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‘Right of selfishness’ vis-à-vis media pluralism in the US and in Europe: The crucial role of broadcasting at the verge of private enterprise and public trusteeship

Abstract

Few areas of law raise the question as to the delimitation of the public vis-à-vis the private sphere as forcefully as broadcasting does. And few businesses display the dual nature inherent in nature radio and TV broadcasting: economic versus cultural good. In Continental Europe, until the 1980s, broadcasting was subject to State monopolies that ought to ensure media pluralism. Likewise, the U.S. Supreme Court, embracing a scarcity rationale, qualified the First Amendment in the realm of broadcasting primarily as a right of the listeners and viewers to receive a wide array of information and opinions. In *Red Lion*, the Court justified large-scale FCC regulation as enhancing rather than infringing the First Amendment right of free expression.

This poses the question as to the theory that underlies the protection of free speech. Is it an individual right that has been granted to everyone to its own benefit and emotional or commercial self-fulfillment, in short: a “right of selfishness?” Or is it rather a functional concept to the benefit of viewers and listeners, and, ultimately, in the service of democracy, aimed at upholding a functioning marketplace of ideas? A private right for the public benefit? My presentation will compare First Amendment jurisprudence in the U.S. and in Europe that have gone opposite ways, relying on case law of Supreme Courts in the U.S., in the EU member states, the European Court of Justice as well as the European Court of Human Rights. This shall elucidate the interrelations between personal liberty and the exigencies of democratic society in a field that genuinely affects the relationship between public and private spheres, and between economics and culture.

I. Introduction

The First Amendment posits: Congress shall make no law abridging the freedom of speech, or of the press. According to Article 10 of the European Convention of Human Rights (ECHR), “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.” Hence, none of these provisions clearly states who the beneficiary of the proclaimed right shall be or what laws would abridge the so-defined freedom. Does a commercial broadcaster who monopolizes a given market infringe the right to free speech, press, or broadcasting, if he merely offers one-sided, biased and incomplete information on issues of public concern? Or is it exactly his freedom to do so? This poses the question as to the theory that underlies the protection of free speech. Is it an individual right that has been granted to everyone to its own benefit and emotional¹ or commercial self-fulfillment², in short: a “right of selfishness?”³ Or is it rather a functional concept to the benefit of viewers and listeners, and, ultimately, in the service of democracy, aimed at upholding a functioning marketplace of ideas?

This question has been the object of a long-standing controversy in US legal scholarship.⁴ The object of this paper, however, is to compare First Amendment jurisprudence in different legal systems, namely in the U.S., within the scope of the European Convention of Human Rights, and in some of its European signatory states.

¹ Cf. Kent Greenawalt, *Free Speech Justification*, 89 COLUM.L.REV. 119, 125 (1989) points out that communication could also be conceived as an outlet for emotional release.

² See David Chang, *Selling the market-driven Message: commercial Television, consumer sovereignty, and the First Amendment*, 85 MINN. L. REV. 451, 501 (2000): “One who seeks to sell a market-driven message, however, has no purpose of participating in public discourse at all. Rather, the seller of the market-driven message seeks simply to engage in commerce as a participant not in the marketplace of ideas, but the marketplace of products.”

³ Congressman Wallace H. White, Jr., one of the co-authors of the Radio Act of 1927, opposed this view arguing: “If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.” 67 CONG. REC. 5479 (1926).

⁴ For an overview of First Amendment theory see Uli Widmaier, *German Broadcast Regulation: a Model for a new First Amendment?*, 21 B.C. INT’L & COMP. L. REV. 75 (1998); Charles W. Logan, *Getting beyond Scarcity: a new Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687 (1997); David Chang, *supra* note 2.

This paper claims that the case law of the U.S. Supreme Court and the European Court of Human Rights (ECHR) has gone opposite ways. Whilst the Supreme Court had originally embraced a functionalist approach protecting the rights of the listeners and viewers, based upon a scarcity rationale, the interventionist approach has been increasingly abandoned for a liberal conception of free speech. The ECHR, by contrast, has increasingly recognized the guarantee of pluralism in the media as a legitimate regulatory goal detached from the scarcity rationale. This owes deference to the European model of freedom of broadcast as opposed to a more liberal model in the U.S. Meanwhile, many constitutional courts in Europe, such as in Italy, France, and Germany⁵ have consolidated their interventionist concept of media freedoms in the field of broadcasting and thereby contribute to the evolving free speech theory of the ECHR. The importance of media pluralism has recently been highlighted by regional and international agreements.

II. Decreasing State Intervention: *Red Lion* and the history of gradual implicit overruling

Radio spectrum is scarce. If two stations broadcast over the same frequency, none of them will be clearly received. The Radio Act of 1912, however, the first national domestic US law for general control of radio, proved inadequate to pre-empt unregulated growth of radio stations.⁶ The Radio Act of 1927, therefore, embraced the notion that “the ether is a public medium, and its use must be for public benefit. The use of a radio channel is justified only if there is public benefit. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public.”⁷ Broadcasters were deemed “public

⁵ For a comparative account see Eric Barendt, *The Influence of the German and Italian Constitutional Courts on their national Broadcasting Systems*, P.L. 93 (1991) and Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* (1997), for specifically concerning France see Philie Marcangelo-Léos, *Pluralisme et Audiovisuel* (2004).

⁶ Erwin G. Krasnow/Jack N. Goodman, *The “Public interest“ Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 608 (1998).

⁷ Secretary of Commerce Herbert Hoover in a speech before the Fourth Annual Radio Conference in 1925, cf. Erwin G. Krasnow/Jack N. Goodman, *supra* note 6, at 608.

trustees” assigned the privilege to use a scarce public resource according to “public interest, convenience, and necessity.”⁸ This phrase coined the regulatory approach to the new medium. Hence, for the purpose of this analysis, public interest as statutory standard and the genuine *constitutional* requirements of the First Amendment shall not be conflated. On principle, statutes can be revoked from one day to the other in the ordinary law-making process, unless their existence responds to a constitutional requirement. This is not true for the First Amendment itself. This paper, therefore, focuses on human rights based requirements that do not lie with the disposition of the legislature. For this reason, arguments pertaining to the “public interest”-standard in broadcasting will not be considered.

A. Red Lion

After a series of rulings, the Supreme Court elaborated its broadcast-specific First Amendment theory in *Red Lion*.⁹ The plaintiff, a radio broadcaster, refused, inter alia, to allot free-of-charge airtime to a third party that had been personally attacked in a report. The Federal Communications Commission (FCC) declared this refusal illegal under the fairness doctrine. Rooted in the public interest standard, that is: at statutory level, the fairness doctrine required i.e. balanced coverage of issues including competing views to be presented as rooted in the public interest standard. The Supreme Court upheld a ruling of the Court of Appeals of the District of Columbia requiring Red Lion to offer reply time to the third party. As to the First Amendment, the Supreme Court established a different level of protection of speech varying with the respective medium. Differences in the characteristics of new media, the Court said, justified the difference in the First Amendment standards applied.¹⁰ “Just as the Government may limit the use of sound-amplifying equipment ... so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a

⁸ This phraseology is still part of the Federal Communications Act of 1934; sections 307 and 309 subject the grant of a frequency to “the public interest, convenience, and necessity.”

⁹ *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969).

¹⁰ *Id.* at 386.

sound truck, or any other individual does not embrace a right to snuff out the free speech of others.”¹¹ Since the reach of radio signals goes beyond the reach of the human voice, such need to protect the rights of others emerges.

Second, if everybody were allowed to speak out via broadcasting, chaos on the ether would result for the limited resources in radio spectrum.¹² The legitimate rationale of government intervention, so far, is to protect the First Amendment rights of others. But the Court goes even further. As opposed to guaranteeing the mere (individual) self-fulfillment of each citizen, the First Amendment was “aimed at protecting and furthering communications”¹³ as a collective good. Speech concerning public affairs, the Court posits, “is more than self-expression; it is the essence of self-government. ... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.”¹⁴ Here, the Supreme Court re-defined the First Amendment as to broadcasting from free speech to free reception. Such interpretation is based on the *telos* of the First Amendment: furthering speech. Receiving a variety of diverging views on questions of imminent political relevance is paramount to upholding the marketplace of ideas, which would otherwise easily be distorted.

Therefore, “no one has a First Amendment right to a license or to monopolize a radio frequency.”¹⁵ The Government could require a licensee to share its frequency with others and to conduct himself “as a proxy or fiduciary with obligations to present those views and voices which are representative of his community.”¹⁶

¹¹ *Id.* at 387.

¹² *Id.* at 388.

¹³ *Id.* at 389.

¹⁴ *Id.* at 390.

¹⁵ *Id.* at 389.

¹⁶ *Id.* at 389.

Such interpretation is grounded on the empirical assumption¹⁷ that the marketplace of ideas is susceptible to market failure and therefore best protected by government intervention instead of the free market itself. It should be noted that the Supreme Court did not rule on the relation between the First Amendment as an individual broadcaster's right and the collective right of the public to receive information.

B. From CBS to Turner Broadcasting: a history of drawbacks

Without expressly overruling *Red Lion*, subsequent case law steadily hollowed its First Amendment theory by either emphasizing the individual component of free speech rights, by declaring this precedent inapplicable to modern transmission paths, or by narrow interpretation of *Red Lion* as being based solely on the notion of scarcity.¹⁸

*Columbia Broadcasting System*¹⁹ constituted the first tentative drawback from *Red Lion*. Here, the Supreme Court upheld an FCC order ruling that the obligation to provide full and fair coverage of public issues does not require broadcasters to accept editorial advertisements. The Court cited *Red Lion* several times, including the public's right to receive suitable access to ideas and experiences,²⁰ but emphasized the broadcaster's right to exercise editorial judgment on whom to grant access to TV and on how to fulfill its Fairness Doctrine obligations.²¹ In addition to this, the Court remarked that Congress had not "yet seen fit to alter that policy, although ... it has ... considered various proposals that would have vested

¹⁷ Cf. Uli Widmaier, *supra* note 4.

¹⁸ According to *Red Lion*, the *Telos* of the First Amendment, namely to further speech, and its ensuing protection of the listening and viewing public are, per se, not intrinsically linked to the problem of scarcity.

¹⁹ *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

²⁰ *Id.* at 102; cf. also at 112; the Supreme Court also cites the FCC's decision underlying the case at hand, in which the Commission clearly refers to *Red Lion*: "The basic principle underlying that responsibility is 'the right of the public to be informed, rather than any right on the part of Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter', *id.* at 112/113.

²¹ *Id.* at 111; cf. also at 127: "Regimenting broadcasters is too radical a therapy for the ailment respondents complain of," *id.* at 125: "In the delicate balancing ... Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many."

private individuals with a right of access.”²² Thereby, the Supreme Court implicitly questions the validity of its First Amendment theory developed in *Red Lion*.

Instead of focusing on the public’s rights, the Court further analyzes the futile question whether broadcast licensees exercise governmental action and could consequently violate the First Amendment.²³ This notion appears as somewhat blurred as it would lead to transforming an *a priori* free broadcaster subject to some conditions into a Government agency.²⁴ This is not what *Red Lion* suggests. It would have rather met the spirit of the latter ruling to ask whether the FCC violated the First Amendment by *not* requesting CBS to broadcast political advertising. Indeed, in their concurring votes, Justices Stevens and Douglas depart more or less overtly from the holding in *Red Lion*. Justice Douglas expressly states that he “did not participate in that decision and ... would not support it. The Fairness Doctrine has no place in our First Amendment regime.”²⁵ Conversely, in their dissenting vote, Justices Brennan and Marshall emphasized the need to balance “competing interests of broadcasters, the listening and viewing public, and individuals seeking to express their views over the electronic media.”²⁶

Further application of the *Red Lion* doctrine was made in *Pacifica*,²⁷ where the Supreme Court upheld the FCC’s determination that the broadcast of a prerecorded monologue was indecent. Even though indecency regulation is not related to the rights of the public to be informed, but constitutes a ‘classical’ free speech restriction, the Court drew some relevant conclusions from *Red Lion* for the case at hand. It pointed out that broadcasting had received the most limited First Amendment protection of all forms of communication and, among others, referred expressly to *Red Lion*.²⁸ The Court justified such lower standard of protection

²² *Id.* at 113/114.

²³ *Id.* at 114 and 121: „We therefore conclude that the policies complained of do not constitute governmental action violative of the First Amendment.“

²⁴ This fallacy recurs as a critique of the approach in *Red Lion* in Justice Stevens’ concurring vote, *id.* at 139.

²⁵ *Id.* at 154.

²⁶ *Id.* at 172.

²⁷ *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).

²⁸ *Id.* at 748.

with the “uniquely pervasive presence (of the broadcast media) in the lives of all Americans”²⁹ that necessitated particular safeguards, as well as the unique accessibility to children.³⁰ More in the vein of *Red Lion*, Justices Brennan and Marshall, in their dissent, expressly rejected the notion that the degree of protection varied with the social value ascribed to that speech.³¹ Indeed, the *Red Lion* theory was not about limiting the level of protection to impart ideas and opinions, but merely to restrict the pertinence of entrepreneurial interests in broadcasting. It was not about stifling free speech, but, to the contrary, about promoting it. *Red Lion* simply does not apply to cases of indecency for the proper function of the marketplace of ideas is not at stake.

A further dismantling of *Red Lion* occurred in *WNCN Listeners Guild*³² where the Supreme Court rejected an obligation of the FCC to regulate program diversity in the entertainment radio sector. In the case, a radio station had changed its music format while continuing to broadcast on the same frequency. The Court emphasized that the FCC’s discretion regarding how the public interest was best served deserved substantial judicial deference.³³ The FCC could reasonably conclude that “relying on market forces to promote diversity in radio entertainment formats and to satisfy the entertainment preferences of radio listeners”³⁴ did not conflict with the First Amendment. In fact, the *Red Lion* Court’s holding was not unconditional. “If experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.”³⁵ It appears the more striking that the *WNCN* Court undertook no argumentative effort to legitimize the FCC’s

²⁹ *Id.* at 748.

³⁰ *Id.* at 749; the disputed monologue was broadcast at 2 p.m.

³¹ *Id.* at 762/763.

³² *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

³³ *Id.* at 597.

³⁴ *Id.* at 604.

³⁵ *Red Lion Broadcasting Co. v. Federal Communications Commission*, *supra* note 9, at 393.

policy shift.³⁶ Hence, it can be argued that mere entertainment radio programs did not imply the prime concern of the *Red Lion* holding.

In *League of Women Voters*,³⁷ the Court marked further disapproval of its initial interventionist First Amendment doctrine. Referring to increasing criticism leveled against the scarcity rationale,³⁸ the Court indicates its potential willingness to depart from *Red Lion*: “We are not prepared, however, to reconsider our long-standing approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.”³⁹ It further asserts that, under the current theory, Congress simply “may”⁴⁰ seek to assure that the public receives a balanced presentation of information, but, apparently, would not be ‘required’ to do so. This conflicts with the *Red Lion* holding under which Congress and the FCC would violate the First Amendment by refraining from necessary regulation.⁴¹

Recently, the Supreme Court ruled on the applicability of the interventionist doctrine to cable Television. The Court analyzed whether must-carry provisions in the 1992 Cable Act that require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations violated the cable operators’ right to free speech. The Court established that the rationale for applying a less rigorous standard of First Amendment scrutiny, “whatever its validity in the cases elaborating it,”⁴² did not apply to cable regulation. The interventionist theory was exclusively based upon the “physical limitations of the

³⁶ Justices Marshall and Brennan filed a dissenting vote, *Federal Communications Commission v. WNCN Listeners Guild*, *supra* note 32, at 604.

³⁷ *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364 (1984).

³⁸ This is still the case, *see* Robert Corn-Revere, *Rationales and Rationalizations-Chapter 1: Red Lion and the Culture of Regulation*, 5 COMMLAW CONSPECTUS 173, 174 (1997): “constitutional anomaly”; Charles W. Logan, *supra* note 4, at 1704: “The essential reason for the rationale’s shortcomings is the fact that ‘it is a commonplace of economics that almost all resources used in the economic system ... are limited in amount and scarce, in that people would like to use more than exists.’”

³⁹ *Federal Communications Commission v. League of Women Voters of California*, *supra* note 37, at 376.

⁴⁰ *Id.* at 377.

⁴¹ *Red Lion Broadcasting Co. v. Federal Communications Commission*, *supra* note 9, at 390.

⁴² This is another rather critical hint at *Red Lion* in *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622, 637 (1994).

broadcast medium.”⁴³ The Court expressly rejected the Government’s assertion that cable regulation was to remedy “market dysfunction.”⁴⁴ The prior broadcast jurisprudence—that is: *Red Lion*—was not grounded upon economic characteristics of the market. This, indeed, marks another slight departure from *Red Lion* where the Court held that “freedom of the press from governmental interference ... does not sanction repression of that freedom by private interests.”⁴⁵ First Amendment freedom in broadcasting was to be equally shielded from distorting influence of whatever nature be it governmental or private. This reasoning is not intrinsically linked to the scarcity rationale.

In *Turner*, the Court exerted intermediate scrutiny on the assumption that must-carry provisions were content-neutral.⁴⁶ Despite declining to posit an affirmative obligation to protect listeners’ and viewers’ interests, the Court justified an interventionist approach to cable systems ‘through the backdoor’: “To satisfy this standard (of content-neutrality), a regulation need not be the least speech-restrictive means of advancing the Government’s interests.”⁴⁷ The Court remanded the issue for further proceedings, since it needed to be established that the must-carry rules would in fact advance the asserted Government interests.⁴⁸ In a second ruling on the matter, the Supreme Court affirmed its first judgment in *Turner* on principle. The Court reiterated that cable regulation responded to a “governmental purpose of the highest order” in ensuring public access to a “multiplicity of information sources”.⁴⁹ Media pluralism now occurs not as a constitutionally-warranted right of the viewers and listeners, but as a legitimate goal for state intervention that withstands intermediate First Amendment scrutiny. Yet, in a concurring opinion, Justice Breyer refers to

⁴³ *Id.* at 637.

⁴⁴ *Id.* at 639.

⁴⁵ *Red Lion Broadcasting Co. v. Federal Communications Commission*, *supra* note 9, at 392 with reference to *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁴⁶ *Turner Broadcasting System, Inc. v. Federal Communications Commission*, *supra* note 42, at 642.

⁴⁷ *Id.* at 662.

⁴⁸ *Id.* at 663; in his dissenting vote, Justice Blackmun advocated sustaining the must-carry provisions, since economic measures were always “subject to second-guessing”, *id.* at 670.

⁴⁹ *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180, 190 (1997) with reference to *Turner Broadcasting System, Inc. v. Federal Communications Commission*, *supra* note 42, at 633.

the Red Lion holding when requiring Court to assess whether cable regulation struck “a reasonable balance between potentially speech-restricting and speech-enhancing consequences.”⁵⁰ According to the standard of review established in Turner, State intervention could only be speech-restricting, not speech-enhancing, but yet legitimate.

C. Conclusion

The foregoing analysis has shown that the Supreme Court initially embraced an interventionist model of broadcast jurisprudence. Even though Red Lion has never been overruled⁵¹, and its spirit carries on in separate opinions, its scope and realm of application have significantly diminished. Regulation of pluralism is now primarily considered as a free speech restriction that requires justification. But the Supreme Court is willing to accept such regulation under intermediate scrutiny as far as it is content-neutral. This will be regularly the case in broadcast regulation.

III. The European Court of Human Rights broadcast jurisprudence – a path toward media pluralism

According to Article 10 of the European Convention of Human Rights (ECHR) “everyone has the right to freedom of expression. This right shall include freedom to ... receive and impart information and ideas without interference by public authority and regardless of frontiers.” This reads like a rather classical guarantee of free speech that, as has often been held, is not tailored towards specific needs or characteristics of modern mass media.⁵² At least, neither the press nor broadcasting have been the object of a specific provision as is the case in

⁵⁰ *Id.* at 227.

⁵¹ Cf. Charles W. Logan, *supra* note 4, at 1704.

⁵² For a critical assessment see Martin Stock, *EU-Medienfreiheit-Kommunikationsgrundrecht oder Medienfreiheit?*, K&R 289 (2001); Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* 180 (1997) stresses the lack of textual support for a „distinct right to pluralism“, but states, in turn, that such right could be grounded upon the right to “receive and impart” information in the first paragraph of Article 10.

numerous modern Constitutions.⁵³ Broadcasting is rather incidentally mentioned in the third sentence of the first paragraph that provides that “this article shall not prevent States from requiring the licensing of broadcasting, television, or cinema enterprises.” Hence, as the *Red Lion* holding convincingly shows, the mere textual appearance of a human rights guarantee (“Congress shall make no law abridging ...”) does not encompass a clear determination in favor of a particular First Amendment theory. Therefore, further inquiry into Article 10 case law of the ECHR is needed to obtain jurisprudential insights into the construction of media freedoms as to broadcasting.

A. The licensing exemption: a *carte blanche* for broadcast regulation?

In *Groppera*, the first broadcasting case under its scrutiny, the ECHR developed its theory of the licensing provision (Article 10 § 1 s 3). The case concerned a radio station operating from the *Pizzo Groppera* in Italy and broadcasting for a Swiss audience in Zurich in the local dialect. The Swiss authorities subsequently prohibited local community-antenna services from feeding in channels that did not comply with the provisions of international conventions and regulations. A cable company that continued broadcasting the plaintiff’s channel was ordered to cease transmission. The Court analyzed whether the prohibition made upon the cable company to transmit a particular channel violated Article 10. Such scrutiny required further determination on the relation between the third clause of the first paragraph and the general justification for restrictions upon the freedom of speech in the second paragraph. The Court resorted to a comparative law argument by referring to the negotiating history of Article 19 of the 1966 International Covenant on Civil and Political Rights where a special licensing clause was deemed unnecessary and a potential hazard to the protection of free speech, since the necessity for a licensing procedure already followed from the general public order exemption

⁵³ Article 5(1) s 2 German Basic Law mentions “broadcasting”; Article 20 of the Spanish Constitution mentions both “pluralism” as well as “public service broadcasting”; the same is true for Article 38(5) of the Portuguese Constitution.

(avoiding chaos).⁵⁴ The Court concluded that the third sentence of the first paragraph of Article 10 served the same purpose. The preparatory work on the Convention equally showed that the clause pertained to technical considerations such as the “limited number of available frequencies and the major capital investment required for building transmitters”⁵⁵ and responded to a political concern of several States. For these reasons, the Court held, the licensing clause was intended to clarify that licensing procedures were compatible with the Convention.

This was especially true in technical respects and did not foreclose the path to the application of the second paragraph. But the Court consistently held and still holds that “the grant or refusal of a license may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.”⁵⁶ In ruling so, the Court permitted derogations from the rights enshrined in Article 10 (1) on grounds other than those enumerated in Article 10 (2).⁵⁷ Restrictions related to licensing systems were still subject to the justification requirements of the second paragraph.⁵⁸ In conclusion, the licensing provision in Article 10 has been carefully interpreted as to prevent lowering the level of protection by accepting a blanket justification to any measures related to licensing.

B. The structure of legal reasoning within Article 10

The Court follows a rigorous approach in assessing the legality of broadcast regulation. It first establishes whether a law or a judgment of a domestic court interferes with Article 10. At this

⁵⁴ *Groppera v. Switzerland*, 173 Eur.Ct.H.R. at 23 (1990).

⁵⁵ *Id.* at 23.

⁵⁶ *Informationsverein Lentia v. Austria*, 276 Eur.Ct.H.R. at 14 (1993); *Radio ABC v. Austria*, 25 EHRR 185, 194 (1997).

⁵⁷ Cf. Rachael Craufurd Smith, *supra* note 52.

⁵⁸ This is well-established case law, *see Groppera v. Switzerland*, *supra* note 54; *Informationsverein Lentia v. Austria*, *supra* note 56; *Radio ABC v. Austria*, 25 EHRR 185, 194 (1997); *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, ECHR 32240/96, Judgment of 21 September 2001 (on file with author).

stage, the Court has ruled out potential free speech concepts as proposed by the Swiss Government in *Autronic*,⁵⁹ namely that an exercise of the liberty for mere pecuniary gain came under the head of economic freedom rather than the freedom of expression. In the Court's view, neither the legal status of *Autronic* as a corporation under private law nor its commercial aims could deprive the company of its Article 10 protection.⁶⁰

Then, the Court turns to the justification provision of the second paragraph. It analyzes whether the restriction was "prescribed by law", pursued a "legitimate aim" as listed in the 2nd paragraph and was "necessary in a democratic society". It follows from the foregoing assessment pertaining to the licensing clause that such procedure pursues a legitimate aim. The decisive question lies with the necessity of any regulation in a democratic society, that is its proportionality with regard to the pursued aim. At this stage, the Court had ample opportunity to develop its First Amendment theory.

C. The "necessity"-standard and free speech theory

This paper claims that the ECHR only tentatively adopted a genuine theory applicable to broadcast as a medium other than the press or face-to-face communication. Some early cases coming under ECHR scrutiny concerned provisions conferring programming monopolies upon public service broadcasting corporations.⁶¹ Such monopolies were largely commonplace in Europe until the mid-eighties except for Great Britain. In *Groppera*, the Swiss Government adduced the furthering of media pluralism as a means to protect the rights of others, since the latter was a legitimate ground for restricting free speech under Article 10 (2). The rationale behind such assertion bears a resemblance to the Supreme Court's reasoning in *Red Lion* where the Court established that freedom did not imply "a right to snuff out the free speech of

⁵⁹ *Autronic AG v. Switzerland*, 178 Eur.Ct.H.R. at 22 (1990).

⁶⁰ *Id.* at 47.

⁶¹ *Informationsverein Lentia v. Austria*, *supra* note 56; *Radio ABC v. Austria*, *supra* note 56; *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, *supra* note 58.

others.”⁶² The ECHR accepted this rationale as a legitimate aim for regulation⁶³ and further considered it in the necessity-test: “the requirements of protecting the international telecommunications order as well as the rights of others must be weighed against the interest of the applicants and others in the retransmission of Sound Radio’s programs by cable.”⁶⁴ The Court concluded that the ban on cable transmission was necessary in order to prevent evasion of the law,⁶⁵ since Sound Radio⁶⁶ broadcast from Italy without a license for a Swiss audience. The Court did not engage in a thorough analysis of Article 10 toward developing a First Amendment theory of its own.⁶⁷

In *Lentia*, the Court further elaborated on its free speech concept as to broadcasting. It highlighted “the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.”⁶⁸ It further reasoned that “such an undertaking cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programs are often broadcast very widely.”⁶⁹ This passage comprises the seeds for an expanding and more complex broadcast freedom theory. The Court does not merely rely on an individual right to speak out via the ether or to use this as a means of commercial self-fulfillment. It proceeds to a value-based approach by functionally linking the freedom of the press to further democratic society. The free press as an institution takes on a valuable function, namely to impart information and ideas. The public, in turn, is entitled to receive these ideas. This might suggest the existence of a

⁶² Red Lion Broadcasting Co. v. Federal Communications Commission, *supra* note 9, at 387.

⁶³ Groppera v. Switzerland, *supra* note 54, at 27.

⁶⁴ *Id.* at 28.

⁶⁵ *Id.* at 28.

⁶⁶ The station of the plaintiff Groppera AG.

⁶⁷ Cf. Rachael Craufurd Smith, *supra* note 52, at 175.

⁶⁸ Informationsverein Lentia v. Austria, *supra* note 56, at 16.

⁶⁹ *Id.* at 16.

corresponding public's right be informed.⁷⁰ This requires State intervention to warrant media pluralism which, as the Court suggests, will not be guaranteed by the mere interplay of private market forces. So far, this is equally true for the press and the electronic mass media. But finally, the Court acknowledges the specifics of radio and television, which are often "broadcast very widely"⁷¹. This is a European equivalent to the assumption of the "uniquely pervasive presence (of the broadcast media) in the lives of all Americans"⁷².

The Court did not embrace the Austrian submission that a broadcasting monopoly was necessary to warrant pluralism in view of scarce radio spectrum. First, in view of technical developments, the scarcity rationale could no longer justify a monopoly. Second, foreign programs were already available in Austria. Finally, the practice of other European countries of a comparable size as Austria which had issued licenses to private broadcasters showed that a total ban on private broadcasting was not necessary.⁷³ The court acknowledged that a monopoly system was capable of contributing to the quality and balance of programs through the supervisory powers over the media conferred on the authorities.⁷⁴ But there were less restrictive measures to reach this aim.

In *Tele 1 Privatfernsehgesellschaft*,⁷⁵ the Court adopted a more lenient attitude toward the necessity of a monopoly as applied to over-the-air frequencies. It upheld the Austrian state monopoly on terrestrial broadcasting, for the latter did no longer apply to cable TV.⁷⁶ All households receiving television in Vienna had the possibility of being connected to the cable net. The interference with the broadcaster's right to impart information that follows from the terrestrial monopoly "can no longer be regarded as being disproportionate to the aims pursued by the Constitutional Broadcasting Act, such as for instance guaranteeing the impartiality and

⁷⁰ On this point see Rachael Craufurd Smith, *supra* note 52, at 180.

⁷¹ The argument recurs in *Murphy v. Ireland*, 2003-IX Eur.Ct.H.R. 1, 27 (2003): "the audiovisual media have a more immediate and powerful effect than the print media".

⁷² *Federal Communications Commission v. Pacifica Foundation*, *supra* note 27, at 748 (1978).

⁷³ *Informationsverein Lentia v. Austria*, *supra* note 56, at 16 (1993).

⁷⁴ *Id.* at 15.

⁷⁵ *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, *supra* note 58, at para 32.

⁷⁶ *Id.* at para 36.

objectivity of reporting and diversity of opinions through a national station.”⁷⁷ The judgment was unanimous. In his concurring vote, Judge Bonello stressed the notion of “equality of arms” between conventional over-the-air and cable television upon which the judgment was grounded. Bonello would have decided otherwise, were cable TV substantially more onerous than terrestrial reception.

In *Verein gegen Tierfabriken*,⁷⁸ the ECHR had to deal with a case similar to *Pacifica*. Swiss law prohibited any political advertising on television, even though this, as opposed to *Pacifica*, did not solely apply to non-commercial stations. The Court considered such limitation not necessary in a democratic society. It bluntly argued that a prohibition that merely applied to certain media, and not to others, “does not appear to be of a particularly pressing nature.”⁷⁹ While this seems barely spectacular, the Court further elaborated on its free speech concept. For the first time, it alluded to the concept of affirmative obligation to protect certain fundamental rights. In addition, not in substitution of, “the primarily negative undertaking of a State to abstain from interference in Convention guarantees, ‘there may be positive obligations inherent’ in such guarantees.”⁸⁰ It did not decide on the application of such positive obligations in the case at hand, though. Further in its judgment, the ECHR alluded to dangers to the equality of opportunity between different forces of society, undue influence of public opinion⁸¹ as rationales to justify a ban on political advertising. The Court also sustained that commercial interests of powerful financial groups, and not only State intervention, could eventually curtail the freedom of the radio and television stations.⁸² But the judges ultimately discarded this reasoning, for the advertiser implied in the case pursued the sole purpose of participating in an ongoing debate on the protection of animals. This

⁷⁷ *Id.* at para 40.

⁷⁸ *Verein gegen Tierfabriken v. Switzerland*, 2001-VI Eur.Ct.H.R. 245 (2001).

⁷⁹ *Id.* at 265.

⁸⁰ *Id.* at 258.

⁸¹ *Id.* at 265.

⁸² *Id.* at 264.

displays a growing awareness of the Court for problems pertaining to pluralism and the impact of broadcast media on society.

In *Demuth*, the Court accepted the tenets of Swiss media policy that programs shall contribute to “general, varied and objective information to the public” and “promote Swiss cultural enterprise”⁸³ which was not akin to granting licences to rather commercially oriented programs such as “Car TV”. It did not go beyond the margin of appreciation to assume that television programs shall “to a certain extent also serve the public interest.”⁸⁴ In *Demuth*, the Court also elaborated on its own concept of free speech, highlighting both its relevance for “an open and free debate in a democratic society *and* the free flow of information”⁸⁵. By juxtaposing free debate versus free flow of information, the judgment concedes that political debate must be something different to the mere flow of information. Furthering political debate, that is the functioning of the marketplace of ideas by protecting it from distortion, therefore, is a primary goal of Article 10.

D. Level of scrutiny

The Court regularly emphasizes that the signatory States enjoy a margin of appreciation in assessing the need for interferences.⁸⁶ This is to some degree comparable to the “deference”-doctrine the U.S. Supreme Court adopts vis-à-vis policy statements and underlying factual assumptions of the FCC.⁸⁷ The Supreme Court refuses to substitute its own risk assessment to that undertaken by Congress or a Federal Agency such as the FCC. Judicial scrutiny rather pertains to the question whether i.e. the FCC had reasonable grounds in support of its policy.

In the case of the ECHR, such deference does not relate to any separation of power argument

⁸³ *Demuth v. Switzerland*, 2002-IX Eur.Ct.H.R. 1, 15 (2002).

⁸⁴ *Id.* at 16.

⁸⁵ *Id.* at 14.

⁸⁶ *Informationsverein Lentia v. Austria*, *supra* note 56, at 15 (1993).

⁸⁷ Cf. *Federal Communications Commission v. WNCN Listeners Guild*, *supra* note 32, at 597 (1981); *see also Turner Broadcasting System, Inc. v. Federal Communications Commission*, *supra* note 49, at 665: “As an institution, moreover, Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon an issue as complex and dynamic as that presented here;” on this issue *see also* Rachael Craufurd Smith, *supra* note 52, at 235.

which usually underlies the notion of judicial self-restraint. It is rather grounded in the mutual respect toward the large variety of Convention States and their cultural specifics which can barely be fully accounted for by a Court sitting in Strasbourg.

Hence, this does not pre-empt careful scrutiny of the reasons the respective Governments adduce in support of their laws. The margin of appreciation “goes hand in hand with European supervision, whose extent will vary according to the circumstances.”⁸⁸ The Court frequently emphasizes that “where has been an interference with the exercise of the rights and freedoms guaranteed in para 1 of Article 10, the supervision must be strict because of the importance ... of the rights in question.”⁸⁹

This applies to a lesser extent, if commercial speech is in play. Such finding is not limited to commercial speech in the strict sense of the term-as encompassing mere advertising-but it extends to journalistic input, if the latter tends to be primarily of a commercial nature, such as special-interest programs on cars and traffic.⁹⁰ This may appear debatable. In fact, this is not intended to exempt some areas from free speech protection, but to respect priorities set up by some member States in media regulation. In the case at hand, Swiss authorities declined the licensing application of a special-interest TV channels on cars and traffic, for it primarily prompted car sales and did not include cultural elements as required by Swiss law.

Another variant of the “margin of appreciation” doctrine is to be seen in the reference to a “clear consensus between the Contracting States”⁹¹ as a common European standard. This argument recurs in *Lentia* in order to dismiss the Government’s submission that the Austrian market was too small to accommodate a coexisting public service and a private broadcasting system. The Court simply referred to other member States where such co-existence seemed

⁸⁸ Informationsverein Lentia v. Austria, *supra* note 56, at 15.

⁸⁹ *Id.* at 15.

⁹⁰ Demuth v. Switzerland, *supra* note 83, at 14.

⁹¹ Murphy v. Ireland, 2003-IX Eur.Ct.H.R. 1, 31 (2003); according to Jürgen Kühling, *Die Kommunikationsfreiheit als europäisches Gemeinschaftsgrundrecht* 176 (1999), this reasoning is to some extent based on a comparative law approach.

possible.⁹² Conversely, the Court sustained the Irish ban on religious advertising on television for the lack of a “uniform European conception of the requirements of ‘the protection of the rights of others.’”⁹³

Beyond debatable issues in media policy, the Court recently had to assess cases from Armenia and Bulgaria, where channels were denied a license or access to radio spectrum without proper reasoning by the licensing authority. The Court found violation of Article 10 without examining any justification, for the “interference with the applicants’ freedom of expression did not meet the Convention requirements of lawfulness.”⁹⁴

E. Free speech and the protection of pluralism

Article 10 protects various rights: first and foremost those of the speakers, but also those of the ‘receivers’. Article 10 expressly mentions the right to receive information. The latter has been considered a ‘right of others’ in the sense of Article 10 para 2 capable of restricting the right to ‘speak out’. This might elevate the public interest to safeguard media pluralism to a right of the viewers and listeners the contours of which have not been ultimately defined. The Court has acknowledged the existence of such rights as a rationale for setting up licensing procedures in terms of Article 10 (1) s. 3. They further recur in the justification pursuant to the second paragraph. In addition to this, the Court expressly mentions the existence of positive obligations of the State, however, without further elaborating on the application of this concept to the broadcast media. The Court has also recognized the dependence of a marketplace of ideas upon media pluralism in *Lentia* and acknowledged that the State serves as the ultimate guarantor of pluralism. Hence, these findings, at present, do not yet provide sufficient support to sustain the conclusion that the State is not only entitled, but obliged to regulate.

⁹² Informationsverein Lentia v. Austria, *supra* note 56, at 16.

⁹³ Murphy v. Ireland, *supra* note 91, at 26/27.

⁹⁴ Glas Nadezha Eood v. Bulgaria, ECHR 14134/02, Judgment of 18 September 2007, at para 52 (on file with author); Meltex v. Armenia, ECHR 32283/04, Judgment of 17 June 2008, at para 84 (on file with author).

The foregoing analysis has shown an increasing awareness of the Court for the specifics of national media policy and underlying cultural patterns toward media and society. This relates to issues such as religious advertising, licensing special-interest channels, or, generally, upholding fair and balanced reporting through a partial public service broadcast monopoly as applied to over-the-air television. Instead of clearly adopting the Red Lion doctrine-based upon viewers' and listeners' rights—the Strasbourg Court retained a classical conception of the freedom of speech primarily directed against Government intervention. The Court has refrained from assuming a balancing approach of competing rights at the first level, that is of free speech of broadcasters (be they commercial entities or not) and the rights of the viewers and listeners to pluralism. Nor has it accepted the free speech theory as to broadcasting many European constitutional courts have developed, namely of broadcasting as functional right serving viewers and listeners and protecting them both against Government and the market.⁹⁵

Instead, the Court balances competing interests within the legal assessment of interferences with the right to free speech pursuant to Article 10 (2). This means: State intervention is still perceived as an interference with Article 10 (1) subject to justification.⁹⁶

Hence, the Court attaches great importance to media pluralism as a justifying moment for State intervention. Therefore, in applying its 'margin of appreciation' doctrine, it leaves substantial discretion with the Convention States to uphold substantive national concepts of broadcast regulation as long as these do not unreasonably restrict free speech.

The reluctance of the Court to adopt the Red Lion rationale—as opposed to European constitutional courts—may be due to the great diversity of Signatory States, some of which do not entirely comply with democratic standards. Turning a freedom into a State obligation to

⁹⁵ See the extensive comparative analysis by Jürgen Kühling, *supra* note 91, and Eric Barendt, *supra* note 5.

⁹⁶ See Rachael Craufurd Smith, *supra* note 52, at 180: "This essentially untheorized presumption of private broadcasting rights places ... the burden on the state to justify all forms of public intervention, in particular the imposition of regulations designed to promote informational pluralism. Such an approach differs markedly from the Italian Constitutional Court's willingness to accept that the constitutional guarantee of freedom of expression embraces not only a right to inform but also a right to be informed, the latter requiring public access to different points of view and cultural trends."

regulate in favor of listeners and viewers might risk abolishing free speech as a bulwark against censorship.⁹⁷

IV. Pluralism as a prime value in Continental European constitutional adjudication

Other than in Great Britain, the media landscape in Continental Europe has been legally characterized by the existence of broadcasting monopolies as a response to a scarcity of radio spectrum. Constitutional Courts in Continental Europe did not raise any objection to this state of affairs. When the advent of new signal transmission technologies such as cable and satellite television called the scarcity rationale into question, legislators began abolishing monopolies and provided for the licensing of private stations while strong public service broadcasting corporations persisted. Constitutional Courts, then, carefully monitored this development with an eye on media pluralism.⁹⁸ Precisely, very much in line with previous concepts of broadcasting freedom, the freedom of speech on television screens was less perceived as a right of private broadcasting companies, but rather as a collective listeners' right to receive a full range of different offerings. With restricted access to radio spectrum and high cost of operating a TV channel, legislators and constitutional courts in Continental Europe feared that particular media companies could gain excessive influence if they acquired licenses and frequencies to broadcast.

This argument has survived the digital era. The “suggestive power”⁹⁹ of the audiovisual media¹⁰⁰ and as well as economic constraints are still perceived as ongoing threats to truly existing media freedoms.¹⁰¹ French legal scholars call this a “reversed interpretation” of the

⁹⁷ Apparently, the Supreme Court's approach in *Red Lion* or the doctrine of European constitutional courts would provide no basis for censorship, since such can never further communication. Furthermore, such concept does not pre-empt the individual's right to speak out, *see* the dissenting vote of Justices Brennan and Marshall in *Columbia Broadcasting System, v. Democratic National Committee*, *supra* note 19, at 172.

⁹⁸ For the following cf. Rachael Crawford Smith, *supra* note 9.

⁹⁹ BVerfGE 119, 181, 215.

¹⁰⁰ For recent authority *see* BVerfGE 119, 181,

¹⁰¹ *See*, recently, CC decision no. 2000-433 DC, Jul 27, 2000, Rec. 121, 129: „particular technical constraints and economic necessities of general interest inherent in this sector“; the German Constitutional Court very recently stressed that the need for regulation „has remained basically unchanged by the technological novelties

freedom enshrined in the 1789 Declaration of the Rights of Man and of the Citizen: The freedom of audiovisual communication is interpreted as the public's right to know and to be truly informed which requires diversity and variety of information. This can only be warranted by such legislation that i.e. countervails media ownership concentration.

The German Constitution encompasses a specific media freedom besides free speech which reads as follows: "Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed."¹⁰² The phraseology could be—and has been—seen to deviate from regular human rights formulations. It is not about the individual (broadcaster) that is entitled to broadcast without State intervention tampering with his liberty, but a state of affairs (freedom of reporting by means of broadcasts) that is guaranteed.¹⁰³ Such a liberty would be perverted if few media companies were allowed to monopolize radio spectrum or the cable systems. As the Constitutional Court argues "the free formation of opinion is the result of a process of communication. This presupposes, on the one hand, the freedom to communicate opinions, and, on the other, to receive such opinions. By warranting the freedom to impart and receive ideas as human rights, Article 5 (1) Basic Law aims at constitutionally protecting this process."¹⁰⁴ The German Constitutional Court has, chiefly, perceived this freedom as being in the interest of the public to have access to diverse and well-balanced reporting in the media.¹⁰⁵

Even though the Italian Constitution does not contain any such express consecration of media freedoms, the *Corte Costituzionale* did not refrain from adopting a similar position.¹⁰⁶ Article

that have occurred in recent years, the ensuing multiplication of transmission capacities and developments of the media markets," for Germany cf. BVerfGE 199, 181, 214.

¹⁰² German Basic Law, Article 5 (1), 2nd sentence.

¹⁰³ For a detailed account of the German case law see Uli Widmaier, *German Broadcast Regulation: a Model for a new First Amendment?*, 21 B.C. INT'L & COMP. L. REV. 75 (1998).

¹⁰⁴ BVerfGE 57, 295, 319.

¹⁰⁵ BVerfGE 83, 238, 296.

¹⁰⁶ For a comparative account in English see Eric Barendt, *supra* note 9; for a comparison of these two systems with France see Martin Schellenberg, *Pluralismus: zu einem medienrechtlichen Leitmotiv in Deutschland, Italien und Frankreich*, 119 AÖR 427 (1994).

21 of the Italian Constitution merely says: “All persons have the right to express freely their ideas by word, in writing and by all other means of communication.”

In France, Article 11 of the 1789 Declaration of the Rights of Man and the Citizen protects free speech, naturally without referring to the media of the 20th Century: “The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.” Apparently, the free communication of ideas and opinions and its protection by Article 11 can set in at different levels. It can refer to the sender of the information or opinion, that is: the broadcaster. It could equally refer to the recipient – that is: the viewers and listeners – who would thence be entitled to receive opinions and ideas. Or, a third solution, this guarantee could be perceived as not protecting free speech via broadcasting at all.

In its seminal ruling on the broadcasting law of Jacques Chirac’s government in 1986, the Constitutional Council expounded its human rights approach to broadcasting: “The pluralism of socio-cultural tendencies is in itself a constitutional principle. The upholding of pluralism is one of the conditions of democracy. The free communication of thoughts and opinions, warranted by Article 11 ... would be ineffective if the public to which the means of audiovisual communication are addressed, did not have at its disposal, both in the public service as in the private sector, programs of diverse tendencies and leanings that observe the imperative of balanced reporting. Ultimately, the objective to be reached is that the listeners and viewers that are the main addressees of the liberty proclaimed by Article 11 are capable of exercising a free choice without neither private interests nor the public powers supplanting their decision (to that of the viewer or listener) nor that the listeners and viewers be made the object of a market.”¹⁰⁷

¹⁰⁷ CC, decision DC 86-217, *in* Les grands arrêts de l’audiovisuel 248 (Charles Debbasch ed. 1991) and CC decision no. 93-333DC, Jan 21, 1994, Rec. 32, 33, *see* also CC decision no. 2001-450DC, Jul. 11, 2001, Rec. 82, 85; the German Constitutional Council uses a similar phraseology, *see* BVerfGE 57, 295, 324.

As a consequence, the Constitutional Council held the legislator as being obliged to enact anti-trust legislation especially tailored toward the specifics of broadcasting and struck down the legislation as of then as insufficient to warrant media pluralism. The German Constitutional Court went even further, deriving a guarantee of public service broadcasting corporations from the constitutional freedom of broadcasting and drawing detailed conclusions as to the financing of the latter entities.¹⁰⁸ As can be seen from the French quote, the link between the interpretation as a listeners' and viewers' right and the text of Article 11 is rather loose, if existent at all. The same is true for the Italian Constitutional Court that has, likewise, spoken of a passive aspect to free speech (*lato passivo*), namely the right of the public to receive, however, without any textual support.¹⁰⁹

What makes this case so particularly striking is the very resemblance in the construction of a human right against its habitual reading: namely as an often economically-connoted entitlement of the individual against the State. In the parlance of the German constitutional court, the freedom of broadcasting does not primarily serve the individual broadcaster for its own profit, but is rather granted "in the interest of free individual and collective formation of opinion."¹¹⁰ The right serves to foster democratic debate and public opinion (functional interpretation). It thereby creates the underpinning without which a freedom of expression cannot exist, because freedom of expression is void if its beneficiaries have no access to a pluralistic media landscape in order to "make up their mind." The French Constitutional Council has forcefully underlined this link between diversity on TV screens and democracy.

This conception is not only of theoretical impact. By interpreting the freedom of broadcasting as an objective rather than as an individual right, the Courts have also adopted a different test to which media legislation has to conform. In the first place, legislation that imposes obligations on entrepreneurs to foster pluralism cannot constitute an infringement of the

¹⁰⁸ Well established case law, cf. BVerfGE 73, 118, 158 or, more recently, BVerfGE 90, 60, 91.

¹⁰⁹ A comprehensive up-to-date overview of relevant Italian case law can be found in Massimo Ranieri, *La libertà di esercizio dell'impresa di comunicazione di massa* 128 (2006).

¹¹⁰ BVerfGE 83, 238, 315.

right.¹¹¹ The legislator is rather expressly *required* to legislate. He may adopt any measure that fosters the goal of media pluralism even if such laws lower the chances for media companies of making profits. For example, legislators can establish minimum requirements in terms of news and culture-related programs to which media companies have to conform.

V. Comparative Conclusion

The U.S. Supreme Court and the ECHR started off at reverse sides. The former considered broadcast regulation as obligatory in order not to breach the rights of listeners and viewers, whereas the latter subjected any regulation to scrutiny as a restriction of free speech. Despite *Red Lion* has never been overruled, the Supreme Court has made several attempts at departing from the established doctrine. As of today, regulating pluralism is justified, but no longer mandated by the First Amendment. As long as regulation is content-neutral, intermediate scrutiny applies.

The ECHR has increasingly recognized pluralism as a prerequisite to the functioning of free speech in a democratic society. It acknowledged that the Government is the ultimate guarantor of pluralism, which further implies that the marketplace of ideas alone does not suffice to reach this goal. The ECHR has not adopted the *Red Lion* rationale, but displayed an increasing awareness for the need of broadcast regulation. It exercises strict supervision over State interferences as to political speech, be they content-neutral or not, but leaves a wide margin of appreciation as to State media policies.

Constitutional Courts in Germany, France, and Italy, by contrast, have never departed from the *Red Lion* rationale which underlay their free speech jurisprudence from the very first day.¹¹² Freedom of speech and of broadcasting continue to be read, first and foremost, as an obligation of the State to warrant media pluralism in the interest of the viewers and the

¹¹¹ Cf. BVerfGE 57, 295, 322.

¹¹² Except for France where a broadcasting-specific approach to the freedom of speech has not emerged but in the 1980s.

listeners, and, ultimately, in the service of democracy. After a tentative start in its early case law, the ECHR has seemingly adopted some notions of Continental European media freedom theory in the course of the ‘inter-judicial’ dialogue across the Continent.

Whilst the U.S. Supreme Court and the ECHR have evolved in opposite directions in protecting pluralism, these findings also support a second conclusion: despite all technical advances, warranting pluralism remains a prime goal of media policy at both sides of the Atlantic and has been widely recognized as such by the U.S. Supreme Court, the ECHR, as well as Continental European constitutional courts.