial telemarketing calls to subscribers to the national registry established and maintained by the FTC. Both agencies were under directives by Congress to regulate telemarketing to protect consumer privacy among other goals. This section of the article sets out the relevant federal statutes and related FTC and FCC rules that established the current regulatory scheme comprising the national do-not-call registry.

A. The Telemarketing Act (1994) and Amended Telemarketing Sales Rule (2003)

The role of the FTC in telemarketing regulation can be traced to the Federal Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 ("Telemarketing Act").¹⁰ In the Telemarketing Act, Congress directed the FTC to make rules prohibiting "deceptive" and "other abusive" telemarketing acts and practices.¹¹ In the legislation, Congress defined "telemarketing" as any "plan, program, or campaign which is conducted to induce purchases of goods or services" by telephone.¹² Congress concluded it was time for government intervention based on findings that telemarketing fraud was costing American consumers and others approximately \$40 billion per year and was a significant problem.¹³

In the Telemarketing Act, Congress ordered the FTC to enact rules limiting the hours of the day that telemarketers could legally call consumers and requiring telemarketers to "promptly and clearly" disclose to consumers whether the purpose of their calls was to sell goods or services.¹⁴ In addition, Congress ordered the FTC to create a specific rule prohibiting telemarketers from "undertak[ing] a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or

9. Meeting Notice, 64 Fed. Reg. at 66,125 n.12. In addition, commentators have questioned the potential effectiveness of self-regulatory initiatives as effective means of privacy protection for consumers. See, e.g., Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1094-1099 (1999) (writing that "pessimism about the willingness of the information industry to adopt a consumer consent system seems more justified given the limited efforts taken to date to protect consumer privacy and their questionable effectiveness" and "[c]ritics of the information industry complain that self-regulation has not been effective"). On this point, Sovern recounted a study conducted by a trade magazine and cited by the FTC in which requests for written do-not-call policies were submitted to 48 telemarketers. See *id.* at 1098. As reported by Sovern, in that study, only 17 of the telemarketers had responded to the requests after three months despite federal law that requires telemarketers to furnish their do-not-call policies upon request. *Id.* (citing 47 C.F.R. § 64.1200(e)(2)(1999)).

10. Pub. L. 103-297, 108 Stat. 1545 (Aug. 16, 1994) (codified at 15 U.S.C. §§ 6101-6108).

11. 15 U.S.C. § 6102(a)(1).

12. Telemarketing and Consumer Fraud and Abuse Prevention Act 1994, Pub. L. No. 103-297, § 7(4), 108 Stat. 1545 (Aug. 16, 1994). As will be discussed, in 2001, Congress amended the definition of "telemarketing" in the Telemarketing Act to include for-profit telemarketers hired by non-profit organizations to make calls for charitable donations. See *infra* note 34.

13. 15 U.S.C. § 6101. Congress did not include in the Telemarketing Act any specific findings with regard to consumer privacy. See *id.*

14. 15 U.S.C. § 6102(a)(3)(B)-(D). One commentator wrote in 1986 that reasonable restrictions on calling hours for telemarketers were likely to be treated by courts as constitutional time, place and manner restrictions although such calling hours would be problematic for telemarketers trying to reach individuals with "non-traditional work schedules," for instance. Mark S. Nadel, *Rings of Privacy: Unsolicited Telephone Calls and the Right of Privacy*, 4 YALE J. ON REG. 99, 113-14 (1986).

abusive of [his or her] right to privacy.”¹⁵

In response to the Telemarketing Act, the FTC enacted the 1995 Telemarketing Sales Rule (“TSR”) ¹⁶ and included two specific prohibitions aimed at protecting consumer privacy.¹⁷ First, the rule prohibited telemarketers from calling consumers “repeatedly or continuously with intent to annoy, abuse, or harass.”¹⁸ Secondly, the rule required telemarketers to maintain their own company-specific lists of consumers who asked them not to call and prohibited them from calling these consumers.¹⁹ The current version of the TSR²⁰ retains both of these prohibitions.²¹

In 1999, the FTC initiated a review of the TSR, in part, to consider whether to establish a mandatory national do-not-call registry.²² As grounds, the FTC cited increasing consumer concerns about privacy and unwanted telemarketing calls.²³ In addition, the agency concluded that state efforts to regulate telemarketing were on the rise with eight states having established centralized do-not-call databases for local consumers.²⁴

After concluding its review of the TSR, the FTC initiated formal rulemaking proceedings in 2002 and ultimately proposed amendments.²⁵ After taking and considering public comments, the FTC amended the TSR in 2003 (Amended TSR) and included the do-not-call registry requirements.²⁶ The Amended TSR prohibits telemarketing calls offering the sale of goods or services to a subscriber to the national do-not-call registry created and maintained by the agency.²⁷

15. 15 U.S.C. § 6102(a)(3)(A).

16. Federal Trade Commission, Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995) (codified at 310 C.F.R. pt. 310).

17. *Id.* at 43,854–55.

18. *Id.* at 43,854 (codified currently at 16 C.F.R. § 310.4(b)(1)(i)).

19. *Id.* at 43,854–55.

20. Telemarketing Sales Rule, 16 C.F.R. §§ 310.1–.9 (West, WESTLAW through Dec. 28, 2005).

21. 16 C.F.R. §§ 310.4(b)(1)(i), (iii)(A). The first of these prohibitions bans telemarketers from “[c]ausing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.” 16 C.F.R. § 310.4(b)(1)(i). The second of these prohibitions bans telemarketers from “[i]nitiating any outbound telephone call to a person when . . . that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered or made on behalf of the charitable organization for which a charitable contribution is being solicited.” 16 C.F.R. § 310.4(b)(1)(iii)(A).

22. Federal Trade Commission, Notice of Public Meeting, 64 Fed. Reg. 66,124 (Nov. 24, 1999).

23. *Id.* at 66,125 n.11.

24. *Id.* Those states were Alabama, Alaska, Arkansas, Florida, Georgia, Kentucky, Oregon and Tennessee. *Id.*

25. Federal Trade Commission, Telemarketing Sales Rule, Proposed Rule, 67 Fed. Reg. 4,492 (Jan. 30, 2002).

26. Federal Trade Commission, Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4,580 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310).

27. Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B)(i) (West, WESTLAW through Dec. 28, 2005). Telemarketing calls to do-not-call registry subscribers without their consent would be at least one manner of defining an “unsolicited” telephone call that is likely to be objectionable to recipients. See Nadel, *supra* note 14, at 108–09 (characterizing defining the term “unsolicited” with regard to telephone calls as one of the key issues with regard to telephone regulation on grounds of protecting consumer privacy). Professor Nadel suggested that any definition of “unsolicited calls” should consider “whether the call has been implicitly solicited, or made to a business, or made by a caller having a prior relationship with the recipient.” *Id.* at 108. He also noted that in 1980, the FCC had ended a three-year investigation and concluded that the term had no precise meaning but meant generally “a business call from an organization with which the

The Amended TSR has two key exemptions to the do-not-call registry requirements.²⁸ First, a company can legally call a registry subscriber with whom it has an “established business relationship.”²⁹ “Established business relationship” means a subscriber who has purchased or leased goods or services from that company within the preceding 18 months, or has made an “inquiry or application regarding a product or service” to that company within the preceding three months.³⁰ To avoid these calls, consumers must make a do-not-call request to each company with which they establish a business relationship regardless of whether or not they are subscribers to the national registry.³¹

In addition, the do-not-call registry requirements only apply to commercial telemarketing calls defined as “outbound telephone calls to induce the purchase of goods or services.”³² Therefore, telephone callers conducting research, calling on behalf of political campaigns, or seeking charitable contributions are exempt from the do-not-call registry requirements.³³ Although the FTC recently asserted jurisdiction over commercial (for-profit) telemarketers hired by non-profit groups to collect charitable donations for a fee,³⁴ the agency ultimately decided to exempt these so-called

recipient has had minimal if any prior dealings [but not] . . . unwelcome personal calls or misdialed calls.” *Id.* at 108 n.56 (quoting *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1029 n.9 (1980)).

28. Whether to distinguish between types of telephone solicitations is an important constitutional and public policy decision for regulators. For instance, Professor Nadel wrote in 1986 that deciding “[w]hether regulations should treat different types of unsolicited calls differently is [an] important question.” Nadel, *supra* note 14, at 109. He concluded then that the “debate on this issue has generally focused on whether noncommercial calls should be made exempt from regulation” *Id.* He also concluded then that “prominent commentators agree that noncommercial callers should not be regulated.” *Id.* at 110.

29. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii).

30. *Id.* § 310.2(n).

31. *Id.* § 310.4(b)(1)(iii)(B)(ii).

32. *Id.* § 310.4(b)(1)(iii)(B).

33. The FTC does not have jurisdiction over non-profit organizations calling for noncommercial purposes. Federal Trade Commission Act, 15 U.S.C. § 45 (West, WESTLAW through 2004).

34. Federal Trade Commission, Telemarketing Sales Rule, Final Sales Rule, 68 Fed. Reg. 4,580, 4,679 (Jan. 29, 2003). In 2001, Congress amended the Telemarketing Act’s definition of “telemarketing” to include telefunder calls. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Subsequently, the FTC incorporated this amended definition into the Telemarketing Sales Rule. Federal Trade Commission, Telemarketing Sales Rule (Final Rule), 68 Fed. Reg. 4,580–85, 4,595 (Jan. 29, 2003) (codified at 16 C.F.R. pt. 310/2(cc)) (noting the Congressional amendment to the definition of “telemarketing” in the Telemarketing Act and noting that the definition of “telemarketing” was being amended accordingly in the Telemarketing Sales Rule). In *National Federation of the Blind v. FTC*, 303 F. Supp. 2d 707, 711–12, 714 (D. Md. 2004), a federal district court held that the FTC has jurisdiction over for-profit telemarketers who call on behalf of non-profit organizations seeking charitable contributions. In that case, non-profit organizations challenged the jurisdiction of the FTC to regulate the for-profit telemarketers that they hire to call and seek charitable contributions on their behalf. *Id.* at 711–12. The federal district judge rejected that argument and concluded that by amending the definition of “telemarketing” in the Telephone Consumer Fraud and Abuse Prevention Act to include telemarketing calls made to solicit charitable contributions implicitly granted the FTC authority to regulate for-profit companies hired by non-profit organizations to conduct their solicitation campaigns for charitable donations even though the FTC did not have jurisdiction over the non-profit organizations themselves. *Id.* See also, Ely R. Levy and Norman Silber, *Nonprofit Fundraising and Consumer Protection: A Donor’s Right to Privacy*, 15 STAN. L. & POL’Y REV. 519, 553–56 (2004) (concluding that the PATRIOT Act amendments confer to the FTC jurisdiction over for-profit companies that solicit charitable contributions on behalf of non-profits even though the agency lacks direct jurisdiction over the non-profits themselves); Augusta Meacham, *To Call or Not to Call? An Analysis of Current Charitable Telemarketing Regulations*, 12 COMMLAW CONSPPECTUS 61, 66–68 (2004) (also discussing the PATRIOT Act amendments and FTC jurisdiction over for-profit companies that solicit charitable contributions on behalf of non-profits in response to “sham organizations” that fraudulently solicited donations from unsuspecting donors in the wake of the

“telefunder” calls³⁵ from the do-not-call registry requirements.³⁶

Subsequently, Congress passed the Do-Not-Call Implementation Act of 2003 and authorized the FTC to establish fees to fund creation and enforcement of the do-not-call registry.³⁷ In response, the FTC amended the Telemarketing Sales Rule again in 2003 to include annual fees for telemarketer access to the do-not-call registry.³⁸ Neither Congress nor the FTC intended consumers to bear financial costs associated with subscribing to the national do-not-call registry.

B. The Telephone Consumer Protection Act (1991) and FCC Rules

When Congress enacted the 1994 Telemarketing Sales Act in 1994, federal legislation already was in place that defined the role of the FCC in telemarketing regulation.³⁹ That legislation—the Telephone Consumer Protection Act of 1991 (“TCPA”)—included various restrictions on telephone solicitations.⁴⁰ Specifically, the

terrorist attacks on the United States on September 11, 2001).

35. See *Nat'l Fed'n of the Blind*, 303 F. Supp. at 711 (referring to “for profit entities that solicit charitable contributions on behalf of non-profit organizations” as “telefunders”).

36. Federal Trade Commission, Final Telemarketing Sales Rule, 68 Fed. Reg. at 4,636–37. The exemption for telefunders was a change from the original do-not-call registry requirements as proposed by the FTC in 2002. Federal Trade Commission, Telemarketing Sales Rule, Proposed Rule, 67 Fed. Reg. 4,492, 4,516–17 (Jan. 30, 2002). In the original version, telefunders were not exempt from the requirements of the do-not-call registry. *Id.* However, the final version of the amended Telemarketing Sales Rule exempted telefunders from the requirements of the national do-not-call registry. Telefunders still must comply with various provisions in the Telemarketing Sales Rule including the prohibition on repeated or continuous calls made “with intent to annoy, abuse, or harass any person,” and the prohibition on calling anyone who has made a specific request to that telemarketer not to call. 16 C.F.R. §§ 310.2(cc), 310.4(b)(1)(i), 310.4(b)(1)(iii)(A).

37. Do-Not-Call Implementation Act of 2003, 108 Pub. L. No. 10, 117 Stat. 557, § 3 (2003). The Do-Not-Call Implementation Act also authorized the FTC to “promulgate regulations establishing fees sufficient to implement and enforce the ‘do-not-call’ registry of the Telemarketing Sales Rule.” 108 Pub. L. No. 10, 117 Stat. 557, § 2. The FTC was authorized to collect fees from 2003 through 2007. *Id.* The fees collected only can be used “to offset the costs of activities and services related to the implementation and enforcement of the Telemarketing Sales rule, and other activities resulting from such implementation and enforcement.” *Id.*

38. Federal Trade Commission, Telemarketing Sales Rule Fees, Final Rule, 68 Fed. Reg. 45,134, 45,144 (July 31, 2003) (codified at 16 C.F.R. § 310.8). Telemarketers accessing the do-not-call registry are charged an annual fee of \$24 per area code with the first five area codes being provided for free. *Id.* The total annual fee for each telemarketer is capped at \$7,373. *Id.* In the context of telemarketing regulation, Professor Nadel wrote in 1986 that “[t]he First Amendment does not permit callers to be saddled with unreasonable taxing obligations, nor does it permit receptive subscribers to be burdened by extra duties” and that “[t]he right of privacy would presumably include the right to enjoy privacy without incurring excessive expenses.” Nadel, *supra* note 14, at 114. He concluded then that in the context of telemarketing regulation, an important issue to be resolved would be “what burdens may be placed on those who wish to maintain their privacy.” *Id.* at 115. The FTC was cognizant of potential constitutional issues arising from mandatory fees for telemarketers required to access the do-not-call registry. 68 Fed. Reg. at 43,134–35. After considering various public comments on the issue, the FTC ultimately concluded that the fee structure was “more akin to the registration fees or business licenses that are commonly imposed upon businesses before they can engage in commercial speech” and, thus, constitutionally sound. *Id.* In 2004, the United States Tenth Circuit upheld the fees provisions as constitutional. *Mainstream Mktg. Servs., Inc. v. Federal Trade Comm’n*, 358 F.3d 1228, 1247–48 (10th Cir. 2004) (holding “that the registry fees are a permissible regulatory measure designed to offset projected expenses incident to the administration and enforcement of the national do-not-call list, not an unconstitutional revenue tax”). The constitutional issues surrounding the fees provisions of the Telemarketing Sales Rule are otherwise beyond the scope of this article.

39. The role of the FTC is discussed first in this article, however, because the FTC took the lead in creating and enforcing the national do-not-call registry, as will be discussed, and enacted its do-not-call registry provisions before the FCC.

40. Pub. L. No. 102-243, 105 Stat. 2395 (codified at 47 U.S.C. § 227 (1991)).

TCPA prohibited the use of artificial and prerecorded voices to deliver messages to consumers on their home telephones,⁴¹ and transmission of unsolicited advertisements to telephone facsimile (telefax) machines.⁴² In addition, the TCPA directed the FCC to make enforcement regulations for these provisions.⁴³

In the TCPA, Congress also directed the FCC to enact regulations to “protect residential telephone subscribers’ privacy rights to avoid receiving telephone solicitations to which they object.”⁴⁴ The TCPA authorized—but did not require—the FCC to set up a national do-not-call database for residential telephone customers who objected to receiving telephone solicitations⁴⁵ and prohibit telemarketing calls to those customers.⁴⁶ However, in a 1992 Report and Order, the FCC declined to adopt a national database as too expensive and difficult to set up and accurately maintain.⁴⁷ In addition, the FCC feared that a national database would be used by “unscrupulous” telemarketers to obtain unlisted numbers and thereby undermine its value as a means of protecting consumer privacy.⁴⁸

Instead, the FCC required telemarketers to maintain their own lists of consumers who had specifically asked them not to call and abide by these requests.⁴⁹ The FCC then found that “company-specific do-not-call list[s] . . . represent[] a careful balancing of the privacy interests of residential telephone subscribers against the commercial speech rights of telemarketers and the continued viability of a valuable business service.”⁵⁰ Thus, the company-specific approach became the policy choice of the FCC and represented an apparent compromise between industry self-regulation and a mandatory national do-not-call database.

In 2002, however, the FCC concluded that telemarketing practices had “changed significantly” since 1992 and began a new rulemaking proceeding to reconsider implementing a national do-not-call database.⁵¹ The FCC cited as factors the increased

41. 47 U.S.C. § 227(b)(1)(B).

42. *Id.* § 227(b)(1)(C).

43. *Id.* § 227(b)(2).

44. *Id.* § 227(c)(1). Additional provisions in the TCPA required the FCC to initiate a rulemaking proceeding within 120 days of enactment of the TCPA on December 20, 1991. *Id.* The TCPA required the FCC to conclude the rulemaking proceeding within nine months and “prescribe regulations to implement methods and procedures for protecting the privacy rights” of telephone subscribers as described in the act. *Id.* § 227(c)(2).

45. *Id.* § 227(c)(3).

46. *Id.* § 227(c)(3)(F).

47. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 F.C.C.R. 8752, ¶ 14 (Sept. 17, 1992). The FCC estimated at that time that a national do-not-call database would cost some \$20 million to establish and operate for the first year. *Id.* In addition, the FCC concluded, necessary updates to the database—as often as every three months—would have increased the cost of operation. *Id.*

48. *Id.* ¶ 15. See Michael E. Shannon, Note, *Combating Unsolicited Sales Calls: The “Do-Not-Call” Approach to Solving the Telemarketing Problem*, 27 J. LEGIS. 318, 395–96, 398–408 (2001) (discussing the 1992 decision by the FCC not to adopt a national do-not-call registry and then various other arguments that have been asserted against such a regulatory vehicle).

49. 7 F.C.C.R. 8752 ¶ 23 (company-specific do-not-call requirements currently codified at 47 C.F.R. § 64.1200(d) (WEST, Westlaw, current through Dec. 27, 2004)).

50. *Id.* In addition, the FCC concluded that “the company-specific do-not-call list alternative is the most effective and efficient means to permit telephone subscribers to avoid unwanted telephone solicitations” and “would allow residential [telephone] subscribers to selectively halt calls from telemarketers from which they do not wish to hear.” *Id.*

51. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of

number of consumer complaints about unwanted telemarketing calls since 1992, the potential advantages for both telemarketers and consumers of a centralized do-not-call database over company-specific lists, the increase in state-legislated do-not-call registries, and the do-not-call proceedings already underway by the FTC.⁵² The FCC acknowledged at the time the need to address the “interplay” between its proceedings and those of the FTC.⁵³

When the FTC enacted the Amended TSR and adopted do-not-call registry requirements in 2003, the FCC had not concluded its own do-not-call proceeding. Impatient with the FCC, Congress enacted legislation directing the agency to finish its rulemaking within six months and “maximize consistency” with the FTC’s Amended TSR.⁵⁴ In 2003, the FCC completed its proceeding and adopted do-not-call requirements that incorporated the FTC’s national do-not-call registry.⁵⁵

Like the FTC’s rule, the FCC’s do-not-call rule prohibits telephone solicitations to subscribers to the national registry.⁵⁶ The rule was intended to supplement the company-specific do-not-call requirements adopted in 1992,⁵⁷ which the FCC also decided to retain when it adopted the do-not-call registry in 2003.⁵⁸ In addition, the new rule applies to entities outside of the FTC’s jurisdiction, such as common carriers, banks, insurance companies and airlines.⁵⁹

The FCC do-not-call registry requirements only apply to “telephone solicitation[s]” defined as “telephone call[s] or message[s] for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services.”⁶⁰ The definition specifically excludes calls made with the “prior express invitation or permission” of the recipient,⁶¹ and those made to recipients with whom the caller has an “established business relationship.”⁶² The definition also specifically exempts calls made “by or on

Proposed Rulemaking and Memorandum and Order, 17 F.C.C.R. 17,459, 17,487–88 (Sept. 12, 2002).

52. *See id.* For law review treatment of state telemarketing regulation, *see generally* Patricia Pattison and Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin’ On!*, 3 WYO. L. REV. 167, 176–92 (2003); Shannon, *supra* note 48, at 392–93, 409–13.

53. *Id.*

54. Do-Not-Call Implementation Act of 2003, 108 Pub. L. No. 10, 117 Stat. 557, § 3 (2003).

55. Rules and Regulations, Final Rule, 68 Fed. Reg. 44,144, 44,152, 44,154–55 (July 25, 2003) (codified at 47 C.F.R. parts 64 and 68).

56. 47 C.F.R. § 64.1200(c)(2) (WEST, Westlaw current through Dec. 28, 2005).

57. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Second Order on Reconsideration, 2005 WL 418189, ¶ 6 (Feb. 18, 2005).

58. *Final Rule*, 68 Fed. Reg. at 44,156–57 (stating that the “company-specific do-not-call rules will complement the national do-not-call registry by providing consumers with an additional option for managing telemarketing calls”). In addition, the FCC decided to reduce the retention period for individual do-not-call requests by consumers to specific companies from ten year to five years. *Id.* at 44,156. The current version of the FCC telemarketing rule reflects this change. 47 C.F.R. § 64.1200(d) (WEST, Westlaw, current through Dec. 28, 2005).

59. *Final Rule*, 68 Fed. Reg. at 44,145.

60. 47 C.F.R. § 64.1200(f)(9) (WEST, Westlaw, current through Dec. 28, 2005). This definition tracks the language in the TCPA. 47 U.S.C. § 227(a)(3).

61. 47 C.F.R. § 64.1200(f)(9)(i) (West, WESTLAW, current through Dec. 28, 2005).

62. *Id.* § 64.1200(f)(9)(ii). The FCC defined an “established business relationship” as “limited in duration to eighteen (18) months from any purchase or transaction and three (3) months from any inquiry or application.” *Final Rule*, 68 Fed. Reg. at 44,148. In addition, the FCC concluded that the do-not-call registry requirements do not apply to calls made to individuals with whom the telemarketer has a “personal relationship” such as calls made to “friends and acquaintances.” *Id.* at 44,149. The determination of whether a call fits within this exception is circumstantial and based in part on whether the recipient considers the

behalf of tax exempt nonprofit organizations.”⁶³ In a 2005 order, the FCC explained that survey and marketing research calls, along with and political and religious calls, are not covered by the rule.⁶⁴

C. Summary of Regulatory Framework

Effective January 1, 2005, telemarketers subject to the FCC or FTC do-not-call rules were required to access the do-not-call registry and delete subscribing telephone numbers from their own calling lists once every 31 days.⁶⁵ Moreover, subscribing to the registry does not guarantee elimination of all unwanted telemarketing calls for consumers. Under the FCC and FTC do-not-call rules, telemarketers can call a subscriber on the list with whom they have an established business relationship unless the subscriber has asked them not to call. In addition, noncommercial callers are exempt from the requirements of the do-not-call registry under both the FTC and FCC rules.

III. CONSTITUTIONAL FIRST AMENDMENT ISSUES

The constitutionality of the national do-not-call registry raises First Amendment issues with broad implications for regulation of commercial telemarketing in general along with other modes of delivering targeted, commercial messages including electronic mail. And, an analysis of the constitutionality of the do-not-call registry must be placed within a relevant First Amendment framework, including the commercial speech doctrine as it applies to the regulation of commercial communications. Two critical constitutional issues surface here.

First, telemarketing regulation in general raises the issue of whether the First Amendment tolerates more extensive restriction of direct-marketing communications than mass media advertising.⁶⁶ Commercial messages delivered by direct means such as door-to-door, telephone and direct mail—referred to as “point-to-point media” by one commentator⁶⁷—seemingly implicate personal privacy and cost-shifting concerns more so than mass-mediated advertising carried by newspapers, magazines, or radio and

telemarketer a friend or acquaintance. *Id.*

63. 47 C.F.R. § 64.1200(f)(9)(iii) (West, WESTLAW, current through Dec. 28, 2005).

64. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Second Order on Reconsideration, 2005 WL 418189, ¶ 6 (Feb. 10, 2005). In addition, the FCC decided that the do-not-call registry requirements apply to telemarketing calls selling newspapers and do not violate the First Amendment in that regard. *Id.* ¶ 11 (concluding that the “right to distribute newspapers is afforded First Amendment protection” but that “a call from a telemarketer to an unwilling listener in their home for the purpose of selling a newspaper subscription” is commercial speech).

65. Restrictions on Telemarketing and Telephone Solicitation, 47 C.F.R. § 64.1200(c)(2)(i)(D) (West, WESTLAW, current through Dec. 28, 2005) (FCC rule); Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(3)(iv) (West, WESTLAW, current through Dec. 28, 2005) (FTC rule).

66. See Ian Ayres and Matthew Funk, *Marketing Privacy*, 20 YALE J. ON REG. 77, 124–27 (2003); Rita Marie Cain, *Call Up and Just Say ‘Buy’—Telemarketing and the Regulatory Environment*, 31 AM. BUS. L.J. 641, 643–49 (1993)(1993a); Rita Marie Cain, *Don’t Reach Out and Touch Us Anymore*, 7 J. DIRECT MARKETING 60, 64–66 (1993) (Cain 1993b); Nadel, *supra* note 14, at 104–06.

67. Nadel, *supra* note 14, at 105 (referring to such “point-to-point media” as “mail and phone communications”).

television programming.⁶⁸ For instance, consumers typically can decide which newspapers, magazines or television programs to purchase or otherwise allow into their homes but cannot, for instance, always control who knocks on the door, calls on the telephone, transmits a telefax to their machine, or sends them regular or electronic mail.⁶⁹

In addition, door-to-door and telephone solicitations may implicate privacy concerns to a higher degree than mail or e-mail. For instance, a knock at the door or ringing telephone demands immediate attention, while mail and e-mail can be opened and read whenever the recipient chooses to do so.⁷⁰ In addition, commercial solicitations delivered by point-to-point means, such as cellular telephones and telefax machines, can result in unwanted charges or other out-of-pocket costs to the recipient.⁷¹

A second constitutional issue raised by telemarketing regulation is the extent to which the First Amendment tolerates regulations that restrict or otherwise regulate commercial messages but not noncommercial ones.⁷² Commentators on this issue have suggested that targeting commercial messages for regulation can be constitutionally problematic without a sufficient public policy goal related to the commercial nature of the regulated communication.⁷³ Although the Supreme Court has consistently held that protected commercial speech falls below the level of First Amendment protection afforded fully-protected noncommercial speech,⁷⁴ the Court has also made it clear that commercial speech cannot be constitutionally regulated on that ground alone.⁷⁵

Instead, the Supreme Court has held that the government must demonstrate a substantial governmental interest that is directly advanced by a narrowly-tailored regulation in order to constitutionally regulate protected commercial speech.⁷⁶ In the telemarketing context, the more specific issue raised is whether regulations that restrict some unsolicited telemarketing calls but not others are a constitutional means of addressing a public policy goal such as protecting consumer privacy. Either type of telephone call can produce the same end result for recipients—an intrusive interruption or unwanted cost, or both.

68. See Ayres and Funk, *supra* note 66, at 124 (citing authorities); Nadel, *supra* note 14, at 104.

69. See Ayres and Funk, *supra* note 66, at 124–25 (calling “[c]ommunications received at home the most intrusive kind of speech”) (citing authorities).

70. *Id.* at 109 (describing “sales calls” as “more invasive (and annoying) than spam and direct mail” because “[consumers] can at least choose at what point during the day [they] want to sort through their [mail and] email”) (citing authorities).

71. These costs might be monetary costs associated with receiving communications on a cellular telephone or telefax machine, for instance. In addition, unwanted solicitations delivered via other means such as telephone that might not involve a monetary cost to the recipient may result in intangible costs such as inconvenience and annoyance, and time spent dealing with unwanted telemarketing calls. See Ayres and Funk, *supra* note 66, at 78, 83–87 (discussing “externalized costs” of direct marketing those that are shifted by the caller to the recipient including time spent sorting through unwanted solicitation, for example).

72. See *id.* at 126–27; Nadel, *supra* note 14, at 109–11; Cain, *supra* note 66, at 642–49.

73. See, e.g., Nadel, *supra* note 14, at 110–11. As pointed out by Professor Nadel, the FCC recognized this issue as early as 1980 in official policy stating that “exempting calls made for political and charitable solicitations or survey research purposes from regulations applicable to commercial sales calls would . . . appear to raise serious constitutional questions” unless there is evidence that noncommercial calls are less objectionable to consumers than commercial ones. *Id.* at 111 (citations omitted).

74. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978).

75. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419–20, 424–26, 428–29 (1993).

76. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

In light of these two major constitutional issues, this section of the article first looks at the First Amendment commercial speech doctrine including the *Central Hudson* analysis and the constitutional impact of exemptions and exceptions in regulations of protected commercial speech. Then, the section looks more closely at the constitutional issues raised by regulating point-to-point communications including door-to-door and direct mail solicitation. This section provides a foundation for the sections on telemarketing regulation that follow.

A. The First Amendment Commercial Speech Doctrine

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the United States Supreme Court squarely held for the first time that the First Amendment protects truthful, non-misleading speech that does nothing more than propose a lawful commercial transaction.⁷⁷ In *Virginia Board of Pharmacy*, the Court specifically struck down a state statute that prohibited pharmacists from advertising prescription drug prices.⁷⁸ A consumer group had challenged the statute in federal district court and alleged that the statute violated their First Amendment right to receive price advertising from pharmacists who would have advertised but for the statute.⁷⁹ Virginia argued that the advertising ban served to protect the professional reputation of pharmacists and prevent consumers from making purchase decisions based on price alone without considering other factors like quality of service offered by pharmacists.⁸⁰

The *Virginia Board of Pharmacy* Court agreed that consumers have a strong constitutional right to receive truthful, non-misleading information about lawful goods and services from willing commercial speakers. Justice Blackmun wrote on this point: "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."⁸¹ The Court characterized free-flowing commercial information as beneficial for facilitating informed consumer decisions in the marketplace.⁸²

77. 425 U.S. 748, 762–63, 771–71 (1976). Justice Blackmun, who delivered the majority opinion, wrote: Our questions is whether speech which does 'no more than propose a commercial transaction,' is so removed from any 'exposition of ideas,' and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,' that it lacks all protection [of the First Amendment]. Our answer is that it is not.

Id. at 762 (citations omitted). Justice Blackmun delivered the opinion for the *Virginia State Board* Court and explained the types of commercial speech that fall outside the First Amendment. *Id.* at 771–73. The issue in the case, he explained, was whether a state regulation can "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

78. A section of the Virginia Code stated that a licensed pharmacist who "publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription." *Id.* at 749–50, 750 n.2 (quoting VA. CODE ANN. § 54-524.35 (1974)).

79. *Id.* at 753–54.

80. *Id.* at 767–68.

81. *Id.* at 756 (citations omitted).

82. Writing for the Court on this point, Justice Blackmun explained:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. 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.

In applying these principles, the Court found the Virginia statute was constitutionally problematic because it prevented consumers from receiving truthful, non-misleading product information—the price of prescription drugs—that consumers would likely consider useful in making their purchase decisions. Quite simply, the Court was not willing to allow Virginia to block this information from consumers as a means of manipulating their purchase decisions.⁸³ In addition, the Court found nothing inherently unprofessional about truthful, non-misleading price advertising by pharmacists and noted that the state remained free to directly regulate specific acts of misconduct by licensed pharmacists.⁸⁴

The *Virginia Board of Pharmacy* Court suggested that even commercial speech protected under the First Amendment could be constitutionally regulated under some circumstances but found it unnecessary to explain this further.⁸⁵ However, in the 1980 case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,⁸⁶ the Court chose to confront that issue directly. In *Central Hudson*, the Court set out the following “four-step analysis” to determine the constitutionality of a regulation of commercial speech:

[First], we must determine whether the [regulated] 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. [Second], we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [third] whether the regulation directly advances the governmental interest asserted, and [fourth] whether it is not more extensive than is necessary to serve that

Id. at 765.

83. *Id.* at 770–71. Calling the ban on price advertising “highly paternalistic,” the *Virginia State Board* Court suggested an alternative. For the Court, Justice Blackmun wrote: “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 enough informed, and that the best means to that end is to open the channels of communication.” *Id.* at 770.

84. *See id.* at 769, 771–772. Justice Blackmun pointed out for the Court that Virginia had made no claim that “prescription drug price advertisements are forbidden because they are false or misleading in any way” nor that “the transactions proposed in the forbidden [price] advertisements are themselves illegal in any way.” *Id.* at 771, 772.

In addition, the Court concluded the state should address specific acts of professional misconduct by pharmacists as opposed to imposing a prophylactic ban on price advertising. *See id.* at 770. For the Court, Justice Blackmun wrote, “Virginia is free to require whatever professional standards it wishes of its pharmacists But it may not [regulate in this context] by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.” *Id.* In a later case, the Supreme Court held similarly that a state could not constitutionally ban all price advertising for routine services provided by lawyers because, in part, the Court found nothing inherently misleading about such advertising that would justify a prophylactic ban. *Bates v. State Bar of Arizona*, 433 U.S. 350, 372–75 (1977). Similarly, the Court ruled that a state could not constitutionally prohibit all illustrations in lawyer advertising on similar grounds. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985).

85. The Court did not address other issues such as the scope of constitutionally permissible regulation of commercial speech disseminated by regulated electronic broadcast media. *Id.* at 773. On this point, the Court cited—but did not discuss—a decision by a federal district court that had upheld a federal ban on broadcast cigarette advertising as constitutional and had been affirmed by the Supreme Court in 1972 without opinion. *Id.* (citing *Capitol Broad. Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), *aff’d sub nom.* *Capitol Broad. Co. v. Acting Attorney Gen.*, 405 U.S. 1000 (1972)).

86. 447 U.S. 557, 566 (1980).

interest.⁸⁷

The *Central Hudson* Court used its new analysis in the case to strike down a state ban on promotional advertising for electricity by utility companies.⁸⁸ Applying the analysis to the facts, the Court concluded first that the regulation prohibited protected commercial speech and therefore needed to withstand scrutiny under the remaining three conjunctive factors.⁸⁹ Under the second factor, the Court concluded the state had demonstrated a substantial governmental interest in promoting energy conservation.⁹⁰ Thus, the ultimate constitutional decision turned on whether the regulation directly advanced that interest (direct-advancement requirement) and, if so, was no more extensive than necessary (narrow-tailoring requirement).⁹¹

Under the third *Central Hudson* factor, the Court concluded that banning promotional advertising for electricity served the governmental interest in energy conservation in a direct and material way.⁹² In doing so, the Court assumed that advertising increased demand and consumption and that limiting advertising for electricity would dampen demand.⁹³ Nonetheless, the Court found the ban failed to satisfy the narrow-tailoring requirement under the fourth factor.⁹⁴ The state failed to convince the Court that a ban on all promotional advertising for electricity was necessary and that a less extensive regulation would not suffice.⁹⁵ For instance, the Court suggested, promoting electricity over less-efficient sources of energy might promote overall energy conservation.⁹⁶

After establishing the *Central Hudson* analysis in 1980, the Court subsequently proceeded to apply the test with varying degrees of rigor; but in 1995, the Court began to consistently tighten the application of the final two factors.⁹⁷ From 1995 to present,

87. *Id.*

88. *Id.* at 571–72. The ban was the result of a policy statement issued by the Public Service Commission of the State of New York finding that the supply of electricity furnished by interconnected utility companies in the state were expected to be insufficient to meet consumer demand and that promotional advertising for electricity would undermine public policy promoting energy conservation. *Id.* at 559–60. The Commission had ordered the Central Hudson Gas & Electric Corp. to halt all promotional advertising for electricity, which the company challenged on First Amendment grounds in the case. *Id.*

89. *Id.* at 566–68.

90. *Id.* at 568–69. The Court also found that the state had a sufficiently substantial interest in ensuring that electricity rates be fair and efficient. *Id.*

91. *Id.* at 569–571. The last two steps of the *Central Hudson* test involve an analysis of the “relationship” between each asserted governmental interest and the advertising regulation under review. *Id.* at 569.

92. *Id.* at 569. The Court rejected the argument, however, that the advertising ban directly served the asserted interest in promoting fair and efficient prices for electricity. *Id.* As to that interest, the Court concluded that the “link between the advertising prohibition and the [utility company’s] rate structure is, at most, tenuous.” *Id.*

93. *Id.* (assuming that “there is an immediate connection between advertising and demand for electricity”). As grounds for this assumption, the Court merely stated that “Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales.” *Id.*

94. *Id.* at 569–71.

95. *Id.* at 570–71. The majority stated, “In 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 571.

96. *Id.* at 570. For instance, Central Hudson had argued that but for the ban, it would advertise the use of electrical heat pumps as a more energy-efficient alternative to other sources of heat. *Id.*

97. See, e.g., Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine*:

the Court has used the *Central Hudson* analysis in six cases and only once upheld a challenged regulation—*Florida Bar v. Went For It, Inc.*, a lawyer solicitation case.⁹⁸ In the other five cases, the Court ruled unconstitutional a federal ban on publishing alcohol content percentages on beer labels,⁹⁹ a state ban on retail price advertising by liquor retailers,¹⁰⁰ a federal broadcast ban on casino gambling advertising,¹⁰¹ state restrictions on outdoor and point-of-sale tobacco product advertising,¹⁰² and a federal ban on direct-to-consumer advertising for compounded prescription drugs.¹⁰³

In a 1999 case, *Greater New Orleans Broadcasting Association, Inc. v. United States*, the Supreme Court summarized its current interpretation of the third and fourth factors of the *Central Hudson* analysis.¹⁰⁴ Under the third factor, the Court explained, the regulation at issue must “directly and materially advance the asserted governmental interest.”¹⁰⁵ This requires the government to “demonstrate that the harms that it recites are real and that [the regulation] will in fact alleviate them to a material degree.”¹⁰⁶ Under the narrow tailoring requirement, the Court explained, the regulation at issue need not meet the “least restrictive means” standard that applies to a restriction of fully-protected speech.¹⁰⁷ Instead, the regulation must create “a fit that is reasonable” with the asserted governmental interest.¹⁰⁸ In other words, the Court instructed, the regulation need not be the “single best disposition [but one] whose scope is in proportion to the interest served.”¹⁰⁹

B. Disparate Regulatory Treatment of Speech Types

Under the *Central Hudson* analysis, the Supreme Court has struck down commercial speech regulations when exemptions or conflicting provisions undermine their effectiveness in advancing the asserted regulatory goal to a direct and material degree. These issues arise in two contexts. First, regulations that treat commercial speech differently than noncommercial speech can be constitutionally problematic.

The Constitutional Impact of Lorillard Tobacco, 8 COMM. L. & POL’Y 267, 272–84 (2003); Michael Hoefges and Milagros Rivera-Sanchez, “Vice” Advertising Under the Supreme Court’s Commercial Speech Doctrine: The Shifting Central Hudson Analysis, 22 HASTINGS COMM. & ENT. L.J. 345, 363–89 (2000); Jef I. Richards, *Is 44 Liquormart a Turning Point?*, 16 J. PUB. POL’Y & MARKETING 156, 158–61 (1997); Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 138–42 (1999).

98. 515 U.S. 618 (1995). For a discussion of this case and its impact on lawyers advertising and solicitation, see John Phillips, *Six Years After Florida Bar v. Went For It, Inc.: The Continual Erosion of First Amendment Rights*, 14 GEO. J. LEGAL ETHICS 197 (2001).

99. *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

100. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

101. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173 (1999).

102. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

103. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

104. 527 U.S. at 188–89.

105. *Id.* at 188.

106. *Id.* (quoting *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993)). The Court also wrote that “the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.” *Id.* (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980)).

107. *Id.*

108. *Id.* (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). In other words, the scope of the regulation must be “in proportion to the interest served.” *Id.*

109. *Id.* (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

This is an important issue because the do-not-call registry requirements only apply to commercial telemarketing calls. Second, regulations that distinguish among types of commercial speech within a category can be constitutionally problematic as well. This also is an important issue because the do-not-call registry requirements exempt some forms of commercial telemarketing calls. The overriding question becomes whether the regulatory lines that have been drawn are rational and supported by evidence to meet the direct-advancement requirement of the *Central Hudson* analysis.

In *Cincinnati v. Discovery Network, Inc.*, decided in 1993,¹¹⁰ the Supreme Court ruled unconstitutional a city code provision that effectively banned commercial newsracks on public sidewalks.¹¹¹ As enforced by the city, the provision prohibited newsracks distributing “commercial handbills” including free publications containing real estate listings for sale, for instance.¹¹² However, the city code specifically allowed newsracks selling “newspapers” as that term was interpreted and applied by the city manager.¹¹³ A group of publishers who were denied permits for “commercial” newsracks challenged the permitting scheme on First Amendment grounds and prevailed at the federal trial court level.¹¹⁴ On appeal, the United States Court of Appeals, Sixth Circuit, affirmed.¹¹⁵

On appeal to the Supreme Court, the parties agreed the newsrack ordinance restricted protected commercial speech.¹¹⁶ Therefore, the Court applied the remaining three *Central Hudson* factors.¹¹⁷ Under the second factor, the publishers agreed with the city that there was a substantial governmental interest in promoting safety and

110. 507 U.S. 410 (1993).

111. *Id.* at 413–15 (quoting CINCINNATI, MUNICIPAL CODE § 714-1-C (1992)).

112. *Id.* at 413–14, 414 n.2., 414 n.3. Under the city code, it was unlawful to “hand out or distribute or sell any commercial handbill in any public place.” *Id.* at 414 n.3 (quoting CINCINNATI, MUNICIPAL CODE § 714–23 (1992)). The city code defined a “commercial handbill” as follows:

[A]ny printed or written matter, dodger, circular, leaflet, pamphlet, paper booklet or any other printed or otherwise reproduced original or copies of any matter of literature:

- (a) Which advertises for sale any merchandise, product, commodity or thing; or
- (b) Which directs attention to any business or mercantile or commercial establishment, or other activity, for the purpose of directly promoting the interest thereof by sales; or
- (c) Which directs attention to or advertises any meeting, theatrical performance, exhibition or event of any kind for which an admission fee is charged for the purpose of private gain or profit.

Id. at 414 n.2 (quoting CINCINNATI, MUNICIPAL CODE § 714-1-C (1992)).

113. *Id.* at 419–20 (quoting CINCINNATI, MUNICIPAL CODE § 862-1 (1992)). The term “newspapers” was not defined in the city code. *Id.* Instead, the city manager determined which publications qualified as “commercial handbills” and which publications qualified as “newspapers” when newsrack licenses were requested from the city. *Id.* The city manager had determined that “newspapers” were daily or weekly publications that “primarily present coverage of, and commentary, on current events.” *Id.* at 420 (citation omitted).

114. *Id.* at 412.

115. *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991).

116. *Discovery Network*, 507 U.S. at 416.

117. *Id.* at 424. The majority noted the “difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.” *Id.* at 419; see also *id.* at 420 (noting the “absence of a categorical definition of the difference between ‘newspapers’ and ‘commercial handbills’” in the code provisions at issue in the case). However, the majority decided to avoid the problem of defining commercial and noncommercial speech. See *id.* at 424 (stating that “for the purpose of deciding this case, we assume that the speech barred from Cincinnati’s sidewalks is what we have labeled ‘core’ commercial speech and that no such speech is found in publications that are allowed to use newsracks”).

aesthetics of city streets and sidewalks.¹¹⁸ The decision therefore turned on the contested direct-advancement and narrow-tailoring requirements of the *Central Hudson* analysis.

Turning to the third factor, the *Discovery Network* Court found that refusing to permit commercial newsracks while allowing noncommercial ones did not directly advance the interests in promoting public safety and aesthetics.¹¹⁹ First, the Court concluded there was nothing inherent about commercial newsracks that rendered them any more of an “eyesore” or safety concern than noncommercial newsracks.¹²⁰ Thus, there was no theoretical correlation between the commercial-noncommercial distinction in the ordinance and the city’s asserted regulatory goals. Nor was there any factual support for the distinction either, the Court concluded. The evidence in the record indicated that only sixty-two commercial newsracks had been denied permits under the ordinance, while between 1,500 and 2,000 noncommercial newsracks had been permitted.¹²¹ Thus, the Court concluded, the proliferation of permitted noncommercial newsracks presented the far more serious and substantial threat to public safety and city aesthetics than commercial newsracks.¹²²

Although it was unnecessary to the ruling, the Court also found the newsrack ordinance failed the narrow-tailoring requirement of the fourth *Central Hudson* factor.¹²³ For the majority, Justice Stevens characterized the ordinance as a “sweeping ban that bars from [the] sidewalks a whole class of constitutionally protected speech.”¹²⁴ Thus, the ordinance burdened protected commercial speech too extensively to be constitutional in light of its marginal effectiveness in achieving the asserted governmental goals.¹²⁵

The newsrack ordinance in *Discovery Network* was constitutionally problematic because of the regulatory line drawn between commercial and noncommercial

118. *Id.* at 416.

119. *Discovery Network*, 507 U.S. at 424. The Court thus found the city’s disparate treatment of commercial and noncommercial newsracks unrelated to the goals of promoting safer and less-cluttered sidewalks. *Id.* at 424 (stating that the “categorical ban on commercial newsracks place[d] too much importance on the distinction between commercial and noncommercial speech” and that the “distinction [bore] no relationship whatsoever to the particular interests that the city has asserted”).

120. *Id.* at 425–26. The Court noted that the city has “not asserted an interest in preventing commercial harms by regulating [commercial newsracks], which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.” *Id.* at 426 (citations omitted).

121. *Id.* at 417–18. The Court concluded that the city had overemphasized the distinction between commercial and noncommercial speech and, thus, had “seriously underestimate[d] the value of commercial speech.” *Id.* at 419.

122. *Id.* at 426 (referring to commercial newsracks as the “greater culprit”).

123. *Discovery Network*, 507 U.S. at 430.

124. *Id.* The Court rejected the city’s argument that the ban on commercial newsracks was a “legitimate” time, place or manner restriction because it was not content-neutral. *Id.* at 430. For the Court, Justice Stevens wrote: “Under the city’s newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is ‘content based.’” *Id.* at 429.

125. In a prior case, a plurality of the Supreme Court struck down a city billboard ordinance that exempted onsite signs with commercial messages related to the commercial use of the premises. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513–14, 521 (1981). Justice White, who delivered the judgment of the Court, wrote “The city does not explain how or why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city.” *Id.* at 513.

newsracks. In two subsequent cases, the Court struck down regulations of protected commercial speech because of disparate treatment of similar types of protected commercial speech within a category. In both of these cases, irrational exemptions rendered the regulatory schemes unconstitutional according to a majority of the Supreme Court.

In 1995, in *Rubin v. Coors Brewing Company, Inc.*,¹²⁶ the Court struck down provisions in the Federal Alcohol Administration Act ("FAAA") that prohibited the publication of alcohol content percentages on beer labels as unconstitutional.¹²⁷ The beer manufacturer, Coors Brewing Company, challenged the label ban on First Amendment grounds and prevailed before the federal district court and United States Court of Appeals, Tenth Circuit.¹²⁸ On appeal, the Supreme Court applied the *Central Hudson* analysis and affirmed.¹²⁹

There was no dispute on appeal that the challenged provisions in the FAAA restricted protected commercial speech¹³⁰ or that the remainder of the *Central Hudson* analysis therefore applied.¹³¹ Under the second *Central Hudson* factor, the Court agreed with the government that there was a substantial regulatory interest in preventing beer manufacturers from competing on the basis of high alcohol content.¹³² The federal government convinced the Court that the so-called "strength war" marketing by beer manufacturers would contribute to both increased rates of high-alcohol beer consumption, and social costs related to alcohol consumption.¹³³

However, the government failed to convince the *Coors Brewing* Court that the label ban satisfied the direct-advancement requirement under the third *Central Hudson* factor.¹³⁴ The Court found that banning alcohol percentage information on beer labels was irrational in light of other federal provisions that allowed the same information on labeling for distilled spirits and actually required the information on labeling for wine products exceeding fourteen percent alcohol content.¹³⁵ For the *Coors Brewing* majority, Justice Thomas wrote: "[T]he irrationality of this unique and puzzling

126. 514 U.S. 476 (1995).

127. *Id.* at 478–80 (reviewing the FAAA as codified at 27 U.S.C. § 201, *et seq.*). The regulation applied to "beer" and "ale" products. *Id.* at 481 (citing implementing regulations enacted by the Bureau of Alcohol, Tobacco and Firearms, 27 C.F.R. § 7.26(a) (1994)). The regulation was applied to prohibit numerical indications of alcohol content along with descriptive phrases such as "strong," "full strength," and "high proof," among others. *Id.* (citing implementing regulations enacted by the Bureau of Alcohol, Tobacco and Firearms, 27 C.F.R. § 7.29(f) (1994)).

128. *Id.* at 479–80.

129. *Id.* at 480.

130. *Coors Brewing*, 514 U.S. at 481, 483.

131. *Id.* at 482.

132. *Id.* at 485. However, the Court rejected the federal government's argument that it also had a sufficiently substantial interest in "preserving state authority" to implement "alcohol-related policies." *Id.* at 485–86.

133. *Id.* at 485 ("We have no reason to think that strength wars, if they were to occur, would not produce the type of social harm that the Government hopes to prevent.").

134. *Id.* at 486–90.

135. *Coors Brewing*, 514 U.S. at 489 (citing 27 C.F.R. §§ 5.37, 4.36 (1994)). In addition, the Court noted, the FAAA and its enforcement regulations allowed beer manufacturers to publish alcohol content percentages in advertising in all but eighteen states. *Id.* at 488. Under the FAAA and related regulations, beer manufacturers were permitted to advertise alcohol content in states that did not ban such information in beer advertisements. *Id.* (citing 17 U.S.C. § 205(f)(2) (1994), 27 C.F.R. § 7.50 (1994)). Only eighteen states banned alcohol content in beer advertising. *Id.*

regulatory framework ensures that the labeling ban will fail to achieve [the goal of combating strength wars]. There is little chance that [the ban] can directly and materially advance its aim, while other provisions . . . undermine and counteract its effects."¹³⁶

Although it was unnecessary to the constitutional ruling, the Court also concluded that the beer label ban failed the narrow-tailoring requirement under the fourth *Central Hudson* factor. The majority found that regulatory options such as imposing a cap on beer alcohol content or a tax on high-alcohol beer, for instance, were available to curb consumption of high-alcohol beer and would not burden protected commercial speech.¹³⁷ It was clear that the Court was not tolerant of a ban on speech when direct controls on the product itself were regulatory options.

In *Greater New Orleans Broadcasting Association, Inc. v. United States*, decided in 1999,¹³⁸ the Supreme Court found another federal regulation of commercial speech irrational and unconstitutional under the *Central Hudson* analysis. In that case, the Court ruled that part of a federal ban on gambling advertising carried by licensed broadcast media was unconstitutional.¹³⁹ Exemptions allowed broadcast advertising for some forms of legalized gambling including state-operated lotteries, Native American-operated casinos, and gambling operations run by non-profit organizations.¹⁴⁰ In addition, as mentioned, the ban only applied to gambling advertising aired by licensed radio and television broadcasters.¹⁴¹

A Louisiana-based coalition of broadcasters challenged the ban in federal district court arguing that the provisions unconstitutionally restricted them from broadcasting advertising for legalized private casinos in Louisiana and adjoining Mississippi.¹⁴² A Louisiana federal district judge upheld the ban under the *Central Hudson* analysis.¹⁴³ The United States Court of Appeals, Fifth Circuit, affirmed the ruling¹⁴⁴ despite a

136. *Id.* at 489. The government did not present sufficient evidence to convince the Court otherwise. *Id.* at 489–90 (“The Government did not offer any convincing evidence that the labeling ban has inhibited strength wars.”). The Court pointed out that while the government had presented “anecdotal evidence and educated guesses to suggest that competition on the basis of alcohol content is occurring today and that [the] ban has constrained strength wars that otherwise would burst out of control,” such “various tidbits” were insufficient to “overcome the irrationality of the regulatory scheme.” *Id.* at 490.

137. *Id.* at 490–91.

138. 527 U.S. 173 (1999).

139. The federal statute prohibited “any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance” *Id.* at 177 (quoting 18 U.S.C. § 1304 (1994)). The broadcast advertising ban on gambling was part of the original Communications Act of 1934. *Id.* at 177 (citing 48 Stat. 1088).

140. *Id.* at 178–79 (discussing specifically the various exemptions enacted by Congress over the years to the broadcast ban for gambling advertising).

141. *Id.* at 177.

142. *Id.* at 180–83 (discussing the proceedings below). For a detailed law review discussion and commentary of the proceedings below in the case, see Hoefges and Rivera-Sanchez, *supra* note 97, at 375–82.

143. *Greater New Orleans Broad. Ass’n v. United States*, 866 F. Supp. 975, 976 (E.D. La. 1994).

144. *Greater New Orleans Broad. Ass’n v. United States*, 149 F.3d 334, 335, 341 (5th Cir. 1998). The United States Fifth Circuit had upheld the decision of the federal district court in a previous decision that was vacated on appeal to the United States Supreme Court and remanded for further consideration. *Greater New Orleans Broad. Ass’n v. United States*, 69 F.3d 1296, 1298 (1995), *cert. granted and judgment vacated*, 519 U.S. 801 (1996) (remanding to the Fifth Circuit for reconsideration in light of the decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)).

conflicting ruling by the Ninth Circuit the previous year in a Nevada case.¹⁴⁵

On appeal, the United States Supreme Court utilized the *Central Hudson* analysis to test the constitutionality of the federal broadcast ban on gambling advertising.¹⁴⁶ The parties agreed that the ban prevented the broadcasters from airing truthful and non-misleading advertising about lawful casino gambling, which is protected commercial speech.¹⁴⁷ Moving to the second factor of the analysis, the Supreme Court agreed that the federal government had sufficiently substantial interests in curbing social costs related to gambling and in supporting the policy of states that prohibit gambling including casino gambling.¹⁴⁸ However, the Court found the broadcast advertising ban failed both the direct-advancement and narrow-tailoring requirements of the third and fourth *Central Hudson* factors and was unconstitutional.

Under the direct-advancement requirement of the third factor, the *Greater New Orleans* Court found the broadcast ban irrational and too “pierced by exemptions and inconsistencies” to be a sufficiently effective means of accomplishing the asserted regulatory interests.¹⁴⁹ For the majority, Justice Stevens wrote: “[T]he government is committed to prohibiting accurate product information . . . [but] only when conveyed over certain forms of media and for certain types of gambling . . . despite the fact that messages about the availability of such gambling are being conveyed over the airwaves by other speakers.”¹⁵⁰ There was no evidence in the case of a significant correlation between broadcast advertising for private casino gambling and the government’s

145. *Valley Broad. Co. v. United States*, 107 F.3d 1328, 1335–36 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998). In the Fifth Circuit’s 1998 opinion in *Greater New Orleans Broadcasting*, the appeals court acknowledged the conflict with the Ninth Circuit in *Valley Broadcasting*. 149 F.3d at 335 n.2. In its opinion in *Greater New Orleans Broadcasting*, the Supreme Court also noted the conflict between the Fifth and Ninth Circuits. 527 U.S. at 183.

146. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183–84 (1999) (concluding that *Central Hudson* analysis was appropriate test in the case); *id.* at 184–95 (application of *Central Hudson* analysis to facts of case).

147. *Id.* at 184. Writing for the majority, Justice Stevens suggested that private gambling advertising probably contributes to the public debate on legalized gambling in addition to simply advertising lawful gambling activities. *See id.* at 184–85. On this point, he wrote:

[T]he proposed commercial messages would convey information—whether taken favorably or unfavorably by the audience—about an activity that is the subject of intense public debate in many communities. In addition, the . . . broadcasts presumably would disseminate accurate information as to the operation of market competitors, such as pay-out ratios, which can benefit listeners by informing their consumption choices and fostering price competition. Thus, even if the broadcasters’ interest in conveying these messages is entirely pecuniary, the interests of, and benefit to, the audience may be broader.

Id.

148. *Id.* at 184–87. The *Greater New Orleans Broadcasting* Court was not overwhelmed by the government’s argument and somewhat grudgingly agreed that these interests were sufficiently substantial. For the majority, Justice Stevens wrote:

We can accept the characterization of these two interests as “substantial,” but that conclusion is by no means self-evident. No one seriously doubts the Federal Government may assert a legitimate and substantial interest in alleviating the societal ills [of gambling], or in assisting like-minded States to do the same. But in the judgment of both the Congress and many state legislatures, the social costs that support the suppression of gambling are offset, and sometimes outweighed, by countervailing policy considerations, primarily in the form of economic benefits.

Id. at 186–87 (citations omitted).

149. *Id.* at 190.

150. *Id.* at 191. Justice Stevens cautioned that laws that discriminate among commercial speakers “conveying virtually the identical messages [are] in serious tensions with the principles undergirding the First Amendment.” *Id.* at 193–94.

asserted interest in curbing social harms of gambling.¹⁵¹

The Court also concluded that the broadcast advertising ban failed the narrow tailoring requirement because more direct, non-speech regulatory means were available.¹⁵² In other words, the government could directly regulate the operations of private casinos to try and curb social harms associated with excessive and compulsive casino gambling.¹⁵³ For instance, the Court suggested, the government could restrict or limit the availability of credit and cash machines in casinos, establish mandatory betting and jackpot limits, and limit casino admission.¹⁵⁴ These regulations would better address the asserted regulatory goals without restricting protected speech.

In order for a regulation that focuses on commercial speech over noncommercial speech to withstand constitutional scrutiny, it seems clear that the governmental interest must correlate with the commercial nature of the regulated speech. In other words, the regulatory choice to restrict commercial speech but not noncommercial speech must be rational in light of the regulatory goal at stake, and that decision may not be constitutionally grounded merely on the intermediate level of protection afforded commercial speech under the First Amendment. That seems to be the clear lesson of *Discovery Network*. Similarly, the decision to regulate some forms of commercial speech within a category but not others also must be rational in light of the governmental interest or interests at stake. That seems equally clear from *Coors Brewing* and *Greater New Orleans Broadcasting*.

C. Regulations of Point-to-Point Communication: Door-to-Door and Direct Mail

Regulations of point-to-point communications such as door-to-door and direct mail solicitation seem highly analogous to telemarketing regulation including the national do-not-call registry requirements.¹⁵⁵ Although the Supreme Court has never ruled on

151. On this point, Justice Stevens wrote for the majority:

We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under *Central Hudson*, however, because the flaw in the Government's case is more fundamental: The operation of [the federal statute] and its attendant regulatory scheme is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.

Id. at 190 (citing *Coors Brewing*, 514 U.S. at 488).

152. *Id.* at 188, 193–94. For the majority, Justice Stevens wrote that the “fourth part of the [*Central Hudson*] test complements the direct-advancement inquiry of the third part, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it.” *Id.* The majority opinion seemed to address the third and fourth factors combined as to each of the asserted governmental interests. *Id.* at 188–95. However, after setting out the requirements of the third and fourth factors, the majority opinion specifically indicate that “as applied to [the facts of the case], [the challenged ban] cannot satisfy these standards,” which indicate the majority had concluded that the ban failed both of the final *Central Hudson* inquiries. *See id.* at 188 (emphasis added).

153. *Id.* at 192.

154. *Id.*

155. *See* Meacham, *supra* note 34, at 74–76 (discussing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970) (direct mail case), *Martin v. City of Struthers*, 319 U.S. 141 (1943) (door-to-door case) and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (door-to-door solicitation case), and concluding that “the type of restriction placed upon telemarketers by the establishment of a national ‘do-not-call’ list is similar to several restrictive activities that the Supreme Court has previously held constitutional against First Amendment challenges”); James Sweet, *Opting-Out of Commercial Telemarketing: The Constitutionality of the National Do-Not-Call Registry*, 70 TENN. L. REV. 921, 954 (2003) (noting that the Supreme Court had not yet addressed regulations of telemarketing but had “addressed the analogous mediums of door-to-door and direct mail solicitations”); Jared Strauss, *The Do-Not-Call List’s Big Hang-Up*, 10 RICH.

the constitutionality of a telemarketing regulation, the Court has addressed constitutional issues in First Amendment challenges to regulations of door-to-door and direct mail solicitation that are relevant in the telemarketing context. This section looks first at door-to-door solicitation cases and then direct mail solicitation cases decided by the Supreme Court.

In *Martin v. City of Struthers*, the Supreme Court ruled unconstitutional a city ordinance that criminalized door-to-door distribution of “handbills, circulars or other advertisements.”¹⁵⁶ Thelma Martin, a Jehovah’s witness, had been convicted under the ordinance for distributing door-to-door religious leaflets and challenged her conviction on First Amendment grounds.¹⁵⁷ In overturning her conviction, the Court found the ordinance problematic constitutionally because it prevented speakers like Martin from reaching householders who had no objection to receiving door-to-door communications.¹⁵⁸

For the *Martin* majority, Justice Black wrote: “Freedom to distribute information to every citizen where he desires to receive it is so clearly vital to preservation of a free society that, [with some exceptions], it must be fully preserved.”¹⁵⁹ Regulations, he explained further, had to be crafted with “due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors (*sic*) from the home.”¹⁶⁰ Justice Black suggested that a regulation allowing door-to-door solicitations except at homes displaying a no-solicitation sign would pass constitutional muster because solicitors still would be permitted to communicate with non-objecting householders.¹⁶¹

In 1980, the Supreme Court struck down another door-to-door regulation in *Village*

J.L. & TECH. 27, *43 (2004) (concluding that “[t]he Supreme Court has, however, endorsed rules analogous to the do-not-call list for protecting privacy” in *Martin* and *Village of Schaumburg*). See also Nadel, *supra* note 14, at 104–05 (concluding that “courts have been more receptive to restrictions on point-to-point media, including phone and mail communications, because such restrictions need not prevent dissemination of messages to willing recipients”).

156. *Id.* at 141, 142, 150.

157. *Id.* at 141–42.

158. *Id.* at 141, 146–49. For the *Martin* Court, Justice Black wrote: “Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the [city] has attempted to make this decision for all its inhabitants.” *Id.* at 141.

159. *Id.* at 146–147. Justice Black went on: “The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.” *Martin*, 319 U.S. at 146–47.

160. *Id.* at 148–49.

161. *Id.* at 148 (“A city can punish those who call at a home in defiance of the previously expressed will of the occupant [not to be disturbed] . . .”); see also *Watchtower Bible and Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 165–69 (2002) (ruling that a city ordinance requiring permits for door-to-door “canvassers” was unconstitutional while noting, *inter alia*, that provisions in the ordinance allowing residents to post “No Solicitation” signs to bar solicitors from their property helped provide “ample protection for unwilling listeners”); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980) (ruling unconstitutional a city ordinance banning “door-to-door” or “on-street” solicitation for charitable donations, unless seventy-five percent or more of the receipts were actually being used for charitable purposes and noting, among other things, that an ordinance allowing citizens to block solicitors from their residences with a “No Solicitors or Peddlers Invited” sign “suggest[ed] the availability of less intrusive and more effective measures to protect privacy”).

of *Schaumburg v. Citizens for a Better Environment*.¹⁶² In that case, a village ordinance prohibited charitable organizations from soliciting door-to-door unless seventy-five percent or more of the donations they collected were used for charitable purposes.¹⁶³ In the case, the village argued that the ordinance served to protect the public from fraud, invasions of privacy and public safety threats.¹⁶⁴ The Court agreed with the village that these were legitimate governmental interests but nonetheless found the ordinance unconstitutionally broad.¹⁶⁵ As an alternative, the Court suggested, the village could directly regulate and penalize specific instances of fraudulent misrepresentation or could require charitable organizations to affirmatively disclose the percentage of donations used for charitable purposes.¹⁶⁶

In addition, the *Village of Schaumburg* Court concluded that the village had not established a sufficient relationship between the ordinance and the asserted governmental interests in protecting privacy and promoting public safety.¹⁶⁷ For instance, there was no evidence that charitable organizations that satisfied the seventy-five percent requirement were less of a threat to privacy or public safety than those that did not meet the threshold.¹⁶⁸ Writing for the majority, Justice White stated, "householders are equally disturbed by solicitation on behalf of organizations satisfying the [seventy-five percent] requirement as they are by solicitation on behalf of other organizations."¹⁶⁹

Both *Martin* and *Village of Schaumburg* involved door-to-door communication of

162. 444 U.S. 620 (1980).

163. *Id.* at 622 n.4. The ordinance stated that in order to solicit lawfully, a charitable organization must have had "a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five percent of the funds collected are utilized directly and solely for the charitable purpose of the organization." *Id.* at n.4 (quoting SCHAUMBURG, OH., CODE ch. 22, art. III, § 22-20 (1974)).

164. *Id.* at 636.

165. *Id.* at 637 (concluding there were "measures less intrusive than a direct prohibition on solicitation" available). The Supreme Court also struck down similar restrictions on fundraising in two subsequent cases. In *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, the Court ruled unconstitutional a Maryland law that prohibited charitable organizations from soliciting if they used more than twenty-five percent of their collections for expenses unless they could obtain a waiver from the state based on a showing of financial necessity. 467 U.S. 947, 962 (1984). In *Riley v. Nat'l Fed. of the Blind of North Carolina, Inc.*, the Court likewise ruled unconstitutional a North Carolina law that limited professional fundraisers to collecting reasonable and non-excessive fees as determined by the state. 487 U.S. 781, 784-86 (1988). For discussion of *Village of Schaumburg*, *Munson* and *Riley* in the context of percentage-based restrictions on charitable solicitations, see Meacham, *supra* note 34, at 67-69. In 2003, the Supreme Court characterized the challenged regulations in *Village of Schaumburg*, *Munson* and *Riley* as unconstitutional prophylactic measures. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 610 (2003).

166. *Village of Schaumburg*, 444 U.S. at 637-38. For instance, in 2003, the Court reversed an order of the Illinois Supreme Court dismissing a fraud action by the Attorney General of Illinois against a for-profit fundraising company hired to solicit funds for a non-profit veterans organization. *Telemarketing Associates*, 538 U.S. at 606. The state had alleged that the fundraising company defrauded the public by claiming falsely that a "significant amount" of the donations would be used for charitable purposes when in actuality only fifteen percent of collected donations went to the charitable organization and eighty-five percent was retained by the fundraising company. *Id.* at 605. The Court held that states can constitutionally "maintain fraud actions when fundraisers make false or misleading representations designed to deceive donors about how their donations will be used." *Id.* at 624. The *Telemarketing Associates* Court distinguished state fraud actions against individual solicitors from the type of "prophylactic" approach at issue in the *Village of Schaumburg* case. *Id.* at 610, 612-13.

167. *Village of Schaumburg*, 444 U.S. at 638.

168. *Id.* at 638-39.

169. *Id.* at 638.

noncommercial messages.¹⁷⁰ In *Rowan v. United States Post Office*, decided in 1970,¹⁷¹ the Supreme Court addressed the rights of postal customers to prevent unwanted commercial solicitations delivered by direct mail. In *Rowan*, the Court upheld a federal statute that allowed a postal customer to object to a direct mail advertisement that he or she considered “erotically arousing or sexually provocative” and block future mailings from that particular sender.¹⁷²

In deciding the case, the *Rowan* Court balanced the First Amendment rights of commercial speakers and the targeted recipients of their messages.¹⁷³ Writing for the Court, Chief Justice Burger stated: “Weighing the highly important right to communicate . . . against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer’s right to communicate must stop at the mailbox of an unrecipients addressee.”¹⁷⁴

On this point, two factors seemed especially important to the *Rowan* Court in reaching its decision. First, the regulation gave postal customers complete autonomy to decide which mailings that they objected to and wished not to receive again.¹⁷⁵ Thus, the Court concluded that the regulation in *Rowan* was distinguishable from the seventy-five percent requirement found unconstitutional in *Village of Schaumburg*, which did not similarly facilitate consumer choice to receive or not receive communications.¹⁷⁶

170. Noncommercial solicitation is likely entitled to a higher level of First Amendment protection than commercial solicitation. See Strauss, *supra* note 155, at 37–38 (discussing the varied levels of First Amendment protection for noncommercial solicitations and commercial speech). However, as pointed out in a recent law review comment, the First Amendment does not insulate false and misleading representations by telemarketers seeking charitable contributions from legal actions such as fraud. See Meacham, *supra* note 34, at 69 (discussing *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 610 (2003)).

171. 397 U.S. 728 (1970).

172. *Id.* at 729–30, 738–39 (quoting 39 U.S.C. § 4009 (1964)). Under the statute, once the Postmaster General receives notice from a postal customer that the customer has received a commercial mailing that the customer finds “in his sole discretion . . . to be erotically arousing or sexually provocative” and does not wish to receive, the Postmaster General is authorized to issue an order to the sender to delete that customer’s name and address from all of the sender’s mailing lists. *Id.* at 729–30 (quoting 39 U.S.C. § 4009(a) (1964)).

173. *Id.* at 736. In addition, Chief Justice Burger wrote that “Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence.” *Id.* at 738.

174. *Rowan*, 397 U.S. at 736–37. For the majority, Chief Justice Burger wrote:

To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home. Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail.

Id. at 737.

175. *Id.* at 737. For the Court, Chief Justice Burger wrote:

Both the absoluteness of the citizen’s right . . . and its finality are essential; what may not be provocative to one person may well be to another. In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents—or indeed the text of the language touting the merchandise. Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official.

Id.

176. See Nadel, *supra* note 14, at 112 (suggesting in 1986 that this approach would offer the “best solutions to the telemarketing problem” and “would thus allow individuals to select the types of calls they receive, rather than presenting them with an all-or-nothing choice” and noting that the statute at issue in *Rowan* “avoids the First Amendment problem because all discretion is left with the individual and not

Secondly, it was critical to the ruling that the postal regulation in *Rowan* was not a categorical ban on all direct mail solicitations.¹⁷⁷ Direct mail marketers remained free to send solicitations to postal customers who had not yet filed a specific objection to their mailings. Thus, unlike the solicitation ban at issue in *Martin*, the postal regulation in *Rowan* allowed marketers to communicate with non-objecting recipients.¹⁷⁸

Of course, *Rowan* was decided before the Supreme Court decided *Virginia Board of Pharmacy* in 1976 and *Central Hudson* in 1980. Thus, when *Rowan* was decided, pure commercial speech was not yet incorporated into the First Amendment, and the *Central Hudson* analysis had yet to be established. In *Bolger v. Youngs Drug Products Corporation*, a direct mail case decided in 1983, the Supreme Court used the *Central Hudson* analysis to strike down a federal statute banning unsolicited direct mail advertising for contraceptives.¹⁷⁹

The *Bolger* Court concluded first that the federal statute prohibited constitutionally-protected commercial speech—truthful and non-deceptive advertising for contraceptives—and, thus, implicated the remaining *Central Hudson* factors.¹⁸⁰ Under the second factor, the *Bolger* Court found the government's asserted interest in "aiding parents' efforts to discuss birth control with their children" was sufficiently substantial.¹⁸¹ However, the Court found the federal ban on unsolicited direct mail contraceptive advertising failed the last two factors and was unconstitutional.

Under the direct-advancement requirement of the third factor, the Court found the ban was largely ineffective in serving the asserted regulatory goal.¹⁸² The Court suggested that, at best, the ban assisted the presumably small percentage of parents whose children had uncontrolled access to the household mail and were not exposed to contraceptive information from other sources.¹⁸³ Under the narrow-tailoring requirement of the fourth factor, the Court found the ban too broad and unconstitutional on that ground as well.¹⁸⁴ Summarizing, the *Bolger* Court concluded that the "marginal degree of protection" provided by the ban came at too high of a constitutional cost.¹⁸⁵ As Justice Marshall explained, the ban operated "by purging all mailboxes of

reviewable by any government officials").

177. *Rowan*, 397 U.S. at 737 ("In this case the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.").

178. See Strauss, *supra* note 155, at 43 (writing about *Martin* and *Rowan* and summarizing that "[w]hile the Court has consistently struck down attempts by municipalities to preemptively stop solicitors from knocking on doors by requiring them to obtain licenses or notify the police in advance, it has recognized and sanctioned provisions giving individuals the ability to prevent intrusive solicitations").

179. 463 U.S. 60, 61, 68–69 (1983).

180. *Id.* at 69.

181. *Id.* at 73.

182. *Id.*

183. *Id.* For the majority, Justice Marshall wrote, "a ban on unsolicited [contraceptive] advertisements serves only to assist those parents who desire to keep their children from confronting such mailings, who are otherwise unable to do so, and whose children have remained relatively free from such stimuli." *Id.* To the contrary, the Court assumed that "parents already exercise substantial control over the disposition of mail once it enters their mailboxes." *Bolger*, 463 U.S. at 73. In addition, the Court noted that children are likely to be exposed to contraceptive advertising carried in mass media vehicles and drug store displays. *Id.* at 73 n.26. Similarly, the Court noted that many minors receive sexual education that includes exposure to the topic of contraception. *Id.*

184. See *id.* at 73–75.

185. *Id.* at 73–74.

unsolicited material that is entirely suitable for adults.”¹⁸⁶

The *Bolger* Court explicitly distinguished the previous ruling in *Rowan*.¹⁸⁷ Writing for the majority, Justice Marshall explained that in *Rowan*, the Court “recognized the important interest in allowing addressees to give notice to a mailer that they wish no further mailings which, in their sole discretion, they believe to be [objectionable.]”¹⁸⁸ However, the statute in *Bolger* provided no such option and instead operated as a categorical ban as to willing and unwilling recipients alike.¹⁸⁹ Justice Marshall wrote: “[W]e have never held that the government itself can shut off the flow of mailings to protect those recipients who might potentially be offended.”¹⁹⁰

In 1995, the Supreme Court decided another First Amendment challenge to a regulation on commercial direct mail solicitation. In *Florida Bar v. Went For It, Inc.*,¹⁹¹ a 5–4 majority of the Court upheld a state regulation prohibiting lawyers from sending targeted, direct mail solicitations to accident victims within thirty days after their accidents.¹⁹² In previous cases, the Court had ruled that states could not constitutionally ban lawyers from advertising prices for routine legal services¹⁹³ or completely ban lawyers from sending targeted, direct mail solicitations to prospective clients.¹⁹⁴ However, the Court had not addressed the constitutionality of a time-limited restriction on targeted, direct mail solicitations by lawyers.

In *Went For It*, the thirty day ban clearly restricted protected commercial speech—truthful and non-misleading solicitations offering lawful services—and thus triggered the remaining factors of the *Central Hudson* analysis.¹⁹⁵ Under the second factor, the Court found the state had substantial government interests in protecting accident victim privacy and preserving the reputation of the legal profession.¹⁹⁶ Thus, the decision turned on the application of the direct-advancement and the narrow-tailoring requirements of the third and fourth *Central Hudson* factors.

Under the third *Central Hudson* factor, the Court found that the thirty day ban sufficiently advanced the asserted government interests.¹⁹⁷ The state had submitted a summary of anecdotal and statistical evidence to support arguments that the public considered direct mail solicitation of accident victims to be an invasion of privacy and a

186. *Id.* For the majority, Justice Marshall wrote: “We have previously made clear that a restriction of this scope is more extensive than the Constitution permits, for the government may not ‘reduce the adult population . . . to reading only what is fit for children.’” *Bolger*, 463 U.S. at 73–74 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)).

187. *Id.* at 72.

188. *Id.*

189. *See id.*

190. *Id.*

191. 515 U.S. 618 (1995).

192. *Id.* at 620. For discussion of the *Went For It* decision and its impact on state regulation of direct mail soliciting by lawyers, see generally, John Phillips, Note, *Six Years after Florida Bar v. Went For It, Inc.: The Continual Erosion of First Amendment Rights*, 14 GEO. J. LEGAL ETHICS 197 (2000).

193. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

194. *Shapero v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988).

195. *Went For It*, 515 U.S. at 623–24.

196. *Id.* at 624–25. For the majority, Justice O’Connor wrote: “[T]he purpose of the . . . ban is to forestall the outrage and irritation with the state-licensed legal profession that the practice of direct solicitation only days after accidents has engendered.” *Id.* at 631.

197. *Id.* at 625–34.

poor reflection on the legal profession.¹⁹⁸ The 5–4 majority found this summary to be sufficient evidence on which to conclude that curbing direct mail solicitations to accident victims would sufficiently serve to protect accident victim privacy and alleviate negative public perceptions of the legal profession.¹⁹⁹

Under the final *Central Hudson* factor, the majority concluded that the thirty-day ban was sufficiently narrow in scope because it left open other means for lawyers to communicate with prospective clients.²⁰⁰ Writing for the majority, Justice O'Connor stated that lawyers had "ample alternative channels" to communicate with accident victims during the thirty-day ban, including mass media advertising and telephone directory listings.²⁰¹ In addition, lawyers were not prohibited from sending targeted direct mail solicitations to accident victims beyond thirty days after their accidents.

The door-to-door and direct mail solicitation cases discussed above provide constitutional lessons for regulation of other point-to-point solicitation activities such as telemarketing. First, solicitation regulations that allow for alternate means of communication between commercial speakers and their targets stand a better chance of surviving constitutional challenge. Secondly, regulations that effectively and narrowly serve the right of consumers to reject unwanted solicitations likewise seem better equipped to withstand constitutional challenge. Third, regulations that focus on the mode of communication as opposed to the message itself also seem more likely to withstand challenge.²⁰²

IV. CONSTITUTIONAL CHALLENGES TO FEDERAL BAN ON UNSOLICITED TELEFAX ADVERTISING

The federal ban on unsolicited telefax advertising had been challenged in the courts on First Amendment grounds prior to creation of the do-not-call registry requirements. At issue in these cases were provisions in the TCPA rendering it unlawful "to send an unsolicited advertisement to a telephone facsimile machine."²⁰³ The TCPA defines

198. *Id.* at 626–28 (describing the "106-page summary" of the Florida Bar's "2-year study of lawyer advertising and solicitation"). Writing for the majority, Justice O'Connor described the summary as reflecting "statistical and anecdotal" support for the proposition that "the Florida public views direct mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Id.* at 626.

199. *Went For It*, 515 U.S. at 631–32. Although the majority found the summary sufficient to establish direct and material advancement under the *Central Hudson* analysis, the four dissenters strongly disagreed and found the summary mostly anecdotal and inadequate. *Went For It*, 515 U.S. at 640–41 (Kennedy, J., dissenting). On this point, Justice O'Connor, writing preemptively in the majority opinion, concluded that empirical data need not "come to us accompanied by a surfeit of background information" in speech regulation cases. *Id.* at 628. Justice O'Connor wrote, "[W]e believe the evidence adduced by the [Florida] Bar is sufficient to meet the standard elaborated in *Edenfield v. Fane*, 507 U.S. 761 (1993)." *Id.* She pointed out that the Court had allowed litigants in previous speech regulation cases to rely upon "reference to studies and anecdotes." *Id.* (citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50–51 (1986); *Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 584–85 (1991) (Souter, J., concurring in judgment)).

200. *Id.* at 633–34.

201. *Went For It*, 515 U.S. at 633–34.

202. One commentator has described this as focusing on the "non-communicative" aspects of commercial speech as opposed to the "communicative" aspects. Sweet, *supra* note 155, at 940–54. He analogized regulations of non-communicative aspects of commercial speech to content-neutral "time, place and manner" regulations of noncommercial speech." *Id.* at 948.

203. 47 U.S.C. § 227(b)(1)(C) (2004).

"unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."²⁰⁴ The only two federal circuit courts of appeals to address the constitutionality of the telefax advertising ban upheld the provisions. The cases are relevant to constitutional issues surrounding the do-not-call registry because of the disparate treatment of unsolicited telefaxes deemed commercial and noncommercial, and the exemptions for some forms of unsolicited telefax advertising.

In *Destinations Ventures, LTD. v. FCC*, decided in 1995, the United States Court of Appeals, Ninth Circuit, upheld the restrictions on unsolicited telefax advertising.²⁰⁵ Destination Ventures, a travel company that wanted to send unsolicited telefax advertising to travel agents,²⁰⁶ filed suit in Oregon federal district court challenging the provisions on First Amendment grounds.²⁰⁷ On motion filed by the FCC, the trial judge dismissed the case and also denied a motion for summary judgment filed by Destination Ventures.²⁰⁸

On appeal, the U.S. Ninth Circuit affirmed the federal district judge.²⁰⁹ The Ninth Circuit conducted a *de novo* review of the constitutional issues and applied the *Central Hudson* analysis to the restrictions on telefax advertising.²¹⁰ The parties already had agreed in the district court proceedings that the ban applied to protected commercial speech and needed to survive the *Central Hudson* analysis.²¹¹ In addition, Destination Ventures agreed with the FCC on appeal that the government had a substantial interest

204. 47 U.S.C. § 227(a)(3) (2004).

205. 46 F.3d 54, 55 (9th Cir. 1995). The specific provision at issue banned using a telefax machine to deliver an "unsolicited advertisement" defined in the statute as "any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* at 55 (quoting 47 U.S.C. § 227(a)(4) (1992)).

206. *Destination Ventures*, 46 F.3d at 55.

207. *Destination Ventures, Ltd. v. FCC*, 844 F. Supp. 632 (D. Oregon 1994). Destination Ventures was joined in the suit by other businesses as plaintiffs; the challenged provisions made it unlawful to "use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." *Id.* at 634 (quoting 47 U.S.C. § 227(a)(4) (1991)). The statute defined an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* (quoting 47 U.S.C. § 227(b)(1)(C) (1991)).

208. *Id.* at 632. In addition, the trial judge refused to grant the summary judgment motion filed by Destination Ventures. *Id.* at 640. In the opinion, the trial judge applied the *Central Hudson* analysis and found that the government had a sufficiently substantial interest in protecting consumers from the costs of receiving unwanted commercial telefaxes, that the ban directly advanced that interest, and that the ban was narrowly tailored. *Id.* at 637–39. In doing, the district judge rejected arguments by Destination Ventures that the FCC had failed to prove the degree to which cost-shifting connected with unsolicited telefax advertising was an actual problem for consumers. *Destination Ventures*, 844 F. Supp. at 637. However, on this point, the judge simply concluded it was sufficient that Congress had identified such cost-shifting as a regulatory target and had addressed it with a ban on unsolicited telefax advertising. *Id.* In addition, the judge concluded that the ban was narrowly tailored because it banned only the type of unsolicited telefaxes associated with the cost-shifting with which Congress was concerned—advertisements. *Id.* at 638–39. The trial judge distinguished the *Discovery Network* case in which the Supreme Court had struck down a city ban on commercial newsracks. *Id.* at 639. The trial judge pointed out that in *Discovery Network*, the city wanted to "alleviate street clutter" but had only banned commercial newsracks when noncommercial newsracks were by far the most prevalent type of newsracks on city streets. *Id.*

209. *Destination Ventures*, 46 F.3d at 55.

210. *Id.* at 55–57.

211. *Destination Ventures*, 211 F. Supp. at 635.

in preventing marketers from shifting costs of telefax advertising to businesses and consumers without their consent.²¹²

However, Destination Ventures argued on appeal that the ban failed to directly advance this regulatory goal under the third *Central Hudson* factor. Specifically, Destination Ventures argued that prohibited telefax advertisements would be no more costly to receive than the types of telefaxes that were permitted.²¹³ The Ninth Circuit, however, pointed out that Destination Ventures admitted that “unsolicited commercial fax solicitations are responsible for the bulk of advertising cost shifting” and that “banning them is a reasonable means to achieve Congress’s goal of reducing cost shifting.”²¹⁴ On those grounds, the appellate court concluded that the restrictions served the regulatory goal directly enough under the *Central Hudson* analysis.

In addition to finding direct advancement, the appellate court concluded the ban was sufficiently narrow under the fourth *Central Hudson* factor.²¹⁵ Destination Ventures had argued the ban was excessive in light of technological developments that had reduced the costs of receiving telefax transmissions since Congress had enacted the TCPA in 1991.²¹⁶ However, the appellate court rejected this argument and instead focused on “the problem as it existed when Congress enacted the [restrictions].”²¹⁷

After the Ninth Circuit’s decision in *Destination Ventures*, the same telefax advertising restrictions were upheld by federal district courts in Indiana in 1995²¹⁸ and Texas in 2000.²¹⁹ However, deviating from this trend, a Missouri federal district court found the restrictions unconstitutional in 2002 in *Missouri ex rel. Nixon v. American Blast Fax, Inc.*²²⁰ In that case, the Missouri Attorney General—later joined by the FCC—sued two telefax marketers in federal district court for allegedly violating the federal ban on unsolicited telefax advertising.²²¹ The telefax marketers challenged the ban on First Amendment grounds.²²²

Under the first *Central Hudson* factor, the district judge concluded that the ban on unsolicited telefax advertising impacted protected commercial speech and needed to be

212. *Id.* at 56. The trial court below had concluded that in passing the ban, Congress had a sufficiently substantial government interest in “protecting consumers from . . . economic harm” by preventing advertisers from shifting the costs of telefax advertising to recipients including direct costs associated with operating a telefax machine such as the cost of paper and ink, and indirect costs associated with having one’s telefax machine occupied while receiving unsolicited telefax advertising and unavailable to receive other telefaxes. *Destination Ventures*, 844 F. Supp. at 635–37.

213. *Destination Ventures*, 46 F.3d at 56.

214. *Id.* at 56. The appeals court characterized the ban as “evenhanded” because “it applies to commercial solicitation by any organization, be it a multinational corporation or the Girl Scouts.” *Id.*

215. *Id.*

216. *Id.* For instance, Destination Ventures argued, newer telefax machines allowed for paperless receipt of transmissions and simultaneous receipt of multiple telefaxes. *Id.*

217. *Destination Ventures*, 46 F.3d at 57.

218. *Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912 (S.D. Ind. 1995).

219. *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085 (W.D. Tex. 2000).

220. 196 F. Supp. 2d 920 (E.D. Mo. 2002).

221. *Id.* at 922. In addition, Missouri alleged that American Blast Fax violated Missouri laws against deceptive marketing by representing to Missouri consumers that its telefax advertising was in compliance with federal law. *Id.* at 921. American Blast Fax filed a motion to dismiss the lawsuit and claimed that the telefax ban was unconstitutional. *Id.* at 922. The FCC intervened in the suit to defend the constitutionality of the telefax advertising ban. *Id.* at 922–23.

222. *Id.* at 922. The FCC intervened in the suit to defend the constitutionality of the telefax advertising ban. *American Blast Fax*, 196 F. Supp. 2d at 921–22.

tested under the remaining three factors.²²³ However, at that point the court departed from the path taken by each federal court that had considered the matter previously. In this case, the judge concluded that the restrictions failed to pass muster under each of the three remaining *Central Hudson* factors.²²⁴

Under the second *Central Hudson* factor, the district judge reviewed the legislative history of the TCPA and refused to conclude that cost-shifting related to unsolicited telefax advertising was a “real and substantial” problem in need of regulation when Congress passed the TCPA.²²⁵ The judge conceded that the “potential” for cost-shifting problems existed at that time but found this too speculative and inadequate to conclude that Congress thereby had a sufficiently substantial governmental interest under the second *Central Hudson* factor.²²⁶

Under the third factor requiring direct advancement, the district judge found insufficient evidence to justify a ban on unsolicited telefax advertising but not other unsolicited telefaxes.²²⁷ Specifically, with no evidence that unsolicited telefax advertisements were more costly and burdensome than other types of unsolicited telefaxes, the judge concluded that banning the former, and not the latter, was constitutionally unsound.²²⁸ In addition, the judge suggested that there were alternate regulatory means available—such as a national “do not fax” database—that would more directly address the asserted regulatory goal without a categorical ban.²²⁹ Thus, he concluded, the restrictions also failed the narrow-tailoring requirement of the *Central Hudson* analysis.²³⁰

In 2004, the United States Court of Appeals, Eighth Circuit, reversed the district judge in *American Blast Fax*.²³¹ The appeals court agreed with the district judge that

223. *Id.*

224. *Id.* at 928–34. The district court concluded: “The government simply fails to meet its burden of demonstrating that the harms it recites are real and that its restriction will in fact alleviate them to a material degree The government also fails to show that the regulations are no more extensive than is necessary to serve the government’s interests.” *Id.* at 933–34.

225. *Id.* at 928–31. In addition, the district court concluded that there was insufficient empirical evidence in the legislative history to establish the extent to which consumers and businesses were prevented from receiving telefaxes because their machines were occupied while receiving unsolicited telefax advertisements. *Id.* at 929.

226. *American Blast Fax*, 196 F. Supp. 2d at 931. The district judge wrote: “The Court finds that there is a *potential* for a serious problem to arise without legislative restrictions on unsolicited faxes. However, the Court questions whether the government has met its burden in showing that there was a substantial interest at the time of enacting the TCPA.” *Id.* The court was much less ambivalent in finding that the restrictions failed to pass scrutiny under the final two factors of the *Central Hudson* analysis. *Id.* at 931–32. The district judge wrote, “Even if the government could meet its burden of showing a substantial interest, it cannot satisfy the other parts of the *Central Hudson* test.” *Id.* at 931.

227. *Id.* at 931–32. For instance, the district court wrote, “There is no evidence as to the number of unsolicited faxes the average business receives, and there is no breakdown as to how many of those are advertisements which fall within the TCPA’s definition.” *Id.* at 932.

228. *American Blast Fax*, 196 F. Supp. 2d at 931. The district judge wrote: “The TCPA does not ban all unsolicited faxes, but rather only advertisements. Therefore, recipients can still bear the costs of printing others’ messages, even if they strongly oppose the messages’ content. The costs of printing political messages, jokes, and even some advertisements which are not included within the TCPA’s definition, still fall upon the recipient.” *Id.*

229. *Id.* at 932–33.

230. *Id.*

231. *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 652 (8th Cir. 2004). In doing so, the appeals court specifically noted that the district judge below had deviated from every federal court

the telefax advertising ban needed to be fully scrutinized under the *Central Hudson* analysis.²³² In other words, the application of the analysis was not disputed by the parties or questioned by the court of appeals.

Under the second *Central Hudson* factor, the Eighth Circuit found that Missouri and the FCC established a sufficiently "substantial [governmental] interest in restricting unsolicited fax advertisements in order to prevent cost shifting and interference such unwanted advertising places on the recipient."²³³ The court of appeals concluded that empirical studies and quantitative evidence were unnecessary to establish the significance of these harms under the *Central Hudson* analysis.²³⁴ The court concluded that anecdotal evidence cited in the legislative history of the TCPA and the record of the proceedings before the district court were sufficient under this requirement.²³⁵

Under the third *Central Hudson* factor, the Eighth Circuit found that the telefax advertising restrictions also satisfied the direct-advancement requirement.²³⁶ In doing so, the appeals court rejected the telemarketers' argument that the ban was constitutionally problematic because it applied to unsolicited telefax advertising but not other unsolicited telefaxes.²³⁷ The telemarketers argued on appeal that the goals of preventing unwanted cost-shifting and interference with telefax machines did not justify the regulatory distinction between commercial and noncommercial content in telefaxes.²³⁸ On this point, they cited to *Discovery Network*, the case in which the Supreme Court had struck down a newsrack ordinance that banned commercial but not noncommercial newsracks.²³⁹ However, the court of appeals distinguished the *Discovery Network* case. The newsrack ordinance in that case allowed noncommercial newsracks to clutter the sidewalks in large number while banning relatively few commercial newsracks, which did little to advance sidewalk safety or aesthetics, the appeals court explained.²⁴⁰ On the other hand, the court noted, the TCPA focused on

decision that had addressed the constitutionality of the same provisions. *Id.* at 653 (citing *Destination Ventures*, 46 F.3d at 57 (9th Cir. 1995), *aff'd* 844 F. Supp. 632 (D. Or. 1994); *Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d 1085, 1092 (W.D. Tex. 2000); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997)).

232. *American Blast Fax*, 323 F.3d at 653. The appeals court pointed out that the parties were in agreement that "fax advertisements . . . are commercial speech, and the Supreme Court has recently indicated that *Central Hudson* remains the test for the constitutionality of a restriction on commercial speech." *Id.* The appeals court also noted that the government did not raise any argument that the fax advertisements in question were unprotected by the First Amendment as either "misleading" or concerning "unlawful activity." *Id.*

233. *Id.* at 655.

234. *Id.* at 654–55.

235. *American Blast Fax*, 323 F.3d at 654–55. The Eighth Circuit concluded that "the legislative record and the evidence produced in the district court adequately demonstrate the potential harm of unrestrained fax advertising" and stated "we do not [find] . . . that the Government must produce empirical studies to show the significance of the harm it seeks to remedy." *Id.* at 654 (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)).

236. *Id.* at 655–58. For instance, the appeals court pointed out, the TCPA banned unsolicited telefax advertising but allowed unsolicited telefaxes with noncommercial messages and that the FCC had allowed businesses to send unsolicited telefax advertising to consumers with whom they have an "existing business relationship." *Id.*

237. *Id.* at 655–56.

238. *Id.* at 655.

239. *Id.*

240. *American Blast Fax*, 323 F.3d at 655–56. The appeals court concluded that the telefax advertising ban was different than the ban on commercial newsracks in *Discovery Network* because in that case, the

unsolicited commercial telefaxes, which was the type that Congress determined to be the most prevalent and problematic for businesses and consumers.²⁴¹

The telemarketers also argued that the TCPA and related FCC regulations comprised an irrational regulatory scheme because they allowed unsolicited telefax advertising to recipients with whom the sender had an “established business relationship” and various types of live telemarketing calls, in addition to allowing unsolicited noncommercial telefaxes.²⁴² Relying on *Coors Brewing* and *Greater New Orleans Broadcasting*, the telemarketers argued that these contradictory provisions rendered the TCPA ineffective in accomplishing the asserted governmental interest in banning unsolicited commercial telefax solicitations.²⁴³ The appeals court rejected this argument as well.

Instead, the Eighth Circuit concluded that Congress was reasonable in assuming that unsolicited commercial telefax advertising sent by companies to non-customers was more likely to be objectionable than that transmitted to existing customers.²⁴⁴ The appeals court also concluded that TCPA provisions allowing live telemarketing calls were consistent with the goal of preventing telemarketers from shifting actual costs of receiving solicitations to consumers.²⁴⁵ For instance, the appeals court noted, the TCPA prohibited live telemarketing calls to devices such as cellular telephones and pagers that result in costs to recipients.²⁴⁶ Thus, the Eighth Circuit concluded, the TCPA—as an overall regulatory scheme—was not so “pierced by exemptions and inconsistencies” to be found unconstitutional like the one struck down by the Supreme Court in *Greater New Orleans Broadcasting*²⁴⁷ nor as “overall irrational” as the one the Court ruled unconstitutional in *Coors Brewing*.²⁴⁸

Finally, the Eighth Circuit found the telefax advertising ban narrowly tailored under the fourth *Central Hudson* factor.²⁴⁹ The court of appeals did not characterize the restrictions as a full ban²⁵⁰ noting that FCC rules allowed unsolicited telefax advertising sent by a company to individuals and entities with whom the sender has an “established business relationship,”²⁵¹ and to anyone who consented to receiving the

evidence demonstrated that commercial newsracks comprised only a small percentage of the total number of newsracks on the city’s streets and sidewalks. *Id.* at n.4 When enacting the telefax advertising ban, on the other hand, the appeals court found that Congress had concluded that “commercial faxes make up a large proportion of all unsolicited faxes.” *Id.*

241. *Id.* at 654–58.

242. *Id.* at 657.

243. *American Blast Fax*, 323 F.3d at 656–57.

244. *Id.* at 657. The appeals court wrote, “It would not have been unreasonable for Congress to conclude that a preexisting business relationship is an indication that a fax advertisement would be welcome.” *Id.*

245. *Id.*

246. *Id.* The appeals court concluded that TCPA provisions allowing certain live telemarketing calls were consistent with the government’s asserted goal of preventing cost-shifting in that, for instance, the TCPA included provisions prohibiting live telemarketing calls to devices such as cellular telephones that involved direct costs to consumers receiving those calls. *American Blast Fax*, 323 F.3d at 657 (citing 47 U.S.C. § 227(b)(1)(A)(iii)).

247. *Id.* at 657 (quoting *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 190 (1999)).

248. *Id.* (quoting *Rubin v. Coors Brewing Company, Inc.*, 514 U.S. 476, 488 (1995)).

249. *Id.* at 658–59.

250. *Id.* at 659, 660.

251. *Id.* at 657 (noting that the FCC had “interpreted TCPA not to prohibit the sending of unsolicited

advertising.²⁵² In addition, the court suggested, marketers remained free to reach consumers through other means such as direct mail marketing and mass media advertising.²⁵³ The appeals court characterized the restrictions on unsolicited telefax advertising as a reasonable means of protecting consumers from the costs of unwanted commercial telefax solicitations.²⁵⁴

The appeals court likened the restriction on unsolicited telefax advertising to the thirty-day ban on direct mail solicitations by lawyers to accident victims, upheld by the Supreme Court in *Went For It*.²⁵⁵ That restriction, the appeals court noted, only applied to targeted, direct mail solicitations, the mode of communication the state considered most threatening to individual privacy and the reputation of the legal profession. Lawyers still could use other modes of communication to reach potential clients, including mass media advertising.²⁵⁶ Therefore, the telefax advertising ban was different than the restrictions on mass media advertising the Supreme Court struck down in cases such as *Coors Brewing*.²⁵⁷ On this point, the appeals court wrote:

commercial faxes to a recipient with whom a sender has an established business relationship”) (citing *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 8752, 8779 n.87 (Oct. 16, 1992)).

252. *American Blast Fax*, 196 F. Supp. 2d at 659, 660. The appeals court concluded that the “TCPA has not eliminated the fax machine as an available channel of communication.” *Id.* at 660. However, since the Eighth Circuit ruled on the case, the FCC amended its rules and eliminated the exemption for telefax advertising sent to individuals or companies with whom the sender has an “established business relationship” effective July 1, 2005. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144, 44,148–49 (July 25, 2003) (to be codified at 41 C.F.R. pt. 64:68); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 69 Fed. Reg. 62,816 (Oct. 28, 2004) (to be codified at 47 C.F.R. pt. 64). In addition, in the amendments, the FCC required that consent to receive a telefax advertisement must be express and written. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44,144, 44,148–49 (July 25, 2005) (to be codified at 41 C.F.R. pt. 64:68).

In 2005, the FCC delayed the effective date of the written permission requirement to January 9, 2006. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 37,705, 37,705 (June 30, 2005). Subsequently, Congress enacted the Junk Fax Prevention Act of 2005, amending the unsolicited facsimile advertising provisions in the TCPA of 1991 and requiring the FCC to conduct a rulemaking proceeding accordingly. Pub L. No. 109-21, 119 Stat. 359 (2005) (amending 47 U.S.C. § 227; signed into law on July 9, 2005). The FCC subsequently suspended the effective date of the written permission requirement until completing its rulemaking proceeding. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 75,070, 75,070 (Dec. 19, 2005). The FCC then initiated its rulemaking proceeding, which remained pending at the time of this article. In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Notice of Proposed Rulemaking and Order, CG Docket No. 05-338, 2005 W.L. 3369907, at *1 (F.C.C.) (Dec. 9, 2005).

253. *American Blast Fax*, 323 F.3d at 660 (concluding that “advertisers remain free to publicize their products through many legal means other than an unsolicited fax.”).

254. *Id.* at 659 (relying on *Went For It, Inc.*, 515 U.S. at 632). The appeals court conceded that the ban on unsolicited telefax advertisements would likely prevent some consumers from receiving telefax advertising they might wish to receive. *Id.* However, the appeals court concluded that the ban was reasonable nonetheless to prevent other consumers from incurring the costs of receiving unwanted telefax advertisements. *Id.*

255. *Id.* at 659–60.

256. *Id.* at 660. The appeals court did not address the extent to which alternatives such as mass media advertising would be as effective or cost-efficient in reaching accident victims as individually targeted, direct mail solicitations. One commentator wrote that while “[s]ome companies may invest more in direct mail, traditional media advertising, and Internet-based marketing, these alternatives do not provide marketers with what they really want—namely a direct line to the consumer’s living room.” Douglas C. Nelson, *The Do-Not-Call Implementation Act: Legislating the Sound of Silence*, 16 LOY. CONSUMER L. REV. 63, 83 (2003).

257. *American Blast Fax*, 323 F.3d at 659–660.

[T]he TCPA ban on unsolicited commercial fax advertisements is neither intended to protect the public from the content of the speech nor to implement policy unrelated to the delivery of the message itself. In prohibiting these fax advertisements, Congress was not concerned with the effect of the content of the advertisements, but rather the effect of the act of communicating The harm associated with unsolicited fax advertisements is similarly not related to the content of the messages.²⁵⁸

In 2004, the Supreme Court denied *certiorari* in *American Blast Fax* and allowed the Eighth Circuit decision to stand.²⁵⁹ In addition, the FCC amended its telemarketing rules to prohibit sending unsolicited advertising to a telefax machine without prior *written* permission from the recipient, although the FCC had delayed the effective date of this requirement at the time of this article.²⁶⁰

In the context of unsolicited telefax advertising, protecting recipients from unwanted tangible costs connected with receiving telefax communications seemed central to the decisions of the courts of appeals. Although telemarketing calls do not result in similar tangible costs, commentators have pointed to intangible costs to consumers connected with unwanted telemarketing calls, including disturbance of privacy and annoyance.²⁶¹ However, whether tangible or intangible, the question for regulators becomes the extent to which message costs are being imposed on unwilling recipients and the constitutional limits of regulatory efforts utilized to curb such shifting of message-related costs.²⁶²

V. LEGAL CHALLENGES TO THE NATIONAL DO-NOT-CALL REGISTRY

Telemarketers challenged the do-not-call registry requirements in federal courts before the registry became effective. One action challenging the jurisdiction of the FTC to establish and maintain the registry did not reach First Amendment issues. However,

258. *Id.*

259. *Fax.com, Inc. v. Missouri ex rel. Nixon*, 540 U.S. 1104 (2004). In a prior case, a federal court of appeals had upheld the constitutionality of a federal statute that bans the use of automatic dialing devices to deliver prerecorded messages unless the recorded message is introduced by a live speaker. *Moser v. Fed. Comm'n Comm'n*, 46 F.3d 970, 975 (9th Cir. 1995). The appeals court only addressed the constitutionality of the statutory provisions and specifically noted that an FCC regulation exempting automated calls on behalf of tax-exempt, nonprofit organizations was not at issue in the case. *Id.* at 972–73, 974. The Supreme Court declined to review the decision of the federal appeals court. *Moser v. F.C.C.*, 515 U.S. 1161 (1995).

260. *See supra* note 252.

261. Commentators have argued that telemarketing calls to individuals involve intangible costs, such as annoyance and disturbance associated with receiving an unwanted telemarketing call, that telemarketers shift to consumers and do not themselves bear. Ayres and Funk, *supra* note 66, at 78, 83–85. They describe the consumer costs of direct marketing as generally “hard to quantify” but, in the specific context of telemarketing, related to the physical efforts involved with answering the telephone and the time spent talking in response to an unwanted telemarketing call. *Id.* at 83–84. They suggest that the increase of unwanted telemarketing calls results in a convergence of lowering response rates, development and sales of products and services to screen out telemarketers, and government regulation, all of which they describe as a “looming crisis for the direct marketing industry.” *Id.* at 88.

262. *Id.* at 85 (writing that “[b]ecause direct marketers do not internalize the full costs of their behavior, they solicit an excessively broad audience” and “are less discriminating [in who they contact] than they should be”). *See also* Cain, *supra* note 66, at 665 (concluding that “[b]ecause the consumer pays for the very phone line that telemarketers now freely use for their profit-motivated speech, such [regulatory] restrictions, in response to consumer demands, are completely appropriate”).

in another case, the United States Court of Appeals, Tenth Circuit, ultimately upheld the registry under the *Central Hudson* analysis, and the Supreme Court allowed that decision to stand.

In *U.S. Security v. FTC*, a group of telemarketers, along with the Direct Marketing Association, filed suit in Oklahoma federal district court challenging the jurisdiction of the FTC to establish and enforce the national do-not-call registry.²⁶³ In 2003, District Judge Lee West granted summary judgment for the telemarketers and concluded that Congress had not specifically empowered the FTC to establish and enforce the registry.²⁶⁴ As grounds, the judge pointed to specific provisions in the TCPA giving the FCC explicit authority to create a national do-not-call list and the lack of similar provisions in the TCFPA as to the FTC.²⁶⁵ However, just seven days after Judge West's ruling, Congress rendered it moot by passing legislation explicitly authorizing the FTC to "implement and enforce" the national do-not-call registry and ratifying the do-not-call registry requirements in the amended Telemarketing Sales Rule.²⁶⁶

Judge West did not address First Amendment issues related to the do-not-call registry in his ruling in *U.S. Security*. However, just two days after his ruling in that case, another federal district judge—Judge Edward Nottingham in Colorado—found the do-not-call registry requirements unconstitutional in *Mainstream Marketing Services, Inc. v. FTC*, another federal suit filed by telemarketers.²⁶⁷ In doing so, Judge Nottingham utilized the *Central Hudson* analysis to test the constitutionality of the registry requirements under the First Amendment.

First, under the *Central Hudson* analysis, the judge concluded that the registry requirements burdened constitutionally protected commercial speech sufficiently to trigger the remaining three prongs of the *Central Hudson* analysis.²⁶⁸ As he explained, the do-not-call registry requirements apply to all "outbound telephone calls to induce the purchase of goods and services" including truthful, non-misleading calls promoting

263. 282 F. Supp. 2d 1285, 1289–90 (W.D. Okla. 2003).

264. *Id.* at 1290–91, 1294.

265. *Id.* at 1291. In his ruling, Judge West rejected arguments by the FTC that the TCFPA included implicit authority to establish the registry under provisions authorizing the FTC to regulate "abusive telemarketing acts or practices." *See id.* In addition, the judge rejected the FTC's argument that the funding provisions in the 2003 Do-Not-Call Implementation Act—which only explicitly authorized the FTC to collect fees to fund the registry—necessarily included implicit authority to the agency to establish the registry in the first place. *See id.* at 1291–92.

266. National Do-Not-Call Registry, Pub. L. No. 108-82, §6 117 Stat. 1006 (2003). Ultimately, the United States Court of Appeals, Tenth Circuit, overruled Judge West in any event and concluded alternatively that the TCFPA provided implicit authority to the FTC to implement and enforce the national do-not-call registry even before the specific legislation enacted by Congress's response to Judge West's ruling. *Mainstream Mktg. Serv., Inc.*, 358 F.3d 1228, 1250 (10th Cir. 2004). The Tenth Circuit also noted that, in any event, the issue was rendered moot by the Congressional legislation. *Id.* (stating that "if some doubt once existed [about the FTC's authority here], Congress erased it through subsequent legislation").

267. 283 F. Supp. 2d 1151, 1168 (D. Colo. 2003). For law review comment on the opinion by Judge Nottingham prior to it being reversed on appeal, *see generally* Nelson, *supra* note, at 256.

268. *Mainstream Mktg.*, 283 F. Supp. 2d at 1161–62, 1164. Judge Nottingham wrote:

[T]he court determines that the do-not-call registry is a significant enough governmental intrusion and burden on commercial speech to amount to a government restriction implicating the First Amendment. The test enumerated in *Central Hudson* must, therefore, be applied in determining the constitutionality of the FTC's amended Rules.

Id. at 1163.

lawful goods and services.²⁶⁹

Turning to the second *Central Hudson* factor, Judge Nottingham next determined that the FTC had demonstrated two sufficiently substantial governmental interests.²⁷⁰ The first was protecting the “well-being, tranquility, and privacy of the home” including the implicit right to “avoid unwanted communications.”²⁷¹ The second was “protecting consumers from deceptive and abusive telemarketing practices.”²⁷² Next, the judge turned to the final factors of the *Central Hudson* to determine whether the registry requirements directly advanced these interests and, if so, whether they were narrowly tailored.²⁷³ However, ultimately, the judge found the do-not-call requirements unconstitutional for failing the direct-advancement requirement and found it unnecessary to reach the narrow-tailoring requirement under the fourth factor.²⁷⁴

On the direct-advancement requirement, the judge addressed each asserted governmental interest separately. First, as to the privacy-protection interest, Judge Nottingham found the do-not-call registry requirements failed the direct-advancement requirement because of the exemption for noncommercial calls.²⁷⁵ He concluded it was irrational to regulate commercial telemarketing calls while exempting noncommercial calls when both types of calls resulted in the same potential net effect for consumers—an unwanted and disturbing telephone call.²⁷⁶ Thus, he concluded, the FTC had failed to justify the disparate treatment of commercial and noncommercial messages.²⁷⁷ In

269. See *id.* at 1162 (quoting the amended Telemarketing Sales Rule, 16 C.F.R. §310.4(b)(1)(iii)(B)).

270. *Mainstream Mktg.*, 283 F. Supp. 2d at 1164.

271. *Id.* Judge Nottingham concluded the privacy protection interest was one of the “highest order in a free and civilized society,” suggesting that privacy protection was more than merely “substantial” as required by the *Central Hudson* analysis. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 1168. Judge Nottingham wrote, “Having held that the [do-not-call provisions in the] amended Rules fail the second part of the *Central Hudson* test, the court chooses not to address the final part of the test.” *Mainstream Mktg.*, 283 F. Supp. 2d at 11698.

275. *Id.* Judge Nottingham relied here on the opinion of the United States Supreme Court in *Greater New Orleans Broadcasting*. *Id.*

276. *Id.* at 1166, 1167. For instance, Judge Nottingham wrote, “There is no doubt that unwanted calls seeking charitable contributions are as invasive to the privacy of someone sitting down to dinner at home as unwanted calls from commercial telemarketers.” *Id.* at 1166. He wrote further, “The regulation cannot distinguish among the indistinct, permitting a variety of speech that entails the same harm as the speech which the government has attempted to limit.” *Id.* at 1166 (citation omitted).

277. *Mainstream Mktg.*, 283 F. Supp. 2d at 1168. On this point, the district judge wrote:

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 . . . , it might be a different matter. As the amended Rules are current 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.

Id. at 1168. Judge Nottingham concluded that the do-not-call registry was distinguishable from the postal regulation upheld in *Rowan* because the latter applied without exemption and gave consumers “complete autonomy to prevent any chosen material from entering his home.” *Id.* at 1163. He wrote that the postal regulation in *Rowan* had “no bearing” on consumer choice while the FTC’s do-not-call registry only allowed consumers to block commercial telemarketing calls and not other types. *Id.* One commentator writing about the case before it ultimately was reversed on appeal by the Tenth Circuit suggested that a “potential solution” to the constitutional issue would be to delete the exemptions for noncommercial telemarketing calls. Jacquelyn Trussell, *The Embattled Future of the Do-Not-Call Implementation Act*, 16 LOY. CONSUMER L. REV. 85, 91 (2003). She noted, however, that application of the do-not-call registry requirements to

addition, the judge concluded that the do-not-call requirements failed to directly advance the government's interest in consumer protection from telemarketing fraud and abuse.²⁷⁸ On this point, the FTC had argued that commercial telemarketers were more likely to engage in fraud and abuse than noncommercial ones.²⁷⁹ However, the judge found this unsubstantiated and ultimately unpersuasive.²⁸⁰

On appeal, the United States Court of Appeals, Tenth Circuit, reversed in 2004 and found the registry requirements constitutional under the *Central Hudson* analysis.²⁸¹ The appeals court was persuaded by four "key aspects" of the registry:

First, the list restricts only core commercial speech Second, the do-not-call registry targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence Third, the do-not-call registry is an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers. Fourth, the do-not-call registry materially furthers the government's interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy, blocking a significant number of the calls that cause these problems.²⁸²

Under the first *Central Hudson* factor, the appeals court agreed with the district judge that the do-not-call registry restricted truthful and non-misleading commercial speech about lawful goods and services and therefore needed to be tested under the

noncommercial telephone calls "would likely violate the heightened First Amendment rights of [noncommercial speakers]." *Id.* at 92. Another commentator writing about the case after it was reversed on appeal by the Tenth Circuit but before the United States Supreme Court denied *certiorari* also described additional constitutional issues that could arise in connection with attempts to extend the do-not-call registry requirements to charitable solicitations. Strauss, *supra* note 155, at 37 (asserting that "[c]haritable solicitations receive greater protection under the First Amendment than pure commercial speech"). See also Janelle M. 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, 660-61 (2003) (concluding that "[p]roblems may arise, however, with application of the 'do not call' registry to telemarketing carried out to solicit charitable donations" because "[t]he Supreme Court has held that such activity is to be given greater First Amendment protection than ordinary commercial speech") (citing *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)). When Judge Nottingham's opinion was heard on appeal, the Tenth Circuit Court of Appeals explicitly refused to express an opinion on the constitutionality of the application of the do-not-call registry requirements to "political and charitable callers." *Mainstream Mktg.* 358 F.3d at n.2 (10th Cir. 2004). As will be discussed next in this article, the Tenth Circuit ultimately found the do-not-call registry constitutional as applied to commercial telemarketers and overruled the district judge on that issue. *Id.* at 1233.

278. *Mainstream Mktg.*, 283 F. Supp. 2d at 1166-67.

279. *Id.* at 1166.

280. *Id.* The judge suggested that the nonprofit or charitable status of a solicitor would not alone guarantee pure motives. On this point, he wrote, "[m]any a mountebank has utilized the corporate form, including nonprofit incorporation, to perpetrate fraud on unsuspecting consumers." *Id.* at 1167.

281. *Mainstream Mktg.*, 358 F.3d at 1233. The Tenth Circuit's ruling embraced four cases consolidated on appeal, which included the opinion issued by the United States District Judge Nottingham (D. Colo.) in *Mainstream Marketing* and the ruling of United District Judge West (W.D. Okla.) in *U.S. Security*, along with two cases involving the direct appellate review of the FCC order adopting its do-not-call rules. *Id.* at 1232, 1236 n.9. In addition, the Tenth Circuit considered the FTC and FCC do-not-call rules along with the coordinated national do-not-call registry as "a single regulatory measure" for purposes of its constitutional analysis. *Id.* at 1234 n.4.

282. *Id.* at 1233 (citation omitted).

remaining factors.²⁸³ Likewise, under the second factor, the appeals court agreed with the district judge that the governmental interests in protecting consumer privacy and alleviating the risks of “fraudulent and abusive solicitation” were substantial.²⁸⁴ However, the appeals court ultimately found that the registry requirements satisfied both the direct advancement and the narrow tailoring requirements of the final two *Central Hudson* factors.²⁸⁵

On the direct-advancement requirement, the appeals court first considered the effectiveness of the registry requirements in light of the governmental interest in protecting consumer privacy.²⁸⁶ Specifically, the appeals court addressed the constitutional validity of the regulatory focus on commercial telemarketing calls exclusively and whether the exemption for noncommercial calls unconstitutionally undermined the effectiveness of the regulatory scheme as a means of protecting consumer privacy.²⁸⁷ On this point, the appeals court admitted there was no evidence in the record that established the number or percentage of telemarketing calls that would be blocked or allowed by the registry requirements.²⁸⁸ However, the court concluded

283. *Id.* at 1237. The Tenth Circuit concluded:

[T]he government has asserted substantial interests to be served by the do-not-call registry (privacy and consumer protection), the do-not-call registry will directly advance those interests by banning a substantial amount of unwanted telemarketing calls, and the regulation is narrowly tailored because its opt-in feature ensures that it does not restrict any speech directed at a willing listener. In other words, the do-not-call registry bears a reasonable fit with the purposes the government sought to advance. Therefore, it is consistent with the limits the First Amendment imposes on laws restricting commercial speech.

Mainstream Mktg., 358 F.3d at 1246.

284. *Id.* at 1237. On the privacy interest, the Tenth Circuit relied on a Supreme Court decision in *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), in which the Court upheld as constitutional a postal regulation that allowed a postal customer to request the Postmaster General to send a cease and desist order to direct mail solicitors from whom the customer had received a direct mail solicitation that he or she found sexually provocative and wished to receive no further mailings. *See id.* On the second asserted interest, the Tenth Circuit quoted from the Supreme Court's opinion in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 771–72 (1976), in which the Court provided First Amendment protection but explained that the First Amendment would not prevent the government from “insuring that the stream of commercial information flows cleanly as well as freely.” *Id.* at 1238.

285. *Id.* at 1238, 1241–42, 1246. Writing for the panel, Circuit Judge Ebel wrote: “The do-not-call registry directly advances the government's interests by effectively blocking a significant number of the calls that cause the problems the government sought to redress. It is narrowly tailored because its opt-in character ensures that it does not inhibit any speech directed at the home of a willing listener.” *Id.* at 1238.

286. *Id.* at 1238. The section of the Tenth Circuit's opinion addressing the direct advancement prong of the *Central Hudson* analysis was titled “Effectiveness.” *Mainstream Mktg.*, 358 F.3d at 1238.

287. *Id.* at 1238–1242. The telemarketers had argued on appeal that the noncommercial exemption rendered the registry requirements “unconstitutionally underinclusive.” *Id.* at 1238. In addition, the telemarketers who challenged the do-not-call registry argued that the exemption in the FCC telemarketing rules for commercial telemarketing calls from companies that have an “established business relationship” with a consumer was arbitrary and capricious because the FCC failed to consider the anticompetitive effect of such an exemption. *Id.* at 1248. The appeals court rejected this argument and found that the FCC had sufficiently considered that issue and made a “reasoned policy decision.” *Id.* at 1250.

288. *Id.* at 1240–41. On this point, the appeals court wrote: “It is unclear from the record exactly how many telemarketing calls will be blocked by the do-not-call regulations. Most significantly, we have not been provided with data as to how many of these unsolicited sales calls would be permissible under the established business relationship exception.” *Id.* at 1240 n.11. The appeals court relied on the Supreme Court's opinion in *Went For It* as legal justification for using anecdotal evidence and “common sense observation” in its direct advancement analysis under the *Central Hudson* analysis. *See id.* (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)). However, the appeals court failed to note that the *Went For It* majority relied on a combination of empirical and anecdotal evidence in upholding a 30-day ban on direct mail solicitations from lawyers to accident victims, and that four justices dissented and sharply criticized the majority for its reliance

that exact numbers were not necessary and instead relied on anecdotal evidence used by Congress, the FCC and the FTC in support of related legislation and rules.²⁸⁹ Thus, the appeals court presumed that the registry requirements would likely prohibit a “significant” number and percentage of all telemarketing calls despite the exemption for noncommercial calls.²⁹⁰ Similarly, the appeals court concluded the established-business-relationship exemption did not undermine the effectiveness of the regulatory scheme because “[c]onsumers [were] more likely to anticipate” telemarketing calls from companies with whom they do business.²⁹¹

The appeals court also agreed with the FTC that the registry requirements directly advanced the governmental interest in protecting consumers from telemarketing fraud and abuse and that this goal was not unconstitutionally undermined by the noncommercial exemption.²⁹² The court relied on FTC conclusions in the rulemaking proceeding that commercial telemarketers are more likely than noncommercial callers to utilize deceptive or abusive practices.²⁹³ The appeals court found these conclusions sufficient to establish direct advancement despite the lack of quantitative evidence in the record to support them.²⁹⁴

In finding the do-not-call registry requirements rational despite the noncommercial exemption, the appeals court distinguished the regulatory scheme struck down as irrational by the Supreme Court in *Coors Brewing Co.*²⁹⁵ In that case, the appeals court pointed out, the federal ban on alcohol content percentages on beer labels was found “irrational” when considered alongside other federal regulations that permitted and even required the same information on liquor and wine labels.²⁹⁶ The noncommercial exemption to the do-not-call registry requirements simply did not rise to that level of irrationality, the appeals court concluded summarily.²⁹⁷

on empirical studies without more detailed inquiry into the validity of the studies. See *Went For It*, 515 U.S. at 640–41 (Kennedy, J., dissenting) (joined by Justices Stevens, Souter and Ginsberg). The Court referred to Florida’s summary as a “selective synopses of unvalidated studies.” *Id.* at 640.

289. *Mainstream Mktg.*, 358 F.3d at 1240–41. On this point the appeals court wrote, “[i]n applying *Central Hudson*, however, we are entitled to rely on anecdotal evidence and make the common sense observation that the do-not-call list will apply to a substantial number of telemarketing calls.” *Id.* at 1240 (citing *Went For It*, 515 U.S. at 628 (1995)).

290. *Id.* at 1240–41.

291. *Id.* at 1241 (quoting FCC statement in *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed. Reg. 44,144, 44,154 (July 25, 2003)).

292. *Id.* at 1241–42.

293. See *id.* at 1241. The Tenth Circuit relied on FTC conclusions that commercial telemarketers have a greater incentive than noncommercial callers to engage “in all things that telemarketers are hated for” and that “non-commercial speech is a different matter.” *Mainstream Mktg.*, 358 F.3d at 1241 (quoting from 68 Fed. Reg. at 4,637). The Tenth Circuit wrote, “[s]pecifically, the FTC concluded that in charitable . . . calls, a significant purpose of the call is to sell a cause, not merely to receive a donation, and that non-commercial callers thus have stronger incentives not to alienate the people they call or to engage in abusive and deceptive practices.” *Id.* at 1241 (referring to 68 Fed. Reg. at 4,637).

294. See *id.* at 1241 (citing Fed. Reg. 4,637). The Tenth Circuit summarized, “[t]he speech regulated by the do-not-call list is therefore the speech most likely to cause the problems the government sought to alleviate in enacting that list, further demonstrating that the regulation directly advances the government’s interests.” *Id.* at 1241.

295. See *id.* at 1238–39.

296. *Id.* The appeals court noted that the Supreme Court found the “irrationality of this unique and puzzling regulatory framework” constitutionally problematic. *Mainstream Mktg.*, 358 F.3d at 1238–39 (quoting *Rubin v. Coors Brewing Company, Inc.*, 514 U.S. 476, 489 (1995)).

297. *Id.* at 1238–39.

In addition, the appeals court distinguished the Supreme Court's opinion in *Discovery Network*.²⁹⁸ In that case, the Tenth Circuit pointed out, the city's ban on commercial newsracks had only served to remove a very small number of the total number of newsracks on the streets and was determined ineffective in reducing the number of newsracks in the name of public safety and aesthetics.²⁹⁹ On the other hand, the court concluded, the do-not-call registry applied to commercial telemarketing calls, which were the "type that Congress, the FTC and the FCC have all determined to be most to blame for the problems the government is seeking to redress"³⁰⁰ when compared with noncommercial calls.³⁰¹

In addition to finding direct advancement, the Tenth Circuit also found that the do-not-call registry requirements were narrowly tailored under the fourth *Central Hudson* factor.³⁰² As grounds for this holding, the appeals court wrote:

[T]he national do-not-call registry . . . does not over-regulate protected speech; rather, it restricts only calls that are targeted at unwilling recipients The do-not-call registry prohibits only telemarketing calls aimed at consumers who have affirmatively indicated that they do not want to receive such calls and for whom

298. *See id.* at 1239.

299. *Id.* (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412, 417–18 (1993)). The appeals court wrote that the do-not-call registry "blocks a substantial amount of unwanted telemarketing calls" while the newsrack ordinance at issue in *Discovery Network* "applied only to a minute and paltry number of newsracks." *Id.* at 1246. In addition, the appeals court concluded that the distinction between commercial and noncommercial newsracks in ordinance challenged in *Discovery Network* had "no relationship whatsoever to the city's asserted interests" while the "do-not-call registry's commercial/non-commercial distinction was based on findings that commercial telephone solicitation was significantly more problematic than charitable or political fundraising calls." *Id.*

300. *Id.* at 1241. The appeals court also relied on the Supreme Court's decision in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). *See Mainstream Mktg.*, 358 F.3d at 1239–40. In *Edge Broadcasting*, the Supreme Court upheld a federal regulation that banned lottery advertising on licensed broadcast media despite an exemption that allowed a station to broadcast advertising for a legally-authorized state-run lottery when the station was licensed in that same state. *Edge Broad.*, 509 U.S. at 422–23. The ban was challenged by a radio station in North Carolina that was located near the Virginia border that wanted to broadcast advertising for the Virginia lottery. *Id.* at 423–24. North Carolina did not have a lottery while Virginia did, and most of the listening audience for the North Carolina station was located in Virginia. *Id.* In a section of the opinion that only drew five votes, the Court concluded that the ban directly advanced the asserted government interest in "supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries." *Id.* at 426. The majority assumed that states had a valid interest in decreasing demand for gambling by decreasing gambling advertising within their borders, and deferred to "legislative judgments" in that regard. *See id.* at 434 (relying on *Posadas de Puerto Rico*, 478 U.S. at 328, 344 (1986)). However, the validity of this rationale was largely abandoned by the Supreme Court in more recent commercial speech decisions. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 510 (1996) (plurality opinion); *Coors Brewing*, 514 U.S. at 476, 489–91, n.2. For a thorough discussion of the Court's shift in its *Central Hudson* analysis in this regard, *see generally*, Hoefges, *supra* note 97, at 272–84; Hoefges and Rivera-Sanchez, *supra* note 97.

301. *See Sweet*, *supra* note 155, at 971–74. For a discussion of the rationale for exempting charities, pollsters and researchers, and political campaigns from do-not-call regulation, *see Ayres and Funk*, *supra* note 66, at 117–20 (describing these as "positive externalities" and summarizing data suggesting that consumers were less annoyed by unsolicited telephone calls seeking charitable contributions than by commercial telemarketing calls). These commentators argued that exemptions for noncommercial telephone calls should not alone be grounds for striking down regulations of telemarketing calls as underinclusive. *Id.* at 127; *cf. generally* Levy and Silber, *supra* note 34, at 520 (discussing "privacy concerns that arise when nonprofit fundraisers trade, sell, rent or otherwise exploit personal information about charitable donors that they obtain in the course of obtaining donations").

302. *Mainstream Mktg.*, 358 F.3d at 1242.

such calls would constitute an invasion of privacy.³⁰³

The appeals court cited two primary reasons in finding narrow tailoring.³⁰⁴ First, the court concluded, the do-not-call registry requirements left open alternate means of communication between marketers and consumers.³⁰⁵ For instance, the court pointed out, a commercial business could use telemarketing to solicit consumers who had not signed up for the national registry and had not specifically asked that business not to call, and could utilize traditional mass media advertising to reach all consumers more broadly.³⁰⁶ Consumers who wanted to receive commercial telemarketing calls had such options as not signing up on the national registry, and signing up on the national registry but granting written permission to individual businesses from whom they would like to receive telemarketing calls.³⁰⁷ The court wrote, “[f]rom the consumer’s perspective, the do-not-call rules provide . . . different options allowing consumers to dictate what telemarketing calls they wish to receive and what calls they wish to avoid.”³⁰⁸

Secondly, the Tenth Circuit was persuaded that available regulatory alternatives to the national do-not-call registry would not as effectively accomplish the asserted governmental interests of protecting consumer privacy, and preventing fraudulent and abusive telemarketing calls.³⁰⁹ The telemarketers had argued on appeal that the existing company-specific do-not-call regulations and other such means as caller ID and call rejection services would allow consumers to avoid unwanted calls.³¹⁰ However, the appeals court was convinced by the FTC that company-specific do-not-call requirements were ineffective in practice³¹¹ and that reliance on avoidance mechanisms such as caller ID would unreasonably require consumers to “compete in a technological arms race with the telemarketing industry.”³¹²

In support of its finding of narrow tailoring, the appeals court relied on the Supreme Court’s ruling in *Rowan* in which the Court upheld a postal regulation that required direct mailers to stop mailing solicitations to postal customers who had found their mailings objectionable and had registered on a company-specific do-not-mail list

303. *Id.* (citation omitted).

304. *Id.* at 1242, 1246.

305. *See id.* at 1243. On this point, the Tenth Circuit wrote, “[t]he do-not-call registry’s narrow tailoring is further demonstrated by the fact that it presents both sellers and consumers with a number of options to make and receive sales offers.” *Id.*

306. *See id.* at 1243–44.

307. *Mainstream Mktg.*, 358 F.3d at 1244.

308. *Id.* The Tenth Circuit wrote, “[u]nder 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.” *Id.* at 1243.

309. *Id.* at 1244.

310. *Id.* at 1244–45.

311. *Id.* at 1244. The Tenth Circuit cited to conclusions made by the FTC in its supporting materials accompanying the rulemaking process for the do-not-call rules. The FTC had concluded that the company-specific approach was overly burdensome for consumers by requiring them to make an individual request to each solicitor from whom they do not wish to receive calls and to keep track of their requests to enforce them, and, in any event, that consumer requests not to call often were ignored by commercial solicitors. *Mainstream Mktg.*, 358 F.3d at 1244.

312. *Id.* at 1245. The appeals court referred in the opinion to FTC conclusions in the supporting materials that accompanied the rulemaking procedure. *Id.* at 1244 (citing 68 Fed. Reg. 4,580, 4,631). In those materials, the FTC had concluded that “the company-specific approach is seriously inadequate to protect consumers’ privacy from an abusive pattern of calls placed by a seller or telemarketer.” *Id.*

maintained by the post office.³¹³ The Tenth Circuit viewed the postal regulation as analogous to the do-not-call registry requirements because under both regulatory schemes, consumers must take an affirmative step to block regulated solicitations.³¹⁴

VI. CONCLUSION

This article has identified constitutional issues that arise from government restrictions on point-to-point commercial communications with a focus on telemarketing regulations. The analysis of legislation and court opinions identified by this research leads to various conclusions in light of the two primary constitutional issues raised earlier in the article. These were the extent to which the First Amendment tolerates more extensive restriction of point-to-point solicitations as opposed to mass-mediated advertising, and the extent to which the First Amendment allows regulation of commercial communications when noncommercial and other exemptions are included in the regulatory scheme.

As to the first of these issues, *Virginia Board of Pharmacy* clearly stands for the proposition that the First Amendment strongly protects the right of the commercial speakers to disseminate truthful, non-deceptive information about lawful goods and services along with a concomitant right of consumers to receive this information.³¹⁵ Implicit here, however, is the right of consumers to be free from unwanted commercial communications. The Supreme Court explicitly recognized such a right in *Rowan* when it upheld a do-not-mail regulation.³¹⁶ Therefore, preserving the right of commercial speakers to communicate with willing recipients while simultaneously protecting the right of unwilling recipients to opt out, seems to be the balance a regulation must strike in order to withstand constitutional challenge. The lesson from the door-to-door solicitation cases discussed previously—*Martin* and *Village of Schaumburg*—is that failure to preserve the ability of willing speakers to communicate with willing recipients can be constitutionally fatal to a regulatory scheme aimed at protecting unwilling recipients.³¹⁷

In the context of regulating point-to-point communications, the courts have required governmental interests that primarily relate to the mode of communication as opposed to the specific content of the message. In the context of telemarketing regulation, courts have found governmental interests substantial when focused on preventing telemarketers from shifting tangible or intangible costs to recipients. Specifically, in *Destination Ventures* and *American Blast Fax*, the telefax advertising cases, the federal courts of appeals recognized a substantial governmental interest under the *Central Hudson* analysis in protecting consumers and businesses from incurring tangible costs of receiving unwanted telefax advertisements. In *Mainstream Marketing*,

313. *Id.* at 1243.

314. *See id.* at 1243. The Tenth Circuit wrote that "opt-in regulation is less restrictive than a direct prohibition of speech." *Mainstream Mktg.*, 358 F.3d at 1243.

315. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

316. *See Rowan v. U.S. Post Office*, 397 U.S. 728, 736–37 (stating that the "mailer's right to communicate must stop at the mailbox of an unreceptive addressee").

317. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 146–47 (1943).

the Tenth Circuit recognized a substantial governmental interest in protecting consumers from intangible costs related to unwanted telemarketing calls such as disturbance of their private lives and annoyance in having to answer an unwanted telephone call. In these cases, federal appeals courts concluded under the *Central Hudson* analysis that restrictions on commercial telefax advertisements and telemarketing solicitations directly advanced the governmental interest in preventing these types of cost-shifting.

As to the second of the constitutional issues raised, both the federal ban on unsolicited telefax advertising and the do-not-call registry requirements effectively exempt noncommercial content from their regulatory requirements schemes. *Discovery Network*, the billboard case discussed previously, stands for the proposition that an exclusive regulatory focus on commercial speech can be problematic under the direct-advancement requirement of the *Central Hudson* requirement unless the governmental interest in fact relates to the commercial nature of the regulated communication. And, as discussed, the billboard ordinance in *Discovery Network* failed that requirement because there was nothing inherent about commercial newsracks that rendered them more of a threat to public safety and aesthetics nor was there any evidence in fact that supported the focus on commercial racks. Indeed, the evidence supported the opposite.

When point-to-point communications are regulated on legislative grounds such as privacy protection and prevention of economic costs to recipients, the distinction between commercial and noncommercial communications seems irrelevant from the perspective of the unwilling recipient. For instance, as mentioned, an unwanted telefax produces the same costs to the recipient whether it is commercial or not. Likewise, an unwanted telephone call can be just as intrusive and annoying to the recipient regardless of whether a telemarketer or political pollster is on the other end of the line. Thus, in situations where there is no apparent connection between the regulatory goal and the commercial nature of the communication, it seems necessary for the government to demonstrate with sufficient evidence that the regulated commercial communication is more prevalent and problematic than exempted communications.

The appeals courts in *Destination Ventures*, *American Blast Fax* and *Mainstream Marketing* were all convinced by legislative and administrative findings that commercial telefaxes and telemarketing calls were more prevalent and problematic than noncommercial ones and, thus, justified the noncommercial exemption under the direct-advancement requirement of the third *Central Hudson* factor. It bears mention here that the amount and sufficiency of evidence required to prove direct-advancement has been a source of controversy among the current Supreme Court justices³¹⁸ and remains an issue yet to be addressed by the Court in the context of telemarketing regulation. However, the majority approach of the Court in *Went For It*, the lawyer solicitation case, seems to indicate that reliance on summaries and anecdotal evidence can be sufficient in commercial speech cases under the *Central Hudson* analysis.³¹⁹

Federal appeals courts now have concluded that the federal ban on unsolicited telefax advertising and the national do-not-call registry are constitutional under the

318. For discussion of this issue, see Hoefges and Rivera-Sanchez, *supra* note 97, at 373–75; Hoefges, *supra* note 97, at 276–80.

319. See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 557–61 (2001).

Central Hudson analysis. The Supreme Court has declined requests to review the decisions in these cases. For the time being, these federal regulatory schemes stand as examples of how to constitutionally regulate point-to-point commercial communications in a manner that preserves the rights of advertisers and marketers while protecting the rights of consumers to receive—and *not* receive—targeted, commercial communications.