

2004

Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations

Adam Zitter

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Adam Zitter, *Good Laws for Junk Fax? Government Regulation of Unsolicited Solicitations*, 72 Fordham L. Rev. 2767 (2004).

Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss6/13>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

GOOD LAWS FOR JUNK FAX? GOVERNMENT REGULATION OF UNSOLICITED SOLICITATIONS

*Adam Zitter**

INTRODUCTION

Financial crisis. War. Telemarketing.¹ Seeing this threesome, William Shakespeare might muse that “[m]isery acquaints a man with strange bedfellows.”² Barely twenty-four hours after a federal district court ruled on September 23, 2003 that the Federal Trade Commission (“FTC”) lacked explicit congressional authority to implement the national do-not-call registry,³ Congress overwhelmingly passed legislation aimed specifically at countering that conclusion.⁴ In a reference to the fifty million phone lines that

* J.D. Candidate, 2005, Fordham University School of Law. B.A., 2001, University of Pennsylvania. I want to thank Professor Abner Greene for providing me with a background in Supreme Court commercial speech jurisprudence, and for helping me to frame the issues in this Note. I am grateful to my family, Hillary and Bob Zitter, Sarah, Stuart, and Joshua Milstein, and to Elana Koss for all their love and support.

1. See Caroline E. Mayer, *Call List Is Again Blocked in Court: Order Comes After Congress Votes to Protect Registry*, Wash. Post, Sept. 26, 2003, at A1 (“Congress’s action was unusually swift; congressional historians could recall lawmakers previously acting so quickly only in times of financial crisis and war.”).

2. William Shakespeare, *The Tempest* act 2, sc. 2, lines 38-39 (Virginia Mason Vaughan & Alden T. Vaughan eds., *The Arden Shakespeare* 2000) (1623). The quoted passage is uttered by Trinculo, a character who is stranded on an island, as he takes shelter beside a sleeping monster during a storm. Perhaps the saying that “politics makes strange bedfellows” is even more apropos.

3. See *U.S. Security v. FTC*, 282 F. Supp. 2d 1285, 1290-91 (W.D. Okla. 2003) (holding that Congress had only delegated authority to establish a national do-not-call registry to the Federal Communications Commission (“FCC”)—and not to the FTC—by way of the Telephone Consumer Protection Act); *The No-Call Catch-22*, Wash. Post, Sept. 30, 2003, at A18 (“Congress took barely 24 hours to make sure the commission had the power it needs—and President Bush signed the new law yesterday.”).

4. Act of Sept. 29, 2003, Pub. L. No. 108-82, 2003 U.S.C.A.N. (117 Stat.) 1006 (to be codified at 15 U.S.C. § 6102 note) (ratifying the authority of the Federal Trade Commission to establish a do-not-call registry). Congress approved the Act on September 25, 2003. Sheryl Gay Stolberg & Matt Richtel, *Do-Not-Call Listing Remains Up in Air After Day of Twists*, N.Y. Times, Sept. 26, 2003, at A1. President Bush signed the new law on September 29, 2003. Editorial, *The No-Call Catch-22*, *supra* note 3. The Act plainly states, “The Federal Trade Commission is authorized . . . to implement and enforce a national do-not-call registry.” Act of Sept. 29, 2003, § 1(a), 2003 U.S.C.A.N. (117 Stat.) at 1006 (to be codified at 15 U.S.C. §

had been placed on the list since registration began on June 26, 2003,⁵ New York Democratic Senator Charles Schumer seemed to echo the rationale that propelled congressional action: “Fifty million people can’t be all wrong.”⁶

Indeed, the national do-not-call registry and other similar state and federal initiatives that are aimed at curbing or eliminating various forms of unsolicited communications—which, along with telemarketing, include junk faxing⁷ and spamming⁸—currently enjoy enormous popularity with the American public. These initiatives are so popular that Congress treated one of their targeted modes of unsolicited communication—telemarketing—as tantamount to financial crisis or war.⁹

Rapid and resolute as it was, Congress’s successful defense of the national do-not-call registry was also short-lived. On September 25, 2003, the same day that the bill passed the House and Senate,¹⁰ a different federal district court invalidated the do-not-call registry on constitutional grounds.¹¹ Still, the registry’s status remained in limbo

6102 note). Congressional support for the bill was nearly unanimous: it passed by a vote of ninety-five to zero in the Senate and 412 to eight in the House of Representatives. Stolberg & Richtel, *supra*.

5. Stolberg & Richtel, *supra* note 4. By February 2004, more than 57.2 million phone numbers had been placed on the do-not-call registry. Caroline E. Mayer, *National No-Call List Upheld by Court: Judges See No Violation of Telemarketers’ Rights*, Wash. Post, Feb. 18, 2004, at E1.

6. Mayer, *supra* note 1.

7. Junk fax has been described as “the electronic equivalent of junk mail” and “the sending of unsolicited advertisements to telephone facsimile machines.” David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 Buff. L. Rev. 1001, 1001 & n.7 (1997) (citations omitted).

8. Sources commonly attribute the origin of the term “spam” as denoting unsolicited commercial or non-commercial e-mail to a Monty Python skit in which diners try to order from a menu that contains nothing but the canned meat product SPAM. See, e.g., Credence E. Fogo, *The Postman Always Rings 4,000 Times: New Approaches to Curb Spam*, 18 J. Marshall J. Computer & Info. L. 915, 918 (2000) (citing *Monty Python’s Flying Circus: The Spam Sketch* (BBC television broadcast, Dec. 15, 1970)). Fogo explains the connection as follows: “The link between Monty Python’s beleaguered diners and email users is that, as in the sketch, inappropriate, unwanted, and exceedingly numerous spam messages can overwhelm wanted communiqués: legitimate email can become impossible to separate from the spam.” *Id.*

9. See *supra* note 1.

10. For a discussion of the dates of congressional passage and presidential signature, see *supra* note 4.

11. *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1168 (D. Colo. 2003) (holding that the registry burdens only one type of speech—commercial speech—without a “privacy-based or prevention-of-abuse-based reason supporting the disparate treatment of different categories of speech”), *stay denied* by 284 F. Supp. 2d 1266 (D. Colo. 2003), *stay granted* by 345 F.3d 850 (10th Cir. 2003), *rev’d*, 358 F.3d 1228 (10th Cir. 2004); see also *The No-Call Catch-22*, *supra* note 3 (“While the program prohibits commercial telemarketing calls, [the district court judge] ruled, it exempts political and charitable solicitations—thus discriminating against commercial speech.”).

for over four months;¹² it went into effect on October 1, 2003, pending the outcome of the appeal of this second district court ruling.¹³

On February 17, 2004, the Tenth Circuit issued a decision on that appeal, upholding the do-not-call registry.¹⁴ Nevertheless, the legal journey of the registry is not quite over. Telemarketing industry representatives are considering an appeal to the Tenth Circuit en banc or to the Supreme Court.¹⁵

Two questions arise from these circumstances. First, is the national do-not-call registry itself constitutional? Second, what are the implications of the registry's legal troubles for regulation of other unsolicited communications, namely, spam and junk faxing?

The second inquiry is particularly relevant if the national do-not-call registry is indeed constitutional, as the Tenth Circuit has held.¹⁶ Commentators in both the anti-spam and direct marketing communities have considered the possibility that spam may increase as a result of the regulation of telemarketing under the do-not-call registry.¹⁷ Perhaps in light of this consideration, various

12. The federal district court had permanently enjoined the FTC from enforcing the do-not-call registry. *Mainstream Mktg. Servs., Inc.*, 283 F. Supp. 2d at 1171. However, the Tenth Circuit stayed that injunction, permitting the FTC to enforce the registry until the court could decide the case on the merits. *Mainstream Mktg. Servs., Inc.*, 345 F.3d at 861, *staying* 283 F. Supp. 2d at 1151, *rev'd*, 358 F.3d at 1228. In that October 7, 2003 stay opinion, the Tenth Circuit ordered "that the petition for review on the merits be expedited." *Id.* Nevertheless, the Tenth Circuit issued a decision on the merits over four months later, on February 17, 2004. *See infra* note 14 and accompanying text.

13. Matt Richtel, *F.C.C. Plans to Enforce No-Call Rules*, N.Y. Times, Oct. 1, 2003, at C10 ("[The FCC] told a Senate committee yesterday that [it] planned to enforce a national do-not-call registry starting today despite logistical complications caused by a federal judge's ruling."). The FCC was not itself barred from enforcing the registry, because it was not a party to the district court case and the permanent injunction applied to the FTC only. *See Mainstream Mktg. Servs., Inc.*, 283 F. Supp. 2d at 1171 ("The clerk shall enter judgment . . . enjoining the FTC from enforcing the amended Rules . . . creating and implementing a federal do-not-call registry . . ."); Richtel, *supra* ("[T]he F.C.C. said that it would assume enforcement of the registry because it had not been blocked by the courts from doing so."). However, the district court judge complicated the FCC's enforcement plans by ordering the FTC—subsequent to the district court decision—not to share the do-not-call list. *Id.* Such complications became inconsequential, however, with the issuance of the Tenth Circuit's stay opinion. *See supra* note 12.

14. *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1232-33.

15. Mayer, *supra* note 5; David Stout, *Court Upholds Telemarketing Restrictions*, N.Y. Times, Feb. 18, 2004, at C3. However, the Supreme Court may not grant certiorari on such an appeal because there is not yet—and perhaps there will never be—any disagreement between United States courts of appeals on the matter. *Id.*

16. *See supra* note 14 and accompanying text.

17. John B. Kennedy & Trey Hatch, *Recent Developments in Consumer Privacy: Focus on Spam and Identity Theft*, in Fourth Annual Institute on Privacy Law: Protecting Your Client in a Security-Conscious World 1219, 1236 (2003) ("Commentators from both anti-spam and direct marketing sources have offered different predictions on whether spam will increase as a result, or, if so, whether the increase will be perceptible.").

commentators recommended the implementation of a national do-not-spam registry.¹⁸

In accordance with these recommendations, President Bush signed into law on December 16, 2003 the CAN-SPAM Act of 2003,¹⁹ which, among other things, authorizes the FTC to plan and ultimately implement a “nationwide marketing Do-Not-E-Mail registry.”²⁰ But perhaps the enormous quantity of spam,²¹ its estimated annual cost to U.S. corporations,²² and growing Internet user intolerance of the practice²³ call for a more extreme solution to the problem: an outright federal ban on spam. California adopted a state version of such a measure in September 2003.²⁴ However, that law, and others like it

18. See, e.g., Danielle Cisneros, *Do Not Advertise: The Current Fight Against Unsolicited Advertisements*, 2003 Duke L. & Tech. Rev. 10, ¶ 14 (Apr. 29, 2003) (“Taking into account the recent legislation against telemarketing phone calls, it might be an opportune time to institute a ‘Do Not E-Mail’ registry.”), at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0010.html>.

19. CAN-SPAM Act of 2003, Pub. L. No. 108-187, 2004 U.S.C.C.A.N. (117 Stat.) 2699 (to be codified in part at 15 U.S.C. §§ 7701-7713). “CAN-SPAM Act of 2003” is an acronym and alternative title for the “Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003.” *Id.* § 1, 2004 U.S.C.C.A.N. (117 Stat.) at 2699 (to be codified at 15 U.S.C. § 7701 note).

20. *Id.* § 9(a)(1), 2004 U.S.C.C.A.N. (117 Stat.) at 2716 (to be codified at 15 U.S.C. § 7708).

21. Kennedy & Hatch, *supra* note 17, at 1221 (“Unsolicited commercial e-mail, or ‘spam’, now comprises 41% of all Internet e-mail, according to a study by Brightmail, an [sic] software company that blocks spam.”).

22. Kennedy and Hatch describe the yearly cost of spam to U.S. companies as follows:

A study by Ferris Research, [a San Francisco consulting firm,] reported in January 2003, quantifies the annual cost of spam to U.S. corporations at \$8.9 billion. The figure was based on the time it takes for recipients to detect and dispose of messages, as well as the cost to companies of having to dedicate additional servers, bandwidth, and staff time to accommodate unsolicited e-mail.

Id.

23. Kennedy and Hatch discuss the Harris poll that details the popular backlash against spam:

Internet users are increasingly intolerant of spam, according to a Harris poll released in January 2003. The poll found that among those who use e-mail, 80% now find spamming “very annoying”, up from 49% who felt this way in 2000. According to the poll, 74% of e-mail users now favor making mass spamming illegal.

Id.

24. Cal. Bus. & Prof. Code § 17529.2 (West Supp. 2004). The statute states: [A] person or entity may not . . . (a) Initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California . . . [or] (b) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

Id.

that are more aggressive than the federal CAN-SPAM Act,²⁵ have been preempted by the passage of the federal act.²⁶

In designing legislation, governments can approach solicitations²⁷ from two coexistent perspectives. First, pertaining to regulation type, legislators can elect to ban solicitations altogether, or permit the public to opt out of receiving solicitations by signing a government-enforced registry. Second, relating to content base, lawmakers can address either one type of solicitation—e.g., commercial speech—or multiple types simultaneously. These two perspectives produce four distinct possibilities of unsolicited solicitation regulation.

This Note examines which of these four possibilities are constitutional under the First Amendment, insofar as they involve state and federal regulations of unsolicited fax, e-mail, and telephone solicitations. The question is particularly intriguing given the Supreme Court's historic distaste for content-based regulations,²⁸ its apparent likelihood of invalidating bans on unsolicited solicitations,²⁹ its evolution towards near-strict scrutiny protection of commercial speech,³⁰ its tendency to guard residential privacy,³¹ and its embrace of both government facilitation of consumer choice and government speech.³²

This Note approaches the regulations of unsolicited communications categorically, with each category embodying a

25. The California law bans all unsolicited commercial e-mail, whereas the federal law regulates fraudulent or deceptive messages only. See *infra* notes 146-47 and accompanying text.

26. CAN-SPAM Act of 2003, Pub. Law. No. 108-187, § 8(b)(1), 2004 U.S.C.C.A.N. (117 Stat.) at 2716 (to be codified at 15 U.S.C. § 7707). The preemption provision states:

This Act supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.

Id.

27. As used in this Note, the term "solicitation" denotes a request for money. However, there are at least three different types of solicitations: (1) solicitations for a product or service, such as a request to purchase encyclopedias; (2) solicitations for a political cause, such as a request to support financially President Bush's reelection campaign; and (3) solicitations for charity, such as a request to donate money to the March of Dimes. This Note addresses scenarios where such solicitations are "unsolicited"—that is, without prior invitation by the recipient. Thus, the phrase "unsolicited commercial speech" implicates solicitation type one only—i.e., that for a product or service. When the Note speaks of "all unsolicited speech," it refers to solicitation types one, two, and three collectively.

28. See *infra* notes 157-65 and accompanying text.

29. See *infra* notes 203-08 and accompanying text.

30. See *infra* notes 167-88 and accompanying text.

31. See *infra* notes 101-03, 234-36 and accompanying text.

32. See *infra* Part II.B.3.

unique combination of regulation type³³ and degree of content focus.³⁴ In Category I, federal bans on all unsolicited solicitations—including federal prohibitions on all residence-targeted telemarketing, all unsolicited bulk e-mail, and all unsolicited faxing—would be held constitutional by the Supreme Court.³⁵ In contrast, Category II regulations—involving federal bans on unsolicited commercial solicitations only—would be invalidated by the Court.³⁶ Moreover, Category III's federal opt-out systems pertaining to all unsolicited speech do not offend the Constitution.³⁷ However, the federal opt-out systems that concern commercial speech only, as addressed by Category IV, would not survive Supreme Court scrutiny.³⁸

Despite these findings, however, this Note recommends that the federal government should not adopt a junk fax provision that is more aggressive than the current law because the decline in junk fax following the adoption of that law renders such a measure unnecessary.³⁹ This Note also urges a cautionary approach to telemarketing regulation beyond the national do-not-call registry, in order to allow the registry to reveal its potential for success over time.⁴⁰ Yet in the case of spam, this Note advocates the expeditious adoption of a federal ban on all spam and presents an argument for the constitutionality of such a ban.⁴¹

I. FORMS OF UNSOLICITED COMMUNICATION AND THE GOVERNMENT MEASURES THAT ADDRESS THEM

This part first examines three different types of unsolicited communication: telemarketing, junk faxing, and spam. It then analyzes the various forms of statutory regulation of such modes of unsolicited communication, beginning with a look at the government interests involved, followed by a discussion of some measures taken by state and federal governments.

33. Categories I and II involve outright federal bans. Categories III and IV address opt-out systems.

34. Categories II and IV relate to regulations of unsolicited commercial speech only. Categories I and III concern regulations of all unsolicited speech regardless of content.

35. *See infra* Part III.B.1.

36. *See infra* Part III.B.2.

37. *See infra* Part III.C.1.

38. *See infra* Part III.C.2.

39. *See infra* Part III.D.1.

40. *See infra* Part III.D.2.

41. *See infra* Part III.D.3.

A. *The Various Modes of Unsolicited Communication*

1. Telemarketing

Of the three different types of unsolicited communication addressed in this Note, telemarketing is unique in that, despite its numerous opponents, it nevertheless provides a quantifiably significant economic benefit. In 2002, telemarketing was estimated to be a \$668 billion-a-year industry, providing six million jobs.⁴² One of the eight representatives to vote against the do-not-call legislation that sped through Congress was Representative Lee Terry (R-NE), who claimed that the telemarketing industry is the source of jobs, whether directly or indirectly, for 39,000 of his constituents.⁴³ Terry explained, “I understand it’s annoying But I come from a district where that annoyance is putting bread on somebody’s table.”⁴⁴

Still, those who must interrupt their own bread-breaking to answer a telemarketer’s call are voicing their disgust. With eighty to ninety percent of all large businesses currently engaging in telemarketing,⁴⁵ telemarketing industry representatives estimate that the average consumer received 2.64 telemarketing calls per week prior to the implementation of the do-not-call registry, which translated into 137 calls annually.⁴⁶ This inundation of telemarketing calls earned telemarketing a fourth-ranked spot on Time magazine’s poll of the 100 worst ideas of the twentieth century.⁴⁷ It also spawned a huge grassroots response to register for the national do-not-call list.⁴⁸

42. Patricia Pattison & Anthony F. McGann, *State Telemarketing Legislation: A Whole Lotta Law Goin’ On!*, 3 Wyo. L. Rev. 167, 171 (2003). Telemarketing industry representatives claim the industry currently employs six-and-a-half million people. Stout, *supra* note 15. Though the junk fax and spam industries clearly are sources of employment, the literature is silent on this fact, suggesting that the numbers of jobs they each respectively provide pale in comparison to that of the telemarketing industry.

43. Stolberg & Richtel, *supra* note 4. Telemarketing industry representatives predict that the national do-not-call registry will force the layoff of up to two million telemarketers. Stout, *supra* note 15.

44. Stolberg & Richtel, *supra* note 4.

45. Pattison & McGann, *supra* note 42, at 171.

46. *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1240 (10th Cir. 2004). Another source estimates that the average household receives over nineteen calls annually, but that figure is from 2000. See Pattison & McGann, *supra* note 42, at 171 (citing Philip Kotler, *Marketing Management* 661 (10th ed. 2000)). Even if the latter estimate was accurate when current, the discrepancy most likely reflects the five-fold increase in telemarketing calls between 1991 and 2003. See Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44144, 44152 (July 25, 2003) (to be codified at 47 C.F.R. pts. 64 & 68); *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1240.

47. Ian Ayres & Matthew Funk, *Marketing Privacy*, 20 Yale J. on Reg. 77, 79 (2003).

48. *The Do Not Call Registry: A New Internet Democracy?*, Economist, July 26, 2003, at 32, 32. The advent of computerized “predictive dialers” in the late 1990s

2. Junk Faxing

If the telemarketing debate is characterized by two distinctly cogent arguments, namely, economic benefit and annoyance, the practice of junk faxing suffered a relatively quick and quiet demise. Even prior to the current legislative constraints on junk faxing, the practice suffered from inherent limitations of the kind to which e-mail and telemarketing—at least subsequent to the development of so-called “predictive dialers”—are immune.⁴⁹ After all, a fax advertiser was restricted in the number of faxes it could send by the number of telephone lines the advertiser leased.⁵⁰

Still, the various costs and inconveniences suffered by the junk fax recipient⁵¹ effected the congressional passage of the Telephone Consumer Protection Act of 1991 (“TCPA”), which, among other things, banned altogether unsolicited fax advertising.⁵² Although its constitutionality has been challenged, the TCPA’s fax provision remains good law,⁵³ and the prevalence of junk faxing has experienced a dramatic decline.⁵⁴

increased the time telemarketers spent talking to a person from twenty minutes an hour to fifty minutes. *Id.* Such technology operates by dialing numerous phone numbers at once and ferreting out disconnected phone lines, faxes, and answering machines. *Id.* When the system determines that it has made contact with a live person, it transfers the call to a salesperson or disconnects the call if none is available. *Id.* Predictive dialers angered telemarketing recipients and led to the do-not-call registry. *Id.*

49. See Sorkin, *supra* note 7, at 1012 (describing the ease and economy of sending bulk e-mail); see also *supra* note 48 (discussing the effectiveness of predictive dialers, which enabled telemarketers to reach a larger audience than ever before).

50. Sorkin, *supra* note 7, at 1012.

51. Junk fax recipients must bear the costs of supplying paper and toner to produce the fax. *Id.* at 1008-09. They are also inconvenienced insofar as they must take time to identify and discard unwanted faxes, an inconvenience similar to that presented by direct mail. *Id.* at 1011. However, see *infra* notes 203-06 and accompanying text for an explanation of why unsolicited commercial direct mail has not been banned despite the inconvenience it poses to the recipient. Furthermore, the unsolicited fax occupies the recipient’s fax machine, barring the sending or receipt of other faxes while the advertisement is being processed. Sorkin, *supra* note 7, at 1011.

52. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2000). Outlining the scope of the ban, the statute defines unsolicited fax advertising:

The term ‘unsolicited advertisement’ means 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. . . . It shall be unlawful for any person within the United States . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine . . .

Id. § 227(a)(4), (b)(1)(C); see also Sorkin, *supra* note 7, at 1016-17 (discussing the legislative history of the TCPA).

53. See *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (8th Cir. 2003) (holding that the TCPA fax provision satisfies the constitutional test for regulation of commercial speech); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 57 (9th Cir. 1995) (holding that the TCPA fax provision was a valid content-based restriction on

3. Spam

Unlike the current state of junk fax, the amount of spam is anything but dwindling. Spam currently comprises sixty percent of all e-mail traffic.⁵⁵ Estimates indicate that daily spam numbers twenty-five million messages.⁵⁶ In fact, at least one commentator has argued that if left unchecked, spam threatens to undermine the entire e-mail communication system.⁵⁷ Reflecting this assertion, a recent poll has indicated that spam is already causing twenty-five percent of respondents to curtail their e-mail usage.⁵⁸ According to another poll, eighty percent of e-mail users find spam “very annoying.”⁵⁹

Spam is often defined either as unsolicited commercial e-mail (“UCE”) or unsolicited bulk e-mail (“UBE”).⁶⁰ The latter definition

commercial speech); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169 (S.D. Ind. 1997) (holding that the TCPA fax provision is narrowly tailored to the government’s interest in protecting consumers from cost-shifting and from interruption of their ability to use their fax machines, and therefore did not violate the First Amendment’s protection of commercial speech).

54. Robert G. Gibbons & Lisa M. Ferri, *Mail Control: Filtering Spam Through a Mix of Technology, Legislation and the Courts*, *Intell. Prop. Today*, Dec. 2001, at 6, 8.

55. Jonathan Krim, *Senate Votes 97-0 to Restrict E-Mail Ads: Bill Could Lead to No-Spam Registry*, *Wash. Post*, Oct. 23, 2003, at A1.

56. Kenneth C. Amaditz, *Canning “Spam” in Virginia: Model Legislation to Control Junk E-mail*, 4 *Va. J.L. & Tech.* 4, ¶ 3 (Spring 1999), at http://www.vjolt.net/vol4/issue/home_art4.html. Another estimate differed, stating that in January 2003 alone, over six million distinct spam attacks occurred. Cisneros, *supra* note 18, ¶ 11. Regardless of which statistic better reflects the reality, it is clear that the quantity of spam is sizeable.

57. *See* Amaditz, *supra* note 56, ¶ 19. There are a variety of spam-related consequences that may cause e-mail users to cease communicating via e-mail and thereby destroy the medium’s utility. Included in such consequences are system delays, users’ unwillingness to sift through an excessive number of messages, and users’ resort to deletion of e-mail from unknown addresses. *Id.*

58. Krim, *supra* note 55 (citing a poll released on October 22, 2003 by the Pew Internet and American Life Project, a nonprofit research organization). A research associate at the Telecommunications Research and Action Center—a nonprofit group that supplemented the Pew study—discussed the curbing of e-mail usage as a symptom of e-mail’s potential obsolescence: “The ever-increasing flood of spam is causing consumers to turn away from e-mail as a means of communication Many people we hear from are contemplating getting off the Internet altogether.” Katie Hafner, *A Change of Habits to Elude Spam’s Pall*, *N.Y. Times*, Oct. 23, 2003, at G1.

59. Kennedy & Hatch, *supra* note 17, at 1221 (citing a Harris poll released in January 2003).

60. David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 *U.S.F. L. Rev.* 325, 328 & n.11 (2001). The critical element of practically all definitions of spam is that it is “unsolicited.” *Id.* at 328. An unsolicited communication is one where the sender and recipient share no prior relationship, and the recipient has not provided explicit consent to receive the communication. *Id.* Alternatively, an unsolicited communication can be one where the recipient has previously attempted to terminate the relationship, often by ordering the sender to send no further communications. *Id.* at 328-29. Regarding UCE, a “commercial” message is typically defined as one that “promotes the sale of goods or services.” *Id.* at 329-30.

includes not only UCE but also the many forms of non-commercial spam, including “charitable fundraising solicitations, opinion surveys, religious messages, political advertisements, wartime propaganda, virus hoaxes and other urban legends, chain letters, and hate e-mail.”⁶¹ Despite this distinction, the greatest amount of UBE comes in the form of commercial advertisements.⁶² Nevertheless, the distinction proves to be important in the context of regulations on spam that discriminate on the basis of subject matter.⁶³

Spam has persisted for two reasons: it is highly inexpensive to send, which, in turn, enables it to be cost-effective despite being an otherwise ineffective method of direct marketing.⁶⁴ There is no per-message charge to send e-mail.⁶⁵ As a result, a spammer’s costs are confined to equipment costs, a monthly rental fee for an e-mail account, and the price of a mailing list.⁶⁶ As one commentator has demonstrated, if a spammer can send an e-mail advertisement to one

61. *Id.* at 333 (citations omitted).

62. *Id.*

63. For a discussion of subject matter discrimination in the context of commercial speech, see *infra* Part II.A. See, e.g., *Carey v. Brown*, 447 U.S. 455, 471 (1980) (holding that an Illinois statute, which banned residential picketing other than peaceful picketing of a place of employment involved in a labor dispute, violated the Equal Protection Clause because the statute discriminated against pickets on the basis of the subject matter of their expression); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 94 (1972) (invalidating a Chicago ordinance prohibiting all picketing within 150 feet of any primary or secondary school except peaceful picketing of a school involved in a labor dispute). The *Mosley* Court explained:

The central problem with Chicago’s ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school’s labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.

Id. at 95. The federal district court ruling against the national do-not-call registry on constitutional grounds is based on a theory of subject matter discrimination. See *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1163 (D. Colo. 2003) (“[T]he FTC, by exempting charitable solicitors from the [national] do-not-call registry, has imposed a content-based limitation on what the consumer may ban from his home.”), *stay denied* by 284 F. Supp. 2d 1266 (D. Colo. 2003), *stay granted* by 345 F.3d 850 (10th Cir. 2003), *rev’d*, 358 F.3d 1228 (10th Cir. 2004).

64. See *Amaditz*, *supra* note 56, ¶ 18; *Sorkin*, *supra* note 60, at 337-38. Spam persists because its uniquely affordable nature permits a disregard of factors that are essential considerations in other forms of communication:

In most forms of communication, the sender experiences significant and, usually, measurable costs. Therefore, the sender usually has an incentive to compare the expected benefits of the communication against these costs in deciding whether to proceed with the communication, and, in the case of an advertisement, how broad or narrow a group of prospects to target. E-mail changes the entire equation because the cost of sending unsolicited bulk e-mail is negligible.

Id. at 338 (citations omitted).

65. *Amaditz*, *supra* note 56, ¶ 18.

66. *Id.*

million people at a cost of only \$100, he will make a profit even if just one customer in 10,000 responds.⁶⁷ He is indifferent to the annoyance to the other 9999 recipients.⁶⁸

Unlike telemarketing, which provides some clear economic benefits, spam “has few redeeming features to balance [its] substantial costs.”⁶⁹ Though many objections to spam cite its content as the problem,⁷⁰ it presents another significant—and legally relevant—concern: spam shifts measurable marketing costs to the middleman and recipient.⁷¹ Spam consumes network bandwidth, memory, and storage space.⁷² Moreover, Internet users and system administrators must take time to read, delete, filter, and block spam.⁷³ On the individual user level, the cost-shifting problem affects most directly those Internet users who incur Internet access charges on the basis of time spent online.⁷⁴ These costs are hardly negligible; one recent study assessed the annual cost of spam to U.S. corporations at \$8.9 billion.⁷⁵

At least as far as the individual spam recipient is concerned, there is little recourse to combat the spam problem. Recipients’ requests to the sender to opt out of unsolicited communications are uniquely ineffective in the spam context because of the absence of incremental costs.⁷⁶ Moreover, there have been few spam-related lawsuits involving individual recipients of spam since the first such suit was brought in 1995.⁷⁷ The lack of individual self-help remedies raises the

67. *Id.*

68. *Id.*

69. Sorkin, *supra* note 60, at 337.

70. *Id.* at 336 (noting that some spam recipients object to commercial messages altogether, while others are troubled by those messages containing sexually explicit material or carrying virus-infected file attachments or embedded code).

71. *See id.* at 336-37.

72. *Id.* at 336.

73. *Id.* at 336-37.

74. *See id.* at 337 & n.49.

75. Kennedy & Hatch, *supra* note 17, at 1221 (“The figure was based on the time it takes for recipients to detect and dispose of messages, as well as the cost to companies of having to dedicate additional servers, bandwidth, and staff time to accommodate unsolicited e-mail.”). A 2001 study of the European Union put the total cost to Internet users of spam worldwide at \$9.4 billion. Gibbons & Ferri, *supra* note 54, at 6.

76. Sorkin, *supra* note 60, at 352 (stating that the incremental costs of each communication in the context of other modes of direct marketing—direct mail and telemarketing—provide marketers with sufficient incentive to honor opt-out requests). Not only are opt-out requests not honored in the spam context, but some spammers sell lists of e-mail addresses belonging to those people who have attempted to opt out. *Id.* at 352-53. Furthermore, the enormous number of potential spammers renders sender-specific opt-out attempts futile. *Id.* at 353.

77. *Id.* at 357-58 (discussing *Arkow v. CompuServe*, a case that was ultimately settled out of court in which the plaintiff argued that the fax provision in the TCPA was broad enough to include computers that send and receive e-mail); Gibbons & Ferri, *supra* note 54, at 8 (stating that relatively few suits have been filed against spammers by individual recipients, and only under recent state anti-spam laws are

question: What are state and federal governments doing to combat the problems posed by spam, as well as by telemarketing and junk faxing?

B. *Statutory Regulation of Telemarketing, Spam, and Junk Fax*

1. Governmental Interests

a. *Consumer Protection Against Fraud and Prohibiting Trespass to Chattel*

There are various grounds posited to justify state regulation of unsolicited communications, including (1) consumer protection against fraud, (2) prohibiting trespass to chattel, (3) prevention of cost-shifting, and (4) protection of residential privacy.⁷⁸ With respect to consumer protection against fraud, the Supreme Court has held that government regulations of false and deceptive advertising do not violate the First Amendment.⁷⁹ Regarding trespass to chattel, some courts have held spammers liable for overburdening the computers of Internet service providers (“ISPs”) and their customers, the spam recipients.⁸⁰ As if to preempt the suggestion that, by opening an e-

individuals beginning to collect damage awards or negotiate settlements). One commentator attributes the small number of individual actions to the relatively small damages available and the difficulty for an individual to prove actual damages. Sorkin, *supra* note 60, at 358 n.158. Internet service providers (“ISPs”) typically find themselves in a better position to demonstrate significant damages than do individual spam recipients. *Id.*

78. See Amaditz, *supra* note 56, ¶¶ 21-33.

79. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (“Advertising that is false, deceptive, or misleading of course is subject to restraint.”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976). The *Virginia State Board of Pharmacy* Court stated:

Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Id. (citation omitted); see also Amaditz, *supra* note 56, ¶ 29 (arguing that because the Supreme Court has permitted governmental regulation of false and deceptive advertising, such regulation will likely be upheld).

80. See, e.g., *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (holding that the defendant-spammer’s e-mails occupied disk space and drained the processing power of CompuServe’s computers, thereby damaging the value of that computer equipment to CompuServe); see also *Intel Corp. v. Hamidi*, 71 P.3d 296, 300-01 (Cal. 2003) (acknowledging a trespass-to-chattels-based remedy for ISPs, but finding that such a theory is not satisfied by the facts of this case). One commentator has suggested that this remedial theory is derived from a Supreme Court decision, which held that if the Court did not uphold a federal law that permitted an unwilling recipient to bar a direct mailer from filling his mailbox, it would “tend to license a form of trespass.” *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 737 (1970); Amaditz, *supra* note 56, ¶ 30 (citing *Rowan*, 397 U.S. at 737).

mail account, an e-mail user willingly subjects himself to such trespasses, the California Supreme Court has stated, "A private actor . . . has no obligation to hear all messages just because he chooses to hear some."⁸¹ While consumer protection against fraud and trespass to chattel are reasonable interests, avoidance of cost-shifting and guarding of residential privacy are the governmental interests of greatest significance and relevance to the inquiry of this Note.⁸²

b. *Prevention of Cost-Shifting*

As stated above, spam shifts advertising costs to e-mail users.⁸³ But that is not the only mode of unsolicited communication that imposes costs on recipients. Recall that one of the primary reasons for passage of the TCPA was the costs imposed on junk fax recipients.⁸⁴ These costs take in the form of paper and toner to produce the fax document, time needed to identify and discard unwanted faxes, and temporary inability to send or receive faxes.⁸⁵ In upholding the TCPA fax provision, one federal appeals court cited such costs as the basis for finding a substantial governmental interest in restricting unsolicited fax advertisements.⁸⁶ As one commentator emphasized regarding the legitimacy of cost-shifting as a significant government

81. *Hamidi*, 71 P.3d at 316.

82. In light of the Supreme Court's acceptance of consumer protection against fraud, *see supra* note 79 and accompanying text, there is little more to comment on on that matter. Moreover, not all unsolicited solicitations involve fraudulent activity. As for the relative insignificance of protection from trespass to chattel in this context, it is owing to the infrequent application by courts and discussion by commentators of such a concept. By way of contrast, cost-shifting and invasion of residential privacy represent paramount concerns because they are well-established and oft-mentioned in legal opinions, scholarly literature, and public discussion.

83. *See supra* notes 71-75 and accompanying text.

84. *See supra* notes 51-52 and accompanying text. Note that telemarketing appears not to entail any mentionable degree of cost-shifting. As implicit evidence of this, the TCPA addressed what is arguably the one form of telephone call reception that involves cost-shifting, aside from collect calls, in which case the recipient is forewarned. The TCPA banned any form of telemarketing that employs an automatic dialing system or an automated or prerecorded voice where that telemarketing is directed at a device for which the recipient gets charged to receive a call, such as a cell phone. 47 U.S.C. § 227(b)(1)(A)(iii) (2000).

85. Sorkin, *supra* note 7, at 1008-09, 1011.

86. *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003). The *American Blast Fax* court noted the following regarding junk fax cost shifting:

There was evidence that unsolicited fax advertisements can shift to the recipient more than one hundred dollars per year in direct costs, that it takes thirty seconds for a one page fax to be received, that most machines can still only receive one fax at a time, that currently eighty percent of all faxes are printed on paper, and that unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail systems.

Id.

interest, “[a federal appeals court] found that cost-shifting was an interest sufficient enough to support an advertising ban on an entire communications medium—the fax machine.”⁸⁷

Recognizing that the fax machine shifts costs to recipients in a way that makes the TCPA ban on junk fax compelling, one commentator has argued that spam inflicts an even greater burden on recipients.⁸⁸ This is true despite the fact that the burden presented by an individual spam e-mail is less than that imposed by an unsolicited fax.⁸⁹ The critical difference, argues the commentator, lies in the total number of spam e-mails that can be sent, as compared to the lesser number of junk faxes to which a junk faxer is constrained.⁹⁰

Spamming shifts costs to some individual e-mail users, ISPs, and employers generally.⁹¹ As mentioned above, one study placed the total annual cost of spam to U.S. corporations at \$8.9 billion.⁹² This estimate was compiled based on the time it takes for e-mail users to

87. Amaditz, *supra* note 56, ¶ 22 (referring to the decision in *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995), in which the Ninth Circuit upheld the TCPA fax provision).

88. Sorokin, *supra* note 7, at 1008.

89. *Id.*

90. *Id.* at 1008, 1012 (“Unsolicited e-mail advertising is likely to be a burden to computer users because of the sheer number of such messages that they receive, rather than simply because of the cost or inconvenience involved in receiving and deleting a single message.”); see *supra* note 50 and accompanying text.

91. See Amaditz, *supra* note 56, ¶¶ 11, 23; Sabra-Anne Kelin, *State Regulation of Unsolicited Commercial E-Mail*, 16 Berkeley Tech. L.J. 435, 437 (2001). The e-mail users affected are those whose subscription fee charges are based on time spent online. Amaditz, *supra* note 56, ¶¶ 11, 23. They incur greater costs than they otherwise would by taking time to identify and delete unwanted spam. *Id.* (stating that some analysts estimate that spam consumes as much as \$2 of such e-mailers’ average monthly fee). Amaditz concedes that it is more difficult to demonstrate cost-shifting to the individual user in situations where the user does not pay a flat monthly fee or receives free e-mail. *Id.* ¶ 23. He submits that despite the inconveniences imposed by spam, the fact that such fee arrangements prevent e-mail subscribers from suffering any measurable cost-shifting might lead a court confronted by e-mailer complainants with flat-fee or free subscriptions to find that such inconveniences are reasonable burdens to bear for the sake of protecting First Amendment freedoms. *Id.* Employers suffer the financial consequences of wasted employee time when an individual undertakes the process of sorting, reading, and discarding spam, as well as attempting to prevent future UCE while at work. *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258, 267 (Ct. App. 2002). Although these are not direct costs but only opportunity costs, at least one judge has acknowledged that for companies, “‘time is money’ nonetheless.” *Intel Corp. v. Hamidi*, 71 P.3d 296, 322 (Cal. 2003) (Brown, J., dissenting). Furthermore, one commentator has asserted that a reasonable argument can be made that those e-mail users who pay flat monthly fees also suffer the burdens of cost-shifting, as ISPs translate their own additional costs into higher monthly rates. Amaditz, *supra* note 56, ¶ 23 n.120. Still, the commentator concludes that courts are likely to afford the government little leeway in its efforts to protect such consumers. *Id.*

92. See *supra* note 75 and accompanying text. The Ferris Research study, released in January 2003, has received attention from respectable sources. For example, it is included among the findings that serve as the basis for the California anti-spam law passed recently. See Cal. Bus. & Prof. Code § 17529(d) (West Supp. 2004).

identify and discard spam, along with the costs companies incur by devoting additional servers, bandwidth, and employee time to deal with spam.⁹³ One state anti-spam statute helps to put spammers' cost-shifting in perspective, saying that it is similar to "sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone."⁹⁴ Notably, the TCPA prohibits the latter.⁹⁵

c. Protection of Residential Privacy

One of Congress's stated purposes in enacting the TCPA was "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home."⁹⁶ Similarly, in establishing the national do-not-call registry, the FTC asserted that it has a substantial interest in protecting residential privacy.⁹⁷ The Supreme Court has routinely grounded holdings in the fundamental aspect of the home as a refuge from undesired communications.⁹⁸ Although the extent to which a state can

93. Kennedy & Hatch, *supra* note 17, at 1221. An analyst at Ferris Research explained the rough methodology of the study and cost-breakdown as follows: it takes an average of 4.4 seconds to deal with a message, yielding a total cost of \$4 billion dollars annually in lost productivity for U.S. businesses. Anick Jesdanun, *Spam Costs U.S. Firms About \$8.9 Billion Annually, Study Says*, AP Online (Jan. 5, 2003), at <http://news.spamcop.net/pipermail/spamcop-list/2003-January/029374.html>. Another \$3.7 billion is attributed to companies' need to purchase more powerful servers, additional bandwidth, and divert employee time. *Id.* The final \$1.2 billion is derived from organizations' need to offer help-desk support to annoyed users. *Id.* Just as claims of cost-shifting by flat-fee or free-subscription e-mail users may not prevail in court, *see supra* note 91, some of these non-tangible factors, such as the costs a company incurs by diverting staff time in order to deal with spam, may be rejected by a court.

94. Cal. Bus. & Prof. Code § 17529(h).

95. *See supra* note 84.

96. S. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968; *see also* Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd., 975 F. Supp. 329, 330 (S.D.N.Y. 1997) (stating that the TCPA was enacted, in part, to protect the privacy interests of residential telephone subscribers by restricting unsolicited automated phone calls to the home).

97. Mainstream Mktg. Servs., Inc. v. FTC, 283 F. Supp. 2d 1151, 1164 (D. Colo. 2003), *stay denied by* 284 F. Supp. 2d 1266 (D. Colo. 2003), *stay granted by* 345 F.3d 850 (10th Cir. 2003), *rev'd*, 358 F.3d 1228 (10th Cir. 2004). The district court in this case held that "[t]he FTC's asserted interest in protecting privacy in the home is sufficiently substantial to justify a restriction in speech" so long as the do-not-call registry satisfied the requirements for commercial speech restriction as defined by *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *Mainstream Mktg. Servs., Inc.*, 283 F. Supp. 2d at 1164.

98. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 487-88 (1988) (upholding a town ordinance that banned picketing before or about any residence because such picketing was held to be intrusive and therefore the ordinance was narrowly tailored and constitutional); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (holding that the FCC's determination that a profanity-laced George Carlin monologue broadcast over radio in the middle of the afternoon merited a notation in the radio station's file did not violate the station's First Amendment rights, in part because broadcasts extend into the privacy of the home and it is impossible to completely avoid those that are

protect residential privacy is not clear,⁹⁹ protection of residential privacy—including that threatened by telemarketing¹⁰⁰—appears to constitute a strong governmental interest.

In fact, the Supreme Court has said as much: “The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.”¹⁰¹ The Court has specifically stated that “[o]ne important aspect of residential privacy is protection of the unwilling listener.”¹⁰² Moreover, in a case involving a profanity-laced radio monologue broadcast in the middle of the afternoon, the Supreme Court stated in dicta a point that is particularly supportive of a governmental interest in protecting privacy in the face of telemarketing:

To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.¹⁰³

blatantly offensive). *But see* *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that the state may not, under the First and Fourteenth Amendments, criminalize the public display of a jacket bearing an expletive, explaining that people are often captive audiences outside their homes and subject to objectionable speech). The Supreme Court has recognized that, in many cases, government may legislate to prohibit intrusion of unwelcome views and ideas into residential privacy. *Id.*

99. *Amaditz*, *supra* note 56, ¶ 24.

100. It is arguably difficult to make a protection of privacy argument in the context of spam or junk fax regulation. One commentator has suggested that “[i]n the spam context, the privacy interest could support anti-spam legislation that protects individuals” and that one Ninth Circuit case, *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995) (upholding the TCPA’s ban on prerecorded or automated telemarketing calls to residential phone lines), indicates that protection of residential privacy could support a complete ban on spam. *Amaditz*, *supra* note 56, ¶ 28. The invasions of privacy posed by spam and junk fax—including exposure to offensive material and identifying and discarding unwanted communications—are akin to those presented by unsolicited commercial direct mail, which the Supreme Court has held are reasonable burdens for a recipient to endure under the Constitution. *See infra* notes 203-06 and accompanying text (discussing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983)). It is conceivable that the temporary interference with a recipient’s use of his own fax machine caused by junk fax constitutes an invasion of privacy. However, the costs shifted by junk fax are a more concrete and compelling factor on which to base a need for regulation of the practice. Therefore, this Note focuses on protection of residential privacy only as it applies to telemarketing. It will deal with cost-shifting as the primary governmental interest implicated in spam and junk fax regulations.

101. *Carey v. Brown*, 447 U.S. 455, 471 (1980).

102. *Frisby*, 487 U.S. at 484.

103. *Pacifica*, 438 U.S. at 748-49. The Court’s holdings in two prominent unsolicited advertising cases, *Bolger*, 463 U.S. at 75 (holding that a federal law, which prohibited the unsolicited mailing of information concerning contraceptives was unconstitutional under the First Amendment right to free speech), and *Rowan v. United States Post Office Department*, 397 U.S. 728, 738 (1970) (holding that a federal law permitting individuals to require that direct mailers remove such individuals’ names from the mailers’ mailing lists and refrain from all future mailings to those

This language suggests that the governmental interest in protecting residential privacy justifies legislation in the area of residence-targeted telemarketing. Hanging up on telemarketers does not sufficiently preserve the home as a refuge.

2. Government Regulation

a. State Statutes

Because there are already federal statutes in place that regulate e-mail and junk fax, this section will only consider state statutes that regulate spam.

In July 1997, Nevada became the first state to enact anti-spam legislation.¹⁰⁴ Currently, thirty-six states have spam statutes.¹⁰⁵ Most state laws can be described as opt-out systems, permitting unsolicited

individuals was constitutional), will be discussed below. *See infra* notes 197-206 and accompanying text.

104. Kelin, *supra* note 91, at 445.

105. *See* Alaska Stat. § 45.50.479 (Michie Supp. 2003); Ariz. Rev. Stat. Ann. § 44-1372 to .05 (West Supp. 2003); Ark. Code Ann. §§ 4-88-601 to -607, 5-41-205 (Michie Supp. 2003); Cal. Bus. & Prof. Code §§ 17529-.9, 17538.45 (West Supp. 2004); Colo. Rev. Stat. § 6-2.5-101 to -105, 13-6-105, 13-6-403 (2003); Conn. Gen. Stat. Ann. §§ 52-59(b), 53-451 to -453 (West 2001 & Supp. 2003); Del. Code Ann. tit. 11, §§ 931, 937-938 (2001); Idaho Code § 48-603E (Michie 2003); 720 Ill. Comp. Stat. Ann. 5/16D-1 to -3 (West 2003); 815 Ill. Comp. Stat. Ann. 511/1 to /15 (West Supp. 2003); Ind. Code Ann. § 24-5-22-1 to -10 (Michie Supp. 2003); Iowa Code Ann. §§ 714E.1-2 (West 2003); Kan. Stat. Ann. § 50-6,107 (Supp. 2002); La. Rev. Stat. Ann. § 14:73.1, .6, .106(A)(7) (West Supp. 2004); Me. Rev. Stat. Ann. tit. 10, § 1497 (West Supp. 2003); Md. Code Ann., Com. Law II §§ 14-3001 to -3003 (Supp. 2002); Mich. Comp. Laws Ann. §§ 445.2501-.2508 (West Supp. 2003); Minn. Stat. Ann. § 325F.694 (West Supp. 2004); Mo. Ann. Stat. § 407.1120-.1132 (West 2001); Act of July 11, 2003, ch. 407, 2003 Mo. Legis. Serv. 710 (West); Nev. Rev. Stat. Ann. 41.705-.735 (Michie 2002 & Supp. 2003); Nev. Rev. Stat. Ann. § 205.492, .498, .511, .513 (Michie 2001 & Supp. 2003); N.M. Stat. Ann. § 57-12-23 to -24 (Michie Supp. 2003); N.C. Gen. Stat. §§ 1-75.4, 1-539.2A, 14-453, 14-458 (2003); N.D. Cent. Code § 51-27-01 to -09 (Supp. 2003); Ohio Rev. Code Ann. § 2307.64 (Anderson Supp. 2002); Okla. Stat. Ann. tit. 15, § 776.1-7 (West Supp. 2004); Act of Sept. 17, 2003, ch. 759, 2003 Or. Laws 1 (amending and adding provisions to Or. Rev. Stat. § 646.607), available at <http://www.leg.state.or.us/03orlaws/0759.pdf>; 18 Pa. Cons. Stat. Ann. §§ 5903, 7661 (West 2000 & Supp. 2003); 73 Pa. Cons. Stat. Ann. §§ 2250.1-8 (West Supp. 2003); R.I. Gen. Laws § 6-47-2 to -3 (2001); R.I. Gen. Laws § 11-52-1 to -3, -4.1 to -7 (2002); S.D. Codified Laws § 37-24-6, -36 to -40 (Michie 2003); Tenn. Code Ann. §§ 47-18-2501 to -2502 (2001 & Supp. 2003); Tex. Bus. & Com. Code Ann. § 46.001-.011 (Vernon Supp. 2004); Utah Code Ann. § 13-36-101 to -105 (Supp. 2003); Va. Code Ann. § 8.01-328.1 (Michie 2000 & Supp. 2003); Va. Code Ann. §§ 18.2-152.2, .3:1, .4, .12, .16 (Michie Supp. 2003); Wash. Rev. Code Ann. §§ 19.190.010-.050 (West 1999 & Supp. 2004); W. Va. Code Ann. § 46A-6G-1 to -5 (Michie 1999); Wis. Stat. Ann. § 944.25 (West Supp. 2003); Wyo. Stat. Ann. § 40-12-401 to -404 (Michie 2003); *see also* David E. Sorkin, Spam Laws, at <http://www.spamlaws.com/state/index.html> (last modified Dec. 16, 2003). Professor David E. Sorkin's website, <http://www.spamlaws.com>, provides a comprehensive discussion of spam laws in the United States, European Union, and other countries. It includes a state-by-state description of U.S. state spam laws.

e-mail until the recipient requests that the spammer send no further communications.¹⁰⁶ In nearly all states, the bans that are involved relate specifically to prohibitions of deceptive practices by commercial spammers.¹⁰⁷

Two states, however, have taken steps to eliminate spam altogether by imposing bans on spam. Delaware was the first to do so in 1999, making it a crime to send UCE.¹⁰⁸ However, only the attorney general can enforce the Delaware law and, as yet, he has not sought to do so.¹⁰⁹ Recently, California went a step further, authorizing recipients of spam, ISPs, and the state attorney general to bring an action for violations of the statutory ban on UCE that travels within the state, or crosses one of its borders.¹¹⁰ However, although the California law took effect on January 1, 2004,¹¹¹ it—as well as other state laws—faces various challenges: legal, constitutional, and practical.

Legally speaking, the issue of federal legislative preemption has proven problematic for laws like those in California and Delaware. The CAN-SPAM Act of 2003, which President Bush signed into law on December 16, 2003, makes explicit provision for preemption of *all* state laws.¹¹²

From the constitutional standpoint, the dormant Commerce Clause¹¹³ may also pose problems for state laws regardless of the aggressiveness of their stance on spam, according to some commentators.¹¹⁴ But despite these arguments, in the last few years,

106. Saul Hansell, *California Acts to Ban Junk E-Mail*, N.Y. Times, Sept. 24, 2003, at C1.

107. *Id.* Such prohibitions require commercial spam to be identified with the phrase “ADV” in the subject line, indicating that the e-mail is an advertisement. *Id.*

108. Del. Code Ann. tit. 11, § 937 (“A person is guilty of the computer crime of unrequested or unauthorized electronic mail . . . [w]hen that person, without authorization, intentionally or recklessly distributes any unsolicited bulk commercial electronic mail (commercial E-mail) to any receiving address or account under the control of any authorized user of a computer system.”)

109. Hansell, *supra* note 106.

110. Cal. Bus. & Prof. Code § 17529.2, .8 (“[A] recipient of an unsolicited commercial e-mail advertisement transmitted in violation of this article, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this article . . .”).

111. Hansell, *supra* note 106.

112. For the preemption provision, see *supra* note 26.

113. The Commerce Clause states: “The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .” U.S. Const. art. I, § 8, cl. 3. The Supreme Court has held that aside from the affirmative grant of authority to Congress to regulate interstate commerce, the Commerce Clause also contains a negative implication, which bars states from legislating in a manner that unduly interferes with or discriminates against interstate commerce. *Kelin*, *supra* note 91, at 449-50; see, e.g., *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (“The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby ‘imped[es] free private trade in the national marketplace.’” (citations omitted) (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980))).

114. See, e.g., *Kelin*, *supra* note 91, at 445-46; Hansell, *supra* note 106 (noting

one state appeals court and one state supreme court overturned lower court rulings that invalidated state spam laws on dormant Commerce Clause grounds.¹¹⁵ These cases reflect the notion that the dormant Commerce Clause is violated only if state regulation “discriminates against or unduly burdens”¹¹⁶ interstate commerce. Still, the current state of the law is anything but clear on whether state regulation of spam constitutes such discrimination or undue interference.

Finally, state regulation of spam entails certain practical problems. Given that the Internet does not respect state borders, it is difficult to regulate spammers through various non-uniform, location-based state laws.¹¹⁷ Even the less site-focused California law, which reaches across state lines,¹¹⁸ does not remedy the lack of uniformity among state laws.¹¹⁹ Ultimately, this non-uniformity may present the greatest frustration for state regulation of spam.¹²⁰

b. Federal Statutes

That federal laws have a greater potential for effective regulation of unsolicited communications is evident from the decline in junk fax following passage of the TCPA.¹²¹ Enacted in 1991, the TCPA deals both with junk fax and telemarketing. The TCPA bans junk faxing for

Professor David E. Sorkin’s argument that the California spam statute could be invalidated on dormant Commerce Clause grounds). Professor Sorkin has suggested that the law could be struck down as an unconstitutional interference with interstate commerce: “I don’t think that states have much business regulating the Internet If you can’t tell where the recipient of an e-mail is, and still have to comply with different state regulations, it is a burden on interstate commerce.” *Id.* There is also the potential for due process problems with state spam statutes, insofar as states must obtain personal jurisdiction over the spammer. Kelin, *supra* note 91, at 446 n.63 (citing generally Christopher S.W. Blake, Note, *Destination Unknown: Does the Internet’s Lack of Physical Situs Preclude State and Federal Attempts to Regulate It?*, 46 Clev. St. L. Rev. 129 (1998)).

115. See *Ferguson v. Friendfinders, Inc.*, 115 Cal. Rptr. 2d 258, 268-69 (Ct. App. 2002) (holding that California’s anti-spam law does not violate the dormant Commerce Clause because the burdens it imposes on interstate commerce are minimal); *State v. Heckel*, 24 P.3d 404, 413 (Wash. 2001) (holding that the Washington law’s benefits of limiting deceptive information contained in e-mail subject lines and transmission paths outweighed any burdens placed on interstate commerce).

116. *Gen. Motors Corp.*, 519 U.S. at 287.

117. Cisneros, *supra* note 18, ¶ 12.

118. See Cal. Bus. & Prof. Code § 17529.2 (West Supp. 2004). As such, the law may be challenged by a dormant Commerce Clause or a due process argument. See *supra* notes 113-14 and accompanying text.

119. Cisneros, *supra* note 18, ¶ 15.

120. This is so not only because it is impractical, but also because it may be unconstitutional under the dormant Commerce Clause or Due Process Clause. See *supra* notes 113-14 and accompanying text.

121. *Gibbons & Ferri*, *supra* note 54, at 8. However, it must be conceded that this success, in part, may be due to the object of the regulation rather than the regulator. It is, after all, easier to identify the junk fax sender than the spammer.

commercial purposes outright,¹²² a prohibition that has been upheld in various federal court cases.¹²³ Regarding telemarketing, the TCPA—among other things¹²⁴—prohibits the placing of an unsolicited call to a residential phone line using an artificial or prerecorded voice.¹²⁵ Although, this provision permits the FCC to exempt calls not made for commercial purposes,¹²⁶ one federal appeals court nevertheless upheld the TCPA as content-neutral.¹²⁷

But the TCPA went beyond such specific regulations, broadly authorizing the FCC to establish a national do-not-call registry.¹²⁸ Though the FCC did not take advantage of this authority, the FTC established such a registry in December 2002 pursuant to authority granted to it under the Telemarketing and Consumer Fraud Abuse and Prevention Act (“TCFAP”).¹²⁹ The TCFAP had ordered the FTC

122. See *supra* note 52 and accompanying text.

123. See *supra* note 53 and accompanying text; see also discussion *infra* notes 211-16 and accompanying text.

124. For example, see *supra* note 84, which refers to the TCPA’s ban on placing a phone call using an automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a cellular phone.

125. 47 U.S.C. § 227(b)(1)(B) (2000). The artificial or prerecorded voice provision states:

It shall be unlawful for any person within the United States . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call . . . is exempted by rule or order by the Commission under paragraph (2)(B).

Id. Regarding paragraph (2)(B) exemptions, see *infra* note 126 and accompanying text.

126. *Id.* § 227(b)(2)(B)(i) (“In implementing the requirements of this subsection, the Commission . . . may, by rule or order, exempt from the requirements of [§ 227(b)(1)(B)] . . . calls that are not made for a commercial purpose . . .”).

127. *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (holding that the TCPA’s artificial or prerecorded voice provision is content-neutral since nothing in the TCPA requires the FCC to distinguish between commercial and non-commercial speech).

128. 47 U.S.C. § 227(c)(2)-(3). The FCC national do-not-call registry provision states:

[T]he [Federal Communications] Commission . . . shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in [§ 227(c)(1)]. . . . The regulations required by [§ 227(c)(2)] may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase.

Id.

129. Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C.A. §§ 6101-6108 (West 1998 & Supp. 2003). The FTC established the national do-not-call registry by amending the Telemarketing Sales Rule (“TSR”). 16 C.F.R. pt. 310 (2003). There, the FTC defined the deceptive and abusive telemarketing acts or practices it was authorized to prohibit under the TCFAP in part as placing a phone call to a person who had put his name on the do-not-call list. Telemarketing Sales Rule, 68 Fed. Reg. 4669, 4672 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). The FTC national do-not-call registry provision states:

It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage

to adopt rules prohibiting deceptive and abusive telemarketing acts or practices.¹³⁰ After a federal district court in Oklahoma questioned the FTC's authority to establish the do-not-call registry,¹³¹ the registry went into effect on October 1, 2003,¹³² following an official mandate from Congress that the FTC does indeed have authority to establish the registry.¹³³

Yet the troubles of the embattled do-not-call registry are far from over. A separate federal district court—this time in Colorado—held the registry, which exempts calls from charities, pollsters, and on behalf of politicians,¹³⁴ unconstitutional because it unjustifiably discriminates against commercial speech on the basis of its subject matter.¹³⁵ Only a few days later, however, the U.S. Court of Appeals for the Tenth Circuit stayed the Colorado district court's permanent

in, the following conduct: . . . Initiating any outbound telephone call to a person when . . . that person's telephone number is on the 'do-not-call' registry, maintained by the [Federal Trade] Commission, of persons who do not wish to receive outbound telephone calls *to induce the purchase of goods or services*

Id. (emphasis added to highlight the registry's application to unsolicited commercial speech only).

130. Regarding the adoption of such rules by the FTC, the TCFAP stated, "The [Federal Trade] Commission shall prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C.A. § 6102(a)(1). Elaborating, the TCFAP added, "The [Federal Trade] Commission shall include in such rules respecting other abusive telemarketing acts or practices . . . a requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy." *Id.* § 6102(a)(3)(A).

131. *See* U.S. Security v. FTC, 282 F. Supp. 2d 1285, 1290-91 (W.D. Okla. 2003) (holding that Congress had only delegated authority to establish a national do-not-call registry to the FCC—not to the FTC—by way of the TCPA).

132. *See supra* note 13.

133. *See* Act of Sept. 29, 2003, Pub. L. No. 108-82, 2003 U.S.C.C.A.N. (117 Stat.) 1006 (to be codified at 15 U.S.C. § 6102 note). This Act both gave the FTC authority to establish a do-not-call registry, and ratified the do-not-call provision of the telemarketing sales rule. The Act addressed these two points succinctly:

The Federal Trade Commission is authorized under section 3(a)(3)(A) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (15 U.S.C. 6102(a)(3)(A)) to implement and enforce a national do-not-call registry. . . . The do-not-call registry provision of the Telemarketing Sales Rule (16 C.F.R. 310.4(b)(1)(iii)), which was promulgated by the Federal Trade Commission, effective March 31, 2003, is ratified.

Id.

134. The do-not-call registry only applies to "persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services." Telemarketing Sales Rule, 68 Fed. Reg. at 4672; *see also* Stolberg & Richtel, *supra* note 4 ("[T]he registry program still allows political and charitable solicitation calls to be made.").

135. *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1168 (D. Colo. 2003) (holding that the registry burdens only one type of speech—commercial speech—without a "privacy-based or prevention-of-abuse-based reason supporting the disparate treatment of different categories of speech"), *stay denied* by 284 F. Supp. 2d 1266 (D. Colo. 2003), *stay granted* by 345 F.3d 850 (10th Cir. 2003), *rev'd*, 358 F.3d 1228 (10th Cir. 2004).

injunction barring implementation of the do-not-call list, reasoning that the FTC was likely to succeed on appeal in its contention that the registry's distinction between commercial and non-commercial speech satisfies the "reasonable fit" requirement of *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹³⁶ Pending the outcome of that appeal, the Tenth Circuit permitted the FTC to enforce the registry.¹³⁷

Over four months later, the Tenth Circuit held that the Constitution permits the FTC to establish and enforce the do-not-call registry.¹³⁸ The court held that the registry conforms to *Central Hudson's* government interest and reasonable fit requirements "because it directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech."¹³⁹ The court highlighted four features of the do-not-call registry that sustain its constitutionality: (1) it restricts commercial speech only; (2) it targets speech that invades residential privacy; (3) it is an opt-out system; and (4) by curbing a sizeable portion of unwanted calls, the registry furthers significantly the government's interests in protecting consumers from abusive telemarketing and invasions of residential privacy.¹⁴⁰

136. 447 U.S. 557 (1980); *Mainstream Mktg. Servs., Inc.*, 345 F.3d at 860-61, *staying* 283 F. Supp. 2d at 1151, *rev'd*, 358 F.3d at 1228. The "reasonable fit" requirement as stated by the *Central Hudson* Court entails an inquiry into "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566. Subsequently, the Supreme Court attempted an even more concise statement of the "reasonable fit" test. *See* *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28 (1993) (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986)); *infra* note 177 and accompanying text. The Tenth Circuit explained its reasoning in the *Mainstream Marketing* stay opinion:

We find it relevant that the national do-not-call list is of an opt-in nature, which provides an element of private choice and thus weighs in favor of a reasonable fit. . . . We also find it relevant that the FTC has not exempted non-commercial speech totally from all regulation, as consumers are also given some mechanism to block non-commercial solicitations by means of company-specific objections to solicitations by charitable organizations.

Mainstream Mktg. Servs., Inc., 345 F.3d at 860 (citations omitted). As a point of clarification regarding terminology, although the Tenth Circuit discusses the do-not-call registry's "opt-in nature" (emphasis added), this Note describes the same characteristic as an "opt-out system." *See supra* text accompanying notes 27-28; *supra* notes 37-38 and accompanying text.

137. *Mainstream Mktg. Servs., Inc.*, 345 F.3d at 861; Bloomberg News, *Court Allows U.S. to Enforce No-Call Rule*, N.Y. Times, Oct. 8, 2003, at C6 ("A federal appeals court let the Federal Trade Commission enforce its do-not-call program against telemarketers yesterday, while the agency appeals a judge's ruling that declared the rule unconstitutional.").

138. *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1250-51.

139. *Id.* at 1233.

140. *Id.*

Despite the Tenth Circuit decision, the legal saga of the national do-not-call registry may not yet be complete. At the time of this writing, telemarketing industry representatives are considering an appeal to the Tenth Circuit en banc or the Supreme Court.¹⁴¹

While the do-not-call registry was tacking through the court system, President Bush signed into law on December 16, 2003 a federal bill proposing—among other things—a national do-not-spam registry.¹⁴² On October 22, 2003, the Senate passed without opposition the CAN-SPAM Act of 2003, the nation's first federal anti-spam legislation.¹⁴³ On November 21, 2003, the House of Representatives overwhelmingly approved the Act.¹⁴⁴ This federal law is notably less aggressive than the California law because it does not give spam recipients a private right of action.¹⁴⁵ Another difference is that unlike the California law, which bans all unsolicited commercial e-mail,¹⁴⁶ the federal law regulates fraudulent or deceptive messages only.¹⁴⁷ These distinctions are all the more noteworthy considering that the federal anti-spam law specifically provides for preemption of tougher state bills like California's.¹⁴⁸ The relative impotence of the federal anti-spam law—which, to add insult to injury, supplants tougher state laws like California's—has some commentators concerned.¹⁴⁹

141. See *supra* note 15 and accompanying text.

142. See CAN-SPAM Act of 2003, Pub. L. No. 108-187, § 9, 2004 U.S.C.C.A.N. (117 Stat.) 2699, 2716 (to be codified at 15 U.S.C. § 7708) (“[T]he [Federal Trade] Commission shall transmit . . . a report that . . . sets forth a plan and timetable for establishing a nationwide marketing Do-Not-E-Mail registry The Commission may establish and implement the plan”). Though the CAN-SPAM Act of 2003 was sponsored by Senators Conrad Burns (R-MT) and Ron Wyden (D-OR), the do-not-spam registry was conceived by Senator Charles E. Schumer (D-NY). Krim, *supra* note 55. Schumer had proposed a do-not-spam registry in his own bill, the SPAM Act, introduced in the Senate on June 11, 2003. See *id.*; see also Stop Pornography and Abusive Marketing Act, S. 1231, 108th Cong. (2003).

143. The Senate approved the bill by a vote of ninety-seven to zero, with three Senators not voting. 149 Cong. Rec. S13,044 (daily ed. Oct. 22, 2003); see also Krim, *supra* note 55.

144. The House of Representatives passed the bill by a vote of 392 to five, with thirty-seven Representatives not voting. 149 Cong. Rec. H12,297 (daily ed. Nov. 21, 2003).

145. Enforcement powers are only granted to the FTC, ISPs, and attorneys general, agencies, or officials of the state. CAN-SPAM Act of 2003 § 7, 2004 U.S.C.C.A.N. (117 Stat.) at 2711-15 (to be codified at 15 U.S.C. § 7706). Regarding the spam recipient's right of action under the California law, see *supra* note 110 and accompanying text.

146. See Cal. Bus. & Prof. Code § 17529.2 (West Supp. 2004).

147. See CAN-SPAM Act of 2003 § 4, 2004 U.S.C.C.A.N. (117 Stat.) at 2703-06 (to be codified at 15 U.S.C. § 7703 and 18 U.S.C. § 1037); see also David Firestone & Saul Hansell, *Senate Votes to Crack Down on Some Spam*, N.Y. Times, Oct. 23, 2003, at C1.

148. See *supra* note 26 and accompanying text.

149. One commentator has noted that the federal bill does nothing to address the problem of so-called “white collar spam,” spam that is sent by large, established companies. Saul Hansell, *It Isn't Just the Peddlers of Pills: Big Companies Add to Spam Flow*, N.Y. Times, Oct. 28, 2003, at A1. Additionally, FTC chairman Timothy

II. SUBJECT MATTER DISCRIMINATION AND BANS ON UNSOLICITED SOLICITATIONS: ARE FEDERAL COURTS DEFYING SUPREME COURT JURISPRUDENCE?

First recognized as deserving of First Amendment privileges in 1976,¹⁵⁰ commercial speech—usually defined as speech proposing a commercial or financial transaction¹⁵¹—currently enjoys a high degree of constitutional protection.¹⁵² The Supreme Court has even rendered an opinion that suggests it is likely to invalidate a ban on unsolicited solicitations, whether in whole or only as applied to commercial speech.¹⁵³ It is therefore notable that federal courts have, on three occasions, upheld the TCPA despite its outright ban on unsolicited fax advertising.¹⁵⁴ Moreover, these rulings, and the recent Tenth Circuit decision declaring the national do-not-call registry constitutional¹⁵⁵ do not seem to square with the Supreme Court's prohibition of subject matter discrimination.¹⁵⁶ The background to this last problem will be addressed first.

A. Subject Matter Discrimination as It Pertains to Commercial Speech

In *Police Department of Chicago v. Mosley*, the Supreme Court invalidated a Chicago ordinance prohibiting all picketing within 150 feet of any primary or secondary school except peaceful picketing of a school involved in a labor dispute.¹⁵⁷ The Court explained that “above

Muris has suggested that spammers are no more likely to comply with a national do-not-spam registry than with the state anti-spam laws they currently ignore. Firestone & Hansell, *supra* note 147.

150. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). For a discussion of *Virginia State Board of Pharmacy*, see *infra* notes 167-70 and accompanying text.

151. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562 (1980) (defining commercial speech as “speech proposing a commercial transaction”); *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1160 (D. Colo. 2003) (“Commercial speech is defined as speech that proposes a financial transaction.”).

152. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). For a discussion of 44 *Liquormart*, see *infra* notes 185-89 and accompanying text.

153. *See* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72-75 (1983).

154. *See* *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003); *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995); *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162 (S.D. Ind. 1997). For a statutory definition of the phrase “unsolicited advertisement,” see *supra* note 52.

155. *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1232-33 (10th Cir. 2004). For a discussion of the decision, see *supra* notes 138-40 and accompanying text.

156. *See supra* note 63 and accompanying text.

157. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 94 (1972). Prior to *Mosley*, Justice Black had articulated a similar notion while writing in concurrence in *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). Justice Black stated:

[B]y specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a

all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁵⁸ Later, in *Bolger v. Youngs Drug Products Corp.*, the Court clarified its position—albeit in dicta—on content-based restrictions as they apply to commercial speech, stating that unlike non-commercial speech, where such restrictions are permitted only under the most extraordinary circumstances, “content-based restrictions on commercial speech may be permissible.”¹⁵⁹ The Court explained its relative leniency on account of the “greater potential for deception or confusion in the context of certain advertising messages.”¹⁶⁰

Nevertheless, the Court continues to make inquiries into the existence of content-based discrimination in the context of commercial speech restrictions.¹⁶¹ In *City of Cincinnati v. Discovery Network, Inc.*, for example, the Court struck down a city ban on the distribution of commercial handbills via newsracks, in part because the regulation was not content neutral.¹⁶² Predictably, lower courts have taken heed of this trend. In *Moser v. FCC*, the Ninth Circuit upheld the TCPA’s ban on prerecorded or automated telemarketing calls to residential phone lines, in part because the statute merely allowed—but did not require—the FCC to distinguish between

most odious form, unconstitutional under the First and Fourteenth Amendments.

Id.

158. *Mosley*, 408 U.S. at 95. The Court later reemphasized that *Mosley* referred to any form of content-based discrimination, whether based on the speaker’s viewpoint or the subject matter of his speech: “The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980). *Mosley* exemplifies a case of subject matter discrimination. The same year as *Consolidated Edison*, the Court invalidated another state regulation on subject matter discrimination grounds. *See Carey v. Brown*, 447 U.S. 455, 471 (1980) (holding that an Illinois statute, which banned residential picketing other than peaceful picketing of a place of employment involved in a labor dispute, violated the Equal Protection Clause because the statute discriminated against pickets on the basis of the subject matter of their expression).

159. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65 (1983).

160. *Id.*

161. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994) (characterizing the federal cable system must-carry rules as content-neutral because the benefits they confer and burdens they impose are made without reference to the content of speech). *Turner Broadcasting* noted, “Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” *Id.* at 642.

162. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993). The Court explained its finding regarding the lack of content neutrality: “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.

commercial and non-commercial phone calls.¹⁶³ That ban's permissiveness is less problematic than the obligatory ban on commercial speech only under the TCPA fax provision.¹⁶⁴ But the TCPA is not the only federal statute enduring judicial scrutiny in this area; the federal courts have been wrestling with the possibility that the national do-not-call registry discriminates against commercial speech on the basis of subject matter.¹⁶⁵ Apparently, despite *Bolger's* early acceptance in dicta of subject matter discrimination as applied to commercial speech,¹⁶⁶ the Supreme Court and federal courts have—in recent years—remained wary of permitting content-based regulations of commercial speech. The reason for this can be found in an appreciation of the heightened protection that commercial speech currently enjoys, as compared to the more subordinate position it once occupied on the spectrum of protected speech.

1. Near-Strict Scrutiny Protects Commercial Speech from Subject Matter Discrimination

*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁶⁷ gave birth to constitutional protection of commercial speech. There, the Court invalidated a Virginia law that—purely to maintain the integrity of the pharmacy profession—provided that a pharmacist was guilty of unprofessional conduct if he advertised a price for prescription drugs.¹⁶⁸ The Court reasoned that, as a matter of public interest, individuals' private economic decisions ought to be well-informed.¹⁶⁹ It concluded, therefore, that “the free flow of commercial information is indispensable.”¹⁷⁰

163. *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995). For further discussion of this TCPA provision, see *supra* notes 125-26 and accompanying text.

164. See *supra* note 52 and accompanying text.

165. See *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1168 (D. Colo. 2003) (holding that the registry burdens only one type of speech—commercial speech—without a “privacy-based or prevention-of-abuse-based reason supporting the disparate treatment of different categories of speech”), *stay denied* by 284 F. Supp. 2d 1266 (D. Colo. 2003), *stay granted* by 345 F.3d 850, 860 (10th Cir. 2003) (staying that district court's permanent injunction barring implementation of the do-not-call list, reasoning that the FTC is likely to succeed on appeal in its contention that the registry's distinction between commercial and non-commercial speech satisfies the reasonable fit requirement of *Central Hudson*), *rev'd*, 358 F.3d 1228, 1238-39 (10th Cir. 2004) (holding the registry constitutional in part because it satisfies the reasonable fit requirement of *Central Hudson*, explaining that “[t]he underinclusiveness of a commercial speech regulation is relevant only if it renders the regulatory framework so irrational that it fails materially to advance the aims that it was purportedly designed to further”).

166. See *supra* notes 159-60 and accompanying text.

167. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

168. *Id.* at 749-51, 773.

169. *Id.* at 765.

170. *Id.*

Having established in *Virginia State Board of Pharmacy* that commercial speech was, in fact, protected by the First Amendment, the Supreme Court proceeded, in *Central Hudson*,¹⁷¹ to define the parameters of that protection. There, it invalidated a regulation promulgated by the Public Service Commission of New York, which prohibited all advertising by electric utility companies doing business in the state.¹⁷² In doing so, the Court adopted a four-part test for permissible commercial speech regulation.¹⁷³ The inquiries include: (1) whether the speech is protected by the First Amendment;¹⁷⁴ (2) whether the government's asserted interest in regulating the speech is substantial; (3) whether the regulation directly promotes the interest that the government claims to have; and (4) whether the regulation is broader than necessary to promote the government interest.¹⁷⁵ The Court held that the regulation failed to satisfy the fourth prong and was therefore unconstitutional.¹⁷⁶ In subsequent decisions, the Court has occasionally considered the third and fourth prongs jointly as a "reasonable fit" test,¹⁷⁷ which thereby renders the *Central Hudson* analysis a three-pronged endeavor.

171. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-66 (1980).

172. *Id.* at 571-72. The rule was originally ordered in response to the energy shortage during the winter of 1973-74. *Id.* at 559. Three years later, after the shortage had abated but with a mind towards continued conservation of energy, the Commission sought public comment on whether to continue the ban. *Id.* Despite the First Amendment-based protests of *Central Hudson Gas and Electric Corp.*, the Commission renewed the ban. *Id.*

173. *Id.* at 566.

174. For commercial speech to be protected by the First Amendment, it at least must relate to lawful activity and not be misleading. *Id.*

175. *Id.*

176. Regarding factor (1), the Court ruled that the electric companies' advertising was commercial speech that was protected by the First Amendment, since the Commission did not claim that the advertising was inaccurate or that it related to unlawful activity. *Id.* at 566-67. Regarding factor (2), the Court held that the asserted government interests of energy conservation and energy rate fairness were substantial. *Id.* at 568-69. Regarding factor (3), the Court decided that although there was a direct link between the government interest in energy conservation and the Commission's regulation, the link between the government's interest in energy rate fairness and *Central Hudson's* rate structure was tenuous at best. *Id.* at 569. Regarding factor (4), the Court concluded that the regulation was overbroad because it applied to advertising of electric devices or services whose usage would cause no increase in the total energy use. *Id.* at 569-70.

177. *See, e.g., United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28 (1993) ("As we have said, '[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends'" (alteration in original) (quoting *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986))). Lower courts have at times followed suit. *See, e.g., Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) ("The Supreme Court has since explained the final two prongs of the *Central Hudson* test as requiring that there be a "reasonable fit' between the legislature's ends and the means chosen to accomplish those ends." (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989))). However, some decisions of the Court continue to

The *Central Hudson* test has been described as an “intermediate standard of review.”¹⁷⁸ Yet despite the label, some Supreme Court decisions subsequent to *Central Hudson* have seemingly cast the commercial speech analysis in a light far closer to—albeit not quite—a strict scrutiny standard.¹⁷⁹ In elaborating on the third prong of the four-part *Central Hudson* test, the Court has been particularly demanding of government justification: “This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁸⁰ Such rigorous demands have occasionally translated into invalidations of government regulations. For example, in *Edenfield v. Fane*, the Court struck down a Florida Board of Accountancy rule barring accountants from engaging in personal solicitation of clients on the grounds that the Board had presented no studies suggesting that personal

enunciate a four-part test. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555-56 (2001). In such decisions, the third inquiry is whether the government has demonstrated that the harms it asserts are real and that the regulation it imposes will actually alleviate the harm to a material degree. *Id.* at 555. The fourth inquiry is whether there exists “a reasonable ‘fit between the legislature’s ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.’” *Id.* at 556 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995), which quoted *Fox*, 492 U.S. at 480) (internal quotation marks omitted). This does not, however, involve a consideration of whether the government employs the least restrictive means. *Id.*

178. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

179. Admittedly, the Court’s elaboration on the fourth prong and its application to various commercial speech cases reflects a relatively surmountable requirement. The Court has emphasized that the fourth prong demands “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served,’ that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.” *Fox*, 492 U.S. at 480 (citation omitted) (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)). Moreover, the Court has stated that the history of the fourth prong suggests that it is somewhat easily satisfied:

None of our cases invalidating the regulation of commercial speech involved a provision that went only marginally beyond what would adequately have served the governmental interest. To the contrary, almost all of the restrictions disallowed under *Central Hudson*’s fourth prong have been substantially excessive, disregarding ‘far less restrictive and more precise means.’

Id. at 479 (quoting *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 476 (1988)). Nevertheless, some of the Court’s cases, including *Central Hudson* itself, have held that the fourth prong has not been met. This, together with the Court’s strict interpretation of the third prong, amount to what occasionally has been perceived as a rigorous form of intermediate scrutiny, as in *44 Liquormart*. *See infra* notes 185-89 and accompanying text. Even the dicta of *Central Hudson* takes a strong approach against blanket bans on commercial speech: “[I]n recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.” *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566 n.9.

180. *Edenfield*, 507 U.S. at 770-71.

solicitation of prospective clients created the asserted dangers of fraud, overreaching, or compromised independence.¹⁸¹

Laws have also failed to satisfy the “reasonable fit” test and the fourth prong. In *Discovery Network*, the Court declared unconstitutional a Cincinnati ban on the distribution of commercial handbills via newsracks, holding that the ban did not establish a reasonable fit between the city’s stated interest in promoting safety and aesthetics through a reduction of newsracks and its selective prohibition of commercial newsracks, because commercial newsracks amounted to only a small number of the total newsracks in the city.¹⁸² Similarly, in *Rubin v. Coors Brewing Co.*, the Court invalidated a federal act that prohibited beer labels from displaying alcohol content with the aim of preventing brewers from competing on the basis of alcohol strength.¹⁸³ In doing so, the Court noted the availability of less intrusive alternatives, such as directly limiting the alcohol content of beers.¹⁸⁴

181. *Id.* at 763-64, 771; see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 667-68 (1994) (remanding for a determination of whether the government has shown that the economic well-being of local television stations was in real danger, such that they were in need of the protections afforded to them by the must-carry provisions of a federal cable television act, which required cable television systems to devote a portion of their channels to transmission of local television stations). *Turner Broadcasting* stated, “When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’” *Id.* at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). The *Turner Broadcasting* Court then proceeded to cite the *Edenfield* rule. *Id.* For the *Edenfield* rule, see *supra* note 180 and accompanying text.

182. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 412-13, 417 (1993). Since the ban failed *Central Hudson*, the Court explicitly did not “reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks.” *Id.* at 428. But see *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-12, 519 (1981) (striking down as facially invalid a city ordinance that banned all billboards except commercial billboards on business premises despite the fact that the ordinance satisfied the requirements of *Central Hudson* because “San Diego has chosen to favor certain kinds of messages—such as onsite commercial advertising, and temporary political campaign advertisements—over others”).

183. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478, 485, 491 (1995).

184. *Id.* at 490-91. The Court also based the invalidation on the government’s failure to satisfy the third prong of *Central Hudson*, maintaining that other sections of the same federal law—such as the allowance of alcohol content displays on wine and spirits labels—frustrate the government’s asserted purpose in a way that will prevent this section of the law from materially advancing it. *Id.* at 488-90; see also *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534-36, 566-67 (2001) (holding that Massachusetts regulations governing advertising and sale of cigarettes, cigars, and smokeless tobacco with the governmental intent of preventing underage smoking did not satisfy *Central Hudson*’s third or fourth prongs). In *Lorillard*, a regulation prohibiting outdoor smokeless tobacco and cigar advertising within 1000 feet of a school or playground was held to materially advance the government’s interest, but also to be overly broad, as it had the practical effect of banning nearly all such outdoor advertising in major Massachusetts cities. *Id.* at 556, 561-63, 566. As a result, the regulation would affect not only underage smokers, but also adults. *Id.* at 562. Another regulation barring

Perhaps the strongest evidence in support of this near-strict-scrutiny interpretation is the Court's holding in *44 Liquormart, Inc. v. Rhode Island*.¹⁸⁵ This declaratory judgment action involved two Rhode Island laws that banned alcohol price advertising so as to promote the state interest of reducing alcohol consumption.¹⁸⁶ The Court held that the law violated the First Amendment because the state failed to satisfy the "heavy burden of justifying [a] complete ban."¹⁸⁷ More skeptically, Justice Stevens noted for the plurality that "blanket prohibition[s] against truthful, nonmisleading speech . . . rarely survive constitutional review."¹⁸⁸ The Court's position in *44 Liquormart*—as well as in the previously discussed cases—has led some commentators to argue that the intermediate scrutiny standard has more "teeth" than once was assumed.¹⁸⁹

The *Central Hudson*-with-teeth interpretation is squarely in accord with the Court's apparent abandonment of *Bolger*'s dicta that in regulating commercial speech, a government can exercise subject matter discrimination.¹⁹⁰ As commercial speech has attained a higher level of protection since the *Bolger* decision, the Court is almost as unlikely to condone instances of subject matter discrimination in the commercial speech context as in the non-commercial speech arena.

smokeless tobacco and cigar advertising from being placed below five feet from the floor in retail establishments within 1000 feet of a school or playground was held not to materially advance the government's interest because some children are taller than five feet and those who are not can look up to view advertising above five feet. *Id.* at 566. Moreover, the Court held that the height provision did not constitute a reasonable fit with the government's goal, since it was not narrowly tailored. *Id.* at 567.

185. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996).

186. *Id.* at 489-90, 504.

187. *Id.* at 516.

188. *Id.* at 504 (Stevens, J., plurality opinion). Justice Stevens was joined in that plurality opinion by Justices Kennedy, Souter, and Ginsburg. *Id.* at 488. Additionally, Justices Stevens, Kennedy, and Ginsburg took an even more strong-handed position, suggesting that a ban on truthful, non-misleading commercial speech for reasons unrelated to the preservation of a fair bargaining process should be held to the same strict scrutiny standard that the First Amendment usually requires. *Id.* at 501 (Stevens, J., plurality opinion). Concededly, the Court has, at times, reaffirmed that *Central Hudson*'s intermediate scrutiny standard is the applicable standard in cases of commercial speech regulation. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002) ("Although several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases, there is no need in this case to break new ground." (citations omitted)). The critical point, however, has been noted by one commentator: "[T]he Court's lack of consistency in this area reinforces the argument that intermediate scrutiny is utterly untethered and capable of substantial manipulation." Christina E. Wells, *Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 Mo. L. Rev. 141, 164 (2001).

189. *See, e.g.*, Wells, *supra* note 188, at 164 & n.148.

190. *See supra* notes 159-60 and accompanying text.

Evidently, commercial speech has entered the fold of protection from subject matter discrimination created by *Mosley*.¹⁹¹

2. Bans on All Unsolicited Solicitation Do Not Constitute Subject Matter Discrimination

Though the Court has given increasing deference to commercial speech in the context of subject matter discrimination, it has refused to view bans on all solicitation—i.e., all unsolicited requests for money, whether for products or services, political causes, or charities—as content-based. In *United States v. Kokinda*, the Court upheld a federal statute prohibiting solicitation on post office premises, in part because a four-justice plurality held that such a regulation was content neutral.¹⁹² This holding came despite the protests of dissenting Justice Brennan, joined by three other Justices, who argued that the regulation was indeed content-based since “a person on postal premises [who] says to members of the public, ‘Please support my political advocacy group,’ . . . cannot be punished” but one who says, “‘Please contribute \$10,’ . . . is subject to criminal prosecution.”¹⁹³ With the departure of Justices Brennan and Marshall from the Court, and the arrival of Justice Thomas, the plurality in *Kokinda* grew to a majority in *International Society for Krishna Consciousness, Inc. v. Lee*, which upheld a Port Authority of New York and New Jersey regulation prohibiting the repetitive solicitation of money within airport terminals operated by that body.¹⁹⁴ The majority held that the prohibition on solicitation satisfied a standard of reasonableness,¹⁹⁵ thereby eliminating the need for this Note to evaluate the constitutionality of scenarios like that described by Justice Brennan in *Kokinda*.¹⁹⁶

191. See *supra* notes 157-58 and accompanying text.

192. *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (O'Connor, J., plurality opinion). Justice O'Connor announced the judgment of the Court, and delivered the plurality opinion, in which Chief Justice Rehnquist, Justice White, and Justice Scalia joined. *Id.* at 722.

193. *Id.* at 753 (Brennan, J., dissenting). Justice Brennan's dissent was joined by Justices Marshall, Stevens and Blackmun (Justice Blackmun only joined with regard to the subject matter discrimination argument). *Id.* at 740. Had Justice Brennan persuaded a majority of the Court of his reasoning that statutes that ban unsolicited solicitations but not unsolicited non-monetary requests—such as a request to vote for a particular political candidate, or to join a friend in a poker game—are not content-neutral, this Note might have explored an additional two categories of unsolicited communication regulation. But because a majority of the Court resolved the matter definitively in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992), there is no need to examine such scenarios in this Note.

194. *Lee*, 505 U.S. at 675-76, 685. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices White, O'Connor, Scalia, and Thomas joined. *The Supreme Court, 1991 Term—Leading Cases*, 106 Harv. L. Rev. 163, 280 & n.949 (1992).

195. *Lee*, 505 U.S. at 683.

196. *But see id.* at 678 (“Where the government is acting as a proprietor, managing

B. Bans Versus Opt-Outs of All Unsolicited Solicitations

Although bans on all unsolicited solicitations have not been invalidated by the Court on account of subject matter discrimination, such bans may be viewed in light of other Supreme Court precedent, which appears to favor opt-outs of all unsolicited solicitations, but disfavors banning those solicitations.

1. Bans Versus Opt-Outs in the Area of Direct Mail Regulation

The Supreme Court itself seems at first glance to have espoused contradictory views regarding unsolicited commercial speech regulation, although further consideration may demonstrate otherwise. In fact, the Court simply may have been opposed to bans—as distinct from opt-out systems—in the area of direct mail regulation.

In *Rowan v. United States Post Office Department*, the Court upheld a federal law permitting an individual to require a direct mailer to remove his name from the sender's mailing list, and to refrain from all future mailings.¹⁹⁷ The Court explained that "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."¹⁹⁸ It added, "[t]o hold less would tend to license a form of trespass."¹⁹⁹ This holding seems perfectly in accord with the judicially-acknowledged governmental interest in the preservation of privacy within the home.²⁰⁰

However, the Court followed that opinion with a holding in *Bolger*²⁰¹ that seems more akin to the Court decisions concerning annoyance outside the home—where the Court does not countenance privacy interests²⁰²—than it does with Supreme Court residential

its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject."). This statement by the *Lee* Court may leave room to argue that in situations where the government is not acting as proprietor but rather, as lawmaker, such as when it bans unsolicited solicitations but not unsolicited non-monetary requests, a heightened standard of review will apply and the existence of subject matter discrimination may invalidate the law. This interpretation certainly is supported by the discussion above, which maintains that, despite the dicta in *Bolger*, see *supra* notes 159-60 and accompanying text, the Court scrutinizes regulations on commercial speech that discriminate on the basis of subject matter almost as closely as it does those on non-commercial speech. See *supra* notes 161-66 and accompanying text. Nevertheless, the constitutionality of scenarios like that described by Justice Brennan in *Kokinda* will be considered settled for the purposes of this Note.

197. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 729, 740 (1970).

198. *Id.* at 736-37.

199. *Id.* at 737.

200. See *supra* Part I.B.1.c.

201. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

202. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414, 416 (1989) (holding that the First Amendment protected a man who burned an American flag during a protest rally since a fundamental principle underlying the First Amendment is that the government

privacy jurisprudence. *Bolger* involved a federal law that prohibited the mailing of unsolicited contraceptive advertisements.²⁰³ The Court dismissed one of the government's asserted interests—shielding mail recipients from offensive material²⁰⁴—by explaining that “[r]ecipients of objectionable mailings . . . may ‘effectively avoid further bombardment of their sensibilities simply by averting their eyes.’”²⁰⁵ The Court added that “the ‘short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.’”²⁰⁶ At least so far as the facts in *Bolger* are concerned, commercial speech trumps residential privacy.

At first glance, *Rowan* and *Bolger* appear somewhat contradictory: *Rowan* is protective of residential privacy while *Bolger* is not. Yet one commentator has attempted to reconcile these cases by suggesting that it is the nature of the regulation, rather than the governmental interest, that is dispositive.²⁰⁷ According to this theory, the Court will uphold a government regulation that allows private individuals to take affirmative steps to prevent unsolicited solicitations from entering the home—i.e., an opt-out system—but will strike down measures whereby the government itself prevents marketers from

may not prohibit expression simply because the public believes that expression to be offensive or disagreeable); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701-02 (1977) (holding a New York statute that banned contraceptive advertising unconstitutional, explaining that the mere fact that protected speech may be offensive to some individuals does not justify its suppression); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206-07, 209, 217-18 (1975) (invalidating a city ordinance prohibiting the display of nudity by a drive-in movie theater where the screen is visible from a public street or place, reasoning that selective shielding of speech by the government on the grounds that it is more offensive than other types of speech has been upheld only when the speaker intrudes on the privacy of the home, or where the extent of the audience's captivity makes it impractical for the unwilling viewer to avoid exposure); *Cohen v. California*, 403 U.S. 15, 21, 26 (1971) (holding that the state may not, under the First and Fourteenth Amendments, criminalize the public display of a jacket bearing an expletive, explaining that the Court has repeatedly stressed that people are often captive audiences outside their homes and subject to objectionable speech). Further demonstrating the analogy between *Bolger* and the annoyance cases, the language in *Cohen*, which was initially adopted by *Erznoznik*, was later appropriated by *Bolger*: “[Viewers] could effectively avoid further bombardment of their sensibilities simply by averting their eyes.” *Id.* at 21; see *infra* note 205 and accompanying text.

203. *Bolger*, 463 U.S. at 61.

204. *Id.* at 71. The Court stressed that the critical issue in determining whether speech directed at the home is intrusive concerns whether the listener is a “captive” audience: “The First Amendment ‘does not permit the government to prohibit speech as intrusive unless the captive audience cannot avoid objectionable speech.’” *Id.* at 72 (quoting *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 542 (1980)) (internal quotation marks omitted).

205. *Id.* at 72 (quoting *Cohen*, 403 U.S. at 21) (citation omitted).

206. *Id.* (quoting *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y. 1967)).

207. Amaditz, *supra* note 56, ¶ 27 (citing Michael W. Carroll, *Garbage In: Emerging Media and Regulation of Unsolicited Commercial Solicitations*, 11 Berkeley Tech. L.J. 233, 243-44 (1996)).

communicating—i.e., a ban.²⁰⁸ If this conclusion is correct, federal court rulings upholding the TCPA junk fax provision stand poised for reversal should the Supreme Court ever agree to address the issue, that is, unless junk fax is somehow distinguishable from direct mail.

2. Federal Court Rulings on the TCPA's Fax Provision

Given the *Central Hudson*-with-teeth interpretation of commercial speech regulation analysis²⁰⁹ and *Bolger's* apparent disapproval of bans on commercial speech,²¹⁰ it is difficult to comprehend the various federal court rulings on the TCPA's unsolicited fax ban.²¹¹ In *Destination Ventures, Ltd. v. FCC*, the Ninth Circuit upheld the TCPA fax provision reasoning that there was a "reasonable fit" between the congressional goal of reducing cost-shifting and the fact that unsolicited commercial faxes are responsible for the vast majority of junk fax cost-shifting.²¹² Likewise, in *Kenro, Inc. v. Fax Daily, Inc.*, a federal district court held that the TCPA junk fax ban is constitutional because it directly advances Congress's asserted interests in guarding consumers from interference with the usage of their own fax machines and from cost-shifting.²¹³ Furthermore, the *Kenro* court found the ban narrowly tailored to those interests.²¹⁴ More recently, the Eighth Circuit in *Missouri v. American Blast Fax, Inc.* reversed a district court ruling striking down the fax provision.²¹⁵ The Eighth Circuit held that the government's interests were substantial, that the statute's distinction between commercial and non-commercial faxes directly relates to these interests, and that the ban on unsolicited commercial faxes was not overbroad.²¹⁶ It would seem that these decisions, which condone broad governmental regulation of an entire mode of commercial speech,²¹⁷ fly in the face of the *Central Hudson*-with-teeth

208. *Id.*

209. See *supra* notes 171-88 and accompanying text.

210. See *supra* notes 201-08 and accompanying text.

211. See *supra* note 52 and accompanying text.

212. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995). Considering the specific issue of whether the ban on junk fax was excessive, the Ninth Circuit held that the fourth prong was met because unsolicited fax advertisements shift significant costs to consumers. *Id.* at 56-57. The Ninth Circuit refused to give credence to the possibility of future technological advances, which may permit simultaneous fax transmission and eliminate the need for fax paper. *Id.* at 57.

213. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1169, 1172 (S.D. Ind. 1997).

214. *Id.* at 1168. Regarding the narrow tailoring requirement, the district court held that the plaintiff's suggested alternatives to the ban—establishing a do-not-fax registry, regulating the hours of fax advertising, and limiting the number and frequency of fax transmissions—do not demonstrate that the TCPA fax provision is overbroad. *Id.* at 1168-69.

215. *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 660 (8th Cir. 2003).

216. *Id.* at 655-56, 658-60. The Eighth Circuit explained that the fourth prong was satisfied because advertisers remain free to market their products through any legal means. *Id.* at 659.

217. See *Amaditz, supra* note 56, ¶ 22 (noting that such decisions "support an

analysis and the Court's holding in *Bolger*, which apparently opposes bans—as distinct from opt-out systems—on commercial speech.

3. Government Facilitation of Consumer Choice or Government Speech: Can an Analogy Be Drawn to Opt-Out Systems?

Rowan and *Bolger* appear to draw a distinction between bans and opt-out systems regarding unsolicited solicitation. This apparent distinction may be reinforced by Supreme Court jurisprudence on government facilitation of consumer choice, which has been upheld by the Court repeatedly. A prime example of such facilitation of choice was the Cleveland, Ohio school voucher program upheld by the Court in *Zelman v. Simmons-Harris*.²¹⁸ In considering whether the program, which provided tuition aid for students to attend a participating public or private school of their parents' choosing,²¹⁹ had the effect of advancing or inhibiting religion,²²⁰ the Court held that "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."²²¹ The Court's allowance of such facilitation of consumer choice raises the question: To what extent are opt-out systems similar?

Alternatively, the distinction between bans and opt-outs may be reinforced by Supreme Court rulings in the area of government speech.²²² In *Regan v. Taxation With Representation*, for example, the Court held that Congress's refusal to grant a non-profit lobby corporation tax-exempt status under the Internal Revenue Code did not violate any First Amendment rights or regulate any First Amendment activity.²²³ The Court explained that Congress had simply refused to pay for Taxation's lobbying.²²⁴ It added: "[w]e have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."²²⁵ When the government is speaking rather than facilitating consumer choice, it is free to discriminate based on subject matter.

If opt-out systems are indeed similar to instances of government speech—more than they are akin to cases of government facilitation of consumer choice—then the government can presumably go so far as to discriminate based on subject matter in formulating an opt-out

advertising ban on an entire communications medium—the fax machine”).

218. *Zelman v. Simmons-Harris*, 536 U.S. 639, 663 (2002). For additional discussion of *Zelman*, see *infra* note 316 and accompanying text.

219. *Zelman*, 536 U.S. at 645.

220. *Id.* at 649.

221. *Id.*

222. For additional instances besides the one discussed here, see *infra* notes 310-12 and accompanying text.

223. *Regan v. Taxation With Representation*, 461 U.S. 540, 541-42, 545 (1983).

224. *Id.* at 546.

225. *Id.* at 549.

system. Therefore, the proper classification of opt-out systems as either government speech or government facilitation of consumer choice bears critical implications for the constitutionality of the national do-not-call registry and other conceivable opt-out systems that target commercial speech only.

III. SUBJECT MATTER DISCRIMINATION: THE DISPOSITIVE FACTOR IN DETERMINING THE CONSTITUTIONALITY OF FEDERAL UNSOLICITED SOLICITATION REGULATION

A. *The Four Quadrants of Unsolicited Solicitation Regulation*

Part II demonstrates that there are overlapping considerations when it comes to analyzing the constitutionality of a government regulation of unsolicited commercial speech. This Note applies the case law discussed in Part II to four distinct scenarios, so as to address the intersections of regulation type and content base. Category I involves a federal ban (i.e., opt-in system) on all unsolicited solicitations, commercial and non-commercial. Category II involves a federal ban (i.e., opt-in system) on unsolicited commercial speech only. Category III involves a federal opt-out system on all unsolicited solicitations, commercial and non-commercial. Finally, Category IV involves a federal opt-out system on unsolicited commercial speech only.

Application within the four categories demonstrates that (1) federal bans on all unsolicited residence-targeted telemarketing, unsolicited bulk e-mail, and unsolicited fax are constitutional;²²⁶ (2) federal bans on unsolicited commercial solicitations are unconstitutional;²²⁷ (3) federal opt-out systems directed at all unsolicited solicitations are constitutional;²²⁸ and (4) federal opt-out systems targeting unsolicited commercial solicitations are unconstitutional.²²⁹

B. *Opt-In Systems: Categories I and II*

1. Category I: Federal Bans on All Unsolicited Solicitations

Since the *Central Hudson* analysis of commercial speech regulation was adopted in 1980, it has evolved into a test that, though described nominally as intermediate scrutiny, is factually much closer to strict scrutiny.²³⁰ However, *Central Hudson*'s near-strict-scrutiny standard is inapt where the federal law applies to all unsolicited monetary

226. See *infra* Part III.B.1.

227. See *infra* Part III.B.2.

228. See *infra* Part III.C.1.

229. See *infra* Part III.C.2.

230. See *supra* notes 178-88 and accompanying text.

requests, whether commercial, political, or charitable. Rather, the test to be applied in such a context is one of true intermediate scrutiny:

[T]he government may 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 governmental interest, and that they leave open ample alternative channels for communication of the information.”²³¹

Under this time, place, or manner test, federal bans on all unsolicited solicitations would be constitutional as applied to each of the three modes of communication considered in this Note. Insofar as they apply to all unsolicited solicitations, such bans would be content-neutral.²³² Moreover, the governmental interests of protecting residential privacy from telemarketing, and eliminating cost-shifting imposed by UBE and junk fax are both significant and narrowly tailored.²³³ Finally, banning such forms of unsolicited solicitation leaves open numerous other means of solicitation, whether solicited or not.

a. *A Federal Ban on All Unsolicited Residence-Targeted Telemarketing Is Constitutional*

To properly appreciate the significance of the governmental interest in protecting residential privacy, one must understand the unique

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

232. This accords with the plurality opinion in *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (O'Connor, J., plurality opinion). See *supra* note 192 and accompanying text. It also agrees with the majority holding in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683 (1992). See *supra* note 193; *supra* notes 194-95 and accompanying text. However, Justice Brennan's dissent in *Kokinda* disagreed with the proposition that bans on all unsolicited solicitations are content-neutral. *Kokinda*, 497 U.S. at 753 (Brennan, J. dissenting); see *supra* note 193 and accompanying text. Moreover, one particular statement by the *Lee* Court may permit an argument that in instances where the government is not acting as a proprietor—as it was in *Lee*—but rather, as a lawmaker, such as when it bans all unsolicited solicitations but not unsolicited non-monetary requests, a heightened standard of review will apply and subject matter discrimination may invalidate the law. See *Lee*, 505 U.S. at 678; see also *supra* note 196.

233. Bans are not per se overbroad. *Frisby v. Schultz* stated, “A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.” 487 U.S. 474, 485 (1988). In this regard, *Frisby* discussed *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), in which the Court upheld an ordinance that banned all signs on public property with the intent of avoiding “visual clutter.” *Frisby*, 487 U.S. at 485-86. *Frisby* explained that the complete ban in *Taxpayers for Vincent* was necessary because the substantive evil—“visual clutter”—was not simply a possible result of posting signs on public property, but was “created by the medium of expression itself.” *Id.* at 486 (quoting *Taxpayers for Vincent*, 466 U.S. at 810). So too, with each of the modes of solicitation considered herein, the substantive evils—invasion of residential privacy or cost-shifting—are created by the media of communication themselves, whether telemarketing, junk fax, or spam.

status of a home in the eyes of the Supreme Court: It is “the last citadel of the tired, the weary, and the sick”²³⁴ and “the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits.”²³⁵ The Court has stated emphatically that “[t]here simply is no right to force speech into the home of an unwilling listener.”²³⁶ Clearly, the Court holds residential privacy in uniquely high esteem.

The huge outpouring of support for the do-not-call registry is evidence of the significant invasion of privacy posed by telemarketing.²³⁷ But if that is not evidence enough, congressional findings prior to the passage of the TCPA substantiated this claim.²³⁸ The problem has only worsened in recent years with the advent of predictive dialing machines.²³⁹ These facts, together with the singularly important status of the home in Supreme Court jurisprudence, point to one conclusion: A ban on all unsolicited residence-targeted telemarketing to further the government interest of protecting residential privacy will overcome the intermediate scrutiny standard of the time, place, or manner test.²⁴⁰

The federal government may restrict, and even ban,²⁴¹ this specific manner of protected speech—all unsolicited residence-targeted telemarketing—because the ban conforms to the three prongs of the time, place, or manner test. Regarding prong one, because the ban would be “justified without reference to the content of the regulated speech”²⁴²—applying to all unsolicited residence-targeted

234. *Frisby*, 487 U.S. at 484 (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

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

236. *Id.* at 485.

237. See *supra* note 5 and accompanying text.

238. The Ninth Circuit discussed these congressional findings in *Moser*: “Congress held extensive hearings on telemarketing in 1991. Based upon these hearings, it concluded that telemarketing calls to homes constituted an unwarranted intrusion upon privacy.” *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995).

239. *Id.* (“The volume of such calls increased substantially with the advent of automated devices that dial up to 1,000 phone numbers an hour . . .”). See *supra* note 48 for a description of predictive dialers.

240. See *supra* note 231 and accompanying text. One commentator has argued that the Ninth Circuit implied in *Moser*—a case that upheld the TCPA’s ban on prerecorded or automated telemarketing calls to residential phone lines on the basis of a congressional finding of invasion of residential privacy—that Congress could have banned all telemarketing calls as invasions of home privacy. Amaditz, *supra* note 56, ¶ 28. Amaditz stated:

Despite *Bolger*, courts continue to assert that protection of privacy is a strong governmental interest. For example, in upholding a federal law that banned auto-dialed telemarketing in *Moser v. FCC*, the Ninth Circuit implied that the ban was reasonable because Congress could have banned all telemarketing calls as incursions on home privacy.

Id.

241. See *supra* note 233 for a discussion of why bans are not per se overbroad.

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

telemarketing because of the invasion of residential privacy it produces—the ban would be deemed content neutral.

Concerning prong two, as discussed above,²⁴³ the ban serves a significant government interest in preserving the residential privacy that is threatened by telemarketing. The clearest proof that telemarketing presents real harm to residential privacy is that over fifty million people registered for the do-not-call list in the list's first few months of existence.²⁴⁴ This surely resulted from the 2.64 telemarketing calls that the average consumer received weekly prior to the establishment of the do-not-call registry,²⁴⁵ and the seven million daily recipients of such telemarketing calls.²⁴⁶ Moreover, such a ban would be narrowly tailored insofar as “each activity within the proscription’s scope is an appropriately targeted evil.”²⁴⁷ Though not necessarily the “least restrictive or least intrusive means”²⁴⁸ of regulating telemarketing, in light of the dominance of commercial telemarketing as compared to non-commercial telemarketing,²⁴⁹ the ban’s inclusion of non-commercial telemarketing is nonetheless reasonable given the potential for incremental invasions of privacy caused by unsolicited non-commercial telemarketing.

Finally, in conformity with prong three, a ban on all unsolicited residence-targeted telemarketing solicitations leaves open numerous alternative channels of communicating such unsolicited solicitations, whether to the home via non-privacy-invasive direct mail,²⁵⁰ or outside the home via solicitations on public premises.²⁵¹

243. See *supra* notes 234-39 and accompanying text.

244. See *supra* note 5 and accompanying text.

245. *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1240 (10th Cir. 2004); see *supra* note 46 and accompanying text.

246. *Moser v. FCC*, 46 F.3d 970, 972 (9th Cir. 1995). Note that this statistic is from 1991, before predictive dialers took hold in the late 1990s and increased the time telemarketers spent talking to a live voice from twenty minutes an hour to fifty minutes an hour. See *supra* note 48.

247. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

248. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). The *Ward* test is not so demanding; *Ward*'s narrow tailoring prong is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

249. See *infra* note 327 and accompanying text.

250. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 75 (1983).

251. Notably, less comprehensive bans have failed to adequately address the invasion of privacy presented by telemarketing. For example, although Congress found in 1991 that automated calls were a greater invasion of privacy than calls placed by live telemarketers, the TCPA artificial or prerecorded voice provision did not sufficiently protect residential privacy. If it had, fifty million people would not have registered for the do-not-call list in its initial months of existence. See *Moser*, 46 F.3d at 972 (discussing Congress’s finding regarding the relative invasions of privacy of live telemarketing versus artificial or prerecorded telemarketing); see also *supra* note 125 (discussing the TCPA’s artificial or prerecorded voice provision).

b. *A Federal Ban on All Unsolicited Bulk E-mail Is Constitutional*

Though the governmental interest in protecting residential privacy arguably supports a federal ban on all unsolicited residence-targeted telemarketing, it is not significantly compelling to justify a similar ban in the context of UBE. Nevertheless, although UBE does not invade residential privacy to the same extent that telemarketing does,²⁵² it does shift costs to e-mail users, ISPs, and employers to a degree that would justify such a ban.²⁵³ Even if the \$8.9 billion Ferris Research estimate amounts to an overstatement of the cost shifted to third parties, middlemen, and end users, it has been sufficiently corroborated to suggest that, at very least, the costs shifted are indeed high.²⁵⁴

A federal ban on all unsolicited bulk email—a manner regulation—would satisfy the three prongs of the time, place, or manner test.²⁵⁵ As with the ban on all unsolicited telemarketing, a ban on UBE would satisfy prong one because it is not justified by way of reference to the content of the regulated e-mail, but rather, by reference to the manner of the e-mail: that which is sent in bulk. Regarding prong two, the Ferris Research estimate and other studies like it²⁵⁶ suggest that the government's interest in protecting e-mail users, ISPs, and employers from cost-shifting is significant. In addition, even if one argues that the opportunity cost to employers for wasted employee time²⁵⁷ does not amount to a real harm, the costs to ISPs that require additional network bandwidth, memory, and storage space,²⁵⁸ as well as those imposed on e-mail users whose Internet subscription fee is based on increments of time spent online²⁵⁹ are no doubt real. The government has a significant interest in preventing the shifting of such costs. Furthermore, similar to the analysis of narrow tailoring in the telemarketing context, a ban on UBE would be reasonable given the incremental costs shifted by unsolicited solicitations for political and

252. See Sorkin, *supra* note 7, at 1011 & n.50 (“Phone calls from telemarketers are generally considered more intrusive than faxes or direct mail, because they are interactive and because they must be dealt with immediately.”). Like junk faxes and direct mail, spam does not require the urgent attention of the recipient.

253. See *supra* notes 88-95 and accompanying text.

254. See *supra* note 75 for a description of the Ferris Research study, as well as an additional study that also demonstrated that spammers shift significant costs. See *supra* note 92 for evidence that the Ferris Research estimate has been acknowledged by authoritative entities. See *supra* note 93 for a discussion of the methodology of the Ferris Research study.

255. Admittedly, a ban on UBE would apply not only to unsolicited solicitations—the topic of this Note—but to all forms of bulk e-mail communication, i.e., also to those that do not involve requests for money. The broad sweep of such a ban would nevertheless be constitutional for the reasons discussed below.

256. See *supra* note 75 for reference to a similar study.

257. See *supra* note 91 and accompanying text.

258. See *supra* note 72 and accompanying text.

259. See *supra* note 74 and accompanying text.

charitable concerns, and the noted deficiencies of narrower bans, including those of the CAN-SPAM Act of 2003.²⁶⁰ As for prong three, it too is met because there are countless alternatives to UBE that do not run afoul of cost-shifting.

c. A Federal Ban on All Unsolicited Fax Is Constitutional

Like UBE, unsolicited fax arguably does not invade residential privacy in cases where it is directed at the home, despite the interference it imposes on a home's fax machine. But also similar to UBE, junk fax shifts costs to the end user in a way that justifies a ban on all unsolicited fax. Evidence suggests that junk fax shifts to the recipient more than \$100 a year in direct costs,²⁶¹ which come in the form of paper, toner, time required to recognize and discard unwanted faxes, and the temporary inability to send and receive faxes.²⁶²

In accordance with prong two of the time, place, or manner test, the federal government has a significant interest in protecting junk fax recipients from these costs. Moreover, despite the effectiveness of the TCPA at curbing junk fax, a ban on both commercial and non-commercial unsolicited fax would not be overbroad. In the wake of the TCPA, which prohibited unsolicited commercial fax only,²⁶³ the prevalence of unsolicited fax generally suffered a marked decline.²⁶⁴ Nevertheless, expanding the ban on unsolicited fax beyond the scope of commercial junk fax would be deemed narrowly tailored, since, as in the case of non-commercial telemarketing,²⁶⁵ non-commercial junk fax shifts some additional costs to the fax machine owner, however slight.²⁶⁶

Regarding prong one of the time, place, or manner test, a ban on all unsolicited junk fax would be content-neutral, just as in the discussions above regarding telemarketing and spam.²⁶⁷ Furthermore, there are numerous conceivable ways in which such a ban would leave

260. See *supra* note 149 and accompanying text.

261. See *supra* note 86.

262. See *supra* note 85 and accompanying text.

263. See *supra* note 52 and accompanying text.

264. See *supra* note 54 and accompanying text. Of course, this discussion assumes that the content-based TCPA is constitutional. Whether or not this is, in fact, the case will be addressed below. See *infra* Part III.B.2.

265. For the incremental harm argument in the telemarketing context, see *supra* notes 248-49 and accompanying text.

266. Even if the TCPA junk fax provision succeeded in eliminating the bulk of junk fax cost-shifting by banning unsolicited commercial fax, a ban on all unsolicited fax would be overbroad only if there exists some factual or logical argument that unsolicited non-commercial fax imposes zero costs on the recipient. Since no such argument seems apparent, the assumption that unsolicited non-commercial fax shifts incremental costs to the fax machine owner renders a ban on all unsolicited fax narrowly tailored.

267. See *supra* Parts III.B.1.a.-b.

open ample alternative means of communicating the information contained in unsolicited faxes, as demanded by prong three.

d. *How the Above Arguments Fit with Rowan and Bolger*

Recall that one commentator theorized how, under *Rowan*²⁶⁸ and *Bolger*,²⁶⁹ opt-out systems that are applied to unsolicited solicitations will survive the Court's scrutiny whereas outright bans will not.²⁷⁰ However, that same commentator concluded that "the government's interest is more likely to withstand scrutiny" when private individuals act in such situations rather than the government.²⁷¹ This hedged argument suggests that the commentator correctly recognizes that the Court has spoken on point only to the issue of direct mail, and specifically, how it relates to invasion of privacy. While extrapolating from *Rowan* and *Bolger* suggests how the Court might conclude regarding other types of unsolicited communication, there are key differences that argue against such generalization.

A fundamental rationale for the *Bolger* holding is the Court's recognition that a direct mail recipient could avoid the offensiveness posed by such communications simply by averting his eyes, and that discarding such direct mail in the garbage is a constitutionally reasonable burden.²⁷² But the Court has implied—albeit in dicta—that it may conclude otherwise in the context of telemarketing: "One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place."²⁷³ In other words, telemarketing is more intrusive of residential privacy than direct mail, so much so that the Court may find that a recipient cannot, without suffering harm to his privacy, perform the equivalent of averting his eyes or trashing the call simply by hanging up.

Likewise, *Bolger* ultimately may not prove to act as a precedent for a federal ban on all UBE or all junk fax because the government interest in prevention of cost-shifting that supports such regulations

268. *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970); see *supra* notes 197-200 and accompanying text.

269. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); see *supra* notes 201-06 and accompanying text.

270. For a discussion of Kenneth Amaditz's theory, see *supra* notes 207-08 and accompanying text.

271. Amaditz, *supra* note 56, ¶ 27. Amaditz's choice of words is by no means haphazard. He hedges a second time soon thereafter: "Although *Moser* indicates that protection of privacy could support a complete ban, *Rowan* and *Bolger* teach that courts are most likely to uphold this governmental interest when legislation enables the consumer to 'opt-out' of certain advertising." *Id.* at ¶ 28; see also *supra* notes 207-08 and accompanying text.

272. See *supra* notes 204-06 and accompanying text.

273. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978); see also *supra* note 103 and accompanying text.

bears no relationship to the government interest of preserving residential privacy at play in *Bolger*. The Court may very well not require UBE and junk fax recipients or middlemen to avert their eyes from the costs being shifted to them. Certainly, it is conceivable that the Court would conclude that the costs borne by such individuals and entities are not reasonable burdens under the Constitution. Thus, seemingly, *Rowan* and *Bolger* can be reconciled without undermining the argument above that federal bans on all unsolicited telemarketing, all UBE, and all junk fax would be constitutional.

2. Category II: Federal Bans on Unsolicited Commercial Speech Only

Whereas Category I bans need only be analyzed from a limitation-on-speech perspective because of their content-neutrality,²⁷⁴ Category II bans entail both speech restriction and subject matter discrimination. Consequently, Category II bans require a twofold analysis that focuses individually on the above two characteristics. Should the Category II bans implicate either an unconstitutional form of speech restriction *or* subject matter discrimination, they will be held unconstitutional.

a. *The Central Hudson Inquiry as Applied to Such Bans*

Unlike the proposed federal bans on all unsolicited solicitations, which—because of their content-neutrality—were examined above according to the intermediate scrutiny time, place, or manner test,²⁷⁵ federal bans on unsolicited commercial speech only must be analyzed under the near-strict scrutiny *Central Hudson* standard.²⁷⁶

i. *Central Hudson* as Applied to a Ban on Unsolicited Commercial Telemarketing

Assuming that commercial telemarketing satisfies the first prong of *Central Hudson*,²⁷⁷ such a ban would still meet prongs two, three, and four, and thus be constitutional.²⁷⁸ Concerning *Central Hudson*'s

274. See *supra* note 232 and accompanying text.

275. See *supra* Parts III.B.1.a.-c.

276. The *Central Hudson* test is set forth *supra* notes 173-75 and accompanying text. For a discussion of the *Central Hudson*'s near-strict scrutiny characteristics, see *supra* notes 178-91 and accompanying text.

277. To be protected by the First Amendment, the commercial speech—in this case, commercial telemarketing—must relate to lawful activity and not be misleading. See *supra* note 174 and accompanying text. Though commercial telemarketing can sometimes be misleading, the satisfaction of the first prong will be conceded for the sake of argument, so as to demonstrate that a ban on commercial telemarketing is constitutional nevertheless.

278. It is conceded that the *Central Hudson* Court itself was wary of justifying bans

second prong, which requires that the government's interest in imposing the regulation be substantial, it is necessary to recognize that the telemarketing practice as a whole is heavily dominated by unsolicited commercial communications.²⁷⁹ As a result, the federal government's interests in preserving residential privacy in the face of unsolicited commercial telemarketing is nearly as substantial as it is in the case of a ban on all unsolicited telemarketing.²⁸⁰ This substantiality is sufficient to satisfy *Central Hudson's* second prong. Moreover, a ban on commercial telemarketing would satisfy *Central Hudson's* demanding third prong,²⁸¹ since there is a real harm posed by telemarketing²⁸² and that harm—invasion of residential privacy—would be materially alleviated by a ban on its primary cause: commercial telemarketing. Finally, in accordance with *Central Hudson's* fourth prong, a ban on unsolicited commercial telemarketing would not be broader than necessary to promote the federal government's interest of preserving residential privacy. After all, the ban targets the primary culprit of invasions of privacy caused by telemarketing—unsolicited commercial telemarketing—while leaving alone the less intrusive offender: unsolicited non-commercial telemarketing.

ii. *Central Hudson* as Applied to a Ban on Unsolicited Commercial E-mail

Assuming, as in the case of commercial telemarketing discussed above, that *Central Hudson's* first prong is satisfied,²⁸³ prongs two,

on commercial speech on the basis of policy interests, like preserving residential privacy (as in the case of telemarketing) or protection from cost-shifting (as in the case of spam or junk fax). The *Central Hudson* Court stated, "We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980). Nevertheless, the policy interests of preserving residential privacy and protection from cost-shifting are arguably significant enough to satisfy such special care review in the case of commercial telemarketing, UCE, and commercial junk fax.

279. See *infra* note 327 and accompanying text regarding the proportion of commercial telemarketing as compared to telemarketing as a whole.

280. For a discussion of the government's significant interest in preserving residential privacy via a ban on all unsolicited telemarketing, see *supra* notes 234-40, 243-46 and accompanying text.

281. For a statement of the third prong as enunciated by the *Central Hudson* Court, see *supra* note 175 and accompanying text. For a discussion of the Court's subsequent elaboration of the third prong's rigorous demands, see *supra* note 180 and accompanying text.

282. For evidence of the real harm posed by telemarketing, see *supra* notes 237-39, 244-46 and accompanying text.

283. Recall that to merit First Amendment protection, commercial speech must relate to lawful activity and not be misleading. See *supra* note 174 and accompanying text. Often, spam involves deceptive content and/or routing information, an issue that

three, and four are also arguably met, thereby rendering a ban on all unsolicited commercial e-mail constitutional. Regarding *Central Hudson's* second prong, it is necessary to recognize that just like telemarketing, spam is primarily comprised of unsolicited commercial communications.²⁸⁴ As such, the government has a substantial interest in banning UCE, the primary cause of the significant cost-shifting imposed by UBE.²⁸⁵ *Central Hudson's* third prong is also satisfied, insofar as the cost-shifting phenomenon is real²⁸⁶ and a ban on UCE—the overwhelming source of spam cost-shifting—will materially alleviate such cost-shifting. Lastly, *Central Hudson's* fourth prong is met since a ban on UCE is far from overbroad, seeing as it does not target other, less blameworthy perpetrators of spam cost-shifting, such as non-commercial bulk e-mailers.

iii. *Central Hudson* as Applied to a Ban on Unsolicited Commercial Fax

It is also necessary to investigate whether a ban on unsolicited commercial fax, as embodied by the TCPA fax provision,²⁸⁷ satisfies *Central Hudson*, as indeed federal courts have held.²⁸⁸ As in the two inquiries above concerning commercial telemarketing and UCE, it will be assumed for the sake of argument that *Central Hudson's* first prong is satisfied. In accordance with *Central Hudson's* second prong, the government has a substantial interest in protecting commercial junk fax recipients from the average \$100 in costs they must bear each year as a result of unsolicited fax advertisements.²⁸⁹ Likewise, *Central Hudson's* third prong is met because unsolicited commercial faxes comprise the bulk of junk fax cost-shifting.²⁹⁰ As such, the real harms posed by junk fax cost-shifting are materially alleviated by a ban on commercial junk fax only. Finally, the fourth prong of *Central Hudson* is satisfied for reasons amply noted by federal courts: The various alternatives that have been proposed—establishing a do-not-

is the primary target of the CAN-SPAM Act of 2003. See *supra* note 147 and accompanying text. Nevertheless, for the sake of arguing that a ban on UCE is constitutional, it is conceded here that prong one is satisfied.

284. See *supra* note 62 and accompanying text regarding the proportion of UCE as compared to UBE as a whole.

285. For a discussion of the costs shifted by spam to third parties, middlemen, and end-users, see *supra* notes 88-95 and accompanying text.

286. Even if the \$8.9 billion Ferris Research estimate overstates the cost shifted to third parties, middlemen, and end users, it has been sufficiently corroborated to suggest that, at very least, the costs shifted are high. See *supra* note 75 for a description of the Ferris Research study, as well as an additional study that also demonstrated that spammers shift significant costs. See *supra* note 92 for evidence that the Ferris Research estimate has been acknowledged by authoritative entities.

287. See *supra* note 52 and accompanying text.

288. See *supra* notes 211-17 and accompanying text.

289. See *supra* note 86.

290. See *supra* note 212 and accompanying text.

fax registry, regulating the hours of fax advertising, and limiting the number and frequency of fax transmissions—fail to establish that the TCPA fax ban is overbroad,²⁹¹ and junk fax advertisers still have numerous legal means of marketing available to them.²⁹²

b. *The Issue of Subject Matter Discrimination Regarding Such Bans*

Although it is contended above that bans on commercial telemarketing, UCE, and commercial junk faxing satisfy *Central Hudson*, such bans must also be examined as regulations that involve subject matter discrimination.²⁹³ Recall that despite the high pedestal on which the Supreme Court placed content-neutrality in the *Mosley* decision,²⁹⁴ the *Bolger* Court stated in dicta that content-based restrictions on commercial speech may be permissible.²⁹⁵

*Discovery Network*²⁹⁶ has been cited as evidence that the Supreme Court remains in a *Mosley*-like posture—averse to content-based bans—even where such bans discriminate against commercial speech.²⁹⁷ But because the ban in *Discovery Network* failed *Central Hudson*'s test, the Court explicitly left unanswered the question whether, under different circumstances, a community might be constitutionally able to discriminate based on subject matter in the way that Cincinnati had unconstitutionally done.²⁹⁸ Read together, one might surmise—albeit incorrectly—that this allowance by *Discovery Network* and the dicta in *Bolger* suggest that content-based

291. See *supra* note 214 and accompanying text.

292. See *supra* note 216 and accompanying text.

293. For a discussion of subject matter discrimination, see *supra* Part II.A.

294. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972); see also *supra* note 158 and accompanying text.

295. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); see also *supra* notes 159-60 and accompanying text.

296. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); see also *supra* note 182 and accompanying text.

297. See, e.g., *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1166 (D. Colo. 2003). The Colorado district court stated:

In *Discovery Network*, the Supreme Court recognized content discrimination as the primary flaw in the city's regulation of news racks. The city's regulation failed under the First Amendment because the regulation distinguished between commercial and noncommercial speech, despite the fact that there was no evidence that the commercial use of news racks was more harmful to city beautification than other uses of news racks.

Id. (citations omitted). But see *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1239 (10th Cir. 2004) (“[S]o long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal under *Central Hudson*.”). It should be noted that both the Colorado district court and the Tenth Circuit were discussing *Discovery Network* and subject matter discrimination in the context of an opt-out system—the national do-not-call registry—rather than a ban. See *supra* notes 134-40 and accompanying text.

298. *Discovery Network, Inc.*, 507 U.S. at 428.

bans on unsolicited commercial telemarketing, UCE, and unsolicited commercial fax are constitutional.²⁹⁹

Yet despite the *Discovery Network* Court's curious willingness to leave the subject matter discrimination question open, the Court has been quite explicit about its rejection of bans that discriminate against speech on the basis of subject matter, even where *Central Hudson* has been satisfied. In *Metromedia, Inc. v. City of San Diego*, the Court struck down as facially invalid a city ordinance that banned all billboards except commercial billboards on business premises despite the fact that the ordinance satisfied the requirements of *Central Hudson*.³⁰⁰ The Court reasoned: "San Diego has chosen to favor certain kinds of messages—such as onsite commercial advertising, and temporary political campaign advertisements—over others."³⁰¹ Such favoritism rendered the ordinance unconstitutional.

More generally, in *R.A.V. v. City of St. Paul*, the Court held that the First Amendment imposes "a 'content discrimination' limitation upon a State's prohibition of proscribable speech."³⁰² Just as *R.A.V.* suggests that a ban on *all* unsolicited telemarketing, UBE, and junk fax solicitations would be constitutionally sound, it is evident that a ban that singles out commercial speech—such as the TCPA—would be invalidated.³⁰³

299. The logic of such an erroneous conclusion would be as follows: The content-based ban in *Discovery Network* failed because of the small number of commercial newsracks relative to the total number of newsracks in Cincinnati. See *infra* notes 325-26 and accompanying text. By contrast, commercial telemarketing, spam, and fax all comprise the vast majority of unsolicited communications sent in their respective media, and therefore are responsible for the majority of privacy invasions and cost-shifting suffered by recipients of such speech. Regarding commercial junk fax as compared to total junk fax, see *supra* note 212 and accompanying text. Concerning UCE as compared to total UBE, see *supra* note 62 and accompanying text. With reference to commercial telemarketing as compared to total telemarketing, see *infra* note 327 and accompanying text. One might conclude—incorrectly—that as a result, a ban on commercial speech in each of these three unsolicited advertising contexts ought to be justifiable, since it would advance governmental interests to a degree that the *Discovery Network* ordinance did not.

300. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 493, 495-96, 507-12 (1981).

301. *Id.* at 519.

302. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992). In *R.A.V.*, the defendants were charged under a St. Paul ordinance for burning a cross on a neighboring black family's lawn. *Id.* at 379. The ordinance forbade placing on public or private property any object that "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. The Court held the ordinance facially unconstitutional, reasoning that those who wish to use so-called "fighting words" for purposes other than those enumerated in the ordinance—such as the expression of hostility grounded in political affiliation—are exempt from the statute's prohibitions. *Id.* at 391. The Court explained that the First Amendment does not permit St. Paul to prohibit only that speech which concerns unpopular topics. *Id.*

303. Admittedly, *R.A.V.* does not entirely prohibit content-based discrimination in areas of speech that may be constitutionally restricted, such as commercial speech. The *R.A.V.* Court stated, "Even the prohibition against content discrimination that

Although Category II bans surmount the *Central Hudson* test for restriction on commercial speech, the bans are unconstitutional because they discriminate on the basis of subject matter. As is clear from *Metromedia*, both inquiries of the dual analysis applied to Category II bans must be satisfied in order for the ban to be upheld.³⁰⁴

C. Opt-Out Systems: Categories III and IV

1. Category III: A Federal Opt-Out System Directed at All Unsolicited Solicitations

Imagine the full field of government regulation as a spectrum, with bans lying at one extreme and opt-out systems residing at the other.³⁰⁵ This metaphor does not, however, imply that all bans offend the constitution whereas all opt-outs are satisfactory. *Bolger* suggests that bans may indeed be unconstitutional.³⁰⁶ Yet this Note has argued that content-neutral bans on all unsolicited telemarketing, UBE, or junk fax would be upheld.³⁰⁷ Likewise, *Rowan* demonstrates the probability that the Supreme Court will uphold opt-out systems constructed to regulate unsolicited solicitations.³⁰⁸ Yet Category IV regulations may or may not prove unconstitutional given the fact that they utilize subject matter discrimination to achieve their ends.³⁰⁹ But what of Category III regulations? Opt-out systems may be likened to either of the two types of government regulation that lie near them on

we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech." *Id.* at 387. Nevertheless, *R.A.V.* makes specific reference to an example of prohibited content-based discrimination in the realm of commercial speech, stating that while a state may choose to regulate price advertising in one particular "industry" prone to fraud, it may not bar only that commercial advertising that depicts men in a demeaning fashion. *Id.* at 388-89. So too with the telemarketing, spam, and junk fax "industries." The federal government may opt to regulate—and even ban—such practices in their entirety, because of the invasion of residential privacy and cost-shifting that they impose. Yet the federal government may not single out for regulation or ban the commercial forms of such "industries" only, since that constitutes subject matter discrimination.

304. See *supra* notes 300-01 and accompanying text.

305. Government inaction, i.e., failure to regulate, does not lie on this regulatory spectrum. The spectrum consists only of modes of government activity, not government inactivity. See *supra* Part II.B.3. for a discussion of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and the question as to what extent government facilitation of consumer choice is similar to government creation of an opt-out system. That question is addressed below.

306. For Kenneth Amaditz's interpretation of *Bolger* in light of *Rowan*, see *supra* notes 207-08 and accompanying text.

307. See *supra* Part III.B.1. regarding the constitutionality of Category I regulations.

308. For Amaditz's understanding of *Rowan* as a result of *Bolger*, see *supra* notes 207-08 and accompanying text.

309. See *infra* Part III.C.2. for a discussion of the constitutionality of Category IV regulations.

the regulatory spectrum: (1) government speech or (2) government facilitation of consumer choice.

Concerning regulation type (1), government speech, the Supreme Court has repeatedly held that government may provide incentives for a particular activity without being thought to have discriminated against its alternative.³¹⁰ The Court highlighted this distinction in *Maher v. Roe*, which involved a state welfare department regulation that limited state Medicaid benefits for first trimester abortions to those that were medically necessary.³¹¹ The Court upheld the regulation, explaining:

There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.³¹²

One possible argument is that opt-out systems may be likened to “state encouragement of an alternative activity”³¹³—i.e., instances of government speech. *Maher* tells us that in such a regulatory capacity, the state's power is “necessarily far broader,”³¹⁴ implying that as a speaker, the government may even go so far as to discriminate on the basis of subject matter. In the words of *Rosenberger v. Rector & Visitors of the University of Virginia*, another government speech case, government has the right “to regulate the content of what is or is not

310. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 178, 192-93 (1991) (upholding a federal act which authorized granting money to family planning organizations, except those that utilize abortion as a method of family planning, because the government did not discriminate on the basis of “viewpoint” but rather, simply chose to fund one activity at the exclusion of another). *Rust* explained the permissibility of subject matter discrimination in this context from a consequentialist perspective: “To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.” *Id.* at 194. For another example of a government speech case, see *supra* notes 222-25 and accompanying text, discussing *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

311. *Maher v. Roe*, 432 U.S. 464, 466 (1977).

312. *Id.* at 475-76 (citation omitted). The Court added that the regulation placed no obstacles in the path of a woman who sought an abortion. *Id.* at 474. Although the state made childbirth a more attractive option due to lack of funding for an abortion, it imposed no restriction on access to abortions that did not already exist. *Id.* Although indigence made it difficult for some women to procure abortions, the regulation did not create such poverty. *Id.* The Court analogized the regulation to a state's policy choice to fund public—but not private—education. *Id.* at 477. In neither case, the Court stated, must the state demonstrate a compelling interest in support of such policies. *Id.*

313. *Id.* at 475.

314. *Id.* at 476.

expressed when it is the speaker or when it enlists private entities to convey its own message.”³¹⁵

An alternative argument is that opt-out systems may be equated with the more limiting type (2) regulations: government facilitation of consumer choice. In *Zelman*, the Court upheld the Cleveland school vouchers program because it was “entirely neutral with respect to religion[,] . . . provide[d] benefits directly to a wide spectrum of individuals, . . . [and] permit[ted] such individuals to exercise genuine choice among options public and private, secular and religious.”³¹⁶ The language of the Court stresses that such government facilitation of consumer choice is permitted only so as long as there is no instance of subject matter discrimination. The government may only facilitate consumer choice by presenting the public with a vast array of options, thus rendering the citizenry’s choice genuine. As such, likening opt-out systems to government facilitation of consumer choice requires that opt-outs be content-neutral to pass constitutional muster.

Regardless of whether one analogizes opt-out systems to instances of government speech, or to government facilitation of consumer choice, it is clear that Category III regulations—opt-out systems that do not run afoul of content-based problems because they apply both to commercial and non-commercial solicitations—are constitutional. Nevertheless, a question that bears critical implications for the constitutionality of Category IV regulations concerns *why* a government’s power is “necessarily far broader”³¹⁷ in Category III. Is it because Category III involves (a) an opt-out system; (b) no subject matter discrimination; or (c) both (a) and (b)? In other words, which is the better analogy: opt-outs to government facilitation of consumer choice, or opt-outs to government speech?

2. Category IV: A Federal Opt-Out System Directed at Unsolicited Commercial Speech Only

In analyzing the constitutionality of the national do-not-call registry—a Category IV regulation—the Colorado district court in

315. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). *Rosenberger* held that a university’s refusal to pay the printing costs of a newspaper published by a qualified student group because the newspaper “‘promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality’” violated the group’s First Amendment right to free speech. *Id.* at 822-27, 837. In doing so, the Court distinguished between the university’s own preferred message and what was at stake in this case: the private speech of its students. *Id.* at 834. *Rosenberger* stated that *Rust* stood for the same principles: “We recognized [in *Rust*] that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.” *Id.* at 833. For a discussion of *Rust*, see *supra* note 310.

316. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002). For a discussion of *Zelman*, see *supra* notes 218-21 and accompanying text.

317. *Maher*, 432 U.S. at 476.

*Mainstream Marketing Services, Inc. v. FTC*³¹⁸ tended to view the answer to the above question as (c): Government's power in Category III is expansive because Category III regulations involve (a) opt-out systems that (b) do not discriminate based on subject matter. In doing so, the district court stated that a content-discriminatory opt-out system such as the do-not-call registry is not legitimately neutral, since it fails to provide consumers with a wide-ranging set of options.³¹⁹ The district court explained what it perceived as the effect of the FTC's decision to target commercial speech only: "The mechanism purportedly created by the FTC to effectuate consumer choice instead influences consumer choice, thereby entangling the government in deciding what speech consumers should hear."³²⁰

Yet the *Mainstream* district court stopped short of hanging the constitutionality of opt-out systems on their content neutrality: "The First Amendment prohibits the government from enacting laws creating a preference for certain types of speech based on content, without asserting a valid interest, premised on content, to justify its discrimination. Because the do-not-call registry distinguishes between the indistinct, it is unconstitutional under the First Amendment."³²¹ To this end, the *Mainstream Marketing* district court analogized the national do-not-call registry to the failed Cincinnati ordinance in *Discovery Network*,³²² stating that the Supreme Court invalidated the Cincinnati ordinance because of the lack of evidence that commercial newsracks were more harmful aesthetically than noncommercial newsracks.³²³ But the district court's reference to *Discovery Network* as precedent for its decision is misplaced, as key factual differences exist between these two cases.³²⁴

In *Discovery Network*, the Court found that the city's asserted interests of beautification and safety were unrelated to the content-based distinction made by the ban.³²⁵ But the Court's determination that the ban lacked a reasonable fit to the city's interests turned on the

318. *Mainstream Mktg. Servs., Inc. v. FTC*, 283 F. Supp. 2d 1151 (D. Colo. 2003), *stay denied* by 284 F. Supp. 2d 1266 (D. Colo. 2003), *stay granted* by 345 F.3d 850 (10th Cir. 2003), *rev'd*, 358 F.3d 1228 (10th Cir. 2004).

319. The Colorado district court stated: "Were the do-not-call registry to apply without regard to the content of the speech, or to leave autonomy in the hands of the individual, as in *Rowan*, it might be a different matter." *Id.* at 1168.

320. *Id.* at 1163.

321. *Id.* at 1168.

322. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *see also supra* note 182 and accompanying text.

323. *Mainstream Mktg. Servs., Inc.*, 283 F. Supp. 2d at 1166.

324. FTC lawyers highlighted these key factual differences following the Colorado district court ruling. *See Adam Liptak, No-Call List: Hard Choices*, N.Y. Times, Sept. 27, 2003, at A1. The Tenth Circuit acknowledged these distinctions in its decision upholding the do-not-call registry. *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1239 (10th Cir. 2004).

325. *Discovery Network, Inc.*, 507 U.S. at 412, 430.

numbers involved; it noted the “paltry” benefit yielded by removing sixty-two commercial newsracks while 1,500 to 2,000 non-commercial newsracks remained.³²⁶ In contrast, the proportion of commercial telemarketing vis-à-vis non-commercial telemarketing is far greater, with estimates of commercial telemarketing totaling anywhere from forty to eighty percent of all telemarketing.³²⁷ Such numbers suggest that there is indeed a valid content-based interest justifying the registry’s discrimination between commercial and non-commercial speech.³²⁸

While the *Mainstream Marketing* district court erroneously likened the national do-not-call registry to the Cincinnati ordinance in *Discovery Network*, the registry—and other content-based opt-outs like it—ought to fail anyway. The dispositive point lies in opt-out

326. Regarding this “paltry” benefit, the *Discovery Network* Court stated, “The benefit to be derived from the removal of 62 newsracks while about 1,500-2,000 remain in place was considered ‘minute’ by the District Court and ‘paltry’ by the Court of Appeals. We share their evaluation of the ‘fit’ between the city’s goal and its method of achieving it.” *Id.* at 417-18. The Court noted that the fact that the ban provided only the slightest incremental support of the government’s asserted interests supported the holding that the prohibition was unconstitutional. *Id.* at 427. A ban on sixty-two of 2000 newsracks amounts to roughly three percent. Liptak, *supra* note 324.

327. The *Mainstream Marketing* district court judge stated that estimates indicate that forty to sixty percent of telemarketing calls will be affected by the do-not-call registry. *Mainstream Mktg. Servs., Inc.*, 283 F. Supp. 2d at 1157. FTC lawyers estimate that blocking commercial telemarketing could eliminate as much as eighty percent of telemarketing calls. Liptak, *supra* note 324.

328. The district court judge in *Mainstream Marketing* ruled that numbers are not the decisive factor. Liptak, *supra* note 324. Rather, the *Mainstream Marketing* district court stated the dispositive issue as follows: “If the government avoids regulating certain fronts in attempting to materially advance its interest, however, it cannot justify its abstention on these fronts based on the content of the speech.” *Mainstream Mktg. Servs., Inc.*, 283 F. Supp. 2d at 1166. But *Discovery Network* demonstrates that the calculation is, at least to some extent, a numbers issue. Some federal appeals courts have interpreted *Discovery Network* to mean as much. In upholding the TCPA ban on junk fax, the Eighth Circuit distinguished *Discovery Network* insofar as commercial newsracks only constituted a small percentage of newsracks on Cincinnati streets, whereas commercial faxes comprise a large proportion of all unsolicited faxes. *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 656 n.4 (8th Cir. 2003). The Ninth Circuit agreed in upholding the same law, distinguishing *Discovery Network* from the ban on junk fax because in the former, the content-based ban only involved a small share of the total number of newsracks. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995). Similarly, the Tenth Circuit in *Mainstream Marketing* suggested that the constitutionality of content-based regulations on commercial speech boils down to numbers. Distinguishing the impact of the law in *Mainstream Marketing* from that in *Discovery Network*, the Tenth Circuit stated:

So far, more than 50 million telephone numbers have been registered on the do-not-call list, and the do-not-call regulations protect these households from receiving most unwanted telemarketing calls. According to the telemarketers’ own estimate, 2.64 telemarketing calls per week—or more than 137 calls annually—were directed at an average consumer before the do-not-call list came into effect. Accordingly, absent the do-not-call registry, telemarketers would call those consumers who have already signed up for the registry an estimated total of 6.85 billion times each year.

Mainstream Mktg. Servs., Inc., 358 F.3d at 1240 (citation omitted).

systems' ultimate similarity to government facilitation of consumer choice, as opposed to government speech. The Tenth Circuit in *Mainstream Marketing* implied as much with its choice of words describing the registry: "The national do-not-call registry offers consumers a tool with which they can protect their homes against intrusions that Congress has determined to be particularly invasive."³²⁹ The registry is a consumer-enabling mechanism provided by the government, rather than a proper expression of government opinion.

By establishing the do-not-call registry, the government is not speaking, nor is it utilizing private entities to deliver its own message.³³⁰ Just as in *Rosenberger*, where the Supreme Court held that the University of Virginia had unconstitutionally imposed its own preferred message on the private speech of its students,³³¹ the federal government has inserted its desired message—by limiting the public's choice to opt out of commercial telemarketing only—into a situation where it is neither speaking for itself nor enlisting private bodies to convey its message.

The essential nature of opt-out systems is that they permit the *public* to speak. Similar to the Ohio voucher program in *Zelman*,³³² the primary goal of opt-out systems is to facilitate consumer *choice*. When the government's message enters the dialogue, thereby encroaching on public speech and limiting choice, the opt-out system inevitably must fail.

The Tenth Circuit in *Mainstream Marketing* overlooked this critical point. Misperceiving unassisted and government-assisted consumer speech as essentially alike, the Tenth Circuit stated, "Just as a consumer can avoid door-to-door peddlers by placing a 'No Solicitation' sign in his or her front yard, the do-not-call registry lets consumers avoid unwanted sales pitches that invade the home via telephone, if they choose to do so."³³³ In fact, the former scenario is not analogous to the latter; once the government intervenes by facilitating consumer choice, it must provide consumers with the full range of available options rather than limit those options on the basis of their subject matter.

D. Recommendations

Since the federal government has staggered its adoption of regulations over unsolicited communications, one may posit

329. *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1233.

330. The reference is to *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). See *supra* note 315 and accompanying text.

331. For a discussion of *Rosenberger*, see *supra* note 315.

332. For a discussion of *Zelman*, see *supra* notes 218-21, 316 and accompanying text.

333. *Mainstream Mktg. Servs., Inc.*, 358 F.3d at 1233.

recommendations with varying degrees of certainty. The recommendations below reflect such variances.

1. Junk Fax: Stick with the Status Quo

The ban on unsolicited commercial fax—itsself the most longstanding federal regulation on unsolicited communications—provides the clearest indication of how to go forward: do not change a thing. This argument is submitted despite this Note's contention that a federal ban on all unsolicited fax would be constitutional,³³⁴ and particularly despite this Note's claim that the TCPA junk fax provision—being a Category II federal ban on unsolicited commercial solicitations—would be held unconstitutional.³³⁵ Since the TCPA fax provision succeeded in fostering a significant decline in the quantity of junk fax,³³⁶ a comprehensive ban on junk fax—though constitutional—is simply unnecessary. Moreover, Congress need not anticipate the Supreme Court's invalidation of the TCPA, though this Note maintains such invalidation is the logical conclusion of the Court's jurisprudence on such matters. Especially in light of the TCPA's practical achievements, Congress ought to amend the TCPA only if the Court requires it to do so.

2. Telemarketing: Stick with the Status Quo

As for the case of telemarketing, clear conclusions present themselves less readily on account of the recent legal challenges to the do-not-call registry³³⁷ and the lack of elapsed time to indicate whether the initiative will prove successful in practice. Assuming the national do-not-call registry survives its current legal limbo despite the predictions of this Note,³³⁸ some time should be afforded to permit the registry to demonstrate its potential for success. Only afterwards—if its failure is apparent—should a federal ban or opt-out system on all telemarketing solicitations be adopted, even though this Note suggests such a ban or opt-out system would be constitutional.³³⁹ After all, as one commentator noted, the regulation is “most likely” to survive judicial scrutiny as an opt-out system³⁴⁰—albeit, according to this Note, a content-neutral opt-out system.³⁴¹ There is simply no reason to craft constitutionally-debatable legislation unnecessarily, that is, of

334. See *supra* Part III.B.1.c.

335. See *supra* Part III.B.2.b. In particular, see *supra* note 303 and accompanying text.

336. See *supra* note 54 and accompanying text.

337. See *supra* notes 10-15, 134-41 and accompanying text.

338. See *supra* Part III.C.2.

339. See *supra* Parts III.B.1, III.C.1.

340. Amaditz, *supra* note 56, ¶ 28.

341. See *supra* Part III.C. (discussing Category III and Category IV opt-out systems).

course, unless the mode of communications to be regulated threatens to undermine an entire system of communications.

3. Spam: Enact a Federal Ban on UBE

The above caveat refers directly to the case of spam. Commentators surmise that if left unchecked, spam jeopardizes the very existence of e-mail as a communications medium.³⁴² Even prior to being signed into law by President Bush, many critics worried aloud that the CAN-SPAM Act of 2003, with its corresponding do-not-email registry, is far too impotent to alleviate this problem.³⁴³ Tougher state laws—such as the Delaware and California anti-spam laws³⁴⁴—are better suited for the task. But they run aground on account of federal preemption issues,³⁴⁵ potential dormant commerce clause problems,³⁴⁶ and general impracticality.³⁴⁷ This is a critical moment that excepts the rule. If, as this Note contends, a federal ban on UBE would be constitutional,³⁴⁸ it ought to be implemented immediately. Such a broad ban is necessary given this Note's contention that a federal ban on UCE—the primary source of the cost-shifting problem³⁴⁹—would not pass constitutional muster.³⁵⁰

CONCLUSION

At the time of this writing, telemarketing industry representatives have yet to make a decision on whether to appeal the Tenth Circuit ruling in *Mainstream Marketing*, either to the Tenth Circuit en banc or to the Supreme Court.³⁵¹ If the industry proceeds with an appeal to the Supreme Court, it is not clear that the Court would be willing to hear it, because there is currently no disagreement on the matter among federal courts of appeals.³⁵²

Mainstream Marketing notwithstanding, it is clear that content-based federal bans on unsolicited solicitations offend the

342. See *supra* note 57 and accompanying text.

343. See *supra* note 149 and accompanying text.

344. See *supra* notes 108-11 and accompanying text.

345. See *supra* notes 26, 112 and accompanying text.

346. See *supra* notes 113-16 and accompanying text. There is only a possibility that such state statutes contravene the dormant Commerce Clause. The current state of the law on the matter is unclear. See also *supra* note 114 (discussing possible due process problems with state spam laws).

347. See *supra* notes 117-19 and accompanying text.

348. See *supra* Part III.B.1.b.

349. See *supra* note 62 and accompanying text.

350. See *supra* Part III.B.2.

351. Mayer, *supra* note 5; Stout, *supra* note 15. If brought, the appeal would challenge the ruling in *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004).

352. Stout, *supra* note 15.

Constitution,³⁵³ whereas content-neutral federal bans and opt-outs are constitutional³⁵⁴— even despite the near-strict scrutiny *Central Hudson* standard³⁵⁵ where it applies.

A closer question, however, is whether opt-out systems that discriminate based on subject matter—like the do-not-call registry—are constitutionally problematic. In *Mainstream Marketing*, the Tenth Circuit held that such opt-out systems are constitutional.³⁵⁶ This Note has argued otherwise, because such content-based opt-out systems fail to present consumers with real choice.³⁵⁷

In one regard, there is absolutely no question: masses of Americans have demanded relief from the nuisances and costs of unsolicited solicitations. However, that solution must not come at the expense of a fundamental judicial principle concerning speech, even that of the commercial variety: subject matter discrimination is rarely tolerated.

353. See *supra* Part III.B.2.

354. See *supra* Parts III.B.1., III.C.1.

355. For a discussion of *Central Hudson*'s near-strict scrutiny characteristics, see *supra* notes 178-91 and accompanying text.

356. For a discussion of the Tenth Circuit holding in *Mainstream Marketing*, see *supra* notes 138-40 and accompanying text.

357. See *supra* Part III.C.2.