

U.S. House of Representatives
Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection

Hearing on
PRIVACY IN THE COMMERCIAL WORLD
March 1, 2001

Supplemental Statement of Professor Fred H. Cate
March 8, 2001

Mr. Chairman:

You asked the witnesses in the March 1, 2001, hearing on Privacy in the Commercial World to respond to Mr. Gordon's inquiry about the constitutional bounds of Congress' authority to legislate in the area of privacy. This statement attempts to do so.

I read the Constitution and the Supreme Court's jurisprudence as permitting Congress to legislate privacy protection only when it has a constitutional basis for doing so (in this case, the interstate commerce clause), and when that legislation meets the requirements of the First Amendment. First Amendment review is required of any law—privacy-related or otherwise—that limits the ability of individuals or nongovernmental institutions to engage in expression. That limit does not have to take the form of a direct prohibition to trigger First Amendment scrutiny, although most privacy laws have that effect.

Strict Scrutiny

Of course, not all restrictions on expression trigger the same type of First Amendment review. This point was largely obscured in last week's hearings, due perhaps to the fact that the Supreme Court's jurisprudence in this area is not always clear or consistent. As a general matter, however, direct government restraints, prior restraints, restraints based on the viewpoint of the expression or, in many cases, the content of the speech, require *strict scrutiny*, the highest form of scrutiny applied by the Court. Under this standard, which is the one that the Supreme Court has most frequently applied when reviewing privacy laws, the government bears the burden of showing that the law is (1) necessary to serve a compelling interest, and that the law (2) imposes no greater burden than is necessary to achieve that purpose. The need to evaluate both the purpose of the law and how narrowly it is tailored is why most of us at last week's hearing focused on what *harm* a privacy law is intended to prevent or remedy, and what *cost* or other burdens privacy law imposes on consumers and businesses. A privacy law that does not respond to a specific, significant harm will not be found to serve a compelling interest, and a law that imposes unnecessary costs, or costs in excess of the benefits it generates, will not be found to be the least restrictive means of achieving the government's interest. In either case, the Court would almost certainly strike down the law as unconstitutional. Moreover, it is important to reiterate that

it is the *government's* responsibility under the First Amendment to demonstrate both the importance of the interest and the precision with which the law is tailored.

Intermediate Scrutiny

Although most privacy laws have been reviewed under strict scrutiny, not all have. Some courts have applied various forms of intermediate scrutiny, usually on the basis that the expression affected by the privacy law was *commercial* in nature. Although specific tests vary in detail, all intermediate scrutiny tests require that the government demonstrate that the law is intended to serve an important or substantial government interest, and that the law be narrowly tailored to achieving that interest. As you know, Professor Volokh testified, and I agree with him, that intermediate scrutiny was inappropriate for reviewing privacy laws and regulations because, even though the expression affected occurred in a commercial context, it was not “commercial speech” (i.e., it did not propose a commercial transaction). Some lower courts have nevertheless reviewed privacy laws or regulations under intermediate scrutiny. When they have done so, however, they have tended to find that the law or regulation failed even this level of scrutiny. In other words, they applied intermediate scrutiny because there was no need to apply strict scrutiny: The restriction being challenged could not survive even the lower standard of review.

The most recent example of this type of scrutiny was the decision of the U.S. Court of Appeals for the Tenth Circuit in *U.S. West, Inc. v. Federal Communications Commission*. The appellate court struck down the Commission’s rules requiring that telephone companies obtain explicit consent from their customers before using data about those customers’ calling patterns to market products or services to them.¹ The court found that the FCC’s rules, by limiting the use of personal information when communicating with customers, restricted U.S. West’s speech and therefore were subject to First Amendment review. Although the court applied intermediate scrutiny, it determined that under the First Amendment, the rules were presumptively unconstitutional unless the FCC could prove otherwise by demonstrating that the rules were necessary to prevent a “*specific and significant harm*” on individuals, and that the rules were ““*no more extensive than necessary to serve [the stated] interests.*””²

Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of substantial state interest under *Central Hudson* [the test applicable to commercial speech] for it is not based on an identified harm.³

The court found that for the Commission to demonstrate that the “opt-in” rules were sufficiently narrowly tailored, it must prove that less restrictive “opt-out” rules would not offer sufficient privacy protection, and it must do so with more than mere speculation:

Even assuming that telecommunications customers value the privacy of [information about their use of the telephone], the FCC record does not adequately show that an opt-out strategy would not sufficiently protect customer privacy. The respondents merely speculate that there are a substantial number of individuals who feel strongly about their privacy, yet would not bother to opt-out if given notice and the opportunity to do so. Such speculation hardly reflects the careful calculation of costs and benefits that our commercial speech jurisprudence requires.⁴

The court found that the FCC had failed to show why burdensome “opt-in” rules were necessary, and therefore struck down the rules as unconstitutional. The Supreme Court declined to review the case.⁵

The Dominance of First Amendment Rights

The result in *U.S. West* is not surprising, because, whether analyzed under strict or intermediate scrutiny, privacy laws and regulations rarely survive constitutional review. For example, the Supreme Court has accorded privacy rights little protection when confronted with freedom of association claims of groups such as the American Communist Party.⁶ The Supreme Court has struck down ordinances that would require affirmative consent before receiving door-to-door solicitations,⁷ before receiving Communist literature,⁸ even before receiving “patently offensive” cable programming.⁹ The words of the Court in the 1943 case of *Martin v. Struthers*—involving a local ordinance that banned door-to-door solicitations without explicit (“opt-in”) householder consent—are particularly apt: “Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants.”¹⁰

Similarly, the Court often has demonstrated little concern for the privacy interests of unwilling viewers or listeners, rejecting claims against broadcasts of radio programs in Washington, D.C. streetcars,¹¹ R-rated movies at a drive-in theater in Jacksonville, Florida,¹² and a jacket bearing the phrase “Fuck the Draft” worn in the corridors of the Los Angeles County Courthouse.¹³ And plaintiffs rarely win suits brought against the press for disclosing private information. When information is true and obtained lawfully, the Supreme Court repeatedly has held that the state may not restrict its publication without first meeting strict scrutiny. Under this requirement, the Court has struck down laws restricting the publication of confidential government reports,¹⁴ and of the names of judges under investigation,¹⁵ juvenile suspects,¹⁶ and rape victims.¹⁷ Even if information published by the press is subsequently proved to be false, the Supreme Court has demonstrated extraordinary deference to First Amendment expression rights and little concern for the privacy interests involved.¹⁸

In fact, when privacy rights conflict with free expression rights before the Court, the latter prevail, virtually without exception. The dominance of the free expression rights over privacy interests is so great that Peter Edelman has written:

[T]he Court [has] virtually extinguished privacy plaintiff's chances of recovery for injuries caused by truthful speech that violates their interest in nondisclosure. . . . If the right to publish private information collides with an individual's right not to have that information published, the Court consistently subordinates the privacy interest to the free speech concerns.¹⁹

This is true irrespective of whether the speaker is an individual or an institution.

The Impact on Congress

So what does this mean for Congress? I believe it necessitates that *whenever* Congress restricts the flow of information in an effort to protect privacy it must demonstrate (1) what harms it is acting to prevent or remedy, (2) that such harms are serious enough to constitute a substantial or compelling government interest, (3) that the law is not broader, or does not regulate appreciably more expression, than is necessary to achieve that interest, and (4) that there are not other tools (such as technologies or market solutions) that would achieve the same end with less interference with information flows. The precise test (i.e., whether the interest must be “compelling” or “substantial” and whether the legislation must be the “least restrictive means” or merely “narrowly tailored” to achieve that interest) will depend upon the nature both of the expression restricted and of the legislation itself, but effectively *all* restrictions on the collection, use, or disclosure of information by the private sector will have to survive this basic First Amendment review.

This is a very high, but not impossible, burden. As a practical matter, it means that Congress cannot legislate to protect individuals from embarrassment or a “general level of discomfort” as a result of the disclosure of true information about them. It also means that Congress cannot broadly restrict uses of information that do not cause harm in an effort to target those that do.

On the other hand, the First Amendment does not restrict Congress from facilitating the creation and enforcement of private contracts. For example, Congress has broad discretion under the First Amendment to require disclosures, provided that those requirements do not interfere with expression to such an extent, or impose such high costs, that they constitute an unconstitutional restraint on expression. The Supreme Court has also found that Congress has significantly broader latitude to act to protect *children*, provided that the law is not so overbroad that it impinges on adult's expression. This explains why the Children's Online Privacy Protection Act may be constitutional under the First Amendment as applied to children, but similar restrictions would be unconstitutional if applied to adults. Moreover, Congress has broad—although not unlimited authority—to regulate the *government's* use of information (i.e.,

to require privacy policies on government Web sites, or to reduce the amount of personal information the government collects from citizens). Congress can fund the development of privacy protecting technologies (either directly or through tax incentives or other subsidies), and sponsor commissions or other research initiatives about privacy issues. Congress can help educate citizens about the steps that we—and often, only we—can take to protect our own privacy.

Conclusion

The First Amendment is often lamented as a regrettable restraint on the ability of Congress and other governmental bodies to act in the best interest of the citizenry and protect the public. It may sometimes have that effect. But I view it differently. The First Amendment reflects the fact that expression, and the information that is essential to expression, are so integral to our democracy and our economy, that laws affecting them always pose a great risk to citizens and consumers. Even when motivated by the most noble of purposes, those laws can result in untold damage, especially if they are not precisely targeted. Moreover, laws regulating expression and information are often attractive to policymakers and to the public; such laws frequently respond to immediate concerns and they usually do not require the expenditure of taxpayer dollars.

The First Amendment reflects a constitutional calculation that because of the attractiveness of laws limiting expression and the great risks that they pose, the government should only be allowed to enact and enforce such laws when they are *necessary* to prevent or remedy a specific, significant *harm*, and when they are *closely tailored* to affect only that expression that causes the harm. Viewed in this light, the First Amendment does *not* limit Congress' authority to restrict expression when necessary to prevent substantial harms. It only limits Congress' authority to restrict expression when that restriction is not necessary or is designed to serve a less important purpose.

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He is a recognized authority on privacy and other information law issues. He directed the Electronic Information Privacy and Commerce Study for the Brookings Institution, chaired the International Telecommunication Union's High-Level Experts on Electronic Signatures and Certification Authorities, was a member of the Federal Trade Commission's Advisory Committee on Online Access and Security, and served as vice chair of the American Bar Association Section on Health Law's Electronic Communications and Privacy Interest Group. He currently directs the American Institute for Contemporary German Studies' project on Electronic Commerce in Europe and the United States.

Cate regularly appears before congressional and state legislative committees, and professional and industry groups on privacy and information law issues. He is the author of many articles and books concerning privacy and information law, including the award-winning *Privacy in the Information Age* and *The Internet and the First Amendment*. He writes widely for the popular press and has appeared on CNN, PBS, and many local television and radio programs. He received his J.D. and his A.B. with Honors and Distinction from Stanford University. A member of the boards of trustees of Phi Beta Kappa Fellows and of National History Day, he is listed in *Who's Who in American Law*.

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Notes

1. U.S. West, Inc. v. Federal Communications Comm'n, 182 F.3d 1224, 1235 (10th Cir. 1999), cert. denied, 528 U.S. 1188 (2000).
2. Id. at 1235 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 486 (1995)) (emphasis added).
3. Id. (emphasis added).
4. Id. (emphasis added).
5. U.S. West, Inc. v. Federal Communications Comm'n, 528 U.S. 1188 (2000).
6. Communist Party of the U.S. v. Subversive Activities Control Board, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961).
7. Martin v. Struthers, 319 U.S. 141 (1943).
8. Lamont v. Postmaster General, 381 U.S. 301 (1965).
9. Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Comm'n, 518 U.S. 727 (1996).
10. Martin v. Struthers, 319 U.S. at 141.
11. Public Utilities Commission v. Pollack, 343 U.S. 451 (1952).
12. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).
13. Cohen v. California, 403 U.S. 15 (1971).
14. New York Times Co. v. United States, 403 U.S. 713 (1971).
15. Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).
16. Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).
17. Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
18. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988); Time, Inc. v. Hill, 385 U.S. 374 (1952).
19. Peter B. Edelman, "Free Press v. Privacy: Haunted by the Ghost of Justice Black," 68 *Texas Law Review* 1195, 1198 (1990).