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The Do-Not-Call List's Big Hang-up

Jared Strauss*

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I. INTRODUCTION	[1]
II. HISTORY OF DO NOT CALL RULES	[3]
III. THE DECISION TO EXEMPT NONPROFITS	[7]
IV. <i>MAINSTREAM MARKETING SERVICES V. FTC</i>	[12]
V. OPTIONS AFTER <i>MAINSTREAM</i> : POLICY IMPLICATIONS	[24]
VI. NEW CONSTITUTIONAL CHALLENGES	[37]

I. INTRODUCTION

[1] On October 1, 2003, the Federal Trade Commission's National Do-Not-Call Registry was supposed to go into effect.¹ By forbidding companies and telemarketers from making unsolicited calls to anyone who had registered their phone number on the list three months prior,² this

* J.D. (expected), Harvard Law School, 2005; B.A., Duke University, 2000. Special thanks to Laurence Tribe, Kimberly Krawiec, Rodney Smolla, and Alexis Strauss for their helpful comments and support.

¹ Daniel A. Cotter, *Don't Call Me, I'll Call You: The FCC and FTC's Do-Not-Call Registry*, 17 CHI. B. ASS'N REC. 42 (2003).

² Abusive Telemarketing Acts or Practices, 16 C.F.R. § 310.4(b)(1)(iii)(B) (2003).

program culminated a decade's worth of efforts to alleviate consumer frustration with unwanted sales calls. However, on September 27, 2003, the District of Colorado derailed the registry, holding that the rule made an unconstitutional distinction between commercial and noncommercial speech by covering commercial calls and exempting calls for charitable, religious, or political organizations.³

[2] On February 17, 2004, the United States Court of Appeals for the Tenth Circuit reversed the District of Colorado's ruling, finding that that the registry's provisions comport with First Amendment standards.⁴ Despite this ruling, however, the registry's future remains in doubt. Should the U.S. Supreme Court reverse the Tenth Circuit, Congress and the Federal Trade Commission (FTC) will need to decide between extending the do-not-call list provisions to charitable organizations—an alternative that presents its own constitutional and policy problems—or dropping the initiative. Accounting for both constitutional and policy factors, the best alternative would be to extend the registry's restrictions to all callers but let consumers choose to exempt charitable calls themselves.

II. HISTORY OF DO NOT CALL RULES

[3] Congress's efforts to regulate telemarketing began in 1991 with passage of the Telephone Consumer Protection Act (TCPA), which authorized the Federal Communications Commission (FCC) to promulgate rules to protect consumers from unwanted calls.⁵ The bill authorized, but did not require, the creation of a do-not-call list, and the FCC instead chose to require telemarketers to maintain company-specific do-not-call lists.⁶ In 1994, Congress passed the Telemarketing and Consumer Fraud

³ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 283 F. Supp. 2d 1151 (D. Colo. 2003), *rev'd*, No. 03-1429, 2004 U.S. App. LEXIS 2564 (10th Cir. Feb. 17, 2004) [hereinafter *Mainstream I*]. The details of the court's ruling are discussed *infra*.

⁴ *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, No. 03-1429, 2004 U.S. App. LEXIS 2564, at *21 (10th Cir. Feb. 17, 2004) [hereinafter *Mainstream III*].

⁵ Telemarketing Sales Rule, 68 Fed. Reg. 4,580 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

⁶ Dean Rodney Smolla, University of Richmond School of Law, Statement to the Senate Committee on Commerce, Science, and Transportation (Sept. 30, 2003), *available at* 2003 WL 22259729. The history of telemarketing regulations is somewhat confusing because of the seemingly overlapping mandates and efforts of the FCC and FTC. While their different jurisdictions inevitably lead to some differences in provisions, the FCC and FTC have sought to "maximize consistency," as Congress ordered in the Do-Not-Call Implementation Act, 15 U.S.C. § 6101 (2003). This note will focus only on the FTC's efforts.

and Abuse Protection Act (TCFAP).⁷ The TCFAP instructed the FTC to create rules to combat “abusive telemarketing acts or practices,” including, *inter alia*, a rule to prohibit “a pattern of unsolicited telephone calls which the consumer would consider coercive or abusive of such consumer’s right to privacy.”⁸ The subsequent FTC rules did not create a national do-not-call registry, but created company-specific regulations, similar to the FCC’s rules.⁹ During a required review of the Telemarketing Sales Rule (TSR) in 1999, the FTC received comments suggesting that the company-specific do-not-call regulation was not effectively protecting consumer privacy.¹⁰ While the Commission began to consider changes to the rules, Congress passed the USA PATRIOT Act, which included a provision extending the TSR to for-profit telemarketers soliciting charitable contributions.¹¹

[4] In January 2002, to protect consumer privacy against unwanted telemarketing calls, the FTC proposed the creation of a national do-not-call registry by amending the definition of “abusive or deceptive telemarketing practices” in the TSR.¹² Use of telemarketing had grown exponentially since the original TCPA, from eighteen million calls per day in 1991 to 104 million per day in 2002.¹³ Frustration with unwanted calls and efforts to control them had similarly grown: consumer complaints over such calls increased 1000% between 1998 and 2002,¹⁴ and twenty-eight states had implemented their own do-not-call lists.¹⁵

⁷ Telemarketing and Consumer Fraud and Abuse Protection Act, 15 U.S.C. §§ 6101-6108 (1994).

⁸ Telemarketing Rules, 15 U.S.C. § 6102(a)(3)(A) (2003).

⁹ Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(ii) (2003). The company-specific regulations required sellers and telemarketers to remove a consumer’s telephone number from that seller’s list upon request.

¹⁰ Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,582 (Jan. 29, 2003).

¹¹ *Id.*

¹² “It is an abusive telemarketing act or practice . . . to engage in . . . (iii) initiating any outbound call to a person when . . . (B) that person’s telephone number is on the “do-not-call” registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services” Abusive Telemarketing Acts or Practices, 16 C.F.R. § 310.4(b)(1)(iii)(B)(2003).

¹³ Cotter, *supra* note 1.

¹⁴ 149 CONG. REC. H412 (daily ed. Feb. 12, 2003) (statement of Rep. Udall).

¹⁵ 149 CONG. REC. H412 (daily ed. Feb. 12, 2003) (statement of Rep. Stearns). For an updated summary of state do-not-call laws, see <http://www.callcompliance.com/regulations/statelist.html>.

[5] The FTC's plan received broad popular support; 33,000 of the 49,000 comments on the proposed rule supported the do-not-call provision.¹⁶ In a year when Congress struggled to agree on anything, the do-not-call list enjoyed unusually broad bi-partisan support.¹⁷ The Do Not Call Implementation Act passed the Senate by unanimous consent and passed the House 418-7 in February 2003.¹⁸ Furthermore, consumers reacted enthusiastically; more than fifty million people registered on the do-not-call list by mid-September 2003.¹⁹

[6] Despite the overwhelmingly positive response from Congress and the public, the do-not-call registry faced immediate legal challenges. While Congress quickly responded to a District of Oklahoma ruling that the FTC did not have the authority to create a do-not-call registry,²⁰ the District of Colorado's ruling that the do-not-call rules violate the First Amendment appeared more problematic. As already mentioned, this ruling stemmed from the FTC's decision to exempt telemarketers soliciting donations on behalf of charities from the national registry requirements.²¹

III. THE DECISION TO EXEMPT NONPROFITS

[7] To understand why the FTC exempted telemarketers soliciting for charities, one must first understand the reasons behind establishing the national registry in the first place. The overriding concern was consumer privacy. Many members of Congress, rising in support of the registry, spoke of protecting the peace and quiet of the home and preventing family dinners from being interrupted by unwanted calls.²² The FTC also

¹⁶ Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,629 n.575 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

¹⁷ See Anne Applebaum, *Public Debate Bypassed in Rush to Bill*, S. FLA. SUN-SENTINEL, Nov. 30, 2003, at 5J, available at 2003 WL 69374703.

¹⁸ 149 CONG. REC. H416 (daily ed. Feb. 12, 2003) (Roll call Vote No. 26).

¹⁹ Press Release, Federal Trade Commission, *Do Not Call Registrations Exceed 50 Million* (Sept. 17, 2003), at <http://www.ftc.gov/opa/2003/09/dncnumbers030917.htm>.

²⁰ See FTC Do-Not-Call Registry Implementation Act, Pub. L. No. 108-82, § 1, 117 Stat. 1006 (2003) (to be codified at 15 U.S.C. § 6102). This Act provided express authority for the FTC to implement the national do-not-call list and was passed in response to *U.S. Sec. v. Fed. Trade Comm'n*, 282 F. Supp. 2d. 1285, 1290-93 (W.D. Okla. 2003). *Id.*

²¹ *Mainstream I*, 283 F. Supp. 2d. at 1168.

²² 149 CONG. REC. H409 (daily ed. Feb. 12, 2003) (statement of Rep. Markey) ("There are Members on the left and right, Democrat and Republican, that want privacy in their own homes Every American believes they have that inherent right."); *Id.* (statement of Rep. Barton) ("This is another step in the protection of privacy . . . so that when you are in the privacy of your own home, if you choose to not have any unsolicited phone calls coming into your home, you can sign up for this.").

received numerous comments from consumer groups, law enforcement representatives, and other privacy advocates asserting the national registry's improved privacy protection.²³ After analyzing the comments and testimony collected during its review of the Telemarketing Sales Rule, the FTC concluded the original company-specific do-not-call provision did not effectively protect privacy.²⁴ Besides the company-specific regime, which allows a seller's initial call to invade the consumer's privacy, the Commission specifically found the system placed too heavy a burden on consumers, who are forced to repeat their request to be removed from a calling list to each individual caller.²⁵ The FTC discovered telemarketers often ignored consumer requests, and consumers had no way of verifying their removal from the list.²⁶ Despite the consumer's private right of action against telemarketers who ignored removal requests, the Commission found the need to keep track of each call and request too burdensome for effective enforcement.²⁷ Frustrations stemming from unsolicited calls continued, despite the company-specific rules, and participants of the do-not-call lists believed a national registry would provide a more convenient one-stop method for reducing unwanted calls further.²⁸

[8] In reviewing the FTC's approach to charitable solicitations, one must remember the FTC does not have jurisdiction over nonprofit organizations and only recently gained jurisdiction over telemarketers who act on behalf of nonprofits since the enactment of the USA PATRIOT Act in 2001.²⁹ While the FTC originally planned to regulate charitable solicitations with

²³ See, e.g., Letter from Susan Grant, Vice President for Public Policy, National Consumers League, to the Federal Trade Commission (Apr. 12, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/ncl.pdf> (regarding Comments of the National Consumers League in the Matter of Telemarketing Rulemaking-Comment); Letter from Marc Rotenberg, Executive Director, Electronic Privacy Information Center, to the Federal Trade Commission (Apr. 10, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/epicetal.pdf> (regarding Comments of the Electronic Privacy Information Center); Comments from the National Association of Attorneys General, to the Federal Trade Commission (Apr. 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf> (last visited Feb. 25, 2004).

²⁴ Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,629 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 4,631.

²⁹ See USA PATRIOT Act, 15 U.S.C. § 44 (2002); Telemarketing Sales Rule Pt. II, 67 Fed. Reg. 4,492, 4,516 n.234 (Jan. 30, 2002) (to be codified at 16 C.F.R. pt. 310). Thus, telemarketers soliciting on behalf of charities were previously not even regulated by the FTC's company-specific rules. *Id.* at 4,516.

the national registry, it decided only to regulate them under the previous company-specific regime for both policy and legal reasons.³⁰

[9] First, the Commission wanted to balance the need to protect consumers with the ability of charities to continue their philanthropic missions.³¹ Many of the organizations submitting comments warned that subjecting their telemarketers to the national do-not-call registry would drastically harm their fundraising capabilities, and that this measure would have a disproportionately heavy effect on small charities that lack the capacity for in-house solicitation drives.³² Also, although not mentioned anywhere in the record, the Commission might have been reticent to hinder political fundraising, which surely would have been unpopular in Congress. At least two Congressmen lamented this “loophole” in the rules.³³

[10] The FTC also thought that calls on behalf of charities did not need as extensive regulation as commercial calls.³⁴ While unwilling to exempt charitable calls completely, noting that even charitable calls intrude on privacy to some degree, the Commission decided that the more intermediate step of requiring organization-specific do-not-call lists was more appropriate than forcing compliance with the full registry because charitable calls were less likely to be “abusive.”³⁵ Charities’ incentives differ from those of commercial telemarketers because solicitation calls are about more than money; the call recipient is “also a voter, a constituent, a consumer, a source of information to others, and a potential source of a future contribution.”³⁶ Thus charitable callers are presumably more likely to honor a consumer’s do-not-call requests.³⁷ Furthermore, while the Commission had found evidence suggesting that company-specific rules were insufficient to control unwanted commercial calls, they had no such evidence regarding charitable calls.³⁸ Thus, the Commission seemed willing to give charitable telemarketers the opportunity to avoid

³⁰ Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,637 (Jan. 29, 2003).

³¹ *Id.* at 4,592.

³² *See, e.g.*, Comments of the Direct Marketing Ass’n Nonprofit Federation, to the Federal Trade Commission (Apr. 15, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/dmanonprofit.pdf>. These claims will be discussed in more detail *infra*.

³³ 149 CONG. REC. H412 (daily ed. Feb. 12, 2003) (statements of Reps. Barton and McCarthy).

³⁴ Telemarketing Sales Rule, 68 Fed. Reg. at 4,637 (Jan. 29, 2003).

³⁵ *Id.*

³⁶ *Id.* at 4,589 (quoting Letter from Hudson Bay Company of Illinois, to the Federal Trade Commission (Apr. 17, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/hbc.pdf>).

³⁷ *Id.* at 4,637.

³⁸ *Id.* at 4,629.

greater regulation, while reserving the right to augment the company-specific approach should it prove ineffective.³⁹

[11] Finally, the FTC did not include charitable solicitations in the national do-not-call provisions because it feared a First Amendment challenge.⁴⁰ In its final rule making, the Commission acknowledged the “higher degree of protection” extended to charitable versus commercial solicitation.⁴¹ It thought that only compelling charitable solicitors to comply with company-specific regulations presented an appropriate balance between charities’ free speech rights and the need to protect consumer privacy.⁴² Ironically, this distinction between the regulations applicable to commercial and noncommercial speech, which was meant to prevent a clash with the First Amendment, became the grounds on which the District of Colorado overturned the rules.⁴³

IV. MAINSTREAM MARKETING SERVICES V. FTC

A. The District of Colorado’s Decision

[12] Because the challenge to the national do-not-call registry provision covers only commercial speech (speech which merely proposes a financial transaction), the District of Colorado examined the rules using the framework established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.⁴⁴ Under *Central Hudson*, the First Amendment protects commercial speech unless the speech is misleading or false.⁴⁵ Commercial speech does, however, receive less protection than, say, charitable speech, and the government can regulate it if (1) the government asserts a substantial interest, (2) the restriction on commercial speech directly and materially advances that interest, and (3) the regulation is narrowly tailored so it does not excessively limit the speech.⁴⁶

³⁹ *Id.* at 4,637.

⁴⁰ *Id.* at 4,629.

⁴¹ *Id.* at 4,586.

⁴² *Id.* at 4,592.

⁴³ *Mainstream I*, 283 F. Supp. 2d. at 1171.

⁴⁴ *Id.* at 1159; see *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n. of New York*, 447 U.S. 557 (1980).

⁴⁵ *Central Hudson*, 447 U.S. at 563.

⁴⁶ *Mainstream I*, 283 F. Supp. 2d. at 1161; *Central Hudson*, 447 U.S. at 564.

[13] The district court found that the do-not-call rules clearly amounted to a government restriction of commercial speech implicating the First Amendment.⁴⁷ In regulating “all outbound telephone calls to induce the purchase of goods or services,”⁴⁸ without regard to truthfulness, the rules would certainly affect some truthful (i.e. protected) commercial speech.⁴⁹ The court believed that this regulation amounted to a government restriction because, by covering only commercial speech, the government was “entangling [itself] in deciding what speech consumers should hear.”⁵⁰

[14] Proceeding into the *Central Hudson* analysis, the court acknowledged that the FTC had asserted the following two substantial public interests: (1) protecting privacy and (2) curbing deceptive and abusive telemarketing practices.⁵¹ As the court noted, the Supreme Court has recognized protecting the privacy of the home as “of the highest order,” which includes the right to avoid unwanted communications.⁵² Similarly, the Supreme Court has identified protecting consumers from deception and mistreatment as a substantial government interest.⁵³ Thus, both asserted interests can justify the FTC’s rules if they fulfill the remaining *Central Hudson* criteria.⁵⁴

[15] However, the district court decided under the second *Central Hudson* element that the FTC’s rules unjustifiably distinguished between calls based on content.⁵⁵ From the outset both parties agreed that both charitable and commercial telemarketing calls invade privacy; however, the do-not-call rules do not apply to all unwanted calls.⁵⁶ The FTC argued that the rules did materially advance the interest of protecting privacy, because they would eliminate between forty to sixty percent of unwanted

⁴⁷ *Mainstream I*, 283 F. Supp. 2d. at 1162.

⁴⁸ 16 C.F.R. § 310.4(b)(1)(iii)(B)(2003).

⁴⁹ *Mainstream I*, 283 F. Supp. 2d. at 1162.

⁵⁰ *Id.* at 1163.

⁵¹ *Id.* at 1164.

⁵² *Id.* (citing *Hill v. Colorado*, 530 U.S. 703, 717 (2000); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)).

⁵³ *Id.* (citing *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979)).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1165. The “materially advances” and “narrowly tailored” prongs together create a requirement for “reasonable fit.” The district court decided the case under the “materially advances” prong, but used the same analysis the Supreme Court used in discussing “reasonable fit” in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Since the court claims to decide the case under the second prong, that is how the analysis is presented here.

⁵⁶ *Mainstream I*, 283 F. Supp. 2d. at 1165.

telemarketing calls.⁵⁷ The plaintiffs conversely argued that the FTC could not justify a distinction between commercial and noncommercial calls because all the calls were equally unwanted and intrusive.⁵⁸

[16] The court's decision turned on an interpretation of *Cincinnati v. Discovery Network, Inc.*⁵⁹ In *Discovery Network*, the city of Cincinnati, as part of a plan to beautify the city and increase safety on sidewalks, prohibited the distribution of commercial hand bills through news racks on public property.⁶⁰ The city, however, allowed traditional newspapers, which contained both commercial and political speech, to continue using news racks.⁶¹ The Supreme Court noted two problems with the city's ordinance. First, hand bill news racks represented only three percent of the city's news racks; thus, removing them would do little to advance the city's interest in esthetics and safety.⁶² Secondly, the Supreme Court asserted that the city had placed too much emphasis on the distinction between commercial and noncommercial speech, and that it is impermissible to make such a distinction when "the distinction bears no relationship *whatsoever* to the particular interests that the city has asserted."⁶³

[17] The court in *Mainstream* accepted the FTC's argument that the do-not-call rules advanced the interest of protecting privacy much more than Cincinnati's ordinance furthered the interest of beauty and safety in *Discovery Network*. The court also noted that if this were the only issue, the FTC would prevail.⁶⁴ In fact, the court quoted the Supreme Court's assertion that "the government is not required to make progress on every front before it can make progress on any front."⁶⁵

[18] However, according to the district court, the FTC could not sufficiently justify its distinction between commercial and noncommercial speech. The court claimed that there was no evidence in the administrative record to support the FTC's assertion that commercial

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

⁶⁰ *Id.* at 412.

⁶¹ *Id.*

⁶² *Id.* at 417.

⁶³ *Id.* at 424.

⁶⁴ *Mainstream I*, 283 F. Supp. 2d. at 1165.

⁶⁵ *Id.* at 1166 (citing *United States v. Edge Broad. Co.*, 509 U.S. 418, 434 (1993)).

callers were more likely to engage in fraudulent or abusive practices.⁶⁶ It also found that the FTC's decision to exempt charitable callers based on the lesser protection given to commercial speech contradicted the law articulated in *Discovery Network*.⁶⁷ Finally, the court rejected the Commission's assertion that the commercial/charitable distinction was based on "secondary effects"⁶⁸ because the secondary effects are the same for both types of calls. Having found that the FTC made a decision to burden one type of speech based on its content without a privacy or prevention-of-abuse rationale for distinguishing it from other speech, the court declared the do-not-call rules unconstitutional and declined to address the third *Central Hudson* prong.⁶⁹

B. The Tenth Circuit's Reversal

[19] On February 17, 2004, the United States Court of Appeals for the Tenth Circuit reversed the District Court of Colorado, finding that the do-not-call rules satisfied the *Central Hudson* criteria. According to the appellate court's interpretation of *Central Hudson*, the registry should survive scrutiny "if it is designed to provide effective support for the government's purposes and if the government did not suppress an excessive amount of speech when substantially narrower restrictions would have worked just as well."⁷⁰

[20] In examining the registry's effectiveness, the appellate court rejected the district court's theory that the rules were impermissibly underinclusive. The court noted that "First Amendment challenges based on underinclusiveness face an uphill battle in the commercial speech context,"⁷¹ explaining that underinclusiveness is only relevant if it makes the regulatory framework so irrational as to be ineffective.⁷² Far from being ineffective, the court stated the do-not-call rules would block a sizable number of unwanted calls (approximately 6.85 billion calls to those already registered on the list), as well as a substantial percentage of

⁶⁶ *Id.* at 1167.

⁶⁷ *Id.*

⁶⁸ The argument is that the regulation aims at eliminating the "secondary effect" of constant phone calls, which is separate from the content of the call. *See id.*

⁶⁹ *Id.* at 1168.

⁷⁰ *Mainstream III*, 2004 U.S. App. LEXIS 2564, at *21.

⁷¹ *Id.* at *22.

⁷² *Id.* at *22-*23 (citing *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980)).

unwanted calls (citing Congress's and the FTC's findings that most unwanted solicitations were commercial).⁷³ Significantly, the appellate court also accepted the FTC's finding that commercial callers generate more privacy complaints and are more likely to engage in abusive practices than noncommercial callers,⁷⁴ whereas the district court had found no evidence for such a distinction.⁷⁵ Thus, the appellate court found that the do-not-call list is not "so underinclusive that it fails materially to advance the government's goals."⁷⁶

[21] The appellate court also found that the rules were narrowly tailored, placing particular emphasis on the role of private choice in assuring that only unwanted calls are preempted.⁷⁷ The court pointed to the Supreme Court's decisions in *Watchtower Bible and Tract Society of New York v. Village of Stratton*,⁷⁸ *Rowan v. United States Post Office Department*,⁷⁹ and *Martin v. City of Struthers*⁸⁰ to illustrate the preference of private choice as a less restrictive alternative to direct prohibitions on speech.⁸¹ Comparing the do-not-call list to the regulation in *Rowan*, the court argued that the registry, by definition, would only block calls that were unwanted.⁸² The court found further evidence of narrow tailoring in the facts: (1) that sellers and consumers would retain numerous options to send and receive solicitations and (2) that plaintiffs could find no equally effective alternatives to the national registry.⁸³

[22] Finally, the appellate court rejected the district court's interpretation and application of *Discovery Network*. The Tenth Circuit believed that the key finding in *Discovery Network* was that regulating only three percent of

⁷³ *Id.* at *26-*27.

⁷⁴ *Id.* at *29. The court emphasized that the original commercial/noncommercial distinction arose in the House of Representative's report on the TCPA in 1991, and that Congress, the FCC, and the FTC have all continued to find commercial callers most responsible for the harms of privacy invasion and abusive practices. See H.R. REP. NO. 102-317, at 16 (1991).

⁷⁵ *Mainstream I*, 283 F. Supp. 2d. at 1167.

⁷⁶ *Mainstream III*, 2004 U.S. App. LEXIS 2564, at *32.

⁷⁷ *Id.* at *33-*34.

⁷⁸ 536 U.S. 150, 168-69 (2002) (stating that allowing residents to post their own "no solicitation" signs was less restrictive than requiring permits for solicitation).

⁷⁹ 397 U.S. 728, 736 (1970) (upholding a statute allowing homeowners to prohibit specific parties from sending them mailings).

⁸⁰ 319 U.S. 141, 148-49 (1943) (striking down an ordinance banning door-to-door canvassing because it prevented private homeowners from deciding whether to receive visitors).

⁸¹ *Mainstream III*, 2004 U.S. App. LEXIS 2564, at *33-*36 (citations omitted).

⁸² *Id.* at *34.

⁸³ *Id.* at *38-*40.

the city's news racks would not materially advance the government's interest.⁸⁴ The language upon which the district court focused merely stated that limiting a measure to commercial speech would not save a regulation that has only minimal impact.⁸⁵ Thus, as applied by the appellate court, *Discovery Network* holds that a regulation is impermissible where it both had a minimal impact and was based on a commercial/noncommercial distinction that bore no relation to the harm being targeted.⁸⁶ The Court of Appeals asserted that neither factor was present in the do-not-call case. It noted that the registry would block a substantial amount of calls, in contrast to the paltry effect of the *Discovery Network* regulation.⁸⁷ More significantly, the appellate court disagreed with the district court by accepting the FTC's arguments that commercial calls are indeed significantly more problematic than noncommercial calls and that the past failures to successfully regulate commercial calls justified covering the commercial calls by the national registry while exempting noncommercial calls.⁸⁸

[23] However, whether the FTC will ultimately prevail is still in doubt. Although the appellate court overruled the district court's decision, the plaintiffs will most likely appeal to the Supreme Court. Given the nuanced, and sometime conflicting, application of the commercial speech doctrine, the Supreme Court could very well grant certiorari. As Dean Rodney Smolla of the University of Richmond School of Law testified,

No one, of course, can predict with complete confidence what . . . the Supreme Court, will do when the *Mainstream Marketing* decision is reviewed on the merits. Congress would be prudent not to proceed, however, on the supposition that *Mainstream Marketing* is some kind of . . . outlying . . . decision that is obviously wrong and heading for certain reversal.⁸⁹

Subsequently, Congress and the FTC should consider alternatives to cure the do-not-call rules' constitutional faults.

⁸⁴ *Id.* at *44-*45 (citations omitted).

⁸⁵ *Id.* at *45 (“[A] regulation that has only a minimal impact on the identified problem cannot be saved simply because it targets only commercial speech . . .”).

⁸⁶ *Id.* at *45-*46.

⁸⁷ *Id.* at *45.

⁸⁸ *Id.* at *46.

⁸⁹ See Smolla, *supra* note 6, at *10.

V. OPTIONS AFTER *MAINSTREAM*: POLICY IMPLICATIONS

[24] If the U.S. Supreme Court decides to overturn the Tenth Circuit's ruling, the FTC has three potential options for saving the registry: (1) extend the registry to cover all calls by professional telemarketers regardless of the purpose, (2) extend the registry to noncommercial calls but give registrants the opportunity to identify specific charities who may continue calling them, or (3) create a "bifurcated" registry which covers all calls, but also gives registrants the opportunity to exempt all noncommercial calls, or all commercial calls, if desired.⁹⁰ In judging each permutation, the Commission and Congress need to consider both the relative harm to charitable organizations and the likelihood that the amended rules themselves will survive constitutional scrutiny.

[25] Extending the do-not-call registry to telemarketing calls made on behalf of charitable organizations in any form would undoubtedly hinder charitable fundraising, especially for certain types of organizations. In the year 2000, charitable organizations received approximately twenty-seven percent of their donations through telephone solicitations, compared to nineteen percent through direct mail and thirty-eight percent from person-to-person solicitations.⁹¹ Of all donations raised by telephone, approximately sixty to seventy percent were solicited by professional telemarketers.⁹² The FTC estimated that forty to fifty percent of all households will sign up for the do-not-call list.⁹³ This could shrink the potential telephone solicitation donor pool and support charitable

⁹⁰ *Id.*; see also Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 YALE J. ON REG. 77 (2003). The authors argue that unwanted telemarketing calls can be reduced by forcing telemarketers to "internalize" all the costs of their methods. Thus, the authors propose a system whereby consumers could set a price at which they are willing to listen to telemarketing calls; telemarketers would need to reimburse these consumers if they chose to call, through a system akin to 1-900 numbers. Because the authors advocate for exempting telemarketers for charitable organizations from this system, their solution still does not avoid the constitutional problems presented by *Mainstream*, and subsequently, their proposal is not analyzed in this article.

⁹¹ Michael A. Turner & Lawrence G. Buc, *The Impact of Data Restrictions on Fundraising for Charitable & Nonprofit Institutions* (2004), at 9 (on file with the Richmond Journal of Law & Technology).

⁹² Jeff Jones, *Do Not Call Registry Could Hurt Charities*, THE NONPROFIT TIMES (May 1, 2002), at <http://www.nptimes.com/May02/npt1.html>.

⁹³ Comments of the Not-For-Profit and Charitable Coalition, to the Federal Trade Commission's Proposed Amendments to the Telemarketing Sales Rule (Apr. 15, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/notforprofit.pdf>.

organizations' fear that the registry will significantly harm their ability to raise funds.⁹⁴

[26] Furthermore, extending the do-not-call list would especially harm smaller charitable and nonprofit organizations. Smaller charities are more likely to rely on professional telemarketers because they lack the resources to conduct in-house fundraising drives.⁹⁵ Most universities, hospitals, and religious organizations have individuals with a particular allegiance to their institutions (e.g. alumni, patients, churchgoers) and raise most of their funds through large gifts solicited person-to-person.⁹⁶ Food banks, soup kitchens, and public television stations, by contrast, cannot rely on such constituents.⁹⁷ Subsequently, charities without a solid and committed donor base must rely more heavily on cold-call solicitations.⁹⁸ Thus, while thirty-eight percent of all charitable donations may come from person-to-person solicitations, very little of this slice goes to certain types of (often smaller) charities; for these organizations, the percentage of donations received through telephone solicitations is likely to be much higher than twenty-seven percent.

[27] In addition to reducing donor pools, charities assert that imposing do-not-call restrictions will raise fundraising costs, in effect diverting more money away from their missions.⁹⁹ Solicitors would need to "scrub" their telemarketing lists regularly to comply with the registry and keep extensive records of previous donations.¹⁰⁰ Commercial telemarketers would certainly pass these costs along to the charities.¹⁰¹ The DMA Nonprofit Federation explained in its comments to the FTC that unlike commercial organizations that can incorporate cost increases into the price of their products, charities cannot ask donors to increase their contributions to cover increased soliciting costs.¹⁰²

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Turner & Buc, *supra* note 91, at 9.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See, e.g., Letter from Paulette V. Maehara, President & CEO, Association of Fundraising Professionals, to the Federal Trade Commission, at 5 (Mar. 29, 2002), *available at* <http://www.ftc.gov/os/comments/dncpapercomments/04/aofp.pdf>.

¹⁰⁰ Comments of the DMA Nonprofit Federation, *supra* note 32, at 15.

¹⁰¹ Letter from Paulette V. Maehara, *supra* note 99.

¹⁰² Comments of the DMA Nonprofit Federation, *supra* note 32, at 15.

[28] The effects of extending the registry, however, may not be as disastrous as nonprofit groups assert. While the do-not-call list could eliminate calls to a sizable portion of the potential donor base, nonprofits will still be able to call their pre-existing donors and volunteers.¹⁰³ The amended rules could allow nonprofits to contact consumers with whom they have an established relationship, similar to the current exception given to commercial telemarketers.¹⁰⁴ Whereas the commercial exception is limited to consumers who have made a financial transaction with the company within the last eighteen months, or called with inquiries within the last three months,¹⁰⁵ the Commission could tailor the definition to the reality of philanthropic giving habits, as long as it fits the “reasonable” expectation of consumers.¹⁰⁶

[29] For example, recognizing that even dedicated donors do not necessarily give every year, “established relationship” could include individuals who have donated to a charity within two years, instead of eighteen months. Similarly, the definition could include people who have purchased something from the organization (say, a symphony ticket), volunteered their time, or merely attended an organization event. This exception should allow charities to keep calling individuals who have donated to them in the past, and allow the charities to conduct a reasonable amount of “prospecting” for new donors by contacting those who have shown some interest in their organization. Furthermore, since such individuals probably constitute a large portion of nonprofits’ calling lists, the exemption could limit the “scrubbing” costs mentioned above.

[30] Additionally, even if the registry prevented charities from calling some individuals, these organizations could compensate by placing greater emphasis on other modes of communication (“channel switching”). For example, while direct mail currently accounts for a smaller percentage of donations than telephone solicitation, it is still a reasonably effective method of fundraising. A recent study by the marketing firm Vertis found that fifty-three percent of adults read fundraising and nonprofit mail, while forty-six percent had responded to a direct mailing within the previous

¹⁰³ Letter from Paulette V. Maehara, *supra* note 99, at 4.

¹⁰⁴ 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii) (2003).

¹⁰⁵ 16 C.F.R. § 310.2(n) (2003).

¹⁰⁶ See Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,591 (Jan. 29, 2003) (noting that, in defining “established business relationship,” the Commission had referred to Congress’s intent in the TCPA that the exemption reflect a reasonable consumer expectation).

thirty days, up from only thirty-four percent in 2001.¹⁰⁷ Alternatively, charities could begin using e-mail more often to solicit donations.¹⁰⁸

[31] Moreover, even if the do-not-call registry shrinks the total number of potential call recipients by forty to fifty percent, it is unlikely to have a proportional impact on the amount of money raised by charities. Given the exception for previous donors and volunteers discussed above, the registry would actually only shrink the donor pool to people with no particular reason to give to the specific charity. Considering that the list eliminates people that presumably react negatively to telemarketing calls in general, the registry would really only prevent charities from soliciting a very unlikely group of donors.

[32] The options that give consumers greater flexibility and choice for exempting nonprofit callers themselves could further mitigate the potential harm to charitable fundraising. One option would be to make all charitable calls to do-not-call registrants *de facto* illegal but allow the organizations to seek express permission to call the individual. By allowing nonprofits to identify individuals who do not meet the technical requirements of an “existing relationship” exception but still want to hear from, and possibly donate to, the organization, this proposal could diminish the “shrinking donor pool” effect. The current rule actually contains this provision for commercial callers, requiring that the caller obtain permission in writing.¹⁰⁹ However, when the Commission proposed a similar provision for charitable solicitation, nonprofits uniformly condemned it as too costly and difficult to implement.¹¹⁰ For example, the DMA Nonprofit Federation claimed that obtaining “opt-in” permission from consumers would increase fundraising costs to charities by \$5.9 billion.¹¹¹

¹⁰⁷ Press Release, Association of Fundraising Professionals, *Survey Confirms: Direct Mail Still Has Impact* (Aug. 29, 2003), at http://www.afpnet.org/tier3_cd.cfm?content_item_id=13431&folder_id=2165 (last visited Mar. 25, 2004); see also Press Release, Vertis Inc., *Two-Thirds of the Nation Plan to Make a Non-Monetary Contribution*, at <http://www.vertisinc.com/about/viewNews.asp?id=92> (last visited Mar. 21, 2004).

¹⁰⁸ See CAN-SPAM Act, Pub. L. No. 108-187, § 7701(a)(12), 117 Stat. 2699 (2003) (to be codified at 15 U.S.C. § 7701-13; 18 U.S.C. §§ 1001, 1037; 28 U.S.C. § 994; and 47 U.S.C. § 227) (revealing that with Congress enacting the CAN-SPAM Act of 2003, the opportunity to replace telemarketing with email may not exist much longer).

¹⁰⁹ 16 C.F.R. § 310.4(b)(1)(B)(i) (2003).

¹¹⁰ Telemarketing Sales Rule, 68 Fed. Reg. at 4,636.

¹¹¹ See Comments of the DMA Nonprofit Federation, to the Federal Trade Commission, at 2 (Apr. 15, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/dmanonprofit.pdf> (recognizing that the note the study cited examined efforts to obtain permission to use personal

[33] The third option of “bifurcating” the do-not-call registry, however, may offer the best solution. Under this approach, the registry would separate commercial and noncommercial calls into separate categories, allowing registrants to block all telemarketing calls or to sign up to block only commercial calls while allowing charitable ones (or vice versa).¹¹² The bifurcated list should eliminate nonprofits’ fears that consumers seeking protection from unwanted sales calls will unintentionally put themselves beyond the reach of charities they support.¹¹³ Nonprofit fundraisers could argue that many individuals would choose to block charitable calls when considering them as a category but would not make the same choice when considering individual charities separately. While this assertion may very well be accurate, the bifurcated list still represents a good compromise between automatically blocking charitable calls to registrants and putting the onus on individuals to put themselves on each charity’s individual do-not-call list. If the bifurcated system included an option for charities to become exempt by obtaining individual express permission, expensive and difficult as that may be, it could allow nonprofits to continue calling those that are most likely to donate while putting commercial and noncommercial calls on sufficiently equal footing to satisfy the *Mainstream I* decision.

[34] The Commission suggested a bifurcated registry in its request for comments, but received relatively few responses with only general comments.¹¹⁴ Responding to the question “Should the ‘do-not-call’ registry be structured so that requests not to receive telemarketing calls to induce the purchase of goods and services are handled separately from requests not to receive calls soliciting charitable contributions,” sixty out of one hundred individuals said “yes.”¹¹⁵ The National Consumers League, a nonprofit organization representing the consumers’ economic and social interests, also expressed support for separating requests to block charitable and commercial calls, although it did not elaborate on the position.¹¹⁶ However, the New York Consumer Protection Board

identifying information for marketing purposes, not for telemarketing specifically); *see also* Turner & Buc, *supra* note 91, at 4.

¹¹² Telemarketing Sales Rule, 68 Fed. Reg. at 4,636; *see also* Smolla, *supra* note 6.

¹¹³ *See, e.g.*, Letter from Barbara Reid, Executive Director, Childhood Leukemia Foundation, to the Federal Trade Commission, at 2 (Feb. 25, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/clf.pdf>

¹¹⁴ Telemarketing Sales Rule, 68 Fed. Reg. at 4,636; *see also* Telemarketing Sales Rule, 67 Fed. Reg. 4,492, 4,539 (Jan. 30, 2003).

¹¹⁵ Telemarketing Sales Rule, 68 Fed. Reg. at 4,637.

¹¹⁶ Letter from Susan Grant, *supra* note 23.

(NYCPB) vaguely suggested that bifurcation might cause technical problems while imposing high administration costs.¹¹⁷ The National Association of Attorneys General (NAAG) also suggested that offering too many options might confuse consumers with unnecessary complexity.¹¹⁸

[35] The cost and complexity concerns raised by NYCPB and NAAG convinced the FTC not to pursue the bifurcated solution initially.¹¹⁹ However, despite these valid points, the Commission should reconsider this option. First, the effects of bifurcation may not be as detrimental as feared. The NYCPB presented its cost analysis in response to a proposal to allow consumers to specify days and times when they would accept telemarketing calls, later saying that bifurcation might experience the same technical and cost problems.¹²⁰ NAAG dealt with the “days and times” proposal simultaneously with bifurcation; thus, its concerns about proliferating options and rapid choices may refer more to the “days and times” issue, which would require several steps, other than bifurcation, which involves one simple choice.¹²¹ Moreover, the American Association of Retired Persons (AARP), which represents the constituency perhaps most likely to be confused by multiple choices presented by an automated telephone enrollment system, endorsed giving consumers options with a series of prompts.¹²² Thus, the concern that a bifurcated registry would confuse consumers may be exaggerated.

[36] Furthermore, the context in which the Commission discarded the bifurcation solution has changed. When the FTC deemed this option “excessively cumbersome,”¹²³ it believed that subjecting charitable calls only to organization-specific do-not-call lists, while imposing the national list on commercial callers, would pass constitutional scrutiny. But if the Commission must extend the registry to satisfy a holding similar to the district court’s decision, it might find that the benefit of keeping the

¹¹⁷ Letter from the New York Consumer Protection Board, to the Federal Trade Commission (Mar. 26, 2002), at <http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf>.

¹¹⁸ Comments and Recommendations of the National Association of Attorneys General, *supra* note 23, at 20.

¹¹⁹ Telemarketing Sales Rule, 68 Fed. Reg. at 4,637.

¹²⁰ Letter from the New York Consumer Protection Board, *supra* note 117.

¹²¹ Comments and Recommendations of the National Association of Attorneys General, *supra* note 23, at 20.

¹²² Letter from David Certner, Acting Director, AARP, to the Federal Trade Commission, at 3 (Mar. 29, 2002), at www.ftc.gov/os/comments/dncpapercomments/04/aarp.pdf.

¹²³ Telemarketing Sales Rule, 68 Fed. Reg. at 4,637.

registry while mitigating harm to charities is worth the extra cost and complexity of bifurcation.

VI. NEW CONSTITUTIONAL CHALLENGES

[37] Any amended rules extending the do-not-call registry to charitable solicitations would undoubtedly face their own constitutional challenges. After striking down the original rules as unconstitutional in *Mainstream I*, the United States District Court in Colorado suggested that “[w]ere the do-not-call registry to apply without regard to the content of speech, or to leave autonomy in the hands of the individual, as in *Rowan*, it might be a different matter.”¹²⁴ However, even if extending the registry to charities made the provision sufficiently content-neutral, or if bifurcation gave individual’s sufficient autonomy, to satisfy the *Mainstream* ruling, attempting to regulate charitable fundraising would require another level of constitutional analysis.

[38] Charitable solicitations receive greater protection under the First Amendment than pure commercial speech because they are “intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues.”¹²⁵ Although the *Central Hudson* test for commercial speech no longer applies, the government can still impose

reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.”¹²⁶

[39] Thus, the first question is whether the extended do-not-call registry would be “content-neutral.” This issue is paramount because content-based regulations are presumptively invalid.¹²⁷ According to the Supreme

¹²⁴ *Mainstream I*, 283 F. Supp. 2d at 1168.

¹²⁵ *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

¹²⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

¹²⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Court, the main issue in determining content neutrality is whether the government chose to regulate the speech at issue because of disagreement with its message.¹²⁸ A regulation is neutral if its purpose is unrelated to the content, even if there is an incidental effect on some speakers but not others.¹²⁹ For example, in *Ward v. Rock Against Racism*, New York City's sound amplification guidelines required for using its Central Park band shell were deemed neutral because their justification, controlling noise in order to prevent disturbing residential neighborhoods, had nothing to do with the types of music or other sound being amplified.¹³⁰ Under this logic, amended do-not-call rules appear to be content-neutral. The registry would apply to all solicitations within the FTC's jurisdiction, regardless of content. Just as *Ward's* sound ordinance aimed at protecting neighborhood peace without regards to the type of music played, the government's purpose here is to protect privacy from unwanted calls, not to eliminate a specific message.

[40] However, the District of North Dakota's recent decision in *Fraternal Order of Police v. Stenehjem*, overturning the North Dakota state do-not-call list, suggests that the amended rules would not be content-neutral.¹³¹ That case asserts that distinguishing between charities that use professional telemarketers and those who use employees or volunteers to make calls is a content-based distinction because it requires the government to look at the type of speech involved.¹³² But this interpretation of "content-based" seems suspect. In support of its decision, the court cited *Arkansas Writers' Project, Inc. v. Ragland*, where the Supreme Court struck down a tax-exemption granted to newspapers and magazines on certain topics (sports, religion, and trade) but not other magazines.¹³³ But whereas the rule in *Ragland* required the government to examine the topics of articles, the statute in *Stenehjem* and the national do-not-call rules do not differentiate based on the topic of the call or the words being used, only the method of delivery (professional telemarketer vs. in-house employee or volunteer). Thus, whether another court would similarly find this distinction to be "content-based" is uncertain.

¹²⁸ *Ward*, 491 U.S. at 791.

¹²⁹ *Id.*

¹³⁰ *Id.* at 792.

¹³¹ *Fraternal Order of Police v. Stenehjem*, 287 F. Supp. 2d 1023, 1031 (D.N.D. 2003).

¹³² *Id.* at 1028.

¹³³ *Id.* (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)).

[41] Showing that an extended do-not-call registry is “narrowly tailored to serve a significant government interest”¹³⁴ will be even more difficult. The FTC’s asserted interests – protecting privacy and preventing fraud – remain significant government interests.¹³⁵ However, the nonprofit groups opposing application of the do-not-call registry to charitable calls argue that the regulations are not “narrowly tailored” to further these interests.¹³⁶ A regulation is “narrowly tailored” if it is aimed at the “appropriately targeted evil.”¹³⁷ While it does not have to be the “least restrictive” method of achieving its goals, the regulation cannot “burden substantially more speech than is necessary to further the government’s legitimate interests.”¹³⁸

[42] An extended do-not-call list would probably not be “narrowly tailored” for preventing fraud. In *Schaumburg v. Citizens for Better Environment*, the Supreme Court struck down a statute that aimed to reduce fraud by prohibiting solicitation by charitable organizations that did not use at least seventy-five percent of the proceeds for “charitable purposes.”¹³⁹ The court found that using a certain percentage of funds on noncharitable activities (e.g. fundraising, salaries, and overhead) was not an accurate proxy for fraudulent behavior, and that lumping together legitimate charities that use more funds for these activities with organizations fraudulently disguising a money-making operation as a charity unnecessarily interfered with First Amendment freedoms.¹⁴⁰ It also noted that “broad prophylactic rules in the area of free expression are suspect.”¹⁴¹ Justifying the do-not-call rules based on fraud prevention essentially argues for a broad prophylaxis, restricting charitable solicitations by professional telemarketers out of fear the some might be fraudulent. As the District of North Dakota found in *Stenehjem*, “[n]ot every professional telemarketer hired by a charity will engage in fraudulent activity, so this law targets and eliminates more ‘than the exact

¹³⁴ *Ward*, 491 U.S. at 791.

¹³⁵ *See Hill v. Colorado*, 530 U.S. 703, 716 (2000); *Frisby v. Shultz*, 487 U.S. 474, 484 (1988); *Friedman v. Rogers*, 440 U.S. 1, 16 (1979).

¹³⁶ Comments of the DMA Nonprofit Federation, *supra* note 32, at 8; Comments of the Not-For-Profit and Charitable Coalition, *supra* note 93, at 38.

¹³⁷ *Frisby*, 487 U.S. at 485.

¹³⁸ *Ward*, 491 U.S. at 799.

¹³⁹ *Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 633-34 (1980); *see also Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781 (1988); *Sec’y of State v. Munson*, 467 U.S. 947 (1984).

¹⁴⁰ *Schaumburg*, 444 U.S. at 637.

¹⁴¹ *Id.* (quoting *NAACP v. Burton*, 371 U.S. 415, 438 (1963)).

source of evil it seeks to remedy.”¹⁴² For example, in *Ward*, the Supreme Court found that the city’s sound amplification guidelines were narrowly tailored because they did not materially interfere with the performer’s artistic control over sound mix (i.e. content). The court also found that the fact that the regulations reduced the artist’s potential audience was insignificant because there were adequate alternative avenues of communication.¹⁴³

[43] The Supreme Court has, however, endorsed rules analogous to the do-not-call list for protecting privacy. While 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,¹⁴⁴ it has recognized and sanctioned provisions giving individuals the ability to prevent intrusive solicitations. In *Martin v. City of Struthers*, the Court said that a city could “punish those who call at a home in defiance of the previously expressed will of the occupant”¹⁴⁵ Similarly, while the *Schaumburg* court struck down the seventy-five percent rule as too expansive, it pointed to “No Soliciting” signs as a provision that protected privacy while intruding less on freedom of speech.¹⁴⁶

[44] The extended do-not-call list is “narrowly tailored” in the sense that it burdens no more speech than necessary to advance consumers’ express desire not to be bothered. Whereas using a certain percentage of solicited funds for non-charitable activities bears little relationship to the likelihood that a charity’s solicitation is fraudulent, calling an individual who has explicitly requested not to be called clearly intrudes on privacy. Unlike the ordinance struck down in *Martin*, the do-not-call rules do not substitute the government’s judgment of what is intrusive for the individual’s judgment.¹⁴⁷ The fact that signing up for the do-not-call list is voluntary and that an individual can still choose to sign up for organization-specific lists rather than the national registry reduces the

¹⁴² *Fraternal Order of Police v. Stenehjem*, 287 F. Supp. 2d 1023, 1029 (D.N.D. 2003) (quoting *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000)).

¹⁴³ *Ward*, 491 U.S. at 802.

¹⁴⁴ *See, e.g., Watchtower Bible and Tract Society of New York, Inc. v. Village of Straton*, 536 U.S. 150 (2002); *Hynes v. Borough of Oradell*, 425 U.S. 610 (1976); *Cantwell v. Connecticut*, 310 U.S. 296 (1941).

¹⁴⁵ *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943).

¹⁴⁶ *Schaumburg*, 444 U.S. at 639.

¹⁴⁷ *Martin*, 319 U.S. at 143-144.

likelihood that the rules will preempt speech that the individual would want to hear. A bifurcated registry system would further tailor the provisions by giving options to consumers who only find one type of calls intrusive. Furthermore, like the regulations in *Ward*, the do-not-call list does not interfere with the content of the callers' messages. While it reduces the potential audience for the message, it leaves the callers with viable alternative avenues of communication (e.g. mail and person-to-person solicitation).

[45] Yet, charitable and nonprofit organizations have several arguments that the registry would not be "narrowly tailored." First, they argue that if the statutes in *Riley v. National Federation of the Blind, Secretary of Maryland v. Munson*, and *Schaumburg*, which only restricted *some* charitable solicitations by professional telemarketers, were not "narrowly tailored," then the do-not-call list, which prohibits all solicitations to list registrants, must be more suspect.¹⁴⁸ This argument, however, fails to recognize that *Riley*,¹⁴⁹ *Munson*,¹⁵⁰ and *Schaumburg* were all decided with respect to the government's interest in preventing fraud, not protecting privacy.¹⁵¹

[46] Another argument that charitable and non-profit organizations could make focuses on the FTC's position in the district court. As noted above, the FTC argued in the district court that it was justified to subject only charitable calls to organization-specific lists because charities were less likely to engage in abusive behavior and there was no evidence that the organization-specific lists would not be effective.¹⁵² Thus, nonprofit organizations could argue that subjecting their organization to the national do-not-call list sweeps too broadly because there is a less restrictive means of achieving the government's interest. The answer to this dilemma may turn on whether the do-not-call rules are content-neutral. The time, place, and manner analysis for content-neutral regulations does not require that the regulations be the "least restrictive . . . means of" serving the government's interest.¹⁵³ However, strict scrutiny of regulations restricting protected speech requires that the government choose the "least

¹⁴⁸ Comments of the DMA Nonprofit Federation, *supra* note 32, at 10.

¹⁴⁹ 487 U.S. 781 (1988).

¹⁵⁰ 467 U.S. 947 (1984).

¹⁵¹ See, e.g., *Riley*, 487 U.S. at 793; *Munson*, 467 U.S. at 967.

¹⁵² Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,637 (Jan. 29, 2003).

¹⁵³ *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

restrictive means.”¹⁵⁴ Obviously, the existence of the organization-specific lists would have more importance if the latter test applies.¹⁵⁵ If the easier standard applies, one could argue that choosing the national registry approach over the organization-specific approach is a “reasonable determination” by a “responsible decision-maker” as to how best to pursue the government’s interest.¹⁵⁶

[47] However, the most damaging “narrowly tailored” argument could be that the do-not-call list is inherently *underinclusive*. As already discussed, the FTC’s jurisdiction does not cover nonprofits, so its do-not-call list only covers charities that use professional telemarketers.¹⁵⁷ The DMA Nonprofit Federation argues that, because there is no evidence that calls from professional telemarketers on behalf of charities are more intrusive than calls made directly from charities themselves, the registry rules do not even pass the less strict “reasonable fit” test for commercial speech, much less the “narrowly tailored” test.¹⁵⁸ The Federation relies on the Seventh Circuit’s ruling in *Pearson v. Edgar*, which held that a statute allowing homeowners to ban real estate agents from soliciting door-to-door failed the *Central Hudson* test because there was no evidence that real estate soliciting, compared to any other type of soliciting, posed a particular threat to privacy.¹⁵⁹ The Seventh Circuit had upheld the same statute ten years earlier in *Curtis v. Thompson*,¹⁶⁰ but felt compelled to reverse its decision based on *Discovery Network*, which also invalidated an underinclusive ban.¹⁶¹ The District of North Dakota used this same reasoning in *Stenehjem*, finding that regulating charities that use professional telemarketers and allowing calls directly from charities meant that the state’s do-not-call rules were not “narrowly tailored.”¹⁶²

¹⁵⁴ *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); see also Comments of the DMA Nonprofit Federation, *supra* note 32, at 10.

¹⁵⁵ If the district court’s ruling in *Mainstream I* (that the FTC cannot subject charitable callers to only organization-specific do-not-call lists while subjecting commercial callers to a national registry) were upheld, then a ruling that the FTC could not subject charitable callers to the national registry because it is not the “least restrictive means” would create an impossible catch-22.

¹⁵⁶ See *Ward*, 491 U.S. at 800.

¹⁵⁷ 15 U.S.C. § 44 (2000).

¹⁵⁸ Comments of the DMA Nonprofit Federation, *supra* note 32, at 10.

¹⁵⁹ *Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998).

¹⁶⁰ *Curtis v. Thompson*, 840 F.2d 1291, 1305 (7th Cir. 1988).

¹⁶¹ *Pearson*, 153 F.3d at 405; see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430-31 (1993).

¹⁶² *Fraternal Order of Police v. Stenehjem*, 287 F. Supp. 2d 1023, 1029 (D.N.D. 2003).

[48] The government could respond by arguing that the reading of *Discovery Network* is too broad. The ordinance in *Discovery Network* was not just underinclusive, but was also content-based (commercial vs. noncommercial).¹⁶³ The court disapproved of the measure because it placed too much emphasis on the distinction between commercial and noncommercial speech, singling out commercial speech because it is less protected.¹⁶⁴ The FTC's do-not-call rules, by contrast, do not distinguish between nonprofits based on content, rather based on their use of professional telemarketers. The distinction is a matter of jurisdictional limitations, not content. Furthermore, from a policy perspective, if FTC rules could be invalidated simply because they result in disparate treatment of industries within the Commission's jurisdiction versus industries outside its jurisdiction, a vast array of FTC rules would be invalid. The FTC does not have jurisdiction over, for example, common carriers and banks.¹⁶⁵ Under the *Stenehjem* logic, the Commission would not be able to issue any regulations unless it could find particular reasons why banks and common carriers are less likely to create the same harm targeted.

[49] Were the decisions of *Mainstream II* and *Stenehjem* to put the FTC in the impossible position of needing to regulate charitable calls but not being able to regulate enough of them, the FCC may present the only solution. In crafting its own do-not-call list rules, the FCC similarly exempted nonprofit organizations from the national registry, in part because the TCPA, from which the FCC received its authority to regulate telemarketing, specifically excluded calls from nonprofit organizations from the definition of "telephone solicitation."¹⁶⁶ Yet, were Congress to amend this definition, the FCC could cover both nonprofits making calls directly and those using professional telemarketers. By contrast, granting the FTC jurisdiction over nonprofits directly would contradict the very basic definition of "corporation" in the FTC's enabling statute.¹⁶⁷

[50] Whether Congress would favor such a plan, or any extension of the do-not-call registry to charities, is uncertain. In addition to the clear intent

¹⁶³ *Discovery Network*, 507 U.S. at 429.

¹⁶⁴ *Id.* at 419.

¹⁶⁵ 15 U.S.C. § 46(a) (2000).

¹⁶⁶ Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,147 (Jul. 25, 2003) (to be codified at 47 C.F.R. pts. 64, 68); 47 U.S.C. § 227(a)(3) (2000).

¹⁶⁷ 15 U.S.C. § 44 (2000).

in the TCPA to exclude charitable calls,¹⁶⁸ some members of Congress applauded the original rules for not regulating legitimate charities.¹⁶⁹ Senator McConnell, the sponsor of the section of the USA PATRIOT Act that extended the FTC's authority over professional solicitors for nonprofits, asserted that "[w]hen Congress enacted this legislation, it did not envision, nor did it call for, the FTC to propose a federal 'do-not-call' list, and certainly not a list that applied to charitable organizations or their authorized agents."¹⁷⁰

[51] However, it is possible that Congress would support the extension if it were the only way to save the popular registry. Caught between the "rock" of *Mainstream II* and the "hard place" of needing to support charities, legislators might find more comfort with a bifurcated registry that mitigates the harm to charities and gives their constituents more choice in what calls they will or will not receive. If not, they may have to fall back on the safely constitutional,¹⁷¹ but less effective, organization-specific lists, and thus surrender one of the few truly bipartisan triumphs of last year.

¹⁶⁸ Rules and Regulations Implementing the TCPA, 68 Fed. Reg. 44,144.

¹⁶⁹ See, e.g., 149 CONG. REC. H412 (daily ed. Feb. 12, 2003) (statement of Rep. Schakowsky).

¹⁷⁰ Letter from Mitch McConnell, Senator from Kentucky, to the Federal Trade Commission (June 14, 2002), at http://www.ftc.gov/os/comments/dncpapercomments/04/dnc_mcconnell.pdf.

¹⁷¹ See Smolla, *supra* note 6 (discussing *Rowan v. United States Post Office*, 397 U.S. 728 (1970)).