German Law Journal (2025), **26**, pp. 114–137
doi:10.1017/glj.2024.68

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Towards the Institutions of Freedom: The European Public Discourse in the Digital Era

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(Received 17 May 2024; accepted 17 September 2024; first published online 23 December 2024)

Abstract

The digital revolution has transformed the dissemination of messages and the construction of public debate. This article examines the disintermediation and fragmentation of the public sphere by digital platforms. Disinformation campaigns, that aim at assuming the power of determining a truth alternative to reality, highlight the need to enhance the traditional view of freedom of expression as negative freedom with an institutional perspective. The paper argues that freedom of expression should be seen as an *institution of freedom*, an organizational space leading to a normative theory of public discourse. This theory legitimizes democratic systems and requires proactive regulation to enforce its values.

Viewing freedom of expression as an institution changes the role of public power: this should not be limited to abstention but instead has a positive obligation to regulate the spaces where communicative interactions occur. The article discusses how this regulatory need led to the European adoption of the Digital Services Act (DSA) to correct DPs through procedural constraints. Despite some criticisms, the DSA establishes a foundation for a transnational European public discourse aligned with the Charter of Fundamental Rights and member states' constitutional traditions.

Keywords: Freedom of speech; disinformation; institution; public discourse; DSA.

A. Introduction

The digital revolution has changed how messages are disseminated and public debate is constructed. At least four factors have led to this change: The rise of digital platforms that affected the traditional bilateral relationship between the individual and the public authority; the crisis of conventional information media; the virality of messages disseminated by algorithms that amplify irrational and emotional drives; the difficulty of regulating, at the national level, entities that operate on a transnational scale and are based on authoritative or quasi-authoritative powers.

The communicative interactions of users in digital platforms give rise to legally relevant social spaces in which the negative reading of freedom of expression, conceived as a shield against public power interference, is insufficient to protect the individual. Each user in digital ecosystems is the author and the recipient of messages, a speaker and an audience member. In this double capacity, the user participates in a public discourse likely to be corrupted by polluting speech.

Awareness of the digital transformation must lead to a theoretical shift in studying fundamental freedoms, particularly freedom of speech. New theoretical premises make it possible to understand and positively evaluate the recent regulatory activism emanating from the EU, of which the Digital Services Act (DSA) is the most prominent—and hopefully not the last—legal outcome.

Therefore, the article proceeds as follows: Section B refers to disintermediation and fragmentation of the Habermasian public sphere in the digital society. Section B.I examines the role of digital platforms operating as quasi-states in regulating digital ecosystems. In particular, the dynamics of digital ecosystems are illustrated in Section C through the phenomenon of disinformation campaigns, which are a paradigmatic example of the short circuits of the digital public sphere. Disinformation can be defined as a continuous, deliberate process of digitally altering reality to influence electoral dynamics and democratic decision-makings.

Disinformation campaigns highlight how the problem is not to sanction users for speech content but to *govern* the digital public sphere. In Sections, D, D.I and D.II the article explains why the traditional reading of freedom of expression as negative freedom should be enriched with its institutional comprehension. Freedom of expression must be seen as an *institution of freedom*, an organizational space which leads, as it will be argued in Section D.III, to a normative theory of *public discourse*, essential for democracy, which expresses the need for *ex-ante* regulation. Section E explains how, at the European level, this regulatory urgency has led to the adoption of several measures, among which the DSA stands out. Section F highlights its positive and negative aspects and explains why it does not threaten to have a chilling effect on freedom of speech. Section G draws a few tentative conclusions—the DSA constitutes a first attempt at constructing a European public discourse through institutionalizing freedom, a process consistent with the values emanating from the Charter of Fundamental Rights and the constitutional traditions common to Member States.

B. The Digital Public Sphere: Fragmentation and Disintermediation

To analyze the digital revolution's effect on the public debate, we will refer to the Habermasian idea of the public sphere. This social space performs an intermediary function between the State and public powers on the one hand and civil society on the other.[1] According to Habermas, in the liberal state of the nineteenth century, the public sphere legitimized the representative institutions through the critical consensus of the narrow bourgeois class. This "public" arena, in which professional journalists representing civil society participated through the press and the expression of ideas, allowed the formation of a public opinion, called upon to examine, discuss, and influence the government, which was formed by the same wealthy people who participated in the discussion.

This intermediary function enters into crises within the mass society, where private and other economic interests influence editorial policy, mass political parties accentuate the process of integrating the social dimension into the State, and, at the same time, the broadcasting system promotes communication devoted to entertainment rather than critical insight. The flow of information becomes verticalized in the sense that a group of powerful private entities manages the diffusion of information to a broad and indistinct audience.[2]

These disintermediation trends and privatization of the digital public sphere are amplified within the digital public sphere. Participation expands by leaps and bounds. Each individual can introduce, share, or support new topics for discussion directly, without any intermediation, or share or support issues, fostering a progressive fragmentation of public debate. The Web has promoted sociological relations within the information exchange framework through technological apparatuses, giving rise to a "mass self-communication" system, replacing traditional modes of communication characterized by vertical and unidirectional communication.[3]

[1]Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society 184 (Thomas Burger & Frederick Lawrence trans., 1989).

[2]Habermas, *supra* note 1, at 175, 185, 199, 201.

[3]Manual Castells, Communication Power 24 (2009).

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

The messages disseminated by the World Wide Web, characterized by individual self-production of content, now reach a global audience.[4] In the light of past global events, from the Arab Spring to the Wikileaks case, some have seen the Web as a new technology of freedom at the service of human self-realization and the creative potential of human beings. The internet would have helped to rewrite the codes of power in their relationship with the sovereign people.[5] The real-time circulation of news and opinions may have reduced the information asymmetry between the rulers and the ruled, allowing for a horizontal discursive process on a transnational scale.[6]

However, some features of this horizontal process of mass self-communication accentuate the loss of the mediating function of the public sphere. Whereas in the bourgeois society, the actors of the public sphere were professional journalists who selected the relevant news, in the digital public sphere, each actor brings their agenda of discussion, thus marginalizing the "general interest intermediaries"[7] and the professional selection of news and facts of general interest in favor of a process of fragmentation and atomization.[8]

The very horizontality of the Web must, therefore, be partly reconsidered. Based on a small number of large corporations that, on a global scale, form the dominant nodes of the network, the Web confirms the power relationship, typical of the mass communication society, between users and owners or managers of information sources. Digital platforms define the technological, economic, and legal structures users interact with.

Technologically, users engage within the boundaries set by these platforms, often compromising their privacy through data tracking via cookies, creating vast amounts of big data. This data is processed by algorithms and artificial intelligence, influencing the digital ecosystem of human interactions. Platforms, therefore, not only record and transmit data and information but also process it.[9]

In economic terms, the model of accumulation is that of information and surveillance capitalism. These platforms seek to profit by exploiting personal data and information, with insights derived from user behavior helping to predict and manipulate choices, thereby eroding individual identity and autonomy in favor of platform profits.[10]

Legally, users contract with platforms, exchanging data for services, agreeing to terms and conditions that often differ from national laws, and granting platforms significant discretion in content moderation and sanctions.[11] Overall, platforms act as more than neutral tools: They function as powerful gatekeepers that regulate social interactions across technical, economic, and legal dimensions, blurring the boundaries between the physical and digital realms that are now part of a large infosphere.[12]

To summarize, the digital public sphere is undergoing a process of disintermediation, as each user can introduce discussion topics and constitute communicative relations around them. This dynamic entails, on the one hand, a fragmentation of public discussion, pulverized into innumerable public issues, and, on the other hand, a verticalization of the public sphere, as discussion spaces take place within the technological, economic, and legal structures that

[4]Castells, *supra* note 3, at 35, 48.

[5]Gaetano Azzariti, *Internet e Costituzione*, 3 Politica del Diritto 367, 368–369 (2011).

[6]Nancy Frazer, Scales of Justice: Reimagining Political Space in a Globalizing World 76 (2009).

[7]Cass R. Sunstein, #Republic: Divided Democracy in the Age of Social Media 18 (2017).

[8]Jürgen Habermas, *Reflections and Hypotheses on a Further Structural Transformation of the Political Public Sphere*, 39 Theory, Culture & Soc'y 153, 157 (2022).

[9]Luciano Floridi, The Fourth Revolution: How the Infosphere is Reshaping Human Reality (2014).

[10]Julie E. Cohen, Between Truth and Power: The Legal Construction of Informational Capitalism 6 (2019); Shoshana Zuboff, The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power 63-97 (2018).

[11]Stefan Theil, *Private Censorship and Structural Dominance: Why Social Media Platforms Should Have Obligations to Their Users Under Freedom of Expression*, 81 Cambridge L. J. 645, 646–47 (2022).

[12]Floridi *supra* note 9, at 43.

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platforms represent. They multiply the spaces of public debate and regulate the rights and freedoms exercised in their respective ecosystems, acting as authoritative powers.

I. Digital Platform's State Mimesis and the Capture of Freedom: The Self-Regulation as (Im)Possible Answer

Digital platforms thus shape the public sphere according to their mode of operation. As private powers compete with public power,[13] they express legal orders alternative to nation-states based on the coincidence between legal order and territorial localization.[14]

The constitutive process of establishing digital power is equal and opposite to the establishment of the nation-state. The latter is based on the acquisition of control over territory, first in the form of ownership (*dominium*), then through the transformation of this privatization into a public relationship of submission to sovereign power, *superiorem non recognoscens*.[15] State sovereignty is exercised through the production of rules and the exercise of the monopoly of force within territorial boundaries. Digital power, for its part, is not focused on territory but on the digital architecture, the data, and, more generally, all the relationships between users in the digital ecosystem. Digital platforms exercise a form of propriety acquisition (*dominium*) and then subject users to the rules they set and enforce (*imperium*). This is not to say that states lose entirely sovereignty over the digital. Instead, in the absence of public intervention to redress the balance, there is a shift of power in digital spaces in favor of private actors, who compete globally with national sovereignties based on the ancient coincidence of territory and legal system.

The legal pluralism and social differentiation that characterize global society, that is, the existence of a plurality of private organizations that operate on a transnational scale according to autonomous rules aimed at promoting their respective sectoral interests, have prompted the theorization of societal constitutions.[16] According to this perspective, societal constitutions are the basic normative systems that emerge from the encounter between sources of autoregulation of private or para-public global institutions and the para-jurisdictional decisions of non-politic subjects—such as arbitration bodies, ethics committees, and other similar bodies.

The *lex digitalis*, inspired by technical efficiency and shaped by the interests of platforms, has an autonomous teleological dimension that is potentially antagonistic to the value of the human person and democratic systems.

This conclusion does not necessarily imply a permanent conflict with the general interest of the political community. For example, in the aftermath of the pandemic crisis, Meta set up an independent fact-checking program, updated its terms of use to exclude fake news about vaccines from public discourse,[17] and even went so far as to create a specially qualified board, independent of management, to decide on the removal of controversial content.[18]

This was the first example of nation-state mimesis. Online platforms became first the "legislators" of their digital environment by drafting their rules, then "courts" by deciding cases on these rules, and finally the "executives" by enforcing the decisions taken.[19] However, apart from

[13]Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1599 (2018).

[14]Carl Schmitt, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum 47–48 (2006).

[15]*Id.*

[16]Gunther Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization 42-45 (2012).

[17]Oreste Pollicino, Freedom of Speech and the Regulation of Fake News 23 (2023).

[18]Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 Yale L. J. 2418, 2449–2451 (2019–2020); Nele Meier & Angelo Golia, *The Emerging Normative System of Meta's Oversight Board – An Introduction*, 2022-29 Max Planck Inst. for Compar. Pub. L. & Int'l L., 2, 4 (2022); Evelyn Douek, *The Meta Oversight Board's Human Rights Future*, 44 Cardozo L. Rev. 2233, 2234 (2023).

[19]Sümeyye E. Biber & Nedim Hogic, *Inter-Legality and Online States*, *in* L'era Dell'interlegalità 281 (Eduardo Chiti et al. eds., 2021).

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

the problems related to the absolute independence of the board and the effectiveness of its decision, these efforts were aimed at addressing, on a case-by-case basis, the moderation of online content. As the first term of the Oversight First Board shows,[20] this attempt is not enough to correct the infrastructure of the digital public sphere.

The role played by digital platforms initially led the European Union to react through Soft Law[21] and self-regulation by the same digital companies. The main result was a code signed by digital platforms and advertisers' associations,[22] which committed subscribers to behaviors and policies that could counteract this phenomenon. Although the code has produced some positive results,[23] the lack of uniformity in some definitions, the absence of relevant associations of advertisers and fact-checking organizations among the subscribers, and the lack of appropriate criteria and indicators to measure the performance of digital platforms led the European Commission to adopt new guidelines[24] that resulted in a strengthened version of the code.[25] It promotes definitional efforts, broadens the audience, and identifies quantitative and qualitative indicators capable of guiding the European Commission in monitoring the actions taken by the platforms.[26]

However, the withdrawal of some relevant digital platforms, such as X, from the Code and the realization that compliance with the commitments could not be left to the self-determination of the platforms alone further prompted the European institutions to pass the Digital Service Act, which, not coincidentally, is cited as the legal basis of the second self-regulatory code.

C. Digital Disinformation as a Case Study for Understanding How Digital Platforms Work

More than self-regulation is needed to avoid the negative externalities of disruptive speech in the public sphere. The algorithmic aggregations of digital platforms recompose the fragmentation mentioned above process, that, for-profit, classifies and disseminates entertainment, opinions, and information of dubious veracity; what matters is not the quality of the news but its susceptibility to virality.

These assumptions can be confirmed by analyzing disinformation campaigns, which are symbolic of the functioning of the digital public sphere. Disinformation studies acknowledge the infrastructural nature of platforms and the mutual interdependence between virtual and analogic reality. Disinformation flows originate in analog reality but are massively created and disseminated online to influence "offline" behaviors.

According to the definition offered by the Expert Group appointed by the European Commission,[27] reiterated by the Commission itself in the Communication on Tackling False Information Online,[28] disinformation consists of the dissemination of a range of messages that turn out:

> [T]o be false or misleading conceived, presented, and disseminated for profit to mislead the public intentionally, which [may] cause public harm. Public harm includes threats to

[20]Douek, *supra* note 18, at 2289-2299.

[21]*See Tackling Online Disinformation: A European Approach*, COM (2018) 236 final (Apr. 26, 2018).

[22]Commission Code of Practice on Disinformation, 2018 O.J. (EU).

[23]*Assessment of the Code of Practice on Disinformation - Achievements and areas for further improvement*, 2020 O.J. (SWD 180) 4 (EC).

[24]*Guidance on Strengthening the Code of Practice on Disinformation*, COM (2021) 262 final (May 26, 2021).

[25]*Code of Practice on Disinformation*, 2022 O.J. (EU).

[26]*Id.*

[27]Directorate-General for Communications Networks, Content and Technology, *A Multi-Dimensional Approach to Disinformation: Final Report of the High Level Expert Group on Fake News and Online Disinformation*, 2018 O.J (EC).

[28]*Tackling Online Disinformation: A European Approach*, *supra* note 21.

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> democratic political and policy-making processes and public goods such as the protection of the health of citizens, the environment, and the security of the EU.[29]

This definition suffers from a certain vagueness, which can be explained in the light of the strategy launched by the European institutions with the creation of the Expert Group,[30] whose aim was to outline policies that would later be incorporated into several legislative initiatives, including as we shall see, the Digital Services Act.

The Union's initiatives do not aim to define the limits of freedom of expression or information or to clarify what content is illegal to prosecute it—a task that, as we will argue later in the article, remains in the hands of the Member States.[31] Rather, the Union's institutions take note of the existence of the phenomenon and identify the best practices to clean up the digital ecosystem.

The methods and purposes of dissemination give consistency to the concept of disinformation beyond the simple element of being patently false. Artificial intelligence tools, such as creating fake videos or images, so-called deepfakes, and the algorithmic architecture of the platforms, play a central role in this regard. It is, in fact, the algorithms that, based on the preferences disseminated online by users, define the order in which contents are displayed, favoring personalized and sensationalized content.[32] Also, false or low-quality news, which often refers to obscurely managed source sites, is linked to advertisements that "monetize" false information.[33] Through automated services, or bots, and fake profiles orchestrated on a large scale, so-called troll factories, and funded by partisan and opaque sponsors, these messages go viral, giving their content credibility.[34]

The purpose of dissemination is "for profit to intentionally mislead the public." The intended "public" harm is to spread disinformation.[35] The manner of dissemination[36] takes place via bots and fake profiles that repost messages, causing them to go viral and giving the content perceived credibility. The purpose, profit, and manner of large-scale reposting are thus the core elements of disinformation.

Disinformation can thus be defined as a continuous, deliberate process of digitally altering reality to influence electoral processes and decision-making dynamics within representative governments. Convincing the audience of a particular claim, as in traditional propaganda mechanisms, is not the only goal of disinformation campaigns; instead, the real goal is *to assume the power* to determine the truth through an alternative reality, thereby influencing people's choices.[37] Thus, technology is not a neutral factor but a direct instrument of influence and control of the masses.[38] The "technological a priori" becomes "political a priori," transforming "the basis of domination."[39] The digital creation and distribution of content outline a process of

[29] *Id.*

[30] The first action on this issue comes from the March 2015 *Conclusions from the European Council* with the request, addressed to the High Representative for Foreign Policy, to react to Russian disinformation. *See* European Council Conclusions, Brussels European Council (Mar. 20, 2015). Following this indication, the East Strategic Communication Task Force has been set in place.

[31] *See infra*, Sections D and E.

[32] Commission of the European Communities, *supra* note 21, at 4.

[33] *See* Giovanni De Gregorio & Catalina Goanta, *The Influencer Republic: Monetizing Political Speech on Social Media*, 23 German L.J. 204, 206-210 (2022). *See* Andrew M. Guess & Benjamin A. Lyons, *Misinformation, Disinformation, and Online Propaganda*, *in* Social Media and Democracy: The State of the Field, Prospects for Reform 10, 14 (Nathaniel Persily and Joshua A. Tucker eds., 2020).

[34] Commission of the European Communities, *supra* note 21.

[35] Elettra Bietti & Oreste Pollicino, *Truth and Deception Across the Atlantic: A Roadmap of Disinformation in the U.S. and Europe*, 11 Italian J. Pub. L. 43, 49 (2019).

[36] Ronan Ó Fathaigh, Natali Helberger, Naomi Appelman, *The Perils of Legally Defining Disinformation*, Internet Pol'y Rev. 10(4), 6-7 (2021).

[37] Lee McIntyre, Post-Truth 117 (2018); Guess & Lyons, *supra* note 32.

[38] Carl Schmitt, The Age of Neutralizations and Depoliticizations 139 (1993).

[39] Herbert Marcuse, One-Dimenstional Man 144, 154 (1966).

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

dehumanization of the message, with algorithmic technologies guiding human behavior and setting the agenda for public discussion: Although humans implement algorithms, the production and distribution of messages result from automated mechanisms. Moreover, the collapse of newspapers and traditional media, regarding resources and readers, leads journalism to conform to digital platforms. In the selection of news, traditional media tend to prioritize sensational content[40] better suited to digital virality, further lowering the quality of the public sphere.[41]

Information cascades lead to emulation by users, who share the flow of news spread by their online contacts, especially if there is an affective tie or a certain homophily between them.[42] This leads to echo chambers that radically exclude the possibility of meeting alternative ideas, worldviews, or information. These filter bubbles,[43] built thanks to the opaque algorithm that selects the messages relevant to the user, foster an emotional communication process that polarizes the users trapped in their respective information cocoons.[44] This reinforces a vertical identification between the subject of the disinformation and the group to which the message is addressed.[45] The horizontality of communication, which also characterized the early internet, is lost in favor of a hetero-directed conflict between opposing, irreconcilable supporters, accentuating the disruption of the public sphere.[46]

Although ideological pluralism allows for an alternative reading of reality, our imperfect democracies are still based on the reasonable expectation that appearance corresponds to reality.[47] The proper exercise of political freedoms depends on a particular coincidence between facts and their description. The right of citizens to elect their rulers, the accountability of political power, and the competition of parties for governmental power presuppose that people can rely on a certain correspondence between the truth of what is said and the truth of what is done.[48] Truth about facts of public interest is a prescriptive ideal, a "political good,"[49] a precondition of free democratic dialectics. Although a direct causal relationship between the spread of fake news and a particular political-electoral behavior has not been proven, empirical studies show how digital disinformation sets the agenda of issues for partisan news sources and captures the public's attention. In addition, mass media studies suggest that exposure to fake news increases cynicism and apathy, fueling extremism and affective polarization.[50]

However, the question remains about how to intervene—through viewpoint restriction on the single, misleading, and false content? Or through broader regulation that makes digital ecosystems more open, less fragmented, and verticalized? In what sense and to what extent can the phenomenon of disinformation disorder be considered a problem for freedom of expression? The answers to these questions depend, at least in part, on our theoretical conception of freedom. It is this aspect that we will now focus on.

[40]*See* Kelsey Bjornsgaard & Simeon Dukić, The Media and Polarisation in Europe: Strategies for Local Practitioners to Address Problematic Reporting 11–12 (2023) (EC).

[41]*See e.g.*, Amy Watson, *Share of Respondents Who Read the Written Press Every Day or Almost Every Day in the European Union from 2011 to 2022*, Statista (2023) https://www.statista.com/statistics/452430/europe-daily-newspaper-consumption/ (describing a recent trend in the European Union where the number of people reading newspapers and magazines every day has strongly decreased from approximately 37% in 2012 to approximately 21% in 2022).

[42]Sunstein, *supra* note 7, at 118.

[43]*See generally* Eli Pariser, The Filter Bubble: What the Internet is Hiding From You (2011).

[44]Sunstein, *supra* 7, at 1.

[45]*See* Irving Janis, Groupthink: Psychological Studies of Policy Decisions and Fiascoes (2d ed. 1982) (explaining so-called "groupthink," which reinforces the beliefs of ideologically homogeneous groups and the link with the leader) *See also* Antonio Nicita, Il Mercato Delle Verità 99 (2021).

[46]Habermas, *supra* note 8, at 159.

[47]Luciano Violante, Politica e Menzogna 4 (2013); Francesca Paruzzo, I Sovrani Della Rete: Piattaforme Digitali e Limiti Constituzionali al Potere 40 (2022).

[48]*Id.*

[49]Franca D'Agostini, Diritti Aletici 8 (2018).

[50]Guess & Lyons, *supra* note 32, at 23–25.

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

D. A Theoretical Interlude: From Negative Freedom to the Institutions of Freedom

To attempt a response, a theoretical shift is needed. This is a shift based on the recognition that the governance of the digital public sphere, which is littered with digital platforms that control, direct, and reorganize expressive content, cannot be based on the abstentionism of public power. The case of digital disinformation shows that speech disseminated through digital platforms cannot be curbed by restrictions imposed by public power based on the speakers' content or viewpoint. First, because the massive distribution of messages renders criminal sanctions largely ineffective; second, messages are often created through automated modes of production that exploit the way platforms work. The problem then becomes one of correcting the structure of the digital public sphere on a legal level.

This paradigm shift requires addressing some theoretical issues concerning the *structure* of freedom and the *purpose* or *function* that freedom of speech plays in liberal democracy.

When discussing the structure of freedom, one usually refers to the concepts scholars assume in their comprehension of freedom. Traditional liberalism espouses a negative conception of freedom: liberty as a shield against public or private intrusion.[51] According to this view, "all coercive laws [. . .]are, as far as they go, abrogative of liberty."[52] Liberty "is to be free from restraint and violence from others,"[53] and consists in the absence of "certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other persons."[54] Thus, the absence of interference defines liberty in purely liberal terms, coinciding with the "presumption of individual autonomy protected through legal rights."[55]

Negative freedom presupposes unhindered speech,[56] which implies a relative presumption of the unconstitutionality of government measures that interfere with it. The institutional consequence of this conception is the fundamental role of the courts, which are charged with determining whether the government has a compelling interest in restricting speech or with adjudicating rights according to several sound legal doctrines that help balance the various interests at stake. According to these theories, freedom of expression is merely a limit on the government, and its protection aims to identify any competing interests capable of balancing it. In this way, the problem of protecting freedom of expression coincides with the problem of placing *limits on the limits* to government functions.[57]

Moreover, a negative conception of freedom of expression has, until recently, characterized the advocates of digital constitutionalism[58], who have reaffirmed the horizontal efficacy of rights and freedoms, so-called *Drittwirkung*.[59] Although reaffirming the fundamental rights even in the ongoing relations between private subjects, *Drittwirkung* realizes the same institutional results as the individual/State relation. It leaves the choice of the prevailing rights to the case-by-case evaluations of judges, which does not profoundly affect the power of digital platforms.

The negative, structural conception comes with analyzing the function of freedom of expression in liberal democratic systems. The search for the rationale should explain why freedom

[51]*See* Isaiah Berlin, Two Concepts of Liberty 169 (2002) ("I am normally said to be free to the degree to which no man or body of men interferes with my activity to the degree to which no man or body of men interferes with my activity."). *See also* John Stuart Mill, On Liberty 7 (2000) (defining social or civil liberty as "the nature or limits of the power which can be legitimately exercised by society over individual.").

[52]Jeremy Bentham, Anarchical Fallacies: The Works of Jeremy Bentham 503 (John Bowring ed., 1843).

[53]John Locke, Second Treatise of Government 34 (Richard Cox ed., 1982) (1690).

[54]John Rawls, A Theory of Justice 202 (1971).

[55]*See* Eric Heinze, Hate Speech and Democratic Citizenship 17 (2016).

[56]Philip Pettit, *Two Concepts of Free Speech*, *in* Academic Freedom 61 (Jennifer Lackey ed., 2018).

[57]Heinze, *supra* note 54, at 95–96.

[58]*See e.g.*, Oreste Pollicino, Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism? 203 (2021). *See also infra*, Section G.

[59]*See generally* Robert Alexy, A Theory of Constitutional Rights 570–71 (2002). For the *Drittwirkung* in the realm of digital context, *see* Pollicino, *supra* note 58, at 203; Theil, *supra* note 11, at 670.

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of expression should prevail over, or succumb to, competing interests and values under certain circumstances or conditions. Of course, the identification and weighting of such circumstances may vary from time to time and from system to system because not all legal systems follow the same legal practices and offer the same degree of protection for freedom of expression.[60]

This search has led to identifying some selective values, such as individual self-realization and autonomy of the speaker,[61] human dignity[62], and the free market of ideas as a metaphor for ideological pluralism.[63] Each of these theories has nuances and details that cannot be recalled here, and each invokes values or interests that are indeed implicated by freedom of expression. However, they fail to fully address the problem within the digital public sphere, where it is no longer—or at least not only—a matter of choosing between freedom of speech and other rights or interests but of governing and regulating digital entities that stand in the traditional binary relationship between government and individual.

Moreover, these theoretical options cannot explain the constitutive nature of freedom of expression in democratic systems and why public power is essential to protecting people in digital contexts. An *institutional* reading is needed to address these questions.

I. Beyond the Negative Structure: Policies for Liberties

In the digital context, the protection of rights, particularly freedom of expression, can not be left only to the adjudication and protection of the courts. The theory of freedom of expression cannot be reduced exclusively to a question of balancing.

A solid theoretical paradigm is necessary to avoid leaving it to the judgment of the interpreters to decide which interest should prevail in a case-by-case analysis. On the contrary, the content and limits of fundamental freedoms should be considered based on institutional principles capable of justifying public policies and an *ex-ante* regulatory framework. Of course, judicial balancing still needs to be revised. Instead, *ex-ante* legislative regulations can guide judges' decisions that otherwise, in case-by-case adjudication, are insufficient to rebalance the power relations within the digital ecosystem. As it will be argued later,[64] general regulations can allow for new digital rights related to, but not coincident with, freedom of expression itself.

This is not, therefore, an abstract need. A theoretical shift in the understanding of freedom of expression is crucial for understanding and evaluating the DSA and, more generally, the measures taken by the European Union to rebalance the digital ecosystem.

Digital platforms are in a dominant position, realizing structures that, by their size and capacity to act, shape individual situations and influence collective processes of democratic deliberation. Digital environments are much more complex than the one-to-one relationships implied by the individual *against* the State or other private parties asserting countervailing rights. If not a triangle,[65] digital environments involve a square of actor[66] composed of nation-states and the European Union, the first side; private Internet infrastructure companies, the second side;

[60]*See e.g.*, HEINZE, *supra* note 55, at 69 (distinguishing "longstanding, stable and prosperous democracy" (LSPDS) from non-LSPDS, which prevent the harms of extreme or hate speech through government censorship).

[61]C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47 (1989); MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 14 (1984).

[62]STEVEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 44-46 (2008).

[63]*See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[64]*See infra*, Section E.

[65]*See generally* Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011 (2018).

[66]Also Oreste Pollicino, *The Quadrangular Shape of the Geometry of Digital Power(s) and the Move Towards a Procedural Digital Constitutionalism*, EUR. L. J. 10, 11 (2023) uses a geometric metaphor to describe user relations within digital ecosystems. According to Pollicino, the quadrangular shape corresponds to four constitutive dimensions: 1. space, 2. values, 3. actors, 4. remedial.

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

speakers, the third side; the audience of the users participating in the digital forum, the fourth side, who may be harmed or misled by the content of the messages.

In the progressive capture of the individual and their prerogatives by private organizations oriented towards the exploitation or subordination of the person, the meaning of freedom is transformed into a positive one.[67] The definition shifts towards a self-mastery that represents an instance of liberation from the relations of domination within a given society.[68]

This is not just the digital case. Many examples can be given. One can think of the trade union rights of workers within companies or the social rights of those same workers vis–à–vis their employers, such as the right to days off or a fair wage.[69] Regarding freedom of speech, one can also mention the right of access to the public broadcasting system, provided for in some European legal systems, for members of political parties during election campaigns to ensure a kind of *par condicio* during electoral competitions. These examples show that fundamental rights no longer have only a subjective, individual function of guaranteeing the citizen against the state but also perform an objective, institutional function of integration into the social system, qualifying these rights as a form of participation in the social processes.[70]

The theory of negative liberties presupposed a rigid separation of state and society, which no longer corresponds to the current effervescence of social pluralism.[71] "[T]he context of the social" is the primary environment that shapes human rights.[72] The human self is shaped by social interactions, part of a larger social whole in which the human being is entangled in a circular relation and which shapes them.[73]

To grab these assumptions, one can consider the dynamics of digital ecosystems. The rights and prerogatives of the user are regulated by the terms of use imposed by the platforms. The terms and conditions imposed by platforms on users, content removal orders, and the establishment of internal bodies to review content removal are symptoms of an authoritative institutionalization of the boundaries of individual autonomy within the digital ecosystem. Similarly, echo chambers, the automated production of fake news, and the viral spread of this kind of abusive speech pollute the digital debate and shape personal identity and individual participation on the Web. Moreover, despite the institutionalization[74] of internal agencies, such as the Meta Oversight Board, content removal by digital corporations still needs to follow principled canons. It has endorsed arbitrary forms of private censorship. In the face of such dynamics, calling for mere government abstention would be reductive. Instead, it is necessary to provide users with tools to challenge platform decisions or to open the informational cocoons in which they usually interact.

These dynamics require rethinking the liberal model, overcoming individualism and abstentionism of public power in favor of proactive interventionism. Law is not only an

[67]Berlin, *supra* note 51, at 178 (describing "[t]he 'positive' sense of the word 'liberty' derives from the wish on the part of the individual to be his own master." In the liberal, analytical approach of the English philosopher, the concept of positive liberty is a romantic, anti-Enlightenment concept that preludes, in the most extreme cases, the tyranny of the majority, and the absorption of the individual into a totalizing mass).

[68]Philp Pettit, Republicanism: A Theory of Freedom and Government 66-70 (1997); A. Barbera, *Articolo 2*, *in* Principi Fondamentali: Commentario della Constituzione Art.1-12, 89–90 (Giuseppe Branca, et al. ed., 1975). *See also* Frank Lovett, *Republicanism*, *in* The Stan. Encyclopedia of Phil. (Edward N. Zalta & Uri Nodelman eds., 2022).

[69]*See* Iñigo González Ricoy, *Little Republics: Authority and the Political Nature of the Firm*, 50 Phil. & Pub. Affs. 90, 108 (2021).

[70]Luigi Mengoni, Ermeneutica e Dogmatica Giuridica 74 (1996).

[71]*See* Angelo Jr. Golia, *The Critique of Digital Constitutionalism*, 13 Max Planck Inst. for Compar. Pub. L. & Int'l L. 1, 13 (2022).

[72]Joseph H.H. Weiler, *United in Fear: The Loss of Heimat and the Crises of Europe*, *in* Legitimacy Issues of the European Union in the Face of Crisis: Dimitris Tsatsos in Memoriam 359, 363, (Lina Papadopoulou, Ingolf Pernice, Joseph HH Weiler eds., 2017).

[73]*See* Michal Stambulski, *Law Schools and Ethics of Democracy*, 2021 L. & Method 1, 7 (2021).

[74]Róisín Á Costello, *Faux Aumi? Interrogating the Normative Coherence of 'Digital Constitutionalism,'* 12 Glob. Const. 326, 339 (2023).

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autopoietic system[75] that fulfills the function of generalizing and stabilizing normative expectations,[76] as the proponents of societal constitutionalism believe. Although the law may reflect expectations of stabilization, liberal-democratic constitutionalism is endowed with a normative surplus. It does not aim exclusively at social stabilization, nor does it merely express a set of reflexive values or rules called upon precisely to register a given social equilibrium—it manifests a need for political transformation to correct existing imbalances in the various contexts of personality formation. Even though transformative constitutionalism has been theorized about the experiences of concrete polities,[77] it can represent a general epistemic template that entrusts public powers to address the unbalanced dynamics of social environments.[78] It is, therefore, possible to reconcile transformative constitutionalism with those theorizations of societal constitutionalism that aim to protect digital ecosystems from the totalizing excesses of specific social systems, such as information and surveillance capitalism.[79]

Constitutionalism challenges the social practices that undermine the value of the human person and is called upon to identify, evaluate, and correct legal rules to develop and promote a positive meaning of freedom. This active intervention of public power can be better understood as the need for a policy for liberty, codified in *ex-ante* regulations that prioritize the interests at stake and protect rights within the different social contexts. A strategic policy for liberty is inevitable when legal or constitutional rules are not updated to social and technological developments, when it is necessary to realign, in other words, the legal and constitutional order to the social system.

II. Freedom of Speech as an Institution

Such a policy for liberties calls for a change of the epistemic schemes, resorting to the model of the "institution of freedom" that designs "rights to freedom" rather than mere "freedom from," with citizens claiming countervailing powers to promote—and not just protect—freedoms.[80] According to this perspective, freedom of speech can be regarded as an institution in two senses.

In the first sense, freedom of expression is an institution because it consists of social and communicative practices that reflect the values of freedom of speech—autonomy, self-realization, ideological pluralism, participation, and self-government. These practices are stabilized by legal norms that recognize and legitimize the same practices to which they refer.[81] Freedom is, therefore, ambivalent in that it has a factual and a normative substance.[82] The institutional

[75]G. Teubner, Law as an Autopoietic System 70 (Ruth Adler trans., 1993).

[76]Golia, *supra* note 71, at 8.

[77]*See* Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. Hum. Rts. 146, 153-156 (1998) (which coined the transformative constitutionalism category for the South African experience).

[78]*See* Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 Am. J. of Compar. L. 527, 527-531 (2017).

[79]*See* Angelo Jr. Golia & Gunther Teubner, *Societal Constitutionalism: Deconstruction of State-Centrism and Construction of a Constitutional Theory for the Digital Age*, *in* The Oxford Handbook on Digital Constitutionalism 1, 3 (Giovanni De Gregorio, et al. eds., forthcoming).

[80]Barbera, *supra* note 68, at 76.

[81]*See* Mariano Croce, Che Cos'è Un'Istituzione 19 (2010)[hereinafter *Che Cos'è*] (discussing first-tier institutions, that are social practices predisposing and stabilizing models of conduct and socialization); Mariano Croce, Self-Sufficiency of Law: A Critical-institutional Theory of Social Order 140 (2012) [hereinafter *Self-Sufficiency*]. *See also* John Rawls, *Justice as Fairness*, 67 Phil. Rev. 164, 164 n.2 (1958) (conceiving "practice" as an activity specified by a system of rules that defines offices, roles, moves, penalties, defenses, and so on).

[82]*See* Peter Häberle, Le Libertà Fondamentali nello Stato Constituzionale 148 (1993) (defining a theoretical definition of institutional facts, to be distinguished from legally irrelevant "brute facts" that "have to do solely with the physical existence of the material universe, that is, of the material objects which compose it."). *See also* Neil McCormick & Ota Weinberger, An Institutional Theory of Law: New Approaches to Legal Positivism 9–10 (1986) (describing that the institutional facts, conversely, can be interpreted "in the light of human practices and normative rules.").

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meaning of liberties implies that they can also be understood as generalized expectations of behavior that give structure to different social systems.[83]

An example may help to explain this. The man speaking to the crowd from his stool in a public square is engaged in factual conduct that becomes a "freedom" by recognizing this practice by a legal norm, which may be explicit or implicit, authoritative or conventional depending on the legal system. Therefore, the speaker's action exists apart from legal recognition and is a *fact*. Nevertheless, it becomes legally relevant, and thus, *freedom*, to the extent that a legal type describes its constitutive elements.

Once a legal norm recognizes that conduct is an exercise of freedom, others will realize that conduct is freedom of expression and must regulate themselves accordingly. Depending on the speech's content and context, the speaker's action may invoke one or more values underlying freedom of expression. Taken together, the values, content, and context of freedom of expression are subject to a given legal doctrine that guides constitutional actors—such as, but not exclusively, courts—in protecting or enforcing freedom.

Freedom of expression is also an institution in a second sense. Once the act of speech complies with the procedures established by the legal order and thus becomes *freedom*, it conveys normative effects that orient public or private organizations. The values embedded in freedom of speech—for example, autonomy, self-realization, human dignity, ideological pluralism, and, as we shall see, participation and self-government—permeate organizations and teleologically influence their procedures and actions.

Let us take an example to illustrate these assumptions drawn from the Italian experience. In the constitutional provision of freedom of speech, there is no indication of how the public sphere is to be governed, and the media must be regulated. Article 21 of the Italian Constitution shows the Constitution's underestimation concerning the mechanisms of public opinion formation. There are no rules regulating the organization of the media, except for the right of the press to be free from censorship and a reference to the publicity of the regime of financing the press itself.[84] Gradually, the legislative and the Constitutional Court have filled the gap left by the text, recognizing freedom of information and a wide range of related principles and rights. Regarding the broadcasting system, for example, the principles of *external* pluralism, understood as the necessary presence of a plurality of market players, and internal pluralism, understood as a plurality of viewpoints, equidistance, and objectivity within the medium, were established.[85] To uphold these principles, two different institutions have been established, one within the Parliament, charged with overseeing compliance with internal pluralism within the public broadcaster,[86] and the other designed as an independent, administrative authority charged with overseeing compliance with external pluralism and internal pluralism within private broadcasters.[87]

Even in the digital ecosystem, organizations and meta-institutions must intervene through regulatory, reporting, and sanctioning powers to rebalance the social spaces in which practices related to freedom of expression operate.

These meta-institutions are responsible for promoting the values of freedom by shaping the same institutional procedures regulated by the legal order.[88] This leads to a further transformation

[83]Niklas Luhmann, I Diritti Fondamentali come IstituzioniI 45 (2002).

[84]*See* Art. 21.2 Costituzione [Cost.] (It.); Art. 21.5 Costituzione [Cost.] (It.).

[85]*See* Michela Manetti, *Freedom of Speech and the Regulation of Fake News*, *in* Italian Nat'l Reps. to the Xxist Int'l Congress of Compar. L. 433 (Michele Graziadei & Marco Torsello eds., 2022).

[86]*See* Legge 14 aprile 1975, n.103, G.U. Apr. 4, 1975, n.102 (It.).

[87]*See* Legge 31 luglio 1997, n. 249, G.U. Jul. 31, 1997, n.177 (It.).

[88]Croce *Che* Cos'è, *supra,* note 80, at 19 (defining such institutions as second-tier institutions, visible bodies with a specific structure, called upon to manage social and legal rules with this conceptualization owing to Santi Romano's definition of institution). *See also* Santi Romano, The Legal Order 21 (2017), describing how these entities:

[E]stablish a synthesis, a syncretism in which the individual gets caught. It not only regulates the individuals' activity but also their position, at times superior and at other times inferior to the others'; things and energies are instrumental in permanent and general ends, and all this with a set of guarantees, powers, subjections, liberties, checks, which systematize and unify an array of scattered elements.

See also Philip Selznick, THE MORAL COMMONWEALTH. SOCIAL THEORY AND THE PROMISE OF COMMUNITY

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

of private organizations, initially set up with some selective goals, into a social community, a structured institution within which its members share practices, symbols, and values.[89] Freedom has the task of integrating a procedurally organized system[90] that becomes a *democratic community* thanks to the continuous implementation of its shared values. As we shall see, it is through institutionalizing freedom of expression that a given community can call itself democratic. Freedom of expression is not only a criterion for guiding institutional action but is also the result of an institutional process that realizes its implicit values. As we shall see in a moment, the product of this institutionalization is what we can call *public discourse*.

III. The Consequence of the Institutionalization of Freedom of Speech: The Theory of Public Disclosure

The institutional reading of freedom of expression thus requires keeping two aspects together: The *act of communication* and the *reinforcement of the principles* related to freedom of expression *through the action of institutions*, from which a series of rights related to freedom itself are derived.

This reading leads to an enrichment of the structure of freedom and, at the same time, of its function and purpose. Therefore, it is possible to explore theories, such as democratic readings,[91] that illustrate the benefits of freedom of expression to the political system.

These theories are, of course, internally differentiated. According to some, the link between freedom of speech and democratic self-government refers to the connection between citizens' right to be informed and the formation of majorities that require "wise" and informed deliberation by the political community.[92] It is a matter of debating the everyday needs of the members of the political body.[93]

Freedom of speech would thus establish a particular model of deliberative democracy based on free confrontation among equals genuinely interested in reaching an agreement on the common good. This model, based on debate rather than the mere negotiation of given interests,[94] finds its historical precedent in the town meetings of colonial America, which refer to a cooperative model based on a regulated and responsible discussion. The example of the town meeting requires an organizational and institutional structure based on planned interventions within well-defined spatial and temporal limits: If the ultimate goal is a "wise" decision for the common good, it is not essential that each person be granted the right to speak, "but that everything *worth* saying can be said."[95]

234 (1992) (according to whom the process of institutionalization originates for organizations that pursue specific goals through a chain of command and communication channels).

[89]SELZNICK *supra*, note 87, at 235.

[90]*See* RUDOLF SMEND, COSTITUZIONE E DIRITTO COSTITUZIONALE 245-246 (1988) (explaining that freedom contributes to what Smend called the material integration within the legal order).

[91]Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1406 (1986) [hereinafter Fiss, *Free Speech*]; CASS SUNSTEIN, DEMOCRACY AND PROBLEM OF FREE SPEECH (1993); HEINZE *supra*, note 54; HEINZE, THE MOST HUMAN RIGHT: WHY FREE SPEECH IS EVERYTHING (2023). *See also* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM. THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-28 (1960) (providing an approach rooted in American cultural tradition); ROBERT POST, DEMOCRACY, COMMUNITY, MANAGEMENT 179-196 (1995); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497-499, (2011); JAMES WEINSTEIN, *Extreme Speech, Public Order, and Democracy*, *in* EXTREME SPEECH AND DEMOCRACY 23–61 (Ivan Hare & James Weinstein eds., 2009).

[92]MEIKLEJOHN *supra*, note 90, at 26.

[93]*Id.* at 55.

[94]SUNSTEIN, *supra*, note 90, at 242. *See also* PETTIT *supra*, note 67, at 187 (describing that in decision-making based on compromise and mere aggregation of interests, the parties aim to reach a beneficial agreement through mutual concessions from static preferences, which do not evolve in the course of discussion; conversely, in deliberation based on debate, individual preferences are defined during free confrontation, with individuals interrogating "one another about the nature and import of those considerations and by converging on an answer to the question of which decision the considerations support").

[95]MEIKLEJOHN *supra*, note 90, at 25.

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The speaker's autonomy is thus subordinate to the audience's interest in hearing speeches on matters of public interest. This reading implies a strong functionalization of freedom of expression to the deliberative ideal, which requires the intervention of the public power whenever it is necessary to safeguard the conditions of the free process of collective self-determination.[96] When the public sphere is subject to the distorting influence of anti-democratic and anti-egalitarian forces, such as the market,[97] but also in cases where a particular point of view may discourage the participation of some individuals in the public sphere,[98] then there is room for public intervention to limit speech and thus satisfy a minimum level of debate quality.

This approach underestimates the role of the speaker and, as a consequence, undermines individual autonomy. According to this perspective, the interest in being informed guides democratic procedures governed by the majority principle. What matters is how majority deliberation is formed, not the individual's choice to participate in a communicative interaction.

To avoid underestimating individual autonomy, it is preferable to refer, as others have emphasized, to the participatory moment of *public discourse*, a structure of communication that sets the stage for a political process of reconciliation among citizens.[99] The open, free, and equal confrontation of individual preferences and opinions defines the same concept of representative democracy, making it responsive to the orientations of the citizens.[100] In other words, freedom of expression implies the opening of communicative interactions that provide the structure of a space for discussion in which processes of collective identification take place. This space gives birth to a particular type of political community called democracy, which is governed by the principle of discourse and based on social relations of a communicative nature. In the context of a differentiated social order characterized by a plurality of subsystems,[101] public discourse enhances the values presupposed by the freedom of expression—such as autonomy, self-realization, ideological pluralism, participation, and self-government—and protects them from the teleologically oriented action of competing subsystems. These subsystems that threaten or interfere with public discourse are, for example, the public authority acting to defend its self-preservation by criminalizing individual dissent, cultural communities aspiring to protect their collective identity through the ban of contents that offends their reputation, private technostructures oriented toward profit maximization, such as the business model of social networks that amplify disinformation and the self-closed fragmentation of digital environments.[102] Public discourse should be protected by these different subsystems, avoiding the institutional domination of the democratic system by other social domains.[103]

The theory of public discourse contributes to the substantive foundation of a democratic system based on the principle of majority procedural organization grounded on the majority principle, political representation, separation of powers, etc. The open, free, and equal confrontation of individual preferences and opinions characterizes democracy in a receptive sense with regard to the sensitivities and orientations of citizens, who help shape the social order according to the person's values.[104]

[96]Fiss *supra*, note 90, at 1416.

[97]Owen M. Fiss, *Why the State?,* 100 Harv. L. Rev. 781, 790 (1987) [hereinafter Fiss, *Why the State?*].

[98]*See* Owen Fiss, The Irony of Free Speech 5 (1995). *See also* Maria J. Matsuda, Charles R. Lawrence III, Richard Delgado, Kimberlé W. Crenshaw, Word Chat Wound. Critical Race Theory, Assaultive Speech, and The First Amendment (1993) (sharing Fiss' perspective among those who advocate race consciousness, aimed at emphasizing the silencing effect realized by racist speech toward historically discriminated racial groups).

[99]Post *supra*, note 90, at 7, 191–196.

[100]*See id.* at 188.

[101]Luhmann *supra*, note 83.

[102]Corrado Caruso, La Libertà Di Espressione in Azione. Contributo A Una Teroria Costituzionale Del Discorso Pubblico (2013).

[103]Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, *A Systemic Approach to Deliberative Democracy*, *in* Deliberative System 23 (John Parkinson & Jane Mansbidge eds., 2013).

[104]Post *supra*, note 91.

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Citizens' participation in public discourse is a condition for legitimizing democratic orders: The legal system can claim citizens' obedience "only insofar as citizens maintain opportunities to intervene in public discourse to air their views about, among other things, extant or possible laws, and policies."[105] In public discourse, viewpoint selection should be exceptional because all arguments and ideas that satisfy the need for individual self-fulfillment and participation should be included.[106] The principle of discourse implies a principle of "egalitarian reciprocity," according to which each of the participants can introduce any topic they deem relevant, redefining the same rules of the discursive agenda.[107]

To fulfill the function of democratic legitimation and avoid its dilution into an indistinct flow of emotional impulses, public discourse must have a minimum qualitative level that allows for self-determination and mutual political understanding of the participants. Misleading interferences in public opinion-forming processes, such as digital disinformation, undermine the collective expectation of a reasonable correspondence between the facts relevant to a given political organization and the description of reality.[108] A dialogical confrontation between consociates becomes impossible when this expectation is lost.

The process of institutionalizing freedom of expression and realizing its value in the public discourse leads to a substantial change in the very nature of public power itself. The latter is transformed from a mere managerial organization oriented to the satisfaction of sectorial objectives,[109] acting according to criteria of instrumental rationality, into a democratic community, an open society that critically discusses the moral criteria of the common good.

Therefore, the institutionalization of freedom of speech takes into account all those principles and rights—freedom of the press, informational pluralism, competitive opening of the information market, transparency of the sources of funding mass media, right to report, improvement of objective information, etcetera—that allow open communication of opposing world views and therefore legitimizes the democratic-representative circuit.[110]

As argued above,[111] the digital public sphere has encountered a process of privatization, self-closed fragmentation, and information pollution favored by the large web corporations. The theory of public discourse aims to correct these pathologies on a prescriptive level. Public discourse has normative and legal dimensions.[112] In the normative dimension, public discourse legitimizes the democratic-representative circuit on a substantive level and directs institutional action toward its enforcement. In the legal dimension, public discourse is defined by the rules and principles that govern it.[113]

In sum, the institutional reading of freedom of expression allows us to rethink the relationship between public power and freedom. The former is not entitled to mere abstention but to a promotional task of realizing the values underlying the rights of freedom. This promotional intervention is translated into regulatory legislation to balance the relationship between authority and the individual in different social spaces, including private ones such as digital ecosystems. This institutionalization process results in public discourse, which legitimizes the democratic system.

[105]Eric Heinze, *From Gutenberg to Instagram: Three Stages of Free Speech Since the Rise of the Modern State* (unpublished manuscript, on file with author).

[106]Heinze *supra*, note 55.

[107]Seyla Benhabib, The Claims of Culture: Equality and Diversity in the Global Era 107–108 (2002).

[108]*See* discussion *supra*, Section C.

[109]Post *supra*, note 91, at 249–252 (providing that in managerial contexts, public power acts functionally to satisfy its ends regardless of the values of the human person, following the logic of "instrumental" rationality).

[110]Post *supra*, note 91, at 7, 191–196; Caruso *supra*, note 102, at 157–166.

[111]*See* discussion *supra* Section II.

[112]Heinze, *supra* note 55, at 82 (underlining "the formal and legal status of public discourse.").

[113]*Id.* (describing the legal status of public discourse as "something that is necessarily presupposed as the original and ongoing source of the constitution, as the 'constitution of the constitution'.").

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The relationship between public discourse and the democratic system is circular. On the one hand, the normative dimension of public discourse guides the actions of public authorities. On the other hand, public discourse exists precisely because of the regulatory action of the same authorities. As I will describe in a moment, at the European level, this regulatory action has been carried out by a plurality of measures, among which the DSA is paramount.

E. Correcting Digital Distortions According to Public Discourse's Principles: The Digital Services Act

If the institutional conception of freedom of expression leads to the theory of public discourse, then its principles define the legal framework, which consists of an *ex-ante* regulatory approach. This approach cannot be pursued by criminalizing the content or viewpoint of the messages circulating on digital platforms nor by relying on regulation at the national level. Regarding the former, the fake news problem highlighted above shows that criminal sanctions against disinformation cannot be an adequate response, as they would not be able to stop the massive production and dissemination of viral disinformation streams. About the latter, the state mimesis of digital corporations and their transnational ability to influence public opinion in the case of abusive speech, as the analysis of fake news shows, makes the national level too weak and fragmented to offer a valuable and effective regulatory intervention.

In this context, the European Union's digital sovereignty strategy, which alludes to the imposition of forms of control and influence over the responsibility and organizational power of tech companies,[114] offers possible answers.[115] The European Union has thus enriched the initial approach to digital environments, based initially on soft law and self-regulation.[116] Recognizing the insufficiency of self-regulation, the European Union has advocated a strategy of co-regulation aimed at providing the regulatory framework within which codes of conduct could be placed. This radically different perspective has seen the demise of the original approach of early regulatory intervention to enable the development of digital services.[117]

This renewed strategy, formally aimed at the integration and competitive development of digital markets,[118] promotes the rights and values recognized by the Charter of Fundamental Rights and stemming from the traditional common constitutions, according to a trend that has led part of the doctrine to consider such reforms as the expression of a renewed "digital constitutionalism."[119]

The European attempt to regulate rights in the digital ecosystem through legislation is not new: Think of the GDPR,[120] which the Copyright Directive followed.[121] In addition to this rights-oriented regulation, the Digital Market Act [hereinafter DMA][122] explicitly qualifies digital

[114]Luciano Floridi, *The Fight for Digital Sovereignty: What It Is, and Why It Matters, Especially for the EU*, 33 PHIL. & TECH 369, 371 (2020).

[115]Ursula von der Leyen, *State of the Union 2020* (Sept. 16, 2020) (European Commission).

[116]*See* discussion *supra* Section III.

[117]Council Directive 2000/31 of 8 June 2000, on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) (EU) [hereinafter "Directive on Electronic Commerce"].

[118]Consolidated Version of the Treaty on the Functioning of the European Union Art. 114, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] (providing the legal basis for the adoption of the new legal framework (DMA and DSA) which enables the European legislative to adopt measures necessary to the establishment and functioning of the internal market).

[119]*See infra* note 163.

[120]Commission Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1 [hereinafter *General Data Protection Regulation*].

[121]Council Directive 2019/790 of 17 April 2019, on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

[122]Commission Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828, 2022 O.J. (EU) [hereinafter *Digital Markets Act*].

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platforms as gatekeepers,[123] a term used in antitrust law to refer to market power holders that can control access to a given infrastructure by creating economic dependency of other operators.[124]

If the DMA is concerned with restoring fairness and competitive obligations within digital markets, the DSA seeks to correct the fragmentation of the public sphere by increasing transparency and attempting to fix the subaltern position of the user.

The DSA is an *ex-ante* regulation that focuses on a risk-based approach. For the first time, it recognizes "systemic risks" related to the design, functioning, and use of digital services are recognized.[125] Although the exemption of liability for hosting illegal content and the prohibition of a general monitoring obligation are confirmed,[126] the regulation sets out obligations and procedures to mitigate these systemic risks. Some solutions are general and applicable to all platforms. Others are aimed at very large online platforms identified by the Commission based on quantitative criteria.[127]

The information and transparency duties on "Terms and Conditions" of the services and their application and enforcement mechanism are worth mentioning among the procedures addressed to all platforms.[128] Each platform must explain policies and restrictions to using the service and content moderation procedures in clear and intelligible terms. Restrictions must be applied to an extent that is proportionate and otherwise respectful of "the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter."[129]

The DSA also designs a notification and action mechanism in case of illegal content detection. In this regard, it specifies the elements and information that the user must include in the request; it establishes a priority order for reports, prioritizing requests coming from previously certified "trusted flaggers."[130]

Moreover, the regulation imposes on digital platforms an obligation to justify any restrictions by specifying the type of sanction to be applied—for example, removal of the content, deactivation of access, *etcetera*—highlighting the facts supporting the decision.[131] To all the service recipients, including those that have submitted a notice, digital platforms shall provide for an internal

[123]*Digital Markets Act* Art. 5, 6. *See also id*. at art. 6(10) (providing other business users with access to data free of charge); *id*. at art. 6(11) (providing access to any third-party online search engine provider on fair, reasonable, and non-discriminatory terms to rank, query, click, and display data, anonymizing personal data). *See* Pierre Larouche & Alexandre de Streel, *The European Digital Markets Act: A Revolution Grounded on Traditions*, 12 J. Eur. Competition L. & Prac. 542 (2021) (providing an overview of the Digital Markets Act).

[124]Larouche & de Streel, *supra* note 123, at 544–545.

[125]Alessandro Mantelero, *Fundamental Rights Impact Assessments in the DSA*, VerfBlog (Nov. 11, 2022), https://verfassungsblog.de/dsa-impact-assessment/.

[126]Commission Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC, 2022 O.J. (L 277) 1 [hereinafter *Digital Services Act*], Arts. 4–8 (confirming, in light of the Court of Justice of the E.U. decisions on consumer protection, what is provided by dir. 2000/31 EC. art. 9 DSA, where it regulates the elements of the national authority's order to remove illegal content and the response owed by the service intermediary to the user) (reversing *Glawischnig-Piesczek v. Facebook Ireland Ltd.*, Case C-18/18, ECLI:EU:C:2019:821, (Oct. 3, 2019), https://curia.europa.eu/juris/liste.jsf?num=C-18/18.) *See also Google France v. Louis Vuitton et al.*, Cases C-236/08, C-237/08, C-238/08, ECLI:EU:C:2010:159 (Mar. 23, 2010), https://curia.europa.eu/juris/liste.jsf?num=C-236/08; *L'Oréal SA et al. v. eBay International AG et al.,* Case C-324/09, ECLI:EU:C:2011:474, (July 12, 2011) https://curia.europa.eu/juris/liste.jsf?num=C-324/09; Catalina Goanta, *Now What*: *Exploring the DSA's EnforcementFutures in Relation to Social Media Platforms and Native Advertising*, VerfBlog (Nov. 4, 2022), https://verfassungsblog.de/dsa-now-what/.

[127]Cf. *Digit. Services Act*, art. 33. On April 25, 2023, the Commission issued a press release listing the VLOPs: Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines.

[128]*Digital Services Act*, art. 14(1)(4). *See also* João Pedro Quintais, Naomi Appelman, & Ronan Fahy, *Using Terms and Conditions to Apply Fundamental Rights to Content Moderation*, 24 German L.J. 909, 909–910 (2023).

[129]*Digital Services Act,* art. 14 (4).

[130]*Digital Services Act*, arts. 16, 22.

[131]*Digital Services Act*, arts. 17, 23 (providing for the suspension from the service of users who frequently provide manifestly illegal content, as well as suspension from the reporting power for individuals who just as frequently submit notices or complaints that are manifestly unfounded).

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complaint system.[132] Finally, the DSA admits to referring disputes to specially certified out-of-court dispute resolution bodies, a remedy placed alongside ordinary judicial remedies.[133] These provisions must then be integrated with Article 18 of the European Media Freedom Act [EMFA], which recognizes a "preferred position" for media service providers' content distributed by very large online platforms.[134]

The DSA sets the stage for a digital due process,[135], designed to resolve conflicts between users and platforms and avoid chilling effects on content protected by freedom of expression. All the mentioned provisions must be read by Article 14(4) of the DSA, which requires respect for freedom of expression and other rights established by the Charter.[136]

The DSA is not limited to working within digital ecosystems by delimiting freedom of expression. It also aims to correct the "external" infrastructure of digital ecosystems by identifying a series of obligations designed to limit the power of platforms to influence individual participation and self-determination within the digital public sphere. Thus, a specific obligation was introduced to design, organize, and manage online interfaces in a way that does not deceive and manipulate service recipients so that they can make "free and informed decisions."[137] About the design and management of the interface, there are certain transparency obligations, including the need to make explicit the parameters used in recommender systems, with the concomitant right of the user to modify these parameters and to indicate "unambiguously" when suggested content is a form of advertising, as well as the customer and the sponsor of the advertisement.[138]

This general framework must then be complemented by specific provisions for very large online platforms, which will identify and analyze systemic risks—risk assessment. Fake news is one of these factors. Among the relevant risks, the DSA explicitly considers threats to "democratic processes, civic debate and electoral processes, and public safety," including those due to "disinformation campaigns."[139] These risks must be mitigated—risk mitigation—through a series of measures to influence the presentation and dissemination of content, among which the need to mark so-called deepfakes is particularly important.[140] In addition, in line with the GDPR, a right to a non-profiling recommendation system[141] and additional transparency obligations for online advertising are provided.[142]

The due diligence obligations in Article 41 of the DSA are then complemented by a final provision granting the Commission the power to impose or propose "specific, effective and proportionate measures" when "extraordinary circumstances lead to a serious threat to public security or public health."[143] This provision is linked to Article 48 of the DSA, which provides particular crisis protocols signed by the Commission and the very large online platforms. Based on these protocols, very large online platforms undertake to display only the information provided by

[132]*Digital Services Act*, art. 20.

[133]*Digital Services Act*, art. 21.

[134]Commission Regulation 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a Common Framework for Media Services in the Internal Market and Amending Directive 2010/13/EU, 2024 O.J. [hereinafter *European Media Freedom Act*], Art. 18 (5)(6). Complaints from media service providers about content moderation must be prioritized by the VLOPS. The latter must engage in meaningful and effective dialogue with the former to reach an amicable solution.

[135]Martin Husovec, *Will the DSA Work?: On Money and Effort*, VerfBlog (Nov. 9, 2022), https://verfassungsblog.de/dsa-money-effort/.

[136]Quintais, Appelman, & Fahy, *supra* note 128.

[137]*Digital Services Act,* art 14(4).

[138]*Digital Services Act*, arts. 26, 27.

[139]*Digital Services Act*, art. 34, Recital (82), (83).

[140]*Digital Services Act*, art. 35(1)(k).

[141]*Digital Services Act*, art. 38.

[142]*Digital Services Act*, art. 39.

[143]*Digital Services Act*, art. 36(1)(2).

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the "States' authorities or at Union level, or, depending on the context of the crisis, by other relevant, reliable bodies."[144]

This regulation sets the stage for a system of conditional, content-neutral responsibility for platforms. To this end, the DSA also identifies those responsible for the supervision and the imposition of sanctions, outlining a sort of halo system. The powers of supervision and sanctioning are entrusted to the Member States and their Digital Services Coordinators, the authority designed for this purpose by each State, about compliance with the obligations applicable to the generality of platforms. In contrast, the Commission is the sole holder of these prerogatives about the more relevant obligations for very large online platforms. This includes risk assessment, risk mitigation, additional online advertising transparency requirements, and non-profiling recommendation systems.[145] Coordination between these two levels will be ensured by the European Digital Services Committee, composed of national coordinators and chaired by the Commission.[146]

In summary, the EU has attempted to shape digital systems according to the principles of public discourse. This strategy has not been pursued by defining illegal expressive content and identifying as many limits to freedom of expression as negative freedom, such as freedom from interference. The DSA has adopted a two-pronged strategy, leaving the determination of illegal content at the national level and the challenge of digital sovereignty to supranational polity.

An overall reading of the DSA concerning providing a digital process of law and the part dedicated to correcting digital ecosystems is consistent with the institutionalization of freedom of expression. The DSA imposes procedures and transparency obligations that affect the infrastructural model adopted by platforms, creating new rights related to the dynamics of the governance of digital ecosystems and congruent with the principle of the public discourse, such as the right to proportionate intervention in the removal of content published online or the right not to be subjected to targeting-based recommendation systems. The assessment of what can be considered "freedom of expression" is reserved to a dialectical process starting from the reports of flaggers, moving through the confrontation between users and the platform, and ending with the out-of-court dispute resolution bodies or the judicial decisions marking the boundaries of lawful speech. The European Commission, national coordinators, trusted flaggers, and out-of-court dispute resolution bodies are responsible for cleaning and opening up public digital discourse from harmful speech and other practices that interfere with individual autonomy and degrade the quality of public discourse. DSA identifies two main types of institutions that free up "discursive spaces" within platforms: spaces unpolluted by disinformation flows and offensive speech. Some institutions, such as the European Commission and national Digital Service Act coordinators, are top-down. Others are bottom-up, formed thanks to the contribution of civil society, such as "trusted flaggers" tasked with reporting priority violations of terms of service and certified out-of-court dispute resolution bodies.

F. A Chilling Effect on Freedom of Expression? A False Question and Some Critical Aspects of the DSA

The DSA has provoked mixed reactions: According to some, it raises compatibility problems with the freedom of expression guaranteed by Art. 11 of the European Charter of Fundamental Rights and the constitutions of many Member States. For example, it has been argued that the DSA could have a chilling effect on freedom of expression[147] by rigidifying the practices of content

[144]*Id.*

[145]*Digital Services Act*, art. 56.

[146]*Digital Services Act*, art. 61.

[147]*See* Daphne Keller, *The EU's New Digital Services Act and the Rest of the World,* VERFBLOG (Nov. 7, 2022), https://verfassungsblog.de/dsa-rest-of-world.

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

moderation services[148] and definitively entrusting digital platforms with the task of distinguishing between lawful and unlawful speech.[149]

According to this view, strengthening the responsibility regime of digital platforms would thus exacerbate the risk of delegating to them the choice of which content to keep and which to remove from the digital ecosystem, therefore realizing private censorship over digital speech.[150]

However, the risks of private censorship are independent of the DSA but depend on the structural functioning of digital platforms. Instead, the DSA seeks to correct that functioning. As seen above, DSA Article 14 (4) requires that any restrictions must always take into account the need to protect freedom of expression:

> Providers of intermediary services shall act in a diligent, objective, and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.[151]

The same provision recalls the principle of proportionality. Applying the principle of proportionality to digital restrictions on freedom of expression means they must be suitable, necessary, and proportionate *stricto sensu* to secure the countervailing interest.[152] This is necessarily a case-by-case analysis to be approached in light of the case's circumstances and the legal landscape of the national orders.

Of course, there are margins of legal uncertainty, but this depends on the choice of a regulatory double-track, which leaves identifying illegal content to national laws. For example, disinformation practices fall into a regulatory gray area, as they are both part of the unlawful content defined by national legislations[153] and harmful activities requiring an appropriate digital ecosystem design. Platforms are required to design and manage interfaces that do not deceive or manipulate users,[154] and to label advertising messages or deepfakes as such,[155] in addition to the obligations regarding very large online platforms and the crisis resolution mechanism.

It is not within the scope of the DSA to pre-determine legal content or to define what constitutes fake news. By imposing obligations of fairness and transparency on content and digital interfaces, the DSA acts on the structure and nature, and thus the power, of disinformation streams. It necessarily addresses the risk posed by digital platforms that directly or indirectly take

[148]*See* Eric Goldman, *How Will the Digital Services Act (DSA) Affect the European Internet?*, TECH. & MKTG. L. BLOG (JULY 12, 2023), https://blog.ericgoldman.org/archives/2023/07/how-will-the-digital-services-act-dsa-affect-the-european-internet.html; Commission Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and Amending Directive 2000/31/EC, 2022 O.J. (L 277) 1 [*Digital Services Act*].

[149]Giovanna De Minico, *Towards an "Algorithm Constitutional by Design,"* 1 BIO L. J. 381, 385–387 (2021).

[150]On the dangers to freedom of speech resulting from legal provisions aimed at holding platforms accountable, *see* Marco Bassini, *Fundamental Rights and Private Enforcement in the Digital Age*, 25 EUR. L.J. 185, 187 (2018); Germán M. Teruel Lozano, *Freedom of Speech and New Means of Censorship in the Digital Era*, 46 REVISTA CHILENA DE DERECHO 301, 309–311 (2019).

[151]*Digital Services Act*, art. 14(4).

[152]On the general structure of proportionality judgment (the Weight Formula), *see* Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 RATIO JURIS 433, 436 (2003).

[153]*See* Loi 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information [Law 2018-1202 of December 22, 2018 relating to the fight against the manipulation of information], JOUNRAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O] [OFFICAL GAZETTE OF FRANCE], Dec. 2018 (prohibiting massive flows of disinformation during the election period (upheld by the Constitutional Council in Dec. No. 2018-774)); P. Türk, *Liberté d'expression et Disinformation en France. Entre Tradition Libérale et Impératif de Régulation: un Encadrement Souple de l'expression en Ligne en France*, *in* FREEDOM OF SPEECH AND THE REGULATION OF FAKE NEWS 226 (Oreste Pollicino ed., 2023).

[154]*Digital Services Act*, art. 25.

[155]*Digital Services Act*, arts. 26, 35(1).

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an editorial line through artifacts or misleading content, such as fake news generated by artificial intelligence tools. This explains, for example, the inevitable clash between the former European Commissioner for the Internal Market, Thierry Breton, and the owner of X, Elon Musk, who not only left the EU's voluntary code against disinformation but also showed the intention of directly interfering in the electoral and political processes of the Member States, which somehow already happened during the US presidential elections.

The idea that DSA can have a chilling effect on expressive content hides a general theoretical-cultural bias related to the atomistic and negative meaning of freedom of speech, which pits the individual *against* (public) power. This reflects the original philosophical justification of freedom of expression, which is no longer sufficient to guarantee its implicit values in the digital public sphere, where freedom of expression must be understood as a freedom *for* the *power*, that is, for the control of private powers and the democratic construction of a public power open to the free and reliable flow of information and the participation of individuals.

Of course, the DSA presents some critical profiles. One example is its compatibility with the legislation of some Member States, which anticipate European intervention, for example, about the procedures and deadlines that platforms must follow to act on reports of illegal content.[156] Even the supervisory powers generally attributed to the Member States, with the relevant exception of the obligations addressed to the very large online platforms, may give rise to disharmonies and uncertainties.[157]

In addition, the institutional arrangement established by the DSA may lead to short-circuits. Consider, for example, the role given to the Commission, which under this European regulation assumes the task of monitoring and possibly sanctioning the failure of very large online platforms to comply with the duties and obligations set out in the DSA. The assessments made by the Commission as the enforcer of the DSA, which is essentially administrative, may interfere with the policies pursued by the same Commission in areas related to the DSA in its role as the motor of European integration. The European Commission is not an independent administrative body but an executive body responsible for legislative initiative and negotiation.[158] The concentration of roles and powers in the hands of the same institution can lead to disharmony between the individual Commissioner in charge of the administrative structure, responsible for the enforcement of the regulation, and the political direction of the Commission as a whole. As recently demonstrated in a case reported by the news, the President of the European Commission, Von der Leyen, denied approval to the letter issued by the former internal market commissioner Breton, who threatened to sanction the social media if its contents were found to place EU citizens at risk of serious harm.[159]

Another problem concerns the so-called societal structures on which the DSA enforcement relies.[160] Consider, for example, the trusted flaggers, whose notifications are prioritized in the notice and action mechanism,[161] or the dispute resolution bodies that can resolve controversies

[156]The discipline of the German NetzDG, which in many ways inspired the supranational regulation, requires platforms to remove content within 24 hours if it is manifestly illegal. *See* E.E. Wagner, *Freedom of Speech and the Regulation of Fake News in Germany: Dealing with Disinformation under the Normative Guiding Principle of Individual and Social Autonomy of the Communication Process*, *in* FREEDOM OF SPEECH AND THE REGULATION OF FAKE NEWS 244 (Oreste Pollicino ed., 2023).

[157]Andrew Turillazzi, Federico Casolari, Mariarosaria Taddeo, & Luciano Floridi, *The Digital Services Act: An Analysis of its Ethical, Legal, and Social Implications*, 15 L. INNOVATION & TECH. 19, 101 (2023).

[158]*See* Ilaria Buri, *A Regulator Caught Between Conflicting Policy Objectives: Reflections on the European Commission's Role as DSA Enforcer*, VERFBLOG (Oct. 31, 2022), https://verfassungsblog.de/dsa-conflicts-commission (arguing possible conflict in the realm of data protection and international trade).

[159]*See* Alice Hancock, *Brussels Slaps Down Thierry Breton Over 'Harmful Content' Letter to Elon Musk Financial Times*, FIN. TIMES (Aug. 13, 2024), https://www.ft.com/Eucontent/09cf4713-7199-4e47-a373-ed5de61c2afa.

[160]Husovec *supra*, note 135.

[161]*Digital Services Act*, arts. 16, 22.

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related to the above mechanism. These actors will play an essential role in DSA enforcement, helping to shape the digital ecosystem according to human rights and the principles of public discourse. Their proper functioning will require the mobilization of civil society and adequate financial resources.

Moreover, the regulation does not prohibit fake or anonymous accounts or require identifying the person behind a given profile to access social networks.[162] However, these possible interventions are implicitly left by the European Union itself to the Member States, which can fill the gaps of supranational regulation.

G. Conclusion: Digital Constitutionalism as a Process of Institutionalization

Beyond these critical aspects, DSA represents a first step towards regulating public discourse in line with European values, a step towards digital constitutionalism. This term refers to the promotion within digital ecosystems of rights and values recognized by the Charter of Fundamental Rights and derived from common constitutional traditions of the Member States.[163]

It is probably true that the term "digital constitutionalism" disregards a certain semantic vagueness and perhaps a rhetorical surplus. The same term is often used to refer to different hypotheses and trends. For example, according to some, digital constitutionalism underlines the role played by private law in orienting the self-regulation and the technological structures of digital platforms according to constitutional values.[164] Others refer to the declarations, which are not always legally binding, relating to internet rights adopted by global institutions and international organizations or proposed within the state.[165] At the same time, some voices consider a manifestation of digital constitutionalism the action of the courts, which, through the adjudication of rights, can rebalance the power of digital corporations in favor of the individual.[166] One last approach sees digital constitutionalism as a set of ideals or values stemming from the tradition of liberal-democratic constitutionalism applicable to digital environments through the joint action of states and transnational actors.[167]

The European regulation undoubtedly expresses renewed digital constitutionalism but does not fit into previous definitions. The theoretical perspectives above must consider elements that characterize the current constitutionalization process within digital ecosystems.

First, they must consider the need for a theoretical rethinking of fundamental freedoms. As argued above, the Web, structured according to digital platforms' technical, economic, and legal models, makes the contexts where freedoms are exercised particularly relevant. For this reason, freedoms must be considered value-oriented social spaces that require positive regulatory intervention by public power to correct imbalances in the digital public sphere. Indeed, the role of public power is underestimated in the various theorizations cited above. It is either seen as just one of the actors constellating a broader transnational inter-legality, or it is reduced to the case-by-case adjudication of the courts.

This case-by-case approach underestimates the importance of the processes of institutionalization of fundamental rights. In the European Union, the ongoing process of digital

[162]Giulio Vigevani, *Piattaforme Digitali Private, Potere Pubblico e Libertà di Espressione*, 1 Diritto Costituzionale 41, 53 (2023).

[163]Pollicino, *supra* note 58, at 184, 203. *See* G. De Gregorio, Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society 38 (2022).

[164]Brian Fitzgerald, *Software as Discourse – A Constitutionalism for Information Society*, 24 Alt. Legal J. 144 (1999).

[165]Dennis Redeker, Lex Gill, & Urs Gasser, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*, 80 Int'l Commc'n Gazette 302, 313-316 (2018).

[166]Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 Univ. Colo. L. Rev. 1263 (2000); Pollicino *supra*, note 58.

[167]Edoardo Celeste, *Digital Constitutionalism: A New Systematic Theorization*, 33 Int'l Rev. L., Comput. & Tech. 76, 90 (2019).

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constitutionalization[168] is inspired by the values enshrined in common constitutional traditions, which are also reflected in the European Charter of Fundamental Rights. However, neither national constitutions nor the European Charter provide *per se* legal protection for the rights of digital users. The invocation of human rights risks becoming a rhetorical exercise if the grounding of rights is not carried out through new rules, procedures, and obligations that digital platforms must comply with. It has been argued, for example, that the EU's human rights-centered perspective is insufficient to correct the functioning of digital platforms that perpetuate social inequalities and social power relations.[169] The human rights narrative would depoliticize social conflicts, diverting attention from the macro-level social, political, and economic context.[170]

This kind of criticism does not detract from the need for a public institutionalization process but rather confirms it. If sovereignty always refers to a relationship between institutionalized powers,[171] the European call for digital sovereignty explains how it is only possible to reassert rights by reasserting power against transnational private powers. Fundamental rights are the offspring of the process of institutionalization, which refers to procedures and distribution of duties to the subject who has to comply with the respect of specific rights.

In the face of digital contexts shaping rights and polluting European public discourse, freedom of expression can no longer be a simple negative freedom. Freedom of expression's institutional meaning emphasizes the importance of contexts and the need for *ex-ante* public regulation oriented towards the values of public discourse—autonomy and self-realization, ideological pluralism, participation, and self-government.

The DSA seeks to limit the discretion of platforms in regulating content and to correct their digital design. New rights are recognized and institutionalized by imposing new obligations and introducing articulated procedures, such as the right to proportionate intervention in content removal or not to be subjected to targeting-based recommendation systems. The regulations of the European Union can go even further, and much remains to be done. This applies, for example, to information and surveillance capitalism and the necessary redistribution of financial resources through the taxation of revenues from the exploitation of data or content,[172] even if a first attempt has been made to redress economic inequalities in digital environments. The European Copyright Directive included provisions on remuneration rights for publishers and authors for journalistic content used and distributed by information society service providers.[173]

In conclusion, the real success of the DSA will depend on its enforcement, which will be entrusted to the Commission and the national level. The European Union will likely have to address the issue of a European digital public service sooner or later. The question is presented: How to ensure a digital information space that is fair, independent, and respectful of European pluralism? Is this an achievable goal along the lines of what has happened at the national level for broadcasting? These questions remain unanswered for now. The DSA is undoubtedly the first step; others must follow it, but the direction is set. If a rights-based European order is to be maintained, there will be no turning back.

Acknowledgments. This Article results from a highly enriching spring semester at the Jean Monnet Center at NYU, where I was Emile Noël Fellow in 2023. I am grateful to Gráinne de Búrca and Joseph Weiler, who guided me through that experience and critically and accurately read and commented on earlier versions of the Article. I am also deeply indebted to Eric Heinze, Chiara Valentini, Michal Stambulski, Nedim Hogiç, Oreste Pollicino, Angelo Jr. Golia, and Micol Pignataro for their insightful suggestions that allowed me to clarify some core arguments of the Article. In the first steps of my research, I also benefited

[168]*Id.* at 90.

[169]Rachel Griffin, *Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality*, 2 EUR. L. OPEN 30, 31 (2023).

[170]*Id.* at 48.

[171]MARTTI KOSKENNIEMI, *Conclusion: Vocabularies Of Sovereignty – Powers Of A Paradox*, *in* SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 222, 241 (H. Kalmo & Q. Skinner eds., 2011).

[172]Golia *supra,* note 71, at 21 (describing some of the proposals).

[173]Council Directive 2019/790, art. 15, 2019 O.J. (L 130) 92 (EU).

https://doi.org/10.1017/glj.2024.68 Published online by Cambridge University Press

from precious conversations with Mikel Diez Sarasola, Ewan Smith, and Thomas Streinz. I am obliged to the anonymous reviewer who encouraged me to sharpen the pivotal passages. Here, as everywhere, the usual disclaimer applies: Nobody but the author can be taken to account for the many omissions and imperfections that remain despite all the support received.

Funding Statement. No specific funding has been declared for this article.

Competing Interests. The authors declare none.

Cite this article: Caruso C (2025). Towards the Institutions of Freedom: The European Public Discourse in the Digital Era. *German Law Journal* **26**, 114–137. https://doi.org/10.1017/glj.2024.68