# A QUADRUPLE DOCTRINAL FRAMEWORK OF FREE SPEECH

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ABSTRACT

Existing theories and doctrines of free speech have focused on *why* the freedom to express is indispensable for realizing the values that we treasure, such as truth or democracy. However, *how* expression facilitates those values is underexplored. This Article proposes a doctrinal framework of free speech consisting of four parts: right of control over one's information, right to know, right of access to platforms, and behavioral rules of public discussion. These are the constitutive parts that are necessary for the exercise of free speech to be meaningful and effective. After elaborating on these elements, this Article tests the framework by analyzing four cases: the European Union's Right to Be Forgotten, the information disclosure laws of China, the blocking of Trump's Twitter account, and the Indian hate speech incident. Those four cases offer a more comprehensive scenario as to how the quadruple framework operates in real contexts.

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## INTRODUCTION

Almost all existing theories of free speech are value-laden. In other words, they explain the constitutional salience and preferred protection of freedom of speech on the basis of one or several external values that the freedom is believed to promote. Three notable external values are truth, democracy, and autonomy. The theory of truth trusts the ability of the free marketplace to find truth or produce knowledge for human society.[1] The theory of democracy endorses the necessary function of the exchange of information for democratic self-governance.[2] And the theory of autonomy claims that free speech is indispensable for individual autonomy or self-realization.[3] For these leading theories, freedom of speech is protected not for its own sake, but for its relationship with another treasured value.

Recognizing this relationship, legal and political doctrines should then elaborate on the exact relationship between free speech and those external values. Strikingly however, current scholarship mostly focuses on *why* free speech facilitates those values, while largely ignoring *how* free speech can facilitate them. This matters because first, without a full grasp on *how* to realize those external values, the right to free speech would suffer, as its necessity depends, to a large extent, on the possibility of the realization of the values. Second, the question of *how* dictates the design of legal rules and doctrines concerning free speech—what free speech really means, which rules it entails, and how they can be implemented.

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1. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he power of the thought to get itself accepted in the competition of the market."); Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 440 (2019) (arguing for reframing the "epistemic theory of the First Amendment" around "true belief"); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1–3 (1995) (arguing the "search for truth" justification still applies in an era of skepticism about "the intelligibility of the notion of truth").

2. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (justifying the protection of free speech upon its role in facilitating democratic self-government); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482–83 (2011) (discussing how democratic legitimation occurs "through processes of communication in the public sphere" and the important role of free speech in establishing a sense of "authorship" of the law for all citizens); Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004) (arguing for a shift in free speech theory to focus on fostering a "democratic culture").

3. *See, e.g.*, EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1992); Martin Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that free speech primarily serves to help the development of an individual's skills or life-altering decision-making abilities); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 303–07 (2011) (discussing how speech is "special" in protecting "individual autonomy").

This exclusive focus on the *why* instead of the *how* fits well with the liberal tradition of free speech, where it has been depicted as a negative liberty—freedom means non-interference by others, primarily the state.[4] However, the gap between potentiality (formal freedom to express) and actuality (actual capability of expression) has been overlooked for two reasons: first, the innate capacity or power to speak is assumed for every individual, and second, state interference is taken to be the one major obstacle to exercising such capacity. These two assumptions are clearly flawed. On the one hand, a myriad of conditions is necessary for one's expression to be effective and meaningful.[5] Truth will not automatically emerge in the marketplace of ideas, and public opinion will not spontaneously form through public discussion. On the other hand, the emergence of private regulators in areas like cyberspace has rendered the "state-individual" model obsolete.[6] People have realized that governments act not only as threat to freedom, but also as a proponent of it.[7] Simply put, we are not living in a vacuum exercising our expressive freedom. A value-laden theory of free speech must provide a critical guide to the current reality and a workable path to achieving its alleged value, otherwise it would become either a merely descriptive theory or a utopian imagination—both lamentable.

This Article fills the scholarly gap by proposing a quadruple doctrinal framework ("the quadruple framework") that captures the central elements necessary for the meaningful exercise of the freedom of speech. The following Parts will illustrate that constitutional doctrines of free speech should incorporate at least four parts: a right of control over one's information, a right to know, a right of access to platforms, and some behavioral rules of public discussion. These four elements should be

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4. *See* D. M. Davis, *Socio-Economic Rights*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1020, 1020–23 (Michel Rosenfeld & Andras Sajo eds., 2012) (describing the initial set of rights, including freedom of speech, to be negative freedoms as opposed to positive prerogatives).

5. *See* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2232 (2018) ("Speech must occur somewhere and, under modern conditions, must use some things for purposes of amplification. In any capitalist economy, most of these places and things are privately owned, and in our capitalist economy, they are distributed in dramatically inegalitarian fashion.").

6. *See* Jack M. Balkin, *Free Speech Is a Triangle,* 118 COLUM. L. REV. 2011, 2015 (2018) ("[T]he internet infrastructure regulates privates speakers and legacy media through techniques of *private governance*.") (emphasis in original); Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2308 (2014) ("In the digital era, digital platforms and intermediaries join television, cable, and radio broadcasters.").

7. *See* OWEN FISS, THE IRONY OF FREE SPEECH 83 (1996) ("[T]he state can be both an enemy and a friend of speech; that it can do terrible things to undermine democracy but some wonderful things to enhance it as well.").

recognized as constitutive parts of free speech law in a country's constitutional order. For example, for regimes that offer deficient protection of freedom of speech because of a lack of constitutionalism, the quadruple framework can work as a benchmark that guides future institutional design. Even though each of these elements has been the subject of study in various legal fields, they have not been closely examined by free speech scholars, particularly not in a holistic fashion.

Before introducing the quadruple framework, it is critical to discuss one caveat. The four elements proposed are legal or constitutional doctrines, not general conditions for fulfilling the values of free speech. They are constitutionally mandated in the sense that the four elements can and should be prescribed by constitutional law. Without such prescription, the freedom of speech would be too thin to have the potential of realizing external values. They are still necessary but not sufficient. Professor Lawrence Lessig has famously posited that law, social norms, market, and technological structure can all have an influence on the enjoyment of freedom of speech on the Internet.[8] Surely not all of them could be encompassed by a constitutional theory. Some conditions, such as providing material assistance to citizens to improve their standard of living and providing civic education to cultivate their critical thinking, are also vital to the realization of free speech values. However, they are relatively distant from free speech jurisprudence, and including them would make the doctrine overbroad and burdensome. In contrast, this Article proposes four elements that are fundamental for a constitutional regime to meaningfully protect free speech. Part I introduces the quadruple doctrinal framework. Part II elaborates on each component in depth, discussing their importance and impact on our thinking of free speech problems. Part III examines four cases to test these doctrinal requirements. Finally, the conclusion remarks on the challenges for future research.

## I. Introducing the Framework

To conceptualize theoretical values underlying free speech, a closer examination of the processes of free speech—dialogue, deliberation, or discussion—is necessary. Thorough examination reveals that at least five elements are indispensable for a meaningful dialogue[9]—subjects, motivation, space, material, and behavior. Each of these elements will be addressed in turn.

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8. LAWRENCE LESSIG, CODE 122–25 (2d ed. 2006).

9. Here, "meaningful" refers to the potential to generate the external values of speech, such as knowledge or democratic legitimacy.

Subjects participate in discussion—they include speakers, listeners, and bystanders that may not be directly involved in the dialogue but are potentially affected.[10] Motivation refers to the willingness of the subjects to engage in the process, without which the mutual exchange between them would not be possible. Space is where the deliberation or dialogue occurs. There are many channels or media that can host dialogue: they are indispensable because no interactive engagement can be conducted in a void. Material means the necessary inputs that inform the process; in other words, information. A lack of information would result in sterile dialogue or nonsense talking. Behavior refers to the conduct of dialogue or discourse. It is the analytical focus of the traditional approaches. Some rules that govern the expressive behavior are required for the dialogue to be smooth, orderly, and effective.

The following Part introduces four doctrinal conditions to propose a freedom of speech framework based on the five elements above. First is the right of control over one's information, which corresponds to the elements of subjects and motivation, since one's own information is what defines one's self-identity. The lack of control over it would significantly chill one's motivation to engage with others. Second is the right to know, or the right of access to information. This is the basis for deliberation because information is the building block for meaningful interpersonal exchange. Third is the right of access to platforms, which guarantees the space for public discourse. For the external values of free speech to be realized, the speaker's message must have a chance to be heard, and such chance depends heavily on the medium or channel where the message is delivered. Fourth is the behavioral rules that ensure a fair and equal dialogue. These conditions ensure that expression satisfies a minimum threshold of quality; for example, that they are open-minded, orderly, free from distortion and coercion. This quality control is crucial for the fulfillment of the public good, irrespective of the external values implicated, be it truth or democratic legitimacy.

Part II will expand on the detailed rationales for these four conditions. The basic landscape is now clear: as a value-laden freedom in reality rather than a formalistic guarantee on paper, free speech requires the four sub-rights or conditions to be protected and guaranteed by a constitutional order. These four conditions capture the holistic process of the function of liberty and correspond to the five elements described above.

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10. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 520–28 (1979) (arguing that the interests of free speech encompass the interest of the speaker, the interest of the audience, and the interest of the bystanders).

| *Subjects* | *Motivation* | *Space* | *Material* | *Behavior* |
|---|---|---|---|---|
| Right of control over information | | Right of access to platforms | Right to know | Behavioral rules governing public debate |

This Article is not the first to suggest that free speech encompasses a much broader range of sub-rights and conditions than a blanket right of non-interference. For example, German philosopher Jürgen Habermas has proffered an ideal speech situation, which includes conditions that are necessary for the public discourse to generate democratic legitimacy.[11] However, his stipulations only cover the subjects, space, and motive elements, and thus do not provide a complete epitome of the conditions of public discourse. Moreover, Professor Caroline Corbin has cogently argued that the right of free speech encompasses four distinct rights: the right to speak, the right not to speak, the right to listen, and the right not to listen.[12] The first is the right in the traditional sense, which relates to the behavior element in my framework. The right to listen is the right to know that captures the material element. And the other two rights—the right not to speak (right against compelled speech) and the right not to listen (right against compelled listening)—represent the autonomy and privacy interests of the subjects, relating to the motive element and the right of control over one's information in my framework. Corbin's structure, though comprehensive, is not attentive to the element of space (right of access to platforms).

Further, Professor Wesley Hohfeld proposes a theory with similarities to the quadruple framework proposed here. For Hohfeld, a right is a composite structure containing four items: claim-right, privilege, power, and immunity, which correspond to duty, no-right, liability and disability respectively.[13] The common themes of the quadruple framework and Hohfeld's theory are that first, all rights implicate duties. In other words, all rights are relational rather than isolated. "If no one has any obligation to

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11. *See* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 96–97 (1989).

12. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 940–41 (2009).

13. *See generally* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (presenting the structure of right as the "jural correlatives" of "right" and "duty," "privilege" and "no-right," "power" and "liability," and "immunity" and "disability"); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) (showing practical applications of "jural correlatives").

supply you with a job, then you have no *right* to a job."[14] Second, each right has both passive elements (claim-right and immunity) and positive elements (privilege and power).[15] According to Hohfeld's theory, the traditional model of treating free speech as merely a negative liberty is overly under-inclusive. In the same vein, Professor Frederick Schauer has applied the Hohfeldian structure to claim that the free speech right might include right to information, right to access, and right against private (in addition to public) censorship.[16] Those propositions are strikingly similar to the quadruple framework.

This similarity is not coincidental. In the landmark U.S. Supreme Court case *New York Times v. Sullivan*, Justice Brennan famously remarked that "debate on public issues should be uninhibited, robust, and wide-open."[17] These three often cited adjectives denote the shared commitments that we generally expect for a value-laden freedom of speech. We can reasonably interpret them as follows: "uninhibited" relates to the negative liberty against interference; "wide-open" refers to the space of expression; and "robust" means that the debate should be active (with motivations to express), informed (supplied by information as the dialogic input), and smooth (behavior free from distortion and coercion). Delving into the meaning of Justice Brennan's words reveals a resemblance between his vision of free speech and the quadruple framework—both share the spirit that free speech should be actual, relational, and systematic, rather than formal, isolated, and piecemeal.

The quadruple framwork is a normative one, in the sense that it prescribes what free speech *ought* to include. It aims to guide the making and construction of the Constitution in the future, rather than merely to interpret the constitutional practice in the current state of affairs. A theory that is only descriptive and pursues no action other than conforming to current practices is reactionary, being "an apologist for the status quo."[18] As a normative framework, the quadruple doctrine in this Article derives its basic contents from current laws while also going beyond them. It attaches itself to the underlying values of free speech and the necessary conditions for fulfilling those values. In this regard, the framework can be used to evaluate and criticize current laws and practices on the one hand, and provide a

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14. Heidi M. Hurd & Michael S. Moore, *The Hohfeldian Analysis of Rights*, 63 AM. J. JURIS. 295, 320 (2018).
15. Jack Clayton Thompson, *The Rights Network: 100 Years of the Hohfeldian Rights Analytic*, 7 LAWS 1, 7–8 (2018).
16. Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914, 929 (2008).
17. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
18. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 270 (2011).

benchmark for future constitutional and legal reforms on the other. Accordingly, Part III features case studies with suggestions for future legal reforms.

## II. Elaborating on the Framework

### A. Right of Control over One's Information

The control over one's information relates to two of the five elements that are necessary for the meaningful exercise of free speech: subjects and motivation. Initially, it may appear strange or even absurd to include information control into the free speech doctrine. Intuitively, free speech means the free flow of information. The tension here is obvious. Information control refers to anonymity, secrecy, and autonomy, while information flow refers to transparency, disclosure, and openness.[19] In traditional analysis, the two are represented by the right of privacy and the right of free speech respectively. Judges and scholars regard them as "hostile" and "competing" values,[20] since one is outward-looking (protecting the right to know), while the other is inward-looking (protecting the right not to be known).[21] The interests lying behind the two are distinct, as traditionally the control of information (privacy) served the interest of the individual, while the flow of information (free speech) served the interest of the social.[22]

There are two approaches to resolving this conflict. The first is the currently dominant one, which excludes the control over information (privacy) from the purview of free speech and takes the two interests as competing, representing freedoms of distinct kinds that need to be balanced. Different legal traditions may confer different weights to the two freedoms and use different methods to do the balancing. For example, the American tradition accords more protection to free speech while the European approach emphasizes privacy.[23] The American style uses a categorical test in dealing with the conflicts, as compared to the European proportionality

19. Frederick Schauer, *Anonymity and Authority*, 27 J. L. & POL. 597, 598 (2012).

20. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 388, 402 (2008).

21. Jennifer M. Kinsley, *Private Free Speech*, 58 U. LOUISVILLE L. REV. 309, 311 (2020).

22. David Mead, *A Socialised Conceptualisation of Individual Privacy: A Theoretical and Empirical Study of the Notion of the 'Public' in UK MoPI Cases*, 9 J. MEDIA L. 100, 102 (2017).

23. For an excellent analysis of the gap, see James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004) (conceptualizing the clash in approaches as rooted in American valorization of liberty and European prioritization of personal dignity).

test.[24] The second approach—endorsed by this Article—is to incorporate the control over information (privacy) into free speech and treat them as not merely conflicting, but also mutually reinforcing.

First, the control over one's information, or information privacy, defines the boundary between private and public spheres, which is the precondition for individuals to participate in public life.[25] The interaction between the individual and the collective is only possible when there is a clear line separating the two. Otherwise, the integrity of the two will be compromised—either the individual will be engulfed by the collective, or the collective will be encroached by the individual. In both circumstances, public discussion would not be able to proceed. In other words, we first have to be "different" before reaching a consensus.

Second, information privacy also defines the subject and her relationship with others and society. Before and during social interactions, an individual needs an isolated space, a "backstage," or a shelter to develop her own identity, ideas, thoughts, and relationship to others.[26] Isolation and detachment are vital for the development of new thoughts.[27] The ability to communicate ideas within a small circle of intimates is crucial for developing those ideas before one is ready to share them with the public.[28] In addition, when we are capable of choosing what information to share, to whom, and in what way, we would then be able to modulate our relationships with others.[29] Self-control over information facilitates varied information exchanges, which "allow us to create differentiated relationships with others, as well as allowing us to confer different public statuses on ourselves."[30] This is crucial for individuals to engage in dialogic interactions through free speech.

Third, lack of control over one's own information has motivational costs—it creates chilling effects on potential speakers.[31] Individual

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24. *See* Ronald J. Krotoszynski, Jr., *Reconciling Privacy and Speech in the Era of Big Data: A Comparative Legal Analysis*, 56 WM. & MARY L. REV. 1279, 1289–95 (2015) (identifying principles of proportionality and balancing in the global human rights context).

25. Mead, *supra* note 22, at 107.

26. Elizabeth De Armond, *Tactful Inattention: Erving Goffman, Privacy in the Digital Age, and the Virtue of Averting One's Eyes*, 92 ST. JOHN'S L. REV. 283, 286 (2018).

27. Richards, *supra* note 20, at 416.

28. *Id*. at 424 ("Consultation with intimates allows us to better determine if an idea is a good one, and to gauge some expectation of how it will be received . . . . Without a meaningful expectation of confidentiality . . . we would have fewer ideas . . . .").

29. De Armond, *supra* note 26, at 289.

30. Mead, *supra* note 22, at 112.

31. *See* Daniel J. Solove, *The First Amendment as Criminal Procedure,* 82 N.Y.U. L. REV. 112, 143–44 (2007) (describing how government surveillance of speech can have a

expression is motivated by the calculation of risks and benefits.[32] When "individuals perceive there is at least a risk of their activity or condition being observed by another who may disseminate those observations," they may "change their behavior—discontinuing or hiding that activity or condition—out of fear of public association with that activity of condition."[33] Several experimental and empirical studies have revealed the chilling effect that disclosure or surveillance of personal information has on expression.[34] Such chilling effects are most salient for marginalized groups,[35] since the unwilling disclosure of their information significantly deters their voices in a social environment that is already hostile to them. *NAACP v. Alabama*[36] illustrates this danger. This case arose in Alabama, where state authorities had improperly investigated civil rights organizations during the periods immediately after *Brown v. Board of Education*.[37] In one investigation, the state demanded that the National Association for the Advancement of Colored People ("NAACP"), an influential civil rights organization, hand over their membership list, based on a state law that governed the business of foreign corporations. The NAACP refused to comply with this disclosure out of fear for potential reprisals and challenged the constitutionality of the state

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chilling effect on said speech); Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 145–64 (2016) (describing a drop-off in views of Wikipedia entries related to terrorism following the revelations about U.S. government surveillance practices leaked by Snowden); Julian R. Murphy, *Chilling: The Constitutional Implications of Body-Worn Cameras and Facial Recognition Technology at Public Protests*, 75 WASH. & LEE L. REV. ONLINE 1, 26 (2018) (explaining the connection between the chilling effect on speech and the removal of anonymity).

32. Jonathon Penney, *Chilling Effects and Transatlantic Privacy*, 25 EUR. L.J. 122, 125 (2019).

33. Pierluigi Perri & David Thaw, *Ancient Worries and Modern Fears: Different Roots and Common Effects of U.S. and E.U. Privacy Regulation*, 49 CONN. L. REV. 1621, 1634 (2017).

34. *See* Yoan Hermstrüwer & Stephan Dickert, *Tearing the Veil of Privacy Law: An Experiment on Chilling Effects and the Right to Be Forgotten*, PREPRINTS OF THE MAX PLANCK INST. FOR RSCH. ON COLLECTIVE GOODS 16–17 (2013) (showing correlation between consent to disclosure information and willingness to share part of their endowment to another); Elizabeth Stoycheff, *Under Surveillance: Examining Facebook's Spiral of Silence Effects in the Wake of NSA Internet Monitoring*, 93 JOURNALISM & MASS COMMC'N Q. 1, 9–10 (2016) ("[W]hen individuals think they are being monitored and disapprove of such surveillance practices, they are equally as unlikely to voice opinions in friendly opinion climates as they are in hostile ones."); Kelly Martin et al., *Data Privacy: Effects on Customer and Firm Performance*, 81 J. MKTG. 36, 43 (2017) (Transparency and control . . . together, they suppress both the positive effect of vulnerability on violation and its negative effects on trust.").

35. Mead, *supra* note 22, at 109–10.

36. NAACP v. Alabama, 357 U.S. 449, 466 (1958).

37. *See* Brown v. Bd. of Ed. of Topeka, 347 U.S. 483 (1954) (holding that racially segregated public educational facilities violated the Equal Protection Clause of the Constitution).

action. In holding the compelled disclosure to be unconstitutional, the Supreme Court recognized the risk of chilling the speech of civil rights advocates, many of whom were marginalized and repressed at that time. Half a century later, Justice Sotomayor expressed a similar concern in her concurring opinion in *United States v. Jones*, stating that "[a]wareness that the Government may be watching chills associational and expressive freedoms."[38]

Fourth, the control over information includes the freedom of choosing what information to share and with whom. Indeed, this kind of audience selection is itself a part of freedom of speech. Different audiences may force speakers into different roles since speakers share different content and adopt different expression styles when addressing distinct listeners.[39] In sum, the audience (who receives information) is a necessary part of expression. Thus, freedom of speech includes the freedom to exclude audiences,[40] falling under the right to control over information.

The above analysis shows that control over information and free speech are not mutually exclusive. Rather, the former is indispensable for the latter because the values underlying the latter cannot be realized without the protection of the former.[41] However, the control over one's information is not absolute. Excessive information control means inadequate information flow and less robust public debate. On the one hand, one individual's information might be the object of another's right to know; and the right to know is another constitutive element of free speech, as the next Section will demonstrate. On the other hand, one's identity information is usually important for mutual understanding and dialogue—anonymity that hides that information will inevitably cause epistemic loss for dialogic participants.[42] Therefore, balance is required.[43]

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38. United States v. Jones. 565 U.S. 400, 416 (2012) (Sotomayor, J. concurring).

39. Matthew Lynch, *Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure*, 5 FIRST AMEND. L. REV. 234, 293 (2007).

40. *Id*. at 298.

41. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 132 (2007).

42. *See* Frederick Schauer, *Anonymity and Authority*, 27 J. L. & POL. 597, 604–06 (2012) (arguing that knowledge is authority-dependent: sometimes we trust other's speech not because of its cogency, but because of the authority of the speaker; such authority derives from the identify information, without which the costs of verifying other's speech will be unacceptably high).

43. For articles discussing the balancing, see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000) (arguing that while privacy is constitutionally protected to an extent, contracted privacy can cause the restriction of freedom of

The private control of information and the public exchange of information are two sides of the same coin, co-serving the values of free speech.[44] It is the listener's interests (of information flow) versus the speaker's interests (of information control) that need to be balanced. Or, more precisely, free speech can be seen as a scale: the two ends are the inward component (control) and the outward component (flow) of information. Crucial to the balance is to distribute fairly the resource of information and to design delicately the institutions that enforce the distribution. The American mode overemphasizes the outward component, inadequately protecting the inward privacy value; the European mode, by contrast, focuses on the inward component through its comprehensive laws on data privacy and control, while compromising the outward value of information flow. Both models have failed to take a holistic perspective on information. A better approach reconciles the two aspects of information more delicately, through both legal institutions and technological tools.

B. Right to Know

The right to know, or, the freedom of information, ensures the availability of material in the five constitutive elements of the freedom of speech. In short, the essence of free speech is the sharing, flow, and exchange of information.

While they overlap, the right to know and the traditional right of free speech are distinct rights. Freedom of speech is typically constructed as negative, defensive, and speaker-oriented, while the right to know is positive, offensive, and listener-oriented. Freedom of speech is more widely acknowledged, generally cherished as a constitutional right across the

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expression); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005) (arguing that data privacy legislation does not infringe on First Amendment rights); Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371 (2012) (dissecting the social good social media networks provide by encouraging free speech and the spread of information, as compared to the social evil of privacy violations that these networks create).

44. *See* Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 371–79 (2010) (arguing that privacy and security protected by the Fourth Amendment and free speech and public deliberation protected by the First Amendment are interrelated, and both are necessary parts of political freedom.); Mead, *supra* note 22, at 128–30 (2017) ("Privacy and free speech, or elements of each at least, can in fact be the same sides of the coin."); Jennifer M. Kinsley, *Private Free Speech*, 58 U. LOUISVILLE L. REV. 309, 312–23 (2020) (arguing that the creativity, intimacy, and self-development secured by the right of privacy are indispensable for free speech, and free speech contains both a public component and a private component).

world,[45] while the legal status of the right to know is more ambiguous, recognized as a constitutional right in some countries while only a statutory right in others.[46] And generally, the right to know receives relatively lower priority and serves more particular ends than the freedom of speech. Notwithstanding these differences, incorporating the right to know into the freedom of speech is both doctrinally required and practically helpful.

First, for individuals to engage in public discussion effectively, they need not only a sheltered space, but also the material of information as meaningful inputs. To engage in public discussion effectively—that is, to make the public discussion capable of promoting the external values of free speech—the speakers must have something to express, and the listeners must understand the speakers. This entails that the exporter (speaker) possesses some information as her background material for output, as well as the receiver (listener) to possess at least enough information to understand the contextual meaning of what the speaker has said. Mutual understanding is the basis for public discourse—such understanding would not be reached unless the required information is constantly available.

Second, the right to know is also a prerequisite for realizing the normative values underlying free speech. Information disclosure and sharing is the first step in mobilizing collective action, and it is also necessary for the collective to critically reshape the values of the individual and for individuals to supervise, check, and engage with the collective.[47] By empowering

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45. *See* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 773 (2012) (noting that the most popular rights in the world, including the freedom of expression, appear in over 70% of all constitutions).

46. *See* DAVID BANISAR, PRIVACY INTERNATIONAL, FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT INFORMATION LAWS 6 (2006), https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/intl/global_foi_survey_2006.pdf [https://perma.cc/5746-9GZL] ("Nearly 70 countries around the world have now adopted Freedom of Information Acts to facilitate access to records held by government bodies and another fifty have pending efforts. A few countries have issued decrees or used constitutional provisions.").

47. For the democratic function of the right to know in facilitating the check of government and public participation, see Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1, 9 (2012) ("[T]he 'right to know' serves two separate democratic values: governmental accountability and citizen participation"); Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 16 (1976) ("One would seem to be on solid ground, therefore, in asserting a constitutional right in the public to obtain information from government sources necessary or proper for the citizen to perform his function as ultimate sovereign."); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1195 (1983) (arguing that denial of access to government information threatens the ideal of a well-informed electorate, "without which democracy is a sham"); William M. Sage, *Regulating Through Information: Disclosure Laws and American Health*

potential listeners with the right to know, they can become more competent, active listeners that can better understand the speakers. Without such a right, robust public debate would not occur.

Third, incorporating the right to know into the free speech doctrine can shed new light on controversial issues such as whether and how commercial speech should be protected. Some have argued for very limited protection of commercial speech because the goal of this kind of speech is to promote transactions and increase profits, which is quite distinct from the normative values of free speech.[48] Considering the right to know in this context may lead to a different analytical outcome. For one, commercial advertisements—even though produced for the very purpose of financial profits—effectively serve the right to know of the consumer.[49] From the commercial advertisements, the consumer acquires information about certain products and the state of the market. Based on this kind of information, she forms expectations and plans her economic behaviors accordingly. Such information may be no less important than others in shaping the values of individuals.[50] Therefore, commercial speech should receive non-minimal protection under the free speech doctrine, due to its role in facilitating the right to know. For another, professional speech is produced in specific and highly technical contexts, such as medical prescriptions from doctors and legal opinions of lawyers. Government regulations of this kind of speech are common—certain qualifications or licenses are required to engage in this speech, speech contrary to professional ethics may be punished, and specific information must be

*Care*, 99 COLUM. L. REV. 1701, 1802–03 (1999) (recognizing the view of proponents of democratic participation that information is important for robust democracy and checking the government against abuse); Manoj Mate, *India's Participatory Model: The Right to Information in Election Law*, 48 GEO. WASH. INT'L L. REV. 377, 403–04 (2016) (citing an opinion by the Delhi High Court for the proposition that one of the rationales for government transparency is to allow voters to actively engage with the political process).

48. *See e.g.*, C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 Iowa L. Rev. 1, 3 (1976) (arguing that profit-driven commercial speech has no connection to human liberty, so it should not receive constitutional protection).

49. Eric G. Olsen, Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505, 519–20 (1979) (noting how the Supreme Court recognized important First Amendment interests in commercial speech); Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1460 (1990) ("[C]ommercial enterprises have determined that health sells, and to a large extent they have devoted their research, marketing, and advertising resources toward both improving the health impact of their products and informing the public of those improvements.").

50. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 11–13 (2000) (describing how commercial speech is relevant to the formation of personal and national ideals).

disclosed to the general public.[51] Under traditional approaches, those regulations have infringed on the freedom of speech of the professional speakers. But the right to know doctrine acknowledges that the general public has a stake in the speech in those professions: they rely on those materials (information) to make important choices and to engage in public life.[52] Thus, the government has to make sure that professional speech is true, accurate, reliable, and "in accordance with the insights of the relevant knowledge community."[53] Here, the speakers' expression is restricted by the listeners' right to know. Professional speakers' freedom of speech should be balanced by that of the general public's, for the latter's right to know protects the legitimate expectation of accurate information regarding certain professions, a prerequisite for the public to be epistemically capable of engaging in public dialogue.

Fourth, the right to know doctrine could also help resolve the intractable problem of legal subjects regarding robotic speech.[54] One concern of granting protection to robotic speech is that this kind of speech is not expressed by humans and thus lacks legal standing. If we incorporate the right to know into the quadruple framework of free speech, it becomes evident that it is content, rather than subject, that matters. That means, if algorithmic outputs by artificial intelligence (robotic speech) are the objects of other individuals' legitimate right to know, they should be protected. In other words, even information that is not produced by humans could be covered by free speech whenever such information serves as material for public discourse. The best way to address the subject issue is to focus on the function of such speech instead. It is the function of information that we really care about, and not the producer, who may be fluid, changing, or even non-human.

Incorporating the right to know into the free speech doctrine is a correction to the dominant formalistic notion of freedom and the narrow purview of speech/expression. The information that is covered by the right to know may not always be conveyed in expressive acts. They should be protected so long as they constitute vital materials for meaningful public debate to be carried out. Before raw information becomes material of public discussion, it may not yet qualify as "expression" or "speech." Nonetheless, if we extend our protection only to information that contains expressiveness

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51. Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1279–80 (2016) (describing how states regulate professional speech).

52. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 810–12 (1999).

53. Claudia Haupt, *The Limits of Professional Speech*, 128 YALE. L.J. 185, 188 (2018).

54. For excellent research on the issue of legal subjects of robots, see Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231 (1992).

or communicativeness, we would be ignoring an ocean of information that is extremely important for the free exchange of ideas. Even raw information may sometimes be the object of the right to know—without it, public discussion would flounder. One example is the climate data: it is acquired by satellites and processed by computers, rather than expressed by humans. However, this kind of data constitutes important source material for scientific research and public discussion. The regulation of the restoration and dissemination of climate data would surely trigger free speech issues.[55]

### C. Right of Access to Platforms

The third doctrinal part is the right of access to platforms, which guarantees space for the public discourse. "Space can constrain individual freedom no less than law . . . ."[56] The right of access to platforms ("right of access") relates to the space element of free speech, ensuring that participants in the public dialogue have a place to engage in information exchange with potential interlocutors. Such a right is indispensable.

First, exchange of information needs space, and the existence of such space cannot be taken for granted. The rationale is simple: public reason cannot proceed in a vacuum but rather relies on the support of some media. Media, whether physical ones like streets, parks, and campuses, or virtual, like the Internet, are spaces for information to be shared, exchanged, and critically reflected among participants. Second, if freedom of speech means more than just soliloquy, it must include the capability to reach an audience.[57] For the commitment of "uninhibited, robust, and wide-open" public debate to be realized, access to media must be guaranteed for reaching the potential audience.[58]

Third, the right of access is more critical now than ever, since paradigmatic speech does not come from street corner speakers standing on

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55. Jane Bambauer, "*Is Data Speech*", 66 STAN. L. REV. 57, 60 (2014) ("Suppose Congress were to pass a law mandating the destruction of mechanically captured climate science data and the discontinuation of the collection of core samples. It is implausible to think that a court would not employ some form of First Amendment scrutiny.").

56. Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 22 (2012).

57. *See* Thomas Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 808 (1981) ("[T]he system [of freedom of expression] demands access to an audience."); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) ("[T]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention.").

58. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

soapboxes,[59] but occurrs on monitored, privately-owned online platforms.[60] Media ownership is becoming increasingly concentrated.[61] In particular, the burgeoning of the Internet has been accompanied by the growth of intermediaries who monopolize speech channels, censor content on the platforms owned by them, and cooperate with the government in regulating speech.[62] They hold the power of determining who has what access to engage in information exchange in cyberspace—unlike the street or public square, every layer of the Internet is privately owned.[63] In other words, the exercise of free speech in our time is intertwined with property rights more than ever: it has become more expensive. Constitutional duties to make platforms open to the public, at least for some time and in some circumstances, is pivotal for the protection of free speech. This surely does not mean that the Internet platforms should be nationalized or commandeered by the government, but that they should remain open to a reasonably minimal degree to ensure access right of the public.

The right of access is in no way uncontroversial. Commentators have offered various arguments about the risks associated with it. First, some argue that the right of access infringes on the property rights of those who own the platforms or media.[64] The access may collide with the property interests in two ways, either "where a speaker seeks physical access to property and thus, interferes with the property owner's right to exclusive possession," or "where speech interferes with use and enjoyment of land,"[65] due to nuisances such as noise or pollution. It is true that when government grants public access to the property, it interferes with the platform owners' private property right. In many occasions, the conflict between free speech and property would be inevitable. However, the conflict is only one side of

59. OWEN FISS, *Free Speech and Social Structure*, *in* LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 8–30 (1996).

60. Jack M. Balkin, *Media Access: A Question of Design*, 76 GEO. WASH. L. REV. 933, 938–39 (2008).

61. Philip M. Napoli & Sheea T. Sybblis, *Access to Audiences as a First Amendment Right: Its Relevance and Implications for Electronic Media Policy*, 12 VA. J.L. & TECH. 1, 18 (2007).

62. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1609 (2018) (analyzing how courts have addressed the growing power of intermediaries); Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1172–82 (2018) (explaining new free speech regulations aimed specifically at Internet platforms and intermediaries).

63. Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won't Believe #3)*, 95 WASH. U. L. REV. 1353, 1361 (2018).

64 . Richard Moon, *Access to Public and Private Property Under Freedom of Expression*, 20 OTTAWA L. REV. 339, 339–42 (1988).

65. Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 30 (1997).

the story and it is far from irreconcilable. On the one hand, many intermediaries like Internet giants, though privately owned, control various public functions: they amass huge amounts of capital, monopolize areas of commerce, and maintain nationwide or even worldwide platforms for communications. Transactions are made, news is shared, social relationships are built, and ideas are exchanged on their private property. Those public functions make such private entities semi-public and thus bound by some public duties, such as providing access to the public. In addition, property rights do not exist in nature, but are created, acknowledged, and protected by the state.[66] As constitutional rights, the right to property and the right of free speech are not absolute; some compromise of the former is required for the protection of the latter. If freedom of speech were to become a property-based freedom, it will only be enjoyed by property-owners—this is totally incompatible with the democratic and egalitarian value behind free speech.

Second, the right of access may be thought to abridge the freedom of speech of those platforms, as they can be speakers themselves. The freedom of speech of platforms includes an editorial freedom to exclude something that they do not want to appear on the platform, which conflicts with the users' right of access.[67] However, this editorial freedom is likewise not absolute. The platform's freedom as editors or speakers should be limited and balanced by its duty as conduits or carriers. In addition, the editorial freedom has to be limited by the public's right to know, since the platforms are important information sources for the public, and the major rationale for protecting their editorial freedom is to guarantee their function of gathering, screening, and organizing information for the public.[68] Editorial freedom, therefore, is a constituent part of the freedom of speech—the exercise of the former should not undermine the value of the latter. To be sure, confusion may arise when platforms are "forced" to provide access to opinions that they do not endorse[69] because a statement, a tag, or a disclaimer may not be sufficient to differentiate the speech of the platform with the speech of its

66. Moon, *supra* note 64, at 366.

67. Mark S. Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 FORDHAM URB. L.J. 163, 165–66 (1982) (distinguishing First Amendment rights of messengers from the property rights of media owners in light of competing First Amendment claims); Mark S. Nadel, *Editorial Freedom: Editors, Retailers, and Access to the Mass Media*, 9 HASTINGS COMMC'N & ENT. L.J. 213, 213 (1986) (arguing that cable owners are not free to prevent certain messengers from accessing their infrastructure because property rights of owners are subordinate to first amendment rights).

68. Nadel, *supra* note 67, at 214–16.

69. Martin H. Redish & Kirk J. Kaludis, *Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1118–19 (1999).

users. One solution may be to accord different levels of protection to different types of platforms, based on the degree of cohesion and the sense of identity among its members, since some platforms are more like collectives while others may be mere sets.[70]

Third, some argue that granting access rights will give the government too much redistributive power, violate the principle of neutrality, and inappropriately infringe individual autonomy by imposing government orthodoxy.[71] As Professor Richard Moon observed, the question of access is ultimately a question of distribution—of communicative resources and opportunities.[72] It is in essence a power of economic distribution, moving resources from one hand to another. This would necessarily entail substantive judgements about whose resources to take and whose to fulfill. These judgements may be too dangerous for governments to make.[73] Despite the risk of danger, complete neutrality is impossible. First, either the government or private corporations will exert substantive power, because there is no power vacuum. Second, the government has a constitutional duty to realize citizens' freedom of speech and should not hesitate to undertake this responsibility. And third, as the devil is in the details, we can reduce the danger of government arbitrariness and abuse of power through micro institutional design.

For public debates to be effective, minimum access must be guaranteed to every citizen. For example, because of the pivotal role the Internet plays in public communications and debate, access to the Internet should be universally guaranteed.[74] Citizens should have an opportunity to participate in mainstream platforms locally, nationally, and internationally. Of course, there may be different standards of what constitutes minimally sufficient access, and they are subject to change and scrutiny. In addition, the

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70. The distinction between a collective and a set is that the former is more unified, cohesive, and resilient, and thus should receive more protection due to the collective capability it enjoys. First, a platform with closer relationships among its members is more conducive to collective discussion and action, which is the main reason for protecting collective capability. Second, a tighter collective with shared identities and ethos will suffer more from compelled speech than a loosely aggregated set.

71. Julian Eule & Jonathan Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1606–18 (1998).

72. Moon, *supra* note 64, at 340.

73. Redish & Kaludis, *supra* note 69, at 1085–88.

74. *See* Ryan Shandler & Daphna Canetti, *A Reality of Vulnerability and Dependence: Internet Access as a Human Right*, 52 ISR. L. REV. 77, 91–94 (2019) (describing legal methods of making internet access a human right).

state should strive to guarantee access rights beyond the minimum[75] and distribute access in a roughly equal way. This mirrors the value of equal dignity of individuals and serves the goal of wide-open communications.[76] This does not mean that the playing field should be completely leveled, but that overly unequal and biased distribution of access rights should be prohibited and corrected.[77]

### D. Behavioral Rules of Public Reason

When subjects are provided with material of information and access to space, they become ready to engage in the process of knowledge production or public value formation. The last piece in the doctrinal framework is behavior: the conduct of engaging, discussing, and debating with each other. This fourth doctrinal mandate concerns the rules or norms that govern the behavior of information exchange between individuals.

The reason why dialogic behavior needs regulative rules is obvious—to ensure fair and equal dialogue. Public reasoning is not just talking for the sake of talking. Rather, it is result-oriented—a process of exchanging and reviewing each other's viewpoints critically and reaching consensus at some level to guide individual and collective decision-making. Intuition teaches us that consensus cannot be reached in free-floating talks or chats. Unconstrained public reason would go against the values underlying public reason.[78] Consensus is most easily fostered in an environment of social unity or homogeneity, while most modern societies are pluralistic. Accordingly, some rules that structure the public reasoning process must operate to ensure the generation of consensual agreements despite social, cultural, and religious divisions.

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75. For example, Marvin Ammori lists five principles as standards of access rights: "sufficient, required spaces," "designated, additional spaces," "diverse and antagonistic sources," "national and local spaces," and "universal spaces." Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 21–22 (2012).

76. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 377–78 (1999) (discussing the importance of decentralized information markets in the service of political discourse).

77. Defining "overly unequal and biased" goes beyond the scope of this Article. The basic idea is to uncouple the influence of power and money from the enjoyment of access to expressive channels. For example, if some platforms are too expensive for ordinary citizens to access, or if some channels are reserved for a small circle of elites, such an arrangement would be constitutionally suspicious. For the relationship between economic power and expressive resources. *See* Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2170–81 (2018).

78. Chantal Mouffe, *Carl Schmitt and the Paradox of Liberal Democracy*, 10 CAN. J. L. & JURIS. 21, 26–28 (1997) (arguing that rational consensus is impossible without some rules of exclusion—these rules are inscribed in the logic of democracy itself).

The concept of "behavioral rules" may sound similar to the notion of "civility rules" articulated by First Amendment scholar Robert Post.[79] Behavioral rules are not only social norms; they also include the legal rules that govern the functioning of public discussion. They include, for example, the laws that regulate hate speech, as the case analysis in Part III illustrates.[80] These rules define which communicative acts are permitted and which are prohibited in the public reasoning process. Behavioral rules, therefore, inevitably straddle both areas of law and social norms.

What kinds of structural rules, then, are desirable for moderating the public debate? Before moving to the content of the rules, three caveats must be noted. First, the rules must be substantive, rather than merely formal. Robert Post has famously pointed out a free speech paradox; namely that public discourse requires civility norms to be orderly and effective, but public discourse also dispels their enforcement because these rules are contestable and substantively biased.[81] Post then argues for mere formal equality and negative liberty to avoid substantive value conflicts. This is too narrow and inadequate.[82] A better way to overcome this paradox is to embrace and accept it bravely by designing a set of rules to govern the public debate, admitting that they are unavoidably parochial, allowing public reason to proceed in such a non-ideal condition, and then reviewing and modifying those rules in an ongoing process. This is related to the second caveat—that all the initial rules of reasoning are not dialogic—not the "outcome of the discourse . . . but must prefigure it."[83] This is not fatal, because the initial rules, whether designed by theorists or provided by lawmakers, are only rules for the first stage of the public debate. Then, the rules themselves, like the external values of free speech, will be continuously reviewed and revised in public debate in subsequent rounds. Third, the rules are regulative ideals. Despite the criticism that they are too utopian to be fulfilled in real contexts,[84] ideals are necessary components of a normative

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79. *See* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Mag. v. Falwell, 103 HARV. L. REV. 601, 623–24 (1990).

80. *See infra* Part III.

81. Post, *supra* note 79, at 642–43.

82. Tomasz Jarymowicz, *Robert Post's Theory of Freedom of Speech: A Critique of the Reductive Conception of Political Liberty*, 40 PHIL. & SOC. CRITICISM 107, 120–21 (2014) (criticizing Post's approach as being too narrow to secure effective, as opposed to only formal, equality).

83. Gautam Bhatia, *Discursive Democracy and the Limits of Free Speech*, 25 CONSTELLATIONS 344, 355 (2018).

84. *See, e.g.*, SEYLA BENHABIB, CRITIQUE, NORM, UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY 321 (1986) (discussing the social inequalities and conflicts that can prevent true dialogues).

theory and serve important functions. Ideal conditions are benchmarks or standards for evaluating, reviewing, and criticizing the current practices.[85] And the non-realizability of ideals renders all the current consensuses temporary and fallible, providing normative reasons and spaces for dissenting and challenging the status quo.[86]

Scholars have proposed various versions of the rules or conditions that should govern public reasoning and deliberation. Much of the literature has been generated in the field of deliberative democracy. Jurgen Habermas, for example, has famously proffered the "ideal speech situations" in regulating public discourse,[87] the key principles of which are inclusivity and equality.[88] Political philosopher Joshua Cohen has proposed a similar "ideal deliberative procedure" which should be free, reasoned, and equal.[89] Likewise, political theorist David Miller has summarized the ideal conditions of public deliberation as being inclusive, rational, and legitimate.[90] I agree with the basic tenets of these writers (who overlap with each other significantly) and draw insights from them in designing my doctrinal framework.

My framework offers three general principles for regulating the behaviors in the public reasoning process:

1) *Inclusivity*. The legitimacy of public opinion requires inclusive participation in the dialogic process. Inclusiveness and regulation are inherently in tension with each other, as illustrated by the controversial issue of hate speech.[91] The degree of inclusivity must be limited by the other two principles. An all-encompassing public realm is impossible.[92]

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85. Christian F. Rostbøll, *Dissent, Criticism, and Transformative Political Action in Deliberative Democracy*, 12 CRITICAL REV. INT'L SOC. & POL. PHIL. 19, 21–22 (2009).

86. Marit Böker, *The Concept of Realistic Utopia: Ideal Theory as Critique*, 24 CONSTELLATIONS 89, 96 (2017).

87. *See* Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 96–98 (1989).

88. Gautam Bhatia, *Discursive Democracy and the Limits of Free Speech*, 25 CONSTELLATIONS 344, 345 (2018).

89. Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 73–75 (James Bohman & William Rehg eds.,1997).

90. David Miller, *Is Deliberative Democracy Unfair to Disadvantaged Groups?*, *in* DEMOCRACY AS PUBLIC DELIBERATION 201 (Maurizio Passerin d'Entréves ed., 2006).

91. See *infra* Part III.D for an analysis of the issue of hate speech.

92. *See* Graham P. Martin, *Public Deliberation in Action: Emotion, Inclusion and Exclusion in Participatory Decision Making*, 32 CRITICAL SOC. POL'Y 163, 178–79 (2012) (finding that no matter whether predetermined rules are present, there will be some participants or viewpoints that are excluded from public deliberation).

2) *Equality*. This requires neither giving equal force to every argument nor offering formalistic equal opportunity to express. Rather, equality mandates that every participant has an equal chance of sharing her information with others and persuading them by the argumentative force of her view. Such equality is procedural and substantive: procedural in that it does not guarantee equal outcomes, while also substantive in that it requires the stripping of undue influence other than the persuasive force of reason.

*3) Rationality*. This is related to the second principle, which dictates the equal force of rationality of each individual. The principle of rationality requires the dialogic participants to use reason to review their own values and influence those of others. Accordingly, each of the participants must respect her fellow citizens, be tolerant of values different from her own, and be open to any challenges and criticisms from others. However, the rationality principle must not be applied in an absolute sense, as the Indian case in the next Part will illustrate.

It would take a monograph to delve into the detailed rules of public reasoning behavior.[93] The following describes how the process of public reasoning can be generally grouped into three stages: issue-raising, deliberation, and decision-making. I propose that different behavioral rules should govern each stage.

Habermas, for example, made a distinction between formal and informal public discussion. He "distinguishes between communication oriented toward mutual understanding on the one hand, and instrumental action and politics on the other."[94] The former is informal, ordinary, spontaneous, and free-floating, aiming at the formation of public reason (reaching consensus). The latter is formal, institutional, organized, and orderly, aiming at the application of the public reason (making decisions).[95]

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93. For discussion on the specific rules or measures that are salutary for public deliberation, see JÜRG STEINER, THE FOUNDATIONS OF DELIBERATIVE DEMOCRACY: EMPIRICAL RESEARCH AND NORMATIVE IMPLICATIONS 215–16 (2012) (summarizing some favorable factors for deliberations); Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359, 363–69 (2002) (proposing to enact a popular branch to facilitate the public reasoning); Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 36–39 (2006) (arguing for absorbing experts in the public deliberation process).

94. Judith Squires, *Deliberation, Domination and Decision-Making*, 117 THEORIA: J. SOC. & POL. THEORY 104, 124 (2008).

95. *See* JÜRGEN HABERMAS, *Popular Sovereignty as Procedure*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 35, 57 (James Bohman & William Rehg eds., 1997) (noting the relation between "formally structured" spaces for "decisions" and informal "surrounding environment of unstructured processes of opinion-formation"); Joshua Cohen, *Reflections on Habermas on Democracy*, 12 RATIO.JURIS 385, 399–401 (1999) (discussing Habermas' two track conception of discursive democracy); Joohan Kim & Eun

The rationale of maintaining such a distinction—why we need a mediated and institutional procedure to "interrupt" the public reasoning process—is that "at some point the dialogue must end, a decision must be made, and the community's decisions must be enforced."[96] In our non-ideal world, we simply cannot wait for a universally accepted consensus to emerge to make decisions and take actions.[97] When temporary consensuses or second-best compromises are available, decisions are ready to be made to guide our individual and collective lives.

Free speech doctrine should thus recognize the multiplicity of different stages of public reasoning, each fulfilling different functions and being bound by different rules.[98] There are at least three stages: the raising of issues, the deliberation of issues, and the decision-making of issues. The second and the third correspond with Habermas's informal and formal tracks respectively. The issue-raising phase is particularly important because not all important issues are salient and readily available for debate in the public sphere, and it is much harder to raise an issue to the public agenda than to deliberate on such an issue, especially for marginalized individuals. To treat the raising of issues separately and to apply distinct regulative rules to it can accommodate this reality.

The first stage is issue-raising, which can be achieved through deliberative and non-deliberative means. Non-deliberative means, such as protest, advocacy, and civil disobedience, may be permitted at this stage. Habermas, for example, has noted the role of social movements in bringing popular concerns into the public agenda.[99] To raise an issue to the public agenda by awakening public awareness is more difficult than to influence the issue through deliberation. In many circumstances, deliberative means are insufficient to raise an issue, as dissident voices are silenced and channels for

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Joo Kim, *Theorizing Dialogic Deliberation: Everyday Political Talk as Communicative Action and Dialogue*, 18 COMMC'N THEORY 51, 53–54 (2008) ("[I]nformal everyday talk . . . is the prerequisite to purposive and rational deliberations."); JOHN DRYZEK & SIMON NIEMEYER, FOUNDATIONS AND FRONTIERS OF DELIBERATIVE GOVERNANCE 11 (2010) (outlining both a "public space" for informal communication and discussion, and an "empowered space" for decision making as key components of deliberative systems).

96. Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 840 (1993).

97. William Rehg, *Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jurgen Habermas*, 17 CARDOZO L. REV. 1147, 1151 (1995).

98. *See* JÜRG STEINER, THE FOUNDATIONS OF DELIBERATIVE DEMOCRACY: EMPIRICAL RESEARCH AND NORMATIVE IMPLICATIONS 184 (2012) ("[F]or [Robert] Goodin it is not necessary that all phases of a decision process are open to the public. His larger point is that deliberation has to be seen in sequences of a decision process and that not all deliberative elements need to be present in all sequences.").

99. Cohen, *supra* note 95, at 409–10.

marginalized individuals to raise their concerns are gravely inadequate. Requiring all the issues to be raised in a deliberative way may help preserve the status quo and suppress the marginalized. Hence, "[d]ifferent forms of political activism as well as alternative forms of communication do not violate the deliberative ideal if they are employed to bring up new issues and bring otherwise excluded groups into the political process."[100]

The second stage is deliberation*.* This is the core stage where individuals are mutually engaged and values are interactively formed. In this stage, non-deliberative means of communications will no longer be allowed. However, the requirement of rationality should not be strictly enforced here, for some "irrational" ways of deliberation may be the marginalized individuals' last hope of getting their voices heard and attracting due attention from others. Requiring marginalized individuals to be "rational" in all circumstances will be unfair, especially when it is the "haves" who define what is "rational." Some methods of deliberation or expression other than strict reason-giving, such as emotional or aesthetic expression,[101] narrative of life stories,[102] and everyday chat,[103] can serve important functions of empowering the powerless in the deliberation process.

The final stage is decision-making*.* The process of decision-making should be institutionalized, efficient, and authoritative. When decisions must be made, it is mandated that they should be responsive to the consensus or compromises made in the second stage—otherwise the decisions would not be legitimate. Habermas envisions "a far-flung network of sensors that react to the pressure of society-wide problems and stimulate influential opinions."[104] What those "sensors" are and how they work, however, is not so clear and has generated debates among theorists.[105]

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100. Rostbøll, *supra* note 85, at 29.

101. Judith Squires, *Deliberation, Domination and Decision-Making*, 117 THEORIA 104, 113–14 (2008).

102. Steve Harrist & Scott Gelfand, *Life Story Dialogue and the Ideal Speech Situation*, 15 THEORY & PSYCH. 225, 236–37 (2005).

103. Kim & Kim, *supra* note 95, at 55–58.

104. Jurgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 300 (William Rehg trans., 1998).

105*.* *See, e.g.*, Cohen, *supra* note 95, at 411–13 (proposing direct decision-making by citizens with regard to local public services, facilitated by formal institutions); JANE MANSBRIDGE ET AL., *A Systemic Approach to Deliberative Democracy*, *in* DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE 1, 10 (John Parkinson & Jane Mansbridge eds., 2012) (listing "multiple forms of communication" among different mechanisms of deliberation); Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 POL. THEORY 277, 286 (1994) (arguing for a linear model of transmission, in which public deliberation first ceases and then is transferred to the decision-making procedure).

There must be workable ways of distinguishing the different stages in real contexts. Though the lines are inevitably vague and fluid, they can be drawn on the basis of the key features of these three stages. The central difference between issue-raising and deliberation is that in the former stage, the public lacks awareness of certain issues, and little attention is drawn to them. In the latter stage, individuals start to deliberate on these issues, with full awareness of their importance. The key difference between deliberation and decision-making is that the former is free-floating and conducted in multiple spheres and occasions, while the latter is institutionalized and authoritative—often, though not always, conducted in settings like legislative conventions or administrative conferences.

## III. Testing the Framework

This Part analyzes several cases to offer a cursory illustration of how the quadruple framework of free speech could be applied to resolving practical issues. Adopting the proposed framework does not mean, however, that the new doctrine will generate different outcomes in each controversy, or that the existing approaches should be completely abandoned and replaced. Rather, the framework aims to provide a new way of understanding issues and approaching them. In so doing, it aims to offer new insights that can supplement, criticize, and sometimes replace the perspectives of existing theories.

The following four cases were selected because they are representative and difficult. They include the constitutionality and necessity of the Right to be Forgotten in the European Union ("EU"); information disclosure laws in China; the blocking of accounts by online social media platforms like Twitter; and a hate speech case from India.[106] They are representative because they correspond to the four parts of the quadruple framework respectively, where each case reflects the core thesis corresponding to the doctrine. They are also difficult because they are each controversial and have generated heated debate in academic circles and in the general public. Additionally, the quadruple framework is not a First Amendment doctrine specific to the U.S., but a universal free speech doctrine. If we endorse the freedom of speech as a universal human value, it must have some universal appeal and applicability across different countries. Thus, this

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106. For the introduction of the "most difficult cases" method, the "most typical cases" method, and other relevant methods in the studies of constitutional law, see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMPAR. L. 125, 142–46 (2005); RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 6 (2014) (arguing that future comparative constitutional inquiry should blend studies of constitutional law and social sciences).

Part covers a wide range of jurisdictions, from the United States to the EU, China, and India. Exploration of these four cases shows how the quadruple framework can work in application.

### A. The Right of Control over Information and the Right to Be Forgotten

The Right to Be Forgotten, first adopted in the EU and then adopted by many legal jurisdictions throughout the world, grants data subjects (arguably all individuals in cyberspace) the right to ask data controllers (notably, intermediaries like Google) to delete, remove, or erase their personal information upon their request.[107] This right has now been codified in the General Data Protection Regulation ("GDPR"), which stipulates several instances in which data may be erased, including when it is no longer necessary for the purpose of processing the data, when the data subject has withdrawn consent, and so on.[108] Without legitimate grounds for keeping the data, data processing entities are obliged to delete the personal information requested.

One of the major controversies of this new right, and probably the most salient reason for the reluctance to adopt it in the United States, is its tension with the freedom of speech. Commentators have taken the Right to Be Forgotten as a new form of privacy in our digital world and argued about whether it can be reconciled with the freedom of speech.[109] Even though the GDPR prescribes an exception to the enforcement of this right based on the

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107. *See* Council Directive 95/46 of Oct. 24, 1995, art. 12, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. (L 281) 31; Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ECLI:EU:C:2014:317, ¶ 70–72 (May 13, 2014).

108. Regulation 2016/679 of Apr. 27, 2016, art. 17, General Data Protection Regulation and Repealing Council Directive 95/46/EC, 2016 O.J. (L 119) 1 [hereinafter GDPR].

109. *See generally* Steven C. Bennett, *The "Right to Be Forgotten": Reconciling EU and US Perspectives*, 30 BERKELEY J. INT'L L. 161 (2012) (discussing pragmatic ramifications of European "right to be forgotten" and proposing ways in which this can be reconciled with U.S. views for the benefit of U.S. companies); Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J. L. & TECH. 349, 386 (2015) (proposing limitations on the right to be forgotten to balance this right with the right of free speech and the societal value of preserving data for historical purposes); Michael J. Kelly & David Satola, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1, 31–34 (2017) (examining the right to be forgotten from a historical and theoretical perspective and considering North American freedom of speech as a limiting factor).

necessary exercise of the freedom of expression and information,[110] people still worry that it will be a burden on free speech because the deleted information might be useful for public debate in some way.[111] Data controllers might also be chilled by the burden of deletion.[112] Unlike in the EU where both the right of privacy and the right of free expression are treated as fundamental rights,[113] in the United States, privacy is not an explicit constitutional right. In the United States, privacy-protecting laws that interfere with the freedom of speech are often reviewed by the courts using strict scrutiny.[114] This discrepancy between the two sides of the Atlantic creates uncertainty for transborder data flow and global Internet governance. This Section argues that the Right to Be Forgotten is not antithetical to, but a constituent part of, the freedom of speech.

Regardless of whether information is treated as property (privately owned) or privacy (privately controlled), both conceptualizations ignore the invisibility, shareability, and publicness of information. Unlike traditional goods, the value of which comes from scarcity, information, as a public good, is more valuable when reproduced and shared with more people.[115] Information is meant to be shared, and it cannot be owned or controlled in the private property law sense. Thus, exclusively explicating the Right to Be Forgotten under the privacy paradigm and endeavoring to balance it with free speech will inevitably flounder. The laws and cases that address the Right to Be Forgotten in India and Japan have used this paradigm, balancing the interests of privacy (information control) with the interests of free

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110. *See* GDPR, *supra* note 108, at 65 (describing the Right to Be Forgotten and its exceptions).

111. Besnik Muçi & Eugerta Muçi, *Defining the Right to Be Forgotten and Its Relationship with Freedom of Expression*, 4 EUR. J. ECON. L. & SOC. SCIS. 26, 33 (2020).

112. Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 90–91 (2012).

113. *See* European Convention on Human Rights art. 8, 10, *opened for signature* Nov. 4, 1950 (entered into force Sep. 3, 1953) (where Article 8 sets out a right to respect for private and family life and Article 10 sets out the right to freedom of expression); Charter of Fundamental Rights of the European Union art. 7, 8, 11, *opened for signature* Oct. 2, 2000 (entered into force Dec. 7, 2000) (establishing the respect for private and family life, the protection of personal data, and the freedom of expression and information, respectively).

114. *See* GEOFFREY STONE ET AL., THE FIRST AMENDMENT 178–85 (4th ed. 2012) (pointing to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and other leading cases reviewing privacy rights).

115. *See generally* YOCHAI BENKLER, THE WEALTH OF NETWORKS CH. 2 (2006) (arguing that protections that restrict the flow of information, such as copyright, hamper collective knowledge production).

speech (information flow) in an ad hoc way.[116] This paradigm, however, fails to recognize the nature of information and the interconnection between information control and information flow.

A more nuanced approach is to view the Right to Be Forgotten as a right of information self-determination. As stipulated by German Basic Law and explained by the German Constitutional Court, the right of self-determination includes the right to control the flow of the information about oneself.[117] Self-determination of one's information is a constitutive part of one's identity and dignity. It entails how one manifests oneself to others, what aspects of oneself should be shared, and under what conditions. These aspects of the informational self-determination belong to the broad concept of personality right in German public law.[118] Recognizing the importance of the Right to Be Forgotten in ensuring one's personality and dignity, as the German court did in deciding its Right to Be Forgotten case,[119] however, is only the first step. It remains to be seen why the Right to Be Forgotten, as a dignitary and personality right of information control, is also a vital component of the freedom of speech, and how the latter can be reformed by the former.

What will the quadruple framework contribute to the debate around the Right to Be Forgotten? First, the right of information control and the right of free speech are not mutually exclusive. The role of the Right to Be Forgotten to facilitate the exercise of free speech can be understood on two levels. On the individual level, citizens need at least some of their information to be deleted from the public realm in order to have a sheltered space for their thought formation and identity construction. Information about our past constitutes a narrative, a life-story about who we are and what we aim

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116. The Personal Data Protection Bill of India art. 27 (2018); 平成２８年（許）第４５号，投稿記事削除仮処分決定認可決定に対する抗告審の取消決定に対する許可抗告事件（平成２９年１月３１日　第三小法廷決定 [Saiko Saibansho [Sup. Ct.] Jan. 31, 2017, Hei 28 no. 45, 71 Saiko Saibansho Mini Hanreishu [Minshu] 63 (Japan).] (a Japanese judicial decision concerning the right to erase data of the data subjects), https://www.courts.go.jp/app/hanrei_jp/detail2?id=86482 [https://perma.cc/GY2V-5QDL].

117 . The Population Census Decision (*'Volkszahlungsurteil'*, BVerfG 1983), https://freiheitsfoo.de/census-act/ [https://perma.cc/A6PF-J3WQ].

118. Claudia Kodde, *Germany's 'Right to Be Forgotten' – Between the Freedom of Expression and the Right to Informational Self-Determination*, 30 INT'L REV. L., COMPUT. & TECH. 17, 19–21 (2016); Robert G. Larson II., *Forgetting the First Amendment: How Obscurity-Based Privacy and a Right to Be Forgotten Are Incompatible with Free Speech*, 18 COMM. L. & POL'Y 91, 104 (2013).

119 . [Right to Be Forgotten II] BVerfG, BvR 276/17, Nov. 6, 2019, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/rs20191106_1bvr027617en.html [https://perma.cc/9EAU-DZPF].

to do. Forgetting or deleting such information is one tool available, just like remembering or adding, to manufacture and reshape our life-narrative. In this regard, the Right to Be Forgotten is "a legal instrument designed to enhance identity construction, a tool that gives society members better control over the process of their identity creation."[120]

The first Right to Be Forgotten case in Germany illustrates this point. The plaintiff—who had been convicted more than three decades before and had already finished his sentence—asked an online magazine, which had published news reports about the plaintiff's crime, to delete the news coverage because it would significantly hinder his re-integration into society.[121] If the plaintiff were not entitled to have his information erased, it would be extremely difficult, if not impossible, to re-form his identity and re-participate in public life.

Further, on a societal level, the Right to Be Forgotten can be a self-cleansing mechanism for the public realm to continuously reshape and rehabilitate itself. In the Information Age, information surplus has replaced information scarcity. More information does not always enrich our public debate. Instead, information can sometimes be distorting, distracting, and chilling—especially information that is inaccurate, outdated, intimate, or carrying little or no public relevance. Thus, a right of deletion, which entitles the individual to withdraw the information from the public realm, is necessary not only so that the individual can engage in public discussion but also so that the public realm can continue to be healthy and vivid.

Second, the tension between information control (including the Right to Be Forgotten) and information flow (including the right to know) derives from the inherent dual nature of information. In its lifecycle, information goes through multiple stages—some information is held in secret or bounded settings, while others are open for free flow between different parties. Information can be either kept private or publicized, either enclosed or disclosed, either kept in small circles (even in a single individual's mind) or circulated and shared with the public. This dual nature enables information to fluctuate between the private and the public, as well as to bridge between the individual and the collective. Failure to recognize this dual nature, or to regard the dual attributes of information as not mutually supportive but mutually exclusive, only captures half of the story. Under the quadruple framework, to control and to share both serve the goals

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120. Noam Tirosh, *Reconsidering the 'Right to be Forgotten' – Memory Rights and the Right to Memory in the New Media Era*, 39 MEDIA, CULTURE & SOC'Y 644, 652 (2017).

121. [Right to Be Forgotten I] BverfG, 1 BvR 6/13, Nov. 6, 2019, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/11/rs20191106_1bvr001613en.html [https://perma.cc/GE6J-YGN8].

of public discussion. Robert Post has expressed similar concerns when he commented that the Right to Be Forgotten should be taken as a right of dignitary privacy, the essence of which is the norms that govern public communications. Without such a right, individuals' dignity may be under risk of infringement and the public debate could become chaotic.[122]

Third, because information has a dual nature and information constantly fluctuates between the two states, the traditional approach of balancing privacy interests with speech interests is lacking. Instead, a holistic constitutional arrangement should involve multiple players like legislators, government agencies, courts, intermediaries, and individual citizens. Moreover, the arrangement should utilize multiple tools such as law, norms, and technology to conduct information management in a delicate way. It should be delicate because of the complicated nature of the "infosphere" that we live in. It should be constitutional because both attributes of information (control and flow) and the corresponding institutional designs are necessary tools to counter the informational power imbalance.[123] The primary goal of granting control over one's information and access to others' information is to empower individuals—especially those who are marginalized—making them more capable of both living individual lives and participating in our collective society. Such a delicate and constitutional mechanism should not consider the Right to Be Forgotten as a panacea, but as a more differentiated, contextual, and dynamic right that considers the heterogeneity of information and its subjects, preferences, and contexts.

### B. Right to Know and Corporate Information Disclosure in China

By 2021, more than half of the states in the world have adopted laws that protect the freedom of information (right to know).[124] Many of them have even incorporated this right into their national constitutions and some have even included it in their freedom of speech articles.[125] The freedom of

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122. Robert C. Post, *Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE L.J. 981, 1009 (2018).

123. *See* Yu Chengfeng (余成峰) & Xinxi Yinsiquan de Xianfa Shike Guifan Jichu Yu Tixi Chonggou (*信息隐私权的宪法时刻: 规范基础与体系重构*) [*The Constitutional Moment of Information Privacy: Normative Basis and Systematic Reconstruction*], ZHONG WAI FA XUE (中外法学) [CHINESE & FOREIGN L.], No. 33, 2021, at 32, 51–53 (describing the informational power imbalance and its potential constitutional remedies).

124. *See* UNESCO, *World Trends in Freedom of Expression and Media Development: 2017/2018 Global Report* 14 (2018), https://unesdoc.unesco.org/ark:/48223/pf0000 261065 [https://perma.cc/2C4R-QE26] ("The number of Member States with freedom of information laws has risen to 112 . . . .").

125. *See* Tao Huang, *Freedom of Speech as a Right to Know*, 89 U. CIN. L. REV. 106, 124–25 (2020).

information has been enforced largely through the institutions and laws of information disclosure—it is a terrain of administrative law, rarely touched by free speech scholars. This is regrettable for two reasons. First, the innate relationship between the two freedoms has not been fully grasped, and the precious opportunity of cross-fertilization between them has been missed. Second, due to the under-appreciation of the constitutional salience of the right to know and its importance to the freedom of speech, the information disclosure practices are driven largely by administrative agencies, while other parties have played relatively minor roles. As a result, the people's right to know largely depends on the mercy of the officials inside the administrative bureaucracy. The undesirable status quo of the implementation of free information laws across the world is to a large extent imputable to the "weak" level of those laws. Without the strong backup of the constitutional freedom of speech, it is extremely hard to realize the ideal of the freedom of information.

Under the quadruple framework, the right to know will be incorporated into the doctrinal range of free speech. Several benefits will emerge after this paradigm shift. First, the government-led institution of information disclosure will be constitutionalized: disclosing is not only for the necessity of administrative management, but also for fulfilling an important constitutional duty. Second, one more channel of interaction between administrative law and constitutional law will thus be opened, facilitating the cross-fertilization and mutual engagement between scholars of the two camps. Third, at the macro level, information disclosure can be used as one dimension to measure the level of free speech protection of different countries.[126] Fourth, at the micro level, different countries' laws, institutions, and practices of information disclosure can be compared, reviewed, and criticized based on their contribution to free speech. This new framework could thus be used to guide legislation and administrative decision-making with regard to information disclosure. The remainder of this Section examines the laws of information disclosure in China through the lens of the free speech doctrine—whether these laws have duly fulfilled the constitutional duty of ensuring the source material of public debate.

China enacted the uniform Right to Know law in 2007, which went into effect in 2008.[127] The regulation is the general guide on information disclosure practices in China and has established several institutions to

126. *See, e.g.*, *Global Right to Information Rating*, ACCESS INFO & CTR. L. DEMOCRACY, https://www.rti-rating.org/ [https://perma.cc/L9ER-KXEL] (creating a rating system for the right to information by each country).

127. *See Open Government Information in China*, YALE L. SCH. CHINA CTR., https://law.yale.edu/china-center/resources/open-government-information-china [https://perma.cc/A85C-J979].

ensure its enforcement. According to China's Regulation on the Disclosure of Government Information (the governing law in this field), before its revision in 2019, corporate information is covered by this law. Article 37 reads:

> The disclosure of the information produced or acquired by the public enterprises and institutions in the field of education, medical care and health, family planning, supply of water, power, air and heat, environmental protection, public traffic or any other field closely related to the people's interests, and in the process of providing public service, shall be governed by this Regulation by analogy, and the specific measures shall be formulated by the relevant competent departments or institutions of the State Council.[128]

This Article confers the duty of information disclosure on two kinds of entities: public corporations and public enterprises.[129] The Article requires that the disclosure of corporate information should be "governed by this Regulation by analogy."[130] This means that the disclosure of corporate information is largely bound by the substantive and procedural requirements set by the Regulation on the Disclosure of Government Information.[131] To apply similar standards of disclosure to government information and corporate information satisfies the requirement of the doctrine proposed by this Article because both kinds of information may be important source materials for the exercise of free speech.

In 2019, however, the Chinese government revised the Regulation on the Disclosure of Government Information, making the law no longer applicable to the disclosure of corporate information. The newly revised law offers separate modes for the disclosure of government information and that of corporate information. Under the new arrangement, disclosure of corporate information will be governed not by the unified regulation—Regulation on the Disclosure of Government Information—but by separate regulations in specific fields such as education, public health, and eco-

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128. 中华人民共和国政府信息公开条例 [Regulation of the People's Republic of China on the Disclosure of Government Information] (promulgated by the State Council, Apr. 5, 2007, effective May 1, 2008), CLI.2.90387(EN) (pkulaw), http://en.pkulaw.cn/display.aspx?cgid=11722 6c0d8725a33bdfb&lib=law [https://perma.cc/AX39-6SBD].

129. Public enterprises in China are organizations that are neither governments nor corporations, but they conduct certain public functions or deliver some public services.

130. *See* 中华人民共和国政府信息公开条例, *supra* note 128.

131. 王军， 公共企事业单位信息公开：依据、路径与标准，《中国行政管理》2018年第 11 期 [Wang Jun, *Information Disclosure of Public Enterprises and Institutions: Basis, Path and Standard*, 11 CHINESE PUB. ADMIN. 56, 59 (2018)].

protection. These fields will then be regulated more specifically by their corresponding agencies in the future.[132]

Compared to the previous unified model, the new model is flawed in at least three aspects. First, if the standards of whether, when, and how to disclose the corporate information are determined solely by administrative agencies in specific fields, without any guidance and supervision from the uniform legislation, the normative basis for disclosure will easily collapse from the constitutional right to know to the administrative necessity of governance. In the absence of a uniform law, the agencies will tend to make decisions concerning information disclosure in accordance with the practical needs of their daily administration, rather than fulfilling the normative duty of facilitating the right to know of citizens and promoting the process of public discussion. A democratic institution of universal disclosure would then become inappropriately expedient and exclusively regulatory.[133]

Second, lack of a uniform standard will likely result in inconsistencies.[134] Even though agencies have more expertise and knowledge in the field they regulate and may thus be more capable of determining whether, when, and how the information of the corporations in their field should be disclosed,[135] their decisions must be bound by a unitary standard because information disclosure concerns constitutional duties of promoting freedom of speech. Too much discretion conferred upon administrative agencies will render the discharge of such duties unpredictable, unstable, and fragmented, increasing the risk of arbitrary and capricious regulation.

Third, the newly revised law only allows citizens to "complain" to upper-level administrative agencies when they find that certain corporations have failed to disclose the information, rather than resorting to the judiciary to seek remedies. Lack of judicial review will further make the disclosure practice dependent upon the beneficence of those administrative agencies,

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132. 中华人民共和国政府信息公开条例 [Open Government Information Regulation of the People's Republic of China] (promulgated by State Council, Apr. 3, 2019, effective May 15, 2019), art. 55 (China), http://en.pkulaw.cn/display.aspx?cgid=25167d137cfd5e55bdfb&lib=law (on file with the *Columbia Human Rights Law Review*).

133. 彭錞，公共企事业单位信息公开的立法定位与制度选择，《环球法律评论》2019 年第 4 期) [Peng Chan, *Legislative Positioning and System Choice of Disclosure of Information in Public Enterprises and Institutions*, 4 GLOBAL L. REV. 99, 108 (2019)] (on file with the *Columbia Human Rights Law Review*).

134. *Id.* at 113.

135. 陆海波、孟鸿志，公共企事业单位信息公开的路径选择——新型冠状病毒肺炎疫情引发的法律思考，《河海大学学报》2020 年第 2 期 [Lu Haibo & Meng Hongzhi, *Path Selection of Public Enterprises and Institutions' Information Disclosure: Legal Reflections Triggered by the New Coronavirus Epidemic*, 22 HOHAI U.J. 22, 26 (2020)] (on file with the *Columbia Human Rights Law Review*).

notwithstanding their purported expertise. Mere internal pressure from the bureaucratic system is far from enough to enforce the duty of disclosure. Supervision from an independent judiciary is indispensable.[136]

Partly in response to the lack of a uniform standard with regard to corporate information disclosure, the General Office of China's State Council (the central government) recently issued a directive to guide the future regulations of administrative agencies in this field.[137] The directive defines the object of the duty of information disclosure as those corporations that need more "strengthening supervision" from the regulatory bodies.[138] This definition still considers the goal of the information disclosure as necessary for administrative management, rather than for ensuring the constitutional right of free expression, and treats the corporations as the objects of administration, rather than the subjects of public participation. The directive ignores the fact that corporations with public information are not only market players that should be regulated, but also participants in the public sphere. The current approach, unlike the prior revision, fails to grasp the importance of information to public life and the relation between disclosure and free speech.

In sum, the quadruple framework proposed in this Article is capable of guiding, critiquing, and measuring the practices of information disclosure of different legal systems. The framework mandates that first, the disclosure of public information—whether it is controlled by the government or the corporation—should be a constitutional duty rather than an expedient rule in service of administrative necessity. Second, even though this area is inevitably led by administrative agencies, judicial review and oversight are indispensable for protecting the disclosure of source material for public debate. Third, more delicate institutional design is important in specifying what, when, and how to disclose. Using the quadruple framework for the right to free speech, we can devise more legitimate, coherent, and powerful systems of information disclosure for different states.

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136. 彭錞，公共企事业单位信息公开：现实、理想与路径，《中国法学》2018 年第 6 期) [Peng Chan, *Information Disclosure of Public Enterprises and Institutions: Reality, Ideals, and Paths*, 6 CHINA LEGAL SCI. 89, 108 (2018)] (on file with the *Columbia Human Rights Law Review*).

137. Notice of the General Office of the State Council on Issuing the "Measures for the Formulation of Provisions on Information Disclosure of Public Enterprises and Institutions" (Promulgated by State Council, Dec. 21, 2020) (China), http://www.gov.cn/zhengce/content/2020-12/21/content_5571847.htm [https://perma.cc/FJ6T-AWXA].

138. *Id*. at art. 4.

### C. The Right of Access and the Blocking of Internet Platforms

It is not unusual for Internet social media platforms to block their users. In December 2020, shortly after his defeat in the U.S. presidential election, then-President Donald Trump called for a march and protest on January 6, 2021 via Twitter.[139] After the Capitol Hill riot that materialized that day, he posted several other tweets, naming the violent protestors "patriots" and claiming that he would not attend the inauguration ceremony on January 20th.[140] Because of these tweets—which were deemed inciteful speech that may cause more violence in the coming days—Twitter blocked his account permanently.[141] This decision generated heated discussion among scholars and politicians about whether it constitutes a violation of freedom of speech under the First Amendment.[142] Donald Trump Jr., for example, has exclaimed outrageously that "[w]e are living Orwell's 1984. Free-speech no longer exists in America."[143] Many have debated whether these platforms, most of which run by big tech companies, should exert such tremendous power in shaping people's freedom of speech.

This Section argues that, according to the quadruple framework of free speech, social media platforms' practice of blocking users implicates constitutional issues because the practice infringes on users' rights of access to platforms. Certain substantive and procedural requirements must be satisfied for a decision to block to be legitimate. After showing the flaws of existing approaches that deal with this issue, this Section shows why the quadruple framework can provide a better solution.

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139. *See* Elizabeth Dwoskin & Nitasha Tiku, *How Twitter, on the Front Lines of History, Finally Decided to Ban Trump*, WASH. POST (Jan. 16, 2021), https://www.washingtonpost.com/technology/2021/01/16/how-twitter-banned-trump/ [https://perma.cc/8Z8W-WRXS] ("Trump used Twitter to call for a rally at the Capitol. 'Big protest in D.C. on January 6,' he tweeted in late December. 'Be there, will be wild!'").

140. *Id.*

141. *Id.*

142. *See, e.g.*, Chris Hoffman, *Pitt Law Professor: Twitter's Ban of President Donald Trump Is Constitutional*, CBS PITTSBURGH (Jan. 9, 2021), https://pittsburgh.cbslocal.com/2021/01/09/pitt-law-professor-says-trump-twitter-ban-constitutional/ [https://perma.cc/4JYJ-RJXL] (explaining that a business that bans speech is not in violation of the First Amendment); Lauren Aratani, *Trump Twitter: Republicans and Democrats Split over Freedom of Speech*, THE OBSERVER (Jan. 9, 2021), https://www.theguardian.com/us-news/2021/jan/09/trump-twitter-republicans-democrats, [https://perma.cc/496B-6DZV] (discussing the debate between Republicans and Democrats on whether the suspension of Donald Trump's Twitter account constituted a violation of freedom of speech).

143. Donald Trump Jr. (@DonaldTrumpJr.), TWITTER (Jan. 8, 2021, 7:10 PM), https://twitter.com/donaldjtrumpjr/status/1347697226466828288?lang=en [https://perma.cc/A5KR-T39B].

Existing doctrines are ill-equipped to analyze the issue of social media platforms blocking accounts. That these platforms are operated by privately-owned corporations rather than government bodies poses formidable difficulties for applying the traditional free speech doctrines. Take the United States as an example. Even though the Supreme Court has recognized that "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen,"[144] constitutional jurisprudence requires that disputed action constitute state action to trigger the free speech clause[145] and uses the public forum doctrine to approach the cases.[146] In deciding *Davison v. Randall*, a case in which a county official blocked a Facebook user from accessing the Facebook page the official opened, the Fourth Circuit reasoned that because the county official had acted on behalf of his office and opened the Facebook page as a tool of governance, his action constituted state action.[147] Moreover, because the page had been intentionally used for public discourse, the Fourth Circuit held it to be a designated public forum.[148] In a similar case, Trump's ban of certain users on his Twitter account was ruled unconstitutional because his management of the account was interpreted as official and state-colored.[149] The Second Circuit found his Twitter account to be a designated public forum in which viewpoint discrimination is impermissible.[150]

Even though these cases were decided in favor of the blocked party, they cannot be applied to blocking by the platforms themselves because these platforms are private entities, unlike the county official or Trump who can be interpreted as representing the state. Moreover, platforms can invoke their property rights, their right to free speech, and their terms of service (as voluntary agreements between them and the users) to defend their decisions to block accounts.[151] To hold such actors accountable, we must step out of the traditional paradigms and ask whether the state action and public forum doctrines are still perfectly applicable and if not, what doctrinal adjustments need to be made. Two questions are key to understanding this issue: (1) Why

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144. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

145. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.")

146. *See* Sheila M. Cahill, *The Public Forum: Minimum Access, Equal Access, and the First Amendment*, 28 STAN. L. REV. 117, 118–132 (1975) (recognizing the Supreme Court's conflicting jurisprudence in public forum cases).

147. Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019).

148. *Id.* at 682–84.

149. Knight First Amendment Inst. at Colum. Univ. v. Trump, 928 F.3d 226, 235–37 (2d Cir. 2019).

150. *Id.* at 237–40.

151. *See supra* notes 64–73 and accompanying texts.

is *government* involvement necessary to trigger the constitutional analysis of free speech, when the government is not the only power regulating communications with others? (2) Why must a forum have traditionally, or for "time out of mind,"[152] been used for public debate like streets and parks, or must have been intentionally designated by the government for public discourse,[153] to be qualified as a public forum, when so many de facto public forums have been enacted by private Internet intermediaries and maintained under their status of monopoly?

The public forum doctrine is based on three social and legal conditions, which are now outdated. First, most communication was previously offline. Before the Internet, a typical public speaker distributed pamphlets or delivered speech on top of a soapbox. In this context, streets and parks undoubtedly lie at the core of the public forum doctrine, which guarantees public debate. Second, people's communicative spaces were scarce—they had no other channels to express themselves other than streets and parks. Apart from these traditional forums, it was mainly the government that proffered "designated public forums" to citizens,[154] which is why the government plays a leading role in the traditional doctrine. Third, the government's power to grant communicative spaces was very limited because classical liberalism mandated that private property is sacred, and that a government shall not encroach upon it by redistributive measures barring very exceptional cases.[155] This is why a government can only designate its own resources for the expressive purposes of its citizens, as illustrated by the traditional public forum doctrine. Today, however, people engage in communication online and most online channels are mediated by private corporations rather than government entities. As such, the redistribution of private resources is required because the existing distribution should not be taken for granted and re-distribution is necessary for fulfilling the values of free speech. Therefore, doctrines must be revised to cope with the serious constitutional issues raised by blocking on social media platforms.

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152. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

153. Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983).

154. David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335, 363–64 (1995).

155. Laura Stein has summarized the flaws of the Neo-liberalism-based property version of the public forum doctrine as "[i]nsensitive to the real-world conditions that affect speech opportunities, concerned almost exclusively with protecting private rather than public spheres, hemmed in by a negative definition of freedom, and immobilized by an overly restrictive view of state action . . . ." *See* LAURA STEIN, SPEECH RIGHTS IN AMERICA: THE FIRST AMENDMENT, DEMOCRACY, AND THE MEDIA 114 (2006).

The quadruple framework of free speech offers a better approach. Under this doctrine, blocking by social media platforms is surely a free speech issue, as it infringes upon the right of access that is a part of the doctrinal framework. First, the platforms are vital channels for access to information: in one sense, newsfeeds on social media like Facebook and Twitter are important sources of information so that individuals know about local, national, and international events. People can also see updates from their friends, classmates, and colleagues, which are important for maintaining interpersonal relationships and one's social identity. Second, these platforms are indispensable spaces for engaging in public dialogue with others. Group discussions can lead to collective actions that bring about social change—such as the Arab Spring[156]—and allow people to participate in the deliberation of collective value formation—such as the online debate about racial justice in America in response to the Black Lives Matter movement.[157] Online platforms are unique in their flexible and far-reaching nature: we can connect with our close friends as easily as we can connect with strangers, and we can belong to both local and international communities. Internet platforms are cross-spatial in that they enable users to freely cross different spheres and engage in, compare, and review different dialogues in those spheres. Flexible online platforms successfully accommodate the tension between the multiplicity of spheres and the singularity of the individual. A decision that shuts down such an important space for individuals would place a huge burden on their exercise of free speech. Third, as the Second Circuit has noted,[158] one's social media account is not only his/her expressive space, but also the space of all the other potential participants, including "fans" and/or "followers" who may frequently engage in the discussion on that page. Thus, blocking Trump's account constrains not only Trump himself, but also millions of his followers.

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156. *See generally* S. Saifuzzaman, *Impact of Social Media in Arab Spring: Special Emphasis on Tunisia's Uprising*, 7 INT'L J. DEV. RSCH. 14227 (2017) (describing the important effects, both positive and negative, of social media on the Arab Spring in different geographic regions).

157. *See generally* Alice Gawthrop & Charlotte Illingworth, *The Role of Social Media in Black Lives Matter* (June 20, 2020), https://www.redbrick.me/the-role-of-social-media-in-black-lives-matter/ [https://perma.cc/PUB2-6V8A] (highlighting the importance of social media in sharing video footage of police violence, donation links, and other resources).

158. Knight First Amendment Inst. at Colum. Univ. v. Trump, 928 F.3d 226, 238 (2d Cir. 2019) ("[T]he speech restrictions at issue burden the Individual Plaintiffs' ability to converse on Twitter with others who may be speaking to or about the President. President Trump is only one of thousands of recipients of the messages the Individual Plaintiffs seek to communicate.") (citations omitted).

The quadruple framework creates five requirements with regard to the access right and the issue of platform blocking. First, in today's world, basic access to the Internet must be guaranteed for each individual by building infrastructure in cyberspace, reducing the cost of an Internet connection, and ensuring that vulnerable groups such as the poor have access to the Internet. Second, giant platforms with dominant or significant market share must provide universal access to all without discrimination and excessive burdens. For public discussion to be possible, those platforms must be open, cheap, and easily available.

Third, the management of those platforms, especially the rules and procedures of blocking users' accounts, should conform to the general spirit of free speech. These rules are contained in the terms of services that users must accept when they sign up for an account. Like many other contracts, the terms of services offered by the social media platforms should be consistent with constitutional requirements to be valid. For our purposes here, blocking a user's account must fulfill both substantive and procedural conditions. Substantively, the terms must contain reasons for blocking an account (such as a user's conduct infringing others' rights), and the reasons must be clear and enforceable rather than vague, with solid evidence proving that the user has triggered such reasons. Procedurally, except in very rare and urgent cases, the blocked user must receive notice of the decision to block, reasons for such a decision, and a mechanism for appeal or review. Because the decision to block implicates a constitutional right, "due process" must be afforded. Viewed in this light, regardless of whether it was substantively right to block Trump's Twitter account, the decision was procedurally flawed. Twitter must provide users like Trump advanced notice and an avenue for appeal before it terminates his account. Even if advanced notice is impractical or unnecessary because of the imminence of possible violence (that may be caused by tweets), Twitter should have at least issued a letter explaining its decision to blocking the account.

In contrast, Facebook's decision to ban Trump's account was more procedurally defensible than Twitter's. Facebook provided reasons for its decision to suspend Trump's account: to ensure "peaceful transition of power" in a period when protest and riot is likely.[159] Besides, Facebook referred the decision to an oversight board, which was set up to "resolve some of the most difficult questions around freedom of expression online,"[160]

159. *See* Nick Clegg, *Referring Former President Trump's Suspension from Facebook to the Oversight Board,* FACEBOOK (Jan. 21, 2021), https://about.fb.com/news/2021/01/referring-trump-suspension-to-oversight-board/ [ https://perma.cc/3ZLE-QGQC].

160. *See Oversight Board*, FACEBOOK, https://transparency.fb.com/zh-cn/oversight [https://perma.cc/J93Q-QSGA].

to review the suspension decision. The board—though it upheld Facebook's suspension decision—advised against an indefinite account block. Consequently, Facebook limited the suspension to two years, subject to future evaluation by experts.[161]

Fourth, it is the state's duty to develop more platforms for public discourse. Some of the platforms will be mediated by private bodies, while others may be maintained by the state. In both cases, utmost openness to the public should be guaranteed to ensure broad participation. To be sure, technological design is as important as legal design on this matter.

Fifth, the right of access is not absolute, but limited by the fourth doctrine in the framework—behavioral rules. In other words, acting according to the behavioral rules of the public sphere is the precondition of enjoying the access right continuously. If someone's communicative act is disrespectful to the basic norms that maintain the equal, fair, and orderly public reasoning, access can be limited or even denied.

### D. Behavioral Rules and the Indian Hate Speech Case

Hate speech has been generally defined as inciteful, offensive, and degrading speech targeted toward a certain group of people because of their race, ethnicity, religion, sexual orientation, etc.[162] Hate speech is often based on social stereotypes and used to incite discrimination and sometimes violence, which is undoubtedly harmful to members of those groups.[163] In

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161. *See* Nick Clegg, *In Response to Oversight Board, Trump Suspended for Two Years; Will Only Be Reinstated If Conditions Permit*, FACEBOOK, https://about.fb.com/news/2021/06/facebook-response-to-oversight-board-recommendations-trump/ [https://perma.cc/TDY3-WR6U].

162. *See, e.g.*, *Hate Speech of Violence,* EUR. COMM'N AGAINST RACISM INTOLERANCE https://www.coe.int/en/web/european-commission-against-racism-and-intolerance/hate-speech-and-violence [https://perma.cc/QM2P-ANTC] ("Hate speech covers many forms of expressions which advocate, incite, promote or justify hatred, violence and discrimination against a person or group of persons for a variety of reasons."); *United Nations Guidance Note on Addressing and Countering COVID-19 Related Hate Speech May 2020*, U.N., https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf [https://perma.cc/YZ7P-72LL] (defining hate speech as "any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor").

163. Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 503 (2009).

recent decades, hate speech has been on the rise[164] and laws and regulations that punish hate speech have increased in response.[165] Nevertheless, politicians, scholars, and the general public have fiercely debated whether and how hate speech should be regulated.

In this debate, the United States stands almost alone in its tolerance for hate speech, by considering regulation of hate speech an unconstitutional encroachment upon free speech. By contrast, other Western democracies, such as Germany and Canada, believe that hate speech regulation is not only permissible but also required.[166] The discrepancies between the two views lie in differing answers to the following questions. First, the value clash between liberty and equality (dignity)[167]—in particular, whether equal citizenship or dignity of the victim should trump the liberty of expression of the speaker. Second, whether the tenet "more speech is better than suppression" works in real life, especially in divided societies.[168] Third, whether hate speech regulations are effective in curbing hatred on the basis of race, ethnicity, and religion. Some, for example, argue that hate speech law is a waste of time because there are better ways of dealing with the underlying issue, like education.[169] Fourth, whether regulation has side effects other than to cure hatred, such as magnifying the harm on victims, chilling potential speakers who may be advocates for social reform, and sometimes being used as tools to suppress the minority groups.[170]

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164. *See Joint Open Letter on Concerns About the Global Increase in Hate Speech*, U.N.H.R. OFF. HIGH COMM'R, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25036&LangID=E [https://perma.cc/J293-Y7GE].

165. *See* Erik Bleich, *The Rise of Hate Speech and Hate Crime Laws in Liberal Democracies*, 37 J. ETHNIC & MIGRATION STUD. 917, 918 (2011).

166. *See* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1558–59 (2003) (analyzing the advantages and disadvantages of the U.S. model and the European model with regard to hate speech). The uniqueness of the U.S. model can be seen from the title of an article, see Kevin Boyle, *Hate Speech—The United States Versus the Rest of the World*, 53 ME. L. REV. 487 (2001).

167. Tsesis, *supra* note 163, at 497.

168. *See* Edward J. Eberle, *Hate Speech, Offensive Speech, and Public Discourse in America*, 29 WAKE FOREST L. REV. 1135, 1205 (1994) ("[M]essages of hate are better confronted openly in the free exchange of ideas rather than silenced through the force of law"). *But cf.* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 229–30 (1991) ("[M]ore speech" argument has premised on the false idea that humans are powerful and independent beings, capable of countering bad speech through conscious judgment, while the truth is that humans are vulnerable and dependent).

169. Richard Delgado & Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid*, 23 N. KY. L. REV. 475, 482 (1995).

170. *Id.* at 486–89; James Weinstein, *Hate Speech Bans, Democracy, and Political Legitimacy*, 32 CONST. COMMENT. 527, 559 (2017).

The quadruple framework proposed by this Article does not answer the above four questions directly, nor does it take a side between the U.S. model (against-regulation) or the European model (pro-regulation). Rather, it addresses the issue of hate speech under behavioral rules in the framework: whether and to what extent discriminatory and inciteful speech against a group should be allowed in the public sphere. A recent hate speech case from India illustrates how behavioral rules should approach this issue.

In 2014, the Tamil Nadu government of India petitioned the court to issue prohibitory orders on several social activists "for their acts of terrorism in attacking Brahmins and Brahmanism, by making inflammatory hate speeches through media and public demonstrations."[171] The incident began when hundreds of Dravidar Kazhagam members—a social justice movement founded in the 1920s aimed at promoting gender equality—tried to forcefully remove a restaurant's name board in an agitated demonstration. The board read "Traditional Brahmin's Café." According to a demonstration leader, "the word 'Brahmin' is interpreted as 'one who is higher in status to others' and hence it was against the spirit of the Constitution."[172]

Brahminism is the Hindu caste system, based on patriarchy, which has been maintained in India for centuries.[173] Those accused of hate speech in this case—those who fervently criticized Brahminism—consisted of several leaders and members of Dravidar Kazhagam.[174] The founder of the movement, Periyar, was a famous feminist activist, exposing the exploitative nature of Brahmanism and advocating respect for women in his lifetime.[175] The petitioners did not buy into such advocacy: they argued that "Brahmins worked for the welfare of the society, keeping the religiosity of the society high in mind," and the speakers' "hate speech" is terrorism because it aimed to "destabilise the country."[176] The Indian court dismissed the petition,

171. C.Vetrian vs The Director General of Police, Unreported Judgments, Writ Petition Nos.1617 of 2013 and 9104 of 2014, at 2, decided on Jun. 13, 2014 (Madras HC), https://indiankanoon.org/doc/55793018/ [https://perma.cc/NA2C-URRN].

172. *Caste Name on Restaurant Hoarding Creates Furore in Srirangam*, TIMES OF INDIA (Oct. 21, 2012), https://timesofindia.indiatimes.com/city/madurai/caste-name-on-restaurant-hoarding-creates-furore-in-srirangam/articleshow/16897222.cms [https://perma.cc/8Z57-XTDC].

173. *Brahman*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Brahman-caste [https://perma.cc/NP6X-PPFX].

174. S. Senthalir, *In Tamil Nadu, DMK Is Fighting the Anti-Hindu* Tag, SCROLL.IN (Apr. 15, 2019), https://scroll.in/article/920054/in-tamil-nadu-the-bjp-aiadmk-have-forced-the-dmk-to-clarify-that-it-is-pro-hindu [https://perma.cc/H4LB-JC7L].

175. Vidya Bushan Rawat, *Why Is Periyar Not Taught in Indian Schools and Colleges?*, SABRANG (Nov. 8, 2018), https://sabrangindia.in/article/why-periyar-not-taught-indian-schools-and-colleges [https://perma.cc/5ZG8-QU53].

176. C.Vetrian vs The Director General of Police, *supra* note 171, at 2–3.

commenting that "there cannot be a declaration that merely because a group of persons criticizes the policies or principles or practices adopted by another group, that group is practising an act of terrorism."[177]

This is not the only controversial event concerning criticism of Brahminism. Four years later, another incident ignited discussion on social media: A photo showing the CEO of Twitter Jack Dorsey raising a sign reading "smash Brahmanical patriarchy." In response, thousands of Indians denounced the words as "hate speech" and asked the CEO to apologize for the harm he has done to Indian traditions.[178] What should the response to these kinds of speeches be?

The quadruple doctrine offers the following insights in approaching the issue of hate speech. First, the definition—what is hate speech—should be specified and reviewed through the public discussion process. The current debate over hate speech presumes that hate speech can be identified easily and clearly.[179] That is not the case. Sometimes speech with hatred is not hate speech, even if targeted at a particular group. Identification by the government can be too broad or vague, and governments may misapply hate speech laws to reasonable criticism. The Indian case is an example. The attack on Brahmanism seems to meet the formal conditions of hate speech: the target is a minority group (Brahmins) in India, the style of expression is fierce and inflammatory, and the speech challenges mainstream values that have lasted for millennia in the Indian society. In that case, however, the voice of social activists to end the unjust system that is based on male dominance and caste entrenchment was suppressed by the government, using just the label of "hate speech." Sticking to the formal requirements or relying solely on the government will result in over-inclusive application of hate speech laws. As a result, those laws, which had been designed to promote progressive social reform, would be used as a tool to quell such reform.

Second, the quadruple framework takes a more nuanced stance toward the principle of rationality in behavioral rules governing free speech. The issue of rationality lies at the center of the hate speech debate. Advocates of hate speech regulation argue that hate speech is unprotected because it is irrational or non-cognitive. As hate speech is the emotional emission of vilification and hatred, no normative values underlying free speech can be

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177. *Id.* at 4.

178. *See* Shoaib Daniyal**,** *A Call to 'Smash Brahmanical Patriarchy' Is Not Hate Speech – It's Progressive, Anti-Caste Politics*, SCROLL.IN (Nov. 20, 2018), https://scroll.in/article/902818/a-call-to-smash-brahmanical-patriarchy-is-not-hate-speech-it-s-progressive-anti-caste-politics [https://perma.cc/TX7E-5EKV].

179. *See supra* notes 165–169 and accompanying texts.

served by allowing hate speech.[180] Opponents of hate speech regulation also use rationality to back up their position. They believe in the power of rationality to counter the harm of hate speech, so that, in their viewpoints, the better way to deal with hatred is refutation through rational debate rather than regulation through coercive laws.[181]

But what is the exact role of rationality? The simple response is that rationality is important, but not omnipotent. As a starting point, rationality is the foundation of public debate and value formation. That free speech can bring us closer to external values is premised on the belief that human beings are rational. In this respect, arguing with reason is encouraged while irrational expression is not. On the other hand, relying exclusively on rationality is dangerous because there is an inherent bias in the notion of rationality. Expressions can be made in various forms. Some of them are rational, in the form of arguing, persuasion, and reason-giving, while others are emotional, bodily, affective, desirous, and aesthetic. These latter forms of expression may not seem "rational" enough because they do not take dialogic or linguistic forms but rather are communicated through the display of body language, the bold manifestation of affection or desire, and messages that are more aesthetic than logical. They are, however, sometimes more powerful, more effective, and most importantly, more easily available to marginalized groups. Members of these groups may lack the resources or channels of rational argument. They may need additional courage to express their thoughts and beliefs in rational ways because of censorship or retaliation. Or, they may resort to those irrational expressions to make their voices louder and more easily heard. Feminist scholar Iris Young has acutely remarked: "[T]he ideal of the civic public as expressing the general interest—the impartial point of view of reason—itself results in exclusion. By assuming that reason stands opposed to desire, affectivity and the body, this conception of the civic public excludes bodily and affective aspects of human existence."[182] Rationality is not a value-neutral word—stressing rationality alone will tend to create bias in favor of the status quo, "entrench inequalities," and "favor the privileged."[183]

Thus, hate speech should be differentiated from criticisms within society. The Indian case is an example. If we adopt a loose standard of defining hate speech and an over-vigilant attitude towards its harms, we may

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180. *See* Caleb Yong, *Does Freedom of Speech Include Hate Speech?*, 17 RES PUBLICA 385, 394–401 (2011) (dividing hate speech into cognitive and non-cognitive categories and arguing that the latter is not covered by the free speech principle).

181. *See* Tsesis, *supra* note 163 and accompanying text.

182. Iris Young, *The Ideal of Impartiality and the Civic Public*, *in* JUSTICE AND THE POLITICS OF DIFFERENCE 109 (1990).

183. Rostbøll, *supra* note 85, at 28.

never hear the voice from the marginalized. Professor Amy Adler has cogently argued that hate expressions can be used for progressive and advocacy enterprises: "[i]n recent years, advocates of rights for women, gays, lesbians, blacks, and other outsiders have turned increasingly to a subversive style of political argument."[184] Those outside speakers, many of them artists, use techniques such as "appropriation," "excorporation," "subversion," and "deconstruction," in order "to frame the horror and absurdity of the speech it appropriates, to erase its sting by taking it as its own, to borrow its effectiveness, or to destroy its power to hurt."[185] The marginalized may need these hateful and extreme forms of expression because there might not exist other ways that are available."[186]

Third, the quadruple doctrine looks at power dimensions to identify hate speech and copes with it using different strategies according to the different stages in which it occurs. Power, not numbers, should be the defining feature of determining whether a group qualifies as a marginalized or minority group. In the Indian case, even though Brahmins constitute less than 5% of the Indian population, they cannot be labeled as a minority group in the context of hate speech. As one commentator pointed out, "[b]eing a 'minority' is not solely about numbers, it is also about power. Brahmins are well-represented in politics and elite white-collar jobs. One survey in 2006 found that Brahmins hold 49% of the top jobs in national journalism. When it comes to positions of high power, Brahmins have an outsized influence given their proportion of the population."[187] Likewise, the quadruple framework observes closely which groups are more capable of influencing the public value-formation process, and which groups are mere recipients of existing values, with their voices seldom heard. It focuses on actual power or capability, rather than sheer numbers or formal opportunities. Sometimes people who engage in hate speech come from marginalized or powerless communities, while the "victims" are from powerful groups which dominate the social resources, as the Indian case illustrated. Moreover, in the stage of issue-raising, hate speech should be granted more tolerance because some instances of injustice may exist in a society for too long and the tradition is too firm to be challenged. Criticism of the tradition needs more courage and resources than ordinary debates. The anti-Brahminism movement in the Indian case is just one instance. If the regulation of hate speech is too strict in this stage, the entrenched traditions of dominance and suppression may never be challenged. In a word, "hate" speech by powerless groups in the

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184. Amy Adler, *What's Left: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1504 (1996).

185. *Id.*

186. *Id*. at 1571.

187. DANIYAL, *supra* note 178.

issue-raising stage should receive more freedom from regulation than other forms of hate speech.

Fourth, the best way to deal with hate speech is neither outright prohibition nor absolute permission, but empowerment of the marginalized speakers, enabling them to use their freedom of speech to refute the hateful and discriminatory speech. The worst consequence hate speech can have is to deter victims from communicating. Accordingly, the best policy is not punishment, but to let victims "speak back" to counter the perlocutionary and discriminatory effect of hate speech.[188] The real solution to the evil of hatred is not just more speech, but more freedom of speech (actual, not just formal freedom). The central cause underlying hate speech is a conflict of values, usually about race, ethnicity, or religion. The only way to resolve and reconcile value conflicts is through the effort of reshaping, reforming, and renegotiating the values through the public reasoning process. This can only be done by empowering the powerless and respecting their voice in the value formation process. By educating and empowering every member of every community,[189] we can make the world a place with more tolerance and less hatred.[190] We should thus bolster the marginalized, empower them by actual power of expression, and encourage them to speak out with courage and confidence. This is what the quadruple doctrine endeavors to achieve.

## CONCLUSION

This Article outlines a four-part framework to specify the basic conditions of realizing the values of free speech. How to use the framework—to make them function in real life contexts—though, is beyond the scope of this Article. Questions abound. How do we fulfill these doctrines? Are there any other elements that are necessary or beneficiary for fulfilling these doctrines? And, what should be done if there are internal tensions within the framework? I offer some preliminary remarks on these issues as an invitation for more scholarly debate in the future.

One issue, for example, is how to motivate individuals to participate in the public discourse and how to make sure that the process is fair and productive, rather than chaotic and aimless. For such an ideal to be realized, protection of a right of control over one's information and enforcement of the behavioral rules are certainly not enough. People are not born as citizens

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188. KATHARINE GELBER, SPEAKING BACK: THE FREE SPEECH VERSUS HATE SPEECH DEBATE 9–10 (2002).

189. Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435, 1477–81 (2011).

190. Eberle, *supra* note 168, at 1207–08.

who care for the public interest, willing to listen to different views and dedicating their time and effort to reach consensus with patience and tolerance. Citizens must be capable of some skills for successful participation in the public.[191] Social scientists Drèze and Sen have wisely noted that citizens must make democracy work.[192] The law has its limits in this regard. Insights from other disciplines, such as education and moral psychology, are helpful here to explore in more detail the conditions of public reasoning.

Another issue is the internal tension within the quadruple framework. It includes both the right of control over information and the right to know, while arguing that both control and flow are important aspects of information. It is advantageous to include the two "opposite" rights, rather than trading theoretical delicacy for shallow unity. However, practical concerns will arise as to how to balance these two opposing rights in real cases in which they will be valued and asserted by different parties in incompatible ways. Generally speaking, both legal institutions and technological tools can be helpful in resolving this tension.

On the legal side, a layered approach may smooth such friction. Based on their possible contributions to public debate, government information and corporate information can be grouped in different layers, each enjoying a different level of priority for disclosure. Likewise, personal information can also be layered on the basis of, for example, its importance in maintaining individual identity. When collision occurs, information on the higher layers will generally be preferred and afforded greater protection. In addition, multiple factors such as personal preferences over information privacy, different weights assigned to different aspects of information privacy, different kinds of social spheres, and different values of information (epistemic or democratic) shall be considered and weighed more systematically. On the technological side, mathematical tools protecting information privacy, such the technology of k-anonymity,[193] differential

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191. These skills include, for example, "the skill of initiating public dialogue or making proposals about an issue; the ability to engage in argument and counter-argument; skills in framing and reframing a debate, and finding ways to harmonize proposals and deal with conflicting views; and an ability for persuasive but not manipulative rhetoric." Séverine Deneulin, *Democracy and Political Participation*, *in* AN INTRODUCTION TO THE HUMAN DEVELOPMENT AND CAPABILITY APPROACH: FREEDOM AND AGENCY 225 (Lila Shahani & Séverine Deneulin eds., 2009).

192. *See* JEAN DRÈZE & AMARTYA SEN, INDIA: DEVELOPMENT AND PARTICIPATION 347–52 (Lilia Shahani & Séverine Deneulin eds., 2002) (discussing various adaptations the Indian people have made to keep democracy and democratic institutions flourishing over time).

193. *See, e.g.*, PIERANGELA SAMARATI & LATANYA SWEENEY, PROTECTING PRIVACY WHEN DISCLOSING INFORMATION: K-ANONYMITY AND ITS ENFORCEMENT THROUGH GENERALIZATION AND SUPPRESSION, PROCEEDINGS OF THE IEEE SYMPOSIUM ON RESEARCH IN SECURITY AND PRIVACY 1

privacy,[194] encryption,[195] and federated learning[196] might help ease the tension between information privacy and information disclosure. To be sure, "a rule tailored to individual inmates will be more cumbersome and costly for agencies to administer."[197] Details of the design await future research.

The last issue involves institutions. The four doctrinal components are not self-enforcing; they must be undertaken by appropriate institutions. Many questions remain to be explored. Which institutions should be responsible for the implementation of the four doctrinal parts? What new institutions should be created? What institutional capacity is required for each component of the doctrine to be fulfilled? How should different institutional actors be coordinated to implement the framework?

Issues for future research are not limited to these mentioned above. This Article merely aims to build a basic doctrinal framework as a basis upon which future criticisms, elaborations, and extensions can be made. It does not aim to settle the issue, but to inspire future scholarly debate.

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(1998) (explaining how data can be shared while keeping truly anonymous using generalization and suppression techniques).

194. *See, e.g.*, Andrew Chin & Anne Klinefelter, *Differential Privacy as a Response to the Reidentification Threat: The Facebook Advertiser Case Study*, 90 N.C. L. REV. 1417, 1455 (2012) (arguing Facebook has successfully used the standard of differential privacy to anonymize data while still meeting market demands); Alexandra Wood et al., *Differential Privacy: A Primer for a Non-Technical Audience*, 21 VAND. J. ENT. & TECH. L. 209, 232–34 (2018) (explaining how differential privacy works to manage privacy risks).

195. *See, e.g.*, Dan Feldman & Eldar Haber, *Measuring and Protecting Privacy in the Always-On Era*, 35 BERKELEY TECH. L.J. 197, 234–35 (2020) (arguing that technology that adds 'noise' to user's data collected from the Internet of Things helps users maintain privacy).

196. *See, e.g.*, Brendan McMahan & Daniel Ramage, *Federated Learning: Collaborative Machine Learning Without Centralized Training Data*, GOOGLE AI BLOG (Apr. 6, 2017), https://ai.googleblog.com/2017/04/federated-learning-collaborative.html [https://perma.cc/C6P6-W468] (arguing for ensuring privacy by having machine learning and training on individual devices, and having each device send a request for focused updates, rather than having all user data stored on a central hub with machine learning to determine privacy needs).

197. Lior Jacob Strahilevitz, *Collective Privacy*, *in* THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 225 (Saul Levmore & Martha Craven Nussbaum eds., 2011).