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n154. Letter from Justice Antonin Scalia to Justice Thurgood Marshall (Mar. 10, 1987) (on file in Thurgood Marshall Papers, supra note 3, at box 418, file 10) (discussing Brock v. Roadway Express).

n155. Letter from Justice Thurgood Marshall to Justice Antonin Scalia (Mar. 11, 1987) (on file in Thurgood Marshall Papers, supra note 3, at box 418, file 10) (discussing Brock v. Roadway Express).

-End Footnotes-

Marshall's approach to drafting opinions reflects his pragmatic jurisprudence. As Stevens put it to Marshall in another case, "the logic of [an] opinion will carry the day in all events." n156 Only in exceptional circumstances would particular language constrain courts from developing what they believed to be sensible solutions to practical problems. For example, White once asked Marshall to change a reference from the "right to travel" to the "right to interstate travel." n157 The former reference might imply something about international travel, while the latter would not. Yet, lawyers and judges in later cases could easily take the right to interstate travel as an example of a broader right reaching international travel as well. Had Marshall's original words prevailed, lawyers and judges could limit the case to the interstate context in which it arose. Marshall could go along with the suggested changes because saying things either way would have much the same effect in the real world of litigation and adjudication.

-Footnotes-

n156. Letter from Justice John Paul Stevens to Justice Thurgood Marshall (Jan. 3, 1985) (on file in Thurgood Marshall Papers, supra note 3, at box 373, file 10).

n157. Letter from Justice Byron R. White to Justice Thurgood Marshall (Jan. 31, 1974) (on file in Thurgood Marshall Papers, supra note 3, at box 122, file 10).

-End Footnotes-

Marshall's concern for professionalism connects his view of lawyers as social engineers - technicians with professional skills - to his role as lawyer-statesman. Marshall's pragmatic jurisprudence was problematic for a judge making constitutional law. How could he deal with disagreement about what was a sensible solution to the practical problems of social life that law addressed?

As long as his colleagues were acting as lawyer-statesmen, Marshall could fit disagreement within his approach to law. When a law clerk produced a draft Marshall disagreed with, Marshall would most frequently sit on it until the law clerk realized it was not going anywhere. If the law clerk pressed for an explanation, Marshall would say, "This is pretty good, but it's missing two things." The puzzled law clerk would wonder what legal arguments had been omitted, what cases overlooked. After a pause, Marshall would point to his commission on the wall: "Nomination by the president and confirmation by the Senate." n158

-Footnotes-

n158. For a short version of this story, see Kagan, supra note 19, at 1128 ("As always when he disagreed with us, he pointed to the framed judicial commission hanging on his office wall and asked whose name was on it.").

-End Footnotes-

[*1148]

Although other judges often point out to their law clerks that the judges have commissions and the law clerks do not, Marshall used his commission to show not simply that he had the final authority to make a decision, but that his authority was justified. For Marshall, nomination and confirmation expressed public confidence in the quality of his judgment and embodied the hope that he would continue to exercise that judgment as a Justice. His experience, in short, justified the exercise of his judgment.

Marshall's comment when President George Bush nominated David Souter to the Supreme Court echoed, albeit in reverse, Marshall's distaste for the Senate's treatment of Robert Bork. As Marshall saw it, Bork had not been treated with the seriousness that a person who had served the nation in high positions deserved. When asked about Souter's nomination, Marshall replied, "Never heard of him. And when his name came down, I was listening to the television... I called my wife and said, "Have I ever heard of this man?'" n159 Marshall believed that he should have heard of anyone nominated to the Supreme Court, because the very fact that Marshall had heard of a nominee demonstrated that the nominee had shown the public the character necessary in a lawyer-statesman.

-Footnotes-

n159. Marshall: Speaking Ill of the Dead, Newsweek, Aug. 6, 1990, at 18.

-End Footnotes-

Marshall was troubled as well when judges were captured by some theory that diverted them from exercising judgment. He was particularly critical of approaches that focused exclusively on original intent. Concern for original intent was a major stumbling block in writing the NAACP's briefs in Brown v. Board of Education, n160 and Marshall ended up hoping that he and his colleagues could persuade the Justices that the evidence about original intent was evenly balanced. n161 "Both as a lawyer and as a judge," he later wrote, "I have constantly had to dig into these matters and I am constantly left, on balance, unable to determine exactly what was intended." n162

-Footnotes-

n160. 349 U.S. 294 (1955).

n161. See generally Tushnet, supra note 3, at 196-200.

n162. Letter from Justice Thurgood Marshall to Rev. Leland B. Henry, Saint Mary's Church (Aug. 5, 1964) (on file in Thurgood Marshall Papers, supra note 3, at box 23, file 7).

-End Footnotes-

During the bicentennial celebrations of the Constitution's adoption, Marshall made a widely publicized speech criticizing original intent approaches to constitutional interpretation. He did not believe, he said, "that the meaning of the Constitution was forever 'fixed' in 1787. n163 By describing the original Constitution's treatment of slavery and the corrections made as a result of "amendments, a civil war, and momentous social transformation," Marshall criticized the conservative purposes to which the jurisprudence of original intent was being [*1149] put. n164 Perhaps as important, however, was that the jurisprudence of original intent had a "tendency ... to oversimplify." n165 Marshall's treatment of constitutional development echoed a famous opinion of Justice Oliver Wendell Holmes, which also mentioned the Civil War, that the Constitution's words "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters." n166 The "true miracle," Marshall said, "was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making" n167 Precisely because the Constitution was "of our own making," judges went wrong if they refused to exercise their judgment and passed responsibility off onto the framers.

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n163. Thurgood Marshall, Reflections on the Bicentennial of the United States Constitution, Address at the Annual Seminar of the San Francisco Patent and Trademark Law Ass'n (May 6, 1987), in 101 Harv. L. Rev. 1, 2 (1987).

n164. Id. at 1.

n165. Id.

n166. Missouri v. Holland, 252 U.S. 416, 433 (1920).

n167. Marshall, supra note 163, at 5.

-----End Footnotes-----

Disagreements between judges and legislators were of course the heart of constitutional law. Calling Marshall a pragmatic judge obscures the difficulties with pragmatism in constitutional law. A judge finding a statute unconstitutional is disagreeing with the judgment of legislators. Some constitutional theorists regard legislators as too implicated in the day-to-day grind of governing to be statesmen. From a pragmatic point of view, however, that immersion might make legislators more sensitive to how their solutions to practical problems would work.

The metaphor of social engineering is illuminating again. Legislators, it might be thought, have designed and built a bridge. The pragmatic judge could ask, "Does this bridge work well enough? Can I design a better one?" Such a judge might also be cautious about attempting to replace the legislators' design with an untested one. Yet Marshall regularly adopted constitutional positions that might lead to large-scale social transformations. Powell v. Texas shows that Marshall's jurisprudence did not always lead him to overturn existing arrangements; there his reluctance was based precisely on his concern about what alternatives were available to deal with alcoholism as a social problem.

Marshall's positions on the death penalty and on racial equality, however, were hardly those of a cautious reformer.

Marshall had a lot of experience with constitutional reform. *Brown v. Board of Education* appeared to promise a major transformation in Southern education. But, Marshall knew, the words the Justices wrote had to be implemented by school boards, legislatures, and lower courts. His experience after *Brown* showed him that a Supreme Court opinion apparently requiring large-scale social change could end up meaning something rather different, and more limited, when it was inserted into the overall political and social system. As a judge, [*1150] then, Marshall could be bold without betraying his pragmatism, because the ultimate outcome would be unlikely to track precisely what Marshall as a judge dictated. Because Marshall was a pragmatic judge, disdainful of grand theories that obscured the question of judgment, the test of his jurisprudence was how his opinions were assimilated into the nation's political and legal culture.

The Supreme Court's course over the decades of Marshall's service suggests some difficulties with Marshall's jurisprudence of social engineering. The substantive values he articulated were widely admired. But the nation appeared to repudiate his views on the issues he cared most about. If Marshall's pragmatism could be validated only by public acceptance of the outcomes he urged, at the time he retired in 1991 it would be difficult to conclude that he had been successful. From the perspective of this form of pragmatism, Marshall might be seen as a social engineer who built an elegant bridge that seemed to lead nowhere.

Marshall was more than a pragmatist, however. He played a role well established in the tradition of lawyer-statesmen. He was one of the Supreme Court's great dissenters. Even in 1991, when Marshall's seat was taken over by Clarence Thomas, Marshall's admirers continued to hope that his judgments, however out of tune with what much of the nation desired then, would be vindicated in the larger forum of history.

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ARTICLE: FREE SPEECH ON THE INFORMATION SUPERHIGHWAY: EUROPEAN PERSPECTIVES

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SUMMARY:

... When the creation of the information superhighway was first announced it was expected to expand the freedom of speech worldwide. ... For the purposes of this article and in order to analyse whether legislative measures need to be adopted or abolished for safeguarding free speech on the information superhighway, we will divide current European free speech legislation into three main parts: current protection of free speech, the prohibition of undemocratic speech and the safeguarding of diversity. ... However, the starting point of any communication or media legislation is the fundamental right of freedom of speech. ... Free speech should be protected, in newspapers, on radio, television, and on the information superhighway, in so far as it contributes to genuine democracy. ... Freedom of speech is an indispensable component of democracy - no democracy can exist without free speech. ... The need for additional free speech legislation on the information superhighway is related to the need for universal access. ... It should be noted that access to the Internet is already, at least partly, an element of the universal service obligation as it exists in the EU. ... In this section, we analyse the relevance of current free speech restrictions safeguarding the diversity of media content on the information superhighway. ...

TEXT:
[*905]

I. INTRODUCTION

When the creation of the information superhighway was first announced it was expected to expand the freedom of speech worldwide. n1 Indeed, users could become their own editors, disseminate information and give their opinions on a global scale. Free expression, distribution and reception of information never seemed so complete. However, reality turned out to be slightly different. The current proliferation of global information networks has prompted governments to regulate communication on these systems. n2 There has been criticism recently about legis [*906] lators' attempts to reduce freedom of speech on the Internet.

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n1. See Recommendations from the European Commission to the European Council: Europe and the Global Information Society (1994); First Annual Report of the Forum Information Society to the European Commission: Networks for People and their Communities. Making the Most of the Information Society in the European Union (1996); Resolution of the Council of Ministers, Nov. 21, 1996, 1996 O.J. (C 376) 1 (describing new policy-priorities regarding the information society); Interim Report from the High Level Expert Group on the Social and Societal Aspects of the Information Society: Building the European Information Society for Us All (1996). See also Address by Al Gore, Vice-President of the United States, G7 Ministerial Conference on the Information Society (Feb. 25, 1995) (visited Apr. 30, 1998) <http://www.di.unito.it/mail_archive/G7/0011.html>; Al Gore, Bringing Information to the World: the Global Information Infrastructure, 9 Harv. J.L. & Tech. 1 (1996).

n2. There have been legislative initiatives in a number of states concerning publicly available information as authorities are trying to prevent illegal information from circulating through the global information networks. For example, in Saudi-Arabia, Internet-access is restricted to hospitals and universities so that Saudi citizens do not encounter discussions of a political, religious or erotic nature. China wants all Internet-users to report to the local police station within 30 days. In the United States, the Communications Decency Act, 47 U.S.C. 609 (1996) was meant to protect Americans against illegal and harmful content. The transition to new media often seems to be a pretext for governments to enact further restrictions on free speech, as was demonstrated recently by the controversies concerning the Communications Decency Act, which was overturned by the U.S. Supreme Court. See *Reno v. ACLU*, 117 S.Ct. 2329 (1997). Note that besides this legislation concerning public information, private communication on the information superhighway has been regulated by way of various rules concerning digital signatures, privacy issues, encryption techniques, etc.

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The purpose of this article is to analyse from an European point of view the need for new free speech legislation on the information superhighway. The central question in this respect is twofold: addressing the need for additional measures protecting free speech, and the relevance of existing restrictions on free speech. Now that complete freedom of speech can be obtained, at least theoretically, public authorities do not seem to hold it sacred, though, in truth, it has never been absolute. It had to be limited from the beginning for two reasons. Firstly, speech harming public order and the subjective rights of other people was prohibited. This undemocratic speech - expressions offending public decency or public security - was forbidden, as were slander and libel. Secondly, European legislators were convinced that they had to ensure the diversity of media content, because it was endangered by frequency scarcity and the threat of media concentrations which would keep diversity at a minimum.

How far can, or should, governments go in safeguarding or restricting free speech on the information superhighway?

Before developing any new free speech legislation for information superhighway purposes, it is important to outline the objectives that are achieved by the freedom of speech principle. This analysis will reveal that the role of free speech does not change because it is applied to different media. Free speech objectives are carrier-independent, and therefore, should be fully

applicable to the information superhighway. n3 There is no reason for this principle to be affected by the emergence of new devices for the dissemination of information. n4 In general, the success of information technology does not give rise to new legal questions or categorisations. Familiar legal problems are just seen in a new light, changing the scale or pattern of existing human affairs or providing new areas for applying old principles. n5 Using the right analogies, the applica [*907] tion of free speech rules to the information superhighway can begin by building on the traditional legal categories and constitutional concepts. n6

- - - - -Footnotes- - - - -

n3. The enforcement of current free speech restrictions in this context may be quite complicated, given the international character of the modern communications networks and the relative ease with which anonymous messages can be sent. Restraints on free speech on the information superhighway which are superfluous should be abolished.

n4. The law should survive technical progress. See Stanley Fish, *There's no Such Thing as Free Speech* 23 (1994). "The law does not remain what it is because its every detail survives the passing of time, but because in the wake of change, society still looks to it for the performance of a particular task." *Id.*

n5. See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *Yale L.J.* 1757, 1765 (1995). See also Marshall McLuhan, *Understanding Media: The Extensions of Man* 8 (1965). The railway system analogy is interesting in this regard: "The railway did not introduce movement or transportation or wheel or road into human society, but it accelerated and enlarged the scale of previous human functions, creating totally new kinds of cities and new kinds of work and leisure." *Id.*

n6. See Sunstein, *supra* note 5, at 1765.

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For the purposes of this article and in order to analyse whether legislative measures need to be adopted or abolished for safeguarding free speech on the information superhighway, we will divide current European free speech legislation into three main parts: current protection of free speech, the prohibition of undemocratic speech and the safeguarding of diversity. First, the exact scope of the concepts of "free speech" and "information superhighway" are delimited in an introductory section. Second, the original motives grounding each part of free speech legislation will be examined. The arguments evolving from this analysis will be assessed in the light of the information superhighway in order to determine their relevance in this context. What do we expect from free speech regulations on the information superhighway? Using the answer to this question as a starting point, the need for further government intervention will be studied for each part of free speech legislation.

II. BACKGROUND

A. The Information Superhighway

The information superhighway is a metaphor for representing the convergence of formerly separate communications means into one unique infrastructure. It is

the medium that should fulfill at one stroke a number of human communication needs. Its digital infrastructure is said to be soon available in every home, delivering a variety of information services: electronic newspapers, radio and television programmes and video games, as well as telephone, fax and e-mail services.

It should be noted that the idea of the information superhighway has different connotations in the United States and in Europe. n7 In the United States, the concept mainly relates to the growing economic interest in information. n8 Over one-half of employees in the U.S. work in information-based jobs, n9 and the information technology sector is of strategic importance. Hence, the words "information superhighway," referring to the technical aspects of the information society, are more frequently used than the words "information society." Conversely, in Europe, the emphasis lies more on the "information society," associated with the general economic and societal changes occurring as a result of the progress in information and communications technology. n10 As citizen's attitudes towards knowledge and information are quickly changing, Europe will be transformed into a new type of society. n11

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n7. See Emmanuel Crabit & Jean Bergevin, *Le cadre reglementaire des services de la societe de l'information: Laboratoire pour un nouveau droit du marche interieur?*, 1995 Rev. Marche Unique Eur. 15, 18.

n8. See Al Gore, *Networking the Future: We Need a National "Superhighway" for Computer Information*, Wash. Post, July 15, 1990, at B3. The American regulation of the information superhighway started with a 1991 report of the National Telecommunications and Information Agency (NTIA) (visited Apr. 16, 1998) <<http://www.ntia.doc.gov/>>. See also *The NTIA Infrastructure, Telecommunications in the Age of Information* (1991). Consequently, the then senator, Al Gore, launched the idea of a "National Information Infrastructure," a "seamless web of communications networks, computers, databases, and consumer electronics that will put vast amounts of information at users' fingertips." White House, *National Information Infrastructure Agenda for Action*, Sept. 15, 1993. In January, 1994, a white paper was published in order to define the envisaged information policy. See White House, *Administration White Paper on Communications Act Reforms* (1994), available in 1994 WL 3823874. The rhetoric advocating the information superhighway is highly euphoric. Besides the beneficial effects on free speech also mentioned are: cultural enrichment, democratic promotion, increasing policy participation of citizens, support of general welfare and potential economic growth. See *Address by Al Gore, Vice-President of the United States, G7 Ministerial Conference on the Information Society* (Feb. 25, 1995), supra note 1.

n9. See Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 Wake Forest L. Rev. 1, 5 (1995).

n10. The information society comprises a great amount of knowledge, to which all states and cultures are contributing. A gap between the information-rich and the information-poor must be avoided at all cost. The successful elaboration of the information society is considered to be crucial for the future of Europe in the 21st century. See *Growth, Competitiveness, Employment - The Challenges and Ways Forward into the 21st Century: White Paper*, COM (93)700 final.

n11. Recommendations from the European Commission to the European Council: Europe and the Global Information Society (1994). "This revolution will change the way we work together and live together." Id.

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The European Union (EU) n12 has given an important impetus to the information superhighway through its policies of liberalisation and financial support. n13 Still, notwithstanding political declarations and efforts, the European information superhighway is relatively undeveloped. Access is limited to major corporations, public institutions and educational organisations. Few residential users are currently connected. In the long term however, the information superhighway should evolve into a fully interactive universal medium, combining public and private communication functions. It will then be used for private messages like telephone calls, fax and e-mail. In the meantime, it carries all kinds of public information, available on demand for free or against due payment: electronic newspapers, databases, radio and television programmes, video games, etc. All of this information will circulate through the [*909] unique carrier that is the information superhighway. Unfortunately, this fully integrated information superhighway is not yet reality. We are now going through a transition period during which the telephone, radio, television, personal computer and their respective carriers and terminals co-exist.

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n12. For consolidated texts of the European Community law currently in force, Treaties and recent rulings by the Court of Justice, see European Union Law Web-site (visited Apr. 30, 1996) <<http://europa.eu.int/eur-lex>>.

n13. See Hans Schoof & Adam W. Brown, Information Superhighways and Media Policies in the European Union, 19 Telecommunications Policy 325, 338 (1995).

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The information superhighway is still in its infancy. Nevertheless, its foundations are already visible, in particular through the growing expansion of the Internet. n14 The Internet is actually the best known illustration of the emerging information superhighway. Originally the Internet was only available to the military and universities, it is now rapidly expanding through public access points in libraries, schools and cyber-cafes. Internet users can disseminate and receive information and ideas on a worldwide scale. Most governments have realized by now that the Internet has become a powerful medium and they have started to subject it to regulation that may possibly find application later on to other information superhighway services. In this sense, the Internet is a true testing ground for regulating the information superhighway.

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n14. Patrick G. Crago, Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Community, 20 Hastings Int'l & Comp. L. Rev. 467, 474 (1997). The Internet is a world-wide amalgamation of computer networks, connected by a common communications protocol, Transmission Control Protocol/Internet Protocol (TCP/IP). Id.

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B. The Freedom of Speech

Before demarcating its scope on the information superhighway, we must define what is meant exactly by "freedom of speech." n15 Generally, the principle is understood as the freedom of every human expression intended for public communication. This signifies that speech, even speech that causes some measure of harm to the public, is entitled to a special degree of immunity from government restraint. n16

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n15. Various definitions of free speech have been formulated down through the years, depending on the circumstances of time and place. A traditional definition is the one Madison states: that the ability to transmit information through one's own person (free speech) or through the use of other material property (free press) needs special protection from government interference. See John O. McGinnis, *The Once and Future Property- Based Vision of the First Amendment*, 63 U. Chi. L. Rev. 49, 56-57 (1996). Later on, the concept was understood as being a social instrument in function of the democratic process: "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'" Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 S. CT. Rev 245, 255. In Europe, the right to freedom of expression is interpreted as the right to seek, receive and impart information and ideas without interference by public authority and regardless of frontiers.

n16. See Frederick Schauer, *Free Speech: A Philosophical Enquiry* 7-8 (1982).

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Freedom of speech is a media-independent principle. It originated in [*910] a printing press environment n17 and was elaborated on later for the purposes of radio and television. n18 Free speech clauses developed more or less simultaneously in the United States and Europe. The First Amendment to the American Constitution was adopted in 1791. Its significance evolved gradually through numerous Supreme Court interpretations. n19 In Europe, the idea of free speech was first suggested during the second half of the eighteenth century as a response to practices of a priori censorship during the Ancien Regime. n20 European freedom of speech theories were closely related to the ideas of enlightenment, natural law and philosophical liberalism. Officially, they were enacted for the first time in Article 11 of the "Declaration des Droits de l'Homme et du Citoyen" of 1789. n21 During the second half of the nineteenth century, freedom of speech was promoted by western European legislators as a principle of constitutional value, being a component of emerging liberalism and democracy.

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n17. McGinnis, supra note 15, at 91. He remarks that at that time the press was the (only) medium for publishing thoughts to a wide audience, whereas today, computer networks are fast becoming the most cost-effective way of delivering information. Id. at 100. See Ithiel de Sola Pool, *Technologies of Freedom* 21 (1983), mentioning that "in the total flow of media delivered information, the

relative part carried by newspapers, magazines and books has dropped from being virtually all of it to being only 18 percent of the words to which people expose themselves." Id.

n18. Broadcasting was subjected to specific free speech rules. See generally Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 Yale L.J. 1719, 1721 (1995). See also Andreas Kohl, *The International Aspects of the Freedom of Expression in Radio and Television*, 8 Rev. Dr. H. 129 (1975); M. Bum u>llinger, *Report on Freedom of Expression and Information: An Essential Element of Democracy*, in *Proceedings of the Sixth International Colloquy about the European Convention on Human Rights*, 44, 86-126 (1985).

n19. These Supreme Court interpretations resulted in, among other things, a ban on prior restraint, in strict procedural requirements for the regulation of speech and in a presumption against such restrictions. See also de Sola Pool, *supra* note 17, at 55-74.

n20. See Henri Blin, Albert Chavanne & Roland Drago, *Traite du Droit de la Presse* 4 (1969).

n21. "La libre communication des pensees et des opinions est un des droits les plus precieux de l'homme; tout citoyen peut donc parler, ecrire, imprimer librement, sauf a repondre de l'abus de cette liberte dans les cas determines par la loi."

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The struggle for freedom of speech was, from the beginning, embodied in a struggle for a free press. n22 The concept of a free press has the advantage of indicating some of the economic implications of the freedom of speech, especially now that information transmission is increasingly [*911] considered an economic activity. n23 It would be erroneous, however, to equate a free press exclusively with this component. n24 More interesting is the perception of a free press as the combination of freedom of speech and freedom of enterprise. Both freedoms should be interpreted as negative freedoms against the state. The institutional press enjoys the same liberties under the free speech provision as the individual. n25

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n22. See McGinnis, *supra* note 15, at 92-93. See also Eric Barendt, *Freedom of Speech* 67-77 (1985) (describing the relationship between free speech and the free press). Note that a free press did not mean a press free from all regulation, but only freedom from special rules not generally applicable to all enterprises. Only rules of the kind that were applied to other business enterprises could be applied to the press.

n23. McGinnis, *supra* note 15, at 55. "Information is more than ever seen as a product to be exchanged, formally and informally, and as a prime source of wealth in society.... Expressive man is economic man." Id. Free speech undeniably has an important economic component, requiring the state to remove all barriers to the free circulation of goods, including opinions. See Libois, *Vers une approche "communautaire" de la liberte de la presse*, in *Les Medias entre Droit et Pouvoir* 36-37 (B. Libois & G. Haarscher eds. 1995).

n24. In this respect, the freedom of enterprise has been misused by economical powers obstructing free speech rights of other market players.

n25. Special rules for the press, including certain immunities, often seem to consist merely of the application to the press of general free speech principles. The European Court of Human Rights has stated that the principles applicable to the freedom of expression are of particular importance to the press, as a purveyor of information and public watchdog. See Federal Republic of Germany v. Barthold, 90 Eur. Ct. H.R. (ser. A) at 4 (1985). See also Barendt, supra note 22, at 81-83; Sunday Times case, 30 Eur. Ct. H.R. (ser. A) at 40 (1979); Austria v. Lingens, 103 Eur. Ct. H.R. (ser. A) at 12 (1986). Note that according to the European tradition, journalists prefer to see their freedom to speak freely and to criticise government as being based on their position as ordinary citizens who simply happen to have access to the media, rather than being based on special constitutional protection. See Thomas Gibbons, Journalistic Freedom and Human Rights, in Legal Problems of the Functioning of Media in a Democratic Society 9, 11 (Council of Europe ed. 1995).

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The continental European tradition of statute law has resulted in the concept of free speech being strongly incorporated in the text of national constitutions. Statutory laws guarantee the freedom to express one's opinion on every matter, except that one can be punished for abuses to this freedom. The principle is sometimes repeated more specifically for the press, resulting in favorable regimes for press offenses. n26 Besides the relevant constitutional provisions, a rich protection of the most diverse expressions of the human spirit is safeguarded on the international as well as on the regional level. n27

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n26. See Bernd Holznagel, Rundfunkrecht in Europa (1996).

n27. The most important international provisions in this respect are to be found in Article 19 of the Universal Declaration of Human Rights, accepted and proclaimed by Resolution 217A (III) of the General Assembly of Dec. 10, 1948: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Id. See also Article 19 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by Resolution 2200 A (XXI) of the General Assembly of December 16, 1966. Entry into force: March 23, 1976:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be

subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For the respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id.

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[*912] The freedom of speech is a compound freedom. It consists of the freedom to foster an opinion, the freedom to impart it, the freedom to distribute and transmit information or ideas and the freedom to receive them, n28 all free from state interference. n29 As such, the freedom of speech evolved from being just a freedom of distribution to a complete freedom of communication, extending from the origin of the message up to its final destination. n30 Various interpretations of free speech are possible. In the United States, a narrow conception requires the state to refrain from interference with individual expression. In Europe, however, a broader interpretation prevails, based on the idea that the state should prevent - through active intervention if necessary - communication from being dominated by particular concentrations of power. n31 A parallel distinction is made between the "negative" freedom of speech (the liberty to speak and write, free from state control and regulation) and the "positive" freedom (the demand for the provision by the state of speech facilities or even of a positive regulatory framework). n32

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n28. The freedom of reception has been explicitly recognized by the European Court of Human Rights, Sunday Times, 30 Eur. Ct. H.R. (ser. A) at 40 (1979).

n29. Note that the German constitution distinguishes three slightly different components to free speech: the freedom of opinion, the right to inform oneself and the freedom of the media. See Bernd Holzmagel, The Constitutional Protection of Freedom of Expression, in Legal Problems of the Functioning of Media in a Democratic Society 75, 76 (Council of Europe ed. 1995).

n30. See Gerard Cohen-Jonathan, La Convention Europeenne des Droits de l'Homme 451 (1989). The three components of free speech are clearly revealed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and by the International Covenant on Civil and Political Rights. Note that the three partial freedoms make an ideal combination together but that they may just as well exist individually. It is not so long ago since the freedom of reception was for example well established in most western European countries, without there being any freedom of transmission under the monopoly of public broadcasting organizations.

n31. Gibbons, supra note 25, at 12. He states: "the broader conception of freedom of communication, however, implies plurality of information, a multiplicity of voices which encourages a diversity of expression." Id. at 18.

n32. Barendt, supra note 22, at 78. This distinction seems to be typical for Europe. Id. See also Holzmagel, supra note 29, at 83-84. Holzmagel calls this the basic right's "subjective" and "objective" side. Id.

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The freedom implies negative as well as positive state obligations in Europe. In principle, governments should not interfere with rights of [*913] free speech, though this abstention duty is not absolute. Freedom of speech may be subjected to restrictions. n33 Legitimate interferences with free speech derive from the prevention of undemocratic speech (harmful to the public order or to private interests) or from the need to preserve diversity. n34 Hence, free speech implies a positive duty of care for public authorities to secure an adequate protection of this freedom. This idea is related to the general evolution of the "socializing" of human rights and freedoms in Europe. n35 The duty of care is based on Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), n36 requiring the state to "secure" the Convention rights to everyone within it's jurisdiction. In certain cases it may indeed be necessary for the state to take positive action with a view to effectively guaranteeing these rights. n37 In the field of free speech, the duty of care has been recognized by the European Court of Human Rights, at least in the abstract. n38

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n33. Council of Europe Steering Committee on the Mass Media: Consultant Study on the impact of new technologies on human rights and democratic values, 13 CDMM(95):

While freedom is in itself inapplicable because of its absolute nature, society has to define the conditions for making it operational, in other words for its implementation. This definition, which outlines and limits the freedom, results from striking a balance between rights and freedoms, sometimes complementary, sometimes competing, in the general interest. But this definition is also likely to evolve, given that it is associated with a given state of society.

Id.

Exceptions to free speech rights are not encoded in the First Amendment. Instead, they are to be found in the doctrine of the Supreme Court defining the extent of free speech protection. The European framework for government restrictions to free speech is enacted in Article 10, para. 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

n34. See Holzmagel, supra note 29, at 87. The latter are treated separately as part of the duty of care.

n35. This relates to the evolution from a liberal, individual and classic freedom/right to a social and cultural right. See Dirk Voorhoof, Critical Perspectives on the Scope and Interpretation of Article 10 of the European Convention on Human Rights, 10 Council of Europe Mass Media Files, 57 (1995). But see Barendt, supra note 22, at 79-80, referring to the analysis of Hohfeld who categorises all legal relationships into the correlations right-duty,

liberty-no right, power-liability and immunity-disability. Since the freedom of speech is only a liberty, the state has no right to intervene. But nobody has a duty to listen, nor is the state under a duty to provide facilities for speech. Id.

n36. European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, Nov. 4, 1950.

n37. Rommelfanger v. Federal Republic of Germany, App. No. 12242/86, 62 Eur. Comm'n H.R. Dec. & Rep. 151 (1989).

n38. See Nederlandse Omroepprogramma Stichting v. The Netherlands, App. No. 13920/88, 71 Eur. Comm'n H.R. Dec. & Rep. 126 (1991) (with respect to other fundamental rights and freedoms). The Court has effectively stressed that the Convention imposes positive obligations on states to safeguard rights, and not merely to refrain from interference. See also Belgium v. Marckx, 32 Eur. Ct. H.R. (ser. A) at 15 (1979), in respect of privacy under Article 8; Austria v. Plattform <um A>rzte f<um u>r das Leben, 139 Eur. Ct. H.R. (ser. A) at 4 (1988), in respect of peaceful assembly under Article 11; B<um u>llinger, supra note 18, at 64- 80. The same idea was accepted by the United States Supreme Court. See Associated Press v. United States, 326 U.S. 1 (1945). For the most important Council of Europe policy documents containing arguments for positive state action with regard to freedom of expression, see Voorhoof, supra note 35, at 56-57.

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[*914] Both aspects of this double state duty, to allow activism while using restraint when necessary, serve the common goal of facilitating autonomous communication by private individuals. n39 They extend to all media, including the information superhighway, and in particular, the Internet. All government interference with free speech is embodied in media law or communications law. n40

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n39. See De Sola Pool, supra note 17, at 18.

n40. Note that such particular communication legislation often serves a series of alternative policy goals: reinforcement of national sovereignty and cultural identity, universal access at reasonable cost, competition in facilities, products and services, etc. The presentation of these communication policy initiatives may mask industrial policy interests, thereby increasing the vulnerability of the public's primary interest as embodied in the funding justifying grounds for free speech. The public's primary interest may be the continued existence of the community from which it is derived, according to Shawn W. Yerxa & Marita Moll, Commodification, Communication, and Culture: Democracy's Dead End on the Infobahn, 16 Media Law and Practice 132, 133 (1995). Governments seem to have the tendency to use media regulations to disguise policy action in other fields, for example, employment or national competition policy. It seems to be a recurring phenomenon that new regulations, presented and defended as helping viewers and customers, are in fact a product of private self-interest, and often not good for the public at all. Industry often seeks government help in the marketplace, invoking public spirit justifications for self-interest ends. See Sunstein, supra note 5, at 1767.

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The information superhighway may still be under construction, but the Internet is already operational and rapidly expanding. European countries try to stay in control of Internet content, but are highly criticized by human rights groups for "illegally" interfering with free speech rights. In order to find out if the information superhighway - as an emerging new medium - is entitled to full free speech protection, an analysis of current free speech legislation is required. This study will be limited to the European context. The actual protection of free speech is studied in the first section, followed by a discussion of the restraints on undemocratic speech and finally the preservation of diversity. The original reasons for the current free speech legislation are analysed in each section, before any argument concerning the amendment of these rules is developed. The purpose is to find out exactly which objectives are to be achieved by free speech legislation. As such, these reasons have not changed with the introduction of new media, and there is no reason to believe that they will be any different for the information superhighway. It is nevertheless important to keep the original reasons in mind, as they should be the starting point for determining the future role of free speech [*915] legislation on the information superhighway. The adoption or abolition of legal rules should always be seen in the light of the original reasons for these rules.

III. ANALYSIS

A. Protection of Free Speech

Speech may have to be restricted for democratic reasons or in order to secure the diversity of media content. However, the starting point of any communication or media legislation is the fundamental right of freedom of speech. This should be no different for the information superhighway. The application of free speech rights to the information superhighway involves an important process of constitutional interpretation. We will determine why European governments started protecting free speech and analyse whether the original philosophical and political reasoning behind fundamental rights can be interpreted in light of this new technology. n41 In this section, we inquire if there is still a need for free speech protection on the information superhighway, and if so, what the appropriate legislation should consist of.

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n41. Note however that their judicial value for enforcing free speech rights on the information superhighway is not unlimited. Legal arguments of a historical and institutional nature also have a role to play in the constitutional interpretation of free speech rights. See Barendt, supra note 22, at 2.

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B. Background to Free Speech Protection

Free speech is an evolutionary and dynamic concept. It has been subject to various interpretations depending on the prevailing ideology in a given time and place. Three main philosophical theories have been invoked in support of free speech rights: the argument from truth, the natural rights theory and the

argument from democracy. n42 We will see, however, that the last theory, the argument from democracy, is the only legitimate one.

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n42. See generally K^um u>bler, The Protection of Human Dignity and Privacy under Media Law, in Legal Problems of the Functioning of Media in a Democratic Society 89, 90- 91 (Council of Europe ed. 1995) (describing this evolution in a European context).

-End Footnotes-

The argument from truth was soon discovered to be inappropriate for supporting a free speech principle. Defenders of this idea were convinced that free speech was a necessary instrument for discovering divine truth. n43 However, there are many examples of speech, the truth of [*916] which cannot objectively be tested, such as pornography. Moreover, the publication of true statements may sometimes be more harmful than beneficial to society, e.g. in the case of military or industrial secrets. It is also unlikely that the possibilities for free speech on the information superhighway will bring us any closer to the truth.

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n43. Note that this philosophical underpinning of the freedom of speech was less studied and developed in Europe than in the United States. See generally J.S. Mill, On Liberty, (David Spitz ed., W. W. Norton & Company 1975); John Milton, Areopagitica: A Speech for the Liberty of Unlicensed Printing (1644) (Douglas Bush ed., Penguin Books 1977). According to these theories, forms of speech not useful to the discovery of truth should be suppressed. Once the goal of divine truth is reached, the liberty can be discarded altogether. The argument rests on the assumption that the truth of certain beliefs can be determined in the long run, or at least that it is possible to distinguish more or less between truth and falsehood. Interesting in this respect is Schauer, supra note 16, at 25: "allowing the expression of contrary views is the only rational way of recognising human fallibility, and making possible the rejection or modification of those of our beliefs that are erroneous." Id. Prohibition of speech which might be true is undesirable, since the opponents of government measures should be free to challenge these measures. Government can then be confident that its policies are right and that it is appropriate to legislate. See Mill, supra note 43, at 81. False speech should not be suppressed either, because then people holding true beliefs would not be challenged any longer or forced to defend their views. See also Barendt, supra note 22, at 9-14 (enumerating the most important criticisms to this 'argument from truth').

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Equally inappropriate is the related argument that all truth is relative and that ideas can only be judged in the competition of the marketplace. n44 The free marketplace of ideas is a metaphor representing a forum for public discussion where citizens meet as equals, no idea is suppressed and all viewpoints are heard. It is hard to imagine what a well- functioning marketplace of ideas would look like in practice. n45 The Internet may bear some resemblance to it, but even on the Internet not all ideas or all users are treated equally. The "real" speech market needs to be regulated to have speech effectively

communicated, if only to prevent simultaneous speech on the street, in public meetings, or on the airwaves. n46 Hence, the marketplace of ideas is no more free than any other "free market."

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n44. Schauer, supra note 16, at 15. "The best test of truth is the power of the thought to get itself accepted in the competition of the market" citing Judge Holmes, in Abrams v. United States, 250 U.S. 616, 630-1 (1919). Id.

n45. R. Randall Rainey & William Rehg, The Marketplace of Ideas, the Public Interest, and Federal Regulation of the Electronic Media: Implications of Habermas' Theory of Democracy, 69 S. Cal. L. Rev. 1923, 1937 (1996) (explaining that this theory assumes that commercial market forces are ideologically neutral, that the marketplace of ideas is open to diverse and controversial issues, that the increase in the number of sources will provide by itself an increase in viewpoint diversity and that an unregulated telecommunications market will respond most effectively to the public's desire for public affairs information).

n46. De Sola Pool, supra note 17, at 143. "A market is not something that happens by itself. It is something crafted by laws; without them it cannot exist." Id. See also Rainey & Rehg, supra note 45, at 1942 (stating that the communications marketplace is unambiguously a creature of the state).

-End Footnotes-

The argument from natural rights is also an inadequate basis on which to ground free speech rights. This concept considers free speech to be a natural, exclusive right of the citizen, being an integral aspect of [*917] each individual's right to self-development and fulfillment. n47 However, other fundamental rights, like the freedom of association or the freedom of religion also contribute to an individual's right to self-development and fulfillment. n48 Moreover, it still needs to be proven that the participation in an Internet newsgroup concerning, for example, neo-nazism or child pornography, can be qualified as an integral aspect of an individual's right to self-development and fulfillment.

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n47. Barendt, supra note 22, at 14-20. Note that freedom of speech was also referred to as being an aspect of the individual's property right to his information. See McGinnis, supra note 15, at 64-65 (analysing the link between Lockean principles of property and the freedom of speech, and stating that Madison himself understood freedom of speech as an inherent property right of individuals).

n48. See Ronald Dworkin, Taking Rights Seriously 266-78 (1977) (pointing to the natural right to "human dignity and equality of concern and respect," not distinguishing freedom of speech from other fundamental rights). See also Barendt, supra note 22, at 16 (remarking that unlimited freedom may well be contrary to the respect for human dignity, hence the restrictions imposed by libel and obscenity laws).

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The only suitable ground for a contemporary free speech theory is the argument from democracy. Free speech should be protected, in newspapers, on radio, television, and on the information superhighway, in so far as it contributes to genuine democracy. The democratic aim of free speech has been explicitly recognised by the Council of Europe. n49 Democracy represents the ultimate procedural attempt to joint decision-making. The idea is that universal participation through reflective and deliberative debate about possible courses of action should guarantee the welfare of all. n50 The decisive criterion for true democracy therefore is the freedom to oppose decisions of the majority and to work towards a change in the majority opinion. n51

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n49. European Convention on Transfrontier Television, March 15, 1989, preamble: "the freedom of expression and information, as embodied in Article 10 of the ECHR, constitutes one of the essential principles in a democratic society and one of the basic conditions for its progress and for the progress of every human being." Id.

n50. Democracy does not equal self-determination, rather co-determination. Many authors while elaborating on self-regulation are in fact referring to this concept of co-regulation, e.g., Sunstein, supra note 5, at 1762.

n51. Note that in the democratic tradition, the power of government should be limited, and since the communication of ideas is crucial to that power, government control over communication should also be limited. This is especially relevant in the new democracies of Eastern Europe. See Gibbons, supra note 25, at 10. Free speech can threaten the interests of the state's rulers more immediately and more substantially than, for example, material production. Therefore, rulers have a greater incentive to suppress and regulate these rights, so special protection from government interference is needed. This even holds for true democracy. See also Jorg P. M<um u>ller, Fundamental Rights in Democracy, 4 Hum. Rts. L. J. 131, 134 (1983); stating that even in a democracy, "the majority decides for everybody, i.e. for the minority." Id. Hence, the majority is capable of oppressing minorities by reducing their freedom of expression. Fundamental rights impose the necessary restrictions to unlimited democracy. They take precedence over majority decisions and overrule them. Id. at 134-35.

-End Footnotes-

[*918] Freedom of speech is an indispensable component of democracy - no democracy can exist without free speech. Careful study of the free speech doctrine reveals that the legislator and jurisprudence are not so much protecting the expressions themselves, as their underlying philosophy: the western democratic ideal. n52 It is that aim that needs protection, not the expressions contributing to that aim. n53 The best illustration of this is the fact that expressions undermining the democratic ideal, for example, racist or hate speech, are not free at all. Free speech turns out to be merely an instrument, a helpful tool for reaching some higher democratic aspiration, existing only to achieve that purpose.

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n52. This underlying objective may vary from the protection of democracy to the promotion of individual self-development, the uplifting of the human being or the progress of humanity. All the values underlying free speech theories are incontestably important, but putting the emphasis on one of them would manipulate the actual implementation of free speech rights in another direction. The democracy rationale is the most cited in Western Europe and the United States.

n53. Fish, supra note 4, at 112. In this respect, some instrumentalists even claim that the free speech principle does not exist. "Free speech principles don't exist, except as a component in a bad argument in which such principles are invoked to mask motives that would not withstand close scrutiny." Id.

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Free speech serves the democratic interests of all citizens, both speakers and recipients. n54 The speaker's interest in free speech is closely linked with his fundamental right to self-development. It lies in the ability to bring ideas and propositions to the attention of a wide audience, and more importantly, in the power to criticise and ultimately vote out the government. n55 In the recipient's point of view, the most fundamental interest in protecting free speech is the need to be informed. n56 Democratic decision making requires a certain degree of information be made available, so that citizen's are exposed to all representative views in society. n57 This exposure allows people to decide for themselves what [*919] is right and what is wrong.

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n54. The protected activities of the communicator include the expression and dissemination of opinions. The freedom of reception has been explicitly recognised by the European Court of Human Rights, See Sunday Times, 30 Eur. Ct. H.R. (ser. A) at 40 (1979). See also Barendt, supra note 22, at 81-83.

n55. McGinnis, supra note 15, at 50. See also Barendt, supra note 22, at 83 (relating free speech to the right to equality) "all people should have equal opportunities to present their views, free speech should not be the privilege of the rich and powerful." Id. He further states that there can be no real free speech without the "recognition of claim-rights for persons wishing to speak and ... corresponding duties to afford them facilities and grant them equal opportunities for the exercise of these rights." Id.

n56. Muller, supra note 51, at 133. See also Rainey & Rehg, supra note 45, at 1930. There should be substantial control by as many as possible over the process of political decision-making. Id.

n57. Barendt, supra note 22, at 22. The freedom to receive is explicitly covered in Article 10, ECHR. The Parliamentary Assembly confirmed this in Recommendation 854 of February 1, 1979: "Parliamentary democracy can function adequately only if the people in general, and their elected representatives, are fully informed." Id. In the United States, recipients' interests are frequently taken into account in interpreting the First Amendment. Id. at 81.

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It is clear that a good reason for protecting free speech is the preservation and promotion of western democracies. This original underlying philosophy of the right to free speech remains relevant to the information superhighway. Free speech should be safeguarded on an independent media basis. The next question is whether there is a need for additional legislation to protect free speech on the information superhighway or whether the current rules are sufficient for that purpose.

C. Legal Instruments Protecting Free Speech

Originally, freedom of expression was formulated as a protection against oppression by the government. Historically, the government and its authorities were seen as the main threat to free speech. n58 Merchants exploiting a free press had to protect it against state intervention. For them, the best press law was no press law. n59 This duty of non-interference is still the main starting-point of all free speech legislation. It is emphasized in national as well as international legal texts, even if it is not absolute. The number of exceptions has grown with the introduction of each new medium.

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n58. See McGinnis, supra note 15, at 57; stating in this respect that the "function of (free speech) the First Amendment is to prohibit regulation of an important [property] right threatened by the government." Id.

n59. Voorhoof, supra note 35, at 54. "The best press law is no press law; the best government interference is no interference; the best State intervention with regard to the freedom of expression and information is no State intervention." Id.

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The European model for the protection of fundamental human rights is based on the existence of two distinct legal orders, namely: the legal order of the European Union ("EU") n60 and the legal order established by the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") within the Council of Europe. n61 The involvement of the Council of Europe and the EU with the industries of print and electronic media is fundamentally different in character. n62 The aim of the Treaty of Rome n63 was to establish a common market for goods and services, including broadcasting services. The Council of Europe on the other hand, by way of the ECHR, aims to guarantee the free flow of information, as a prerequisite to an open, democratic society. The EU as such is not a party to the ECHR. Still, the ECHR has an effect within the legal order of the EU. n64 Fundamental rights including those guaranteed by the ECHR are an integral part of the general principles of law, the observance of which is ensured by the European Court of Justice. n65 Hence, EU legislation on broadcasting, cable distribution or online services must ensure freedom of speech.

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n60. The European Union is a political and economic transnational organisation of European countries, characterized by a distribution of

lawmaking powers between the Union and the Member States. Its legislative branch is composed of the European Commission, the European Council of Ministers and the European Parliament. The European Court of Justice is responsible for interpreting EU law and for resolving disputes concerning the interpretation of Community Treaties. See generally P. Kent, *Law of the European Union* 10-88 (1996); P.S.R.F. Mathijssen, *A Guide to European Union Law* (1995) and Christopher Harding & Ann Sherlock, *European Community Law* (1995).

n61. Koen Lenaerts, *Fundamental Rights to be Included in a Community Catalogue*, 16 *Eur. L. Rev.* 367, 371-372 (1991). This legal order has essentially a supervisory role, controlling the way in which member states comply with their ECHR obligations, but exercising no normative powers of its own. *Id.* See also Dirk Voorhoof, *The Media in a Democratic Society, Legal Problems of the Functioning of Media in a Democratic Society* 40-41 (Council of Europe ed. 1995) (describing the procedure in case of violation of the Convention by Member States). Still, the ECHR is a binding instrument for legislators of the Member States, as was explicitly confirmed in Article 1 of the Convention: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." Supervision of the application of the ECHR is the responsibility of the organs of the European Convention: the European Commission of Human Rights, the Committee of Ministers and the European Court of Human Rights. *Id.*

n62. An interesting illustration thereof is their respective handling of the issues concerning transfrontier broadcasting. The problem was regulated in the European Convention on Transfrontier Television (*Television without Frontiers*), March 15, 1989; and in Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities, 1989 O.J. (L298) 23. The Convention has a strong cultural and human rights bias, and was developed under the auspices of the Council of Europe. See Holznagel, *The European Convention on Transfrontier Television, Legal Problems of the Functioning of Media in a Democratic Society* 206-207 (Council of Europe ed. 1995); Alfonso Sanchez-Tabernerero, *Media Concentration in Europe* 206-207 (1993). The directive was developed by institutions of the European Union, concentrating on broadcasting as a purely commercial service. Most provisions of the Convention correspond to the Directive, the main difference being the applicable method of enforcement. See also B<um u>llinger, *supra* note 18, at 46. "The economic aspect of a free market and the democratic aspect of a free marketplace of ideas are related and interconnected but not identical." *Id.*

n63. *Treaties Establishing the European Economic Community (EEC) and the European Atomic Energy Community (Euratom)*, Rome, Mar. 25, 1957 (visited Apr. 16, 1998) <<http://europa.eu.int/abc/obj/chrono/40years/7days/en.htm>>.

n64. This was explicitly recognized by the EU institutions. See Rideau, *L'influence du droit communautaire sur la protection des droits fondamentaux de la personne dans les états-membres, Droit communautaire et protection des droits fondamentaux dans les états-membres*, 6-7 (L. Dubuis ed. 1995). For an overview of jurisprudence of the European Court of Justice, see generally Voorhoof, *supra* note 61, at 42-43.

n65. This was confirmed in the preamble of the EC Directive 89/552/EEC in which the free distribution of television services is considered to be a specific application in community law of the freedom of expression as

enshrined in Article 10 para. 1 of the ECHR. The principle is confirmed as well in the new Treaty on the European Union (Maastricht, Feb. 7, 1994; amending the Treaties of Rome and the Single European Act so as to integrate the existing Communities fully under the common framework of the EU. Title I, Article F(2)): "the Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms." Id.

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[*921] The most important provision for European free speech protection is Article 10, ECHR. Its aim is to protect the right of everyone, regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in the text of the article: n66

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n66. Declaration on Freedom of Expression and Information of the Committee of Ministers, Apr. 29, 1982.

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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.

Article 10, ECHR provides the basis for media and information law within the Council of Europe and its member states. It safeguards every kind of expression, opinions, political speech, factual data and even commercial speech in all of its forms. n67 The protection of Article 10 is equally applicable to information or ideas that offend, shock or disturb the state or any sector of the population. n68 It is understood to cover all technical means of communication. n69 As such, there is no need for any additional legislation making free speech applicable to the information superhighway.

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n67. Voorhoof, supra note 61, at 35.

n68. Handyside, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

n69. Voorhoof, supra note 61, at 37-43. Meaning at least the press, radio, television, cinema.

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Thus, freedom of speech is already protected on the information superhighway, at least in theory. However, given the democratic function of free speech, there seems to be a practical problem. The fundamental human right to freedom of speech should enable all citizens of a modern democracy to speak freely to all others, who should in turn receive the message without government interference. It is crucial for a democratic society to cater to such a free flow of opinions and ideas, providing its citizens with pertinent social and political information. The circulation of such information currently happens by way of traditional media: the printing press, radio and television. These are almost universally available to users but access to speakers is only granted on an arbitrary [*922] base. n70

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n70. Access for speakers to the printing press is possible by way of letters to the editor, or by way of editorials. There is, however, no right to have them published. It is even more complicated to gain access to radio and television stations. There is a limited right of reply in cases where television transmissions constitute a personal attack or an intrusion into private life. But there is no right to free broadcast of speech. See Article 8 Convention on Transfrontier Television and Article 23 Directive 89/552/EEC. To users, all of these media are easily accessible. Penetration of television receivers in households amounts to 99.4 percent of total households in the United States and 92.4 percent of total households in the EU. See also Organisation for Economic Co-Operation and Development, 1997 Communications Outlook 1, 90. Personal Computers, however, only have a penetration rate of 25.5 percent of the American households an average penetration of 20.4 percent in the United Kingdom, Ireland, Spain, Netherlands, France, Germany, Italy, Belgium and Denmark; Organisation for Economic Co-Operation and Development, 1997 Information Technology Outlook 1, 88.

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The information superhighway can offer a solution in this matter. n71 To a certain degree, the answer lies in the Internet. However, for the information superhighway to fulfill its democratic function in society, an indispensable condition is universal access to the network. People need to have access to terminals and connections, and they need to receive the appropriate education in order to use them. Only through universal access will the information superhighway truly improve democracy. n72

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n71. Martin B<um u>llinger, Kommunikationsfreiheit im Strukturwandel der Telekommunikation, 65 (1980). In a broadcasting context the access of users was limited to the receiving side. The information superhighway offers every user a double access to information sources, since he can act as a sender or as a receiver. In this respect, it is said to promote democracy and increase the

political participation of citizens. Id.

n72. Final Report from the High Level Expert Group on the Social and Societal Aspects of the Information Society: Building the European Information Society for Us All (1997). "Information access systems must be developed to be geared to the needs of the entire population. In other words, remote-access information systems must be user- friendly, guarantee universal access, and enable individual enquiries." Id.

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The need for additional free speech legislation on the information superhighway is related to the need for universal access. A growing gap between the information rich and the information poor should be avoided at all cost. n73 In the short term, legislative measures need to be enacted, providing access to the information superhighway for every citizen at a reasonable cost. Such a guarantee should be considered an extension of the already existing universal service obligations in the telecommunications field. It should be noted that access to the Internet is already, at least partly, an element of the universal service obligation as it exists in [*923] the EU. Indeed, universal service is comprised of, among other things, the provision of voice telephone service via a fixed connection, which will also allow a fax and modem to operate. This means that users are given the possibility of accessing all services that can be provided over today's telecommunications network, including the Internet. Provided, of course, they have a computer and a subscription with an Internet service provider. n74

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n73. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, Universal service for telecommunications in the perspective of a fully liberalised environment, Brussels, 13.03.1996, COM(96)73 final. The European Commission is very aware of this problem, taking into account the need to avoid a "two-tier society," divided between those who have access to the new technologies and are comfortably using them and those who are excluded from fully enjoying their benefits. Id.

n74. Id.

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All citizens should be able to express themselves freely through the information superhighway in order for democracy to be complete. Unfortunately, abuses of free speech undermine democracy, and must be eliminated. That is why the right to freedom of speech was restricted from the very moment western governments started protecting it. That is also the reason why it should remain limited in the future. The question is to what extent the original motives for restricting free speech still make sense on the information superhighway. The answer to that question should be the starting point for any further government intervention.

D. Restraints on Undemocratic Speech

Despite great opposition, governments are currently attempting to limit free

speech on the Internet. This is actually not surprising, since free speech has never been completely unrestricted. In the course of time speech has been subjected to various restraints. An important category of these speech limitations is studied in this section and concerns the prohibition of undemocratic speech. In Europe, other free speech limitations exist which are related to the need for preserving the diversity of media content. These are treated in the next section.

Freedom of speech is protected in order to safeguard and advance the democratic ideal. Hence, it is clear, that the principle is not applied to speech that fundamentally contradicts the basic egalitarian principles and other values of a free and democratic society. n75 It might be stated as a general rule that when forms of speech strike at the heart of values deeply cherished in a free and democratic society, doctrinal space for regulation opens up. Indeed, certain expressions may, instead of helping to realize the fulfillment of democracy, undermine or endanger that realization. Free speech may be restrained so as to protect public order: offences against public decency, insults to the head of state, and revealing national or military secrets are all prohibited. Alternatively, certain expressions should be banned because they infringe subjective rights of individual people, for example, slanderous or libelous speech. Free speech restrictions are part of media law, and were introduced at the very begin [*924] ning of free speech regulation. They were later expanded on due to the impact of radio and television messages on public opinion, and because of the immediacy of the information disseminated over the airwaves.

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n75. Gibbons, supra note 25, at 16. "In some cases, the protection of other rights may be more important than free speech." Id.

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Undemocratic speech is not favored by the courts. It has little (or no) constitutional value and thus receives little (or no) constitutional protection. n76 On the contrary, undemocratic speech is prohibited and punished. Examples of undemocratic speech are expressions promoting racial hatred, or hate speech in general. n77 The purpose of protecting minorities from the willful promotion of hatred against them is a constitutionally justifiable limitation on the freedom of expression. n78 Expressions causing (racial) hatred are clearly not contributing to the principle of democracy. Hence, hate propaganda cannot be considered as a legitimate form of speech.

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n76. Elena Kagan, Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 472 (1996).

n77. Barendt, supra note 22, at 10. "A society is arguably entitled to take the view that for the foreseeable future racial harmony is such an important goal that an absolute tolerance of free speech is too great a luxury." Id.

n78. Mahoney, supra note 75, at 803.

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A general framework for free speech restrictions in Europe is laid down in Article 10, ECHR, which contains the general conditions for all free speech restrictions, irrespective of the medium they are applied to. According to the text, governmental restrictions to free speech are legitimate only if three cumulative conditions are fulfilled: state interferences restricting free speech must be prescribed by law, they must serve a legitimate purpose and they must be necessary in a democratic society. n79 Firstly, the restricting measure must be a statutory or regulatory text qualified as law. n80 The law in question needs to be transparent and precise enough for the citizen to be able to have an indication of the rules applicable to the case and to foresee the consequences that may result from a given action. n81 Secondly, public authorities need to indicate the aim of the restricting measure. The legitimate purposes are exhaustively enumerated in Article 10, ECHR. Thirdly, the restraints on free speech are necessary in a democratic society. They need not be "indispensable," yet they should be more pressing than mere "normal" or "use [*925] ful" measures. n82 Restrictions must not go beyond their legitimate purpose, the proportionality doctrine being a fundamental element in the Court's control mechanism. Every restriction to free speech should be proportionate to its legitimate aim. n83

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n79. Voorhoof, supra note 61, at 56. "If one of these conditions is neglected, the restricting condition, rule or sanction with regard to the freedom of communication must be regarded as an infringement of Article 10 ECHR." Id. Moreover, all free speech restraints must be applied without distinction. Any discrimination (e.g. based on nationality) in implementing a restrictive measure--even if conforming to the enumerated purposes--is strictly forbidden. Id.

n80. European Commission of Human Rights, X v. United Kingdom, 16 Eur. Comm'n H.R. Dec. Rep. 32 (1979). See also European Commission of Human Rights, X v. Switzerland, 9 Eur. Comm'n H.R. Dec. Rep. 40 (1978). The restricting rule need not necessarily be a formal law, directly emanating from Parliament.

n81. See, e.g., Sunday Times, 30 Eur. Ct. H.R. (ser. A) at 31 (1979).

n82. Article 10, para. 2, ECHR. The member states have a certain discretionary power here, however this power is not unlimited. Their exact margin of discretion depends on the purpose of the restriction in question and on the restricted activity. Id. The legitimacy and the proportionality of their interference are examined by the Commission and the Court. Id.

n83. Voorhoof, supra note 61, at 60-63 (extensively on the proportionality principle in this respect). Therefore, the pursuit of the aims mentioned in Article 10, para. 2 has to be weighed against the degree of interference with the applicant's freedom of expression. Id. In case of disagreement or dispute, it is up to the national state to prove the need for free speech limitation and to justify it in light of Article 10, para. 2 ECHR. The European Court of Human Rights evaluates the government measures, taking into account the facts and circumstances of the case. In judging which restrictions are admissible, the Court also takes into consideration the particular situation of the person exercising the right of freedom of expression and the duties and

responsibilities attached to that situation. See also Hadjianastassiou v. Greece, 252 Eur. Ct. H.R. (ser. A) at 4 (1992).

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Article 10, ECHR is applicable to all media, including the information superhighway. Hence, restraints to free speech on the information superhighway can be enacted as exceptions to the government's principal duty of non-interference. n84 Most free speech restraints take the form of market access conditions or market behavioral rules. They are often directed at the institutional players in the press, broadcasting and information markets. n85 The market access rules are closely related to the principle of ensuring diversity, and are treated in the next section. The market behavior obligations prevent speakers from abusing their rights which disrupt public order or injure other people's rights. Governments may invoke these obligations to prevent hate speech, racist speech or pornography on the Internet. Public authorities should, however, always bear in mind that freedom of speech should not be curtailed arbitrarily. Exceptions to the principle of freedom of expression must be narrowly interpreted. n86 The non-application of constitutional guarantees may not [*926] reach beyond the purposes of these restrictions. n87

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n84. If a government attempts to transpose these rules onto the information superhighway, it should first do what it has done with other new forms of communication: understand the technology intended to be regulated. See James D. Nahikian, Learning to Love "the Ultimate Peripheral"--Virtual Vices like "Cyberprostitution" Suggest a New Paradigm to Regulate Online Expression, 14 J. Marshall J. Computer & Info. L. 779, 784 (1996).

n85. Nevertheless, note that some free speech restraints are directly imposed on the individual citizen. For example, intellectual property legislation prohibiting citizens from abusing the work of their fellow citizens, or the legislation concerning public decency and public order.

n86. See European Court of Human Rights, Sunday Times Judgement of April 26, 1979, Publications of the European Court of Human Rights, Series A, vol. 30.

n87. B<um u>llinger, supra note 71, at 60. Restrictions must be applied in a spirit of pluralism, tolerance and broadmindedness. Id.

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Expressions clearly going against any of the fundamental principles of free speech are never entitled to any legal protection. The ban on such speech should be media-independent, extending itself to both old and new media, including the information superhighway. n88 In most jurisdictions, the ban on offensive speech is formulated in sufficiently general terms. There is no need then for additional government interference in this respect on the information superhighway. Other specific speech bans which are linked to specific media can be extended by way of analogous legislative provisions to cover the Internet. In short, the same speech restricting standards should apply to the information superhighway as are already applicable to other media.

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n88. Dawn L. Johnson, It's 1996: Do You Know Where Your Cyberkids Are? Captive Audiences and Content Regulation on the Internet, 15 J. Marshall J. Computer & Info. L. 51 (1996). Free speech protection always goes together with free speech restriction, even on the newest media. Id. It should be mentioned that even if indecent, harmful, racist and other undemocratic speech is available on the Internet, it is not there just for the taking. An interested user has to make significant efforts to gain access to it. He or she must join one of the respective newsgroups, search for the information required, pay for it, download it, and possibly run a viewer to look at it. Unlike radio or television messages, the user doesn't receive such messages without requesting them. This high degree of user control should be taken into account when developing speech bans for the Internet or the information superhighway. Id.

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Unfortunately, the complexity on undemocratic speech on the information superhighway is more complicated than that. This prohibition is illustrated by some current legal difficulties with the Internet. The problem is that the Internet is a global communications network, while standards for intolerable speech are established on a regional or national basis. The problem was apparent during the negotiations for the United Nations International Covenant on Civil and Political Rights. n89 Evidently, each state will apply its own values when regulating content and services on the information superhighway. n90 Soft-core pornography, for example, might be generally acceptable in the Netherlands, but is illegal in Saudi-Arabia. Revisionist speech is forbidden by law in Germany, yet it is permitted in California.

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n89. See B<um u>llinger, supra note 18, at 54. This wide international agreement has to be applied to many states, each with a different concept of democracy.

n90. See Crago, supra note 14, at 478-487 (discussing the problem of the jurisdiction of European Member States to legislate, prescribe, and enforce their judgements concerning Internet content).

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Each government has its own categories of prohibited speech, but if such expressions are legal abroad, they can easily be made available from there. The only solution seems to be an international harmonisation of minimum standards for unacceptable subject matters, as exists [*927] already for child pornography. There may not always be a need for additional legislative measures in order to ban undemocratic speech from the information superhighway. However, governments should work together on the common legal framework needed to enforce such measures.

The enforcement of the ban on undemocratic speech is also complicated by other reasons. First, it is almost impossible to monitor all of the communication circulating through the information superhighway, and second, legal pursuits are difficult, particularly where the illegal message originated abroad. n91 Traditional criminal lawsuits are bound to fail when a speaker

promoting child-pornography or neo-nazi theories is residing abroad, is operating under a false name, is posting anonymously, or is hiding in seemingly uncontroversial newsgroups. A solution for this enforcement problem might be self-regulation. n92 On a small scale, this implies that users who do not conform to a certain expected behavioural standard are instantly excommunicated by their fellow surfers. Insiders call this process "Netiquette." Large scale self-regulation is adopted by the market players themselves, having developed their own codes of conduct. n93 Furthermore, experiments are being carried out with points of contact. Users confronted with various degrees of pornography or otherwise inappropriate materials on the Internet can report this by e-mail to a local contact point. The service provider is then aware of the illegal information, and obliged to remove it. Service providers cannot be held responsible for the whole of the information circulating on their network but they are liable for knowingly displaying illegal information on one of their sites. n94

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n91. See Jongen, L'evolution du droit depuis les Lumieres: la liberte par l'Etat et contre la presse?, Les Medias entre Droit et Pouvoir 67, 73 (B. Libois & G. Haarscher eds. 1995). See also Ethan Katsh, Rights, Camera, Action: Cyberspatial Settings and the First Amendment, 104 Yale L.J. 1681, 1713 (1995). New global media allow information to move across borders at electronic speed, blurring all boundaries. The nation states--traditionally in control of physical boundaries--lose some ability to control communication that might, quite literally, have been stopped at the border. Id.

n92. See Crago, supra note 14, at 485 (describing CompuServe's reacting to the verdict of a German court, which declared 200 sex-related Internet discussion groups illegal under German law. CompuServe eliminated access to the groups for its four million members world-wide).

n93. Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Illegal and Harmful Content on the Internet (visited Feb. 25, 1998) <<http://www2.echo.lu/legal/en/internet/content/communic.html>> (describing the codes of conduct that have been set up in the United Kingdom, Germany, the Netherlands and France).

n94. Id. (concerning the responsibilities of access providers and host service providers).

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Under very specific circumstances public authorities are allowed to restrict free speech in order to protect the public order and other people's rights. According to a European tradition, people need to have a broad diversity of information at their disposal in order to be fully informed. [*928] Hence, the government's role in safeguarding the freedom of speech has gradually evolved into an active state interference preserving the diversity of media content endangered by economic powers. n95

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n95. Illustrative for this duty of care are the traditional press subventions and the former European broadcasting monopolies.

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E. Safeguarding Diversity

Free speech is protected because it is fundamental to democracy. Western democracies presuppose an informed electorate. So, the information the user is provided with should reflect current social and political diversity. Such diversity was expected to emerge spontaneously in the newspaper market, since there is no scarcity of infrastructure and every citizen is free (at least in theory) to start up a new paper. However, in the broadcasting market a series of free speech restrictions were enacted by European legislators in order to guarantee this plurality of opinions. Diversity of media content was endangered by frequency scarcity and media concentrations. n96 In this section, we analyse the relevance of current free speech restrictions safeguarding the diversity of media content on the information superhighway. Since there will be no scarcity on the information superhighway, these restrictions may have to be abolished.

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n96. Voorhoof, supra note 35, at 57. See also Resolution of the Committee of Ministers on Press Concentrations, Dec. 16, 1974 (stating that measures have to be taken in order to assure media diversity and to prevent excessive media concentrations).

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1. Frequency Scarcity

Frequency scarcity was the motive for a number of exceptions to the freedom of speech principle in the broadcasting field. n97 These restraints were needed for guaranteeing a well-organized use of the spectrum frequencies. n98 European states wanted to avoid the monopolistic or oligo [*929] polistic control over the airwaves by private broadcasting corporations. n99 Private broadcasters were believed to endanger the diversity of information that citizens are entitled to. For years, national public broadcasting monopolies throughout continental Europe have operated based on these arguments. The monopolies were only broken down and replaced by licensing systems in the 1980s under pressure from the European Commission. Article 10, ECHR had already introduced a licensing system for broadcasting, cinema, and television corporations. n100 This provision was originally interpreted as indiscriminately authorizing public broadcasting monopolies. n101 Today, the licensing measures under the first section of Article 10 are subject to the general requirements of the second section of Article 10. n102 This provision is of little relevance to the Internet or the information superhighway.

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n97. Francois Jongen, *Le Droit de la Radio et de la Television* 32-33 (1989). See B<um u>llinger, supra note 18, at 44 (enumerating of the most important government measures in this field in Europe). See also Holznagel, supra note 29, at 84. "Broadcasting liberty necessarily supplements and reinforces freedom of opinion making; it serves the function of guaranteeing free and comprehensive

opinion formation through broadcasting." Id.

n98. Note, *The Message in the Medium: the First Amendment on the Information Superhighway*, 107 Harv. L. Rev. 1062, 1074 (1994). Note that the frequency scarcity rationale and the regulatory edifice built upon it were aimed at minimizing viewpoint scarcity, given the rights of viewers and listeners to receive a broad range of ideas. This is true for Europe as well as the United States. But see McGinnis, *supra* note 15, at 110 (mentioning that the scarcity rationale for regulation of transmission is far stronger in the newspaper context than in the video programming market). "All physical goods, including newsprint, are scarce. From a standpoint of pure economic efficiency, scarcity does not justify regulating broadcasting any more than it justifies regulating newsprint." Id. An additional social-political argument was found in the enormous possibilities provided by the new media to influence public opinion, and in the immediate character of information dissemination by airwaves. See *Purcell v. Ireland*, App. No. 15404/89, 70 Eur. Comm'n H.R. Dec. & Rep. 262 (1991), stating "the impact of radio and television is more immediate than that of the print media, and the possibilities for the broadcaster to correct, qualify, interpret or comment any statement made on radio or television are limited in comparison with those available in the press." Id.

n99. Such a situation would not be conducive to the public interest, as users would have to pay high prices and access to the airwaves would be granted or refused arbitrarily. In addition, the information the user would be provided with would run the risk of being one-sided, coming from only one or two sources.

n100. European Commission, Article 10, ECHR, para. 1. This provision was inserted for practical reasons, e.g., the frequency scarcity or the major investments required for building transmitters.

n101. European Commission of Human Rights, *X v. Sweden* decision of Feb. 7, 1968, Collection of Decisions of the European Commission of Human Rights, vol. 26.

n102. See *Groppera Radio AG v. Switzerland*, 173 Eur. Ct. H.R. (ser. A) at 24 (1990) (stating that the object and the purpose of the last sentence of Article 10 para. 1 and the scope of its application must be considered in the context of article 10 as a whole, and in particular in relation to the requirements of para. 2). Note that this provision remains relevant in the light of state control over technical aspects, e.g. the allocation of frequencies. Still, it is increasingly difficult to defend national broadcasting monopolies from the perspective of Article 10, para. 2. Under present day conditions, Article 10 may instead become a legal argument against the maintenance of public broadcasting monopolies. See *Voorhoof*, *supra* note 35, at 41.

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As such, public broadcasting monopolies or licensing systems do not provide a solution to the scarcity problem. Diversity in broadcasted information is safeguarded by the doctrine of pluralism. n103 This policy [*930] goal claims that the current, socially present diversity is reflected in the offer of information services. In short, pluralism is meant to increase the diversity of the information available to the public. n104 It is the responsibility of European states to ensure that such a plurality of opinions is encouraged.

n105 The need for supplying the user with a diversity of interests and opinions prevails in the European tradition over the principle of consumer sovereignty.
 n106 The relation of pluralism towards free speech is ambiguous. On the one hand, pluralism unmistakably creates an obstacle to full freedom of speech. On the other hand, it contributes to the presence of a broad range of social attitudes in the information the user is provided with. n107 Such diversity can be guaranteed through the obligation for one medium (the public monopolist) to have a plurality of opinions reflected in its communication activities (internal pluralism), or through the existence of various independent and autonomous media (external pluralism). n108 The latter system is implemented in all European states through the enactment of various market access rules.
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n103. Tony Prosser, David Goldberg & Stefaan Verhulst, *The Impact of New Communications Technologies on Media Concentrations and Pluralism*, study prepared at the request of the Committee of Experts on Media Concentrations & Pluralism of the Council of Europe 42 (1996). "Pluralism is understood to mean diversity of media supply." *Id.* Note that the doctrine of pluralism is not accepted by everyone. One of the traditional free speech philosophies--the argument from truth--aims at the elimination of difference rather than protecting it. See McGinnis, *supra* note 15, at 59. Some regulators have declared that the public interest would best be served by free market forces. "Empowering a centralised authority to make decisions as to diversity ... will threaten rather than increase the diversity of information.... There is no reason to believe that they will be better at deciding what proportion of ideas should be transmitted on what pathway of the net." *Id.* at 123. See also Mark S. Fowler & Daniel L. Bremmer, *A Market Place Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207, 209-10 (1982), as cited by Rainey & Rehg, *supra* note 45, at 1935. In any case, certain preconditions need to be fulfilled for safeguarding the democratic state while at the same time protecting pluralism. See also Bullinger, *supra* note 18, at 52.

n104. Green Paper from the European Commission: *Pluralism and Media Concentration in the Internal Market*, COM(92)480 final.

n105. See *Informationsverein Lentia v. Austria*, 276 *Eur. Ct. H.R.* (ser. A) at 16 (1993).

n106. See Sunstein, *supra* note 5, at 1787. This was confirmed several times in the jurisprudence of the European Court of Justice in Luxembourg and in policy documents of the Council of Europe. See, e.g., Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda v. Commissariaat voor de Media*, 1991 *E.C.R. I-4007-4046*; Case C-353/89, *Commission v. Netherlands*, 1991 *E.C.R. I-4069-4103*. See also Voorhoof, *supra* note 35, at 56-57.

n107. Even if the idea of pluralism is to be situated essentially within European media law tradition, the United States Supreme Court has accepted the idea that a content-neutral effort to promote diversity may well be justified. "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment," *Turner Broadcasting System, Inc. v. FCC*, 512 *U.S.* 622, 663, 114 *S. Ct.* 2445 (1994). See also *Associated Press v. United States*, 326 *U.S.* 1, 19-20 (1945). The Supreme Court has recognised, in the context of print media regulation, the need for government action designed to enhance the

diversity and quality of public affairs discourse.

n108. Prosser, Goldberg & Verhulst, supra note 103, at 43. See Green Paper from the European Commission: Pluralism and Media Concentration in the Internal Market, 18 COM(92)480 final, supra note 104. See also Holznagel, supra note 29, at 86. More particularly external pluralism concerns the number of television and radio stations and the number of people controlling them, while internal pluralism is related to the content of the broadcast programmes; Council of Europe Steering Committee on the Mass Media: Consultant Study on the Impact of New Technologies on Human Rights and Democratic Values, 16 CDMM(95); Sanchez-Tabernerero, supra note 62, at 228-235 (describing the different means for encouraging pluralism put into practice by European States).

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Market access rules may vary from a system of free admission (for example, printing press), to a declaration regime (for example, Internet service providers) or a licensing system (for example, broadcasting organizations). n109 Market access rules apply to the information superhighway even if there is little or no question of scarcity. Carriers need to fulfill the usual conditions of telecommunications law, mostly license obligations. Service providers are subject to a particular declaration regime.

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n109. In this respect a distinction needs to be made between the production market and the transmission market. The production market can be defined as the market where (electronic) information services are produced. Access thereto is free for the printing press (the publishing of a new title), broadcasters generally need a license. The procurement of databases for the public over electronic networks is free. Different carriers (operators of terrestrial airwaves, cable and satellite links) offer their network services to the information providers at the transmission market. Nearly all European transmission markets have a monopolistic or oligopolistic structure. The frequency spectrum was originally under complete control of national broadcasting monopolies but since the eighties, private radio and television stations have gradually been allowed to use the spectrum for the broadcasting of their programs. The dismantlement of the de facto monopoly of television cable operators has not started yet, although nothing prevents potential operators from applying for a license. The transmission of on-line services can be undertaken by any interested carrier. See generally KPMG, Public Policy Issues Arising from Telecommunications and Audiovisual Convergence, 216 (1996).

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The information superhighway is a hybrid network, using a combination of different carriers: telephone lines, television cables and wireless connections, analogue or digital. There should be no scarcity on these networks, every user will have his message transmitted or downloaded, and a plurality of opinions will be available. During the current transition period, pluralism remains safeguarded on radio and television, hence the electorate is sufficiently "informed." There seems to be no immediate need for additional state interference to ensure pluralism on the information superhighway. This may change, however. It is expected that the transmission of radio and television programmes will be fully integrated in the information superhighway. The

consumption of this information will take place in a growing interactive way. Users will only receive the programmes they ask for. In those circumstances, the market alone may not be able to guarantee full diversity. Then a new form of pluralism might be needed.

The transposition to the information superhighway of existing free speech regulation ensuring pluralism is far more complex than the transposition of legislation prohibiting undemocratic speech. It is unclear if democracy can still be guaranteed on the information superhighway, when equal access to a minimum package of information that is representative of all social and political tendencies in society, including [*932] minority opinions, is not guaranteed to every citizen. This is especially relevant when radio and television programmes will be integrated into the information superhighway to such an extent that they are no longer broadcast in the traditional manner. Some authors believe that it is the responsibility of the state to provide a minimal amount of information: this is called "universal service with content." n110

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n110. Yves Pouillet, Jean-Paul Triaille, Francois Van Der Mensbrugge & Valerie Willems, *Convergence between Media and Telecommunications: Towards a New Regulatory Framework*, 11 *Computer L. & Sec. Rep.* 174, 179 (1995). But see Nicholas Garnham, *Telecommunications and Audio-Visual Convergence: Regulatory Issues*, 12 *Computer L. & Sec. Rep.* 284, 285 (1996).

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It seems that during this transition period the current market access rules must remain in force, in order to have diversity ensured on radio and television. When the information superhighway is fully completed, a new form of pluralism may need to then be implemented. Additional measures might be necessary, since the diversity of information the electorate is provided with is not only endangered by a shortage of frequency spectrum, but also by the growing media concentrations and alliances. n111

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n111. This makes it possible for the same economic group to take control over a number of information channels (with the risk of private censorship), or for certain media to disappear or merge, thereby reducing the sources of information. See Council of Europe Steering Committee on the Mass Media: *Consultant Study on the Impact of New Technologies on Human Rights and Democratic Values*, 15 *CDMM*(95). Media concentrations and alliances are encouraged by the development of new media industries (cable and satellite television, teletext and videotext services), the ending of broadcasting monopolies and the increase in advertising revenue. See also Sanchez-Tabernero, *supra* note 62, at 5-7. Concentration of media markets in this respect is defined as "an increase in the presence of one or a handful of media companies in any market as a result of various possible processes: acquisitions, mergers, deals with other companies, or even the disappearance of competitors."

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2. Media Concentrations

There is a strong belief in Europe that the market alone never guarantees diversity nor quality in news reporting or the dissemination of information. n112 This is especially true on the information superhighway. Its expansion involves increased tendencies of vertical integration and concentration of media ownership. n113 Indeed, the development of digital infrastructure and services is associated with great investments, forcing media and telecommunications corporations to increase their profitability and to concentrate on commercial competition. Carriers and content providers realize that in order to be successful they must pursue alliances, mergers and joint ventures with their former competitors. n114

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n112. See generally Green Paper from the European Commission: Pluralism and Media Concentration in the Internal Market, COM(92)480 final.

n113. Gillian Doyle, The Cross Media Ownership Debate, 16 Media L. & Practice, 38-43 (1995). These integration and concentration tendencies even seem to be encouraged by the European Commission, always stressing that the expansion of the information superhighway will depend on private investment. Id.

n114. Karel Van Miert, Mapping the New Open Telecommunications Marketplace, (visited July 7, 1997) <<http://europa.eu.int/en/comm/dg04/speech/seven/en/sp97034.html>>. Indeed, investors in the telecommunications network also have a clear interest in acquiring interests in content providers. "We have seen some gigantic partnerships, agreements and mergers spring up in Europe and the rest of the world, and this trend will continue: on the one hand between alternative or complementary networks, on the other between the content producers and packagers of information and the carriage networks." Id. See Mark L. Gordon & Diane J.P. McKenzie, A Lawyer's Roadmap of the Information Superhighway, 13 J. Marshall J. Computer & Info. L. 177, 185 (1995). This repositioning of media markets is not surprising, for new speed and power are incompatible with existing spatial and social arrangements. New media are not just additions to the old ones, nor do they leave the old ones in peace. Instead, they never cease to oppress the older media until they find new shapes and positions for them, See also McLuhan, supra note 5, at 174.

-End Footnotes-

The emergence of mighty media concerns gaining control over media markets can be as dangerous for free speech as government control. n115 These intersectorial corporations may become so dominant as to push other potential speakers out of the market, giving rise to a lack of diversity and to private censorship. Higher access prices and information costs will be the result, and as a consequence the information superhighway will be preserved for the elite. n116 Contemporary media tycoons may pretend to be the greatest proclaimers of the traditional free press doctrine, but they only use the free speech argument in order to protect their own monopolistic situation and to inhibit the free speech rights of others. n117 They have the ability to take control of one or several media markets without regard to the importance of free speech as a basic, inalienable, human right of every citizen. n118

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n115. Barendt, supra note 22, at 83 (stating that in certain cases there is no real difference between state censorship and private censorship exercised by editors and journalists). Private censorship may well constitute as serious a danger to free speech as state control. Id.

n116. Sunstein, supra note 5, at 1762-3. "There is no logical a priori connection between a well-functioning system of free expression and limitless broadcasting or Internet options." Id.

n117. Krattenmaker & Powe, supra note 18, at 1735. Indeed, "if the past is prologue, entrenched private interests will use public policy to achieve their goals of limiting competition." Id. See also Voorhoof, supra note 35, at 59. The conglomeration of power in national or transnational multimedia consortia can pose a threat to the freedom of expression of others, and to freedom of information of the public. Id.

n118. Gibbons, supra note 25, at 20. Indeed, "the excessive concentration of media power is likely to restrict the seeking and imparting of information and thereby inhibit democratic discussion." Id. An interesting illustration of this is the European newspaper market. Fusions, concentrations and joint-ventures have drastically reduced the number of independent newspaper titles over the last 30 years. It is very difficult to launch new initiatives in a concentrated market. There has been very little new print media developed over the last 20 years. Also, most of them have disappeared almost at once, or have been integrated into the great concerns. The same trend is occurring in the audiovisual sector. Berlusconi controls the entire Italian media market, and Canal+ is growing all over Europe.

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[*934] Such occurrences should be avoided on the information superhighway. The state has an active role to play in the protection of free speech, endangered as it is by private groups. It is the government's responsibility to secure pluralism and a diversity of media sources and access. Therefore, concentrations and alliances between carriers and content providers are subject to competition law and to media ownership restrictions. Diversity is further safeguarded through various active policies concerning frequency management and press subventions. It is the ultimate challenge for public authorities to preserve a minimum of state neutrality in the course of these actions. n119 This increasing state control is perceived by the affected corporations as significantly diminishing their speech and press freedoms. n120

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n119. Richard Abel, *Speech and Respect* 44-46 (1994).

n120. See Schauer, supra note 16, at 122. Hence the ambivalence of the current press subventions: essentially intended to increase the freedom of expression, they seem as well symptomatic of the growing lack of press independence. In fact, the state has the press under control by threatening the withdrawal of subsidies.

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IV. CONCLUSION

The technological revolution now going on in the communications sector is of almost as great a magnitude and scale as the advent of the telephone system. A number of regulatory problems are likely to emerge, unless proactive government action and industry self regulation occur soon. n121 Part of the problems will directly and indirectly be related to free speech. It seems that even if the information superhighway is far from "finished," a few conclusions can already be drawn as to the role of free speech legislation on the new medium.

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n121. See Ilene K. Gotts & Alan D. Rutenberg, Navigating the Global Information Superhighway: a Bumpy Road Lies Ahead, 8 Harv. J.L. & Tech. 275, 277 (1995).

-End Footnotes-

We assumed in the introduction to this article that the role of free speech is the same on all media, including the information superhighway. New communications technologies would not give rise to new legal questions, and therefore, there would be no immediate need for additional legislative measures concerning free speech on the information superhighway. The starting point for any new legislation should be the original motives for protecting and restricting free speech. Understanding the regulation of older communications media offers guidance for developing new, contemporary rules. n122 That is why we began by discussing the protection of free speech in the past, before concluding [*935] with the role of free speech legislation for information superhighway purposes. n123

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n122. Krattenmaker & Powe, supra note 18, at 1725. "Past complaints will be prologue for future complaints about what creators place on, and users receive from, the infobahn." Id.

n123. Id. "Past complaints will be prologue for future complaints about what creators place on, and users receive from, the infobahn." Id.

-End Footnotes-

Free speech is protected because it is an indispensable instrument for democracy. That goes for free speech on the information superhighway as well, especially given the actual growth of the global network. The principle as such is not affected by the rise of successful new technologies. Still, even if current free speech regulation is highly relevant for application to the information superhighway, a number of legislative amendments are indispensable.

As to the additional legislative measures for protecting free speech on the information superhighway, universal access for all citizens should be guaranteed. It is the responsibility of European states to provide access to the information superhighway for all their inhabitants. Indeed, Article 10 of the ECHR is applicable to all technical means of communication, including the information superhighway. And following Article 1 of the ECHR, member states should take care that the freedom of expression is secured for everyone within

their jurisdiction. This means that member states should secure access to the information superhighway from the moment it has developed sufficiently to become the main instrument for spreading ideas, opinions and information. A number of European states have already installed public access points in schools and libraries.

The protection of democracy requires free speech to be limited to a certain extent. That is the reason why undemocratic speech is illegal and why the diversity of media content is explicitly safeguarded in Europe. States applying these current restraints to the information superhighway are in no way acting illegally. Free speech should indeed remain restricted on any new media. Therefore, a number of additional governmental interferences may be required. Undemocratic speech should be forbidden on the information superhighway, if it is not already. For efficiency, this prohibition should preferably be designed according to international harmonized standards. The time has come for public authorities of the different states to start negotiating on the exact content of these standards and for a unified procedure in the pursuit of infringers.

The diversity of media content is especially protected in Europe. It remains guaranteed in the traditional media by way of pluralism rules. The information superhighway may become the overall medium for the transmission of any information, including newspapers, television programmes and video games. At that point, a new form of pluralism may be needed, to the extent that sufficient diversity will not be provided [*936] for automatically by the market. Future free speech legislation for the information superhighway should therefore guarantee a minimum package of diverse information to be provided to each user at a reasonable price. At the same time, regulatory bodies on a national and European level should supervise concentrations and alliances between corporations on the information market, so that they do not endanger diversity and pluralism.

Originally, free speech was guaranteed mostly through the governmental duty of abstention. Any interference with individual speech was illegal. In the meantime, the state's responsibilities in this respect have evolved into a positive duty of care. n124 It is its duty to provide for a full and effective freedom of speech for all its inhabitants. Legislation within the framework of this duty of care seems to increase due to the rise of the information superhighway. There is a need for universal access rules, for a new form of pluralism and potentially for more anti-concentration legislation. Creative solutions in all these fields should be discussed and decided on now, while the information superhighway still is in its infancy. Control over change consists in moving not with change, but ahead of it. n125

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n124. B<um u>llinger, supra note 18, at 68. An inherent conflict between both governmental functions characterizes the ambiguous role of the state. In exercising its duty of care the government, by definition, infringes its duty of abstention, endangering free speech while at the same time safeguarding it. The supervision of media concentrations is illustrative in this respect. Incapable of abstaining and interfering at the same time, the state should avoid interference in principle and act only when indispensable for preserving the freedom of speech. "The legitimacy of restrictions on freedom to impart information by the press should be weighed against the public's right to be informed. The same prudent approach needs to prevail in the Member States."

16 J. Marshall J. Computer & Info. L. 905, *936

Id. See also Voorhoof, supra note 35, at 59.

n125. McLuhan, supra note 5, at 199.

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