

Commissioner Swindle (Concurring Statement Commissioner Orson Swindle in Telemarketing Sales Rule Review, File No. R411001):

“A major objective of the Telemarketing Act and the TSR is to protect consumers’ “right to be let alone” in their homes, which is the “most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. U.S.*, 177 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

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Subsequent Supreme Court decisions:

**Hill v. Colorado 530 U.S. 703 (2000)**

Abortion opponents sought declaration that criminal statute prohibiting any person from knowingly approaching within eight feet of another person near health care facility without that person's consent violated First Amendment, and they sought injunction against statute's enforcement.

1. “The right to avoid unwelcome speech has special force in the privacy of the home, *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970).  
Hill v. Colorado 530 U.S. 703, 717 (2000).

2. “We have since recognized that the "right to persuade" discussed in that case is protected by the First Amendment, *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), as well as by federal \*718 statutes. Yet we have continued to maintain that "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan*, 397 U.S., at 738, 90 S.Ct. 1484. None of our decisions has minimized the enduring importance of "a right to be free" from persistent "importunity, following and dogging" after an offer to communicate has been declined. While the freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Id.*, at 736, 90 S.Ct. 1484. It is that right, as well as the right of "passage without obstruction," that the Colorado statute legitimately seeks to protect. The restrictions imposed by the Colorado statute only apply to communications that interfere with these rights rather than those that involve willing listeners.”

Hill v. Colorado 530 U.S. 703, 717-18 (2000).

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**Rowan v. U. S. Post Office Dept., 397 U.S. 728 (1970)**

Appellants challenge the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, 81 Stat. 645, 39 U.S.C. s 4009 (1964 ed., Supp. IV), under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder.

p. 731: “Section 4009 was a response to public and congressional concern with use of mail facilities to distribute unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character.” However, section 4009 is interpreted broadly to allow postal customers to request cessation of any unwanted mailing, regardless of its character.

p. 735: “The essence of appellants' argument is that the statute violates their constitutional right to communicate.”

“Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home.”

P. 736-37: “Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's \*737 right to communicate must stop at the mailbox of an unreceptive addressee.”

P. 737: “The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.”

“In operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalog because he objects to the contents--or indeed the text of the language touting the merchandise. Congress provided this sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official.”

P. 738: “In effect, Congress [w/ section 4009] has erected a wall--or more accurately permits a citizen to erect a wall--that no advertiser may penetrate without his acquiescence.”

P. 738: “We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.”

“The asserted right of a mailer, we repeat, stops at the outer boundary of every person's domain.”