

NOTE

Commercial Speech in the Law of the European Union: Lessons for the United States?

J. Steven Rich*

I. INTRODUCTION	264
II. THE LEGAL FRAMEWORK OF THE EUROPEAN UNION	265
A. <i>The Treaties</i>	265
B. <i>The Courts</i>	266
III. CASE LAW ON COMMERCIAL SPEECH IN THE EUROPEAN UNION AND THE UNITED STATES	268
A. <i>Professional Advertising</i>	268
B. <i>Abortion Services</i>	272
IV. ANALYSIS: THE STATUS OF BANS ON TOBACCO ADVERTISING ..	275
A. <i>The Proposed and Current European Bans</i>	275
B. <i>The Existing U.S. Ban</i>	276
V. CONCLUSION	279

* B.A., *cum laude*, Southwest Missouri State University; *Certificat*, Université Paris-sud; candidate for J.D., Indiana University School of Law—Bloomington, 1998. The Author wishes to thank Professors Fred Cate and Elisabeth Zoller for their comments and suggestions on earlier drafts of this Note; the Author, however, accepts sole responsibility for any errors or omissions contained herein.

I. INTRODUCTION

On July 6, 1998, the Council of Ministers of the European Union adopted a proposal calling for a ban on all tobacco advertising in the European Union.¹ The far-reaching measure will phase out not only press and billboard advertisements, but will also prohibit tobacco company sponsorship of sporting events.² The likelihood of challenges to this measure by European advertising interests³ raises the question of whether the measure is consistent with EU law governing freedom of expression. This raises the further issue of whether the EU's existing ban on broadcast tobacco advertising⁴ could survive a legal challenge. Finally, the analysis of cigarette advertising in the European Union provides an opportunity to reconsider the validity of the current ban on broadcast tobacco advertising in the United States.

In order to assess the validity of restrictions on tobacco advertising in the European Union and the United States, this Note first provides a general framework of EU law. It next examines the extent to which European and American courts have protected the freedom of expression in two other areas—professional publicity and advertisement of abortion services. These are both areas that have traditionally been considered commercial speech, and on which the courts of the European Union and the United States have reached somewhat similar conclusions. This Note next analyzes new and existing restrictions on cigarette advertising in the European Union, together with their American counterparts. This Note then argues that the existing EU ban on broadcast tobacco advertising may violate the European Convention on Human Rights and that the new total ban will clearly do so. Finally, this Note concludes that while the current U.S. ban on broadcast tobacco advertising would likely be upheld under the Supreme Court's treatment of commercial speech, both the U.S. and EU broadcast bans are more restrictive than necessary and should be narrowed to allow truthful cigarette advertising targeted at adults.

1. Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the Advertising and Sponsorship of Tobacco Products, 1998 O.J. (L 213) 9.

2. *Id.*

3. Patrick Smyth, *Newspapers Fight EU Tobacco Ad Ban*, IRISH TIMES, Dec. 3, 1997, at 10.

4. See Council Directive of 3 October 1989 on Television Broadcasting Activities, 1989 O.J. (L 298) 23. For an extended analysis of the European Convention Council Directive containing the ban on broadcast cigarette advertising, see Fred H. Cate, *The First Amendment and the International "Free Flow" of Information*, 30 VA. J. INT'L L. 371, 402-19 (1990).

II. THE LEGAL FRAMEWORK OF THE EUROPEAN UNION

The European Union today, consisting of fifteen nations,⁵ traces its roots to the European Communities created by the Treaty of Rome. This treaty, signed in 1957, was later modified by the Treaties of Luxembourg (1970), Maastricht (1992), Amsterdam (1997), and the Single European Act (1986).⁶ While the treaties, as agreements between sovereign States, may be thought of as containing an implied right of repudiation, the treaties contain no provisions for withdrawal and are therefore considered by some to be quasi-constitutional in nature. Furthermore, the Member States are not free to interpret EU law in any way they see fit. Rather, they are bound by the interpretations of the European Court of Justice (ECJ), and where applicable, the European Court of Human Rights (ECHR).

A. *The Treaties*

Since the European Union is a supranational organization, treaties are the primary source of its law. The Treaty on European Union (Maastricht Treaty), signed in 1992, created the European Union on the foundation of the European Communities.⁷ The Maastricht Treaty incorporates by reference the European Convention on Human Rights (Convention).⁸ Article 10 of the Convention provides that:

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.
2. The exercise of these freedoms . . . 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 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.⁹

5. When referring to the nations of the European Union, this Note follows standard international terminology and uses the term "State" interchangeably.

6. In fact, the Treaty of Rome (or EEC Treaty) built its institutions on those of the European Coal and Steel Community, created in 1951. For an excellent general history of European integration, unfortunately completed before the signing of the Maastricht Treaty, see DEREK W. URWIN, *THE COMMUNITY OF EUROPE: A HISTORY OF EUROPEAN INTEGRATION SINCE 1945* (1991).

7. P.S.R.F. MATHIJSEN, *A GUIDE TO EUROPEAN UNION LAW* 3-4 (6th ed. 1995).

8. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1, art. F [Treaty of Maastricht].

9. COUNCIL OF EUROPE, *EUROPEAN CONVENTION ON HUMAN RIGHTS: COLLECTED TEXTS* art. 10 (1987).

The Convention, as incorporated by the Maastricht Treaty, provides the substantive source for the freedom of expression analyzed here. If the freedom were based on Article 10(1) alone, it would appear to be absolute. However, this right may lawfully be subjected to the limitations allowed in Article 10(2). The extent to which the Member States may limit freedom of expression under Article 10(2) has provided material for much litigation. The validity of such restrictions on commercial speech is the key issue addressed by this Note.¹⁰

B. *The Courts*

The court that enjoys the greatest stature in the framework of the European Union is the European Court of Justice. The ECJ, which has been called “one of the strongest of the EU’s political institutions,”¹¹ has broad powers of judicial review of acts by EU institutions and Member States.¹² Two important doctrines help explain the importance of ECJ decisions to Member States—direct effect and supremacy. Under the doctrine of direct

10. Where commercial speech is concerned, the freedom often relates to another basic freedom of the Maastricht Treaty, the freedom to provide services. *See, e.g.*, Case C-159/90, *Society for the Protection of Unborn Children Ir. Ltd. v. Grogan*, 1991 E.C.R. I-4685, [1991] 2 C.M.L.R. 849 (1991). The freedom to provide services is based on Articles 59 to 66 of the Treaty of Rome. *See generally* MATHIJSSEN, *supra* note 7, at ch. 4. While practical difficulties remain concerning the application of this freedom to lawyers and certain others, the Treaty theoretically allows professionals to offer their services in either their home states or in another EU Member State. The freedom to provide services is beyond the scope of this Note, however, so the discussion of *Society for the Protection of Unborn Children v. Grogan* and other cases will be limited to the applicability of Article 10 of the Convention.

11. Karen J. Alter, *The European Court’s Political Power*, 19 W. EUR. POL. 458, 459 (1996).

12. *See* Treaty Establishing the European Economic Community, Feb. 7, 1992, O.J. (C 224) 1, arts. 173-77, [1992] 1 C.M.L.R. 573 (1992) [hereinafter EEC Treaty]. *See generally* GEORGE A. BERMANN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* chs. 4, 7 (1993). Concerning acts of EU institutions, it bears mentioning here that the European Union is not a party to the Convention, and the Convention therefore does not directly govern actions by EU institutions. *Id.* at 146. However, the Parliament, Council, and Commission of the European Union have issued a non-binding declaration in support of the Convention. Joint Declaration by the European Parliament and the Commission Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1977 O.J. (C 103) 1; *see also* BERMANN ET AL., *supra*, at 146. Furthermore, one expert has argued that the European Union is in fact bound by the Convention. *See* Henry G. Schermers, *The European Communities Bound by Fundamental Human Rights*, 27 COMMON MKT. L. REV. 249, 251-52 (1990). Moreover, the ECJ has recognized the existence of certain “fundamental” rights that may or may not be explicitly granted by the relevant treaties. BERMANN ET AL., *supra*, at 142. This Note assumes that the ECJ would entertain a claimed violation of the Convention by EU institutions, whether the claim was couched in terms of the Convention itself or of unwritten, “fundamental” rights.

effect, the treaties of the European Union are read to create rights that individuals may claim in national courts without any further incorporation of the treaty into national law.¹³ The doctrine of supremacy posits that Member States are prohibited from enforcing any law that conflicts with an EU law, whether the national law was enacted before or after the EU law in question.¹⁴ Therefore, individuals have the right to use EU law to challenge national laws in the Member States' own courts, and national courts may, depending on their internal laws governing the reception of EU law, refuse to enforce the national laws if a conflict is found with an EU law.¹⁵ Furthermore, even if the national court does not find a violation, the courts of the Member State may no longer apply the offending law if the ECJ declares that the law of a Member State is in conflict with EU law.¹⁶

The other court that is relevant for the purposes of this analysis is the European Court of Human Rights. While the ECHR is not part of the structure of the European Union and therefore may not review acts by EU institutions, it has jurisdiction over "all cases concerning the interpretation and application" of the Convention so that its interpretation of the Convention may be regarded as persuasive authority.¹⁷ Since all Member States have bound themselves to the Convention¹⁸ and submitted to the Convention's separate legal order, they are bound by decisions of the ECHR. While it is conceivable that the ECJ could refuse to apply the terms of the Convention to EU institutions even if the ECHR found a violation of the Convention by an EU Member State in its implementation of an offending EU directive, this possibility seems remote.¹⁹ It should be pointed out that the European courts, which in principle follow the continental practice of only deciding the case presented, attach a great deal of weight to precedent.²⁰ Strictly speaking, there is no rule of *stare decisis*—the courts are free to disregard prior decisions.²¹ However, in practice the courts do follow their prior decisions,

13. See Case 26/62, *van Gend en Loos v. Nederlandse Tariefcommissie*, 1963 E.C.R. 1, [1963] C.M.L.R. 105 (1963). See generally BERMANN ET AL., *supra* note 12, at 180-82.

14. See Case 6/64, *Costa v. Ente Nazionale per l'Energia Elettrica*, 1964 E.C.R. 585, [1964] C.M.L.R. 425 (1964). See generally BERMANN ET AL., *supra* note 12, at 192-93.

15. See generally BERMANN ET AL., *supra* note 12, at 204-06.

16. See EEC TREATY, *supra* note 12, art. 177.

17. EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 9, art. 45.

18. In addition to ratifying the Convention in their capacities as sovereign nations, the EU Member States have reiterated their commitment to the Convention in the Maastricht Treaty. See *supra* text accompanying note 7.

19. See *supra* note 12.

20. HENRY G. SCHERMERS & DENIS F. WAELBROECK, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* §§ 166-72 (5th ed. 1992).

21. *Id.* § 166, at 95.

so studying European case law can provide insight into the law as it stands today.²²

III. CASE LAW ON COMMERCIAL SPEECH IN THE EUROPEAN UNION AND THE UNITED STATES

The ECJ and the U.S. Supreme Court have faced many similar issues concerning restrictions on commercial speech and have ultimately developed rules for such restrictions that are somewhat similar. First, both Courts have considered restrictions on publicity by lawyers and other professionals. Second, they have analyzed restraints on advertisement for abortion services. In both areas, the Courts have applied balancing tests that generally recognize a right to free expression, with some limitations in the commercial context.

A. *Professional Advertising*

As in the United States, professionals in the European Union face a conflict between traditional standards of professionalism, abhorring advertisement in any form, and modern economic realities, sometimes making advertisement a question of professional survival.²³ Even though most of the EU Member States allow lawyers to advertise in some form, the restrictions vary considerably from one state to another.²⁴ These restrictions raise two questions concerning the scope of Article 10 of the Convention. First, does the freedom of expression granted in Article 10(1) include commercial speech? Second, to what extent may a state abridge this freedom without exceeding the limitations allowed by Article 10(2)?

Unlike the U.S. Supreme Court, which was at one time reluctant to apply First Amendment protection to commercial speech, the European courts have held without qualification that Article 10 of the Convention applies to commercial speech.²⁵ This makes sense for two reasons. First, the language of Article 10(1) in no way excludes commercial speech, while at the same time Article 10(2) provides states with the authority to regulate advertising when necessary. Second, European integration was, from the beginning, predominantly an effort to integrate economic sectors,²⁶ so protection of commercial speech fits the purposes of the treaties.

Much more complicated than the applicability of Article 10(1) to commercial speech is the issue of a State's authority to restrict commercial

22. *Id.* §§ 166-67.

23. See Louise L. Hill, *Lawyer Publicity in the European Union: Bans Are Removed but Barriers Remain*, 29 GEO. WASH. J. INT'L L. & ECON. 381, 383 (1995).

24. *Id.*

25. See *Coca v. Spain*, 18 Eur. Ct. H.R. (ser. A) (1994).

26. See URWIN, *supra* note 6, at 58.

speech under Article 10(2). This entails a four-part analysis. First, is the action carried out by a public authority?²⁷ Second, is the restriction “prescribed by law”?²⁸ Third, is the aim of the measure legitimate under Article 10(2)?²⁹ Finally, is the law “necessary in a democratic society”?³⁰

In the leading case of *Coca v. Spain*, the European Court of Human Rights found that a Spanish Royal Decree prohibiting nearly all lawyer advertising did not violate Article 10 of the Convention.³¹ The lawyer involved had been sanctioned by the Barcelona Bar Council after placing an advertisement containing his name, the title “letrado” (lawyer), and his office address and telephone number in a local homeowners’ newsletter.³² The Court found that the Bar Council had the character of a public authority,³³ the royal decree in question constituted a legal basis for the prohibition,³⁴ and protecting the public and other members of the profession was a legitimate goal.³⁵

After finding the first three parts of the test satisfied, the Court then considered whether such a prohibition was necessary in a democratic society. For a restriction on speech to be compatible with Article 10 of the Convention, it must be “justifiable in principle and proportionate.”³⁶ Concerning the justifiability of the measure, the Court reasoned that even “objective, truthful advertisements might be restricted in order to ensure respect for the rights of others or owing to the special circumstances of particular business activities and professions.”³⁷ In this case, the punishment had been limited to a written warning; the rule allowed advertising in certain limited circumstances; and finally, the Council of the Catalonia Bars had relaxed its advertising rules after the events in question.³⁸ Based on these facts, the Court held that the authorities’ action was not “unreasonable and disproportionate to the aim pursued.”³⁹

27. *See Coca*, 18 Eur. Ct. H.R. (ser. A) at 11.

28. *See Barthold v. F.R.G.*, 7 Eur. Ct. H.R. (ser. A) at 398-400 (1985).

29. *See id.* at 400.

30. *See id.* at 401-04.

31. *Coca*, 18 Eur. Ct. H.R. (ser. A).

32. *Id.* at 3.

33. *Id.* at 11-12.

34. *Id.* at 12.

35. *Id.* at 12-13.

36. *Id.* at 24.

37. *Id.*

38. *Id.* at 24-25.

39. *Id.* at 25.

The European Court of Human Rights, however, had found a violation in the earlier case of *Barthold v. Germany*.⁴⁰ This case involved a veterinary surgeon who had criticized the lack of emergency veterinary services available at night in Hamburg in a newspaper interview, incidentally mentioning his own name and profession.⁴¹ After referral of the matter by fellow veterinary surgeons, the local businessmen's association obtained an injunction against Dr. Barthold that prohibited his repeating to a journalist any of the items he had discussed in his prior interview.⁴² Any violation of the injunction could result in fines of up to 500,000 DM (approximately U.S. \$280,000) or imprisonment of up to six months per occurrence.⁴³

Applying the same test used in *Coca*, the Court first held that the involvement of the court of appeals clearly constituted an "interference by public authority."⁴⁴ Second, the Court determined that the veterinary profession possessed rulemaking authority by virtue of a delegation by Parliament, so the interference was prescribed by law.⁴⁵ Third, the Court conceded that the stated goal of the measures in question, preventing unfair competition, was legitimate.⁴⁶ However, concerning the necessity of the law, the Court found the measure disproportionate to the alleged harm after taking into account the nature of Dr. Barthold's statements, which were not primarily advertising by nature but informational, and the truth of the problem of which Dr. Barthold had complained.⁴⁷

While these two cases differ in their facts and outcomes, several broad rules appear to govern the rights of professional publicity in the European Union. First, any action by a purely private body would not fall within the scope of Article 10 of the Convention. Second, no restriction on speech is subject to review unless it has a "basis in law," although this requirement is read quite broadly. Third, a restriction that completely takes away the rights of professionals to seek publicity will likely be found in violation of Article 10. Finally, the Court will consider the nature of the punishment involved.

Like the ECJ, the U.S. Supreme Court has also found itself confronted with the issue of whether professional publicity is protected speech. The contemporary doctrine of the Court on the question of professional publicity traces its origin to the decision in *Virginia State Board of Pharmacy v. Vir-*

40. *Barthold*, 7 Eur. Ct. H.R. (ser. A) (1985).

41. *Id.* at 386.

42. *Id.* at 387-89.

43. *Id.* at 389.

44. *Id.* at 398.

45. *Id.* at 398-400.

46. *Id.* at 400.

47. *Id.* at 403-04.

*ginia Citizens Consumer Council, Inc.*⁴⁸ There, the Supreme Court held unconstitutional a Virginia statute that declared the advertisement of prescription drugs by a licensed pharmacist to be unprofessional conduct.⁴⁹ Following its earlier decision in *Bigelow v. Virginia*,⁵⁰ discussed *infra* Part III.B, the Court rejected the idea that purely commercial speech, which “does ‘no more than propose a commercial transaction,’”⁵¹ is “wholly outside the protection of the First Amendment.”⁵²

Less than a year after its decision in *Virginia State Board of Pharmacy*, the Court turned to the question of whether lawyer advertising was also subject to First Amendment protection.⁵³ In *Bates v. State Bar of Arizona*, the petitioners had been sanctioned for placing a truthful advertisement in a daily newspaper in violation of a rule of the Arizona Supreme Court.⁵⁴ The Court considered the various justifications offered by the State Bar in support of the rule and concluded that none of them provided a sufficient reason to justify a ban on all lawyer advertising.⁵⁵ However, the Court did not end its analysis there. Refusing to apply standard First Amendment overbreadth analysis in the commercial speech context, the Court considered whether the petitioners’ speech was in fact outside the scope of First Amendment protection.⁵⁶ Finding that the speech had not been misleading, the Court concluded that the speech was protected and struck down the rule.⁵⁷

Several years after its decision in *Bates*, the Court in *In re R.M.J.*⁵⁸ again upheld the freedom of lawyers to advertise. This case involved a rule of the Supreme Court of Missouri, revised after *Bates*, that severely limited advertising by lawyers.⁵⁹ The advertisements in question included certain information that was not expressly permitted by the Missouri rule, as well as a listing of practice areas that did not conform to the categories specified by

48. *Virginia State Board of Pharmacy*, 425 U.S. 748 (1976).

49. *Id.* at 770.

50. *Bigelow*, 421 U.S. 809 (1975).

51. *Virginia State Board of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U.S. 376, 385 (1973)).

52. *Id.* at 761.

53. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

54. *Id.* at 354, 356.

55. *Id.* at 368-79.

56. *Id.* at 380-81.

57. *Id.* at 381-83.

58. *R.M.J.*, 455 U.S. 191 (1982).

59. *Id.* at 193-94.

the rule.⁶⁰ The Court applied the test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁶¹

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, 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, and whether it is not more extensive than is necessary to serve that interest.⁶²

First, the Court in *R.M.J.* found that the lawyer's expression was protected by the First Amendment because it concerned lawful activity and was not misleading.⁶³ Then the Court determined that there was no substantial state interest in prohibiting truthful advertising.⁶⁴ Since the Court found the advertising not to be misleading based on the record before it and ascertained no substantial state interest, the Court did not need to reach the third and fourth prongs of the *Central Hudson* test.⁶⁵

B. *Abortion Services*

Advertising for abortion services is another area where the European Union has faced the dilemma of whether to give more weight to the freedoms granted by its treaties or to the national policies of EU Member States. The problem stems from the fact that Ireland, a Member of the European Union since 1972,⁶⁶ has the "most restrictive abortion laws in the West."⁶⁷ Such laws have existed since 1861 and were made part of Ireland's constitution by a 1983 referendum.⁶⁸ Not only do these laws prohibit abortion in nearly all situations, but they have also historically prohibited the giving of information related to abortion services in other States.

In 1989, the Society for the Protection of Unborn Children (SPUC) moved for an injunction against a group of Dublin college students to prevent the group from publishing abortion information in its annual student guide.⁶⁹ The lower court declined to rule on questions relating to the treaty

60. *Id.* at 196-97.

61. *Central Hudson*, 447 U.S. 557 (1980).

62. *Id.* at 566.

63. *R.M.J.*, 455 U.S. at 205.

64. *Id.*

65. *See id.* at 205-06.

66. URWIN, *supra* note 6, at 253.

67. Elisabeth Porter, *Culture, Community and Responsibilities: Abortion in Ireland*, 30 Soc. 279, 279 (1996).

68. *Id.* at 283.

69. Case C-159/90, *Society for the Protection of Unborn Children Ir. Ltd. v. Grogan*,

and referred the case to the ECJ.⁷⁰ Before the ECJ heard the appeal, the Irish Supreme Court granted SPUC a permanent injunction.⁷¹

After holding that Ireland had not interfered with the provision of a service, the Court turned to the question of whether the law violated the freedom of speech granted in Article 10(1) of the Convention. Without analyzing this question, the Court simply held that:

[I]t is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.⁷²

This decision contained two distinct ideas, one obvious and the other less so. First, the ECJ found no foundation in the Treaty for an individual right to disseminate information of this nature. Second, the narrowness of the holding, only applying to student groups and explicitly excluding clinics that are involved in the distribution of the prohibited information, also suggests that the outcome might have been different had the Irish law interfered with the operations of a service provider.

While the ECJ left some doubt whether the ban on abortion information constituted a violation of human rights when applied to service providers, the European Court of Human Rights removed any doubt when it held in 1992 that the ban violated Article 10 of the Convention.⁷³ In this case, the ECHR directly faced the question of whether organizations in the business of counseling pregnant women could lawfully be prohibited from providing their clients with information on obtaining abortions in another EU Member State.⁷⁴ Proceeding through the same steps that the ECJ had followed in *Barthold*, the ECHR found that there was an interference with the applicants' rights, that the restriction was "prescribed by law," and that the aims of the restriction were legitimate under Article 10(2).⁷⁵

When the Court reached the question of whether the restriction was "necessary in a democratic society," it considered the necessity and proportionality of the measures.⁷⁶ First, concerning the necessity of the restraint,

1991 E.C.R. I-4685, para. 2, [1991] 3 C.M.L.R. 849 (1991).

70. *Id.*

71. *Id.*; see also *Porter*, *supra* note 67, at 283.

72. *Society for the Protection of Unborn Children*, 1991 E.C.R. at para. 33.

73. *Open Door Counselling & Dublin Well Woman v. Ireland*, 15 Eur. Ct. H.R. (ser. A) at 268 (1992).

74. *Id.* at 247.

75. *Id.* at 261-63.

76. *Id.* at 264-68.

the Court observed that it was not a criminal offense for a pregnant Irish woman to travel abroad for an abortion.⁷⁷ Turning to the question of proportionality, the Court first noted the “perpetual” nature of the restraint and stated that “[o]n that ground alone the restriction appears over-broad and disproportionate.”⁷⁸ The Court then considered the fact that the applicants’ counselors only provided objective information and did not recommend particular courses of action.⁷⁹ It also mentioned the availability of abortion information in other sources, such as magazines and telephone directories.⁸⁰ Finally, the Court referred to undisputed evidence that suggested that the ban on information harmed women’s health by rendering inadequate the available pregnancy counseling services.⁸¹

In response to the decision in *Open Door Counselling and Dublin Well Woman*, Ireland passed a referendum the same year allowing access to abortion information available in another state.⁸² Consequently, the Convention’s protections of commercial speech have greatly expanded the rights granted by Ireland’s constitution, which still enshrines the right of the unborn to life but now recognizes freedom of expression in the context of advertising for abortion services. At the same time, the decision raises serious policy questions concerning the future of national sovereignty within the European Union.

The U.S. Supreme Court addressed the issue of advertising for abortion services in *Bigelow v. Virginia*.⁸³ In *Bigelow*, a newspaper editor had been convicted of a misdemeanor for carrying an advertisement in his newspaper for an abortion referral service in New York.⁸⁴ The Court noted its decision in *Roe v. Wade*,⁸⁵ which had followed the appellant’s conviction and constitutionalized the right to an abortion during the first trimester.⁸⁶ Emphasizing both the legality of the services advertised and the “public interest” nature of the message,⁸⁷ the Court distinguished its previous decisions in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*⁸⁸ and

77. *Id.* at 266.

78. *Id.*

79. *Id.*

80. *Id.* at 267.

81. *Id.*

82. See Porter, *supra* note 67, at 285-86.

83. *Bigelow*, 421 U.S. 809 (1975).

84. *Id.* at 811-12.

85. *Roe*, 410 U.S. 113 (1973).

86. *Id.*

87. *Bigelow*, 421 U.S. at 821-22.

88. *Pittsburgh Press Co.*, 413 U.S. 376 (1973).

Valentine v. Chrestensen.⁸⁹ The Court then balanced Virginia's interest in "regulating what Virginians may *hear* or *read* about the New York services" against the appellant's interest in free expression, and concluded that the latter clearly prevailed.⁹⁰

IV. ANALYSIS: THE STATUS OF BANS ON TOBACCO ADVERTISING

The EU Council of Ministers and Parliament have adopted a directive calling for a complete ban on tobacco advertising in the European Union.⁹¹ In view of claims by the European Advertising Tripartite that the ban would violate Article 10 of the Convention,⁹² the question arises whether such claims have merit in light of the preceding case law. Similarly, the possible invalidation of a complete ban on tobacco advertising raises the question of whether the current ban on broadcast tobacco advertising comports with the free speech jurisprudence of the ECJ. Finally, this analysis presents an opportunity to reconsider whether the current broadcast ban on cigarette advertising in the United States is constitutional.

A. *The Proposed and Current European Bans*

Application of the analysis from Part III, above, demonstrates the strength of the advertisers' argument that the ban of all cigarette advertising would violate Article 10 of the Convention. First, the action would be carried out by public authorities, so the provisions of Article 10 apply. Second, the ban would be based in law. Finally, even conceding that the goal of protecting health is clearly a legitimate one,⁹³ such an absolute ban does not appear to satisfy the fourth element of the *Barthold* test. This test requires that the measure be "necessary in a democratic society."⁹⁴ To be considered necessary, any interference with the freedom of speech "must be proportionate to the legitimate aim pursued and must be justified on grounds that are not merely reasonable but relevant and sufficient."⁹⁵

An EU-wide prohibition of all tobacco advertising appears not only to be disproportionate, but also to have insufficient grounds for justification. The analysis above shows that any outright ban on speech by a particular

89. *Valentine*, 316 U.S. 52 (1942).

90. *Bigelow*, 421 U.S. at 827.

91. *See supra* Part I.

92. *See supra* note 4.

93. This seems especially clear given the ECJ's reluctance to question lawmakers' motives. *See Barthold v. Germany*, 7 Eur. Ct. H.R. (ser. A) at 383 (1985).

94. *Id.* at 401.

95. *Coca v. Spain*, 18 Eur. Ct. H.R. (ser. A) at 14-15 (1994).

group is likely to be considered disproportionate. Even in *Coca*, where the Court upheld broad restrictions on lawyer advertising, the Court noted that the lawyer had some opportunities for publicity.⁹⁶ Furthermore, the justification for the ban also appears to be insufficient. If the goal of the ban is truly to protect the health of EU citizens, the proper route would be simply to outlaw tobacco. So long as tobacco remains legal, if the ECJ applies its standard analysis, it is unlikely to uphold the proposed ban.

The current EU ban on broadcast tobacco advertising poses a more difficult question, especially since it has existed for nearly a decade without any legal challenges. However, applying the above analysis, it appears that even this less restrictive ban might be found in violation of the Convention. As with the proposed outright ban, the current broadcast ban easily satisfies the first three prongs of the test set forth in *Barthold*. It is carried out by public authorities, based in law, and carried out in the pursuit of a legitimate goal. The analysis differs, however, concerning the necessity of the ban. The broadcast ban is certainly more proportionate to the aim pursued than an outright ban. In the commercial speech cases analyzed above, such as *Coca*, the ECJ was much less hostile to partial bans than outright bans. However, even the broadcast ban faces difficulty in meeting the requirement that a measure restricting speech be "justified on grounds that are not merely reasonable but relevant and sufficient."⁹⁷ Based on the reasoning of the ECHR in *Open Door Counselling and Dublin Well Woman*, several factors support the idea that the broadcast ban violates the Convention: smoking is a legal activity, the ban is perpetual, and the potential penalties for violation are substantial. However, smoking is also an activity that poses serious health risks, so the courts would likely employ a more deferential level of scrutiny toward this ban than in other contexts. Weighing the above factors, the current ban on broadcast tobacco advertising appears to be inconsistent with the case law of the ECJ, but whether the Court would in fact strike it down is far from clear.

B. *The Existing U.S. Ban*

If the preceding analysis is correct, that the proposed EU ban of tobacco advertising would violate Article 10 of the Convention and the current broadcast ban may do so, could the current U.S. ban on broadcast cigarette advertising⁹⁸ survive a constitutional challenge? Based solely on *Capital Broadcasting Co. v. Mitchell*,⁹⁹ the only case that has squarely addressed

96. *Id.*

97. *Id.* at 15.

98. See 15 U.S.C. § 1335 (1998).

99. *Capital Broadcasting Co.*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd without opinion*

the question whether the ban on broadcast cigarette advertising violates the First Amendment, the answer appears to be yes. In that case, the district court held that the statute had “no substantial effect on the exercise of petitioners’ First Amendment rights[,]”¹⁰⁰ and the Supreme Court agreed.¹⁰¹

While the ban on cigarette advertising has not been overturned, three separate reasons would suggest that *Capital Broadcasting Co.* is no longer good law. First, the decision itself left some room for doubt whether the case would have reached the same result had it been brought by the advertisers themselves rather than the broadcasters. The court asserted that the broadcasters had “lost no right to speak—they have only lost an ability to collect revenue from others for broadcasting *their* commercial messages.”¹⁰² Without explicitly addressing the issue, the court implied that the broadcasters lacked standing to challenge the law.

The second reason that suggests *Capital Broadcasting Co.* should no longer be followed is its inconsistency with the Supreme Court’s later decision in *Virginia State Board of Pharmacy*.¹⁰³ Justice Rehnquist noted in his *Virginia* dissent that the Court’s decision must be logically read as protecting the advertisement of cigarettes and liquor “so long as it is not misleading or does not promote an illegal product or enterprise.”¹⁰⁴ Moreover, at least one respected commentator has suggested that perhaps Justice Rehnquist was right.¹⁰⁵

Finally, *Capital Broadcasting Co.* is inconsistent with *Central Hudson*. Applying the *Central Hudson* four-part test, the first two parts are relatively straightforward. First, cigarette advertising concerns an activity that is lawful, and cigarette advertising is not inherently misleading. Therefore, the speech is protected. Second, the government has an admittedly substantial interest in protecting the health of the public by discouraging smoking.

The third and fourth parts of the *Central Hudson* test are perhaps somewhat more subjective than the first two, but they are sufficiently demanding that the ban on cigarette advertising cannot meet them. The ban does not directly advance the government’s interest in protecting public health for three reasons. First, it leaves open exposure to many other forms

sub nom. *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972).

100. *Capital Broadcasting Co.*, 333 F. Supp. at 584.

101. *Capital Broadcasting Co.*, 405 U.S. 1000.

102. *Capital Broadcasting Co.*, 333 F. Supp. at 584 (emphasis added).

103. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

104. *Id.* at 781 (Rehnquist, J., dissenting).

105. RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 20.31, at 170 (2d ed. 1992).

of advertising. Second, it does nothing to alleviate the real threat to public health—the cigarettes themselves, not the advertisements for them.¹⁰⁶ Third, given the decline of cigarette smoking among American adults and the widespread knowledge that cigarettes are harmful, the goal of cigarette companies that target adult¹⁰⁷ audiences with cigarette advertising must logically be to increase the companies' shares of a shrinking market and not to attract new adult smokers. While the government clearly has an interest in protecting public health, a law that serves primarily to protect existing market shares has no relation to this interest. Furthermore, the ban is more extensive than necessary. Time, place, and manner restrictions could constitutionally be placed on broadcast advertisements to limit their impact on young audiences, analogous to restrictions on the broadcasting of offensive material.

Based simply on *Central Hudson*, the ban on cigarette advertising appears to be unconstitutional. However, the Supreme Court has considerably restricted the reach of *Central Hudson* over the past decade, and there are several reasons that the ban on cigarette advertising may today survive a constitutional challenge. First, “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”¹⁰⁸ Second, the Supreme Court has cited with apparent approval its summary affirmation of *Capital Broadcasting v. Mitchell*.¹⁰⁹ Third, the Court has also approved a “greater-includes-the-lessor” philosophy, which reasons that it is anomalous for the government to be allowed to prohibit an activity or product if it may not prohibit advertising of the same subject.¹¹⁰ Finally, the Court in *Board of Trustees v. Fox*¹¹¹ modified the “no more extensive than necessary” language of the *Central Hudson* test in favor of the more deferential requirement that the restriction of speech have a “reasonable fit” with the asserted governmental goal.¹¹²

106. Of course, the ban follows from a legislative determination that advertising increases the demand for cigarettes. Given the Court's unquestioning acceptance in *Posadas* of a legislative assumption that advertising increases the demand for gambling, see *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 344 (1986), it is unlikely that the Court would require greater evidence of causation in this context.

107. This Note does not consider the issue of advertising directed at minors, which could presumably be prohibited lawfully under even the most favorable reading of *Central Hudson*.

108. *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 748 (1978). Note that none of the above cases involved broadcasting.

109. See *Posadas*, 478 U.S. at 347 n.10.

110. See *id.* at 346. This doctrine thoroughly undercuts the significance of *Virginia State Board of Pharmacy*. If the FDA may ban a particular drug, it stands to reason under this analysis that the federal government may now ban even truthful advertising of prescription drugs.

111. *Fox*, 492 U.S. 469 (1989).

112. *Id.* at 480.

V. CONCLUSION

This Note has shown the existence of relatively similar standards by which the European and American courts now examine infringements of commercial speech. In both legal systems, the courts protect advertising as speech, but allow legislatures considerably more freedom to regulate it than other forms of speech. This Note has demonstrated that the proposed EU ban of tobacco advertising violates the European Convention on Human Rights, and that the current EU broadcast ban may also do so. While the latter appears to be safe from judicial scrutiny after a long history of acquiescence, the former clearly goes far beyond measures that can be considered “necessary in a democratic society.”

Additionally, this Note has shown that the current U.S. ban on broadcast cigarette advertising is inconsistent with the Supreme Court’s decisions in *Central Hudson* and *Virginia State Board of Pharmacy*. This suggests that the ban should therefore be narrowed to allow cigarette advertising in such a time and manner that children would be unlikely to see it unless the Court explicitly overturns those decisions. While the U.S. broadcast ban may satisfy the deferential standards that the Supreme Court has recently set for restrictions on commercial speech, the U.S. judiciary should nonetheless follow the lead of the ECJ and ECHR in promoting free speech rather than hindering it. It would be ironic if the United States, long considered a leader in the protection of civil liberties, continued to move toward less protection of free speech while the European Union, with democratic governments in Member States such as Germany and France that have existed in their current forms for barely half a century, led the way forward through greater judicial protection of free speech. Unless and until tobacco is outlawed, courts must recognize the rights of cigarette manufacturers in both the United States and the European Union to advertise their products to adults in their respective jurisdictions.