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### Balancing Business Interests with Consumer Concerns: A Comparative Examination of U.S. and E.U. Commercial Expression Doctrines

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# BALANCING BUSINESS INTERESTS WITH CONSUMER CONCERNS: A COMPARATIVE EXAMINATION OF U.S. AND E.U. COMMERCIAL EXPRESSION DOCTRINES

SCOTT SIVLEY<sup>†</sup>

## ABSTRACT

*Warning: This Note does not deal with a particularly new nor particularly interesting subject. If sellers of goods and information were this forthcoming when making claims about their products, this Note would not be necessary. Unfortunately, there is a colossal tug of war, as illustrated by the Occupy Movement in the fall of 2011 and as campaign financing during the 2012 American election cycle has and will continue showing us, emerging in the domestic and global marketplace over who should ultimately be responsible for protecting consumers from irresponsible or false commercial speech. Should we continue down the road of survival of the fittest and leave it up to consumers to wade through the muck of puffery and illusion in an information age when new technologies and ideas pop up virtually overnight, or do governments and those who claim to look out for everyone's best interest have a responsibility to do their job and regulate to provide for greater transparency? In fact, "consumers" is an erroneous description in this debate because it, in a sense, dehumanizes who consumers are, consumers are people with inalienable rights not some legal construct such as a corporation whose basic governing rules can wax and wane based on the whims of a state and a court. The legal profession has a role to play in this tug of war, but unfortunately more and more of those in the judiciary bring a clouded view of what the law should be and blindly discredit the idea that entities whose sole purpose is to make money will generally do whatever they can to make money. The differences in the law of the United States and the European Union are admittedly subtle in this area, but the opinions and the authoritative articulations of the law have a profound, divergent effect on its consumers (a.k.a. citizens). The United States is a promise promulgated on its commitment to all of its peoples with business freedom serving its people not the other way around. Our laws should reflect that promise.*

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## I. INTRODUCTION

I wish [the Manicheans] might have heard what I said in comment on those words—without my knowing that they heard, lest they should think that I was speaking it just on their account. For, indeed, I should not have said quite the same things, nor quite in the same way. . . . And if I had so spoken, they would not have meant the same things to them as they did to me . . . .<sup>1</sup>

Since St. Augustine's time, technology has evolved and people experience more during a lifetime, but core truths concerning the processes and susceptibilities of the human mind remain virtually unchanged.<sup>2</sup> In later times, Rousseau and other enlightenment philosophers crafted arguments to free humanity from the bonds of

<sup>1</sup> ST. AUGUSTINE OF HIPPO, THE CONFESSIONS OF SAINT AUGUSTINE, Book Nine, Chapter IV, 8 (Albert C. Outler trans. and ed.), available at <http://www.fordham.edu/halsall/basis/confessions-bod.html>.

<sup>2</sup> Because of internet, mobile phones and satellite television, humans simply have more information at their disposal. Because of transportation shifting from horses to trains, cars and planes, people may go more places. All of these basic facts of life allow the average human to have a far more robust life experience, but for example, most people have always feared death and the unknown, and both even in our technological age still drive many of our behaviors.

political and economic servitude. Freedom of expression was at the core of developing individual dignity, autonomy and self-realization.<sup>3</sup>

Today, freedom of individual expression remains the cornerstone of democracy.<sup>4</sup> Pertinent to this paper, how far does that right extend in its pure form to commercial speakers? How one answers that question may depend on whether he or she views commercial speech as information transformed into a product that comes with responsibilities or simply as another legal category that serves the same purpose as other forms of protected speech?<sup>5</sup>

The consumer society, to which we all belong, is predicated on business delivering messages that drive people to action.<sup>6</sup> Businesses spend exorbitant amounts of money on effective psychological techniques to penetrate the media cloud of haze.<sup>7</sup>

This Author takes the position that, if protected at all, commercial expression should remain subsidiary under freedom of expression doctrines of the United States and the European Union. Moreover, U.S. courts should adopt a more expansive understanding of how advertising works and more carefully examine the intent and effect of language and images used in modern advertising. It will be shown by progressively reviewing Supreme Court holdings that today there are few (and becoming fewer) limits to commercial speech in America because the Court's opinions take the position that consumers have the right to more information which burdens them to increasingly becoming experts to make proper choices. However, the preferred model should encompass the European approach where the societal interest rests more in the accuracy of advertising claims and eliminating some of the clutter and ambiguity that advertised messages purposely create.

Most important to this analysis involves an examination of differences between the two systems in how the "societal interest" is considered. The case law will show that differences on this point lead to divergent outcomes between the systems. I will analyze both systems' constitutional histories and frameworks and review relevant case law before espousing a preferred approach.

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<sup>3</sup> See generally JEAN JACQUES ROUSSEAU, DISCOURSE ON THE ORIGIN OF INEQUALITY (1755). An inescapable premise of this paper is that the social contract is more important in a technological society of today than even the agrarian state in which it was conceived. Irresponsible expression destroys the balance between the powerful with access to media and the weak who have little resources to speak or the ability to band together. Ultimately, a democracy is so skewed by such an imbalance because there is no equity in form or substance.

<sup>4</sup> ROGER A. SHINER, FREEDOM OF COMMERCIAL EXPRESSION 3 (2003).

<sup>5</sup> See generally *id.* at 3.

<sup>6</sup> Advertising is de facto evidence of this practice.

<sup>7</sup> IAIN RAMSAY, CONSUMER LAW AND POLICY: TEXT AND MATERIALS ON REGULATING CONSUMER MARKETS 395 (2007).

## II. CONSTITUTIONAL FRAMEWORKS OF THE U.S. AND E.U.

A. *The United States of America*

## 1. The Supreme Court of the United States

The United States of America is a constitutional federal republic with a constitution dating to 1789.<sup>8</sup> Its constitution has an entrenched set of rights,<sup>9</sup> and among other provisions sets forth the powers of the judiciary of the United States, including the establishment of the highest court, which is the United States Supreme Court (the Supreme Court), and other “inferior” courts established by Congress.<sup>10</sup> There are avenues of appeal to the highest court, but most importantly the Supreme Court, if it so chooses to exercise its power, is the final interpreter of constitutional questions.<sup>11</sup> For comparative purposes, cases examined in this paper are limited to U.S. Supreme Court rulings.

## 2. The First Amendment to the U.S. Constitution

The controlling constitutional authority for freedom of expression is guaranteed in the Bill of Rights: “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>12</sup> The First Amendment now extends to state governments under the doctrine of incorporation.<sup>13</sup> For most of its history, American jurisprudence understood the freedoms enjoyed to be either protecting individuals from the abuses of government or restraining the activities of government.<sup>14</sup> One hundred fifty-three years passed from the Bill of Rights adoption without the Court examining whether business purposes merit any protection under the speech clause.<sup>15</sup>

As differentiated from individual speech, commercial expression is now considered a low-level speech category,<sup>16</sup> and is currently examined under the four prongs of the Central Hudson: Does the expression concern a lawful activity; and is it not misleading? If both are answered “yes,” then one is to consider whether the “asserted governmental interest is substantial.” Finally, if “yes,” a determination of whether the regulation is proportionate must be made. Proportionality is determined

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<sup>8</sup> *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last updated Nov. 17, 2011).

<sup>9</sup> MARK TUSHNET, *LIVING WITH A BILL OF RIGHTS*, IN *UNDERSTANDING HUMAN RIGHTS* (Connor Gearty & Adam Tomkins eds., 1995). Entrenchment simply means that there are rights guaranteed to the people as part of the constitution. In the U.S. those rights are the first ten amendments also known as the Bill of Rights.

<sup>10</sup> U.S. CONST. art. III, § 1.

<sup>11</sup> *Id.*

<sup>12</sup> U.S. CONST. amend. I.

<sup>13</sup> *Schneider v. New Jersey (Town of Irvington)*, 308 U.S. 147, 160 (1939).

<sup>14</sup> See Steve Mount, *Constitutional Topics: Bar to Federal Action*, U.S. CONSTITUTION ONLINE, [http://www.usconstitution.net/consttop\\_bor.html](http://www.usconstitution.net/consttop_bor.html) (last updated Jan. 24, 2010).

<sup>15</sup> *Valentine v. Chrestensen*, 316 U.S. 52, 52 (1942).

<sup>16</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (acknowledging that First Amendment protection does not extend completely to all speech).

by examining whether the regulation directly advances the government's interest and is it narrowly tailored to serve that interest.<sup>17</sup>

### *B. The European Union*

The European Union (E.U.) is the current product of multilateral treaties agreed to by European States following World War II to avoid future clashes and promote prosperity while moving toward a more unified Europe.<sup>18</sup> There is no actual constitutional apparatus for the E.U.; alternatively, a bolstered treaty framework remains intact.<sup>19</sup> While this framework is more of a political agreement between states than a strict legal framework, the states' actions have shown intent to give up elements of sovereignty not typically granted in traditional treaties, and have certainly created a "specified legal order."<sup>20</sup> That order includes making individuals of the member states citizens of the E.U.<sup>21</sup> Subsequently, they have rights that are interpreted on the Community level against member states.<sup>22</sup>

The cooperative efforts took two paths in the early days.<sup>23</sup> One path flowed from human rights concerns<sup>24</sup> while the other centered on economic and political stability.<sup>25</sup> Each path resulted in the following separate convention frameworks.

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<sup>17</sup> *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

<sup>18</sup> Post World War II Europe, cooperative efforts first came in the steel industry among a few nations and with the purpose evolving toward establishing the internal market, and thus not particularly interested in dealing with fundamental rights of persons. It was nearly twenty years later that The European Court of Justice "would protect fundamental rights as general principles of law. *See generally* ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* 337 (2006).

<sup>19</sup> *What the EU Constitution Says*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/2950276.stm> (last updated June 22, 2004) ("The constitution brings together for the first time the many treaties and agreements on which the EU is based. It defines the powers of the EU, stating where it can act and where the member states retain their right of veto." After being signed in June 2004, French and Dutch voters rejected it and thus the effort failed.). *See generally* The 'Treaty of Lisbon,' EUROACTIV.COM, <http://www.euractiv.com/en/future-eu/treaty-lisbon/article-163412> (last visited Nov. 17, 2011) (The Treaty of Lisbon was created after the failed attempt at a constitution. It contains many of the changes envisioned to have been part of the Constitutional Treaty but instead were formulated as amendments to the existing treaties. After contentious efforts, most notably in Ireland, the Treaty of Lisbon came into force on Dec. 1, 2009.).

<sup>20</sup> P S R F MATHIJSEN, *A GUIDE TO EUROPEAN UNION LAW* 39 (2007). They have done this by making the agreements limitless in duration, created agreed upon institutions for enforcement and the law binds not only the member states together but also residents of the member states.

<sup>21</sup> *Id.*

<sup>22</sup> *See generally id.* at 5 n. 8.

<sup>23</sup> *See* Patricia R. Waagstein, *Human Rights Protection in Europe: Between Strasbourg and Luxembourg*, SPICE, [http://spice.stanford.edu/docs/human\\_rights\\_protection\\_in\\_europe\\_between\\_strasbourg\\_and\\_luxembourg/](http://spice.stanford.edu/docs/human_rights_protection_in_europe_between_strasbourg_and_luxembourg/) (last visited Nov. 17, 2011).

<sup>24</sup> Convention for the Protection of Human Rights and Fundamental Rights as amended by Protocols Nos. 11 and 14 (adopted Nov. 4, 1950 as amended June 1, 2010), C.E.T.S. No. 194,

### 1. European Convention on Human Rights

The European Convention on Human Rights (ECHR) is enforceable against all forty-seven signatories.<sup>26</sup> While controlling over the ECHR member states, it was initially and only observed by the European Court of Justice (ECJ), acting on behalf of the E.U., out of respect for the “common constitutional traditions of the member states.”<sup>27</sup> This interplay will be discussed further in the ECJ section.

Commercial speech, as applied by both the European Court of Human Rights (ECtHR) and ECJ, is part of freedom of expression but has been afforded less protection than other forms of individual expression, particularly political expression.<sup>28</sup> The test employed by both courts is effectively stated by the ECtHR as follows: “[i]t should therefore be determined whether it was ‘prescribed by law,’ whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was ‘necessary in a democratic society’ to achieve such aims.”<sup>29</sup> The ECJ adds gloss to this test. It uses the word “justified” in its reasoning when examining the legal basis, which is similar to the “prescribed by law” language of the ECtHR. It adds proportionality, which is similar to Central Hudson, but in effect it is simply a more thorough method of analyzing the “necessity” component the ECtHR utilizes.

### 2. The European Court of Human Rights

Section II, Article 19 of the ECHR established the ECtHR.<sup>30</sup> Its jurisdiction is laid out in Article 32, which states, “1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the

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213 U.N.T.S. 221, *in* THE EUROPEAN CONVENTION ON HUMAN RIGHTS OF 1950, [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf) (last visited Nov. 17, 2011) [hereinafter ECHR]. The European Convention on Human Rights of 1950 established the original concept of the now European Court of Human Rights.

<sup>25</sup> See Arnall, *supra* note 18, at 5. Article 31 of the Treaty establishing the Economic Coal and Steel Community of 1951 established “a court of justice” to interpret and apply the treaty for the member states. Now, the functions of the court of justice are: As part of that mission, the Court of Justice of the European Union: reviews the legality of the acts of the institutions of the European Union, ensures that the Member States comply with obligations under the Treaties, and interprets European Union law at the request of the national courts and tribunals. The Court thus constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of European Union law. See also EUROPEAN COURT OF JUSTICE WEBSITE, [http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/) (last visited Nov. 17, 2011) [hereinafter ECJ Website].

<sup>26</sup> *Frequently Asked Questions*, ECtHR, Oct. 2010 edition, at 5-6, [http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ\\_ENG\\_A4.pdf](http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf) (last visited Nov. 17, 2011).

<sup>27</sup> ECJ Website, *supra* note 25.

<sup>28</sup> *Church of Scientology v. Sweden*, E.C.C. 511, 527 (1979).

<sup>29</sup> *Markt Intern GmbH & Beermann v. Germany*, 12 E.H.R.R. 161, 172 (1990).

<sup>30</sup> ECHR, *supra* note 24, Section II, art. 19.

protocols thereto . . . . 2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.”<sup>31</sup> Besides binding judgments as set forth in Article 46, the ECtHR may also make advisory opinions through its Article 47 powers.<sup>32</sup>

The ECtHR reviews cases brought against states<sup>33</sup> by individuals, groups of individuals, other contracting states,<sup>34</sup> companies, and even NGOs.<sup>35</sup> The decisions of the ECtHR are binding against states, and member states “are obliged” to put the decision into force.<sup>36</sup>

### 3. Article 10 of the ECHR

Article 10 of the Convention provided the first shared articulation of freedom of expression among European states.<sup>37</sup> Unlike the First Amendment of the United States Constitution, Article 10 of the ECHR includes provisions outlining the rights and the duties along with responsibilities those rights entails:

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 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.<sup>38</sup>

### 4. The Treaty of Lisbon

Following the failed attempt at a constitution, the latest and most comprehensive of the treaties of the European Union is the Treaty of Lisbon.<sup>39</sup> Coming into force on

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<sup>31</sup> *Id.* art. 32.

<sup>32</sup> *Id.* art. 46-47.

<sup>33</sup> *Id.* art. 34.

<sup>34</sup> *Id.* art. 33.

<sup>35</sup> Frequently Asked Questions, *supra* note 26, at 7-8.

<sup>36</sup> *Id.* at 10.

<sup>37</sup> ECHR, *supra* note 24, Section I, art. 10 §§ 1-2 (this is more than the number of current members states in the E.U.).

<sup>38</sup> *Id.*

<sup>39</sup> *Treaties and Law*, EUROPA.EU, [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm) (last visited Dec. 16, 2010).



December 1, 2009, it has consolidated and amended many of the agreements<sup>40</sup> made since the first agreement on coal and steel in 1952<sup>41</sup> until today, with E.U. membership now including 27 states.<sup>42</sup> It formally made the Charter of Fundamental Rights binding law in the E.U.,<sup>43</sup> and maintained the ECJ as the superior court for questions of E.U. law<sup>44</sup> with jurisdiction to decide human rights cases.<sup>45</sup>

The body that is now known as The Court of Justice for the European Union (ECJ) was first established in 1952 by the treaty establishing the European Coal and Steel Community,<sup>46</sup> and just as the E.U. has expanded so too has the ECJ's jurisdiction and mandate.

Today, it interprets and applies E.U. legislation for uniform application in all member states. It hears cases involving member states, EU institutions and EU citizens.<sup>47</sup> Each member state has a seat on the Court, but usually hears cases as a panel of thirteen or five. Additionally, the court is assisted by advocates-general who compile cases and present preliminary decisions on the matters that come before the panels and whose opinion is included in the public record.<sup>48</sup> The Court, aside from adjudicating cases, may also provide preliminary rulings upon request of member states that act as advisory opinions.<sup>49</sup> This supports the court's primary goal of bringing consistency to the laws of the E.U.<sup>50</sup>

As mentioned, the ECJ looks to the traditions of the member states, which allows it to give weight and validity to the ECHR. This is legally referred to as "accession," and as related to fundamental rights, was first recognized in an ECJ decision of 1986.<sup>51</sup> With amendments made by the Treaty of Lisbon, the ECJ now must accede

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<sup>40</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007/C306/01, available at EUROPA.EU, [http://europa.ed/lisbon\\_treaty/glance/index\\_en.htm](http://europa.ed/lisbon_treaty/glance/index_en.htm) (last visited Dec. 16, 2010) [hereinafter Treaty of Lisbon].

<sup>41</sup> MATHIJSEN, *supra* note 20, at 13.

<sup>42</sup> Treaty of Lisbon, *supra* note 40, ¶ 2.

<sup>43</sup> *Id.* ¶ 3.

<sup>44</sup> *Institutions*, EUROPA.EU, [http://europa.eu/institutions/index\\_en.htm](http://europa.eu/institutions/index_en.htm) (last visited Dec. 16, 2010) [hereinafter *Institutions*].

<sup>45</sup> *See* Treaty of Lisbon, *supra* note 40.

<sup>46</sup> *Institutions*, *supra* note 44.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* *See also* ECJ Website, *supra* note 25 (explaining the public hearing and advocate general's role).

<sup>49</sup> Treaty of Lisbon, *supra* note 40.

<sup>50</sup> ECJ Website, *supra* note 25 (court within the legal order of the E.U.).

<sup>51</sup> *See id.* "After numerous terrorist attacks against the police, police officers in Northern Ireland began carrying fire-arms. However, on the grounds of public safety, women police officers were not authorised to carry fire-arms (on the basis of a certificate issued by the competent minister which could not be challenged before the courts). As a result, full-time contracts in the Northern Ireland police were no longer offered to women. On a reference from a United Kingdom court, the Court held that excluding any power of review by the courts of a certificate issued by a national authority runs counter to the principle of effective

to the ECHR when applying “general principles of the Union’s law,” however; this accession does not affect the competences of the Union or the powers of its institutions.<sup>52</sup>

The Court of Justice’s incorporation of the principles of the ECHR into Union law made it possible to maintain the independence of the ECtHR and ECJ while creating coherence in their work.<sup>53</sup> More to the point, commercial expression is a concept that encompasses both economic behavior and human rights, so it is an area of the law that is perfectly suited for the ECJ to weigh-in on since it does so primarily acknowledging the fact that there is a human rights component to all economic decisions<sup>54</sup>

The Charter of Fundamental Rights came into effect in 2000,<sup>55</sup> but only with the adoption of the Treaty of Lisbon is it now legally binding.<sup>56</sup> Article 11 is far less comprehensive than its companion, Article 10 of the ECHR, and as such, is not cited as often in case law or any comparative cases used in this paper. Article 11 states, “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.”<sup>57</sup>

As explained, the ECJ and the ECtHR are autonomous and distinct, however both cooperate and, as will be seen, use the same basis for deciding cases. Therefore, a sampling of cases from both courts will be analyzed to provide a view as to the approach the E.U. has taken on commercial speech.

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judicial control which may be relied upon by all persons who consider themselves wronged by discrimination on grounds of sex (Johnston, 1986).”

<sup>52</sup> Treaty of Lisbon, *supra* note 40 at Protocol 8 concerning Article 6 (1) and (2).

<sup>53</sup> See generally ARNULL, *supra* note 18, at 368.

<sup>54</sup> See Waagstein, *supra* note 23.

<sup>55</sup> The Charter of Fundamental Rights, EUROPA.EU, [http://europa.eu/scadplus/glossary/charter\\_fundamental\\_rights\\_en.htm](http://europa.eu/scadplus/glossary/charter_fundamental_rights_en.htm) (last visited Dec. 16, 2010) (“The EU’s Charter of Fundamental Rights was solemnly proclaimed by the Nice European Council on 7 December 2000. It is based on the Community Treaties, international conventions such as the 1950 European Convention on Human Rights and the 1989 European Social Charter, constitutional traditions common to the Member States and various European Parliament declarations. . . . the Charter defines fundamental rights relating to dignity, liberty, equality, solidarity, citizenship and justice. While the European Convention on Human Rights (ECHR) is limited to protecting civil and political rights, the Charter goes further to cover workers’ social rights, data protection, bioethics and the right to good administration.”).

<sup>56</sup> See Treaty of Lisbon, *supra* note 40.

<sup>57</sup> The Charter of Fundamental Rights of the European Union art. 11, Dec. 18, 2000, 2000/C364/01, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) (last visited Dec. 16, 2010).

## III. DEVELOPMENT OF COMMERCIAL SPEECH IN THE U.S. AND E.U.

## A. American Commercial Expression

## 1. Before Central Hudson

In 1942, The United States Supreme Court weighed in on what (if any) level of protection should be enjoyed by commercial actors in *Valentine v. Chrestensen*.<sup>58</sup> The case involved a New York City sanitation code making it illegal for any person to “throw, cast or distribute . . . commercial or business advertising matter” on the public streets, public areas or private property.<sup>59</sup> The majority firmly expressed its longstanding commitment to freedom of expression in the public arena, particularly noting streets.<sup>60</sup> The Court went on to just as firmly state, “the Constitution imposes no such restraint on government as respects purely commercial advertising.”<sup>61</sup>

Relying on advice from the police commissioner that handbills with information of a public use or protest<sup>62</sup> was acceptable, Chrestensen published a handbill that on one side promoted his business while the other side protested §318 of the code.<sup>63</sup> The court noted Valentine’s efforts to circumvent the intent of the law by stating, “If [merchants’] evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law’s command.”<sup>64</sup> Even while holding that commercial speech was not protected under the First Amendment,<sup>65</sup> the case was the harbinger of an oncoming commercial speech debate.

The next major step in carving out the protection for commercial expression came in 1975 with *Bigelow v. Virginia*.<sup>66</sup> In that case, the Supreme Court reviewed a Virginia statute that made the circulation of any publication that advertised support of abortion in any manner illegal.<sup>67</sup> Bigelow, the editor of a Virginia-based newspaper, had allowed an advertisement to be printed that let readers know abortions were legal in New York State and provided information for a referral service. Bigelow was convicted under the Virginia law and subsequently appealed to the Supreme Court.<sup>68</sup> The Supreme Court reversed his conviction.<sup>69</sup>

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<sup>58</sup> *Valentine*, 316 U.S. at 52.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 53.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 52.

<sup>63</sup> *Valentine*, 316 U.S. at 53-54.

<sup>64</sup> *Id.* at 53-54.

<sup>65</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 758 (1976) (citing *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

<sup>66</sup> *See Bigelow v. Virginia*, 421 U.S. 809 (1975).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See id.* *See also Virginia Bd.*, 425 U.S. at 759-60.

While not explicitly carving out protection for commercial speech, the Court stated *Chrestensen* was limited in validity, and commercial speech was not valueless.<sup>70</sup>

Following *Bigelow* just one year later in 1976, the transition to protecting commercial speech was completed with *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*.<sup>71</sup> In this case, the Supreme Court finally considered whether a First Amendment exception to commercial speech existed.<sup>72</sup> The plaintiffs, a consumer group known as Virginia Citizens Consumer Council, sued, challenging § 54-524.35 of the Virginia Code Annotated.<sup>73</sup> The code regulated the professional conduct of pharmacists and specifically limited the ability of pharmacists to advertise or promote the prices or terms of a transaction for the sale of drugs requiring a prescription.<sup>74</sup> The relevant text of the statute is §§ 2 and 3 of § 54-524.35, which stated:

Any pharmacist shall be considered guilty of unprofessional conduct who . . . (2) issues, publishes, broadcasts by radio, or otherwise, or distributes or uses in any way whatsoever advertising matter in which statements are made about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare; or (3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any amount, price, fee, premium, discount, rebate or credit terms for professional services or for drugs containing narcotics or for any drugs which may be dispensed only by prescription.<sup>75</sup>

The consumer group, as appellees, argued that First Amendment protection flows not only to advertisers but also to the recipients of the information.<sup>76</sup> The Court agreed with this proposition by stating, “[f]reedom of speech presupposes a willing speaker. But where a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both.”<sup>77</sup>

The Board of Pharmacy took the position that commercial speech was not afforded any protection under the First Amendment.<sup>78</sup> The Court pointed out that,

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<sup>70</sup> *Bigelow*, 421 U.S. at 819.

<sup>71</sup> *Virginia Bd.*, 425 U.S. at 761-62.

<sup>72</sup> *Id.* at 760-61.

<sup>73</sup> *Id.* at 749.

<sup>74</sup> *Id.* at 750.

<sup>75</sup> *Id.*

<sup>76</sup> *Virginia Bd.*, 425 U.S. at 748, 756-57.

<sup>77</sup> *Id.* at 757 (citing *Lamont v. Postmaster General*, 381 U.S. 301 (1965), in which the Court upheld the First Amendment rights of citizens to receive political publications sent from abroad.) “More recently . . . we acknowledged that this Court has referred to a First Amendment right to ‘receive information and ideas,’ and that freedom of speech ‘necessarily protects the right to receive.’”

<sup>78</sup> *Virginia Bd.*, 425 U.S. at 758.

since 1951, no protection had been denied simply because the speech was commercial.<sup>79</sup>

The Court differentiated this case from *Chrestensen*, *Bigelow*, and other cases by stating:

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The “idea” he wishes to communicate is simply this: “I will sell you the X prescription drug at the Y price.” Our question, then, is whether this communication is wholly outside the protection of the First Amendment.<sup>80</sup>

The Court decided the prevailing societal interest was the free flow of information instead of the public harm that could come with less regulation at the point of sale in the pharmaceutical industry,<sup>81</sup> and stated, “Advertising, however tasteless and excessive . . . is nonetheless dissemination of information . . . . It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”<sup>82</sup>

The Court held that commercial speech was afforded protection under the First Amendment, but there were instances where it could be regulated.<sup>83</sup> Soon, this approach was ingrained by the Supreme Court when it established the Central Hudson test for commercial expression.<sup>84</sup>

## 2. Central Hudson

The Supreme Court set forth the modern test for American commercial expression in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.<sup>85</sup> The question presented in this case was whether a regulation of the Public Service Commission of the State of New York violated the First and Fourteenth Amendments because it completely banned promotional advertising by an electrical utility.<sup>86</sup>

Following the energy crisis of the 1970s, the Public Service Commission of New York (hereinafter PSC) sought a continued ban on advertising materials. It divided advertisements “into two broad categories: promotional-advertising intended to stimulate the purchase of utility services-and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.”<sup>87</sup> It

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<sup>79</sup> *Id.* at 759.

<sup>80</sup> *Id.* at 761.

<sup>81</sup> *Id.* at 765.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 770.

<sup>84</sup> *Central Hudson*, 447 U.S. at 557.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 558.

<sup>87</sup> *Id.* at 559.

proceeded to declare all promotional advertising to be contrary to public policy and banned it, but allowed informational advertising to continue.<sup>88</sup> Its reasoning was to encourage advertising that shifted consumption practices of the public toward more energy efficient means.<sup>89</sup>

Central Hudson Gas & Electric Corp. (hereinafter Central Hudson) lost at each level prior to the Supreme Court, because consumers actually had no choice when it came to deciding who would provide electrical power.<sup>90</sup> Central Hudson was challenging the restraint of commercial speech under the First and Fourteenth Amendments.<sup>91</sup>

The Court first noted the limitation on states to regulate First Amendment rights because of the Fourteenth Amendment.<sup>92</sup> Then the Supreme Court affirmed the *Virginia Bd.* proposition of the societal interest in commercial speech by stating, “[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.”<sup>93</sup> Before explaining the test, the Court reaffirmed its position that “[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.”<sup>94</sup>

The Court then established the current four-part test:

[1.] If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed.

[2.] The State must assert a substantial interest to be achieved by restrictions on commercial speech.

[If both of these prongs are satisfied, the Court then goes to the next level of analysis.] Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by [the following] two criteria.

[3.] The restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.

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<sup>88</sup> *See id.* at 559-60.

<sup>89</sup> *Id.* at 560.

<sup>90</sup> *See Central Hudson*, 447 U.S. at 561.

<sup>91</sup> *Id.* at 560.

<sup>92</sup> *Id.* at 561.

<sup>93</sup> *Id.* at 561-62.

<sup>94</sup> *Id.* at 562-63.

[4.] If the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.<sup>95</sup>

In this case, the question really involved the second prong of the test.<sup>96</sup> Applying the test, the Court held that while the governmental interest in controlling and adapting energy usage was substantial and the regulation did directly advance the government's interest, the regulation was not narrowly tailored to serve the interest of the state and therefore it was found to be unconstitutional.<sup>97</sup>

### 3. After Central Hudson

Interestingly, the Central Hudson test is best considered in the context of cases dealing with the highly regulated products of alcohol, tobacco and pharmaceuticals that follow.

In 1995, the Supreme Court examined the appropriateness of alcohol content appearing on the labels of beer products.<sup>98</sup> Coors Brewing Company (hereinafter Coors) was challenging § 205(e)(2) of the Federal Alcohol Administration Act that prohibited beer labels from displaying alcohol content.<sup>99</sup>

The government argued for a deferential approach instead of applying Central Hudson in this case, because there was a history of more leeway being granted when the regulation concerned socially harmful activities.<sup>100</sup> The Court disregarded this line of argument and moved on to the government's attempt to meet its burden by asserting two interests it felt were sufficiently "substantial" to justify the labeling ban.

First, the Government contends that § 205(e)(2) advances Congress' goal of curbing "strength wars" by beer brewers who might seek to compete for customers on the basis of alcohol content. According to the Government, the FAAA's restriction prevents a particular type of beer drinker—one who selects a beverage because of its high potency—from choosing beers solely for their alcohol content. In the Government's view, restricting disclosure of information regarding a particular product characteristic will decrease the extent to which consumers will select the product on the basis of that characteristic.<sup>101</sup>

Additionally, the government argued that its efforts aided those of states that wished to regulate alcohol under the Twenty-first Amendment, and would prevent consumers from crossing state lines to thwart certain states' laws on the matter.<sup>102</sup>

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<sup>95</sup> *Id.* at 564.

<sup>96</sup> *See generally id.*

<sup>97</sup> *See id.*

<sup>98</sup> *See generally* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).

<sup>99</sup> *Id.* at 478.

<sup>100</sup> *Id.* at 482.

<sup>101</sup> *Id.* at 483-84.

<sup>102</sup> *Id.* at 485-86.

Coors reframed the government's intention as one which was designed to control competition on the basis of strength of beer.<sup>103</sup> It noted the trend toward more information not less for consumers.<sup>104</sup> The Court rejected the so-called "strength war" argument because, while it may be substantial, it did not directly advance the governmental interest.<sup>105</sup>

Ultimately, the Supreme Court first rejected the government's claim of assisting the states under part two of the test, declaring that the stated interest was not substantial enough to meet the requirements.<sup>106</sup>

Only a year later in 1996, *44 Liquormart, Inc. v. Rhode Island* required the Supreme Court to review a Rhode Island statutory ban on advertising alcoholic beverage prices in places other than the store.<sup>107</sup> In this case, the Court further expanded its deference to commercial speech under the First Amendment, and in so doing, watered down the Central Hudson test by stating, "[W]hen a State entirely prohibits the dissemination of truthful, non-misleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands."<sup>108</sup>

The case centered on two separate 1956 statutory prohibitions of the Rhode Island codes.<sup>109</sup> The first applied to vendors' efforts to advertise prices except on the product or signs near the product in the store.<sup>110</sup> The other ban prohibited the media from broadcasting advertisements for the sale of alcoholic beverages.<sup>111</sup> 44 Liquormart had placed a newspaper ad in 1991 leading to this case.<sup>112</sup>

Rhode Island took the position that the prohibitions promoted reduced drinking.<sup>113</sup> Therefore, the Court had to determine whether the ban would significantly reduce alcohol consumption.<sup>114</sup> The Court found no evidence that there would be a significant reduction in consumption.<sup>115</sup>

The Court grounded its decision by stating, "As a result, neither the 'greater objectivity' nor the 'greater hardiness' of truthful, non-misleading commercial speech justifies reviewing its complete suppression with added deference."<sup>116</sup>

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<sup>103</sup> *Id.* at 484.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 491.

<sup>106</sup> *Id.* at 486.

<sup>107</sup> *44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 489-90 (1996).

<sup>108</sup> *Id.* at 501.

<sup>109</sup> *See generally id.*

<sup>110</sup> *See generally id.*

<sup>111</sup> *Id.* at 489-90.

<sup>112</sup> *Id.* at 492.

<sup>113</sup> *Id.* at 504.

<sup>114</sup> *Id.* at 505.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 502.



Summing up its reasoning for striking down the Rhode Island legislation, the court reiterated Virginia Board of Pharmacy by favoring a country where information is “misused” over a country where information is suppressed.<sup>117</sup>

In *Thompson v. Western States* a group of licensed pharmacists who specialized in compounding drugs sought to invalidate § 127(a) of the Food and Drug Administration Modernization Act of 1997.<sup>118</sup> The Act exempted “compounded drugs” from the FDA’s standard drug approval requirements so long as the providers refrained from advertising or promoting particular compounded drugs among other restrictions. Their position was that this was an infringement of their First Amendment rights.<sup>119</sup>

The government conceded that the providers were making truthful statements that were not misleading, but grounded its argument in three substantial interests. Those interests were: preserving the new drug approval process’s effectiveness, ensuring those patients who needed the compounded drugs had access, and creating the proper balance between two compelling opposed views.<sup>120</sup>

Writing for the majority, Justice O’Connor suggested a number of non-speech methods for accomplishing the goals of the government.<sup>121</sup> She then noted that the government gave no evidence that her options would be unworkable, which is important since it is up to the party wishing to limit speech to carry the burden under *Central Hudson*.<sup>122</sup>

The majority ruled that § 127a was unconstitutional.<sup>123</sup> The government had failed to justify any of its reasons, and the Court seemingly was concerned with the overbreadth of the statutory construction, as it would impinge, for instance, upon pharmacists who served special clientele.<sup>124</sup>

In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court had to determine whether certain tobacco product advertising regulations were pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), and whether certain Massachusetts regulations on the advertisement and sale of tobacco products violated the First Amendment.<sup>125</sup> For purposes of this paper, only the second question will be examined.

The regulations in question were 940 Code of Mass. Regs. §§ 21.04(5)(a), 22.06(5)(a) (2000) which prohibited advertising of smokeless tobacco or cigars within a 1,000 foot radius of a school or playground<sup>126</sup> and 940 Code of Mass.

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<sup>117</sup> See generally *id.*

<sup>118</sup> *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 360 (2002).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 368.

<sup>121</sup> *Id.* at 372.

<sup>122</sup> *Id.* at 373 (quoting *Bolger v. Young’s Drug Prods. Corp.*, 463 U.S. 60, 71 (1983)).

<sup>123</sup> *Thompson*, 535 U.S. at 377.

<sup>124</sup> *Id.*

<sup>125</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, at 556 (2001) (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 109 S.Ct. 3028, 3038 (1989)).

<sup>126</sup> *Id.* at 556.

Regs. §§ 21.04(5)(b), 22.06(5)(b) (2000) which restricted advertising to no “lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any school or playground.”<sup>127</sup>

The parties stipulated that the advertisements concerned lawful activity and were not misleading.<sup>128</sup> Furthermore, no contention was made that the government did not have a substantial interest in preventing tobacco use among minors.<sup>129</sup> Justice O’Connor then explained that the Central Hudson test’s third prong demands scrutiny of the relationship between the harm caused and how the methods the State uses to advance its interests directly and materially meet its objective.<sup>130</sup>

Justice O’Connor then expressed the standard for justifying restrictions included academic studies and examples of similar situations from different areas, but empirical data was not necessary.<sup>131</sup>

The Massachusetts Attorney General cited a Surgeon General report that provided significant statistical analysis supporting the proposition that advertising and labeling played a significant role in a youth’s decision to use cigarettes and smokeless tobacco.<sup>132</sup> The majority accepted this and additional evidence to find that the regulations did advance the governmental interest.<sup>133</sup>

Moving to the last prong of narrow tailoring, Justice O’Connor confirmed that “the least restrictive means” is not the standard; instead, the case law requires a reasonable fit between the legislature’s ends and the means chosen to accomplish those ends . . . a means narrowly tailored to achieve the desired objective.”<sup>134</sup>

At the final stage of inquiry, the 1,000-foot outdoor regulation failed Central Hudson.<sup>135</sup> The petitioners’ argument that the geographical reach of the regulations would significantly diminish, the access adults had to cigarette and smokeless tobacco advertising, the point nearing a complete ban.<sup>136</sup> “Petitioners maintained that this . . . would prevent advertising in 87% to 91% of Boston, Worcester, and Springfield, Massachusetts. . . . Thus, the Court of Appeals concluded that the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts.”<sup>137</sup>

The ban also included advertising in the store if visible from outside the store while also restricting the size of the ads plus any oral statements.<sup>138</sup> Ultimately,

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<sup>127</sup> *Id.* at 566.

<sup>128</sup> *Id.* at 555.

<sup>129</sup> *Id.* at 555.

<sup>130</sup> *Lorillard Tobacco*, 533 U.S. at 555.

<sup>131</sup> *Id.* at 556.

<sup>132</sup> *Id.* at 558.

<sup>133</sup> *Id.* at 561.

<sup>134</sup> *Id.* at 556.

<sup>135</sup> *Id.* at 561.

<sup>136</sup> *Lorillard Tobacco*, 533 U.S. at 562.

<sup>137</sup> *Id.* at 563.

<sup>138</sup> *Id.*

these facts show the Attorney General did not adequately consider the broad geographical sweep of the regulation, and thus that it was not narrowly tailored nor were the speech interests properly calculated.<sup>139</sup>

940 Code of Mass. Regs. §§ 21.04(5)(b), 22.06(5)(b) (2000), requiring advertisements be a minimum height of five feet off the floor, failed both the third and fourth prongs of the Central Hudson test in the majority's opinion.<sup>140</sup> The Court highlighted the third prong and pointed out that not all children are shorter than five feet tall, and even if not that tall, almost all have the ability to look up the relatively short distance to see the advertisement.<sup>141</sup> Therefore, the regulation did not advance the government's substantial interest.<sup>142</sup>

### B. European Commercial Expression

As previously mentioned in part II of this paper, commercial expression is protected under Article 10 of the ECHR.<sup>143</sup> The ECtHR has granted much more deference to regulations restricting commercial speech than in its consideration of restrictions on other forms of expression.<sup>144</sup> The ECtHR has paid particular attention to the phrase "necessary in a democratic society," and interpreted it to imply a pressing social need is at stake.<sup>145</sup> To interpret this requirement, the ECtHR has taken a similar approach to the U.S. Supreme Court by distinguishing types of expression and then applying an appropriate level of scrutiny.<sup>146</sup> Given the peculiarities of the E.U., the ECtHR has given member states a bit of discretion in determining whether a "pressing social need" exists in its state.<sup>147</sup>

While the ECtHR has more expansively applied its commercial expression doctrine to a wider array of commercial speech than just conventional advertising,<sup>148</sup> the U.S. has remained focused solely on advertising, and thus for comparative purposes, only advertising cases will be examined in this section.

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<sup>139</sup> *Id.* at 562-63.

<sup>140</sup> *Id.* at 566.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Casado Coca v. Spain*, 18 E.H.R.R. (1984) ("In its *Barthold v. Germany* judgment of 25 March 1985 the Court left open the question whether commercial advertising as such came within the scope of the guarantees under Article 10, but its later case law provides guidance on this matter. 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—as the Commission rightly pointed out—and even light music and commercials transmitted by cable.").

<sup>144</sup> *Id.*

<sup>145</sup> Maya Hertig Randall, *Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?*, 6 HUM. RTS. L. REV. 53, 55-56 (2006).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 56.

<sup>148</sup> *See id.* at 58 (author also points out that no concrete definition of what commercial speech is has been developed by the ECtHR, and still reviews this on a case by case basis).

The first case the ECtHR examined in the area of commercial speech<sup>149</sup> came in 1979.<sup>150</sup> At issue in *Church of Scientology v. Sweden* was a Swedish court's injunction of the use of the phrase "an invaluable aid to measuring man's mental state and changes in it"<sup>151</sup> in an advertisement that appeared in a Scientology magazine promoting the Hubbard Electrometer. The Scientologists advertised the "E-Meter" as a "religious artifact used to measure the state of electrical characteristics of the 'static field' surrounding the body."<sup>152</sup> In this case, the ECtHR rejected any freedom of religion claims the Scientologists might have had.<sup>153</sup>

The Court announced that commercial speech is part of freedom of expression but it is not afforded the same rights as political expression.<sup>154</sup> In its decision, the Court differentiated between Scientology's right to have religious opinions on the E-Meter and using those opinions to profit from the sale of the E-Meter under Article 10.<sup>155</sup>

The Court used the text of Article 10(2) to develop a three-pronged test: 1. the restriction imposed must be prescribed by law; 2. whether there is a legitimate aim of the restriction; and 3. is the restriction necessary?<sup>156</sup>

In this case, the controlling law was the 1970 Marketing (Improper Practices) Act which prohibited unfair marketing practices, including unfair advertising methods.<sup>157</sup> Therefore, prong one was met. The Court found the legitimate aim of the State was that of protecting consumers from misleading and deceptive practices, which it noted was consistently found in the States' own legislation, thus satisfying prong two.<sup>158</sup> Finally, the Court held that the restriction was necessary given the facts of the case and the goals of the Convention.<sup>159</sup> The Court also created a standard of review in which it stated "the test of 'necessity' in the second paragraph of Article 10 should therefore be a less strict one when applied to restraints imposed on commercial 'ideas.'"<sup>160</sup> Accordingly, the Court upheld the injunction on the phrase used in the advertisement.<sup>161</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> *Church of Scientology v. Sweden*, E.C.C. 511, 511 (1979).

<sup>151</sup> *Id.* at 512.

<sup>152</sup> *Id.* at 513.

<sup>153</sup> *See generally id.* at 513. This is a critical point of divergence with the United States, as recognized religious groups normally receive a great deal of latitude to conduct their activities under freedom of religion.

<sup>154</sup> *Id.* at 527.

<sup>155</sup> *Id.* at 526.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 519.

<sup>158</sup> *Id.* at 527.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* A final note on the Court's decision: it considered and gave great weight to the finding that the advertisements were misleading because two expert witnesses testified to the

Another case that mixed concepts usually tied to free expression was the case of *Markt Intern & Beermann v Germany*.<sup>162</sup> Instead of religion this case brought in elements of freedom of the press.<sup>163</sup> The case involved Markt Intern, a trade magazine publisher that reprinted a letter written by Mr. Klaus Beermann to a British mail order company stating his dissatisfaction with the product.<sup>164</sup> Markt Intern was attempting to gain a response from the company on behalf of Mr. Beermann.<sup>165</sup> The mail order company did respond and the response was published.<sup>166</sup> Markt Intern's subsequent column went further by requesting submissions from readers related to the products and customer service of the mail order company.<sup>167</sup>

German courts granted an interim injunction based on the idea that Markt Intern had breached § 1 of the Unfair Competition Act 1909.<sup>168</sup> After fifteen years of the case working its way through the German courts and a negative result in the European Commission, Germany submitted the question of whether it had violated article 10 of the ECHR to the ECtHR.<sup>169</sup>

In its analysis, the ECtHR reiterated the test for examining an Article 10 case that it had employed in *Scientology*<sup>170</sup> by stating, "[i]t should therefore be determined whether it was 'prescribed by law,' whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was 'necessary in a democratic society' to achieve such aims."<sup>171</sup>

The ECtHR upheld the injunction as applied to the test.<sup>172</sup> Prong one of the test was met because Germany had based its injunction on the 1909 Unfair Competition Act mentioned earlier. When making a determination relating to prong two, the Court considered there was a legitimate aim on the part of Germany to protect the rights of others.<sup>173</sup> While there were lesser disputes over the first two prongs' applicability in the case, the main question came down to whether the action taken was necessary in a democratic society.<sup>174</sup> The Court rooted its decision in the

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idea that the machine was incapable of determining one's mental state given the generally accepted definition of "mental state." *See id.*

<sup>162</sup> *Markt Intern GmbH & Beermann v. Germany*, 12 E.H.R.R. 161 (1990).

<sup>163</sup> *Id.* at 163.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 164.

<sup>168</sup> *See generally id.* at 161. Markt Intern took truth and generalized. The courts would eventually find that Markt Intern was an agent of the retailers and not as much of a journalist endeavor as an attempt to influence the market.

<sup>169</sup> *Id.* at 170.

<sup>170</sup> *See generally Church of Scientology v. Sweden*, E.C.C. 511 (1979).

<sup>171</sup> *Markt Intern*, 12 E.H.R.R. at 172.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 173.

<sup>174</sup> *See generally id.*

“margin of appreciation” granted to member states to enact and enforce regulations that are particular to the circumstances of its own people and systems of governance and commerce.<sup>175</sup> Notwithstanding the “margin of appreciation,” the court also examined its necessity by weighing the proportionality of the regulatory effect to aid the rights of others with the right to publish the information.<sup>176</sup>

The court recognized that truthful disclosures are of interest to readers and promote open business dealings, but even true information describing real events may sometimes be prohibited to uphold the privacy of others or maintain the confidentiality of some information.<sup>177</sup> The ECtHR found the German court had reached a reasonable decision that did not exceed the “margin of appreciation” granted to national courts.<sup>178</sup>

In 2004, the ECJ reviewed an Austrian court decision to issue an injunction that restricted the use of the phrase “insolvency auction” in an advertisement for goods, which were no longer being sold during an insolvency estate sale.<sup>179</sup> In *Herbert Karner Industrie GmbH v. Troostwijk GmbH*, the ECJ applied reasoning that looks very similar to Central Hudson, and reiterated many of the same propositions that the ECtHR articulated.<sup>180</sup>

In reviewing the Austrian regulation, the ECJ examined Articles 28 and 30 EC and applied Council Directive 84/450/EEC as amended by 97/55/EC, which concerns misleading and comparative advertising in business-to-consumer and business-to-business transactions.<sup>181</sup> The purpose of that directive was “to protect consumers . . . against misleading advertising . . .”<sup>182</sup> The directive defined

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<sup>175</sup> See *id.* at 174. “Such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as 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.” See Randall, *supra* note 145, at 57-58 (“Under the margin of appreciation doctrine, the standard of review varies not only according to the category of speech at issue; other factors, such as the aim pursued by the measure, the policy field concerned and the uniformity or divergence of state practice, also play an important role. This will have to be borne in mind when analyzing the restrictions of commercial speech.”).

<sup>176</sup> *Markt Intern*, 12 E.H.R.R. at 174.

<sup>177</sup> *Id.* at 175.

<sup>178</sup> *Id.* at 176. The Court goes on to state “It is obvious that opinions may differ as to whether the Federal Court’s reaction was appropriate or whether the statements made in the specific case by Markt Intern should be permitted or tolerated.” *Id.*

<sup>179</sup> *Herbert Karner Industrie GmbH v. Troostwijk GmbH*, C-71/02, 2 C.M.L.R. 5, Mar. 25, 2004, at 100. The Advocate General’s opinion delivered on Apr. 8, 2003, is included as part of the Court’s opinion as he puts forth the relevant facts and law, and I reference it extensively in the following case analysis. Many of his findings are accepted but the holding differs slightly from his opinion. Karner fought the admissibility of the preliminary ruling in this case, but the Court ruled against Karner and admitted it. *Id.* at 102.

<sup>180</sup> There is some redundancy to illustrate the point that the separate courts use the ECHR and the treaty law similarly.

<sup>181</sup> *Karner*, 2 C.M.L.R. 5, 94 AG ¶ 76, C-71/02.

<sup>182</sup> *Id.* at 80-81.

misleading advertising as “any advertising which in any way, including its presentation, deceives or is likely to deceive . . . by reason of deceptive nature, [and] is likely to affect their economic behavior. . . .”<sup>183</sup>

To determine whether the advertisement was misleading, the Court looked to the characteristics of goods and services advertised, their availability, origination, and even tests of products, among other considerations.<sup>184</sup> Prior to his preliminary analysis on behalf of the court, the advocate general stated the goal: “[i]n the Court’s case law, consumer protection and fair trading are considered to be overriding requirements in the general interest which are in principle capable of justifying restrictions” on advertising and movement of goods.<sup>185</sup>

The advocate general reminded the Court of its responsibility to uphold the ECHR when within the scope of Community law, and additionally stated that commercial expression is part of Article 10(1) of the ECHR, and advertising specifically is part of commercial expression.<sup>186</sup> When making its judgment, the Court accepted the advocate general’s finding that the regulation was a restriction on freedom of expression and restricted truthful information.<sup>187</sup>

The advocate general articulated the test that the ECJ applied in its judgment.<sup>188</sup> The threshold inquiry for the court to examine is whether the restriction is justified.<sup>189</sup> The Court then summarized the test:

[T]he discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. When the exercise of the freedom does not contribute to a discussion of public interest and, in addition, arises in a context in which the Member States have a certain amount of discretion, review is limited to an examination of the reasonableness and proportionality of the interference. This holds true for the commercial use of freedom of expression, particularly in a field as complex and fluctuating as advertising.<sup>190</sup>

When examining whether a regulation is justified, the Court first looked to Article 10(2) that expressly states that “freedom of expression may be restricted in so far as such restriction is necessary and provided for by law.”<sup>191</sup> Comparison to ECtHR cases, in particular *Markt Intern* and *Casado Coca*, was made to show that advertisements being restricted to protect others’ rights and reputations is consistent

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<sup>183</sup> *Id.* at 81.

<sup>184</sup> *Id.*

<sup>185</sup> *See id.* at 92 (citing Case C-3/99 *Ruwet* [2000] ECR I-8749, ¶ 50).

<sup>186</sup> *Id.* at 93-94. The full court also reiterates this fundamental premise. *See id.* at 105 ¶ 50.

<sup>187</sup> *Karner*, C-71/02, 2 C.M.L.R. 5, at 94 AG ¶ 76.

<sup>188</sup> *Id.*

<sup>189</sup> *See id.* at 94-95.

<sup>190</sup> *Id.* at 106.

<sup>191</sup> *Id.* at 94.

with the ECtHR view that commercial expression may be restricted more extensively than political expression because “commercial expression does not normally perform a wider social function of any significance.”<sup>192</sup>

Upon passing this threshold, the next consideration was whether the prohibition on advertising is necessary.<sup>193</sup> Truth is an element considered in gauging necessity, but the context of the truth is as vital.<sup>194</sup> Subsequently, when the seller wanted to call his auction an “Insolvency Auction” although the items came from another insolvency estate sale, it was necessary to regulate such behavior to protect the interests of the consumers and other competitors as well.<sup>195</sup> The ECJ held that, given the facts and the deference Member States are given, the restriction on the advertising was reasonable and proportionate to achieve consumer protection and fair trading.<sup>196</sup>

#### IV. WHICH APPROACH IS BETTER FOR THE U.S. AND E.U. IN THE 21<sup>ST</sup> CENTURY?

It is clear from the case law of both systems that today commercial expression holds a subsidiary place under freedom of expression of the individual. However, if one created an accurate commercial speech continuum, the American case law would be much closer to making commercial expression fully protected than its European peers. More alarming to those who support the subsidiary approach is that the United States may be trending toward placing commercial expression on an equal level to political speech.<sup>197</sup>

From cases examined, there are areas of divergence between the two systems. These areas include who is best suited to analyze truth or what is not misleading; what level of deference will the courts give the representative bodies of the people; and what value is there in commercial speech.<sup>198</sup>

##### A. *Who Decides What is Misleading?*

The Karner case is a good example of the difference between truth and accuracy. The items had come from an insolvency estate at some point, but the sale in question was not an actual direct insolvency sale.<sup>199</sup> As such, the ad was not accurate, and so the court upheld regulations to prevent the sale being advertised as such.<sup>200</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *See generally id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 95.

<sup>196</sup> *Id.* at 106.

<sup>197</sup> The rumblings coming from both sides regarding the discomfort of *Central Hudson* are exacerbated by the fact that the composition of the Court suggests that if any action is taken it will be to give greater protection to commercial speech and burden citizens even more.

<sup>198</sup> *See generally Virginia Bd.*, 425 U.S. at 770; *Central Hudson*, 447 U.S. 557; *Markt Intern*, 12 E.H.R.R. 161.

<sup>199</sup> *Herbert Karner Industrie GmbH v. Troostwijk GmbH*, C-71/02, 2 C.M.L.R. 5, Mar. 25, 2004.

<sup>200</sup> *Id.*



This contrasts with the Supreme Court's majority opinion in *Virginia Bd.* where the balance of power in the commercial speech debate shifted to corporate interests with one line: "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."<sup>201</sup>

How can one be well enough informed when the individual spends far less time and resources to understand the messages being fired at him or her daily? If the item in question is coming from a street vendor selling Tiffany jewelry, buyer beware would probably and should suffice. But what if it is a compound drug being sold by a pharmacist without the normal regulation of the FDA, as in *Thompson*.<sup>202</sup> *Thompson* is the best example of the American system being too attached to the ideal as opposed to the reality that the public simply does not always have the time, resources and, unfortunately, the mindset to combat advertisements that purposely distort a human sense of reality.<sup>203</sup>

### B. The Courts vs. Legislatures

There are areas of the law that lend themselves to greater appreciation for the findings of the duly elected representatives of the people. Commercial expression should be one such area.

Justice O'Connor, writing for the majority in *Lorillard*, stated that justifications for restrictions need not be strictly empirical data. She accepted academic studies and examples of similar situations from different areas; but when reviewing the deference the U.S. Supreme Court has given congressional and regulatory agencies' findings, this seems to be an imperfect science that has been too strictly applied by the Supreme Court in an effort to open the door wider for commercial expression.

Justice Breyer, in his dissent in *Thompson*, weighed in on the risk of dismissing congressional findings too readily in order to apply the commercial speech doctrine by stating,

[T]he Constitution demands a more lenient application . . . which, in particular, clearly distinguishes between "commercial speech" and other forms of speech demanding stricter constitutional protection. Otherwise, an overly rigid "commercial speech" doctrine will transform what ought to be a legislative or regulatory decision about the best way to protect the health and safety of the American public into a constitutional decision prohibiting the legislature from enacting necessary protections. As history in respect to the Due Process Clause shows, any such transformation would involve a tragic constitutional misunderstanding.<sup>204</sup>

The contrast is easily made when compared against the *Markt Intern* case. There the ECtHR reiterated the approach that member states should have a "margin of appreciation" to decide what is best for their particular society's interests.<sup>205</sup>

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<sup>201</sup> *Virginia Bd.*, 425 U.S. at 770.

<sup>202</sup> *See Thompson*, 535 U.S. 357.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 389.

<sup>205</sup> *See Markt Intern*, 12 E.H.R.R. 161.

Moreover, however, the legal question of what governmental body is better suited to make such decisions must be considered is a running theme through the cases examined in this paper.<sup>206</sup> Should it be a court of very thoughtful people who are unaccountable and as such may uphold ideals without regard to the practical implications,<sup>207</sup> or would the Courts be better served by giving greater deference to the regulatory agencies, legislative findings and laws, and experts, such as in the Scientology case?<sup>208</sup>

While answering this question, Justice Breyer's dissent brings focus to the most pressing question: what is necessary for democracy to thrive?<sup>209</sup> The European judicial decisions in this area, stemming from the express mandate of Article 10 of the ECHR, illustrate a greater appreciation for these "goals of society" as opposed to a blind adherence to a debatable principle of commercial expression.<sup>210</sup> None of the judges or laws cited in this paper state any deviation from the idea that freedom of personal expression particularly in the area of political speech is crucial to the development and furtherance of democratic societies. Nor do any propose that commercial expression should be on an equal standing. However, those who willfully conflate core democratic values with marketplace desires do so at the risk of losing the very freedom western culture expounds.

### *C. What Value is Really Being Protected?*

Many of the best warnings of the potential problems with putting commercial expression on par with human expression come not from a bleeding-heart liberal but are encapsulated by then-Justice William H. Rehnquist, a highly respected conservative. Dissenting in *Central Hudson*, he wrote,

The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Board*. For in the world of political advocacy and its marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.<sup>211</sup>

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<sup>206</sup> See generally *Virginia Bd.*, 425 U.S. 748; *Central Hudson*, 447 U.S. 557; *Scientology*, E.C.C. 511.

<sup>207</sup> See generally *Virginia Bd.*, 425 U.S. 748; *Central Hudson*, 447 U.S. 557.

<sup>208</sup> *Scientology*, E.C.C. 511.

<sup>209</sup> *Thompson*, 535 U.S. 357.

<sup>210</sup> *Scientology*, E.C.C. 511; *Karner*, C-71/02, 2 C.M.L.R. 5.

<sup>211</sup> *Central Hudson*, 447 U.S. at 598.

Some Supreme Court justices argue that too much regulation or judicial adherence to strict standards of truth and accuracy are paternalistic.<sup>212</sup> Others take the view that advertising undermines consumer sovereignty by creating a dependence effect which fuels the consumers' desires, not out of self-choice, but because advertising techniques are designed to create desires in an unsuspecting public.<sup>213</sup> This is critical because how one sees the purposes and needs of speakers and recipients of commercial speech will determine how he or she will decide a case on the question of commercial expression. If the American jurisprudence is to evolve toward the European approach, stricter standards on commercial expression need to be applied; otherwise the American consumer and ultimately the American democracy will suffer.

#### V. CONCLUSION

Therefore, the United States Supreme Court should reexamine its commercial expression doctrine under *Central Hudson* by re-evaluating what is actually at stake and in the best interests of the American democratic society. To do this it must apply a common sense 21<sup>st</sup> century understanding of the role and effect of advertising, and place people's interests ahead of business interests.

However, the issue of commercial expression may simply be one that is a blind spot for the legal profession and politicians on both sides in America because increasingly they rely on the same tricks of the trade as the advertisers and marketers to gain victories for their side. In conclusion, this paper ends where it began with a not-so-subtle warning against these trappings:

During those years I taught the art of rhetoric. Conquered by the desire for gain, I offered for sale speaking skills with which to conquer others. . . . I really preferred to have honest scholars . . . and, without tricks of speech, I taught these scholars the tricks of speech—not to be used against the life of the innocent, but sometimes to save the life of a guilty man. And thou, O God, didst see me from afar, stumbling on that slippery path and sending out some flashes of fidelity amid much smoke—guiding those who loved vanity and sought after lying, being myself their companion.<sup>214</sup>

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<sup>212</sup> See generally *44 Liquormart*, 517 U.S. 484; *Lorillard*, 533 U.S. 525.

<sup>213</sup> See Ramsay, *supra* note 7, at 395-96.

<sup>214</sup> St. Augustine, *supra* note 1, at Book 4, Chapter 2, at 2. Our words have meaning and power and with that power comes responsibility that may be more important than the right to speak the words themselves. Taken out of the religious context, one might consider the social contract and the responsibility lawyers, judges, and politicians have for the preservation of an informed, free society play. Central to our properly functioning democracy is the free flow of ideas, but free speech run amuck creates confusion; a confusion prone to manipulation and profit which ultimately will be detrimental to our society.