Constitutional Assessment of Untrue Statements of Fact. Disinformation Campaigns, Controlled Public Discourse, and Filter Bubbles as Threats to the Democratic Public Sphere – Constitutional Theoretical Approaches from Milton's Pursuit of Truth to the Restriction of Fake News

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Abstract: *In his "Areopagitica", John Milton passionately argued that even false statements of fact—lies—play a constitutive role in the discovery of "truth." This functionalist perspective has, for centuries, served as a cornerstone in the constitutional justification of freedom of speech. Echoing this tradition, the U.S. Supreme Court, several European constitutional courts, and the European Court of Human Rights (ECHR) have all consistently affirmed that the scope of freedom of speech generally extends to untrue statements of fact as well. However, the twenty-first-century platform society presents novel challenges to this long-standing constitutional principle of content-neutral protection. Disinformation campaigns of growing magnitude undeniably distort the healthy structure of democratic public discourse and influence democratic procedures. The constitutional question posed is straightforward: Can untrue speech be restricted in defense of democracy, or would such limitations unjustifiably compromise long-standing democratic achievements? And if demonstrable harm does exist, is the constitutional challenge it poses genuine or merely apparent?*

Key words: *Freedom of Speech; Constitutional Law; Untrue Statements of Fact; Fake News; Disinformation.*

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1. Introduction – Framing the Problem

Among fundamental rights, freedom of speech enjoys exceptional constitutional protection. It is one of the most venerable liberties, with a constitutional tradition that spans several centuries. In its classical formulation, freedom of speech is subject to only minimal limitations and must yield to very few competing rights (cf. Constitutional Court

Decision 30/1992. (V.26.) HCC, ABH 1992. 167. 178)[1]. Its special constitutional significance lies in its dual function: it serves as a core instrument of individual self-expression rooted in human dignity, and it is a *sine qua non* for the functioning of a democratic society.

As will be explored in the following overview, the scope of freedom of speech encompasses all forms of expression, regardless of content or form. This also implies that, as a general rule, it protects not only truthful statements but also untrue ones. In legal terms—put simply—lying is not prohibited and, with certain exceptions, even enjoys constitutional protection. This is especially true in the context of public discourse on matters of public interest. Because such discourse is of particularly high constitutional value, it receives heightened protection regardless of whether the expression involves value judgments or factual assertions—and, in the latter case, irrespective of the truthfulness of those assertions. This traditional perspective has shaped the doctrine of freedom of speech as it has developed over centuries, informing the jurisprudence of national constitutional courts and international human rights tribunals alike. However, technological change and the rapid proliferation of social media platforms have profoundly disrupted the functioning of the democratic public sphere and brought up serious challenges to our traditional understanding of freedom of speech, particularly concerning untrue statements of fact. In the historically limited and evolving publicity of civil democratic societies, the principle that "more speech is better than less" (Meiklejohn 1948, Meiklejohn 1961.) could be reasonably upheld. Yet, in the era of unlimited, unfiltered internet access, this surplus of speech may lead not to a deliberative collective search for truth, but rather to disoriented confusion: a noise that lacks the normative structure traditionally associated with democratic public opinion.

The folk saying "too much talk leads to nonsense" now seems more accurate than ever. The real question is whether this "residue" of low-truth-value speech holds any constitutional worth, or whether, to use another proverb, we might be justified in “throwing the baby out with the bathwater.” Over the past decade, intense public, academic, and legal debate has emerged around the impact of fake news and disinformation on democratic discourse, ultimately raising the issue of what legal tools may be effective in defending democracy against targeted disinformation campaigns.

Moderate voices, including the present author, seek solutions within the framework of traditional fundamental rights doctrine. More radical approaches, by contrast, advocate for removing constitutional protections from a broad category of untrue statements, thereby excluding them from democratic discourse, at the risk of compromising the very democratic nature of that discourse. Constitutional dilemmas and challenges to the

[1] References to decisions of the Hungarian Constitutional Court follow the format below: ABH year (Volume number), the first page of the Decision, actual page(s) of the Decision. ABH is the Yearbook of Decisions of Hungarian Constitutional Law. The decisions are available in Hungarian. The English text is based on the author's translations.

traditional doctrine of free speech are undeniably sharpened by the rise of organized disinformation campaigns. There is now ample evidence of deliberate, state-sponsored disinformation efforts—often orchestrated by foreign intelligence agencies—to manipulate public opinion through a flood of falsehoods to influence voter preferences and, ultimately, the policy direction and governmental functioning of target states.[2] The operational model of social media platforms amplifies both the spread and the impact of false information. While disinformation is not new—it existed in previous publicity models as well—its scale and reach have been dramatically expanded by social media.

Any proposed solution to this challenge must consider one fundamental point: limiting false speech that disrupts democratic processes inevitably entails restricting freedom of speech. Lowering the standard of free speech protection or lifting it from constitutional scrutiny represents a slippery slope that could threaten democracy itself. Can democracy be defended using undemocratic tools without rendering itself a hollow shell? this is actually a democracy paradox (Gosztonyi 2023].

This study cannot offer definitive answers to these difficult questions. It does, however, seek to contribute to the formation of collective democratic wisdom and the search for "truth." Rather than aiming for a comprehensive analysis of disinformation and regulatory responses, this article seeks to enrich the ongoing scholarly discourse with selected theoretical and doctrinal reflections. It examines the traditional justifications of freedom of speech, outlines the relevant constitutional frameworks, focusing on how various jurisdictions (Hungarian, Romanian, U.S., and European) assess untrue statements, and explores the dilemmas of regulating disinformation on social media, offering a critical evaluation of existing proposals, with particular emphasis on their implications for freedom of expression.

2. Theoretical Foundations: False Statements of Fact in Theories of Freedom of Expression

Theoretical justifications of freedom of expression not only contribute to academic discourse but also significantly shape the living interpretation of fundamental rights, including their content and the conditions under which they may be limited. Such justifications become especially relevant when the law must respond to fundamental societal transformations that materially alter the reality or the social context of a given fundamental right. The broad societal changes outlined in the problem statement inevitably affect how freedom of expression is interpreted in practice. In navigating these shifts, the theoretical frameworks discussed below may provide valuable guidance.

This paper does not aim to provide a systematic overview of all theories justifying freedom of speech and the press. Instead, it highlights the most influential schools of thought and focuses on their perspectives regarding false information.

[2] See Point 4.3.1. The analysis of The Romanian Constitutional Court's Decision Annulled the First Round of the 2024 Presidential Election.

2.1. Truth-Seeking Theories

The desire to find "Truth" as an ultimate goal profoundly influences the theoretical foundations of freedom of speech. Truth-seeking theories consistently argue that, to discover truth, individuals must be guaranteed the right to speak, and the institutional press must be guaranteed the right to operate freely. This theoretical approach is teleological, as it does not regard the right to freedom of speech as a value in itself, but rather as a means to uncover a higher (social) value, namely "Truth." However, even within this school of thought, there are significant differences regarding what is considered Truth and the conceptual frameworks through which one approaches one of the most debated and analyzed concepts in the history of philosophy.

The first theoretical and philosophical foundation for freedom of speech and the press was articulated during the English Civil War by John Milton—an outstanding figure of baroque epic literature and a politician in the Cromwellian revolution (he also served as Oliver Cromwell's personal secretary), in his political essay *Areopagitica* (1644) (Milton 1918)[3]. Milton, a Puritan thinker, argued in his impassioned pamphlet defending unlicensed printing (subtitled "A Speech [...] for the Liberty of Unlicenc'd Printing, To the Parliament of England") from a fundamentally theological standpoint. According to Milton, the greatest danger of restricting free speech is that it might obstruct the manifestation of divine will and love, as the primary purpose of humanity, created in God's image, is to develop the "free and learned spirit" endowed by the Creator. Milton argues that a work should be "examined, refuted, and condemned" rather than suppressed prior to review. His point is that God granted every person reason, free will, and conscience to judge ideas independently, so the rejection of a text's ideas should be a reader's decision, not that of a licensing authority.

In his now-classic lines, Milton passionately advocates for the inevitable triumph of truth over falsehood and for the cause of free speech:

> Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter? Her confuting is the best and surest suppressing. For who knows not that Truth is strong, next to the Almighty; she needs no policies, nor stratagems, nor licensings to make her victorious; those are the shifts and defences that Error uses against her power.
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> Milton 1918, 58

[3] The title of the work alludes to the renowned speech delivered by Isocrates in the 4th century BCE. The Areopagus refers to a hill in Athens, historically associated with both actual and legendary tribunals, and was also the name of a governing council whose authority Isocrates sought to reinstate. Some scholars contend that the title also significantly references St Paul's defence before the Areopagus in Athens, where he responded to accusations of promoting foreign gods and unfamiliar doctrines.

More than twenty years after writing this political essay, Milton reaffirmed his views on freedom of speech in what many consider the greatest work of baroque epic literature, *Paradise Lost* (1667). In this narrative of the loss of Paradise due to original sin, Milton also seeks to affirm the righteousness of God's intentions and the doctrine of predestination. However, unlike in Madách's *The Tragedy of Man*, the protagonist is not God or fallen Man, but Lucifer. Superficial readers might see Milton as portraying the fallen Angel as a heroic figure, yet in reality, he is a tragic character whose existence serves a function: Lucifer is granted the right to speak freely and argue with God so that the "sacred purpose"—the triumph of divine truth—can prevail, and God's eternal truth may not degenerate into lifeless dogma.

It must be added, somewhat cynically, that Milton was very much a product of his time. As a captive of Puritan political thought, he did not advocate for full freedom of speech; he did not consider the suppression, censorship, or even burning of the writings of "bigoted papists" to be contemptible actions.[4]

Two centuries after Milton's theologically grounded *Areopagitica*, the English philosopher and economist John Stuart Mill articulated the first liberal justification for freedom of speech in his work *On Liberty* (1859), in which truth is no longer a theological category but a fundamental value accessible through rational inquiry. Mill views the pursuit of truth as a prerequisite for societal progress. In his conception, truth is not absolute but evolves with social development; it is a value that changes—and must change—with social transformation. No individual is infallible, and no one holds absolute truth (especially since such a thing does not exist), so even one's own beliefs cannot be assumed to be true. Doubt, in this regard, is itself a value—an instrument for discovering the truth relevant to societal development. When authorities attempt to suppress a statement, they believe to be false, they risk silencing the very truth itself, thereby hindering societal progress. For Mill, the true test of truth lies in its trial by falsehood: a socially accepted truth must be constantly reaffirmed to prevent it from degenerating into a lifeless dogma. As with Milton, free debate is always beneficial to the recognition of truth. Mill also emphasizes the role of the community and social development, in which the collective discovery of truth plays a vital role. He assigns significant importance to public debate in the societal recognition of truth. Public debate, as a space for competing ideas, functions like a marketplace for goods and services. This idea clearly draws from Adam Smith's classical liberal economic theory. In *The Wealth of Nations* (Smith 1776), Smith introduced the famous "invisible hand" metaphor to describe how market processes, driven by supply and demand, are shaped by unseen forces, resulting in the establishment of the "natural price."

[4] „I mean not tolerated Popery, and open superstition, which as it extirpates all religions and civil supremacies, so itself should be extirpated, provided first that all charitable and compassionate means be used to win and regain the weak and the misled." (Milton 1918. 60).

Although the theoretical roots of the "marketplace of ideas" can be traced back to Mill and Smith, its classic constitutional formulation was developed in the work of the prominent American legal scholar and Supreme Court Justice, Oliver Wendell Holmes. In his famous words: "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." (Abrams v. United States, 250 U.S. 616, 630, 1919, Holmes, J., dissenting).

Like Mill, Holmes relativizes the concept of truth, identifying it with a *communis opinio*, i.e., a view that becomes accepted or acceptable by the majority of society, one that wins out in the market of competing opinions. According to Holmes, this outcome is made possible by establishing and maintaining "*a free and unrestricted"* marketplace of ideas. However, this does not mean Holmes believed in the deterministic nature of such a market, i.e., that under given circumstances, there is always a necessary solution. Rather, he argued that the statistical likelihood of reaching truth is far higher in a free market of ideas than within any other public structure.

The three theories outlined above employ three distinct concepts of "truth." Milton's idea of truth is theologically grounded, absolute, and exclusive—an objective truth derived from the transcendent that aims at humanity's highest good and must be pursued as a life calling. Mill's rational theory no longer considers truth to be absolute or exclusive; on the contrary, it sees truth as necessarily evolving with social progress and scientific advancement. Challenging or debating previous truths creates opportunities for new ones to be accepted, ultimately fostering societal and scientific development. Holmes's notion of truth is the least substantive, describable instead as a framework filled with content by the majority view in society. The truth that crystallizes from social public debate within Holmes's "*free and unrestricted"* marketplace of ideas is not material or value-laden; it can be defined as a "technical" or descriptive (value-neutral) conception of truth.

In summary, truth-seeking theories attribute a central role to falsehoods in the pursuit of truth. Rather than excluding untrue statements from public discourse, these theories regard them as essential to the functioning of freedom of expression. *They advocate not for legal restrictions on falsehoods, but for faith in individual and collective reason, in the power of the free and enlightened spirit.*

2.2. Democratic Justifications

Democratic justifications regard freedom of speech as a *conditio sine qua non* for democracy as a desirable form of social organization. These theories emerged within 20th-century constitutional thought but can be traced back to key figures of the utilitarian tradition, such as James Mill (father of John Stuart Mill) and Jeremy Bentham. For the utilitarians, freedom of speech and of the press served as crucial guarantees

for sound governance[5]. Drawing upon this instrumental logic, Alexander Meiklejohn articulated his influential perspective in *Free Speech and Its Relation to Self-Government* (Meiklejohn 1948)[6]. The American philosopher explicitly linked freedom of speech to the idea of democratic self-government (Török 2018, 50), asserting that its primary constitutional purpose is to ensure that individuals (as citizens) can participate freely in public discourse and, having access to all essential information and exposure to all relevant perspectives, make well-informed decisions on public matters. That is, meaningful and responsible participation in democratic decision-making is only possible if all pertinent opinions, information, and arguments can be freely expressed and accessed in public debate.

Within this interpretive framework, freedom of speech constitutes the very condition for substantive and effective participation in self-governance. It is thus no coincidence that Meiklejohn chooses the term "power" rather than "right" (Meiklejohn 1961). In this framework, the function of freedom of speech is to support democratic self-governance and decision-making grounded in civic participation. Central to Meiklejohn's conception is not the freedom of individual expression as such, but rather the proper functioning of the democratic order constituted by the community. This leads him to conclude that: "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." (Meiklejohn 1948, 25) Since, for Meiklejohn as well, freedom of speech is the prerequisite for public deliberation and democratic will-formation, political expression receives heightened protection, whereas speech not directly linked to democratic functioning—such as private communication or commercial advertising—is accorded lesser constitutional protection.

Theories of democratic justification constitute a foundational element of the U.S. doctrine of freedom of speech. Within American legal scholarship, two unavoidable contributions are Robert Bork's restrictive, functionalist perspective and Robert Post's theory of "constitutional domains."

As a representative of conservative constitutional interpretation, Judge Bork confined the scope of free speech exclusively to expressions within political discourse. He argued that, in a narrow sense, freedom of speech functions as a constitutional instrument for enabling democratic procedures in matters of public concern. Thus, freedom of

[5] It is also worth emphasizing at this stage that, while the immediate intellectual roots lie in utilitarian theories, important antecedents can be traced back to ancient Greek philosophy and classical conceptions of democracy—as exemplified by figures such as the philosopher Plato and the statesman Pericles.

[6] While Meiklejohn is widely recognized as the principal architect of the democratic justification, András Koltay highlights that, a year before the publication of *Free Speech and Its Relation to Self-Government*, William Hocking advanced a similar position—focusing specifically on freedom of the press. Hocking argued that press freedom functions as a tool of democratic self-governance and, accordingly, should be understood as purpose-driven, serving to fulfil public-interest expectations [cf. Hocking 1947].

speech is not absolute, but applies only to expressions that facilitate civic participation and democratic accountability. For Bork, the constitutional value of speech is grounded in its role in discovering and disseminating political truth. This, however, justifies protection solely for "explicitly and predominantly political speech," such as speech addressing the exercise of public authority or the functioning of government. Accordingly, constitutional protection in Bork's view does not encompass self-expression or individual autonomy in general, but only those communicative acts that are essential to the operation of democratic governance—a framework referred to as Constitutional Value Theory. Such essential values include the circulation of political information and the critique of governmental decisions. Under Bork's approach, speech receives constitutional protection based on whether it contributes to political discourse, irrespective of the truth or falsity of its content (Bork 1971).

Robert Post's theory also adopts an instrumental approach; however, its objective is not collective decision-making per se, but the preservation of self-governance, with a focus on the individual citizen's ability to participate meaningfully in that process. At the core of Post's doctrine lies the principle of democratic legitimacy, whereby the state must operate responsively, i.e., open to and reflective of citizens' views, thoughts, and needs. To achieve such a responsive model of governance, it is essential that citizens actively engage in public discourse and be guaranteed the freedom to express their positions on matters of public concern.

As Bernát Török notes, Post's central concept is public discourse, understood as a set of communicative acts and channels: open spaces and actions within which citizens may freely exchange their views. These expressions collectively shape public opinion, which in turn grants democratic legitimacy to the state by informing and influencing its decision-making (Török 2018, 52). In Post's framework, then, freedom of speech in a democratic society serves as a means of democratic participation. It is not confined to promoting voter awareness, nor is its scope limited to explicitly political speech; it also encompasses cultural and social expression, functioning as part of civic identity and cultural self-representation. Artistic expression, media, popular culture, and feminist discourse all enjoy constitutional protection, as they contribute to processes of "collective self-governance."

Post's *Constitutional Domains* theory presents a functionalist and context-sensitive model of freedom of speech. He identifies three constitutional domains: democracy, community, and management (Post 1995). The first domain—democracy—concerns the exercise of political self-governance, where citizens act as democratic decision-makers. Here, freedom of speech receives the highest level of protection, given its direct connection to democratic participation. The second domain—community—encompasses discourse that shapes cultural identity, social belonging, and self-understanding. In this domain, democracy is viewed as cultural integration, and speech enjoys constitutional protection, though to a lesser extent than in the democratic sphere. In the third domain—management—speech serves organizational functions within hierarchical and

institutional settings. Here, expression loses its participatory or self-expressive character and becomes instrumental to organizational aims; accordingly, freedom of speech may be more broadly restricted when it conflicts with institutional objectives. In Post's typology, constitutional protection depends on the social function of speech within its specific context, and differentiated levels of protection are justified accordingly.

The most prominent European representative of democratic justification is Jürgen Habermas, who, in his theory of discursive-deliberative democracy, moves beyond the framework of U.S. constitutional jurisprudence to formulate the same fundamental democratic aims within a normative, social-theoretical, and communication-theoretical context. In Habermas's account, the primary function of freedom of speech is to secure public, rational discourse about the validity of social norms (Málik 2024). This is not only crucial for the legitimacy of political decision-making, but also because, in a democratic society, only a consensus reached through communication can legitimize the exercise of power.

Habermas offers a comprehensive normative framework for interpreting freedom of speech, linking democratic self-governance with the moral imperative of public reasoning (Habermas 1984). His justification represents a continuation and deepening of earlier theories: it extends Meiklejohn's constitutional-political aim of safeguarding democratic governance, explicitly rejects Bork's radically narrow interpretation, and provides a more systematic theoretical basis for Post's cultural expansion.

A shared foundation of democratic justifications is the view that the exercise of popular sovereignty and the realization of individual and collective will formation—whether in the Athenian assembly, the Meiklejohn town meeting, modern mass democracies shaped by media systems, or the public spheres of today's platform ecosystems—require a plurality of perspectives, including the presence of false statements. Democratic justifications do not categorically exclude falsehoods from constitutional protection.

2.3. Individualist approaches

Individualist approaches are grounded in the principle that the constitutional value justifying freedom of speech resides in the individual—in the Person. These theories view individual liberty either as an intrinsic value or, akin to other previously discussed traditions, as an instrumental right—serving the realization of autonomy, self-identity, and the full development of personality. The instrumental line of reasoning within individualist justifications contends that truth-seeking and democratic theories misplace the value–means relationship by treating truth and/or democracy as fundamental values. Instead, these are merely instrumental goods in service of the ultimate value: the fulfilment of human dignity and the individual personality it underpins. John Laws captures this distinction aptly: it is not democracy that gives rise to free speech, but rather the institutional guarantee of individual freedom of speech that compels the state to operate democratically (Laws 1998, 135–137).

With respect to the constitutional protection of false statements, it is significant that the absence of truthfulness may itself be part of one's personality. Personality, as a legal abstraction, resists definitive legal categorization; the role of the law is not to define personality, but to safeguard its autonomy. The legal mandate arises through the protection of personality rights, which collectively form the legal construction of personhood within a given social model (cf. Sólyom 1983, 10).

Although lying may be morally reproachable, from a legal standpoint, it may constitute part of the individual's free self-expression. A person's personality may, lawfully, include a lack of commitment to truthfulness—though this may be subject to social or moral judgment. Within certain limits, falsehoods may therefore be part of protected self-expression; consider, for example, the exaggerations of a boastful angler or the half-true tales of a gifted storyteller.

This does not imply, of course, that lying is unconditionally protected by law. A specific subset of false statements constitutes unlawful speech and may give rise to legal liability (cf. Section 3).

Since statements concerning falsehoods may, in certain contexts, be understood as communicative expressions of an individual's personality, they are generally considered to fall within the scope of protected speech. However, in the process of balancing fundamental rights, competing rights or interests may arise that take precedence over the legal protection of such personal expressions.

Although John Stuart Mill is widely recognized as a key figure in the truth-seeking tradition, his theory of free speech also contains notable individualist elements. Mill held that freedom of expression, in its individual dimension, fosters personal development. For him, freedom of speech is essential to intellectual autonomy, personal growth, and individual inquiry into truth. The value of false speech lies in its capacity to provoke critical self-reflection and reassessment of one's beliefs.

Thomas I. Emerson argued that the function of freedom of speech is to secure individual self-expression and identity. He moved beyond understanding speech merely as a communicative act, defining it instead as a right to one's essential self—a right to selfhood (Emerson 1970).

C. Edwin Baker placed individual autonomy at the centre of his justification: as an expression of human dignity, every person must be free to determine how they express themselves. For Baker, speech is not merely instrumental—it is a distinct mode of autonomous existence (Baker 1989).

Ronald Dworkin's conception of free speech is likewise foundational within the individualist tradition. He considered freedom of speech to be a safeguard of individual dignity and moral status (Dworkin 1996).

Because the individualist conception of free speech is person-centred, any expression that contributes to this personal purpose is, in principle, protected. Restrictions are not based on substantive attributes, such as the truth or falsity of the statement, but must

be assessed within context, evaluating which external, competing rights or values justify limitations on personal expression. Among these is the protection of others' personality rights.

For example, if A falsely and maliciously accuses B of theft, A's statement—while a form of personal expression—may be lawfully restricted, as it infringes upon B's reputation and social standing.

2.4. Theoretical Foundations and Their Influence on Constitutional Practice

The theoretical schools and directions briefly surveyed above do not exist in isolation but form an interrelated and mutually influential body of thought. These theories are not merely elegant philosophical constructs; they have played a formative role in shaping the long-standing constitutional jurisprudence surrounding freedom of speech and of the press. Numerous landmark decisions of the U.S. Supreme Court, several of which have had a significant impact on European practice, draw explicitly on the justifications developed in centuries of constitutional theory. Similarly, these theories have been instrumental in the evolution of European constitutional jurisprudence, informing the reasoning of the European Court of Human Rights and various national constitutional courts, including the Hungarian Constitutional Court. During its first decade, under the leadership of László Sólyom (cf. Sólyom 2001) the Court explicitly and deliberately grounded its freedom of speech doctrine in these theoretical sources.

It is important to note, however, that the relative influence of these theories varies across national constitutional practices. The historically earliest explanations tend to appear more peripherally—typically as part of rhetorical or reinforcing arguments (Török 2021, 208)—whereas democratic and individualist justifications serve as central normative foundations. The democratic justification, in particular, is undoubtedly the most extensively cited in both European and American jurisprudence, as it provides the broadest justificatory framework within a democratic constitutional system. As articulated by the Hungarian Constitutional Court in its first foundational ruling on freedom of speech, this right enables informed individual participation in the social and political processes of a pluralistic democratic society (cf. 30/1992. (V.26.) HCC, ABH 1992. 167).

The value of "truth" is present across all theoretical approaches, albeit with differing weight and from distinct angles. Restrictions on speech are thus *contextually grounded*: the same false statement may warrant different constitutional evaluations depending on the circumstances. For instance, stating that "A" wore a black shirt when in fact he wore white, as opposed to asserting that the person who committed a crime wore a black shirt and then falsely claiming that "A" wore one, results in two very different legal assessments. The first constitutes a protected falsehood, while the second falls outside the scope of constitutional protection. Similarly, the legal evaluation of speech diverges depending on whether someone falsely shouts "fire" in a dark, crowded, enclosed space or in an open area where it is clearly evident that no danger exists.

Given the pluralistic understandings of truth that emerge from the above theories, it is essential, from the perspective of constitutional rights protection, that the concept of truth remain value-neutral and technical in nature. It is not the role of the law to define truth in general terms. Academic truth should be determined by the academic community; matters of belief or worldview, by religious institutions and their members; and the veracity of statements that defame or harm reputation, by the courts.

In democratic decision-making—particularly within deliberative procedures—the majority view becomes the "technically true" one and exerts decisive influence on the trajectory of social processes, irrespective of its normative correctness. It is at this juncture that the reasoning of truth-seeking and democratic justifications converge, jointly affirming a key substantive characteristic of freedom of speech: that even false or untrue statements have a place in public discourse and, as a general rule, fall within the scope of constitutional protection.

3. Freedom of Expression and the Constitutional Assessment of (False) Factual Statements

3.1. The Practice of the Hungarian Constitutional Court[7]

In the jurisprudence of the Hungarian Constitutional Court, freedom of expression is regarded as one of the most highly valued and strongly protected fundamental rights—ranked, in the notional hierarchy of fundamental rights, directly after the rights to life and human dignity[8] (cf. Hungarian CC). From its earliest rulings, the Court anchored this elevated constitutional status in theoretical justifications, affirming that freedom of expression enables meaningful individual participation in democratic processes and guarantees the free development and fulfilment of personality grounded in human dignity.

The Court articulates this by distinguishing between the subjective and objective dimensions of freedom of expression: it not only secures the individual's subjective right to speak and express themselves (a personal entitlement), but also, through its objective, institutional role, upholds the functioning of democratic public discourse as a foundational political institution. It is this institutional role that elevates freedom of expression from a mere individual right to a core value of a pluralist democratic society (cf. 30/1992. (V. 26.) HCC, ABH 1992. 167. 172). The Court's doctrinal approach to free speech clearly draws on both individualist and democratic theoretical frameworks.

[7] Before summarizing the Hungarian constitutional doctrine, a brief terminological clarification is necessary. Throughout this study, I consistently use the term *freedom of speech*, whereas the Hungarian Constitutional Court typically refers to the right as *freedom of expression*. Without engaging in a detailed analysis of this terminological divergence, the two terms are used interchangeably in this subsection.

[8] The right to life and human dignity enjoys heightened constitutional protection and is regarded as absolute and non-derogable, i.e., no one may be arbitrarily deprived of their life [cf. the prohibition of the death penalty, 23/1990. (X. 31.) HCC, ABH 1991. 88.].

Under the leadership of László Sólyom, the Constitutional Court—established in 1989—frequently incorporated theoretical reasoning into its judgments. Its foundational decision on freedom of expression was situated explicitly within a historical-theoretical perspective: the unconstitutional restriction of free speech can result in grave consequences, which

> […] manifest not only in the life of the individual but also in society as a whole, and have led humanity into tragic and painful dead ends. The free articulation of ideas and viewpoints, including those that are unpopular or unconventional, is a fundamental condition for the existence of a dynamic and genuinely open society.
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> 30/1992. (V. 26.) HCC, ABH 199. 167. 171

Accordingly, in addition to recognizing the individual's right to self-expression, the Court identified the state's duty to ensure the conditions for the formation and maintenance of democratic public discourse as an inherent aspect of freedom of expression. This has crucial implications for assessing the constitutionality of limitations on fundamental rights: not only must the speaker's subjective right be considered, but also the indispensable democratic interest in the free development of public opinion and open public debate.

Although the elevated status of free expression does not render it absolute, unlike the right to life or to human dignity, it does mean that the right may only be restricted in exceptional cases. As a result, any legislation limiting freedom of expression must be interpreted narrowly. In rights balancing,

> […] a law that restricts expression carries greater weight if it directly protects another subjective fundamental right, less weight if it does so only indirectly through an 'institution,' and the least weight if it merely serves to protect an abstract value in itself.
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> 30/1992. (V. 26.) CC, ABH 1992. 167. 178

Freedom of expression, as a rule, refers to the liberty of any form of communicative act, regardless of its format or method of expression—whether spoken, written, symbolic, or physical—and regardless of its content, whether a value judgment or a factual assertion. However, the constitutional protection of this fundamental right[9] may vary depending on the type of expression and how it interacts with other rights or values during a balancing of interests. A central conceptual element in the Hungarian Constitutional Court's doctrine on freedom of expression is the principle of content neutrality—opinions are protected regardless of their value or truth content (30/1992 (V. 26.) AB, ABH 1992. 179 and 36/1994. (VI. 24.) HCC, ABH 1994. 219). Only this approach is consistent with both the theoretical justifications for freedom of expression and the

[9] In constitutional law, the scope and protection of fundamental rights are distinct categories. However, a detailed presentation of these categories would go beyond the limits of the present study. For more on the scope and protection of freedom of expression (c.f., Török 2018.).

state's obligation to maintain ideological and religious neutrality[10] [cf. Sólyom 2001. 474). Accordingly, freedom of expression is subject only to external limitations. As long as a given expression does not violate such constitutionally defined limits, the very act and possibility of expression is protected, regardless of its content.

> In other words, what enjoys constitutional protection is the act of individual expression, the development of public opinion according to its own rules, and—interacting with these—the individual's ability to form opinions based on the broadest possible access to information. Freedom of expression, therefore, ensures free communication—both as individual conduct and as a social process—and the fundamental right does not pertain to the content of opinions. In this process, there is space for all opinions, good or bad, pleasant or offensive alike—especially because the very assessment of an opinion is itself a product of this process.
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> 36/1994 (VI. 24.) HCC, ABH 1994. 219. 223

The distinction between value judgments and factual statements is of particular importance when it comes to the constitutional protection of false statements. While the Constitutional Court recognizes that both value judgments and factual assertions fall under the scope of freedom of expression, it nonetheless draws a clear distinction between scope and **p**rotection.

> Whereas the falsity of opinions cannot be meaningfully proven, demonstrably false factual claims are, in themselves, not constitutionally protected.
>
> 7/2014. (III. 7.) HCC, ABH 2014. 135. 152

In simplified terms**,** scope refers to the normative concept of expression—what qualifies as speech and what does not—meaning the types of communication for which the arguments and high standards of freedom of expression must be taken into account. In contrast, protection refers to whether, in a particular case, constitutional guarantees effectively shield the expression from interference by other fundamental rights or interests (cf. Török 2018, 24–29).

Thus, as a general rule, all forms of expression fall within the scope of freedom of expression, which means that any restriction must be assessed against a high constitutional standard. However, not all expressions enjoy protection: some may fail the applied fundamental rights test and therefore may be lawfully restricted in favor of protecting other rights or legitimate interests.

[10] László Sólyom rightly pointed out that the ideological and worldview neutrality of the state followed from the ideological neutrality of the Constitution. However, Hungary's Fundamental Law is not ideologically neutral. Nevertheless, the majority of the Constitutional Court, in its most recent decisions, has not deviated from its previous practice.

While false factual statements always fall within the scope of freedom of expression, not all of them deserve constitutional protection when weighed against competing interests. The difference between scope and protection, therefore, does not lie in disregarding freedom of speech arguments for false statements, but rather in the fact that a broader range of restrictions may constitutionally apply to factual assertions than to value judgments.

> The applicable standards differ depending on context—specifically, on the weight and constitutional value of the external limit involved.
>
> Török 2018, 31

In the context of criticism of public authority and public figures**,** false factual statements only lose constitutional protection if made in bad faith (c.f., 13/2014 (IV. 18.) HCC, ABH 2014. 286.; 3328/2017 (XII. 8.) HCC, ABH 2017. 1455). In other contexts, the threshold for restriction is lower. It should also be noted that the protection of the personality rights of others is one of the most compelling justifications for limiting freedom of expression.

The Constitutional Court's approach to the contextual protection of false statements is articulated in its decision concerning the constitutionality of the criminal offence of spreading "scaremongering." The Court established as a matter of principle that the public dissemination of false factual claims capable of disturbing public order—even if misleading or untrue—still falls within the scope of freedom of expression, as freedom of opinion protects not the content, but the very possibility and fact of expression.

Applying the strict standard that governs speech restrictions, the Court held that scaremongering is not inherently unlawful, since a high constitutional threshold must be met: namely, that the competing constitutional interest—public peace—is seriously and imminently threatened (clear and present danger). Accordingly, in the context of criminal law, the Court narrowed the constitutionally acceptable scope of restriction to instances involving public emergencies or wartime conditions, while it found general prohibitions on false speech to be unconstitutional[11] (18/2000 (VI. 6.) HCC, ABH 2000. 117).

[11] Twenty years after the adoption of the AB decision on spreading alarmist rumors, during the COVID-19 pandemic, the National Assembly adopted a new provision on spreading alarmist rumors applicable during a state of emergency. The new provision significantly narrowed the scope of freedom of expression under criminal law, as it generally punished false statements made in public during a state of emergency, requiring only that they be capable of hindering or thwarting the effectiveness of defense measures. Although the obstruction or frustration of the effectiveness of the defense allows for extremely broad discretion in the application of the law, which in my opinion should have led to a finding of unconstitutionality of the text of the norm, the Constitutional Court ultimately ruled that the provision was constitutional: 15/2020. (VII. 8.) HCC, ABH 2020. 511.

A comparative constitutional assessment of factual assertions and value judgments was most comprehensively carried out in the Constitutional Court's decision 34/2017 (XII. 11.) AB. The Court clearly reiterated that:

> Although different standards apply to factual statements and value judgments, both—whether true or false—fall within the scope of freedom of expression, and both are subject to the arguments favoring robust protection of public discourse.
>
> 34/2017 (XII. 11.) HCC, ABH 2017. 794. 806

Given the complexity of the constitutional situation as well as the dichotomy between scope and protection**,** the constitutionality of restricting false factual claims must be assessed on a case-by-case basis, with a careful balancing of interests that aims to preserve freedom of expression. As the Court put it:

> False factual claims—unlike value judgments—do not enjoy constitutional protection in themselves**,** but in certain cases, considering all relevant circumstances, legal liability for such claims may nonetheless be constitutionally precluded**.**
>
> 34/2017 (XII. 11.) AB, ABH 2017. 794. 806

Where false statements concern matters of public interest and are made in the context of democratic public debate, restrictions are even more limited. Criminal sanctions may only be imposed in a very narrow set of circumstances (cf. 36/1994 (VI. 24.) AB; 18/2000 (VI. 6.) AB; 13/2014 (IV. 18.) AB), and even in civil law contexts, the Court emphasized that:

> The communication of facts relating to public affairs is typically the basis of opinion. Therefore, even in cases involving factual claims later proven false and lacking constitutional value, freedom of public debate must be taken into account in deciding questions of legal liability.
>
> 7/2014 (III. 7.) CC, ABH 2014. 135. 152

3.2. The Jurisprudence of the Romanian Constitutional Court

A brief overview of the jurisprudence of the Romanian Constitutional Court (*Curtea Constituțională a României*, hereinafter CCR) is warranted here, particularly because the Court's response to disinformation—especially its unprecedented intervention in the highly publicized 2024 presidential election—will be examined in more detail in Section 5.

Much like the Hungarian and American constitutional courts, and in line with the jurisprudence of the European Court of Human Rights (ECHR), the CCR does not automatically prohibit false statements of fact. Instead, it employs a context-sensitive balancing approach. Political expression—even if misleading or partially false—enjoys broad constitutional protection: "Satirical, exaggerated, or speculative political statements are integral to democratic debate" (CCR, No. 62/2007).

According to the CCR, some "false" claims are an unavoidable consequence of political speech and cannot be deemed unconstitutional by default, especially when they do not serve inciting, defamatory, or hate-driven purposes. At the same time, freedom of speech may be restricted where a statement intentionally distorts reality in a way that misleads others (CCR, No. 54/2004).

This brief exploration of Romanian constitutional practice is necessary because Chapter 5 will revisit the CCR's approach to disinformation in two significant respects.

3.3. The Jurisprudence of the U.S. Supreme Court

The United States' constitutional approach to false statements of fact is most authentically illustrated through the doctrine of the Supreme Court of the United States (SCOTUS), which—as noted in the theoretical section—is grounded in the *marketplace of ideas* theory and the principles of democratic governance. This paper does not aim to systematically analyze SCOTUS jurisprudence, but rather to present key representative arguments that illustrate the Court's consistent stance.

Even in its early rulings on freedom of speech, SCOTUS embraced the foundational principle of "more speech, not enforced silence." This was most famously articulated by Justice Louis Brandeis in his concurring opinion in *Whitney v. California*:

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.
>
> 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)

According to SCOTUS, the First Amendment does not differentiate between expressions based on the truthfulness of the ideas they convey. As the Court emphasized in *New York Times Co. v. Sullivan*:

> Erroneous statement is inevitable in free debate, and [...] must be protected if the freedoms of expression are to have the breathing space that they need to survive.
>
> 376 U.S. 254, 271–272 (1964)

This rationale was later generalized in *Gertz v. Robert Welch Inc.*, where the Court held that under the First Amendment, the concept of a "false idea" is not legally meaningful. Courts are not tasked with identifying such ideas; rather, they are to be contested and defeated in the open marketplace of opinion:

> Under the First Amendment, there is no such thing as a false idea.
>
> 418 U.S. 323 (1974)

While false statements of fact may not possess inherent constitutional value, they are nonetheless often an inevitable byproduct of free debate and, therefore, must sometimes be protected to preserve the conditions of that debate.

In more recent jurisprudence, the Supreme Court reaffirmed this view in its divided decision in *United States v. Alvarez*. There, the majority rejected the government's argument that falsehoods constitute a category of unprotected speech:

> The Court has never endorsed the categorical rule the Government advances (…) Our prior decisions have not confronted a measure, like the Stolen Valor Act (…) that targets falsity and nothing more. (…) The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech.
>
> 567 U.S. 709, 720 (2012) (Kennedy, J., plurality)

Justice Kennedy, writing for the plurality, offered a moral affirmation of this principle:

> Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.
>
> 567 U.S. 709, 729 (2012)

In summary, SCOTUS consistently affirms the value of false statements in a democratic society, grounding its arguments primarily in democratic legitimacy and the importance of open public discourse.

3.4. Jurisprudence of the European Court of Human Rights

The ECHR has taken a path somewhat different from that of the U.S. Supreme Court. It has consistently imposed a stricter duty of truthfulness on the press compared to that expected of ordinary citizens exercising their right to freedom of expression. In particular, the Court demands that journalists meet standards of accuracy and reliability in public reporting. However, this does not mean that every factual inaccuracy in the press is subject to legal sanction.

Unlike SCOTUS, the ECHR—drawing on Article 10 of the European Convention on Human Rights—makes a consistent distinction between factual assertions and value judgments, applying different standards to assess their permissibility. In the landmark *Lingens v. Austria* case, the Court emphasized:

> A careful distinction needs to be made between facts and value judgments/opinions. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof.
>
> *Lingens v. Austria*, 8 EHRR 407, §46

Thus, different standards apply when assessing the veracity of objectively verifiable statements as opposed to subjective opinions.

In assessing false factual statements, the ECtHR applies the principle of good faith. In *Bladet Tromsø and Stensaas v. Norway*, the Court articulated that the press may report on matters of public interest, provided that:

> Journalists must act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.
>
> *Bladet Tromsø and Stensaas v. Norway*, no. 21980/93, §65, ECHR 1999-III

A similar principle was affirmed in *Thoma v. Luxembourg*, where the Court held that:

> Punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public interest.
>
> *Thoma v. Luxembourg*, no. 38432/97, §62, ECHR 2001-III

Nevertheless, the ECtHR does not automatically exclude even deliberately false statements from the scope of protection under Article 10. Instead, it conducts a case-by-case analysis based on contextual evaluation and fundamental rights balancing. In other words, the Court has not created a general rule that categorically excludes all false statements from protection. Instead, it applies the necessity and proportionality test to assess the intent, context, impact, and diligence associated with the statement.

For example, in *Fressoz and Roire v. France*, the journalist received protection even though he could not prove the absolute truth of all his claims, because:

> It was not necessary for the journalist to prove the truth of the information, provided it was based on a sufficiently accurate factual basis.
>
> *Fressoz and Roire v. France*, no. 29183/95, §54, ECHR 1999-I

Similarly, in the *Steel and Morris v. United Kingdom* case (the so-called "McLibel case"), the Court held that individual citizens—particularly civil society activists—may be protected even when their statements contain inaccuracies, provided the content addresses a matter of public interest and does not cause disproportionate harm:

> The limits of acceptable criticism are wider when it comes to a multinational company, especially in the context of a campaign on matters of public interest.
>
> *Steel and Morris v. United Kingdom*, no. 68416/01, §94, ECHR 2005-II

In applying the proportionality test required under Article 10(2) of the European Convention, the ECHR considers whether the restriction is (i) prescribed by law, (ii) serves one or more legitimate aims (such as the protection of the rights of others, public order, or national security), and (iii) is necessary in a democratic society:

> Restrictions or penalties as are prescribed by law and are necessary in a democratic society.
>
> ECHR, Article 10(2)

This was clearly articulated in *Vogt v. Germany*, where the Court defined the "necessity in a democratic society" requirement as follows:

> Freedom of expression constitutes one of the essential foundations of a democratic society (…) it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.
>
> *Vogt v. Germany*, ECHR 1995, §52

In conclusion, the ECHR does not automatically exclude false statements of fact from the scope of freedom of expression. Instead, their permissibility is evaluated based on contextual factors, including the purpose of the speech, good faith, and journalistic diligence. Legal protection is thus not determined by the objective truth of the statement but by its social context and ethical quality.

4. False Statements of Fact, Fake News, and Disinformation in the Online Public Sphere

This study does not aim to provide a comprehensive constitutional-theoretical analysis of false statements, fake news, or disinformation in the online public sphere, nor does it seek to outline the full range of regulatory consequences. Rather, its objective is to examine the applicability of the theoretical justifications and fundamental rights doctrines—outlined in earlier chapters—within the context of this contemporary phenomenon. Although a brief reference is made to regulatory attempts, they are discussed only in light of the interpretive framework established by this study.

4.1. Describing the Phenomenon – Fake News as More Than Just a False Statement

The question of whether modern disinformation campaigns amount to more than mere lies—whether fake news is more than simply false information—has significant implications. Even in the era of professional news media, there have been instances of deliberately falsified or manipulated reporting, and both political actors and foreign states have previously engaged in disseminating untrue claims to shape public perception, manipulate opinion, destabilize governmental functioning, or influence the exercise of public power.

In the early twenty-first century, the explosive expansion of internet-based publicity—especially the rise of unmediated access—raised hopes for the realization of unrestricted freedom of speech. Yet, the romantic vision of a fully democratized digital public sphere now appears illusory. It has become clear that more speech is not always

better speech, and that the new media ecosystem is not necessarily freer or more open than its traditional predecessor (cf. Koltay 2019 and Koltay 2024).

While many characteristics of the traditional public sphere persist in the digital age—sometimes amplified in their dysfunction—the sheer volume of information has caused a devaluation of factuality. "Facts" presented in public debates have become increasingly unverifiable.

Disinformation (intentionally false or misleading content) and fake news have, in recent years, shaken the foundations of the classical arguments underpinning freedom of expression—arguments that previously supported both American and European doctrines. Classical theories often rest on the premise that humans are fundamentally rational beings, capable of discerning truth in an open and free marketplace of ideas. Yet in the digital media ecosystem, falsehoods can spread exponentially and rapidly, rendering traditional legal safeguards increasingly blunt.

Aggressive, deliberate disinformation campaigns function as a kind of denial-of-service attack against the democratic public sphere, overwhelming and disabling the marketplace of ideas. The mechanisms of public opinion formation—once guided by internal logic—cease to function, and the space for rational and mutual understanding erodes. Citizens are confined within ideological echo chambers and filter bubbles, undermining public trust, social cohesion, and democratic procedures. (See Koltay 2019, Klein 2024, Papp 2022, Papp 2024, Török 2022a, Török 2022b, Ződi 2023).

4.2. Theoretical Starting Points – What Do Free Speech Theories Teach Us?

As discussed in Chapter 2, foundational theories of free speech suggest that public discourse is not weakened but strengthened by the presence of false statements. There is divergence, however, regarding the standards and criteria by which such statements may be limited. Nonetheless, there is a strong consensus against blanket prohibitions.

As noted above, the conditions of the digital public sphere—shaped by online platforms—present a radically new challenge to traditional assumptions. Fake news and deliberate disinformation, particularly when amplified by algorithms, social media networks, and deepfake technologies, spread rapidly and with precision (Gosztonyi and Lendvai 2024). In such an environment, the ideal of a deliberative marketplace of ideas becomes nearly unreachable. Citizens have little opportunity to engage in meaningful debate or weigh competing arguments. The foundational assumptions of classical theories—once resilient to changes such as the printing press, mass newspapers, radio, television, and digital news portals—now seem increasingly fragile in the face of algorithmically structured, manipulation-prone digital platforms.

A common misunderstanding must first be dispelled: the distortions caused by algorithmic coordination on social media platforms are not mere malfunctions of the model. They are, in fact, intrinsic features of that model (cf. Koltay 2019.and Koltay 2024).

This section does not aim to revisit every theory in detail but highlights a few classical frameworks for reconsideration:

- Milton, while a passionate defender of freedom of speech—including falsehoods—viewed lies not merely as tolerable but as useful tools in the search for truth. Yet he did not defend the deliberate, bad-faith falsification of facts.
- Mill assumed humans were rational and could be persuaded by reasoned debate. In today's platform society, even the most logical, responsible citizen is likely to be overwhelmed by the flood of content—particularly in the context of deepfakes, which can render even visual evidence untrustworthy. In the post-truth era, truth-seeking theory finds itself largely disarmed.

- Meiklejohn was more restrictive, protecting only those expressions that contribute to democratic self-governance. False statements are, by this view, a systemic malfunction. While Meiklejohn did not define "democratic purpose" or specify who determines it, the question of "who" is crucial—it implies the authority to draw the boundaries of acceptable discourse and decide which falsehoods fall outside protected speech.

From this logic, disinformation—such as false claims about elections or candidates—hinders citizens from making rational political decisions and undermines democratic self-regulation. It cannot be seen as "politically protected speech" because it obstructs, rather than facilitates, informed public deliberation. In Meiklejohn's doctrine, restricting disinformation is not a limitation on free speech but a defense of democracy itself. His reasoning may also justify both state regulation and private platform governance.

- Habermas grounds deliberative democracy in the possibility of asserting truth and achieving consensus through rational argumentation. Disinformation deliberately disrupts this process, eroding the factual basis of consensus and obstructing rational deliberation. It thus fails to serve the goals of discursive democracy.
- Post argues that deliberately false speech undermines the preconditions for democratic self-governance. For him, the central concern is not the substantive truth of individual statements but the integrity of public discourse and citizens' capacity to participate in a legitimate deliberative process. Disinformation threatens this legitimacy by distorting reality and corrupting rational debate.

Since Post sees free speech as instrumental to legitimating state authority through public deliberation, he argues the state cannot determine what is true or false without compromising that process. Thus, state intervention is only justified when disinformation destroys the very conditions of civic deliberation. For this reason, Post favors non-state regulatory solutions.

- Individualist theories, while grounded in the individual's right to self-expression (even to lie), also value the autonomy of the individual, which depends on access to reliable information. Disinformation compromises this autonomy by manipulating thought and decision-making. Upon closer analysis, even the theories of Emerson and Baker reject disinformation: for Emerson, speech aimed at manipulating others

is not genuine self-expression; for Baker, intentional deception is not merely expression but harmful conduct—and therefore not constitutionally protected.

In conclusion, if we update the classical justifications of free speech and apply them to the digital public sphere, fake news and disinformation appear to fall outside the scope of protected expression. The question then becomes: what tools are available to legitimately restrict such content?

4.3. Regulatory Solutions

Regulatory responses to disinformation can generally be classified into three models: state regulation**,** private (platform-based) regulation**,** and hybrid co-regulatory approaches combining elements of both. Constitutional safeguards significantly limit the scope of action available to state regulators—a fact that is welcome to proponents of free speech. In recent years, numerous legislative efforts have been introduced to combat disinformation, many of which have failed to pass constitutional scrutiny.

Initially, platform providers responded to disinformation with enthusiasm, implementing a variety of tools and procedures. However, many of these measures resulted in serious limitations on freedom of expression, often without any constitutional oversight, provoking criticism from defenders of free speech. Hybrid regulatory models—based on cooperation between public authorities and private actors—have emerged most prominently within EU platform governance frameworks.

Below, without claiming completeness, I briefly highlight key characteristics and select examples of these models, with a particular focus on state regulation.

4.3.1. State Regulation

One of the most compelling arguments in favor of state regulation is that—if enacted within a democratic rule-of-law framework—any legal restrictions on disinformation are set by the legislature and enforced by the judiciary. In such cases, the constitutional guarantees protecting freedom of expression, discussed earlier, can be upheld through legal review. Thus, state regulation provides the possibility for constitutional scrutiny of legislative norms and for enforcing the requirements of free speech protection.

This, however, is also the model's greatest weakness. Because it is bound by traditional constitutional principles, it often proves ineffective or too slow in responding to the rapid and serious harms caused by disinformation. By the time the state delivers a constitutionally justified and procedurally sound resolution, the damage may already be irreparable.

The legal procedures and institutional guarantees that define state-based responses—while vital for the protection of rights—render them inefficient and cumbersome in addressing problems within the current information ecosystem. The scale and speed at which disinformation spreads far exceed the capacity of legal and judicial institutions to respond comprehensively and in real time.

Nevertheless, due to their constitutional legitimacy and the formal guarantees they offer, states cannot abdicate their regulatory responsibilities. They are obligated to provide legal procedures grounded in normative frameworks.

A) General Restrictions

i) The Online Safety Act (United Kingdom)

A prominent example of a general statutory restriction is the United Kingdom's Online Safety Act, enacted in 2023. One provision specifically addresses the criminal prohibition of disinformation in digital communications. According to Section 179 of the Act:

> A person commits an offence if
> (a) the person sends a message [...],
> (b) the message conveys information that the person knows to be false,
> (c) at the time of sending it, the person intended the message, or the information in it, to cause non-trivial psychological or physical harm to a likely audience, and
> (d) the person has no reasonable excuse for sending the message.
>
> Online Safety Act, 2023, Art. 179)

This provision has been the subject of significant criticism, primarily because it could lead to broad and vague restrictions on freedom of expression. The extent to which English courts interpret the law narrowly and consistently with free speech protections remains to be seen[12]. In the author's view, however, a strict reading of the statute poses serious risks to freedom of expression and fails to meet constitutional standards for criminal legislation.

ii) Proposal for the Fake News Act (Romania) and the CCR's Decision

In 2021, the Romanian legislature considered a proposal for a Fake News Act (*Legea pentru combaterea dezinformării intenționate*), which would have imposed criminal sanctions on the intentional dissemination of false information—especially in online spaces—during situations posing risks to national security**,** public order**,** or public health (e.g. pandemics, wars, elections)[13].

[12] The British constitutional system differs significantly from both continental European and American models, primarily because the United Kingdom lacks a single written constitution and does not have an institutionalized constitutional court. In other words, there is no supreme judicial authority with the power to annul legislation on constitutional grounds. The principle of parliamentary sovereignty lies at the heart of the British legal order, under which decisions of Parliament are legally final and binding. As famously articulated by the constitutional scholar A. V. Dicey: "Parliament... has the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." [Dicey 1959. 39.].

[13] Set out below is the pertinent provision of the draft legislation: Article 5 – Criminal Sanctions for the Intentional Dissemination of Manipulated Content:

In its decision [Nr. 51/2022] declaring the draft law on intentional disinformation unconstitutional, the Romanian Constitutional Court (Curtea Constituțională a României, CCR) articulated several fundamental constitutional objections, grounded in core principles of legal certainty, freedom of expression, proportionality, and press freedom.

First and foremost, the Court criticized the vague and indeterminate terminology employed by the draft legislation. It found that the law failed to define with sufficient clarity what constitutes "false information" or "deepfake content." This lack of precision generated legal uncertainty and risked enabling arbitrary and discretionary intervention by administrative or judicial authorities. The Court emphasized that the principle of legality in criminal matters – nullum crimen sine lege certa – requires that criminal offenses be clearly and predictably defined.

Secondly, the Court identified a disproportionate infringement on the freedom of expression, as guaranteed under Article 30 of the Romanian Constitution. It noted that even erroneous or misleading statements, particularly within the realm of political or public debate, fall within the protective scope of free speech in a democratic society. By criminalizing the dissemination of allegedly false content, the draft law risked chilling public discourse and fostering self-censorship, especially in sensitive political or electoral contexts.

A further constitutional flaw identified by the CCR was the lack of proportionality in the proposed sanctions. The law prescribed a wide range of punitive measures—including imprisonment—without adequately distinguishing between truly harmful, large-scale manipulative campaigns and minor, isolated or non-malicious incidents. Such blanket penalization failed to meet the constitutional test of necessity and proportionality in the limitation of fundamental rights.

Lastly, the Court warned of the potential threat to media freedom and pluralism. The combination of vague legal standards and criminal liability would have placed a particular burden on online media platforms, independent bloggers, and digital content creators. This would have undermined the free flow of information and ideas, and ultimately endangered the pluralistic public sphere essential to a functioning democracy.

In conclusion, the CCR's decision made it unequivocally clear that while combatting disinformation is a legitimate and important public interest, it cannot override constitutional guarantees of fundamental rights. Measures aimed at addressing false or manipu-

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A violation of Article 3 shall constitute a criminal offense and shall be punishable as follows:
a) The creation of deepfake content shall be punishable by imprisonment for a term of six months to two years;
b) The dissemination of deepfake content, with the knowledge of its falsity, shall be punishable by a criminal fine equivalent to 60 to 180 days.
The court shall also decide whether the removal of the deepfake content from the platform shall remain in effect or be lifted.

lative content must comply with the principles of legal clarity, proportionality, and respect for free expression and media independence.

iii) Practice Among U.S. States

In the United States, more than a dozen states (19 as of the finalization of this manuscript, including Ohio) have adopted some form of legislation aimed at combating disinformation. However, these laws have repeatedly failed to withstand constitutional scrutiny by state supreme courts when tested against the First Amendment.

For example, in striking down an Ohio law, Judge Timothy Black (6th Cir., Ohio) held:

> We do not want the government (i.e., the Ohio Elections Commission) deciding what is political truth — for fear that the government might persecute those who criticize it. Instead, in a democracy, the voters should decide.
>
> *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. Ohio)

A similar conclusion was reached in a Minnesota case, where Judge Benton reasoned that the state cannot act as the arbiter of truth in political discourse, as this would constitute an excessive restriction on freedom of expression:

> Indeed, the ultimate 'supervisor of falsity in the political arena' is not the government but 'the people, who are capable of processing and challenging the myriad of statements and refutations to which they are exposed'.
>
> *281 Care Comm. v. Arneson*, 766 F.3d 774, 786 (8th Cir. 2014)

In recent years, state legislatures have focused increasingly on banning the use of deepfakes in electoral campaigns. While broad prohibitions have generally failed under First Amendment analysis, some narrowly tailored, partial restrictions have survived judicial review. Between 2019 and July 2025, 47 (!) states enacted laws targeting deepfake content, with more than three-quarters of those passed within the last 18 months.

B) Targeted Restrictions During Election Campaigns

The restriction of false factual assertions becomes particularly contentious during election campaigns, when the unrestricted and uninfluenced participation of voters in the democratic process may clash with the freedom of expression of those disseminating false information. Although political discourse reaches its constitutional zenith during election periods, it is precisely in this sensitive timeframe that malicious and aggressive disinformation campaigns can cause the most serious harm to democracy. During election campaigns, the constitutional interest in ensuring the free and fair expression of the electorate's will may justify broader restrictions on freedom of expression. (See also: Koltay and Szikora 2022, Lendvay, Papp and Szikora 2024, Szikora 2025a, Szikora 2025b).

i) France

In 2018, France adopted a new law aimed at combating the manipulation of false information during election periods [original title: *Loi relative à la lutte contre la manipulation de l'information en période électorale*]. The law allows for stricter and, more importantly, expedited responses to disinformation in the three months preceding an election (requiring judicial decisions within 48 hours and enforcement within 24 hours after notification).

According to the relevant provision of the law:

> During an electoral period, when defamatory or insulting allegations or imputations against a candidate, or of a nature to mislead voters as to the meaning or scope of an electoral consultation, are disseminated by an online public communication service, the urgent relief judge [juge des référés] may, at the request of the Public Prosecutor [procureur de la République], of the candidate, or of any person having a legitimate interest to act, order the withdrawal of these allegations or imputations, their suppression, or the cessation of their dissemination, within a period of twenty-four hours from the notification of the order.
>
> The request is admissible even in the absence of prejudice, and it is heard and judged in urgent relief [en référé], within forty-eight hours of its referral. The judge may also order the publication of his decision or of a communiqué.
>
> *Code électoral*, Article L. 163-1

Under this provision, the court may order, in an expedited procedure, the temporary removal, restriction of access to, or takedown of content in question. The French Constitutional Council (*Conseil constitutionnel*) reviewed the provision and found it compatible with Article 11 of the *Déclaration des Droits de l'Homme et du Citoyen*, which enshrines the French doctrine of freedom of expression. At the same time, the Council emphasized that in each individual case, the judge must apply a strict proportionality test and may only impose restrictions if the content is intentionally false, significantly distorts facts, and poses a threat to the integrity of the electoral process.

Importantly, actual harm to the electoral process is not a prerequisite—merely the *obvious potential* for such harm is sufficient. This "obvious harm" standard introduces a kind of "harm-based test," which requires the court to assess whether the false statement is capable of undermining democratic decision-making or affecting the electoral outcome. However, such a broad discretionary assessment creates an unstable and slippery foundation for limiting fundamental rights in practice.

ii) The Romanian Constitutional Court's Decision Annulled the First Round of the 2024 Presidential Election

Shortly after striking down the "Fake News Law" as unconstitutional, the Romanian Constitutional Court was again called upon to rule in a politically sensitive, non-hypothetical case—this time regarding the validity of the first round of the 2024 presidential elections. The petitioners argued that the campaign had been subject to an in-

tense, organized, and aggressive foreign (allegedly Russian) disinformation campaign in favor of an extreme right-wing candidate, which significantly distorted the formation of voters' will and, as a result, influenced the outcome.

In its Decision No. 32 of 6 December 2024—a ruling of significance far beyond the case at hand—the Constitutional Court annulled the entire presidential election process. The Court held that a comprehensive assessment revealed the disinformation campaign posed a grave threat to the constitutional order, the integrity of democratic elections, and the free expression of citizens' political will.

This unprecedented and striking decision lies at the intersection of electoral rights and freedom of expression. Although widely welcomed in political discourse, the ruling received limited broader attention, despite setting a potentially dangerous precedent for challenging the validity of elections—one that may have unforeseeable consequences for democratic processes and the expression of popular sovereignty.

This is not to deny the extraordinary constitutional risk that malicious foreign disinformation poses—indeed, hostile foreign states may use such campaigns to effectively interfere with democratic elections, manipulate voter decision-making, and thereby influence the exercise of public authority. This constitutes a serious threat to democracy.

The core question remains: did the Constitutional Court's intervention, justified by the arguments above, genuinely serve to protect democracy, or did it in fact undermine it? Crucially, can democratic arguments grounded in freedom of expression be invoked to defend such a decision?

> The Court details how disinformation and opaque campaigns influenced the free formation of voter will, highlighting the role of digital platforms (especially TikTok): The declassified information confirms the existence of a widespread disinformation campaign that painted a distorted picture of candidates and political reality, thereby severely affecting the exercise of citizens' informed right to vote. Particularly concerning is the extremely aggressive and non-transparent online campaign exploited by certain candidates, which used digital platforms (e.g., TikTok) to circumvent the legal rules on electoral campaigns and violate the rules on campaign financing transparency. The impact of these actions was immediate and significant, distorting the electoral competition and creating unequal conditions among candidates.
>
> cf. Decision of CCR, No. 32/2024, Paragraph 5, 11 and 16

These actions, which are part of a hybrid attack, represent serious violations of electoral legislation, undermining the principle of fair competition and the integrity of the electoral process. The popular will, which is the foundation of democracy, cannot be formed freely and informedly in an environment where disinformation and manipulation distort reality and deliberately mislead citizens: „conducted affected the free expression of the citizens' vote" (cf. Decision of CCR, No. 32/2024, Paragraph 130

The Court addresses the limits of freedom of expression when it threatens the integrity of democratic elections, emphasizing that free speech does not grant immunity from legal restrictions when the foundations of democratic order are at stake:

Article 30 (2) of the Constitution of Romania states that 'censorship of any kind is prohibited,' but Article 30 (6) specifies freedom of expression shall not be prejudicial to the dignity, honour, privacy of a person, and to the right to one's own image. Furthermore, according to constitutional doctrine and the opinion of the Venice Commission, freedom of expression can be limited to ensure the integrity of democratic electoral processes, particularly in the fight against disinformation and foreign interference (cf. Decision of CCR, No. 32/2024, Paragraph 10 and 15).

> Illegal and disproportionate actions used during the electoral campaign, including disinformation and foreign influence, prevent voters from making informed decisions and undermine democratic legitimacy. In this context, the Constitutional Court considers that the protection of the integrity of the electoral process takes precedence over an exercise of freedom of expression that distorts reality and manipulates public opinion.
>
> cf. Decision of CCR, No. 32/2024, Paragraph 16

The decision marks a clear breach in European constitutional doctrine. Within the framework of the proportionality test—balancing the democratic interest in the uninfluenced expression of popular will against the right to freedom of expression, including its exercise through the dissemination of false factual assertions that distort reality and manipulate public opinion—the Romanian Constitutional Court found the democratic public interest to be more compelling and constitutionally worthy of protection.

The CCR's exceptionally brief ruling represents a classic example of the slippery slope in the restriction of freedom of expression. It paves a path for states that is extremely dangerous to follow.

4.3.2. Self-Regulation by Platform Providers

The regulatory approaches adopted by platform providers are highly diverse and undergo paradigm shifts every few years. Even a brief overview of this evolution exceeds the scope of the present study, so below I will highlight only the key characteristics of platform self-regulation.

While self-regulation by platforms is arguably among the most effective tools in combating disinformation and the spread of false information, it simultaneously poses the most significant threats to freedom of expression from a fundamental rights perspective. The algorithmic coordination mechanisms (Ződi 2023, Klein 2024b) used by platforms enable rapid responses to illegal and/or harmful content. However, these content moderation practices are often based on the platforms' own internal self-regulation frameworks (see Klein 2020, Klein 2024a, Németh 2018 etc), their proprietary doctrines of "freedom of expression," and their internal procedural rules. In recent years, platforms have, to some extent, aligned these rules with the constitutional and legal frame-

works of the jurisdictions in which they operate, though significant discrepancies remain in the degree of harmonization.

As a result, platform doctrines may diverge significantly: the same content may be assessed and treated differently across platforms. Moreover, the varying depth and precision of self-regulatory mechanisms open the door to arbitrary decisions by private service providers. In cases related to disinformation, it is most often the platforms themselves that decide whether specific content remains accessible or should be removed—frequently without any clearly established constitutional foundations for their decisions.

The European Union has taken steps to safeguard citizens' freedom of expression through the Digital Services Act (DSA), which introduced a de facto fundamental rights protection mechanism. This ensures that an EU citizen who alleges a rights violation by a platform can challenge such a decision in court (see in detail: Török 2021., Török 2022., Klein, 2023, Klein 2024a, Hohmann 2025, Hohmann, Fábián and Szőke 2025 etc). While this horizontally applicable rights protection mechanism[14] may offer a remedy against rights-infringing measures taken by private platforms in certain cases, it can be difficult to demonstrate individual fundamental rights in matters concerning disinformation.

Moreover, from the perspective of democratic public discourse, what matters is not necessarily who expresses a particular opinion, but that the opinion is present in the public sphere and able to influence the public according to the dynamics of opinion formation. As Meiklejohn famously observed: "[W]hat is essential is not that everyone shall speak, but that everything worth saying shall be said." (Meiklejohn 1948, 25).

A large portion of disinformation is not unlawful but merely harmful content. It must be recalled that, under traditional free speech doctrine, harmful speech is protected. However, when it comes to unlawful content, assessing its illegality and whether it enjoys fundamental rights protection is a matter of constitutional interpretation that typically requires complex legal tests and falls within the competence of the judiciary. Delegating this authority to platforms poses serious constitutional concerns.

Platforms have deployed various measures in recent years. The most radical is content removal, which involves full or partial deletion. A milder approach is downranking or demotion, which reduces the visibility of content. Another method **is** flagging or labeling, where the platform signals that the credibility of a post is questionable—either by offering alternative content or by warning users about its uncertain veracity (Málik 2024).

It is worth noting that platform providers' attitudes and levels of engagement with the freedom of speech vs. disinformation conflict have varied greatly. The 2016 U.S. presidential election marked the first public commitment to action. The 2020 and 2024 campaigns were similarly characterized by promises to counter disinformation and fake news. However, following the 2024 election, all major platform providers

[14] About the horizontally applicable rights protection mechanism see: Chronowsky 2022, Gárdos-Orosz 2010a., Gárdos-Orosz 2010b, Gárdos-Orosz and Bedő 2018., Bán-Forgács 2024.

announced that they would cease fact-checking operations in the U.S. and return to the "roots of free speech" (cf. Meta: *"More Speech and Fewer Mistakes"* blog post; X: *"Community Notes: a collaborative way to add helpful context to posts and keep people better informed."*.)

This paradigm shift is not based on a principled commitment to free speech, but rather on political and strategic interests. Therefore, these invocations of freedom of expression cannot be viewed as genuine expressions of normative dedication to fundamental rights. There is a growing concern that this newfound passivity on the part of platform providers may lead to an increasingly toxic public discourse. This trend is exacerbated by ever more deceptive techniques used in aggressive disinformation campaigns—such as the widespread use of deepfakes.

4.3.3. Hybrid Regulatory Model – EU Regulation ("Vaccine Law")

The *Digital Services Act* (hereinafter: DSA) functions as the general codex of the EU's platform regulation framework (cf. Ződi 2023b, Klein 2024b), containing several provisions relevant to freedom of expression and disinformation. This study does not allow for a comprehensive analysis of the DSA[15]; therefore, only the most essential aspects of its relevance to the issue at hand are briefly highlighted below (see Gosztonyi 2025).

The previous section already discussed the DSA's horizontally applicable fundamental rights protection mechanism, which applies to all online platform providers. While the effectiveness of this mechanism remains uncertain, it offers a degree of optimism for advocates of freedom of expression.

Another significant element of the DSA—applicable only to very large online platforms (VLOPs)—is the risk assessment and risk mitigation framework (cf. relevant provisions of the DSA). This component aligns with the EU's broader *ex ante regulatory philosophy*, which seeks to minimize potential harms through the *precautionary principle*. This regulatory model first emerged in the General Data Protection Regulation (GDPR), continued with the DSA as part of the general EU platform regulation framework (cf. Ződi 2023a, Ződi 2023b), and found its most recent expression in the Artificial Intelligence Act.

I refer to these frameworks as *"vaccine law"* because they operate like immunizations—seeking to prevent harm—rather than *"lawyer's law"* (Juristenrecht, see. Ehrlich, 2017 (1936)), which functions like medicine, offering remedy after a violation (cf. Ehrlich, 2017 (1936)). The "vaccine law" model, which focuses on reducing objectively measurable risks, is—in my view—less suited to the domain of fundamental rights protection.

While not denying the necessity of such compliance regulations, there is an inherent conflict between ex ante legal frameworks and the value-laden logic of fundamental

[15] About the DSA see more: Koltay, Szikora and Lapsánszky (edit.) 2024, especially: Hohmann 2024, Klein 2024b, Papp 2024, Szikora 2024.

rights (Ződi 2024).Ex ante rules are designed to address quantifiable and general risks, whereas the substance of fundamental rights and the institutions of constitutionalism rest on qualitative, interpretive, and value-driven foundations, grounded in constitutional reasoning (Dworkin 1967).

Issues concerning fundamental rights arise in social contexts, yet are adjudicated in individual cases, using contextual evaluation**,** value-balancing**,** and legal interpretation (Dworkin 1986. and Dworkin 1982) Consequently, such issues cannot be effectively modeled ex ante. The imposition of pre-emptive compliance obligations, based on general and decontextualized risk assessments, proves inherently imprecise and may, paradoxically, lead to fundamental rights violations—even if the regulatory objective itself is well-intentioned.

While the DSA, as an EU Regulation, constitutes a landmark source of law in imposing duties on social media platforms regarding disinformation, it is not the Union's only initiative in this area. Worth noting—without attempting an exhaustive listing—are the European Democracy Action Plan and the Code of Practice on Disinformation, both of which formulate non-binding recommendations for platform providers.[16]

5. Conclusion – Democracy's supporters have reason to worry, but not to panic

The theoretical justifications that have shaped the constitutional framework of freedom of expression over the past century teach us that we should not fear lies — even malicious ones that aim to crush the truth. Falsehoods should not be censored but exposed for what they are. Constitutional legal thinking over the last hundred years has shown that the protection of free speech also extends to false statements, especially when expressed within the framework of political debate or as criticism of public authority.

However, the current ecosystem of online platforms and the nature of democratic-social discourse taking place on them is fundamentally different from the traditional structure of the public sphere and public debate. Many question whether the traditional doctrine of free speech can be upheld in an environment that has so dramatically changed. The rise of increasingly aggressive disinformation campaigns and techniques — particularly deepfakes — gives even the staunchest defenders of free speech pause, including the author of these thoughts.

[16] Australia is also discussing a draft similar to the European DSA regulatory model. In 2024, the Australian Parliament considered a legislative proposal that would have established a hybrid model combining elements of self-regulation and state oversight. As a first step, the draft law would have obligated industry actors to implement appropriate measures against disinformation. However, if these proved ineffective, the Australian Communications and Media Authority (ACMA) would have been authorized to intervene. ACMA would not have had the power to mandate the removal of specific content. Nevertheless, due to concerns over vague terminology, potential constitutional issues, and the risk of disproportionate restrictions on freedom of expression, the proposal was withdrawn by its sponsor in November 2024.

Nonetheless, I firmly believe that freedom of expression remains the strongest pillar of democratic societies — a structural element without which democracies begin to falter. At the same time, we must remember that democracy is not a given; it must be defended and reinforced every day. In a well-functioning democratic society, citizens are active participants in this process. And if citizens fail to do everything in their power to ensure that the democratic processes which most directly affect their fate are embedded in open, free, and undistorted public discourse, then they may end up losing more than just freedom of expression.

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