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Online disinformation and digital populism in the EU and the USA: Western constitutionalism at the crossroads of Internet regulation

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Abstract

Nowadays, the “platformisation of news distribution” has not only led to the well-known decline of traditional gatekeepers (journalists *in primis*) but has also created a new paradigm in the production of culture. This paradigm shift has generated an influx of content produced by non-traditional gatekeepers and has also paved the way for the populist distortion of news (by news, I mean the dissemination of fact-based stories/information).

This paper aims to investigate how the US and the EU constitutional systems might react to these subversions of the rules of public discourse and how populists, in the field of disinformation and Internet regulation, are proposing an alternative vision of constitutionalism to that of the systems involved. The research question explores how, in the complex debate about regulating or not regulating digital platforms, the populist narrative seeks to exploit the categories of constitutionalism and what solutions Western constitutionalism has to respond to populist disinformation.

Key - words

Fake News; Populism; Disinformation; Freedom of Expression and Information; Internet Service Providers; Social Networks.

Online disinformation and digital populism in the EU and the USA: Western constitutionalism at the crossroads of Internet regulation

Matteo Monti*

1. Introduction: the new paradigm in the production of culture, disinformation and the era of populists

The “platformisation of news distribution”¹, linked to the successful enclosure of the Internet by large digital platforms (social networks *in primis*), has not only led to the well-known decline of traditional gatekeepers² such as publishers, journalists and science communicators, but has also created a new paradigm in the production of culture³. This paradigm shift has generated an influx of content produced by non-traditional gatekeepers and has also paved the way for the populist distortion of news (by news, I mean the dissemination of fact-based stories/information). The “death of expertise”⁴ which has marked the Internet, together with a growing distrust towards so-called experts by citizens (and an aversion to complexity), has been accompanied by populist narratives and propaganda aiming to demolish what remained of gatekeepers’ power over the news.

In the populist narrative, the gatekeepers, i.e., journalists, editors, publishers, etc., have been portrayed as corrupt elites and the news they disseminate as untrustworthy. In this sense, “[p]opulism embraces the notion that truth does not exist as a common good. Truth as a collective enterprise is dismissed as a pure ideological illusion of liberalism (...). Truth is divided, partisan, and ideological; it is anchored in particular social interests. Truth-seeking politics is about reaffirming ‘popular’ truths

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¹ Bertin Martens, Luis Aguiar Wicht, Maria Estrella Gomez Herrera and Frank Muller-Langer, *The digital transformation of news media and the rise of disinformation and fake news* (JRC Technical Reports 2018), 15.

² Emily Bell and Taylor Owen, ‘The Platform Press: How Silicon Valley Reengineered Journalism’ (Tow Center for Digital Journalism 2017, March 29), 9. Available at www.cjr.org (last accessed on 8 March 2021).

³ Pier Luigi Sacco, ‘Culture 3.0: A new perspective for the EU 2014-2020 structural funds programming’ (2011) *EENC Paper* 1, 7. Cf. Lance Bennett and Steven Livingston, ‘The disinformation order: Disruptive communication and the decline of democratic institutions’ (2018) 33(2), *European Journal of Communication*, 122, 128-129.

⁴ Tom Nichols, *The Death of Expertise. The Campaign Against Established Knowledge and Why It Matters* (OUP 2017).

against ‘elite’ lies”⁵. In the broad dimension of information disorder, populists’ use of disinformation has profoundly altered the pillars of Western liberal democracy and public debate⁶. This is true in the United States, as well as in Europe, where populist movements are on the rise and strengthening as a result of their exploitation of Internet platforms⁷. Nowadays, we are witnessing the emergence of a kind of techno-populism⁸ that is undermining liberal democracies by exploiting unregulated new “media” such as social networks and search engines⁹.

The aim of this paper is not to investigate the reasons behind the erosion of confidence in so-called experts in Western democratic legal systems, nor to examine how the widespread dissemination of disinformation has occurred through Internet platforms from a technical point of view, but to understand how the US and EU constitutional systems might react to these subversions of the rules of public discourse and how populists, in the field of disinformation and Internet regulation, are proposing an alternative vision of constitutionalism to that of the systems involved. The research question, therefore, investigates how, in the complex debate about regulating or not regulating digital platforms, the populist narrative seeks to exploit the categories of constitutionalism and what solutions Western constitutionalism has to respond to populist disinformation. The issue of misinformation will not be addressed in this paper, although it is very much linked to the reception of populist discourse, which is many times based on distrust towards experts and elites.

To explore this research question, the first section will analyse the constitutional theories behind the regulation or non-regulation of Internet platforms according to the paradigms of freedom of expression and information in both the European Union and the United States. The second section will examine how populists in the European Union, with a specific focus on Italy as a prototypical case of European populism¹⁰, and the United States have interacted with new digital platforms and how they have approached their regulation. In the conclusion, I will highlight how

⁵ Silvio Waisbord, ‘Why Populism Is Troubling for Democratic Communication’ (2018) 11(1) *Communication, Culture and Critique* 21, 29.

⁶ Anna Grzymala-Busse, Didi Kuo, Francis Fukuyama and Michael McFaul ‘Global Populisms and Their Challenges’ (Stanford University white paper 2020), 4. See also: Silvio Waisbord, ‘The elective affinity between posttruth communication and populist politics’ (2018) 4(1) *Communication Research and Practice* 17.

⁷ Sven Engesser, Nicole Ernst, Frank Esser, Florin Büchel, ‘Populism and Social Media: How Politicians Spread a Fragmented Ideology’ (2016) 20(8) *Information, Communication & Society* 1109, 1110.

⁸ Emiliana De Blasio and Michele Sorice, ‘Technopopulism and direct representation’ in Paul Blokker and Manuel Anselmi (eds.), *Multiple Populisms* (Routledge 2019), 127. In this chapter, it is used the notion of techno-populism as a sub-category of mediated populism: Gianpietro Mazzoleni, ‘Mediated Populism’ in Wolfgang Donsbach (Ed.), *The International Encyclopedia of Communication* (Blackwell 2008).

⁹ Mauro Barberis, *Come internet sta uccidendo la democrazia: Populismo digitale* (Chiarelettere 2020).

¹⁰ Giuseppe Martinico, *Filtering Populist Claims to Fight Populism? The Italian Case in a Comparative Perspective* (CUP 2021) and Giacomo Delledonne, Giuseppe Martinico, Matteo Monti and Fabio Pacini, ‘Introduction: A Constitutional Viewpoint on Italian Populism’ in Giacomo Delledonne, Giuseppe Martinico, Matteo Monti and Fabio Pacini, (eds.), *Italian Populism and Constitutional Law: Strategies, Conflicts and Dilemmas* (Palgrave 2020).

the constitutional positivisation of the press as a watchdog of democracies allows European constitutionalism to possess the legal tools necessary to react to populist challenges in the field of disinformation, while the US system seems to have been hampered by the lack of the positivisation of a legal concept such as that of freedom of information, as the freedom to inform *and* the right to be informed. In this paper, we will use the term “freedom of information” in the European diction and not in the Anglo-Saxon one of access to data of public authorities (*infra*)¹¹.

2. The issue of freedom of information and the framing of Internet platforms in the European and the US constitutionalism

In this section, two aspects of the US and European constitutional paradigms need to be analysed, which assume an important correlation with the theme examined therein. The first relates to the issue of so-called freedom of information or freedom of the press; the second to the regulation of digital platforms (i.e., Internet Service Providers).

From the first point of view, it should be noted that European constitutionalism has a concept of freedom of the press, with a passive and an active aspect: it is the so-called freedom of information. “The European Convention on Human Rights and the constitutions of the European states recognize (...) freedom of information as a qualified part of freedom of speech; and they present that freedom in three different modes: active (freedom to inform, or to spread information), passive (freedom to receive information), and medium (freedom to search for information)”¹². The term is undoubtedly ambiguous in English because, even though it reflects the terms used in many European countries¹³, its literal translation into English calls to mind the right of access to public documents in force in Anglo-Saxon countries.

Before the advent of the Internet, news distribution was provided through traditional media by journalists, who in many legal systems and in the caselaw of the European Court of Human Rights (ECtHR) are entitled to reinforced protection clauses. Against this background, the European paradigm of public discourse seems to be built on the idea that the press is bound to the verification of the truthfulness of news, or better this is an obligation for journalists, and that its activity of news distribution is protected under free speech clauses only when it is not maliciously false. This

¹¹ Matteo Monti, ‘Freedom of information (freedom of expression – access to public data)’ in Giovanni Comandè (ed.), *Encyclopaedia of Law and Data Science* (forthcoming).

¹² Oreste Pollicino, ‘Freedom of expression and the European approach to disinformation and hate speech: The implication of the technological factor’ (25.02.2020) *Consulta OnLine: Liber Amicorum per Pasquale Costanzo* 1.

¹³ *Libertà di informazione* in Italian; *Informationsfreiheit* in German; *Liberté d’information* in French; *Libertad de información* in Spanish.

paradigm seems to be also embraced by the European Court of Human Rights (ECHR)¹⁴, although the Court does not use the expression freedom of information. From a methodological point of view, it is possible to use the caselaw of the ECtHR to describe the European paradigm both because the Court of Justice of the European Union has a limited number of decisions on freedom of expression and because the ECHR has become the minimum standard of rights in Europe. European constitutionalism, read through the case law of the ECtHR, has therefore adopted the stance that democratic debate must be fed by accurate news (or rather news that is believed to be accurate, after checking its sources¹⁵) on which to build the political debate. In this sense, in addition to the undisputed difference between the transmission of facts (press activities, above all) and judgments of values (political speech, above all), the ECtHR stated that even in value judgments “the proportionality of an interference may depend on whether there existed a sufficient ‘factual basis’ for the impugned statement: if there was not, that value judgment may prove excessive”¹⁶. Therefore, in this constitutional context, it is evident that “[u]nlike in the US practice, European constitutions and the individual legal systems actively try to separate the freedom of speech from the freedom of the press”¹⁷. Clearly, the constitutional architecture on which this structure was built, relying mostly on the monopoly of news diffusion by journalists, has been wholly overturned by the advent of platforms and the production of culture from below (citizen journalism). It is possible ultimately to conclude that in the European “marketplace of ideas”, fake news (i.e., disinformation) is not protected speech, although this does not mean that it can be criminalised¹⁸.

On the contrary, the US constitutionalism has not formalised a distinction between freedom

¹⁴ See Matteo Monti, ‘The EU Code of Practice on Disinformation and the Risk of the Privatisation of Censorship’ in Serena Giusti and Elisa Piras (eds.), *Democracy and Fake News - Information Manipulation and Post-Truth Politics* (Routledge 2020) 214.

¹⁵ *Fuchsmann v. Germany* App no. 71233/13 (ECtHR, 19 October 2017), § 43. On the proportionality test to be applied: *Prager and Oberschlick v. Austria* App no. 15974/90 (ECtHR, 26 April 1995), § 37. Moreover, it should be remembered that the exaggeration of the news is possible, also because it would not be based on the invention of facts but on an interpretation of them: *Ibid.*, § 38. In this sense, further proof of the difference between political speech and information dissemination can be found in the fact that the duty to check sources is weaker in the field of political speech or in the case of a speech based on the previous work of journalists (using the latter as an argumentative basis): *Salov v. Ukraine* App no. 65518/01 (ECtHR, 6 December 2005), § 113. The issue of misinformation will not be addressed in this chapter.

¹⁶ *GRA Stiftung gegen Rassismus und Antisemitismus v Switzerland* App no. 18597/13 (ECtHR, 9 January 2018), § 68.

¹⁷ András Koltay, *New Media and Freedom of Expression. Rethinking the Constitutional Foundations of the Public Sphere* (Hart 2019), 45.

¹⁸ In this case, a proportionality test is required, as also established by the Italian Constitutional Court in reviewing cases where the offence of false reporting (fake news) could be applied: Corte costituzionale, judgments no. 19/1962, 199/1972 and 210/1976. Using the words of Pollicino, ‘[t]he real challenge in Europe is not then – as in the US – if the issue of fake news can be tackled legally, but rather *how* this can be done in order to avoid a disproportionate restriction on the fundamental rights at stake, above all the freedom of speech’ Oreset Pollicino, ‘Fundamental Rights as Bycatch – Russia’s Anti-Fake News Legislation’ (2019, March 28), *Verfassungsblog*, available at verfassungsblog.de (last accessed on 8 March 2021).

of the press and political speech (as well as that between facts value judgements¹⁹), effectively leaving to praxis the construction of the objective journalism²⁰, which has long since been the basis of the US democratic system and its free marketplace of ideas. In this sense, it could be argued that before the advent of Internet platforms, the US and European paradigms converged in terms of results, even if not in terms of methods: the press had the same task of accountability and control of public power, as well as of providing the public with truthful news; in Europe with the help of legal norms, while in the US via a type of social constitution. However, it is worth recalling that the lack of distinction between political speech (Speech clause) and “freedom of information” (Press clause) in the US legal system²¹, together with the absence of citizens’ right to be informed, has meant that no expression (news/facts or political opinion/value judgments, indifferently) can be defined as not protected by the First Amendment on the basis of its untruthfulness²². Fake news - disinformation - can therefore be said to be an expression protected by the First Amendment in continuity with the notion of the free marketplace of ideas, which is considered the best tool to make the truth prevail over the falsity, and the dogma of the non intervention of the State, according to which any form of public control (even by judges and independent authorities) over news would be irreconcilable with free speech.

The second aspect needing to be analysed is that of the regulation of digital platforms, *rectius* Internet Service Providers, and the constitutional framework in which it occurs.

In this sense, the American system has created, with the mechanism of section 230 Communications Decency Act (CDA), the legal regime of the exemption of liability for the

¹⁹ The issue of the distinction between facts and opinions and the protection of falsehood in US public discourse under First Amendment doctrines has recently been addressed by several voices: *ex multis* Mark Tushnet, “‘Telling Me Lies’: The Constitutionality of Regulating False Statements of Fact” (2011) No. 11-02 *Harvard Public Law Working Paper*; Frederick Schauer, ‘Facts and the First Amendment’ (2010) 57 *UCLA L. Rev.* 897; Steven G. Gey, ‘The First Amendment and the Dissemination of Socially Worthless Untruths’ (2008) 36 *Fla. St. U. L. Rev.* 1; Cass R. Sunstein, *On Rumors: How Falsehoods Spread, Why We Believe Them, and What Can Be Done* (Princeton University Press 2014). See the well-known judgments: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *United States v. Alvarez*, 567 U.S. 709 (2012).

²⁰ So-called objective journalism – wherein objective does not mean impartial or absence from bias (Cf. American Press Institute, ‘The lost meaning of “objectivity”’, available at americanpressinstitute.org (last accessed on 8 March 2021)) – was born in the US with Adolph S. Ochs at the end of the 19th century and became the dominant model during the 20th century (Walter Lippmann, *Liberty and the news* (Harcourt 1920)). See David T.Z. Mindich, *Just the Facts: How Objectivity Came to Define American Journalism* (New York University Press, 1998) and cf. Michael C. Dorf and Sidney G. Tarrow, ‘Stings and Scams: “Fake News”, the First Amendment, and the New Activist Journalism’ (2017) 20 *The University of Pennsylvania Journal of Constitutional Law* 1.

²¹ Sonja R. West, ‘Press Exceptionalism’ (2014) 127 *Harv. L. Rev.* 2434, 2439.

²² *United States v. Alvarez*, 132 S. Ct. 2537, 2542–43 (2012). *Ex pluribus*: Cass R. Sunstein, *On Rumors: How Falsehoods Spread, Why We Believe Them, and What Can Be Done* (Princeton University Press 2014), 106. The boundaries of defamation, which is the only case in which falsehood is not protected, are very restrictive. In terms of defamation, in the US fake news is not protected if diffused with actual malice and if the plaintiff can prove it (it is a type of *probatio diabolica*): *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). A less strict standard is applied if the target of fake news is a non-public figure, as affirmed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), but it is nonetheless not easy to win a defamation trial.

moderation activity carried out by the digital platforms, not imposing publisher-like liabilities with respect to the publication of illegal content by users²³. Alongside this approach aiming to shield digital platforms from any liability for the content disseminated by users, an autonomous freedom of expression seems to have been attributed to Internet platforms²⁴, which has ultimately legitimised the content choices they could implement, both in terms of political messages and news diffusion. Indeed, platforms appear to be endowed with their own freedom of expression on the basis of the First Amendment, which allows them to make content choices. The paradox is that this system has allowed - given the non-identification of these actors as state actors, common carriers or public forums, which are bound by the rules of the First Amendment as public authorities - platforms to make content-based decisions that if made by a state agent would be incompatible with the First Amendment (such as censoring fake news). Most recently, this has led to the exclusion of disinformation-spreading pages on Facebook (activities confirmed by the courts as legitimate actions²⁵) and fact checking on Trump by social networks. In short, digital platforms are implementing quasi-journalistic activities and censoring disinformation: these actions are based on their own autonomous freedom of expression. In conclusion, in the US legal system, platforms are exempt from controlling illicit content, but they can make content-based choices. On the issue of disinformation, hence, there is no obstacle to platforms taking on the role of fact-checkers and assuming the democratic responsibilities of the press, thus becoming the new watchdog of democracy.

On the contrary, in the EU legal system, the EU E-Commerce Directive (2000/31/CE) has implemented a regime similar to the one in place for copyright in the US (Section 512 of the Digital Millennium Copyright Act), i.e., a notice and take down mechanism requiring ISP to remove an illicit content once it has been reported (art. 13-14, Directive 2000/31/CE). Within the competences that had been left to EU member states in relation to the regulation of the web by the e-commerce directive, German²⁶ and French²⁷ laws and Italian attempts to combat disinformation were

²³ Cary Glynn, 'Section 230 as First Amendment Rule' (2018) 131 *Harv. L. Rev.* 2027.

²⁴ On the model of the *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). See *ex pluribus*: Eugene Volokh and Donald Falk, 'First Amendment Protection for Search Engine Search Results: White Paper Commissioned by Google' (2012) *UCLA School of Law Research Paper* no 12-22. This view, then, seems to have been adopted by the Courts which have legitimised the content choices made by platforms in the folds of section 230 CDA. These choices are regarded as expression protected by the First Amendment. On the greater protection of the 230 CDA than the First Amendment: Eric Goldman, 'Why Section 230 is better than the First Amendment' (2019) 95 *Notre Dame Law Review* 33.

²⁵ *Federal Agency of News LLC v Facebook Inc* WL 137154 (ND Cal 2020). See also *Federal Agency of News LLC v Facebook Inc* WL 3254208 (ND Cal 2019).

²⁶ *Netzwerkdurchsetzungsgesetz - NetzDG*, 2017, § 2 and 3. It is not a law, however, that specifically targets disinformation. Victor Claussen, 'Fighting hate speech and fake news. The Network Enforcement Act (NetzDG) in Germany in the context of European legislation' (2018) 3 *MediaLaws* 110.

²⁷ However, this law is limited in its application to election periods. Marie-Claire Ponthoreau, *Liberté d'expression, une*

developed²⁸. All these laws or law proposals were based on a sort of notice and takedown system: they provide a warning to platforms to remove certain content (news) identified as false. Regarding the attribution of autonomous freedom of expression to platforms, it shall be noted that the existence of proper freedom of expression to platforms does not seem to have been recognised by the EU Court of Justice or national courts²⁹. However, in this context, although advocated by some scholars, there has been no horizontal enforcement of fundamental rights³⁰, leaving platforms free to set up activities to regulate news pieces and political content (on the basis of their contractual terms and policies) without any control by public authorities (judges or independent authorities). In this legal framework, the EU Code of Practice on Disinformation was developed in the European Union under the umbrella of the E-commerce Directive. The Code has attempted, within the limits of the EU's competence on free speech and considering its nature as a soft law instrument, to impose rules on digital platforms to tackle online misinformation; most notably, extending the visibility of reliable news while decreasing that of fake news, removing profiles that are involved in disinformation campaigns, encouraging partnerships with fact-checkers, decreasing the economic advantages for the spreaders of disinformation and increasing transparency with respect to sponsored content. In spite of the fact that the Code involves considerable problems concerning the privatisation of censorship³¹, it is a symbol of a regulatory approach based on three competing aspects: the European right to be informed, the non-recognition of digital platforms' freedom of expression in the European scenario, and the idea of substantial regulation of the media that has traditionally characterised European constitutionalism. In this scenario, the Digital Services Act could strengthen that element of cooperation between public power (judges and independent authorities) and platforms in the 'management' of disinformation through the proceduralisation of appeals against the removal of content, which could ensure fewer problems regarding the privatisation of censorship, but also and above all to help combat disinformation³².

perspective de droit comparé: France (EPRS | Service de recherche du Parlement européen 2019), 30.

²⁸ Art. 7, co. 2, Senate of the Italian Republic, proposal Gambero, S. 2688 - 17^a Legislature; Art. 2, Senate of the Italian Republic, proposal Zanda-Filippin, S. 3001 - 17^a Legislature.

²⁹ One example is Google Spain (C-131/12) where the search engine's freedom of expression is not taken into account, but also the German Constitutional Court recently highlighted: 'Hingegen kann sich der beklagte Suchmaschinenbetreiber für seine Tätigkeit nicht auf die Freiheit der Meinungsäußerung aus Art. 11 GRCh berufen (...) Entsprechend hat auch der Europäische Gerichtshof den Suchmaschinenbetreibern die Berufung auf das Medienprivileg versagt (vgl. EuGH, Urteil vom 13. Mai 2014, Google Spain, C-131/12, EU:C:2014:317, Rn. 85).' German Constitutional court, Judgment of 06 November 2019, 1 BvR 276/17, par. 105.

³⁰ On the contrary, the horizontal effects of fundamental rights occurred in the field of digital privacy and data protection; cf. Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet* (Hart forthcoming) 204 and ff.

³¹ Monti (n 13).

³² Paolo Cesarini, 'The Digital Services Act: a Silver Bullet to Fight Disinformation?' (2021, February 8), *MediaLaws*, available at medialaws.eu (last accessed on 8 March 2021).

3. Populists' convenient visions of platforms' regulation and free speech

Western populisms, and for Europe³³ we will study the Italian case as a prototypical one³⁴, have found a highway³⁵ on the Internet to spread their message: the absence of traditional gatekeepers on the Internet has allowed populists to exploit the web for disinformation campaigns and disintermediation has allowed them a direct connection with a larger audience, increasing polarisation and creating filter bubbles with high populist potential. In the current technological and political scenario, “[m]edia populism is structured around a media technological tool which allows for the very existence of that populism”³⁶. From this perspective, several scholars have highlighted how populism has exploited the unregulated Internet platforms to subvert the written and unwritten rules of the public discourse, flooding it with streams of disinformation to gain momentum, increase its own visibility and that of its own main themes, and discredit political opponents and experts. This has been combined with a narrative praising the new digital platforms as the perfect tool to spread the ‘real’ truth (the populist one) about facts and news, in other words, the populist reporting and news as opposed to the work of journalists, who have always been portrayed as part of corrupt elites. Disinformation has, in fact, become a new weapon of political propaganda facilitated – in a grotesque way at first with completely invented hoaxes (think about the pizza parlour with slave children, the so-called Pizzagate³⁷, or the participation of the Italian Democratic Party members at the funerals of Mafia bosses³⁸) and today with a mixture of true and false facts – by the exploitation of these new platforms³⁹. Indeed, one cannot forget that today freedom of expression, according to Balkin’s well-known metaphor⁴⁰, is a triangle and the role of intermediaries (social networks and search engines *in primis*) is decisive in the public discourse. In this context, the ‘constitutionalism of populists’ seems to be inverted compared to the constitutional approach of the systems in which

³³On the political propaganda of populist movement in Europe see: Toril Aalberg, Frank Esser, Carsten Reinemann, Jesper Stromback, Claes De Vreese (eds.), *Populist Political Communication in Europe* (Routledge 2017).

³⁴ See n. 10.

³⁵ Revisiting Floridi's metaphor and insight: Luciano Floridi, ‘Brave.Net.World: the Internet as a disinformation superhighway?’ (1996) 14 (6) *The Electronic Library* 509.

³⁶ Manuel Anselmi, *Populism: An Introduction* (Routledge 2017), 83.

³⁷ Gregor Huang, Jon Aisch and Cecilia Kang, ‘Dissecting the #PizzaGate Conspiracy Theories’. (December 10, 2016) *The New York Times*. Available at archive.org (last accessed on 8 March 2021).

³⁸ Il Fatto Quotidiano, “‘Boschi e Boldrini ai funerali di Riina’”. La sottosegretaria: “Fake news, passato il limite”. Il M5s prende le distanze’ (2017, 22 November) *ilfattoquotidiano.it*. Available at ilfattoquotidiano.it (last accessed on 8 March 2021).

³⁹ For the US case, see: Michael Hameleers, ‘Populist Disinformation: Exploring Intersections between Online Populism and Disinformation in the US and the Netherlands’ (2020) 8(1) *Politics and Governance* 146; for the Italian case, see: Matteo Monti, ‘Italian Populism and Fake News on the Internet: A New Political Weapon in the Public Discourse’, in Giacomo Delledonne, Giuseppe Martinico, Matteo Monti and Fabio Pacini, (eds.), *Italian Populism and Constitutional Law: Strategies, Conflicts and Dilemmas* (Palgrave 2020) 177.

⁴⁰ Jack M. Balkin, ‘Free Speech Is a Triangle’ (2018) 118 *Colum. L. Rev.* 2011.

they carry out their political activities. From this perspective, one can analyse the populist conception of constitutionalism and its constitutional attitudes in the light of the dynamic of mimetism and parasitism that for some scholars⁴¹ characterises the populist narrative and approach in relation to the rules of constitutionalism.

In Europe, populists tend to heavily use the rhetoric of constitutional rights and freedoms in their political discourse⁴². In this contest, the Italian populists⁴³ – Salvini’s League and Five Star Movement (M5S) – have raged against any attempt to regulate the Internet, adopting a vision of freedom of expression more akin to the US First Amendment than the European paradigm of freedom of expression and information of Article 10 of the ECHR. In this perspective, they opposed the two Italian draft laws against online disinformation, denouncing them as Internet censors and inquisitors⁴⁴. One cannot avoid noticing that this attitude coincided with the full freedom enjoyed by the digital platforms before the Code of Practice on Disinformation, which partly changed it. Even though the light measure of the Code and the limited fact checking on pages linked to populist movements do not seem to have affected the argument of the full freedom of the net as a space to remain unregulated. This idea seems to contradict the traditional legal structure of European constitutionalism, which involves a reliably regulated news market, aiming to guarantee both pluralism and the truthfulness of news facts. In this sense, it is clear that, on the one hand, Italian populists have tried to establish themselves as defenders of freedom of expression (mimetism) and, on the other hand, have only exploited this constitutional principle to keep their own political

⁴¹ Giuseppe Martinico, 'Between Mimetism and Parasitism: Italian Populism in a Comparative Perspective' (2020), 26 (4) *European Public Law* 921.

⁴² Alexander Alekseev, “‘Defend Your Right!’ How the Populist Radical Right Uses References to Rights and Freedoms to Discursively Construct Identities’ (2021) 29 (4) *New Perspectives* 376.

⁴³ Regarding the possible impact of fake news in 2017, Matteo Salvini argued that he was: "deeply concerned by the fake news that may pollute the election campaign, not those on Facebook but the ones that sell newspapers and TV news about government lies, taxes, immigration and false economic recovery". My own translation from Italian. Source: Francesco Bongarrà, 'Fake news, botta e risposta Pd-M5s' (2017, 26 November) *Ansa.it*, available at www.ansa.it (last accessed on 8 March 2021).

⁴⁴ In the session of 5th of April 2017 at the EU Parliament, Salvini, commenting on the EU proposal to fight disinformation, claimed “It's going badly for you, you can't buy brains anymore, you can't control the newspapers, the news, the radio. In Great Britain, they voted as they wanted; in the United States, they voted as they wanted; in Italy, they voted as they wanted, and you are going crazy. So, what are you inventing? Facebook gag, Internet gag, punishment - 1 million, 5 million, 50 million! You invent George Orwell's Ministry of Truth, the Ministry of Propaganda. I am waiting for the European Parliament to pay for psycho-police to investigate the psycho-crimes of those who are not aligned with the single thought and the single currency. You can come up with all the gags you want. The only thing you can do is to pack your bags and go and look for a real job, because no one can stop freedom, neither here nor elsewhere. Thank you and long live the net, long live Facebook”. My own translation from Italian. Source: Matteo Salvini (ENF), P8_CRE-REV(2017)04-05(3-708-0000), Session of Wednesday 5 April 2017. Regarding the law proposal of the Italian Parliament that would have regulated news on the web, and the concurring statements of the President of the Italian Competition Authority (AGCM) on the need to contrast disinformation online, the reaction of the Five Star Movement was very strong. Mr Grillo responded that elites were trying to act as “the new inquisitors of the web”, and that they wanted to create “a court to control and condemn [those] who disgrace them”. My own translation from Italian. Source: Marcello Campo, ‘Antitrust, stop alle bufale sul web. Grillo: “Volete l'inquisizione”’ (2016, December 31) *Ansa.it*, available at www.ansa.it (last accessed on 8 March 2021).

propaganda weapon intact (parasitism). The change that the two populist movements are introducing in their policies and narratives, the M5S because it is affected by the disinformation of the former government ally (The League) and the League because of the intervention of the platforms and their fact-checking, denote the mimetic and parasitic nature of the choice of the constitutional paradigm to which they are adhering regarding freedom of expression⁴⁵.

On the other side of the Atlantic, Trump, who exploited but then also suffered social networks' counter offence, has instead espoused a paradigm partly more similar to the European one, as far as the privatisation of censorship is concerned, or at least a swinging view of freedom of expression and media regulation. The evolution of the behaviour of Facebook and Twitter, which in the US have begun to develop fact-checking techniques that make them look more and more like publishers/journalists, or rather gatekeepers – watchdogs of democracy –, has in fact led to the reaction of the former President of the United States. The fact-checking of social networks, the deleting of fake news pages on Facebook, and the placement of banners inviting users to verify Trump's claims with traditional media (and ultimately his ban from social networks) led Trump to change his constitutional attitude, going against the dominant constitutional view of freedom of platforms and non-regulatory approach. In this context, the Executive Order on the privatisation of censorship aimed at stopping social networks from making editorial choices on political content⁴⁶. In this sense, this populist constitutional thesis, which seems to somehow echo the theory – although not yet embraced by the US Supreme Court – of the state action doctrine⁴⁷ (such as also

⁴⁵ Salvini on Twitter claimed in January 2021: “#Salvini: Twitter is a private company, but it has a public function. Does it gag Trump? Enrico Letta also spoke about it, I wonder: where are we going? Who decides what can and cannot be said? Violence should be condemned but I never like censorship. #mezzorainpiù”. My own translation from Italian. Source: <<https://twitter.com/matteosalvinimi/status/1348277986110398466>> (last accessed on 8 March 2021). The approach of the M5S, which proposed an anti-fake news commission after becoming a governing party, also appears to have changed partially. Lattanzio and others: “Establishment of a Parliamentary Commission of Inquiry concerning the massive dissemination of false news through the information and communication system, the guarantee of the right to information and the critical use of the media and communication technologies” (2213) (Submitted on 24 October 2019, announced on 25 October 2019). My own translation from Italian. “Istituzione di una Commissione parlamentare di inchiesta sulla diffusione massiva di informazioni false attraverso il sistema dell'informazione e della comunicazione, sulla garanzia del diritto all'informazione e sull'utilizzo critico dei mezzi e delle tecnologie della comunicazione” (2213) (presentata il 24 ottobre 2019, annunciata il 25 ottobre 2019).

⁴⁶The executive order of 28 May appears to be a consequence in particular of a case of fact-checking carried out by Twitter, which marked a tweet by US President Trump on postal voting as misleading, referring to further details on a CNN webpage and then advising users to better educate themselves. The Executive Order claimed: “Today, many Americans follow the news, stay in touch with friends and family, and share their views on current events through social media and other online platforms. As a result, these platforms function in many ways as a 21st century equivalent of the public square (...). As President, I have made clear my commitment to free and open debate on the internet. Such debate is just as important online as it is in our universities, our town halls, and our homes. It is essential to sustaining our democracy. Online platforms are engaging in selective censorship that is harming our national discourse.” Executive Order on Preventing Online Censorship, Infrastructure & Technology, Issued on: May 28, 2020. The issue is quite complicated, also because in the First Amendment field the government cannot achieve through threats of adverse government action what the Constitution prohibits it from doing directly.

⁴⁷ Kate Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ (2018) 131 *Harv. L. Rev.* 1599.

the public forum doctrine or the common carries one), can be interpreted as a dynamic of mimetism and parasitism⁴⁸. Although the theory of the application of the state action doctrine – similarly to the theory of the horizontal enforcement of fundamental rights in Europe – could be a democratically reasonable move to regulate and constitutionalise these new – *de facto* – public forums, Trump’s self-interested use of this thesis is evident. In fact, on the contrary, Trump had opposed the “small” state action that had been applied to his profile by the US federal courts – with the *Knight v Trump* ruling⁴⁹ – which had prevented the President from banning and excluding users from the debate on his Twitter profile. Trump not only refused to accept that he could not ban his opponents from his profile, but also did not accept the *rationale* and decision of the ruling, challenging it before the Court of Appeals and then seeking an appeal to the US Supreme Court⁵⁰, all this despite the fact that the ruling was somehow consistent with the idea that there should be no censorship or restrictions on free speech on social networks in line with established First Amendment doctrine. The claim to be able to ban users on a private platform (challenging the *Knight v Trump* ruling), but equally the willingness to impose the notion that private platforms shall not verify false information or stop the flow of disinformation (Executive Order), shows a willingness to exploit the First Amendment (mimetism) only in interpretations deemed favourable to maintaining its political propaganda weapon - including disinformation - free from any control (parasitism).

This trend of populists embracing ideas of constitutionalism diametrically opposed to those established in their own systems can be traced back to the classic anti-establishment and anti-institutional populist dynamic. However, the populist arguments challenging initiatives to counter disinformation (by public authorities in Europe or by digital platforms in the US), which can undermine populist online dominance and propaganda tools, have made extensive use of constitutional arguments. Constitutional arguments often take on nuances that do not coincide with the legal orders in which these populist movements operate and which denote the commitment of populist constitutionalism to be chameleon-like (mimetism). However, these populist constitutional arguments appear above all functionalised to precise political strategies and contextual to historical moments (parasitism).

⁴⁸ Martinico (n 41)

⁴⁹The judgment is, of course, somewhat different because the censure stemmed from the profile of a public official and thus from a content-based censure by a member of the government, which is more easily framed within the traditional First Amendment paradigm (i.e., prohibition of censorship by public authorities), even if it is through a private actor (Twitter). *Knight First Amendment Institute v. Trump*, No. 1:17-cv-05205 (S.D.N.Y.) and *Knight First Amendment Inst at Columbia Univ v Trump* No 18-1691-cv (2nd Cir 2019).

⁵⁰ With the inauguration of the new presidency, the case was not examined: *Joseph R. Biden, Jr., President of the United States, et al. v. Knight First Amendment Institute at Columbia University, et al.* 593 U. S. ____ (2021).

4. Conclusions: populism v constitutionalism in the field of disinformation

Digital platforms heavily altered the way in which news was disseminated and public debate was articulated in the European and the US constitutionalism. In this technological framework, populist movements have made extensive use of these unregulated social media and employed disinformation as a tool for political propaganda in both Europe and the United States. The European and the US systems are antipodes when it comes to regulating digital platforms and combating disinformation; the former permitting forms of intervention by public authorities, the latter rejecting any attempt to regulate the free marketplace of ideas and relying on the functioning of the news market and objective journalism. However, both systems are trying to respond to online disinformation.

In recent years, the European constitutionalism at both the EU and national levels has reacted (or attempted to react) to online disinformation by also providing for the intervention of public authorities (judges or independent authorities)⁵¹. On the other side of the Atlantic, the US system is nailed to the goodwill of platforms in the fight against disinformation, but recently a certain willingness to fight online disinformation seems to be emerging from the main social networks⁵². With respect to these trends, the constitutional narrative of populists appears to be marked by two concomitant elements: mimetism and parasitism⁵³.

Populist constitutionalism appears to embrace a particular conception of freedom of expression and information depending on how functional it is in maintaining the populist propaganda weapon of disinformation. Mimetically, in fact, populists have championed free speech in their respective legal systems, but parasitically they have embraced the concept of freedom of expression and information that would have been functional to maintain the space of the Internet (Internet platforms, social networks *in primis*) without any fact-checking or control on the correctness and truthfulness of the news. From this perspective, Italian populists have become

⁵¹ In this context, distinguishing the category of freedom of information from that of political propaganda is without doubt problematic in the context of the information disorder characterising the Internet (Claire Wardle, *Understanding Information Disorder* (First Draft 2019)). On the question of categories, see: Irini Katsirea “‘Fake news’: reconsidering the value of untruthful expression in the face of regulatory uncertainty” (2018) 10 *J. Media Law* 159 and Monti (n 14).

⁵² In this context, it is impossible to identify whether the radicalisation of the Republican media (Reece Peck, “Listen To Your Gut”. How Fox News’s populist style changed the American public sphere and journalistic truth in the process’, in Howard Tumber and Silvio Waisbord (eds), *The Routledge Companion to Media Disinformation and Populism* (Routledge forthcoming)) and the distrust in institutions and media created by Trump through disinformation and his polarising propaganda (the latest act of which was the assault on Capitol Hill) can be reabsorbed by the world's oldest democracy. On the first amendment's suitability in the online environment *ex pluribus*, see: Philip M Napoli, ‘What If More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble’ (2018) 70 *Fed. Comm. L.J.* 57.

⁵³ Martinico (n 41).

heralds of an anarchic and libertarian idea of the Internet (with the exception of changing their position in the presence of possible activism of the platforms on the issue of disinformation or after having been targeted by disinformation campaigns), while Trump (after having exploited the platforms when they lacked gatekeepers and did not carry out any fact-checking) has harshly contested the role of the platforms on the Internet when they began to behave like watchdogs of democracy. In this mimetic and parasitic dynamic, hence, Italian populists have attacked all the attempts to regulate platforms and fight disinformation, depicting them as dictatorial, while American populists have attacked the digital platforms by invoking the end of the privatisation censorship and the regulation of social networks according to the content rules of the First Amendment. Furthermore, this populist constitutionalism has shown itself to be functionally changeable, depending on convenience: Italian populists have started to mistrust the role of platforms the moment social networks started fact-checking, while Trump certainly did not accept that he could not censor opponents on his Twitter profile, a prohibition that instead appears to be consistent with the qualification of the digital platforms as public forums, which is a qualification advocated by Trump himself to prevent censorship and fact-checking by platforms on his own propaganda.

In conclusion, on the one hand, populist constitutionalism does not seem to be coherent with the systems into which it tries to infiltrate, but it attempts to camouflage and to appear in compliance with them through the broad use of constitutional arguments and freedom of expression clauses (mimetism). On the other hand, populist constitutionalism opposes attempts to recreate on digital platforms a news market based on objective journalism in the name of its own functional concept of freedom of expression in a parasitic dynamic (parasitism). Italian populist constitutionalism stood against the attempts of European and Italian constitutionalism to regulate the news market online, while American populist constitutionalism stood against the attempts of those private actors (platforms) who are trying to reconstruct objective journalism online (which appears to be in line with the US constitutionalism's idea of self-regulation of the marketplace of ideas).