ALESSANDRO MORELLI & ORESTE POLLICINO*

Metaphors, Judicial Frames, and Fundamental Rights in Cyberspace†

How do legal imagination, metaphors, and the "judicial frame" impact the degree of protection for free expression when the relevant (technological) playground is the world of bits? This Article analyzes the so-called judicial frame, focusing on legal disputes relating to freedom of expression on the Internet. The authors compare the European Court of Human Rights and the U.S. Supreme Court case law from a methodological perspective. The Article shows how the adoption by supreme courts of an internal or external point of view in relation to the Internet affects not only the use of different metaphors to describe the digital world, but also the balance struck between the fundamental rights at stake.

Introduction

What is the relationship between metaphorical language and the judicial protection of fundamental rights on the Internet? How do judicial frames affect the balance struck between competing rights? How, in particular, do legal imagination, the "judicial frame," and metaphorical language influence the protection for free expression granted by supreme courts in the digital realm? These are the main research questions of this Article, which, inspired by cognitive linguistic studies, aims to show how the adoption of an internal or external point of view of the web leads courts not only to use different metaphors to describe the digital world, but also to strike different balances and reach different conclusions in similar cases.

According to the metaphor deployed by Dirk Geeraerts, cognitive linguistics has the features of a theoretical "archipelago": "It is not one clearly delimited large territory, but rather a conglomerate of more or less extensive, more or less active centers of linguistic research that

* Alessandro Morelli is Full Professor of Public Law Institutions at the Magna Graecia University, Catanzaro, Italy; Oreste Pollicino is Full Professor of Constitutional Law at the L. Bocconi University, Milan, Italy. The authors share final responsibility for the contents of the Article. However, Professor Morelli wrote the Introduction and Parts I and II; Professor Pollicino wrote Parts III–VI and the Conclusion. The authors wish to thank Giovanni De Gregorio for the editorial support in this work.

† http://dx.doi/org/10.1093/ajcl/avaa028

are closely knit together by a shared perspective, but that are not (yet) brought together under the common rule of a well-defined theory."[1]

Within this "archipelago" is the shared insight that language is not an autonomous system: it depends upon other cognitive faculties, and is therefore strongly conditioned by both context and the speaker's interaction with others.[2] From this viewpoint, it is clear that the metaphor takes on a central role. A metaphor is not only a rhetorical contrivance, as is often argued, but something much more important. In fact, some scholars consider the metaphor to form part of a complex cognitive process that enables knowledge—and, at the same time, the development of language. This process also occurs within the context of legal language and, as far as it is relevant for present purposes, within the language used by judges, whose decisions are influenced precisely by the dynamics of these cognitive processes. Therefore, an analysis of metaphors and of the reference contexts that influence judicial reasoning is of fundamental importance (and for this purpose, the concept of "judicial frame" proves to be particularly valuable).

We have chosen to focus on judicial decisions concerning the protection of fundamental rights on the Internet as this is an issue of central importance to contemporary constitutionalism. Above all, the web offers many reference points for a study based on cognitive linguistic theories. The Internet is a world that is both real and virtual, which develops according to metaphorical processes. The adoption by a court of an "internal" rather than "external" point of view vis-à-vis the realm of the Internet can therefore impinge upon the outcome of its reasoning. Given the *sui generis* nature of the Internet, the problems that have arisen regarding the guarantee of rights online merit detailed consideration.

The structure of the Article is as follows. After presenting the theoretical background to metaphors and "frames" within legal and judicial language and introducing the distinction between internal and the external points of view (Parts I and II), the Article analyzes how these issues are particularly relevant in the digital era (Part III). Against this backdrop, the Article studies the different degrees of protection for freedom of expression on the Internet granted by the European Court of Human Rights (ECtHR), on the one hand, and the U.S. Supreme Court, on the other (Part IV), placing particular emphasis on the "legendary" metaphor of the free marketplace of ideas. We argue that this metaphor should be handled carefully in order to ensure that the correct approach is taken to the issue of so-called fake news. In this respect, two clarifications are needed. First, as regards the European dimension, we shall consider only the case law of the European Court of Human Rights; thus, the case law of the Court of Justice of the European Union falls outside

1. Dirk Geeraerts, *A Rough Guide to Cognitive Linguistics*, *in* COGNITIVE LINGUISTICS: BASIC READINGS 1, 2 (Dirk Geeraerts ed., 2006).

2. JOHN R. TAYLOR, LINGUISTIC CATEGORIZATION: PROTOTYPES IN LINGUISTIC THEORY (2003).

the scope of this Article. Second, as regards the U.S. constitutional dimension, our goal is to consider the First and Fourth Amendment case law solely with reference to the perspective described above. No claim to exhaustiveness is made in this respect.

Finally, having compared the points of view and frames analyzed (Part V), and having used the metaphor of the free marketplace of ideas as a case study (Part VI), the Conclusion examines the issues of the choice of frame, judicial creativity, and the rise of private powers as crucial challenges that constitutional law must answer.

The purpose of this Article is to highlight how judicial frames and metaphors in the legal reasoning of courts reveal the significant incidence of extralegal factors in judicial decision making. Having these factors in mind is, in our opinion, a precondition to a full understanding of the current challenges to constitutional law concerning the protection of fundamental rights and could inspire possible reforms to the system of constitutional guarantees.

More precisely, we believe that metaphors and frames in general, and with particular regard to the context, should be handled carefully, because the conceptual shift from the frame of a "world of atoms" to the frame of a "world of bits" is not neutral. By contrast, depending on the framework of values on which the abovementioned shift is premised, it will change the balance that is actually struck by the court, and ultimately, the level of protection granted to the rights at play.

It is evident that the perspective sketched above offers insights into judicial protection of fundamental rights on the Internet. This Article attempts to flesh out that reality by comparing and contrasting the points of view adopted by the European Court of Human Rights and the Supreme Court of the United States in relation to the limits placed on fundamental rights on the Internet. The comparison between the perspectives adopted by the two courts—which, as will be seen, are very different—will raise some questions of crucial importance for constitutional law and, while these problems are certainly not new, they take on a whole new meaning within the digital dimension and call for an appropriate legal response.

I. Metaphors and Legal Reality

Metaphors are not simple stylistic and rhetorical contrivances, but are rather necessary elements in the cognitive processes employed to understand and represent reality. For some time, numerous studies addressing the issue have demonstrated that poetic or literary use does not exhaust the many functions of the metaphor, which may be put not only to an argumentative use but may also be used, *inter alia*, within "everyday communication" as well as in "heuristics."[3] Within

3. Thomas W. Joo, *Contract, Property, and the Role of Metaphor in Corporations Law*, 35 U.C. Davis L. Rev. 779, 784 (2001). On metaphor as an argumentative tool, see Chaïm Perelman & Lucie Olbrechts-Tyteca, Traité de l'argumentation: La nouvelle rhétorique (1958).

the domain of philosophy, Hans Blumenberg, one of the founding fathers of metaphorology, construes metaphor as a cognitive phenomenon.[4] The "ornamental" conception is also rejected by Paul Ricoeur, for whom the metaphor is a "heuristic fiction" since, on the one hand, it corresponds to a model that does not describe precisely the reality of the object portrayed, while, on the other hand, makes it possible to expand one's knowledge of that very object.[5] The idea that the metaphor also performs an epistemological function can be found in Aristotelian theory. This function was also at the heart of the criticisms levied by the epistemological, linguistic, and psychological conceptions that asserted themselves from the mid-twentieth century onwards.

Of the theories of metaphor that in recent times have exerted the greatest influence on studies in this area, particular attention must be paid to the interactive conception and the theory of conceptual metaphor. The former, which was developed in the 1950s, sees metaphor as the result of a process of semantic interaction or, more specifically, as the product of the combination of an expression used metaphorically (the "focus") and the enunciative structure within which the expression is framed (the "frame").[6] The relationship is thus dynamic, and its outcomes cannot be determined in advance, giving rise to an extension or shift in the meaning of the focus itself through a "filter" operation involving the screening of one semantic system by another.[7] Black asserts that the interaction does not occur simply between two ideas but rather between two entire semantic systems, originating from a "set of associated implications"[8] between the connotations and the expressions used. The metaphor thus enables growth of knowledge as a result of the interaction between two semantic-conceptual domains, one of which is better known than the other. Consider the various instances of cognitive metaphorical processes within the "context of discovery" of scientific research: for instance, when elaborating theories of the atom, which belongs to a dimension of extremely small particles that cannot be viewed by any instrument but could only be hypothesized, various explanatory metaphors were employed in order to describe that dimension (a sphere, a plum pudding, a planetary system, a cloud, and so on), a situation that has recurred throughout the history of scientific thought.

The shift from a conception of metaphor as an exclusively linguistic fact to one that considers it to involve a cognitive process and a conceptual

4. *See* HANS BLUMENBERG, PARADIGMEN ZU EINER METAPHOROLOGIE, ARCHIV FÜR BEGRIFFSGESCHICHTE (1960); HANS BLUMENBERG, DIE LESBARKEIT DER WELT (1981).

5. *See* Paul Ricoeur, *Parole et symbole*, 49 REVUE DES SCI. RELIGIEUSES 142 (1975); PAUL RICOEUR, LA MÉTAPHORE VIVE (1975).

6. Max Black, *Metaphor*, 55 PROC. ARISTOTELIAN SOC'Y 273 (1954); MAX BLACK, MODELS AND METAPHORS: STUDIES IN LANGUAGES AND PHILOSOPHY 25 (1962); IVOR A. RICHARDS, THE PHILOSOPHY OF RHETORIC (1936).

7. Annamaria Contini, *La forza cognitiva della metafora: convergenze e divergenze nel dibattito novecentesco*, 4 I CASTELLI DI YALE ONLINE 14, 24 (2016), http://cyonline.unife.it/article/view/1211/1003.

8. Max Black, *More About Metaphor*, *in* METAPHOR AND THOUGHT 19, 28 (Andrew Ortony ed., 1979) (internal quotation marks omitted).

framework occurred with the publication in 1980 of George Lakoff and Mark Johnson's *Metaphors We Live By*.[9] The study inspired research into the role and potential of the metaphor in a wide variety of fields (from politics to religion, from economics to the law, etc.). Two central theses of modern cognitive linguistics emerged from those studies: the idea that language is not autonomous from other human cognitive activities (such as perception and reasoning) and the conviction that there is a close link between meanings and concepts. The fundamental theoretical assumption underlying research into the conceptual paradigm is therefore that the metaphor is more a fact of thought than of language.[10] According to this view, every metaphor has a source domain, a target domain, and source-to-target mapping. The metaphorical processes that are developed through shifts from one domain to the other correspond to the cognitive structures that condition human understanding.

From a cognitive point of view, metaphors are conceptualized as "communication protocols," which serve to link up language and brain circuits.[11] As Manuel Castells explained, returning to Lakoff's account,[12] metaphors are used to construct narratives, which are in turn comprised of frames, and translate into narrative structures corresponding to "neural networks of association."[13] The structures of the frames are not arbitrary, but are based on experience and emerge from the social organization that defines social roles within the culture; the frame is then fixed within brain circuits.[14]

Metaphorical language performs an essential role in law. In fact, many legal categories and institutions have been constructed through metaphorical processes. Metaphors perform a constitutive function of legal reality: consider the categories of "legal person" or of sovereignty in all of its manifestations (state, national, popular, etc.). As Jonathan Blavin and Glenn Cohen write:

> Within the law, metaphors mold the framework of discourse, determining the scope of appropriate questions about and answers to various social and legal problems. Courts and commentators employ metaphors as heuristics to generate hypotheses about the application of law to novel, unexplored domains. Metaphors structure the way lawyers conceptualize legal events, as they infiltrate, consciously and unconsciously, legal discourse.[15]

9. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980).
10. Contini, *supra* note 7, at 30.
11. MANUEL CASTELLS, COMMUNICATION POWER (2009).
12. *See* GEORGE LAKOFF, THE POLITICAL MIND: WHY YOU CAN'T UNDERSTAND 21ST-CENTURY POLITICS WITH AN 18TH-CENTURY BRAIN (2008).
13. CASTELLS, *supra* note 11, at 1.
14. *Id.*
15. *See* Jonathan H. Blavin & I. Glenn Cohen, *Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary*, 16 HARV. J.L. & TECH. 265, 266 (2002); Joo, *supra* note 3. *See also* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003).

Scholars have analyzed three different ways of describing the Internet in metaphorical terms: "the information superhighway," "cyberspace," and the Internet as "real" space. They have shown how these conceptual metaphors influence solutions to Internet-related legal problems.[16]

However, the role of metaphorical language in law is not always fully appreciated, and metaphorical language has not always been viewed favorably (above all by judges) in the context of arguments used by legal practitioners. Thus, for example, in the U.S. context, Richard Posner has asserted that "[a]nalogies can be suggestive, like metaphors, similes and parallel plots in literature—devices that analogies resemble. . . . But analogies cannot resolve legal disputes intelligently. To say that something is in some respects like something else is to pose questions rather than answer them."[17] And before him, Benjamin Cardozo—wearing his judge's hat—argued that "metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it"[18] (and it is of singular significance that, in condemning metaphors in this manner, Cardozo did so by recourse to a dual metaphor, namely the liberation of thought and its reduction to slavery).

More generally, the creation of new fictions by courts is viewed with suspicion by various U.S. scholars who claim that such activity jeopardizes the "judicial candor" that should characterize judicial decision-making processes.[19]

II. Judicial Frames and Internal and External Points of View in the Digital Era

As we have seen, the conceptual and cognitive paradigm of the metaphor presupposes a fundamental concept of frame. Within the specific context of legal argumentation, a "judicial frame" is the expressive structure and, more broadly, the reference context for the reasoning set out in the judgment. As this Article will demonstrate, depending upon the particular frame chosen by a judge who considers the issue as to how a right should be protected within the "world of bits," a different balance will be struck and different solutions will be found even in cases that are near identical.

As will become clear from our analysis of the case law, a study of judicial frames appears to be necessary for at least two reasons. On

16. The same idea is behind the book Stefan Larsson, Conceptions in the Code: How Metaphors Explain Legal Challenges in Digital Times (2017), which uses conceptual metaphor theory "to strengthen the awareness of the strong metaphoricity in contemporary understandings of the Internet" (*id.* at 3).

17. Richard A. Posner, How Judges Think 181 (2008).

18. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

19. David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv. L. Rev. 731 (1987); Peter J. Smith, *New Legal Fictions*, 95 Geo. L.J. 1484 (2007).

the one hand, as mentioned above, metaphors in judicial reasoning operate as "vehicles" that can lead to different conceptual areas and value contexts. Behind every metaphor there is a world of logically interrelated concepts, and the preference of one conceptual world over another is the result of an axiological choice by the decision maker. An analysis of judicial frames of reference and the conceptual source and target domains of metaphorical shifts makes it possible not only to reconstruct with precision the argumentative steps followed in judicial decision making, but also to measure the consistency (or distance) of the decisions with (or from) the positions previously stated by the same decision-making bodies, or by others when ruling on identical or similar questions. As mentioned above, metaphorical conceptualization is necessary in order to resolve legal disputes within the online realm, which is a particularly interesting field of inquiry. Thus, a study of the different ways of engaging in metaphorical conceptualization offers valuable insight into the current trends of the highest courts in contemporary democracies.

On the other hand, as far as systemic dynamics are concerned, an analysis of metaphorical conceptualizations of the Internet by the highest courts can make a useful contribution to the ongoing debate concerning the relationship between political decision makers and judicial bodies. The choice made in this Article to compare the positions adopted in the case law in relation to a right that is of crucial importance for contemporary democracies systems—namely freedom of expression—is also justified from this perspective.

Having highlighted the importance of metaphorical language in legal discourse in general, and on the Internet in particular, a further step in our research path should be made: an examination of the ambivalent nature of the Internet. The Internet is a "virtual" world, built according to special metaphorical and figurative processes, and, at the same time, it is a part of the real world. Depending on the particular point of view adopted, we may resolve similar legal problems relating to the exercise of rights online in different ways.

Against this background, the online world may be viewed from two different points. On one side, there is the user who perceives the "virtual reality"[20] of cyberspace and acts on the basis of *analogies*, drawing a connection between the acts that he carries out on the Internet and equivalent acts normally carried out in the real world, such as buying goods in a physical shop and shopping online, sending letters via physical post and sending e-mails, meeting up with friends in the real world and carrying out the same actions (which, however, will not be exactly the same) on a social network or in a chatroom.

On the other side, there are those who, while remaining within the "physical reality," consider not what happens on the Internet but

20. On the concept of "virtual reality," see JARON LANIER, DAWN OF THE NEW EVERYTHING: A JOURNEY THROUGH VIRTUAL REALITY (2017).

rather what happens "behind the scenes." In doing so, they do not therefore adopt the viewpoint of a user of digital services, but rather that of the external observer viewing the virtual reality of the "world of bits," as something distant and very different from the "world of atoms." Within this latter perspective, the Internet appears simply as a "network of computers located around the world and connected by wires and cables."[21]

The distinction between an internal and external point of view allows one to appreciate aspects of lawmaking that may be of particular interest in an online context. While the perspective of the insider invites us to look for analog connections and to develop metaphorical processes between cyberspace and the real world, from the outsider's perspective, analogies and metaphors develop between the "behind the scenes" digital world and the real world.[22]

Depending on which perspective is chosen, the procedures for applying the law to the Internet will lead to significantly different outcomes: consider the problem of extending constitutional guarantees (which were defined in relation to a vastly different set of instruments) to the online world. For example, can law enforcement agencies intercept an e-mail? From the external perspective, we may note that—in contrast to traditional mail—when a sender sends an e-mail to the recipient, the sender instructs the computer to tell his or her Internet service provider to forward the message to the recipient's provider. Transmission occurs through a sequence of transcriptions of the message from one provider to the other, a very different procedure than dispatching a traditional letter. Therefore, we may conclude that, in this case, the guarantees provided by the Fourth Amendment to the U.S. Constitution,[23] to uphold the privacy of any person who decides to use e-mail, are not applicable.

The distinction between the two perspectives (the perspective of virtual reality and that anchored in physical reality) recalls the Hartian dialectic between internal and external points of view.[24] Scholars use this distinction differently, but the meaning that appears relevant here is the one based on a particular interpretation of that dialectic. According to this conception, the internal point of view is that of a person who participates in the game of law and also shares the rule of recognition of the legal system for particular "ends or values," to which she may also have an emotional attachment.[25] The internal point of

21. Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 360 (2003); LARSSON, *supra* note 16.

22. Kerr, *supra* note 21, at 362.

23. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

24. *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

25. This point is not attributable to Hart, but, actually, to Neil MacCormick. *See* NEIL MACCORMICK, H.L.A. HART 34 (1981).

view of the legal system would thus be the point of view of a person who had good reasons (either because she shares the values of the legal system or due to purely selfish reasons) to respect and ensure respect for the legal rules. The intuition behind this account is that the choice between an internal and an external point of view is never a neutral decision but rather a choice premised on certain value judgments.

III. Metaphors, Frames, and Points of View Within Debates Concerning the Protection of Rights on the Internet

In order to provide examples of the arguments set out above, and thus to tease out the connection between metaphorical language, judicial frames, and the protection of fundamental rights in the digital realm, it is useful to compare two quotations:

> The Court notes that Article 1 of Law No. 47 of 1948 limits itself to an explicit definition of the concept of the press in its technical sense of reproduction through typographical means or otherwise using mechanical or physical-chemical means. However, the term "press" also has a figurative meaning and, in that sense, refers to newspapers, which are an instrument of choice for obtaining information, and were so above all at the time when the Constitution and Law No. 47 of 1948 came into force, that is when other forms of mass media, in particular television and online information sites, were not in operation. This concept of press in a figurative sense defines the editorial product that features both the ontological prerequisite (structure) and the teleological prerequisite (purposes of publication) for a newspaper.[26]

> Now you can see the meaning of my title cyberspace and the Law of the Horse. When asked to talk about Property in Cyberspace, my reaction was, "Isn't this just the law of the horse?" . . . This leads directly to my principal conclusion: Develop around law of intellectual property, then just apply it to computer networks.[27]

The two quotes appear to have very little in common. The first comes from an Italian judgment (the Joint Divisions of the Court of Cassation) of January 2015 concerning the application to the Internet (and in particular to electronic magazines) of rules originally intended for the printed press.

The second quote comes from a 1995 paper penned in the early days of the Internet by another judge, Frank Easterbrook, writing in

26. Cass., sez. un., 29 gennaio 2015, n. 31022, Giur. it., 2015, 2002 (translated by author).

27. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. Chi. Legal F. 207, 208.

his "academic capacity" for a conference held in Chicago and dedicated to the nascent cyberspace. In it he asks himself, ironically, whether it would make any sense to speak of the "law of horse" when it is sufficient to refer to the more general "law of animals." He thus proposes that there is no need to adopt new legislation for the digital world; instead, following a common sense approach, one can apply the traditional legal rules from the real world to the new technological realm.

Despite their differences, however, the two quotes highlight the very same dilemma facing practitioners and lawmakers alike when they are required to "transfer" certain categories, both legal and nonlegal, from the realm of the analog to the digital world. A choice must be made between a shift and a transposition *sic et simpliciter* of traditional categories into the new technological context and the need to rethink and reshape those categories in order to adapt them to a completely different technological scenario.

The two passages quoted above appear to suggest two diametrically opposed choices. In the first case, the Joint Divisions of the Court of Cassation propose to rethink "in a figurative sense" something (the concept of the press) that had been previously defined in a technical sense, so as to open up that concept to technological evolution and in particular to the impact of the Internet.

In the second case, the words of Easterbrook reveal a value frame of resistance to emerging technology, which manifests itself in the call for a mere shift in the application of the traditional legal toolkit to the digital world. However, in both cases, the interpreting bodies cannot refrain from exercising—in the words of James Boyd White[28]—their "legal imagination," whether the proposal is to reconsider existing rules (which may even result in their alteration) in light of changes in the technological circumstances, or whether to simply shift those rules from the material level to the intangible level.

It is clear that, whichever solution is adopted, courts in general, and constitutional (or supreme) courts in particular, appear to play a very delicate role as they are required to choose, between constitutional translation and constitutional caution.[29] That is, they must decide whether to translate the values behind the original constitutional principles according to a technologically informed interpretation of the relevant parameters in light of the new technological scenario or whether to exercise self-restraint, leaving the translation of values to politicians. In other words, it is necessary to understand whether the more appropriate approach in these cases is one of judicial deference or of judicial activism, all the while considering the relationship between politics and the courts in the context of digital law.[30] In the area under consideration here, the concept of frame proposed by Lakoff

28. JAMES B. WHITE, THE LEGAL IMAGINATION (2d ed. 1985).
29. Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361.
30. *See* the discussion *infra* Conclusion.

appears to be useful, as it describes a constitutive use of the metaphor under which the metaphor acts as the focal point for a context that operates as its indispensable framework. The usefulness of the concept of frame for present purposes is evident: in transferring that concept from the domain of the theory of language and cognitive sciences to the domain of the theory of interpretation and argumentation—and thus identifying the judicial frame as a subclass of frame[31]—it is possible to establish what basic value choices can act as a frame for the use of a specific metaphor by the courts and as the basis for a particular judicial balancing operation.

Although the scenario is much more complex, there would appear to be only two argumentative options: either to recontextualize the relevant parameters, thus creating new frames in light of the technological environment, or to adopt a stance of judicial deference towards the legislature. The latter is a solution supported, for example, by Lawrence Lessig: "My sense is that, knowing nothing, or at least not very much, terrified by the threats of which they don't know, these judges will defer to democratic authority."[32]

However, a problem remains: the courts must rule on the case before them, and they do not have much choice in this matter. Justice Kennedy's dissenting opinion in *Denver Area Educational Telecommunications Consortium*[33] on the regulation of cable television is emblematic in this regard. Referring to the technological factor (which was new at the time), Kennedy adopted a cautious approach arguing, "[t]his is why metaphors and analogies to other areas of our First Amendment case law become a responsibility, rather than the luxury the plurality considers them to be."[34] In other words, a decision has to be reached in the case, the technological factor has to be addressed in some way, and it is here that the frame (construed by linguistic scientists as the cognitive structure established in order to facilitate comprehension) becomes a judicial frame and an argumentative technique that can be used in order to persuade through metaphors or analogies, that is, by a shift from the traditional category to the new technological context.

It seems necessary to draw a distinction here between a frame of resistance to technology and a frame of technological openness. In any case, whichever frame is chosen (i.e., whether there is a perception of continuity or discontinuity with the pre-existing technological framework), the operation will never be neutral as it is conditioned

31. András Sajó & Clare Ryan, *Judicial Reasoning and New Technologies: Framing, Newness, Fundamental Rights and the Internet*, *in* THE INTERNET AND CONSTITUTIONAL LAW: THE PROTECTION OF FUNDAMENTAL RIGHTS AND CONSTITUTIONAL ADJUDICATION IN EUROPE 3 (Oreste Pollicino & Graziella Romeo eds., 2016).

32. Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869, 874 (1996).

33. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

34. *Id.* at 787 (Kennedy, J., dissenting).

by another important alternative, which is often downplayed in discussions of how courts respond to technological change: namely, the possibility that—returning to the juxtaposition between the Hartian external and internal points of view[35]—a court may adopt either a perspective that is internal to the new technology, or one that is external to it. A juxtaposition of this type vis-à-vis technological developments was already apparent *avant la lettre* in the context of the birth of the Internet, in relation to the telephone in the *Olmstead* judgment of the U.S. Supreme Court,[36] and in particular in Justice Brandeis's dissenting opinion. According to the majority opinion, the use of telephone conversations intercepted by federal agents without a court order as evidence in a trial did not violate the Fourth Amendment because listening to a private telephone conversation did not require a physical search or entry into a person's private space. By contrast, the judicial frame that informed Brandeis's dissenting opinion was diametrically different in nature and insisted on the recognition of technological discontinuity between the new technology (at that time) and the status quo; it thus leaned towards a teleological interpretation of search and seizure based on the Fourth Amendment.

One might ask why such different frames were drawn upon by judges sitting at the same time on the same court. The difference may be accounted for, as mentioned above, by a distinction between the internal perspective of someone involved in the game (i.e., the insider) and the external perspective of who is outside this framework (i.e., the outsider). Ultimately, while the majority in *Olmstead* adopted an external perspective—also in spatial terms—with regard to the person whose telephone conversations were wiretapped, Brandeis, as an internal player, adopted his own judicial frame by considering the then new technology from an internal perspective, conceiving of the telephone network as a privileged means for creating a virtual closet, in which secrets, in the words of Brandeis, can be "whispered."[37] On the basis of this value frame, which is structurally different from that adopted by the majority, Brandeis had no difficulty in concluding that, although it was not physical, there was nonetheless an intrusion, if not into private property at least into the private sphere of the person whose conversations were wiretapped, thereby violating the Fourth Amendment.

While the possible juxtaposition between the external and internal perspectives vis-à-vis the identification of technological developments may have been in evidence prior to the advent of the Internet, it has been with the explosion of the web that this juxtaposition has found its most fertile terrain, in which the dialectic between openness and resistance to change plays out. This is unsurprising. It is

35. According to MacCormick's more incisive understanding: *see infra* note 25.
36. Olmstead v. United States, 277 U.S. 438 (1928).
37. *Id.* at 277 (Brandeis, J., dissenting).

no coincidence that the Internet is the only medium equipped with its own constitutive spatial metaphor: cyberspace. This is because, in contrast to other technologies, the context, or frame of reference, is so integral and self-sufficient as to be able to compete with the physical reality, so much so as to push any court required to apply the law in relation to the Internet to choose a perspective to characterize their judicial frame.

If we consider the two passages quoted above, whereas the preference, expressed by the Joint Divisions of the Court of Cassation, for the "figurative meaning" over the technical meaning of the press is indicative of an internal perspective that considers the intangible reality as a locus for a reconsideration of certain traditional categories or institutions, the ironic and provocative reference to the "law of the horse" by Easterbrook denotes an external perspective vis-à-vis the object of inquiry—a perspective that takes the analog realm as a point of reference for the application of certain rules, with the digital dimension having merely an accessory status to which it is possible, and even advisable, to transfer *sic et simpliciter* traditional legal categories.

IV. Freedom of Expression on the Internet in the Case Law of the ECtHR and the U.S. Supreme Court

Having established the terms of reference that will operate as a theoretical substrate for our analysis, it is now necessary to test how a difference in the judicial frame can have a significant impact on the final result in a balancing operation carried out by courts in relation to the protection of fundamental rights on the Internet. We shall concentrate in particular on how the different value frames adopted by the European Court of Human Rights (ECtHR) and the U.S. Supreme Court in relation to the protection of freedom of expression online can be decisive in identifying the level of protection to be afforded to that freedom, even where it clashes with other fundamental rights.

Starting with the European Court of Human Rights, it should be recalled that if, in Lee Bollinger's words, free speech is "the paramount right within the American constellation of constitutional rights,"[38] the same cannot be said with regard to European law, for at least two reasons. The extent to which constitutional protection is afforded to freedom of expression is more limited in Europe, where there is no provision carving out a sphere of protection as broad as that provided by the First Amendment. The European approach to freedom of expression, the exercise of which must be balanced with the protection of other fundamental rights, is apparent from the relevant parameters which the European courts have been called upon to enforce.

38. Lee Bollinger, The Tolerant Society: Freedom of Speech and Extremist Speech in America 7 (1988).

In particular, since the European Union—at least in its origins—was intended to constitute an economic community only, the constitutional background has been provided by the European Convention on Human Rights (ECHR) system and the ECtHR. Starting with an analysis of the Article 10 ECHR case law,[39] it must first be acknowledged that the scope of the protection guaranteed under this provision has been defined in broad terms by the ECtHR with reference to the real, or offline world. The Court has adhered to several important fixed points of reference ever since the cases of *Handyside v. United Kingdom*[40] and *Jersild v. Denmark*.[41]

In *Handyside*, a historic 1976 judgment, the Court clarified that Article 10 protection applies not only to "information" or "ideas" that are regarded as inoffensive or with indifference, it also extends to expressions that are offensive, shocking, or disturbing for the state or any segment of the population. The Court then goes on to stress that the breadth of this protection meets the demands of pluralism, tolerance, and broadmindedness without which there is no democratic society. This judgment considerably expands the scope of freedom of expression, asserting that even content that, as shocking or offensive, would have difficulty in securing the approval of the public at large cannot be censored or cannot be denied free expression. The level of acceptance or social approval of content is therefore not what justifies its eligibility for protection under freedom of expression.

These assertions appear to endorse the view that the more variegated the panorama of ideas and opinions, the more the democratic nature of a system will benefit. However, this view must be measured against the various manifestations of "fake news," a concept which is not associated with any specific merit from an informative viewpoint, but gives rise to effects that run contrary to the purposes of freedom of expression in disseminating untruthful messages. The question that we must ask is therefore whether false or misleading news, which is entirely devoid of social value and does not contribute to the dissemination of information, should also be allowed to circulate in the same

39. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 221 ("(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.").

40. Handyside v. United Kingdom, App No. 5493/72, 1 Eur. H.R. Rep. 737 (1976).

41. Jersild v. Denmark, App. No. 15890/89, 19 Eur. H.R. Rep. 1 (1994).

manner as information that satisfies an information interest in accordance with the Convention.

In *Jersild*, one of the first cases on hate speech, the ECtHR demonstrated a certain sensitivity to the specific context within which offensive expressions are formulated, holding that the contracting state (Denmark) had violated Article 10 of the ECHR by convicting a journalist who had interviewed a group of youths belonging to extremist political fringe groups who had made obviously offensive and racist declarations in the course of the radio interview.

The body of case law referred to above provides clear indications in favor of an expansive scope of freedom of expression, which—as interpreted by the European Court—would appear to also embrace expression that does not offer any significant contribution to democratic development and the formation of public opinion even if disturbing in nature.

We must now consider which value frame emerges within the case law of the Court when freedom of expression is exercised in the virtual world, as compared to the judicial frame described above for the protection afforded by the Court to freedom of expression in the real world.

In decisions concerning alleged violations of freedom of expression on the Internet, the European Court of Human Rights has shown an inclination to redefine the expansive scope of its previous case law on the application of Article 10 in the analog world. This reining in of the scope of freedom of expression on the web appears to be rooted in the conviction that the use of digital technologies entails a greater degree of offensiveness as compared to other interests with which the exercise of freedom of expression must engage.[42] While it must be noted that the "relative" status of the fundamental rights protected under the ECHR and their potentially subsidiary status within balancing operations is certainly nothing new, this aspect appears to have been accentuated within the case law concerning the Internet.

A precursor to this "narrow" reading, as it were, may be found in *Editorial Board of Pravoye Delo & Shtekel v. Ukraine* from 2011, in which the Court argued:

> [T]he Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment

42. Oreste Pollicino & Marco Bassini, *Free Speech, Defamation and the Limits to Freedom of Expression in the EU: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON EU INTERNET LAW 508, 508 (Andrej Savin & Jan Trzaskowski eds., 2014).

> of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.[43]

In contrast to the U.S. Supreme Court, which, as we will see below, in *Reno v. ACLU* in 1997 the Court immediately clarified the potential of the web for a possible expansion (defined as "phenomenal")[44] of the space within which freedom of expression may be exercised, the European Court appeared to be concerned in its judgment above all with the critical aspects of the use of the Internet as well as with the risks of a more significant violation of other, competing fundamental rights.

As noted above, the European Court has always considered freedom of expression, and in particular freedom of the press, to be a kind of touchstone (the "canary in the coal mine") for the democratic nature of a legal system. It would appear that the extent of this protection as consolidated within the case law of the European Court has been revised. First, in the 2007 judgment *Stoll v. Switzerland*, the Court appeared to endorse the imposition of more stringent obligations on online journalists compared to those working with the printed press:

> [T]he safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism.
>
> . . . .
>
> These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.[45]

43. Editorial Bd. of Pravoye Delo & Shtekel v. Ukraine, 2011-II Eur. Ct. H.R. (extracts) at 383, 401–02.
44. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997).
45. Stoll v. Switzerland, 2007-V Eur. Ct. H.R. 267, 306–07.

Furthermore, a similar view is confirmed in *KU v. Finland* in 2008:

> Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. Without prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. Such framework was not, however, in place at the material time, with the result that Finland's positive obligation with respect to the applicant could not be discharged.[46]

Naturally, it must not be forgotten that the decisions of the European Court are largely based on the specific circumstances of the case. This means that the scope of apparently radical judgments must be scaled back, or in any case not overstated. This applies, for example, to the case of *Delfi AS v. Estonia*,[47] a 2015 Grand Chamber decision which confirms the judicial tendency described above and which is more open to possible restrictions on online freedom of expression (consider, *inter alia*, the following quote: "Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online."[48]).

The Court held that the imposition of a fee (albeit minimal) on the operator of an online information portal, as compensation for the losses suffered by an individual as a consequence of defamatory comments made in an online article, which had remained accessible for around six weeks, did not constitute a disproportionate restriction on freedom of expression in view of the need to strike a balance with the protection that must be afforded to the personality rights (such as honor and reputation) of the person who was defamed.

It should be pointed out that the same case would most likely have been decided differently by the Court of Justice of the European Union, whose power of scrutiny would, however, have been based on criteria other than those adopted by a human rights court such as the

46. K.U. v. Finland, 2008-V Eur. Ct. H.R. 125, 142–43.
47. Delfi AS v. Estonia, 2015-II Eur. Ct. H.R. 319.
48. *Id.* at 370.

ECtHR, since they are rooted in the issue of the potential liability of the operator of the online portal under Directive 2000/31/EC.[49] The ECtHR judgment is undoubtedly problematic and difficult to reconcile with EU law: leaving aside the need to adopt a perspective of inquiry that is not misleading (the *thema decidendum* here was whether the requirement of monetary compensation could constitute an unjustified violation of Article 10 of the ECHR, and not the compatibility of such an outcome with Directive 2000/31/EC), the judgment leaves open the possibility of finding an online portal editor liable under certain circumstances for unlawful content published by third parties.

The implications of this case can be better understood if compared with the judgment issued several months later in *MTE v. Hungary*, where the ECtHR restated its position in relation to a similar issue, albeit with a different outcome.[50] The case is not substantially different from *Delfi AS*, as the application sought a review of the compatibility with Article 10 of a ruling against an operator of an information portal due to defamatory comments left anonymously by third parties, i.e., using pseudonyms, at the foot of a news article published on the portal. As noted above, the ECtHR reached a conclusion opposite to its precedent in *Delfi*, finding Article 10 to have been violated. According to the Court, the two cases may be distinguished by the nature of the offensive comments and the resulting harm: in *Delfi* the content posted by third parties was particularly offensive in nature, so much so as to amount to a form of hate speech, constituting an incitement to acts of violence and racial hatred. That aspect, which for the Court appears to make expressions more attractive to users, was by contrast absent in *MTE*, and it is precisely the absence of this element of manifest unlawfulness that constituted the difference in the treatment of the Internet service provider.

The European Court of Human Rights thus revised its previous position. Unlike in *Delfi*, the case did not involve a delay in the removal of comments (which was done promptly), but held the platform operator responsible for the offensive comments published by third parties. The Court appears to have attempted to move closer to EU law, in contrast to the *Delfi* case, and the principles of responsibility of Internet service providers.

The same underlying value frame that leads to mitigating the expansive scope of freedom of expression online may also be found in two recent decisions of the European Court of Human Rights concerning the balance between this freedom and copyright.

49. Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1.

50. Magyar Tartalomszolgáltatók Egyesülete & Index.Hu Zrt v. Hungary, App. No. 22947/13 (Feb. 2, 2016), http://hudoc.echr.coe.int/fre?i=001-160314.

The 2013 decision in *Ashby Donald v. France*[51] contained a discussion as to whether the provision of a fine in relation to the publication on a website of certain photographs taken by professional photographers at an event without the consent of the fashion house amounted to a violation of Article 10 of the ECHR. The Court answered in the negative, finding the interference in the exercise of freedom of expression to be justified, especially in light of the commercial nature of the expression in question, with the result that the contracting states can rely on a greater margin of appreciation than they do in other areas.

Another significant case is *Neij & Sunde Kolmisoppi v. Sweden*, in which the Court ruled against the operators of the website "The Pirate Bay" due to violations of Swedish copyright law.[52] The Court held that "[s]ince the Swedish authorities were under an obligation to protect the plaintiffs' property rights in accordance with the Copyright Act and the Convention, . . . there were weighty reasons for the restriction of the applicants' freedom of expression."[53] While the case law of the European Court of Human Rights has been characterized by marked hostility towards the extension of freedom of expression to the digital realm, the United States, by contrast, stands out as a bastion of freedom of expression within the new digital ecosystem.

One gets the impression that, by crossing the Atlantic Ocean, a shift occurs in the relevant judicial frame.[54] Whereas, as has been argued, the dominant frame in the European Court of Human Rights is fear of the novelty of technology (or a kind of technological xenophobia) coupled with a kind of digital distrust, the case law of the U.S. Supreme Court seems to adopt the opposite judicial frame: digital trust and openness to technological innovation. This was confirmed by a landmark ruling of the U.S. Supreme Court in the area of freedom of expression on the Internet: *Reno v. ACLU*.[55] The Supreme Court ruled unconstitutional certain provisions of the Communications Decency Act (CDA), which criminalized the online distribution of obscene or indecent material to any person under the age of eighteen. In the Court's view, the CDA imposed restrictions that were too vague and that lacked the precision required in order to limit free speech only to the extent necessary for the protection of minors, in particular by failing to properly define "indecent" and "patently offensive" content. It is worth noting that the decision expressly considered the difference between the nature of the Internet and that of other media such as radio and television: radio and television, unlike the Internet, have "as

51. App. No. 36769/08 (Apr. 10, 2013), http://hudoc.echr.coe.int/eng?i=001-115845 (in French).

52. Neij & Sunde Kolmisoppi v. Sweden, App. No. 40397/12 (Feb. 19, 2013), http://hudoc.echr.coe.int/eng?i=001-117513.

53. *Id.* at 11.

54. *See* the discussion *infra* Part IV.

55. Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997).

a matter of history . . . received the most limited First Amendment protection, . . . in large part because warnings could not adequately protect the listener from unexpected program content." On the Internet, however, "the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."[56]

In the eyes of the U.S. Supreme Court, the Internet offers new fora and spaces for the exercise of freedom of expression, which must be viewed through a different lens than traditional media. In *Reno v. ACLU*, to borrow the metaphor of the "free marketplace of ideas" from the renowned dissenting opinion of Justice Holmes, the enduring relevance of which could be called into question in the light of the changes to the Internet in its early days.

The judgment, which dates back to 1997, came in response to the first attempt by the U.S. government to limit access to online content by minors, in the face of concerns that, as has been powerfully described by Lessig, it was impossible to replicate online the zoning and age verification systems used in the real world, thereby preventing minors from gaining access to prohibited material. It was for this purpose that the CDA was approved in 1996, which sought to apply in particular to content that was defined as "indecent" and "patently offensive." However, the Supreme Court struck down part of CDA as unconstitutional due to its violation of the First Amendment as the restrictions provided for under the CDA were excessively vague and indeterminate, and did not pass the strict scrutiny test to which, according to the Supreme Court, any restriction of freedom of expression must be subject. In other words, the restriction on free speech did not remain within the limits of what was strictly necessary in order to achieve the goal pursued, namely the protection of minors. The Supreme Court embraced the metaphor of the free marketplace of ideas, discussed in depth in Part VI, and in fact exalted it by identifying the Internet as a special domain in which this free exchange could be considerably expanded.

Turning to the reasoning given in the judgment, there is a clear link between the recognition of technological discontinuity brought by the development of the Internet and the internal perspective which—as mentioned above—is characteristic of the point of view of an insider as opposed to an outsider. The nine justices of the Supreme Court resisted the temptation to extend to the web the case law on radio and television broadcasting and hence to impose a frame of resistance on the (then) new technology and the resulting continuity with the previous technological framework. The Court stressed the specific reasons why the regulatory regime for radio and television could not be transferred *sic et simpliciter* to the Internet, starting with

56. *Id.* at 867.

the specific problem of television as (at that time) a scarce resource, which thus called for public regulation, as well as the fact that, with specific reference to the protection of minors, whereas on the Internet they would have to take "affirmative steps" (in 1997) to access obscene material, had they been watching television they would have been passively exposed to such material.

A similar ethos informed the second attempt of the U.S. government to regulate the protection of minors online. In 1998, after the U.S. Supreme Court struck down the most important part of the CDA, the Child Online Protection Act (COPA) was enacted with the same objective. The Act was reviewed by the Supreme Court, which found it violated the First Amendment. Specifically, the COPA defined "material harmful to minors" as any material that was obscene, or that—on the basis of community standards—might be considered by the average person as appealing to prurient interests. This definition, according to the Supreme Court, failed to meet the standards required in order to circumscribe any limitations on free speech.[57]

Another decision on the protection of freedom of speech on the Internet was taken in *Ashcroft v. Free Speech Coalition*.[58] Reinforcing the protection of minors—through the Child Pornography Prevention Act adopted in 1996—against the dissemination of explicit content, the Court concluded that the restrictions introduced by this Act with regard to freedom of expression were disproportionate and overly broad. Most notably, the decision focused on the provisions that prohibited not only the diffusion of images of persons who appeared to be minors engaging in sexual activity, but also any form of speech conveying the impression that the images depicted minors involved in sexual behavior. Free-speech activists complained that this type of regulation had chilling effects. The Supreme Court found that Congress had the authority to pass laws with the aim of preventing child pornography and the circulation of obscene material. However, since the provisions contained in the COPA went beyond this admissible scope, the restrictions were overly broad and violated the First Amendment.

Fifteen years later, as evidenced by the decision in *Packingham v. North Carolina*,[59] the U.S. Supreme Court was still operating within the frame of digital trust. In this case, the North Carolina General Assembly enacted legislation in 2008 banning the use of commercial social networking websites by registered sex offenders.[60] The law made it a felony for any person included in the state's sex offender registry to access a wide range of websites—including Facebook and YouTube—that enable communication, expression, and the exchange of information among users, if the site is known to allow minors to

57. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 584 (2002).
58. 535 U.S. 234 (2002).
59. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
60. N.C. GEN. STAT. § 14-202.5 (2008).

have accounts. The law also covered people who had already completed all criminal justice supervision and was applied automatically: thus, it did not require the state to prove that the accused had been in contact with—or had gathered information about—any minor, or intended to do so, or that the accused had accessed any website for any illicit or improper purpose. It should be noted that North Carolina has not been the only state to enact legislation banning access to social media for certain categories of sex offenders—similar statutory provisions can be found in Indiana, Louisiana, and Nebraska.[61] In April 2010, the local police launched an investigation in order to establish which sex offenders were illegally accessing social networking websites. As a result, the police identified Mr. Packingham who, despite being aware of the prohibition, had been using his Facebook account at the time of the investigation. The defendant was subsequently indicted for violating the legislation. The North Carolina Supreme Court confirmed his conviction and upheld the constitutionality of the disputed provision, claiming that the state had a sufficient interest in "forestall[ing the] illicit lurking and contact" of registered sex offenders and their potential future victims, thereby facilitating "the legitimate and important aim of the protection of minors."[62] The dispute eventually reached the U.S. Supreme Court, which held the contested law unconstitutional:

> While we now may be coming to the realization that the cyber age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be . . . . The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.[63]

The Court went further to state that it should exercise extreme caution before limiting the application of the First Amendment to the Internet.

These rulings are indicative of a clear desire to safeguard the exercise of free speech through an instrument that would be capable of enduring an extraordinary expansion in scope. In other words, the Supreme Court has not made any effort to "downgrade" its sensitivity to this issue, specifically by focusing on the possible critical implications of the usage of the Internet, but instead has affirmed its own liberal vision, even recognizing room for expansion in freedom of speech in light of the features of an entirely new instrument. It is emblematic that the three "strikes" of the Supreme Court have been applied

61. John Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media*, 89 IND. L.J. 1239 (2014).
62. State v. Packingham, 368 N.C. 380, 387–88 (2015).
63. *Packingham*, 137 S. Ct. at 1736.

to rules enacted in order to protect a particularly sensitive interest, namely the protection of minors, which is, more than others, capable of legitimizing highly invasive encroachments on freedom of expression.

This is accordingly indicative of a judicial frame that in general terms is opposite that followed by the European courts, which rather than endorsing the Internet as a driving force of freedom of expression, have recognized above all its critical significance for the exercise of competing rights.

V. Points of View and Frames Compared

Against this background and in the light of the analysis carried out, if one considers the differences in the results arrived at by the U.S. Supreme Court on the one hand and the ECtHR on the other in the area of freedom of expression, it is possible to identify an important factor in support of our research hypothesis.

The use of a particular value frame is capable not only of influencing the argumentative structure of a decision and the balance struck by the courts, it is also therefore capable of impinging upon the level of protection for the fundamental rights in play.

Let us return for a moment to the *Reno* judgment, in which the Supreme Court held:

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[64]

As mentioned above, the Supreme Court went on to add, in relation to the Internet, that "the dramatic expansion of this new marketplace of ideas" was at odds with the vision underlying the legislation proposed by the Clinton Administration that the accessibility of indecent material on the web would have the effect of driving users away from the Internet.

We shall now compare this passage with the findings reached in the decisions cited above (which have become more frequent in recent times) in which the ECtHR has been called upon to rule on the compatibility with Article 10 of the ECHR of limits imposed by the respondent state on the exercise of the applicant's freedom of expression on the Internet. As this Article has attempted to establish, it is possible to identify from this analysis a judicial frame that seeks to narrow and rein in the expansive scope of Article 10 protection compared to the very broad protection, noted above, which freedom of

64. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 885 (1997).

expression enjoys in the analog domain. The perhaps most complete manifestation of this trend may be found in 2011 when the ECtHR held that:

> [T]he Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.[65]

This passage shows that, unlike the U.S. Supreme Court, the European Court placed the emphasis less on the benefits of further expansion of freedom of expression online and more on the risks that such an expansion could have—through a technological instrument that, at least prima facie falls beyond the control of states[66]—on effective protection for rights and other freedoms, which may on occasion come into conflict with one another in that medium. The two courts appear to be working on the basis of opposite presumptions: while the U.S. Supreme Court presumes that a content regulation will not benefit freedom, the European Court, which is more suspicious, considers it likely that this instrument will jeopardize other rights, and asserts the need for, and the legitimacy of, corrective action. In contrast to the distrust in the new digital technology that is apparent from the ECtHR case law, it is clear that the frame underlying the U.S. case law is one of unconditional faith in the instrument, which is considered to be capable of further expanding the reach of First Amendment freedoms.[67]

For the purposes of this analysis, it must be stressed that the need to examine the new technology, and to compare it with traditional media, takes on a different significance depending on the frame of reference chosen. For the U.S. Supreme Court, acting in accordance

65. Editorial Bd. of Pravoye Delo & Shtekel v. Ukraine, 2011-II Eur. Ct. H.R. (extracts) at 383, ¶ 63.

66. JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (2006).

67. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

with that value frame (characterized by trust in the "novelty" of the web), the original nature of the technology is referred to in support of the need for reduced regulatory intrusion on the web as compared to the regulatory framework applicable to television. For the European Court, on the other hand, the same argument is drawn upon in order to justify greater encroachment by the states on freedom of expression when it is exercised online compared to when it is exercised, for example, through the printed press. This occurs in accordance with a frame that is characterized by substantial mistrust in the new technology and concerns about the potential expansion of the risk that other rights competing with freedom of expression may suffer greater infringement on the Internet as compared to in the real world.

Against this backdrop, the case of the free marketplace of ideas demonstrates how delicate the exercise of exporting legal metaphors is. This exercise specifically involves borrowing from different cultural, legal, constitutional, economic, and technological contexts and the subsequent decontextualizaton of these borrowed notions.

VI. The Metaphor of the Free Marketplace of Ideas: Considerations in the Era of Fake News

The Internet is the "new free marketplace of ideas."[68] This is the preferred metaphor used in scholarship and public debate in support of the claim that the issue of fake news should not be addressed by public authorities (and public law).[69] The main idea behind such an assertion is that if, as Justice Holmes wrote in 1919, in the world of atoms the "best test of truth is the power of the thought to get itself accepted in the competition of the market,"[70] this is even more true in the world of bits, because the Internet amplifies the free exchange of and competition among ideas and opinions. Consequently, according to the marketplace of ideas paradigm, if "under the First Amendment there is no such thing as a false idea"[71] in the material world, this is even truer in the digital world thanks to more ways of expressing thoughts. In other words, public powers should not perform any role in dealing with the increasingly prevalent phenomenon of fake news on the Internet. This is because web users are (optimistically) supposed to have all the tools necessary in order to select the most convincing ideas, i.e., true news, and to disregard any unconvincing fake news. This reflects complete trust in the self-corrective capacity of the market for information.

Is there any alternative reading of the possible relationship between public powers, regulation, and the truth on the Internet? Or

68. *Reno*, 521 U.S. at 885.

69. On the metaphor of the "marketplace of ideas," see Haig Bosmajian, Metaphor and Reason in Judicial Opinions 49 (1992).

70. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

71. Gertz v. Welch, 418 U.S. 323, 339 (1974).

should public law refrain from playing any role in the matter? In order to try to answer these questions, it is necessary to take a step back, and ask, what is hidden behind the label of fake news?

A first tentative answer could include all information or news with a certain degree of falsehood. Such information could be either totally invented or only partially false. Obviously, just like the "right to be forgotten" and many other issues experiencing a second life in the digital era, the debate concerning fake news is nothing new. However, the spread of false content has become much more significant, and more pervasive. It is evident that the global nature of the "new" technology, the fact that virtually every Internet user is able to become a content creator—and hence disseminate and (especially) share information (which may also be false)—and the potential consequence of Internet falsehoods on public discourse are exponentially amplifying the need to verify sources of information in the post-truth digital era, and to do so as quickly as possible.

The real challenge is how such control should be carried out. According to the champions of the free marketplace of ideas metaphor, since by definition scarcity of resources is an analog and not a digital limit, and consequently there is no need to protect pluralism of information on the Internet, legal rules (and especially public law) should take a step back in the name of the alleged self-corrective capacity of the information market. Just as the economic market does not test the quality of a product but rather allows demand to drive supply, relying on the market to distinguish between viable and shoddy products, the best solution for dealing with fake news is to secure the widest possible dissemination of all news, including that from contradictory and unreliable sources.

This argument is not so convincing for at least three reasons. First, while it may be that the problem of scarcity of technical resources does not apply to the Internet, attention and time continue to be scarce commodities. In fact, while the amount of available information is growing, the twenty-four hours in the day cannot be increased. Against this background, when confronted with information overload the user will be tempted to search for news, information, and ideas that reinforce their previous thoughts and preferences, which leads to the group polarization process described by Cass Sunstein.[72] In other words, in the world of bits—much more than in the word of atoms—deliberation tends to move groups, and the individuals who compose them, toward a more extreme point of view that reflects their own opinions. The result seems to be that, paradoxically, in spite of the fact that (or perhaps better, precisely because) the amount of information is unlimited, there is a less pluralistic exchange of different

72. CASS SUNSTEIN, REPUBLIC.COM (2001).

opinions than in the traditional media, where scarcity considerations still apply in relation to sources.

Second, it is reasonable to ask whether the marketplace of ideas metaphor is well suited to the scope (and limits) of the protection of free expression according to the European constitutionalism paradigm. As is known, protection of freedom of expression is more limited in Europe than in the United States. One need only compare the wording of the First Amendment to the U.S. Constitution with Article 10 of the European Convention on Human Rights. However, it is not simply a question of a difference in scope, but also of a difference in focus. While the First Amendment focuses mainly on the active dimension related to the right to express thoughts freely, Article 10 of the ECHR (and also Article 11 of the Charter of Fundamental Rights of the European Union[73]) stresses the passive dimension of the right to be informed pluralistically. In this respect, it could be argued that fake news does not fall within the constitutional purview of the European vision of free expression. Alternatively, the European courts would at the very least have difficulty in accepting the view of the U.S. Supreme Court, that, no matter how pernicious an opinion may seem, "we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[74]

Third, as noted above, metaphorical language fits well in legal reasoning; however, it must be handled with care. Metaphors imply knowledge transfer across domains (from the Greek *meta pherein*, to "carry over"). This means that we have two relevant constitutive domains: the source domain and the target domain. The free marketplace of ideas metaphor carries over from the source domain of economic activity to the target domain of speech a systematic set of entailments that supersede the limitations of the older freedom of expression model. In order to understand it fully, it is important not to forget the features of the source "market" domain when Justice Holmes made use of the metaphor in 1919 and the U.S. Supreme Court then adapted it to the Internet in 1997. Holmes was writing during a period of laissez-faire capitalism, in which the liberal state and competition on the market were at their pinnacle. Holmes was skeptical about any external verification of the truth and the removal of proven false news, and the concept of a free market provided a meaningful alternative model for the notion that truth, just as economic well-being, could result from a competition between (true and false) ideas and information. Similarly, when the U.S. Supreme Court borrowed the metaphor, naming the Internet the "new marketplace of ideas," the online economic market was, at the outset, absolutely free and completely unaffected by dominant positions or, even worse, monopolies and oligopolies. In this context, the metaphor of the free

73. 2012 O.J. (C 326) 391.
74. *Gertz*, 418 U.S. at 339.

marketplace of ideas and the proposed test for truth (competition in the absence of any control by public authorities) made perfect sense. By contrast, today, the same metaphor seems to be completely decontextualized when the economic market (as the source domain from which the metaphor has transferred), is far from free, as is well known by the Directorate-General for Competition in Brussels along with every other national competition authority that call for ex post intervention by public authorities. In other words, contrary to the claims of the U.S. Supreme Court, which in 1997 defined the Internet as the "new free marketplace of ideas," today, almost twenty years after that decision, the web is anything but a free market. It is in fact characterized by financial concentration and, as will be discussed in the following Part, the economic and sometimes even political dominance of (a limited number of) private operators who dominate algorithmic technology.

Conclusion: Choice of Frame, Judicial Creativity, and the Rise of Private Powers as a Crucial Challenge for Constitutional Law

In light of the comparative analysis carried out, the choice of frame cannot simply be described as the use of a rhetorical and argumentative contrivance in order to persuade the audience of the soundness of the final decision. On the contrary, we have seen how that choice has immediate repercussions on the way in which courts engage with new technologies and, ultimately, on the outcome of the balancing operation between the rights and freedoms that come into play online.

However, metaphors, including those that describe the Internet as a "new free marketplace of ideas" and the law of the web as a "law of the horse," are expressions of a particular vision of the world; they are, thanks to their explanatory and imaginative capacity, capable of significantly impinging on the frame of reference, inevitably conditioning the scope of the value frame that is used by the courts or by the decision-making body in the particular case. In fact, if, on the one hand, the reference to the "free marketplace of ideas" reflects a vision of the U.S. Supreme Court that—if possible—amplifies unbridled freedom of expression under the First Amendment when that freedom is exercised online, on the other hand, the provocative reference by Easterbrook to the "law of the horse" reveals an opposing attitude of incomplete acceptance (if not a refusal) of the new technology, which is typical of someone who considers the Internet from the external point of view.

Court enjoy de facto freedom to choose the metaphorical universe applicable to the virtual realm, based on their value judgment that the chosen universe is capable of providing precise parameters within which to resolve disputes. This freedom gives rise to further areas of discussion within the ongoing debate in both North America and

Europe concerning the institutional role of courts.[75] These are familiar questions, but they need not be considered any further here, and they may be largely countered by an objection regarding the supposed lack of democratic legitimacy of a decision-making body with such broad and fluid boundaries.

On the other hand, it is undeniable that courts nowadays occupy a privileged position in their respective legal systems in terms of identifying the risks of constitutionally relevant collisions between rights, in particular in terms of the identification of the highest standard of protection for the particular rights at play and consequently in intervening, through dialogue, to avoid the risk of an interconstitutional "collision" and to improve the quality of interaction between legal systems.

This framework appears to be all the more applicable to that specific interaction between courts that occurs in relation to the Internet, where the risk of a collision is even higher, for at least two reasons, one substantive and the other procedural.

Regarding the first reason, the unabating change in the relevant technological scenario and the transnational nature of the Internet considerably magnify the difficulties (which are already apparent in other areas) faced by national (and supranational) legislatures in providing minimum normative protection to the rights in question. It is evident that an immediate consequence of that legislative inertia or inadequacy is an amplification of the creative, substitutive role of the courts.

As regards the second reason, the centrality of the jurisprudential "moment" has been further expanded by the cross-border nature of the Internet, as well as by the fact that the issue of the applicable law—a question that is logically related to (even if conceptually autonomous from) that concerning the jurisdiction of the relevant court—has far-reaching implications for the standard of protection for the fundamental rights in play.

In this case, an institutional system that is capable of guaranteeing sufficient standards of predictability for judicial decisions, and, at the same time, an articulation of powers that is consistent with the founding principles of contemporary democratic constitutionalism appears to be an objective that can realistically (and perhaps must) be achieved. The problem is how to achieve it: whether by giving back a significant role to representative political institutions or through the adoption by the courts of an approach characterized by self-restraint, without the risk of the legislative inertia mentioned above turning into more general inertia, and hence immobility and stagnation.

75. *See further* Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 Eur. J. Legal Stud. 1 (2007); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004); Julie Allard & Antoine Garapon, Les juges dans la mondialisation: La nouvelle révolution du droit (2005).

These are, however, questions that largely fall beyond the scope of this Article. However, the important point for now is the analysis of the argumentative paths of courts, and the metaphors they use in order to answer, one way or the other, the various legal questions posed.

Metaphorical language structures narratives even in the world of law; we must therefore analyze the strategies followed by the principal Internet "narrators," both in order to understand the dynamics within the development of the current legal reality and to verify its consistency—albeit within new technological and globalized contexts—with the traditional paradigms of modern constitutionalism. It should be pointed out that, as ingredients of metaphorical language, words and definitions should be carefully selected to avoid distorting the debate surrounding the identification of the right legal tools, as evidenced in relation to the metaphor of the free marketplace of ideas. The same could be said in relation to the term "digital platform" in which the image of a neutral and passive host entirely masks the increasingly active and biased role of such platforms.

More specifically, the combination of the economic strength of the Internet giants and the introduction of algorithm technology automating decision-making processes has resulted in a relevant shift for constitutional law. It is in fact precisely because of algorithms that the freedom to conduct business has turned into power. Digital firms are no longer market participants: rather, they are market makers capable of exerting regulatory control over the terms on which others can sell goods and services.[76] In addition, they "aspire to displace more government roles over time, replacing the logic of territorial sovereignty with functional sovereignty."[77] Taking the example of Amazon, Frank Pasquale observes that "as artificial intelligence improves, the tracking of shopping into the Amazon groove will tend to become ever more rational for both buyers and sellers. Like a path through a forest trod ever clearer of debris, it becomes the natural default."[78] It is no coincidence that commentators replaced the term "digital platforms" with references to "gatekeepers" in order to stress how the implications of the control that they exert over infrastructure and users is no longer limited to the domain of the economy and competition. Second, it is necessary to stress how the shift in power towards private actors also implies that they are performing functions and tasks normally vested in public authorities, including courts. These dynamics had also led to a privatization of the protection of individual rights. In this respect, Rory Van Loo employed the fascinating metaphor of "the corporation as courthouse" to describe platforms implementing dispute resolution schemes for settling conflicts between buyers and sellers.[79]

76. Frank Pasquale, *From Territorial to Functional Sovereignty: The Case of Amazon*, LAW & POL. ECON. (Dec. 6, 2017), https://lpeblog.org/2017/12/06/from-territorial-to-functional-sovereignty-the-case-of-amazon.

77. *Id.*

78. *Id.*

79. Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547 (2016).

While public enforcement has for a long time been the default option, primarily because public authorities enjoy a monopoly over human rights adjudication, private enforcement has recently emerged as a new trend for protecting digital rights, i.e., fundamental rights in the digital realm. Such privatization of rights protection is just one of the countless processes within a trend where judicial discretion is slowly being replaced by the implementation of algorithms in the functioning of online platforms, such as in the process of content moderation.[80] A consideration of how the law addresses the emergence of new global market powers with the advent of the Internet may provide valuable insight into understanding the role of constitutional law and democratic states in responding to that paradigm shift in the protection of human rights.

80. Giovanni De Gregorio, *Democratising Content Moderation: A Constitutional Framework*, 36 COMPUTER L. & SEC. L. REV. 105,374 (2020); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).