Commercial Speech and Free Expression: The United States and Europe Compared

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Introduction

When freedom of expression is at issue, the United States is widely considered to be in a class by itself. This is especially true of the long history of American courts in grappling with a vast array of free speech issues. American courts have considered freedom of speech questions "for longer than those of any other jurisdiction."[1] Throughout the years, the free speech jurisprudence of the U.S. Supreme Court has revolved around the detailed line drawing on the First Amendment's mandate.[2]

Given the ninety-year experience of American constitutional law with freedom of speech, it would be surprising if the impact of the First Amendment has been confined to Americans or their press within the United States.[3] The influence of U.S. free speech jurisprudence abroad can be positive or negative.[4] The United States has long been viewed as an exception in protecting freedom of expression.[5] Recently, however, the U.S. Supreme Court has been challenged as the predominant agenda setter in human rights law in general and on freedom of expression in particular.[6] A comparison of case law of the U.S. Supreme Court and the European Court of Human Rights (ECtHR) in certain areas of free speech illustrates that the term *exceptionalism* does not entirely exclusively apply to America in free speech.[7]

1. ERIC BARENDT, FREEDOM OF SPEECH vi (2d ed. 2005).
2. U.S. Const., amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press").
3. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537 (1988) (stating that "[n]ot only have American concepts of freedom shaped the rise of constitutionalism in Europe and elsewhere, but courts overseas refer frequently to U.S. Supreme Court precedents in constitutional cases").
4. *See, e.g.*, OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 157-58 (1996) (stating that "[i]n building a free press, the reformers should look to the American experience, but only selectively. They must create for the press a measure of autonomy from the state without delivering the press totally and completely to the vicissitudes of the market").
5. *See generally* Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29-56 (Michael Ignatieff ed., 2005).
6. Adam Liptak, *U.S. Court, a Longtime Beacon, Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1.
7. For an expansive protection of freedom of the press under the European Convention on Human Rights (ECHR) on the reporter's right to protect confidential sources,

The ECtHR, along with the now abolished European Commission of Human Rights, has emerged as a powerful articulator of freedom of expression in the past thirty years.[8] In 1985, the number of the ECtHR's freedom of expression cases was only "a handful." Since then, however, that court "has now produced a number of important decisions, particularly to resolve conflicts between freedom of expression and reputation or privacy rights."[9] The European Convention on Human Rights (ECHR) and its developing case law exert a considerable impact on European countries[10] and beyond. For example, the ECtHR held in 1996 that journalists have a right not to disclose their sources unless a countervailing interest overrides the confidentiality of news sources.[11] This ruling has been instrumental to the International Criminal Tribunal for the former Yugoslavia (ICTY) in recognizing the reporter's privilege for war correspondents.[12]

Meanwhile, a 2006 analysis of the U.S. and European approach to freedom of speech concluded:

> Given that the United States and Europe share "a common freedom and the rule of law" tradition, their free speech jurisprudence more often converges than diverges. The First Amendment to the U.S. Constitution and Article 10[[13]] of the European Convention on Human Rights are similar theoretically and conceptually.[14]

From a comparative law perspective, commercial speech[15] is a significant area of freedom of expression in the United States and Europe

see Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, J. INT'L MEDIA & ENT. L. 1, 32-36 (2006).

8. The year 1976 marked the beginning of the ECtHR's serious endeavor to treat freedom of expression as more than abstractions. *See* Handyside v. United Kingdom, 1 Eur. Ct. H.R. (Ser. A) 737 (1979).

9. Barendt, *supra* note 1, at v. *See also* FREEDOM OF EXPRESSION IN EUROPE: CASE-LAW CONCERNING ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 7 (2007) (noting that "[t]here is a substantial body of European Court and European Commission of Human Rights . . . case-law regarding this article [i.e., Article 10]).

10. HERDIS THORGEIRSDOTTIR, JOURNALISM WORTHY OF THE NAME: FREEDOM WITHIN THE PRESS AND THE AFFIRMATIVE SIDE OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10 (2005).

11. *See* Goodwin v. United Kingdom, 22 Eur. H.R. 123, 136-7 (1996).

12. *See* Prosecutor v. Brdjanin and Talic, Case No. IT-99-36-AR73.9 (Dec. 11. 2002). For a discussion of this 2002 ICTY case, see Youm, *supra* note 7, at 36-51.

13. Article 10 of the ECHR is equivalent to the First Amendment to the U.S. Constitution on freedom of expression. For a discussion of Article 10, see *infra* notes 44-47 and accompanying text.

14. Kyu Ho Youm, American "Exceptionalism" in Free Speech Jurisprudence?: A Comparison of the U.S. Constitution with the European Convention on Human Rights 99 (July 15, 2006) (unpublished master's thesis in law, Oxford University) (on file with co-author Kyu Ho Youm).

15. "Commercial speech," as a term used by the U.S. Supreme Court and the European Court of Human Rights, can be defined as "communication (such as advertising

in that it illustrates "how courts protecting citizens' constitutional or fundamental rights apply similar methods of scrutiny when dealing with comparable issues."[16] In U.S. law, the growing protection of commercial speech is considered "one of the most dramatic and interesting stories of modern First Amendment jurisprudence."[17] Similarly, the ECtHR has increasingly expanded freedom of expression to commercial speech.[18] Although there is no denying that commercial speech is more protected now than ever, in the United States and Europe the legal status of commercial speech is still evolving.

In light of global commercialization and its concomitant impact on commercial expression across borders, this article examines the judicial interpretations of commercial speech in the U.S. and Europe. It first focuses on the textual and theoretical framework of freedom of expression as a right in the U.S. Constitution and the European Convention on Human Rights. Second, it examines how the U.S. Supreme Court and the European Court of Human Rights have balanced commercial speech with other competing individual and social interests. Third, it discusses the key similarities and differences between the United States and Europe. Finally, this article concludes that whereas commercial speech is less protected than non-commercial speech in both U.S. and European law, the "commercial speech" doctrine informs the U.S. Supreme Court on advertising and the fact-specific application of Article 10 is salient in ECtHR law.

and marketing) that involves only the commercial interests of the speaker and the audience." BLACK'S LAW DICTIONARY 1435-36 (8th ed. 2004).

16. WALTER VAN GERVEN, THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES 250 (2005).

17. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 20:1 (2008) [hereinafter SMOLLA AND NIMMER].

18. Maya Hertig Randall, *Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?*, 6 HUM. RTS L. REV. 53, 54 (2006). It should be emphatically noted that the ECtHR is not the only court in Europe adjudicating commercial speech. The European Court of Justice (ECJ), in the context of ensuring that the European Community's laws and regulations are observed, has addressed issues relating to commercial speech as part of the EC's goal of market integration in Europe. So, it differs from the ECtHR, which is concerned with how human rights are reflected in the law and regulations of the ECHR member states. Over the years, however, the ECJ has drawn on the ECHR not necessarily as a direct source of EC law but "as a key source of inspiration for the [fundamental rights] general principles of EC law." PAUL CRAIG & GRAINNE DE BURCA, EU LAW 384 (4th ed. 2008). Hence, it is hardly an overstatement the ECtHR case law, which is the central focus of this paper, benchmarks the ECJ on commercial speech and other free speech issues. More substantively, the ECHR case law is older and more extensive than that of the ECJ. *See* ROGER A. SHINER, FREEDOM OF COMMERCIAL SPEECH 95 (2003); VAN GERVEN, *supra* note 16, at 243-44.

I. The European Court of Human Rights: A Brief Overview

The ECtHR has undergone a transformative period. During the first seventeen years of its existence, its significance was almost nonexistent. The court handed down only seventeen decisions. Few of the decisions have addressed freedom of speech and the press. Indeed, it was not until the 1980s that the ECtHR had adjudicated commercial speech as a free speech issue.[19]

Nonetheless, ECtHR has now become "probably the most influential Court in the world" and one of the "most effective organ[s] for the protection of human rights."[20] Dean Harold Hongju Koh of Yale Law School stated in September 2008 that "[t]hese days, foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty," adding that " 'they tend not to look to the rulings of the U.S. Supreme Court.' "[21]

The ECtHR currently boasts a large amount of Article 10 case law that has resulted from thirty years of interpretations of the ECtHR, dating back to *Engel v. Netherlands*.[22] A total of 153 judgments were rendered and reported by October2008.[23] Among the major ECtHR cases that have resulted into key free-speech principles are:

- *Engel v. Netherlands* (1976): punishment of Dutch servicemen for publication of articles harmful to military discipline, not a violation of Article 10;[24]
- *Handyside v. United Kingdom* (1976): British authorities' ban of *Little Red School Book* under its obscenity law, not a violation of Article 10;[25]
- *Lingens v. Austria* (1986): finding defamation of a politician under the Austrian criminal libel law, a violation of Article 10;[26]

19. See Markt Intern & Beermann v. Gemany, 12 Eur. Ct. H.R. (Ser. A) 161, 171 (1990). For a discussion of *Markt Intern & Beermann*, see *infra* notes 182-212 and accompanying text.

20. Brian Walsh, "Foreword," in VINCENT BERGER, CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS xi (1989).

21. Liptak, *supra* note 6 (quoting Yale Law School dean Harold Hongju Koh).

22. Engel v. Netherlands No. 22), 1 Eur. Ct. H.R. (Ser. A) 647 (1979).

23. By focusing on Article 10 of the European Convention on Human Rights I've searched the HUDOC Collection of the European Court of Human Rights at http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=14391684&skin=hudoc-en. (last visted Nov. 6, 2008)

24. 1 Eur. Ct. H.R. (Ser. A) 647, 685 (1979).

25. 1 Eur. Ct. H.R. (Ser. A) 737, 741 (1979).

26. 8 Eur. Ct. H.R. (Ser. A) 407, 421 (1986).

- *Sunday Times v. United Kingdom* (1991): injunction against publication of an unauthorized memoir by a former employee of the British Security Services, a violation of Article 10;[27]
- *Goodwin v. United Kingdom* (1996): court order to a journalist to reveal confidential sources, a violation of Article 10;[28]
- *News Verlags GmbH & GoKG v. Austria* (2000): Austria's ban on news magazine's publication of a crime suspect's picture in connection with a trial, a violation of Article 10;[29]
- *Steel & Morris v. United Kingdom* (McLibel case) (2005): UK denial of legal aid to those sued for defamatory criticism of big corporations, a violation of Article 10.[30]

To borrow from U.S. media attorney Bruce Sanford on the evolution of American libel law since the 1964 case of *New York Times Co. v. Sullivan*,[31] European human rights law on free speech has "emerged from an adolescent period of ferment and instability and entered an era of maturation. Fundamental development occurred, and now years of refinement lie ahead."[32] Of course, ECtHR approaches freedom of speech as a human right rather than as a constitutional right. Most important, its decision on freedom of speech, whether commercial or not, has more to do with the "unique systemic context in which the Court operates."[33]

II. The U.S. Constitution and the ECHR: Text and Theory

Noting worldwide consensus that freedom of speech is "a basic human right" (since the mid-twentieth century), American constitutional scholar Rodney A. Smolla stated:

> Conceptually . . . the problems posed by attempting to reconcile freedom of speech with other social values are largely the same for all societies. The policy choices cross cultures. Different societies will, of course, bring different values, traditions, and practical constraints to bear on those choices, but the choices themselves remain essentially uniform.[34]

27. http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=sunday%20|%20times%20|%20v.%20|%20united%20|%20kingdom&sessionid=14406820&skin=hudoc-en (last visited Nov. 6, 2008).
28. 22 Eur. Ct. H.R. 123, 137 (1996)
29. 31 Eur. Ct. H.R. 8 (2001).
30. http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=steel%20|%20morris&sessionid=14406887&skin=hudoc-en(lastvisitedNov.6, 2008)
31. 376 U.S. 254 (1964).
32. BRUCE W. SANFORD, LIBEL AND PRIVACY § 1.1 (2d ed. 2008).
33. SHINER, *supra* note 18, at 109.
34. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 351 (1992).

Hence, modern free speech jurisprudence, especially in many Western democracies, has taken on a heightened importance, for "[t]he growth in human rights thinking has been a significantly *legal* phenomenon"[35] in the sense of active judicial role in defining and expanding it.[36]

This section examines the U.S. Constitution and the European Convention on Human Rights on freedom of expression from a textual and theoretical perspective. It first focuses on the language and then surveys various theories invoked by the U.S. Supreme Court and the ECtHR in commercial speech cases.

A. *Textual Comparison: Absolute Versus Qualified*

Textual law rarely matches with experiential law.[37] A case in point is the formal guarantee of free expression as a right in nearly every nation. Nonetheless, the nature of the constitutional commitment in a country reflects not only its constitutional history and tradition, but also its political philosophy underlying freedom of expression. This is all the more so in the U.S., given that its "visible" Constitution should involve "nontrivial arguments about what the underlying concept embraces."[38]

1. THE FIRST AMENDMENT: OPEN-ENDED AND NEGATIVE

The text of the First Amendment to the U.S. Constitution on freedom of expression is composed of a "few disarmingly simple words."[39] Its normative limitation on freedom of speech and the press is absolutely prohibited, and it is negative in the sense that it forgoes any positive right to speak.[40] Because of the text's brevity, almost every word of the

35. Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499, 500 (2000).

36. For a recent discussion of the important role that judges have played in protecting freedom of expression as a constitutional right in the U.S., see ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).

37. LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 28 (1991).

38. LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 26 (2008).

39. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 8 (1991).

40. Conversely, in their own constitutions many American states provide a positive grant of free expression. In 1776, Pennsylvania became the first state to affirmatively guarantee freedom of speech, writing, and publishing. Article XII of Pennsylvania's Declaration of Rights, found in Pennsylvania's Constitution of 1776, asserts that "the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained." In revising its constitution in 1790, Pennsylvania appears to have borrowed heavily from the 1789

First Amendment's free speech clause is less visible than apparent in that "much of what we mean by the Constitution cannot be found in the visible text."[41]

Considering that the First Amendment textually offers only a hint of the "ultimate contours of legal protection," the invisible free speech jurisprudence of American law derives more from the gloss provided by the U.S. Supreme Court than from the constitutional text.[42] Nonetheless, the text of the Amendment is still relevant to the free speech culture of America in that "[t]he fact that there is a provision of the Constitution protecting freedom of speech surely plays a role in the way society as a whole regards free expression."[43]

2. *ARTICLE 10: DETAILED, QUALIFIED, AND POSITIVE*

The earlier constitutional commitments of various countries are phrased in "broad and general" language and are "relatively short," in contrast with the "elaborate and specific" constitutional provisions of the twentieth century.[44] The textual difference between the old and the new constitutions on freedom of expression is illustrated by the distinctive approach of the European Convention on Human Rights on free speech.

The Convention's recognition of freedom of expression is broader and more detailed than the First Amendment. Article 10 stipulates:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as

French Declaration of the Rights of Man and of the Citizen. The language, nearly identical to the French document, states: "The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on every subject, being responsible for the abuse of that liberty. . . ." Pa. Const. of 1790 art. IX § 7. Many other states adopted Pennsylvania's positive-grant model until Alaska capped the tradition in 1959, when it secured its statehood. *See* Alaska Const. art. 1 § 5 (stating: "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."). While Hawaii, the 50th state, provides free-speech protections, it mirrors the U.S. Constitution. *See* Haw. Const. art. 1 § 4.

41. Geoffrey R. Stone, "Editor's Note," in TRIBE, *supra* note 38, at xiii.

42. DANIEL A. FARBER, THE FIRST AMENDMENT 1 (2d ed. 2003).

43. David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 59 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

44. Pnina Lahav, *Conclusion: An Outline for a General Theory of Press Law in Democracy*, in PRESS LAW IN MODERN DEMOCRACIES: A COMPARATIVE STUDY, at 340 (Pnina Lahav ed., Longman Inc. 1985).

> are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[45]

Article 10(1) recognizes freedom of expression for each person and prohibits the state from denying it. Article 10(1) also defines the "right to freedom of expression" as including "freedom to hold opinions."

The "right to receive information" under Article 10(1) does not equate with the right to seek and demand information from government agencies,[46] which is recognized by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

The mode of expression (i.e., written versus spoken) is a nonissue insofar as its protection as a right is concerned. While freedom of the press is not explicitly mentioned in Article 10, its protection is well entrenched. Yet the structural regulation of broadcast media and cinema through licensing is allowed unless it violates their free speech rights under the Convention, that is, it must be prescribed by law and it must be necessary in a democratic society.[47]

B. *Theoretical Comparison: A Distinction Without a Difference*

Theoretical interpretations of freedom of expression differ in the United States and in Europe, but the end result is often an increasingly similar attitude toward free speech. In this context, the U.S. Supreme Court and the ECtHR on commercial speech is illustrative of the "principle of functionality" in comparative law.[48] An American media law scholar concluded in his 2006 study of the U.S. Supreme Court and the ECtHR on libel law:

45. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 45 Am. J. Int'l L. Supp. 24 1951, 213 U.N.T.S. 211.

46. For a thoughtful discussion of the ECtHR on access to information as a nascent right, *see* Wouter Hins & Dirk Voorhoof, *Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights*, 3 Eur. Const. L. Rev. 114 (2007).

47. ANDREW NICOL ET AL., MEDIA LAW & HUMAN RIGHTS 152-53 (2001).

48. The principle of functionality in comparative law rests on its proposition tht "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results." KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 34-35 (Tony Weir trans., 3d rev. ed. 1998).

> [T]he extent to which the [ECtHR's] defamation case law has come to mirror principles of U.S. First Amendment law and common law is striking. . . . The First Amendment is generally recognized to provide the most liberal protection for free speech; the fact that the ECHR parallels many of its defamation principles indicates the importance the ECHR has typically placed on protecting expression in the face of claims of harm to individual reputation.[49]

1. THE FIRST AMENDMENT: WHY FREEDOM OF EXPRESSION?

There is no such thing as one overarching free speech theory in American law. The U.S. Supreme Court's approach to First Amendment freedom of expression is "quite eclectic."[50] The most famous theory of freedom of speech and the press is the concept of a "marketplace of ideas." It posits that ideas should be allowed to compete against one another in an open process of human interaction in search of truth.[51] The marketplace theory dominates First Amendment jurisprudence.[52]

For instance, in striking down provisions of the Communications Decency Act, the U.S. Supreme Court noted in 1997 the Internet's role in dramatically expanding the "new marketplace of ideas," and ruled that the federal law would more likely interfere with the "free exchange of ideas" than encourage it.[53]

The marketplace of ideas should treat commercial speech in no different way from non-commercial speech insofar as it aims "to spread information and promote discussion that are relevant to people's search for truth or their attempts to make wise decisions."[54] Since the U.S. Supreme Court recognized commercial speech as protected in the mid-1970s, it has used the marketplace of ideas theory as its dominant doctrine. On the other hand, for those who view the marketplace of ideas as

49. Dan Kozlowski, *"For the Protection of the Reputation or Rights of Others": The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10(2)*, 11 COMM. L. & POL'Y 133, 167 (citation omitted).

50. MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 1 (2001).

51. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .").

52. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989).

53. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 (1997). The Court struck down the Act's "indecent transmission" and "patently offensive display" provisions, which sought to protect minors from sexually explicit material on the Internet. The Court held the provisions impermissibly abridged the First Amendment by enacting vague and overbroad content-based restrictions on freedom of speech; however, the Court left untouched the remaining portions of the Act. *Id*. at 849.

54. BAKER, *supra* 52, at 194.

something worthy of protection for democratic deliberation, commercial speech is misplaced.[55]

The self-governance theory stands in sharp contrast with the marketplace of ideas because it is based on a premise that freedom of speech is essential to a democracy. Alexander Meiklejohn, the preeminent proponent of the self-governance theory, distinguished the self-governance rationale from the truth-searching marketplace of ideas:

> The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizen of a self-governing society must deal.[56]

The crux of the Meiklejohnian theory lies in a distinction between public (i.e. political) speech and private (i.e. nonpolitical) speech. He has defined public speech absolutely protected by the First Amendment as speech that is *related to self-governance*, and thus valuable to the public weal.[57] On the other hand, private speech that is primarily for private gain is outside the absolute protection of the First Amendment, for it is for private, not communal, good.[58]

Given the centrality of political speech under the Meiklejohnian theory, little protection is accorded to commercial speech as a whole, although the category of "political" speech has been elastically expanded. No Supreme Court decision has protected commercial speech because such speech facilitates democratic governance. The Court merely recognizes the free flow of commercial speech as "indispensable to the formation of intelligent opinions" necessary for enlightened "public decisionmaking in a democracy."[59]

Meanwhile, the individual autonomy theory holds that "every man—in the development of his own personality—has the right to form his own beliefs and opinions" and "the right to express these beliefs and opinions."[60] This theory also derives from the relationship between an

55. SHINER, *supra* note 18, at 299-301.
56. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1965).
57. *Id*. at 88-89.
58. *Id*. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88-89 (1948).
59. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 765 (1976).
60. THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 4, 5 (1966).

individual and society.[61] Society and the state are not ends in themselves but exist to serve the individual.[62]

In protection of commercial speech, the individual autonomy theory is a most powerful argument. A leading advocate of the self-realization value of commercial speech argued:

> When an individual is presented with rational grounds for preferring one product or brand over another, he is encouraged to consider the competing information, weigh it mentally in the light of the goals of personal satisfaction he has set for himself, counter-balance his conclusions with possible price differentials, and in so doing exercises his abilities to reason and think; this aids him towards the intangible goal of rational self-fulfillment.[63]

2. ARTICLE 10: FREEDOM OF EXPRESSION AS A DEMOCRATIC VALUE

The ECtHR has developed an influential free speech jurisprudence to which other parts of the international human rights system have turned for their normative development.[64] The ECtHR cases are striking because they are more about interpreting the European Convention on Human Rights as a legal document than about discussing human rights in the abstract.[65] The European court, however, has ventured few theoretical efforts to explain the underlying basis of why freedom of expression is protected as a right.

Regardless, as the preamble of the European Convention on Human Rights declares freedom of expression is related to "an effective political democracy."[66] Most of the time, the ECtHR assumes a normative theory of free speech in a democratic society.

In one of its earliest Article 10 cases, the ECtHR addressed whether an English obscenity law was in breach of the freedom of expression of a U.K. citizen, who was ordered to destroy the obscene books he had published.[67] The European court first noted that its supervisory func-

61. *Id*. at 5.
62. *Id.*
63. MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 60-61 (1984) (citation omitted).
64. HENRY J. STEINER ET AL, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 964 (Henry J. Steiner et al. eds., 3rd ed. 2008).
65. C.A. Gearty, *The European Court of Human Rights and the Protection of Civil Liberties: An Overview*, 52 CAMBRIDGE L.J. 89, 95 (1993).
66. European Convention for the Protection of Human Rights and Fundamental Freedoms, preamble, Nov. 4, 1950, 213 U.N.T.S. 211, 45 Am. J. Int'l L. Supp. 24 1951.
67. Handyside v. United Kingdom, 8 Eur. H.R. Rep. (Ser. A) 737 (1979).

tions require it to pay the "utmost attention" to the principles that characterize a "democratic society." It then held:

> Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the *development of every man*.... [I]t is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society."[68]

The ECtHR's justification of freedom of expression as an essential condition for the fulfillment of an individual parallels the individual autonomy theory of the First Amendment law. It casts a broad net for protection of freedom of expression not only as a means to a collective (societal) good but also for the private value of speech to the individual.

The marketplace of ideas and self-governance, as they have been recognized as rationales for free speech in American law, have been adopted by the ECtHR.[69] The European Court emphasized in 1986 the "particular importance" of press freedom as a principle of a democratic society.[70] "While the press must not overstep the bounds set, *inter alia*, for the 'protection of the reputation of others,'" the Court stated, "it is nevertheless incumbent on it to impart information and ideas on *political* issues just as on those in other areas of public interest: the public also has a right to receive them."[71] It highlighted the critical role of the news media in democratic politics:

> Freedom of the press furthermore affords the public one of the best means of discring and forming an opinion of the ideas and attitudes of *political* leaders. More generally, freedom of *political* debate is at the very core of the concept of a democratic society which prevails throughout the Convention.[72]

Closely related to but distinguished from the self-governance theory in the United States is the "checking value" theory.[73] This is particularly relevant to freedom of the press because journalists serve as government watchdogs, and the First Amendment must facilitate the press'

68. *Id*. at 754 (emphasis added).
69. Lingens v. Australia, 8 Eur. Ct. H.R. (Ser. A) 407, 418 (1986).
70. *Id.*
71. *Id.*
72. *Id*. at 418-19 (emphasis added).
73. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. 521. "Checking value" theory examines the idea that free expression has value to the extent it functions to check abuses of official power. *Id*. at 523.

role in keeping government officials accountable.[74] The Supreme Court has occasionally alluded to the checking value theory;[75] however, it has not vigorously enforced the theory's tenets, particularly the journalist's privilege against compelled disclosure of confidential news sources to a grand jury.[76]

Nonetheless, the European court expounded on freedom of expression as an "essential foundation of a democratic society and more specifically on the safeguards that a free press needs in serving its crucial role as a watchdog."[77] The Court was emphatic about the journalistic privilege as part of freedom of the press:

> Without such protection [of journalistic sources], sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.[78]

III. Past and Current Contours of Commercial Speech in the United States

A. *A Decades-long Trip Coming in from the Cold*

By any standard, protections for commercial speech in the United States began ingloriously. In *Valentine v. Chrestensen*,[79] the Supreme Court upheld the conviction of a roving submarine owner who distributed advertisements (along with a political protest message printed on the back) in violation of New York law. The Court held that while "the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion,"[80] commercial advertising did not qualify for First Amendment protection. "[T]he Constitution imposes no

74. *Id*. at 554-67.

75. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983).

76. *See* Branzburg v. Hayes, 408 U.S. 665, 703-709 (1972) (holding that journalists do not have a First Amendment privilege to withhold the identity of confidential sources in a grand jury hearing). Some lower courts, though, have interpreted *Branzburg* narrowly, applying it only to the grand jury arena. The following language, excerpted from a Third Circuit case, summarizes that view: "No Supreme Court case since [*Branzburg*] has extended the holding beyond that which was necessary there to vindicate the public interest in law enforcement and in ensuring effective grand jury proceedings." Riley v. Chester, 612 F.2d 708, 714 (3d Cir. 1979) (quotation omitted).

77. Goodwin v. United Kingdom, 22 Eur. Ct. H.R. 123, 136 (1996) (citation omitted).

78. *Id*. at 143.

79. 316 U.S. 52 (1942).

80. *Id*. at 54.

such restraint on government as respects purely commercial advertising," wrote Justice Roberts for a unanimous Court.[81] This first stepping stone placed commercial speech among other free expression categories—including obscenity, defamation, and fighting words—considered by the Supreme Court outside First Amendment protections. One scholar has noted, "if one sees freedom of speech primarily as an aid to democratic self-governance, commercial speech is likely to be left out in the cold, for it does not in any obvious or direct way appear to advance the process of democracy."[82] In *Valentine*, the Court left commercial speech out in the cold.

The *Valentine* landscape remained unchanged for more than two decades, until *New York Times Co. v. Sullivan*,[83] in 1964. Although not strictly a commercial speech case,[84] *Sullivan* nonetheless gave heft to the notion that the *Valentine* Court may have improvidently lumped commercial speech among categories of expression not covered by the First Amendment. The decision cast doubt on the so-called talismanic immunity from First Amendment protections for virtually all types of expression, not merely libel. After 1964, speech had to be "measured by standards that satisfy the First Amendment."[85] Accordingly, the vast majority of speech—including commercial speech—to this day undergoes a scrutiny within the ambit of the First Amendment.

The general concept laid down in *Sullivan* found more precision, first, in *Bigelow v. Virginia*,[86] then in *Virginia State Board of Pharmacy*.[87] In the latter case, the Court invalidated a Virginia statute that prohibited pharmacists from advertising the price of prescription drugs, stating:

> [S]peech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. . . .Speech likewise is protected even though it is carried in a form that is 'sold' for profit,. . .and even though it may involve a solicitation to purchase or otherwise pay or contribute money.[88]

81. *Id.*

82. RODNEY A. SMOLLA, THE FIRST AMENDMENT: FREEDOM OF EXPRESSION, REGULATION OF MASS MEDIA, FREEDOM OF RELIGION 113 (1999).

83. 376 U.S. 254 (1964).

84. In fact, the Court explicitly noted that the civil rights advertisement published by *The New York Times*, "Heed Their Rising Voices," was noncommercial. *Id*. at 266.

85. *Id*. at 269.

86. Bigelow v. Virginia, 421 U.S. 809, 818 (1975) (stating that "[t]he fact that the particular advertisement in appellant's newspaper had commercial aspects or reflected the advertiser's commercial interests did not negate all First Amendment guarantees).

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

88. *Id*. at 761.

After *Virginia Pharmacy*, commercial speech in the form of advertising rested comfortably under the First Amendment umbrella.[89] The Court found value, particularly, in the dollars-and-cents information communicated to would-be purchasers. Advertising, the Court said, "contributed to enlightened public decision-making in a democracy."[90] Interestingly, Justice Blackmun also noted that the advertising message was significant not only to the speaker, but also to the recipient. "[T]he protection [of the First Amendment] is to the communication, to its source and to its recipients both,"[91] he wrote. However, while the Court found advertising speech deserving of some First Amendment protections, it did not bring those protections up to par with fully-protected noncommercial speech.

Just four years after *Virginia Pharmacy*, the Supreme Court decided *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*,[92] a landmark case that still resonates throughout the realm of commercial speech. In weighing the constitutionality of commercial speech restrictions, the intermediate-scrutiny framework established in *Central Hudson* remains the applicable standard.[93] Under *Central Hudson's* four-prong test, for commercial speech to enjoy First Amendment protection "it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted,"[94] and whether a "reasonable fit" exists between the state interest and the regulation.[95] As the first prong makes clear, the Ameri-

89. In a footnote, though, the court stated that because commercial speech was "durable" and the truth of it could potentially be "easily verifiable, it could be subject to various forms of government regulation. "In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between [commercial speech] and other varieties." *Id*. at 771 n.24.

90. *Id*. at 761.

91. *Id*. at 756.

92. Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

93. *Id*. at 566.

94. *Id.*

95. In *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), the Court refined the *Central Hudson* test's fourth prong to the "reasonable fit" standard, eliminating *Central Hudson*'s "least restrictive means" requirement. However, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 n.13, the Court further refined the fourth prong to include consideration of "numerous and obvious less-burdensome alternatives to the restrictions on commercial speech."

can system focuses on protecting lawful commercial speech that is not misleading.

For at least the next decade, the Court applied the *Central Hudson* test inconsistently, often seeming to backpedal from the course it charted. Just six years later, in *Posadas de Puerto Rico Associates*,[96] the Court deferred to a Puerto Rican prohibition on local advertising for gambling (which was legal on the island). The Court concluded that because Puerto Rico *could* ban gambling if it chose, it could, by extension, ban its advertising. The Court noted that "advertising of anything 'deemed harmful' enjoys less First Amendment protection than other advertising, even if the product itself is legal."[97] This line of reasoning began the Court's experimentation with a so-called vice exception to the *Central Hudson* test.[98]

In applying *Central Hudson*'s third prong, Justice Rehnquist wrote: "We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view."[99] The opinion similarly diluted *Central Hudson's* fourth prong, holding that "it is up to the legislature to decide"[100] whether proposed less-restrictive means than a complete ban on casino advertising would further the state's interest. The deference given to legislatures in *Posadas* appeared to stop the steady march toward robust protection of commercial speech in its tracks. Appropriately, media commentators have called this timeframe an "era of uncertainty" characterized by "fits and starts."[101]

In recent years, the Court has staked out a more protective view of certain commercial speech rights. In *Ibanez v. Florida Department of Business & Professional Regulation*,[102] Justice Ginsburg, writing for the Court, stated that the *Central Hudson* test requires a showing that the government regulation on commercial speech "directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest."[103] *Rubin v. Coors*[104] built on the *Ibanez*

96. *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328 (1986).
97. WAYNE OVERBECK, MAJOR PRINCIPLES OF MEDIA LAW 534 (2008 ed. 2008) (quoting *Posadas*, 478 U.S. at 346).
98. While the Court toyed with the vice exception in *Posadas*, it ultimately abandoned the concept in subsequent cases.
99. *Posadas*, 478 U.S. at 342.
100. *Id.* at 344.
101. STEVEN G. BRODY & BRUCE E.H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE 5-3 (2d ed. 2008).
102. 512 U.S. 136 (1994).
103. *Id.* at 142.
104. Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

foundation by unanimously rejecting certain perceived pigeonhole exceptions to the *Central Hudson* test. The Court made clear that there would be no "vice" or "socially harmful" exceptions to the commercial speech doctrine. The Court further expanded protections for commercial speech, most notably, in *44 Liquormart v. Rhode Island*,[105] *Greater New Orleans Broadcasting v. United States*,[106] and *Lorillard v. Reilly*.[107]

As the preceding case chronology illustrates, the Supreme Court's overarching approach to free-expression questions might best be described as compartmentalization. Each area of expression receives a separate level of protection. First Amendment lawyer John Wirenius calls the status quo a "bizarre mess" of pigeonholes, and complains free expression jurisprudence "allows the suppression of some speech without any but the most cursory judicial review, holds the suppression of other kinds of speech up to mild scrutiny, and exposes a third set of speech categories to very exacting scrutiny indeed."[108] Obscene speech, for example, falls outside the ambit of First Amendment protections;[109] prior restraints, on the other hand, are presumptively unconstitutional and can be declared valid only in rare circumstances.[110] Many other forms of speech—including the modern commercial speech doctrine—fall in the middle.

Through this pigeonhole approach, protections for commercial speech in the United States survived an incremental, if halting, climb to their current perch. Modern commercial speech jurisprudence embraces the view that commercial speech, as a form of expression, is entitled to considerable protections. One noted scholar has written, "[t]he theoretical question should be not what qualifies it for First Amendment coverage, but what, if anything *disqualifies* it."[111]

105. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (rejecting a Rhode Island regulation that sought to bar liquor retailers and the press from truthfully advertising the price of alcohol).

106. Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173 (1999) (reversing a lower court decision that upheld a federal law prohibiting advertising of private casino gambling).

107. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (invalidating Massachusetts's regulations banning outdoor advertising for tobacco products).

108. JOHN F. WIRENIUS, FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH 72-73 (2000). Wirenius proposes a "verbal act" test, which he says separates the content of speech protected by the First Amendment from the dangers posed by speech, which may form the basis of liability. *See generally id*. at 122-181.

109. DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 462 (2009-2010 ed., 2008).

110. *Id*. at 67; *see also* Near v. Minnesota, 283 U.S. 697 (1931).

111. SMOLLA, *supra*, note 82, at 115 (emphasis in original).

B. *Select Areas of Commercial Speech: American-European Overlaps*

The American and ECtHR experiences intersect across many areas of commercial speech. For purposes of this article, U.S. cases regarding professional advertising, corporate political speech, and mixed-content speech are particularly relevant.

U.S. and European court dockets are rich in lawyer advertising cases. At first glance, the U.S. jurisprudence in this area appears particularly scattershot. No clear rule, test, or standard guides lawyer advertising, due in part to the fact-specific application of law. In the first landmark U.S. case, the Supreme Court protected professional advertising. *Bates v. State Bar of Arizona*[112] concerned a legal clinic's advertisement for "very reasonable" prices. The *Bates* Court held that across-the-board prohibitions on lawyer advertising violated the Constitution, but in some scenarios states could suppress lawyer ads. The Court stated, "advertising by attorneys may not be subjected to blanket suppression."[113] Although the Court found that state restrictions on commercial speech could not pass constitutional muster on the facts presented, the majority opinion nonetheless explained that in-person solicitation and quality-of-service assurances might be subject to state regulation.

In fact, the *Bates* language foreshadowed the result in *Ohralik v. Ohio State Bar Association*,[114] only a year later. There, the Court rejected an overbreadth defense, holding instead that Ohio's moratorium on lawyer advertising could be used to discipline forceful in-person lawyer solicitation. The specific facts of the case persuaded Justice Powell that "the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public" was the appropriate course.[115] The Supreme Court distinguished *Ohralik* that same year, however, in the case *In re Primus*.[116] The Court determined that a lawyer working in concert with the American Civil Liberties Union ("ACLU"), when informing indigent clients of their legal rights and the availability of ACLU legal aid, did not violate South Carolina lawyer advertising rules. The Court noted that due to the political nature of the communication and the importance of informing the clients of their legal rights, "significantly greater

112. Bates v. State Bar of Ariz., 433 U.S. 350 (1977).
113. *Id.* at 383.
114. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).
115. *Id.* at 468.
116. *In re* Primus, 436 U.S. 412 (1978).

precision" is required in the restriction than "in the case of speech that simply proposes a commercial transaction."[117] In recent cases, the Court has maintained this scattershot, fact-specific approach to professional advertising cases.

Moving from advertising to politics, the Supreme Court has explicitly protected corporate political speech. In *First National Bank of Boston v. Bellotti*,[118] the Court struck down a Massachusetts law that forbade businesses from spending money "for the purpose of. . .influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[119] The Court advocated a content-based approach, stating that the focus of the restriction should be on the communication, not the speaker. The Court was persuaded by the argument that corporations should be entitled to participate in public debate. Justice Powell wrote that "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[120] The *Bellotti* interpretation blurred the line between commercial and noncommercial speech for political purposes, absorbing political corporate speech into the First Amendment zone of protection for noncommercial speech.

The level of First Amendment protections afforded various forms of commercial speech, including mixed-content speech, remains ambiguous. Defining commercial speech was not always so difficult. In fact, the Court started off solidly, defining commercial speech as that which "does no more than propose a commercial transaction."[121] However, the Court watered down this approach in subsequent cases.[122] Unsurprisingly, lower courts apply the law inconsistently.

In *Nike, Inc. v. Kasky*,[123] the Supreme Court was asked to decide what degree of protection arguably political, noncommercial messages

117. *Id*. at 437-38.
118. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978).
119. *Id*. at 768 (quotation and citation omitted).
120. *Id*. at 783.
121. *Va. State Bd. of Pharmacy*, 425 U.S. at 762.
122. *See Central Hudson*, 447 U.S. at 561 (noting that "expression related solely to the economic interests of the speaker and its audience" is commercial speech); City of Cincinnati v. Discovery Network, 507 U.S. 410, 422 (1993) (explaining that the Court defined "a somewhat larger category" of speech as commercial in *Central Hudson*); United States v. United Foods, 533 U.S. 405, 409 (2001) (commercial speech is "usually defined" by the "no more than" test); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (finding yet another "combination" of factors).
123. Nike, Inc. v. Kasky, 539 U.S. 654 (2003).

communicated through the shoemaker's press releases, letters, and promotional materials should receive. The Supreme Court previously held that commercial speech "inextricably intertwined with otherwise fully protected speech" should receive the protections granted other public dialogue.[124] However, after granting certiorari and hearing arguments, the Court dismissed the case, citing procedural and jurisdictional problems.[125]

Dismissing the case affirmed the California Supreme Court's "highly criticized"[126] decision,[127] which established an expansive view of commercial speech. The Supreme Court's dodge opened the door to litigation against corporations in California stemming from "virtually any statement made by a commercial enterprise concerning itself, or its products and services, that likely will be heard by, or repeated to, potential customers."[128] Furthermore, by leaving California's interpretation of *Kasky* untouched, the Supreme Court let stand a clouded picture of what exactly constitutes commercial speech. For example, California's Supreme Court saw Nike's press releases, which were probably best categorized as policy statements imparting a business point of view, as commercial speech deserving less protection than political communications. Other courts likely would have, and now will continue to, interpret the facts differently. As one commentator noted: "The case law has a schizophrenic quality when it comes to factoring in whether a commercial purpose affects the degree of First Amendment protection given to expression."[129]

Kasky disappointed commercial speakers and First Amendment observers who hoped the Supreme Court would expand—or at least more meticulously define—its interpretation of what constitutes commercial speech. Justice Breyer summed up those feelings in his dissent: "[T]he questions presented [in *Kasky*] directly concern the freedom of Americans to speak about public matters in public debate. . .and delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on."[130]

124. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 796 (1988).
125. *See* Nike, Inc. v. Kasky, 539 U.S. 654 (2003).
126. Bruce E.H. Johnson, *First Amendment Commercial Speech Protections: A Practitioner's Guide*, 41 LOY. L.A.L. REV. 297, 297 (2007).
127. *See* Kasky v. Nike, Inc., 119 Cal.Rptr.2d 296 (2003).
128. BRODY & JOHNSON, *supra* note 101, at 2-23.
129. David Kohler, *At the Intersection of Comic Books and Third World Working Conditions: Is It Time to Re-Examine the Role of Commercial Interests in the Regulation of Expression?*, 28 HASTINGS COMM. & ENT. L.J. 145, 149 (2006).
130. Nike, Inc. v. Kasky, 539 U.S. at 667.

IV. Commercial Speech Under the European Convention on Human Rights

It was not the ECtHR that established the commercial speech test or its method of judicial application;[131] rather, Article 10(2) sets the criteria for evaluation of all restrictions on expression, whether commercial or not. To a certain extent, it is true that "[d]ifferent tests are not used for different types of expression"[132] in Article 10, at least not to the same degree as they are in the First Amendment jurisprudence of the U.S. Supreme Court. Indeed, there is not a distinctive "commercial speech" doctrine in ECtHR case law like the one of the U.S. Supreme Court.[133] As in U.S. free speech law, however, commercial speech receives less protection than noncommercial speech in the case law of the ECtHR.

A. *Margin of Appreciation in Regulation*

For example, the European court is usually more willing to accept the regulation of advertising than it is to accept the regulation of noncommercial speech. In that respect, its doctrinal approach to advertising law is largely similar to that of the U.S. Supreme Court. Furthermore, the different degree of the "margin of appreciation"[134] under Article 10(2) illustrates a judicial discrimination against commercial speech.

131. Karie Hollerbach, "Expression Here and Abroad: A Comparative Analysis of the U.S. Supreme Court's and the European Court of Human Rights' Commercial Speech Doctrines," presented at the annual meeting of the International Communication Association, Marriott Hotel, San Diego, CA (May 27, 2003), *available at* http://www.allacademic.com/meta/p111960_index.html.

132. *Id.*

133. ERIC BARENDT, *supra* note 1, at 460.

134. The doctrine of "margin of appreciation" allows the governments of the ECHR member states some discretion, subject to the ECtHR supervision, in balancing freedom under the ECHR with conflicting interests such as reputation, privacy, and the right to a fair trial. This doctrine was first articulated by the ECtHR in *Handyside v. United Kingdom:*

> In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. . . . Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.
>
> Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed

X and Church of Scientology v. Sweden,[135] the first commercial speech case under the ECHR, is a good example. This 1979 case involved an injunction against the Swedish Scientology Church's certain misleading statements in advertising a device called the E-meter.[136] In adjudicating the statements at issue in the E-meter advertisement, the European Commission of Human Rights[137] made a distinction between informational or descriptive advertisements about a religious faith and commercial advertisements that offer products for sale. Thus, when religious advertisements promote the sale of goods for commercial purposes, they are not for dissemination of religious beliefs.[138] According to the Commission, because the advertisements challenged aimed to persuade people to buy the E-meter, it was commercial.[139]

On whether the Swedish government had authority to restrict the Scientology Church's freedom of expression, the Commission held that the necessity requirement of Article 10(2) must be interpreted less

by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force…

Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court…

Handyside v. United Kingdom, 1 Eur. Ct. H.R. (Ser. A) 737, 753-54 (1979).

135. The Church of Scientology and Another v. Sweden, App. No. 7805/77, Eur. Comm'n H.R. Dec. & Rep. 511 (1979). For a discussion of the Scientology case, *see* Randall, *supra* note 18, at 60-61.

136. The E-meter was "an electronic instrument for measuring the mental state of an individual" especially after confession to determine "whether or not the confessing person has been relieved of the spiritual impediment of his sins." *Church of Scientology* at 513.

137. Before the new European Court of Human Rights came into operation in November 1998 as a replacement for the part-time European Court of Human Rights and the European Commission of Human Rights, the ECHR complaints were first examined by the Commission to determined their admissibility. Once the complaint was declared admissible, the Commission left the parties to settle it. If no settlement was forthcoming, it prepared a report on the facts and delivered an opinion on the merits of the case. Where the respondent State had accepted the compulsory jurisdiction of the Court, the Commission and/or any Contracting State could bring the case before the Court for a final, binding adjudication. Individuals were not entitled to bring their cases before the Court. *See* European Court of Human Rights: Historical Background, at http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/ (last visited Oct. 5, 2008).

138. Church of *Scientology*, at 527.

139. *Id.*

strictly when commercial speech is restricted. It observed that most of the ECHR state parties have statutes for commercial speech to protect consumers from deceptive advertising.[140] Although commercial speech is not necessarily unprotected under the ECHR, the Commission held, "the level of protection must be less than that accorded to the expression of 'political' ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention are chiefly concerned."[141]

The ECtHR's deference to the national authorities' measures against commercial speech was as clear-cut in *Jacubowski v. Germany*,[142] a 1994 case, as in *Markt*. Manfred Jacubowski was ordered by the German courts to desist from sending newspaper articles, along with a circular letter, that criticized a news agency, his former employer, in connection with his dismissal.[143] According to the German courts, Jacubowski, who had started a public relations agency, violated the 1909 Unfair Competition Act. Rejecting his challenge to the injunctive order, the German Constitutional Court found that the dissemination of his circular was not to discuss public issues but to promote his business interests and to improve his competitive position in the news market.[144]

While accepting the German courts' assessment of Jacubowski's circular as an illegal unfair competition, the ECtHR did not consider the court order against him disproportionate. The European court emphasized that he could still continue to criticize his former employer by any other means, although he was prohibited from distributing the circular.[145]

In a joint dissenting opinion, Judges Walsh, MacDonald, and Wildhaber rebuked the majority of the ECtHR for relying too deferentially on the German courts' finding of fact. "In so doing," the dissenting judges argued, "it gives an excessive significance to the doctrine of the margin."[146] There was little "competitive element" in Jacubowski's distributing those newspaper clippings already in the public with a note that they were fair. To inject "a preponderance of the competitive element" into Jacubowski's act is essentially to accept unfair competition law as a rule while delegating freedom of expression as an exception.[147]

140. *Id.*
141. *Id.*
142. Jacubowski v. Germany, 19 Eur. Ct. H.R. 64, (1994).
143. *Id*. at 67-69.
144. *Id*. at 70.
145. *Id*. at. 78.
146. *Id*. at 78. (Walsh, MacDonald & Wildhaber, joint dissenting opinion).
147. *Id.*

Meanwhile, the ECtHR addressed whether advertising is protected or unprotected expression. In *Casado Coca v. Spain*,[148] the Court stated unequivocally that Article 10, in guaranteeing freedom of expression to everyone, does not concern whether expression is profit-motivated or not.[149] It found that "Article 10 does not apply solely to certain types of information or ideas or forms of expression, in particular those of a political nature; it also encompasses artistic expression, information of a commercial nature . . . and even light music and commercials transmitted by cable."[150] However, the ECtHR granted the national authorities a wide margin of appreciation in unfair competition and advertising.[151]

Meanwhile, the Court indicated its willingness to review the margin of appreciation more strictly when *truthful* advertising is subject to regulation. Advertising may be restricted to prevent unfair competition and misleading advertising. But the Court continued: "In some contexts, the publication of even objective, truthful advertisements might be restricted .... *Any such restrictions must, however, be closely scrutinized by the Court, which must weigh the requirements of those particular features against the advertising in question*."[152]

The ECtHR is wary of the chilling effect of the wider margin of appreciation on commercial speech and freedom of expression relating to debates of public concern. In *Hertel v. Switzerland*,[153] the injunction against a Swiss scientist in connection with a magazine article about his research was held to violate Article 10 of the ECHR. The article concerned Hans U. Hertel's findings that food prepared in microwave ovens was harmful to health. The Swiss courts proscribed Hertel from speaking about the danger of microwave ovens to health and from using the image of death in publications and speeches on microwave ovens.[154] The Federal Court of Switzerland ruled that any scientist is "wholly free" to present his expertise in the academic community.[155] Where competition is involved and a research discovery is still in dispute, however, a scientist must not misuse his unconfirmed opinion "as

148. 18 Eur. Ct. H.R. 1 (1994).
149. *Id.* at 20.
150. *Id.*
151. *Id.* at 23-24.
152. *Id.* at 24. (emphasis added).
153. Hertel v. Switzerland, 28 Eur. Ct. H.R. 534, 534 (1998).
154. *Id.*
155. *Id.* at 558.

a disguised form of positive or negative advertising" of his own work or the work of others.[156]

In deciding whether they had a "pressing social need" to impose an injunction on Hertel, the ECtHR accorded the Swiss authorities some margin of appreciation.[157] This was especially the case with commercial matters in unfair competition, according to the Court.[158] Nonetheless, the margin of appreciation must be reduced "when what is at stake is not a given individual's purely 'commercial' statements, but his participation in a debate affecting the general interest . . . over public health."[159] To the Court, Hertel's publication in a general-interest magazine was not a commercial advertisement but for a debate, which stood in sharp contrast with *Markt Intern* and *Jacubowski*. Thus, the Court more carefully examined whether the Swiss authorities' enforcement of the 1986 Unfair Competition Act accorded with the intended aim.

In balancing Hertel's right to free speech with the interests of microwave oven makers, the ECtHR paid close attention to Hertel's role—or lack thereof—in publishing the journal's article about his research findings and to the tone of his research paper quoted in the article. Hertel had nothing to do with the editing, illustrating, or headlining of the journal's article and his comments on microwave ovens were qualified. His only role in the journal's article was that he sent a copy of his research paper to the journal editor.[160] Meanwhile, the Court could not detect any substantial adverse impact of the journal article on the sale of microwave ovens in Switzerland.[161] So, it questioned the proportionality of the Swiss authorities' measure to its intended objective. The Court held:

> The effect of the injunction was thus partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.[162]

B. *Professional Advertising: Variable Protections*

In connection with lawyer advertising at issue, the ECHR in *Casado Coca* emphasized that "the rules governing the profession, particularly

156. *Id.* at 558-559.
157. *Id.* at 571.
158. *Id.*
159. *Id.*
160. *Id.* at 573.
161. *Id.*
162. *Id.*

in the sphere of advertising, vary from one country to another according to cultural tradition"[163] and that they change in most ECHR member states with varying degrees.[164] Hence, the complex nature of the lawyer advertising regulations place the national authorities in a better position than the ECtHR to balance the conflicting interests involved.[165] Significantly, however, the Court implied that restrictions on lawyer advertising would be more strictly reviewed in the post-*Casado Coca* years if the advertisement rules in the ECtHR nations are liberalized and lawyers are given greater freedom in advertising.[166]

In an earlier *professional* commercial speech case, *Barthold v. Germany*,[167] the ECtHR found an Article 10 violation in an injunction a German court ordered against a veterinary surgeon for what he said in a newspaper interview that discussed after-hours services. A veterinarian's association charged the veterinarian with a violation of the Rules of Professional Conduct and the Unfair Competition Act, where in its view, the veterinarian sought publicity for his own clinic.[168]

The EctHR said that the German restrictions on professional publicity and advertising violated the free speech rights of the members of professional veterinarians, and the watchdog role of the news media. Noting the crucial role of the press in a democratic society, the Court stated that "[t]he injunction . . . does not achieve a fair balance between the . . . interests at stake."[169] The Court further held:

> A criterion as strict as this in approaching the matter of advertising and publicity in the liberal profession is not consonant with freedom of expression. Its application risks discouraging members of the liberal professions from contributing to public debate on topics affecting the life of the community if ever there is the slightest likelihood of their utterances being treated as entailing, to some degree, an advertising effect. By the same token, application of a criterion such as this is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.[170]

Similar to *Barthold*, the 2003 case of the ECtHR, *Stambuk v. Germany*,[171] arose from the publication of a newspaper article about an

163. 18 Eur. Ct. H.R. (Ser. A) at 24.
164. *Id*. at 25.
165. *Id.*
166. *Id*. Noting the "material time" relevant to its judgment, the ECtHR held that the authorities in Spain did not overstep their boundaries in regulating the lawyer advertising.
167. Barthold v. Germany, 7 Eur. Ct. H.R. (Ser. A) 383, 383 (1985).
168. *Id*. at 388.
169. *Id*. at 404.
170. *Id.*
171. Stambuk v. Germany, 37 Eur. Ct. H.R. 845, 848 (2003).

ophthalmologist, Dr. Miro Stambuk. The article concerned Stambuk's new laser operation technique, and his success and experience with it.[172] Stambuk was fined for violating a law banning medical doctors from advertising.[173] The German courts stated that the German law prohibited medical practitioners' cooperation with the news media "to the extent that publications had an advertising character" because news stories could disguise their advertising nature and thus could circumvent the advertising ban.[174]

The ECtHR ruled that the punishment against Stambuk for having broken the professional rule on advertising infringed the ECHR.[175] Drawing on *Casado Coca*, the Court noted that advertising enables citizens to learn about the characteristics of services and goods offered to them and that restrictions on truthful advertising "must . . . be closely scrutinized."[176] Whereas the strict standard of review did not apply to lawyer advertising in *Casado Coca*, it applied to doctor advertising in *Stambuk*. The ECtHR explained that when compared to the legal profession, the medical profession does not lack common ground among Member States relating to the professional principles or a need to consider the diversity of moral conceptions that would warrant a wide margin of appreciation to the national authorities.[177]

In weighing the medical profession's rules of conduct against the public's legitimate interest in information, the Court limited the applicability of the rules to the extent they preserve the profession's well-functioning status.[178] The Court warned against interpreting the rules in such a way as to "put[] an excessive burden on medical practitioners to control the content of press publications."[179] The balancing process, the Court held, should factor in the "essential function" of the press, whose duty in a democratic society is "to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest."[180]

Applying the balancing test to the facts in the case, the ECtHR found that the news story about Stambuk informed the pubic on a matter of

172. *Id.*
173. *Id.*
174. *Id.* at 849.
175. *Id.* at 845.
176. 18 Eur. Ct. H.R. (Ser. A) at 24.
177. 37 Eur. Ct. H.R. at 854.
178. *Id.*
179. *Id.* at 845.
180. *Id.*

general medical interest and it was published "in a language and manner of presentation destined to inform a general public."[181] The Court considered the article balanced and Stambuk's statements in the article accurate. While acknowledging the article's effect of publicizing his practice as a medical doctor, the Court held it secondary when compared with the article's principal content.[182]

C. *Balancing Test for Injunction on Advertising*

In its leading but controversial commercial speech case, *Markt Intern & Beermann v. Germany*,[183] the ECtHR was less than analytical in applying the balancing test in commercial speech. This 1990 case led the Court to rule on an injunction imposed on a publishing firm, Markt Intern, and its editor-in-chief, Klaus Beermann. Markt Intern and Beermann tried to promote the interests of small-and medium-sized retail businesses against competition of large-scale distribution companies. They were sanctioned for publishing an article in their weekly newsletters that was critical of the business practices of an English mail-order firm, Cosmetic Club International. They were ordered not to repeat the statements published in their newsletter.[184] Although Markt Intern was not a competitor against the Club, the German courts held that the publishing firm had violated the 1909 Unfair Competition Act, because its publication disadvantaged the Club while advancing the interests of its competitors.[185] In embracing the interests of the Club's competitors while attacking the Club's commercial interests, Markt Intern did not act as an organ of the press.[186]

The European Commission of Human Rights ruled 12 to 1 that Germany had violated Markt Intern's right to free speech under the ECHR.[187] Nonetheless, the ECtHR disagreed with the Commission. In its 10-9 opinion, the Court adopted the German courts' reasoning in toto: Markt Intern's newsletter at issue was not directly aimed at the general public but focused on a limited circle of traders conveying information of a commercial nature.[188] Recognizing a wide margin of appreciation for the national authorities in advertising regulation, the Court said:

181. *Id*. at 855.
182. *Id.*
183. 12 Eur. Ct. H. R. (Ser. A) 161, 161 (1990).
184. *Id*. at 164.
185. *Id*. at 167.
186. *Id.*
187. *Id*. at 171.
188. *Id.*

> Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating a s that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.[189]

Interestingly, the European human rights court recognized the important role of the "specialized" press such as Markt Intern in a market economy in which criticism of business practices is inevitable. In order to closely scrutinize a company's commercial strategy and its consumer commitments, the Court noted, "the specialized press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities."[190]

Nonetheless, the Court refused to accept truth as a justification for prohibiting commercial speech. It observed that the right of privacy and the confidentiality of information sometimes outweigh publication of accurate commercial advertising. Further, the Court emphasized the context of supposedly truthful advertising:

> [A] correct statement can be and often is qualified by additional remarks, by value judgements, by suppositions or even insinuations. It must also be recognized that an isolated incident may deserve closer scrutiny before being made public; otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice. All these factors can legitimately contribute to the assessment of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not.[191]

It is not entirely clear how privacy and confidentiality were relevant to the central issue in the case. Indeed, the ECtHR rarely applied its stated standard to the facts. Rather, the Court made clear that because of the national authorities' wider margin of appreciation in advertising regulation, it should respect the national courts' determination of whether to permit or disallow advertising if based on "reasonable" grounds.[192]

The dissenting opinions, whether joint or individual, were strenuous. The joint dissent, to which eight judges signed on, considered whether the Article 10 standard was satisfied in the case. The dissenting judges found no "convincing" proof that the measures taken against Markt In-

189. *Id*. at 174.
190. *Id*. at 175.
191. *Id.*
192. *Id*. at 176.

tern were necessary.[193] They considered freedom of expression as important to commercial activities as it is to the conduct of government leaders.

The joint dissenting opinion noted that an economic interest does not deprive a person of his right to free speech. It stressed the value of the free flow of information to commercial transactions:

> In order to ensure the openness of business activities, it must be possible to disseminate freely information and ideas concerning the products and services proposed to consumers. Consumers, who are exposed to highly effective distribution techniques and to advertising which is frequently less than objective, deserve, for their part too, to be protected, as indeed do retailers.[194]

In this connection, the eight judges of the ECtHR pointed out that Markt Intern's exercise of its freedom of expression was "entirely normal" because its information was truthful.

The dissenting judges had strong reservations about the Court's unprecedented approach to the margin of appreciation because it will considerably restrict freedom of commercial expression. Also, they chided the Court for not supervising the state parties' conformity with the ECHR when it expressed its reluctance to reexamine the facts and circumstances of the case. Finally, the judges argued that in balancing the competing interests at stake, the Court failed to consider the legitimate interests of Markt Intern.[195]

Judge Pettiti added his own individual opinion separate from the joint dissenting opinion. He went further than any other judge in arguing for an expanded freedom of expression for advertising, especially when prior restraint is imposed. Freedom of expression allows "only a slight margin of appreciation for the States," Judge Pettiti wrote, and censorship of the press is permitted in "only in rare cases."[196]

To Judge Pettiti, the anti-censorship principle is particularly relevant to freedom of expression for commercial advertising and for challenging commercial and economic policy. For the State cannot claim to protect the "general interest" when it prohibits commercial speech because it simply defends "a specific interest."[197] Judge Pettiti asserted that the

193. *Id*. at 177. (Gölcüklü, J., Pettiti, J., Russo, J., Spielmann, J., De Meyer, J., Carrillo, J., Salcedo, J., & Valticos, J., dissenting, part I).
194. *Id.*
195. *Id*. at 177-78.
196. *Id*. at 178. (Pettiti, J., dissenting). Judge Pettti noted the First Amendment and mentioned the case law of the United States, Canada, and France Supreme Courts with no case citations. *Id*. fn.49.
197. *Id.*

government uses a fair competition or price law as a pretext for discriminating one group against another. He declared that freedom of expression "must be total or almost total" and that censorship should never be allowed even where commercial speech is restricted.[198] Only when advertisements are misleading or affect market competition unfairly, legal actions can be exceptionally used. Yet criminal prosecutions or civil proceedings are acceptable, not prior restraint, according to Judge Pettiti.[199]

For Judge Pettit, expanding the State's margin of appreciation at the expense of free speech conflicts with the ECtHR case law and diverges from the Council of Europe's work on the consumers' access to communication technology. Most troublesome about various anti-competition and anti-trust laws is that the State seeks to limit free speech on the pretext of punishing economic infringements. The State's legal proceedings are politically motivated or designed to safeguard "'mixed' interests (State-industrial)."[200] Judge Pettit has warned not to underestimate the economic pressure from various groups and laboratories.[201] He credits the freedom of the specialized economic press with protecting the general public from a dangerous medicine or substance.[202]

In his individual dissenting opinion, Judge De Meyer agreed with Judge Pettiti that the national authorities had no legitimate aim to justify their prohibition against publication of Markt Intern's article. Judge De Meyer saw no "rights of others"[203] to be protected by the State's enforcement of the Unfair Competition Act of Germany because the challenged action defended only commercial interests.[204] He also questioned the Court's "re-examination" of the fact and circumstances of the case since the Court simply adopted the German courts' disputed assessment.[205]

In a two-judge dissenting opinion, Judge Martens shared other judges' rejection of the ECtHR's ruling as incompatible with the ECHR on freedom of expression guaranteed even to "a partisan press organ."[206] His criticism of the majority opinion stands out from those of other

198. *Id.*
199. *Id.*
200. *Id.* at 179.
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* (De Meyer, J., dissenting).
205. *Id.*
206. *Id.* at 180. (Martens, J., dissenting) (approved by MacDonald, J.).

dissenting judges in that it focused on the Court's burden-of-proof assumptions in weighing the conflicting interests under the law on unfair competition and in considering freedom of speech as an interest.

In comparing the German law on unfair competition with the ECHR on freedom of expression, Judge Martens pointed out that the German law is assumed to protect the *private* interests of the competitors and the ban on a company's publication of harmful criticism about its competitor is normal. Here, the person who publishes denigrating comments has to prove that his criticism is sufficiently grounded and falls within the "strictest" limits of the law.[207]

By contrast, according to Judge Martens, the assumption underlying freedom of expression is diametrically opposed. Freedom of expression is to serve the *general* interest, especially when the news media are involved, and it makes freedom to criticize the norm.[208] Here the person who complains about the criticism has to establish that his claim is well-founded. Judge Martens argued that the Court must balance the general interest of the public and the individual interest of the party who claims to have been injured.[209]

As a result, to ask under the unfair competition law whether a news article is acceptable is to place a news media entity in a position that is "fundamentally different" from what it is entitled to under the ECHR, and it considerably restricts freedom of the press.[210] Judge Martens suggested that the Court ask whether the national authorities in a democratic society have to restrict the fundamental freedom of the press solely because a news article has promoted the specific economic interests of a particular trade.[211] Applying this analysis to the fact in the case, Judge Martens wrote that there was no room for the margin of appreciation for the State because the assessment of the national authorities violated the ECHR freedom of expression.[212]

Judge Martens also took issue with the proportionality of Germany's restriction on freedom of the press to the protection of the reputation of others. For proof should be convincing enough to establish that the Club's private interests were more important than the general interest of both the Markt Intern readers and the public to learn about the ongoing

207. *Id.*
208. *Id.*
209. *Id.* at 181.
210. *Id.*
211. *Id.* at 182.
212. *Id.*

struggle between small-and medium-sized retail businesses and large-scale distribution companies.[213]

Comparative advertising cannot be subject to an injunction unless it is overbroad. The 2003 case of *Krone Verlag GmbH & Co. KG v. Austria (No. 3)*[214] is illustrative. The Salzburg edition of *Neue Kronenzeitung*, one of the daily newspapers owned by KG in Vienna, published an advertisement for subscriptions for the newspaper in which its monthly subscription rates were compared with those of another regional newspaper. The advertisement called the *Neue Kronenzeitung* the "best" local newspaper.[215] The Austrian courts issued an injunction against the *Neue Kronenzeitung* under Austria's Unfair Competition Act.[216] The Linz Court of Appeal banned the newspaper from comparing its subscription prices with those of its competitor unless its comparison included the differences in their news reporting styles.[217]

The ECtHR rejected the Austrian government's measure against the *Neue Kronenzeitung* because its consequences would impact future advertising profoundly. Mandating inclusion of information about the differences between the compared newspaper in their news reporting styles, according to the Court, is "far too broad, impairing the very essence of price comparison."[218]

D. *Political and Cause Advertising*

"Cause advertising" is given more protection than purely commercial advertising under Article 10. In *Vgt Verein Gegen Tierfabriken v. Switzerland*,[219] an animal rights association wanted to run an advertisement on television to encourage people to eat less meat. The European Court reiterated a wider margin of appreciation for commercial speech.[220] The Court held, however, that the animal rights film at issue was not commercial because it did not persuade the public to purchase a particular product, but it reflected controversial views relating to modern society.[221] Because the advertisement was political, the Swiss government's discretion in restricting it was reduced.

213. *Id*. at 182-83.
214. Krone Verlag GmbH & Co KG v. Austria, 42 Eur. Ct. H.R. 578, 578 (2006).
215. *Id*. at 579.
216. *Id*. at 580.
217. *Id.*
218. *Id*. at 584.
219. Vgt Verein Gegen Tierfabriken v. Switzerland, 34 Eur. Ct. H.R. 159, 163 (2002).
220. *Id*. at 176.
221. *Id.*

The Court acknowledged a possibility that freedom of the broadcasting media will be curtailed at the expense of the public's right to information if powerful financial groups dominate commercial advertising on radio and television.[222] It considered pluralism in information and ideas essential to freedom of information in a democratic society. In this context, the Court said the audio-visual media should be guided by the principle of pluralism.[223]

The European Court concluded that the statutory prohibition of political advertising in Switzerland was supported by no "relevant and sufficient" reasons.[224] It rejected the Swiss government's assertion that political advertising was prohibited from broadcasting media, but not in print media since "television had a stronger effect on the public on account of its dissemination and immediacy."[225] The Court said the differential treatment of the broadcast and print media for political advertising was not particularly pressing.[226]

Further, the Court stated that the animal rights organization was not a financially powerful group that was committed to undermining the independence of the television broadcaster, unduly influencing public opinion, or endangering the equality of opportunity among the different forces of society.[227] Instead of abusing a competitive advantage, the organization merely wanted to participate in an ongoing debate on animal protection.[228]

Four years earlier, the ECtHR also protected editorial advertising as political speech. In *Lehideux and Isorni v. France*,[229] the Court, in a 15-6 ruling, found a violation of the ECHR in two Frenchmen's criminal conviction for publishing a newspaper advertisement.[230] The advertisement in *Le Monde* defended the crimes of collaboration with Germany during World War II.[231] Without expressly addressing the issue of whether the advertisement was commercial, the Court treated it as the kind of historical debate that deserves strict scrutiny. The Court recalled that the ECHR protects not only information or ideas that are favorably received

222. *Id.*
223. *Id*. at 176-77.
224. *Id*. at 177.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. Lehideux & Isorni v. France, 30 Eur. Ct. H.R. 665, 665 (2000).
230. *Id.*
231. *Id.*

or regarded as a matter of indifference, but also to those that offend, shock or disturb.[232]

E. *Advertising on Electronic Media*

Religious advertisement on electronic media is subject to a wide margin of appreciation by national authorities. In a 2003 case, *Murphy v. Ireland*,[233] the Irish Radio and Television Act was held compatible with the ECHR when it applied to a blanket ban on a pastor's advertisement for the screening a religious video.[234] When regulating speech on "intimate personal convictions," the state authorities can operate with more latitude, according to the ECtHR:

> [T]here is no uniform European conception of the requirements of "the protection of the rights of others" in relation to attacks on their religious convictions. What is likely to cause substantial offence to persons of a particular religious persuasion will vary significantly from time to time and from place to place, especially in an era characterized by an ever-growing array of faiths and denominations. By reasons of their direct and contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements with regard to the rights of others as well as on the "necessity" of a "restriction" intended to protect from such material those whose deepest feelings and convictions would be seriously offended.[235]

In balancing the proportionality of the Irish authorities' measure against Murphy, the Court viewed the medium of his speech as an important factor. The Court stated the "audio-visual media have a more immediate and powerful effect than the print media."[236] This led the Court to frame the central question in the case: Can religious advertising on the *broadcast* media be prohibited under the circumstances involved?[237] The Court answered in the affirmative. To begin with, according to the State, the ECHR states appear to have no "clear consensus" on how to legislate the broadcasting of religious advertisements.[238] Second, various laws of the ECHR nations on the broadcasting of religious advertising appear to have no "uniform conception" of what is required in protecting others against attacks on their religious beliefs.[239]

232. *Id*. at 683.
233. Murphy v. Ireland, 38 Eur. Ct. H.R. 212, 218 (2004).
234. *Id*. at 238.
235. *Id*. at 234.
236. *Id*. at 235.
237. *Id.*
238. *Id*. at 238.
239. *Id.*

The ECtHR in *Demuth v. Switzerland*[240] also took into account the broadcast media's profound impact on society in upholding the Swiss government's denial of a license to Car Tv AG. Noting that Car Tv AG's primary purpose was to promote car sales, the Court observed that "in view of their [audio-visual media] strong impact on the public, domestic authorities may aim at preventing a one-sided range of commercial television programmes on offer."[241] When issuing broadcasting licenses, the national authorities may weigh pluralism in broadcasting to ensure the quality and balance of broadcasting programs.[242] The Court concluded that the licensing requirements of the Swiss Radio and Television Act did not exceed the margin of appreciation given to the Swiss government.[243] The particular political circumstances in Switzerland compelled the authorities to consider sensitive political criteria such as cultural and linguistic pluralism.[244]

V. Discussion and Analysis

The theoretical underpinnings of the First Amendment to the U.S. Constitution and Article 10 of the European Convention are similar. Despite these similarities, they are textually distinguishable. The textual simplicity of the First Amendment could have contributed to unexpected detours in U.S. free speech jurisprudence, some of which might not dovetail with the ideals envisioned by the Amendment's framers.

Significantly, freedom of speech and freedom of the press in the First Amendment are treated as freedom of expression; for the most part, courts lump them together as one freedom, not two separate freedoms. This stands in sharp contrast to freedom of expression under Article 10 of the European Convention. Article 10 makes no textual reference to the press, as an institutional concept, for protection of its freedom. But the ECHR reads freedom of the press into freedom of expression as distinct from freedom of speech.

Neither the First Amendment nor the ECHR recognizes absolutism in freedom of speech. Rights balancing is an unending process for the U.S. Supreme Court and the ECtHR. As the commercial speech case law of the Supreme Court and the ECtHR indicates, it makes little

240. Demuth v. Switzerland, 38 Eur. Ct. H.R. 423, 433 (2004).
241. *Id.*
242. *Id.* at 434.
243. *Id.*
244. *Id.*

difference whether the constitutional guarantee of freedom of speech or of the press is textually qualified or unconditional.

Both the U.S. Constitution and the European Convention recognize the classical free speech values—*i.e.*, personal autonomy, discovery of truth, and democracy—as underpinning freedom of expression. Because the First Amendment and Article 10 substantially parallel each other on the recognized values of freedom of expression in a democratic polity, courts have interpreted them similarly. Insofar as commercial speech is concerned, the case law reveals an overall liberal trajectory with constant fine-tuning, depending on what theories sway the fact-specific balancing of interests. This is more pronounced in the U.S. Supreme Court rulings on commercial speech.

Judicial interpretations of commercial speech in Europe and the United States reflect the hierarchical approach to the social, political, cultural, and educational values assigned to various expressive activities. Courts grant commercial speech less protection than noncommercial speech, even if it constitutes truthful speech or advertises legal products and services. Significantly, however, commercial speech has been considered worthy of protection under the European Convention since it was first adjudicated 30 years ago, although the ECtHR allows more margin of appreciation to each country in regulating such speech.

The ECtHR's nondiscriminatory approach differs from the U.S. Supreme Court's categorical approach to commercial speech (leaving some forms of commercial speech out in the cold) and non-commercial speech (largely protected). Contrast the Supreme Court's rather flippant rejection of First Amendment protection of commercial advertising in *Valentine* with the ECtHR's encompassing statement in *Casado Coca* on the ECHR protection of commercial information.

The U.S. Supreme Court's pigeonhole approach to commercial speech has been reexamined in recent years. But the dichotomy underlying the Court's free speech jurisprudence on commercial advertising is still entrenched, albeit far less than before. It is true that protection for commercial speech is not only for the consumer but also the business entity as its source. Yet more often than not, the protection is discussed from the consumer's perspective, not the speaker's. In this regard, the Court's analyses often verge on paternalism.

On the other hand, the ECtHR is far more receptive to commercial speech as belonging to *both* the consumer and the speaker, especially when commercial speech is examined as a matter of freedom of the press. This makes the European Court's commercial speech jurisprudence intriguingly different from that of the U.S. Supreme Court. In

U.S. law on commercial speech, it rarely emerges as an important consideration whether an institutional news media is involved as the communicator of advertising or not. But the ECtHR pays close attention to the news media's watchdog role as a factor in assessing possible impact of the challenged government regulation on press freedom.

Further, when compared with the U.S. Supreme Court, the ECtHR's willingness to give State authorities more discretion to regulate advertising on broadcast media than print media. This is derived from the European countries' institutional commitment to pluralism in the mass media in general and in the electronic media in particular.

Another notable difference between the U.S. Supreme Court and the ECtHR relates to professional advertising. The U.S. makes little distinction between lawyer and doctor advertising as far as regulation of professional advertising is concerned. The European Court treats lawyer advertising differently from medical advertising. That is, lawyer advertising is subject to a wider margin of appreciation and, thus, to more restriction than doctor advising. According to the ECtHR, regulation of law practice varies more from country to country than regulation of medical practice.

Both Europe and the U.S. protect cause, or political, advertising more than purely commercial advertising. Often, in Europe the type of media involved in advertising can be a determining factor. That is, in Europe, religious advertising on television and radio is more likely to be regulated than non-religious advertising in non-electronic media. Religion remains an amorphous issue among the ECHR nations and broadcast media are regulated as a matter of State policy.

Nonetheless, mixed content speech, such as that at issue in *Nike v. Kasky* of the U.S. Supreme Court, will likely be protected by the ECtHR largely because Nike's speech will be viewed as part of an ongoing public debate about labor practices by global conglomerates. In this context, the European Court will apply a heightened scrutiny when examining the proportionality of the California law to its intended objective.

VI. Conclusion

As in other areas of free speech jurisprudence, commercial speech in U.S. law is more protected now than ever before. This is hardly surprising; commercial speech has become part of the free flow of information under the First Amendment, not only for the speaker but also for the consumer. But the U.S. Supreme Court has often acted inconsistently by applying a case-by-case approach, all while setting forth a seemingly

confusing four-prong commercial speech test. By contrast, the European Court of Human Rights has not adjusted its commercial speech judicial framework as often as the Supreme Court.

The common benchmark on commercial speech in the U.S. and the ECHR nations is that commercial speech is protected in varying degrees, but not as much as political speech. To this end, the U.S. Supreme Court's initial categorization of commercial speech as unprotected speech continues to color the nation's still evolving commercial speech doctrine. Meanwhile, the ECtHR's protection of commercial speech, whether more or less than that of the U.S. Supreme Court, largely hinges on how the "margin of appreciation" doctrine applies. The deferential attitude of the ECtHR toward the decisions of the national courts profoundly affects the extent to which commercial speech is protected or not protected.