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I. INTRODUCTION: CURRENT THEORY AND ITS DISCONTENTS

As one of the oldest and mostly acknowledged[1] constitutional rights, freedom of speech is conventionally viewed as freedom to express oneself and communicate with others without the interference from the state. Its basic logic lies in an Enlightenment-era creed—the belief that the ability to express or speak is inherent in every individual and that everyone will be better-off by being more fully informed. It does not mandate information to be provided, platforms to be established, or interlocutors to be educated, at least according the traditional doctrines. Free speech is a liberal right, and liberalism is confident in each individual's capacity to acquire, handle, exchange, and judge the information she needs in communicative conducts.

The right to know, or the freedom of information,[2] is a much younger right. Compared to the history of hundreds of years of free speech, the right to know can only be dated back to half a century ago. It was born in the transformative years in the Twentieth Century as a response to the expansion of government powers and the rise of the administrative state. In contrast to the freedom of speech, the right to know enables more direct and positive control over information. By granting the right of access to some government information produced in its process of administration, the right to know facilitates democratic participation and supervision of the citizens. The guiding principles are popular sovereignty and government responsibility. It is a modification of the romantic Enlightenment ideal that individuals are better left alone even in the face of aggrandizing state powers.

The contrasts between the two rights are obvious. First, unlike the negative, defensive and speaker-oriented freedom of speech, the right to know is positive, offensive, and listener-oriented—it emphasizes the citizen's active capability to acquire information and the government's positive duty to disclose them. Second, rather than being a fundamental human right, like the freedom of speech, the right to know belongs more to the realm of administrative law. Even though some

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1. *See* David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 773 (2012).

2. In many countries' constitutions and laws, the right to know has been phrased as the freedom of information.

countries have enumerated the right to know in their constitutions, the importance and the degree of protection it enjoys are generally less than the older right of free speech. Third, partly because the right to know enjoys relatively lower priority and serves particular ends, its scope is much narrower than the freedom of speech. Normally, what the citizen is entitled to know includes only the government information that relates to the public interests, which is why this right has intertwined and co-developed with the principle of open government and the practice of government information disclosure.

Despite those differences, there are also connections between them. As two rights that both treat information as their objects and regulate the exchange of information, we can hardly say that they are totally separate from each other. Since its birth, the right to know was based, at least partly, on the basic tenets and values of the free speech. In practice, some countries have prescribed both rights in their constitutional texts. Some have treated the right to know as a significant part of the expressive freedom, either in constitutional text or through constitutional interpretation, while others have protected the right to know through ordinary legislation, supplementing the constitutional protection of the freedom of speech.[3] In any event, freedom of speech is a major foundation of the institution of right to know—scholarly literature admits as much.[4] Because the freedom of speech implicates the popular check of the government, a right to know how the government operates necessarily follows.

However, deeper relationships between the right to know and the freedom of speech remain underexplored. In particular, the issue of whether and to what extent the old freedom of speech should be reshaped by the new right to know has received little, if any, scholarly focus. Just like the marketplace of goods and services, the marketplace of ideas can also run into malfunction, or even paralysis. The threat to free speech does not only come from the state. Effective exchange of ideas requires not only inaction or neutrality of government: formal equality of expressive freedom could lose much of its meaning due to the disparity of wealth and power. Scholars have begun to revise the

3. *See infra* Section IV- A of this Article.

4. David M. O'Brien, *The First Amendment and the Public's Right to Know*, 7 HASTINGS CONST. L.Q. 579, 580 (1980) ("[a]n increasing number of constitutional scholars argue that the public's 'right to know' is implicitly guaranteed by the First Amendment and by the general principles of a constitutional democracy."); Anthony Lewis, *A Public Right to Know about Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 2-3 (1980) ("If citizens are the ultimate sovereigns, as the Constitution presupposes, they must have access to the information needed for intelligent decision."). For general reviews of this issue, *see* Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive Right to Know*, 72 MD. L. REV. 1, 11-12 (2012).

traditional theories to respond to those challenges.[5] One of the endeavors was to reformulate the theory of free speech through the module of the right to know.

Nearly half a century ago, commentators posited that the freedom of speech encompassed the basic tenets of the right to know,[6] although they refused to interpret it as a general and enforceable right.[7] The most typical and radical proposition came from Alexander Meiklejohn, who advocated that the right to know was the major, or even the only, component of free speech. Meiklejohn argued that the normative basis for protecting our freedom of expression was to ensure the people participate in the process of self-government, and that the constitution protects the freedom of speech exactly for the reason of making certain that people are uninhibited in accessing the information about their representatives and hold open discussions on them.[8]

However, another major advocate of the right to know, Thomas Emerson, deemed that Meiklejohn's proposal had gone too far.[9] His reasons were, first, that a freedom of speech based primarily on the right to know, primarily protects the listeners, while leaving the speakers under-protected. Second, the Constitution could provide absolute protection to free speech, while it is hard to provide a similar degree of protection to the right to know. Finally, speakers are normally more motivated to claim their rights, and through protecting listeners directly and protecting speakers indirectly, the right to know would decrease the overall strength of protection of free speech.[10] This article refutes the first and third points in the next Section of this Article. The second point, which deals with the strength and scope of the right, will be examined in Section four of this Article.

Meiklejohn and Emerson are not the only scholars that have touched

5. *See, e.g.*, OWEN FISS,THE IRONY OF FREE SPEECH (1996); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

6. *See, e.g.*, Wallace Parks, *Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); O'Brien, *supra* note 4, at 579; David Mitchell Ivester, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977).

7. *See* David M. O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1 (1981); Sullivan, *supra* note 4, at 1).

8. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961); William Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

9. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1, 4-5 (1976).

10. *Id.* Emerson also proposed a fourth line of argument, *i.e.*, the history, tradition, and practice (of America) are based on the speaker's right; so a listener-based right to know might break abruptly with the past. But historical baggage alone cannot be our reason to refuse reform, and most countries in the world have a history of free speech much shorter than the United States, thus carrying much light baggage of history.

on this topic. For example, Anthony Lewis, in response to fast-growing agencies and bureaucracies, has proposed reinterpreting free speech as a "sword" against the government, empowering the citizens with information needed for checking the public power.[11] Going one step further, Michael Perry explicitly contended that the principle of free expression should be "amplified" as including a right to know, because "[a] refusal to disclose is simply a kind of interference with access."[12]

These attempts offered us new insights in rethinking and rebuilding the relationships between freedom of speech and right to know; However, they are inadequate. First, these scholars only gave preliminary thoughts, rather than structured approaches, much less the systematic designs of the new approaches. Second, the papers mentioned above were written before the Internet Age, thus lacking the consideration of the new challenges brought by information technologies. These challenges are tremendous. For instance, traditional theories of free speech focused more on speaking rather than listening: in most circumstances, the constitution directly protected speakers, not listeners.[13] It is reasonable that speakers are the major claimers of rights, but it becomes more and more arbitrary to separate speakers and listeners nowadays. Sometimes speakers are difficult to identify, as in the situation of anonymous speech that is common in cyberspace. Sometimes an individual can have dual identities as a speaker and a listener, as the Internet has made everyone both content consumers and producers. Sometimes a speaker is not a human being, as robots can express ideas too. At the same time, the problem of multiple regulators and polarization in cyberspace has challenged the values and practices of democratic participation, one of the major normative bases of free speech.

This Article will start from the premises and proposals of the scholars mentioned above. Through developing, modifying, and supplementing their theories, as well as taking into account the new speech conditions in the Internet Age, this Article aims to develop

11. Lewis, *supra* note 4, at 25.

12. Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1194 (1983).

13. Emerson, *supra* note 9, at 5.("[h]istory, tradition, doctrine, and practice have all developed largely on the basis of protecting the rights of the speaker."). There are some authors who think that the freedom of speech protects mainly the listener's rights, and the speaker's rights are only incidentally protected. *See* LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 8-9 (2005); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 22-27 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25-26 (1971); Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 216-24; Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1370-71 (2016).

systematically, though not completely, the theoretical basis and practical implications of the freedom of speech as a right to know. The relationship between the two rights is not unidirectional: not only could the freedom of speech form the basis for the right to know, but also the right to know could enrich the doctrine of the freedom of speech. The characteristics of the right to know could make the freedom of speech more direct, more practical, and more enforceable. We should accordingly interpret the freedom of speech as a right to know. This Article's thesis does not necessarily require the right to know to be expressly written into the Constitution (although this is one reasonable approach), nor does it contend that freedom of speech is the only basis for the right to know. Rather, this Article reformulates the theory of free speech through the module of the right to know. Having done that, the right to know will, in effect, be constitutionalized because it will become a part of the freedom of speech. What's more important is the impact on our current free speech jurisprudence: using information as both a shield and a sword, this new and reformulated right will better respond to the age we are in where speech is information, information is power, and the liberty of speech is the freedom and control of information.

This Article proceeds as three parts: Why, What, and How. Part II of this article will demonstrate why the freedom of speech, especially in the context of the Internet Age, should be reformulated as the right to know, or the freedom of information. On the one hand, expression presupposes the possession of information, and the right to know actually serves both the interest of the listener and that of the speaker. On the other hand, freedom of speech needs the positive element to know in this age, when more delicate surveillance and control facilitated by information technology has made individuals much more vulnerable, and the multi-polar structure of regulations—especially the authority of censorship by Internet intermediaries—has shaken the foundation of our traditional constitutional values, such as transparency, due process, and responsibility. In this scenario, to "empower" the freedom of speech by the right to know means to empower the individuals against the gradual and invisible encroachment by the state and the intermediaries. Democratic participation and supervision constitute the shared basis for the freedom of speech and the right to know. Through the acquisition of more information, citizens become more capable to express themselves in the public sphere, and the public opinion thus formed acts as an important check to the governments.

If the previous argument stands, the natural next question would be: what is the difference between this new freedom of speech as a right

to know and the traditional freedom? What is the implication for such reformulation? Part III tries to answer these questions. In theory, this reformulation will clarify the currently ambiguous role of listeners in traditional theories and put an end to the outdated debate of whether free speech is a negative or positive liberty. In addition to the "enrichment" of the normative theories of free speech, the reformulation can also help resolve many practical issues in the field, facilitating the development of free speech adjudications and institutions. First, the issue of subject will be solved once and for all, since in the right to know analysis, whether certain kinds of speech are produced by corporations, organizations, or even robots becomes unimportant. Second, specific categories of speech, such as commercial speech and professional speech, are highly controversial in traditional approaches. The right to know perspective provides a clearer and better framework in understanding whether and how these kinds of speech should be protected. Third, defining the freedom of speech as the acquisition and keeping of information propels us to go beyond the dichotomous mode of analysis and broaden our perspective to view free expression as a system. This will also change our method of interpreting and applying the constitution, by moving from the narrow notion of formal liberty to the systematic balance of the formal and the substantive.

Part IV will discuss how to implement this reformulated freedom in practice: an issue of institutional design. After comparing different modes of tackling the two rights in the national constitutions, I will divide the issue into various subcategories and offer my tentative proposals. Among other issues, the scope and strength of information disclosure should capture our top priority. To be sure, as a preliminary attempt of reshaping the freedom of speech through the right to know, this paper cannot be flawless. Part V lists several possible criticisms this approach and offers brief responses to them. These responses are also preliminary. What I hope is that my endeavor in this paper could provoke more in-depth discussions among readers.

II. WHY: THEORETICAL FOUNDATIONS

A. Right to Know is the Basis of Freedom of Speech

First and foremost, it is common sense that the acquisition and comprehension of information constitutes the basis of expression. Expression is the transmission and exchange of information. For any expression to be effective, two conditions must be present: the speakers have something to express, and the listeners can understand

what the speakers have expressed. It is not necessary that what the listeners understand should be exactly the same as what the speakers have had in mind; but the listeners must comprehend, at least partly, what the speakers mean in the specific contexts. The first condition requires the exporter (speaker) to possess some information as her background material for output. Similarly, the second condition requires the receiver (listener) to possess at least enough information in order to understand what the speaker says. Otherwise the conversation would become cross-talk at best and meaningless at worst. All expressions, whatever forms they take (verbal, visual, behavioral, etc.) are contextual. Thus, effective communications presume the sharing of particular information between the two parties. Without the condition "to know," the expressive conduct itself would lose much of its essence, let alone realizing the meaning of free expression.[14]

Second, to know is not only the factual basis but also the normative basis of expression. The search for truth, the participation in democratic self-government, and self-realization[15] all rely on the possession of information. If information is blocked, suppressed, or distorted, the hope of the truth being triumphantly sifted out in the marketplace would be dimmer, the development of the human capacity would be hindered, and democratic participation would also be an illusion.[16] Among the several values, the argument from democracy is the most important common denominator between freedom of speech and right to know,[17] and the major justification for the latter to be institutionalized or constitutionalized.[18] Freedom of speech and right

14. Thus, Justice Thurgood Marshall of the U. S. Supreme Court has analogized the freedom to speak and the freedom to listen as the two sides of the same coin. Kleindienst v. Mandel, 408 U.S. 753, 775 (1972) (Marshall, J., dissenting) ("The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin.").

15. These are the three normative values that are mostly acknowledged by the commentators. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

16. Emerson, *supra* note 9, at 2 (arguing that the right to know and the freedom of speech serve the same normative values.)

17. Sullivan, *supra* note 4, at 9 (demonstrating that the right to know serves two democratic functions: government accountability and citizen participation.); *Open Meeting Statutes: The Press Fights for the Right to Know*, 75 HARV. L. REV. 1199, 1204 (1962) (arguing that in the United States, the advocates of the right to know have grounded it upon the constitutional bases of freedom of speech and of the press, the aim of which is to promote the democratic check on the government.)

18. Emerson, *supra* note 9, at 16. ("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."); David C. Vladeck, *Information Access - Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1787-78 (2008) (surveying a series of laws of the United States that protects the right to know, such as the FOIA, and pointing out that the rationale behind them is the notion that information is the life of democracy.)

to know are both instrumental rights and supplementary rights. They are instrumental in the sense that without an informed citizenry and a corresponding open public debate, democratic participation and supervision would be impossible. The two rights, like two sides of the same coin, serve the value of democracy and ensure the sovereign role of the people.[19] As Michael Perry remarked, "government denial of access to protected information . . . subverts the ideal of a knowledgeable citizenry, a well-informed electorate, without which democracy is a sham."[20] They are also supplemental in the sense that, on the one hand, the two rights provide remedies to the innate flaws of representative democracy: how to make the government responsible for the people in the interim of elections. Freedom of speech and right to know facilitates the popular participation in politics in daily lives—though some or most citizens might lack the willingness to participate, they at least obtain such an option—giving them the power beyond ballots. On the other hand, the deliberative process that is safeguarded by the two rights is also the major source of political legitimacy in modern societies. Habermas, for example, argued that communicative actions that aim for cooperative undertakings serve as the legitimate basis for politics in an age of plurality, and such communicative actions must be equal, inclusive, and free of coercion and distortion.[21] A presumption of this argument is the free flow and equal sharing of information —at least the information which is important to the political community. Thereby, freedom of speech as a right to know justifies the existence and continuance of modern polities.

Third, a right to know serves both the speaker and the listener. At first glance, the subject of the right to know is the listener and the speaker is only relevant for fulfilling her duty of disclosing the requested information. The right of the speaker to express seems derivative or secondary to the right of the listener to know. In fact, the former could be protected through the protection of the latter. No more and no less. If a listener wants to hear, the freedom of the speaker to express could be protected through the protection of the listener's right to know. That means the disclosure and expression of such information cannot be banned without legitimate and adequate reasons. Only information which no one in the world wants to hear, or no one in the world could understand, would fall outside of this protection. A speech without audience cannot serve any normative values underlying the

19. *See* Meiklejohn, *supra* note 13; Meiklejohn, *supra* note 8.

20. Perry, *supra* note 12, at 1195.

21. The opposing concept of communicative action is strategic action; for their meanings, distinctions, and the implications for political legitimacy, see JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1984).

free speech principle. Of course, one talking to herself is protected by the Constitution and the law—even when no one hears or no one understands. But here the protection is afforded by the general freedom, rather than the specific freedom of speech.

One line of argument that Emerson raised in refuting Meiklejohn's proposal was that the right to know, as a listener-oriented right, ignores the interests of self-fulfillment of the speaker.[22] Randall Bezanson expressed a similar concern when he stated that "a speaker-based approach provides a degree of conceptual clarity and perhaps even simplicity in the structure of First Amendment doctrine."[23] Both were worried about diluted protection of speakers from an audience's perspective. The analysis here proves that the self-fulfillment interest of the speaker could be protected by either the right to know of the listener (in the case of where there is audience) or the general freedom (in the case of soliloquy). As for who claims the rights, the right to know does not deprive the speaker's privilege to claim her right, and through institutional design, the speaker can claim her free speech right through her audience's right to know.

B. The Right To Know is More Urgently Needed in the Information Age

The danger of polarization looms large—much larger—in the era of big data and artificial intelligence. As the Silicon Valley saying goes, data is the new oil.[24] Data has become the most important resource and source of wealth in this age.[25] Whoever controls data wields power. Because data is produced by us but does not belong to us, it is much easier for a small group of technology and business elites who "own", processes, and make use of the big data to amass tremendous power—winner takes all! The digital divide will naturally produce and exacerbate the class divide. New information technologies have accelerated this process. At first sight, Constitutional scholars should celebrate these technologies. As the media of expression have migrated from streets and parks to mass media and now to cyberspace, we've witnessed the burgeoning of expressive channels, the reduction of expressive costs, and the expansion of expressive scope. Indeed, many scholars have cheered this revolution of democratic participation

22. *See supra* notes 10-11 and the accompanying text.

23. Randall P. Bezanson, *Institutional Speech*, 80 IOWA L. REV. 735, 741 (1995).

24. 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, 1154 (2018).

25. *Id.* at 1158 ("We tend to associate power with the effects of technology itself. But technology is actually a way of exemplifying and constituting relationships of power between one set of human beings and another set of human beings.")

and cultural innovation brought by the Internet.[26] However, the situation of most individuals—normal persons without much wealth or power—has not changed substantially. Information explosion has made attention, rather than information itself, the scarce resource.[27] More channels of expression and broader scope of communication in theory do not mean they are equally effective in practice: what matters is the influence. Everyone can speak, but only those minority speakers (such as the giant Internet intermediaries controlled by the state or businesses) can catch our attention. Louis Seidman has made a critical and illuminating remark:

> One might suppose that this democratization of speech breaks the link between wealth and speech opportunities. In fact, though, the change exacerbates, rather than diminishes, the difficulty for progressives. In a world where there is too much speech, the old notion that a free speech regime creates an unfettered marketplace of ideas breaks down. Anyone can use Twitter, but that very fact means that Twitter produces an undifferentiated and useless swamp of information and opinion. The result is that people need a filter. Real control is therefore exercised not by speech producers but by speech aggregators and amplifiers, who themselves enjoy some protection under the First Amendment. While it may be cheap to produce speech, aggregation and amplification—speech management—still require capital. Moreover, the managers regularly shield speech consumers from ideas that are unfamiliar, upsetting, or inconsistent with a preconceived narrative. To the extent that progressive views are all of these things, they are regularly filtered out by technological devices that allow people to receive only the ideas that they want to hear.[28]

Information explosion makes filtration inevitable. Ad hoc filtration that adapts to specific contexts is too costly to be universally applied. Hence, centralized and general filtration became the only alternative. The task of computing and processing huge amounts of data is so formidable that only the government and giant corporations with enough human and financial resources can handle it. The technology and necessity of filtration not only greatly enhances the powers of the government and corporations, but also threatens the freedom of expression and the flow of information in our public sphere.[29]

Furthermore, the multipolar structure of regulations has made individuals more vulnerable. Unlike the bipolar structure (state as regulator vs. regulatees) in the pre-Internet era, scholars have acutely

26. *See, e.g.*, YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006).

27. Balkin, *supra* note 5, at 7.

28. Louis M. Seidman, *Can Free Speech be Progressive*, 118 COLUM. L. REV. 2219, 2235 (2018)(footnotes omitted.)

29. Katia Bodard, *Free Access to Information Challenges by Filtering Techniques*, 12 INFO. & COMM. TECH. L. 263 (2003).

observed the tri-polar phenomenon on the Internet: state, intermediaries, and regulatees.[30] Intermediaries like Internet Service Providers, search engines, and social media, have gained regulatory power no less salient than the state. Individual regulatees are now facing double threats from both the state and intermediaries—and the two often cooperate. This kind of "new-school regulation" is more invisible, more effective, and more delicate.[31] The regulatory power wielded by intermediaries has posed significant challenges to our traditional constitutional values. This kind of private censorship runs without the limits of due process, democratic accountability, transparency, and is more prone to over-censor or manipulate.[32] In confronting the powerful intermediaries, individuals need more than formal freedom from interference to truly realize their liberty to express. To require the intermediaries to disclose and share their data can not only alleviate the risks of lack of transparency and due process, but also check their use of power, striking a balance between the freedoms of different parties in the structure. In other words, the right to know is a shield and sword against both the state and the private intermediaries.

In the Information Age, everything is information: everything can be digitalized. The internet has become the most important public forum. It has replaced newspapers, radios, and television, and constitutes the biggest platform for citizens to acquire information, exchange opinions, and participate in public life. But the characteristics of the Internet are not all hospitable to democratic values. In addition to the control and polarization brought by information overflow, anonymity makes online speech much less reliable and responsible. The echo chamber effect facilitates the spread of extreme views. The "personalization" based on big data can reinforce the current biases and make the process of consensus-building much harder.[33]

In this context, values are in struggle: freedom vs. control; democracy vs. authority; and equality vs. polarization. What values technology will promote depends on the choice of the individual.[34]

30. Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011 (2018).

31. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014); Balkin, *supra* note 24.

32. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 27-33 (2006).

33. *See* CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017). For an account of the Internet's influence on the general constitutional jurisprudence, see Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637 (2014-2015).

34. *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT (2008).

And how we shape and treat the freedom of speech and the right to know will determine whether the choice will be made by sheer power and capital or by each individual citizen. "There is no such thing as a free speech,"[35] because the freedom to speak is not free. For any formal and theoretical freedom to be realized, words on parchment are not enough. Rather, some conditions and resources are needed. The chief purpose of speech is to communicate, and to influence others through such communication. Whether, where, and to what extent this influence could be effective depends primarily on the material and cultural resources that the speaker owns. In this sense, government's protection and promotion of free speech will unavoidably relate to its general distributive program of resources. Fortunately, money is not the only factor here. Other factors, such as persuasive force, reputation, control of information, also determine the practical effects of free expression.[36] The right to know entitles citizens the right to request, possess, and use information. To endow such a right to citizens as a basic constitutional right can be seen as a measure by the state to redistribute information—an important kind of resource, and a legitimate means of remedy, targeting the failures of the marketplace of ideas and the inequality caused by the disparity of informational resources in this age.[37]

As the right to know can empower individuals to withstand the state and intermediaries, why not prescribe it directly, rather than by reformulating the freedom of speech? Apart from the similar content and common normative ground between the two rights, the power of intermediaries derives not only from their ownership of the data, but also from the freedom of speech they enjoy. Intermediaries can be speakers too. Many intermediaries, like Google, have resisted government regulations by claiming that their algorithmic output constitutes speech protected by the First Amendment.[38] Thus, they are both the subject of private rights (of free speech) and public power (of regulating speech). On the one hand, a statutory right to know by

35. Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L. J. 257, 258 (1985).

36. *See* Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 949 (1993).

37. For research on to what extent free speech can alleviate the problems of polarization and alienation, and promote equality or fairness, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills*, 77 CORNELL L. REV. 1258 (1991-1992) (arguing that freedom of speech can hardly mitigate the inequality in fields of race and gender); *Cf.* Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161 (2018) (maintaining that freedom of speech could and should promote equality).

38. *See* EUGENE VOLOKH & DONALD M. FALK, FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS (Commissioned by Google 2012)

ordinary legislation is not enough, because it cannot trump the constitutional right of free speech enjoyed by the intermediaries (as speakers). On the other hand, the approach of reformulating freedom of speech as a right to know does not deny the plausibility of another approach, which puts the right to know directly in the Constitution. Although the right to know serves multiple constitutional values,[39] it shares one key value with free speech: democratic participation and supervision. This Article's proposed approach stresses that by incorporating the right to know into freedom of speech, we can clarify and highlight the positive and obligatory elements inherent in the freedom of speech—avoiding abuse by intermediaries.

III. WHAT: CROSS-FERTILIZATION BETWEEN THE TWO RIGHTS

What's the difference between the freedom of speech as a right to know and the traditional right of freedom of speech? What changes will the reformulated right bring about? As this Part discusses, such a reformulation has at least the following implications—all of which should be embraced.

First, the right to know makes visible the long-invisible role of the listener in traditional free speech jurisprudence. In most typical cases, the issue of dispute is that the speaker's expression was prohibited or limited by the government regulation and the interests to be balanced are normally the freedom of speech of the speaker versus the alleged government interests, such as national security or social order. In this analysis, the listeners—who are they, what are their interests, and how to protect them—have received little attention. In theory and judicial practice of many countries, the protection of listeners was realized through the protection of the speakers. This is generally reasonable because the speakers are fixed in numbers and scope, more easily identifiable, and more easily targeted by government regulation. They are also more willing and able to vindicate their rights. By contrast, the scope and number of listeners are often uncertain and fluid. They are also difficult to identify and not the direct object of regulations. Thus, focusing on the speakers has served as a workable way for "delegating" the rights of the listeners to those of the speakers.[40]

However, sometimes the speakers might not choose to claim their

39. Freedom of speech is not the only constitutional basis for the right to know; other values are salient here too: such as popular sovereignty, deliberative democracy, and government accountability.

40. Leslie Kendrick, *Are Speech Rights for Speakers*, 203 VA. L. REV. 1767, 1778 (2017) ("Because the government often seeks to restrict speech by penalizing speakers, speakers are often best placed to challenge allegedly censorial governmental action.")

right, or the right of the speaker and that of the listener may clash.[41] A direct right to know by the listeners would be necessary in these circumstances. We should not forget that the normative values of truth-seeking and democratic participation function mainly by the involvement of the listeners. By empowering potential listeners with a right to know, they can participate more directly and effectively in the process of public debate and democratic self-governance. Through this approach, the reformulated freedom of speech would now enjoy broader protection (from the individual speaker to the large audience) and grow stronger (from negative non-interference to positive request) than the traditional freedom.

Second, reformulating the freedom of speech as a right to know can help us get rid of the outdated and parochial notion of free speech as merely a negative liberty,[42] and figure out a new path of positive protection of the freedom of speech. Freedom is not free. The realization of any freedom requires some material, cultural and social conditions. The traditional theory is biased towards minimal government. It is based on the classic liberalism in the early stages of industrialization—trust in the market and distrust in the government. In recent decades, this theory has come under fierce criticism: people not only realize that the market may be wrong, but also realize that the government can do good..[43] Freedom framed only in the negative way could stratify the marketplace and bias the entrenched interests of incumbents—those who monopolized the expressive resources.

Understanding the limitations of the traditional approach and the positive capacity of the freedom of speech is only the first step. We need to find a plausible path for realizing the positive capacity. The government, or other entities, can take many different positive measures to promote citizens' right to freedom of speech. For example, facilitating more equal and more open media access, providing better education, and bettering the material conditions of marginalized groups. These measures all concern the redistribution of public resources and might raise the question of whether they will better be prescribed by the Constitution or reviewed by the legislature through the political process. One less radical measure, which is not

41. Emerson, *supra* note 9, at 7 (The author summarized the reasons for acknowledging an independent right to know as follows: the interest of the listener may be different than the interest of the speaker; the speaker may not claim the right for the listener; the interest of the listener may be very important that worth independent protection; and the right to know focus on the positive side of the free speech, rather than mere non-interference.)

42. Frederick Schauer, *Positive Rights, Negative Rights, and the Right to Know*, *in* TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 34, 37-39 (David E. Pozen & Michael Schudson eds., 2018).

43. *See, e.g.*, Fiss, *supra* note 5.

that redistributive, is to incorporate the right to know into the freedom of speech. Stipulating a positive duty of information disclosure in required situations is what the constitution can, and should, do. True, this approach is also redistributive, since the relevant institutions of disclosure need financial support; but it is a much more moderate path. It could become a starting point for us to reinvigorate the free speech clause.

Third, the definition of freedom of speech as the right to know solves the difficult problem of legal subjects. Whether certain expression is protected does not depend on the subject of the expression, whether it is an individual or a corporate body, and no matter of whether it has legal standing.[44] Content, rather than the subject, is the determinative factor.

This issue is particularly salient in the field of artificial intelligence ("AI").[45] Robots can express, just like humans. Consider search engine rankings, news feeds, and auto-generated ads—they are all "uttered" by robots. In the case of weak AI, one solution is to categorize the expression of robots (algorithms) to that of the developer (programmer). This approach is not perfect, since that the developer is the author of the algorithm, but not necessarily the author of the algorithmic output. In other words, a developer predefined the purpose—the problem to be solved—by the program, but has stayed away from the output process. When the program is intelligent, its output is generated and produced automatically by its predefined algorithm. The developer just sets the first step and waits for the work to be finished by the algorithm. Her connection with the algorithmic output is too indirect and weak to claim either a copyright[46] or a free speech right on the output. Otherwise there will be the risk of overprotection. In the case of strong AI, the connection is even weaker. Should we protect such subjectless expression? In my proposed approach, if those algorithmic outputs are the object of others' legitimate right to know, they should be protected. This is not to say that as long as someone wants to know something, that something will always receive the protection of freedom of speech. To want to know is just the first step. The expression must be something that should be known. The information that claims protection must serve the common normative basis of the freedom of speech and the

44. Eric G. Olsen, Note, *Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505, 515 (1979).

45. For excellent research on the issue of legal subjects with regard to artificial intelligence, see Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231 (1992).

46. Robert Yu, Comment, *The Machine Author: What Level of Copyright Protection is Appropriate for Fully Independent Computer Generated Works*, 165. U. PA. L. REV. 1245, 1261 (2017).

right to know—democratic participation. This means the information must have public importance. This relates to the question of institutional design (where information is the object of the right to know) and will be explored in Section IV.

Fourth, the perspective of the right to know provides us additional insights on some controversial issues in the area of free speech, such as whether and how commercial and professional speech should be protected. Current jurisprudence holds that commercial speech receives no or very limited free speech protection.[47] That's because commercial speech is intended to promote business transactions and to increase profits. These aims are quite distinct from the normative values underlying free speech. But the interest of the speaker (producer or seller) is one thing; the interest of the listener (consumer) is another. Commercial ads, even though produced for the very purpose of financial profits, effectively serve the right to know of the consumer. From the commercial propaganda, the consumer acquires the information of the features of certain products and the state of affairs of the market. Based on these kinds of information, she forms expectations and plans her economic behaviors accordingly. A market with vibrant flows of information and informed consumers is vital to the stability of the economy and the society. This does not mean that commercial speech enjoys free speech protection in all events or that it enjoys the same degree of protection as other kinds of speech. Suffice to say that any analysis of the value of commercial speech should take into account the right to know of the consumers (the general public).[48] Before we make hasty conclusions, an inquiry should be made on whether some information with public importance is contained in the commercial ads.

Professional speech, unlike commercial speech, is produced in specific and highly technical contexts, such as the prescriptions of doctors and the legal opinions of lawyers. Government regulations on this kind of speech are ubiquitous. For example, certain qualifications of licenses are mandatory before making such speech. Speech contrary to professional ethics may be punished and specific information must be disclosed to clients or the general public. Judging solely from the standpoint of speakers, those regulations have infringed their freedom of speech. But they are understandable from the angle of the right to know of the listeners. Because of the special contexts the speech involves, people hold special expectations about professional speech. The reliability of professional speech can influence the trust people

47. *See* GEOFFREY R. STONE, ET. AL., THE FIRST AMENDMENT, 171-182 (5th ed. 2016).

48. Eric G. Olsen, Note, *Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505, 519-20 (1979).

have in professions. The government has to make sure that professional speech is true, accurate, reliable, and "in accordance with the insights of the relevant knowledge community."[49] Imagine the societal consequences if a lawyer or a doctor can "freely" express themselves, regardless of the limits of the professional rules and ethics. Here, expression is restricted by the right to know. Professional practitioners' freedom of expression is restricted by the overall knowledge structure of the profession on the one hand, and by the general public's legitimate requirements for accurate information on the other. Therefore, unlike ordinary speech, professional speech enjoys a different kind and degree of protection due to its special link with the right to know.[50]

Fifth, redefining the freedom of speech as a right to know enables us to take a holistic and systematic view in resolving concrete issues. In the Internet Age, freedom of speech is more like a system[51]than a simple dichotomy between the regulators and the regulatees. Focusing on information, which is constantly in flow, rather than on the static relationship between two communicating parties, broadens our perspective on the freedom of speech. Jack Balkin has summarized the free speech system as a triad structure.[52] But it is more accurate to describe it as a tetrad: in this terrain, the state and the intermediaries (corporations) are regulators of speech (and they might be speakers in some occasions too), while individual speakers and listeners are regulatees. In addition, those who have neither spoken nor heard the communications—the general public—should also be included in our system. As third parties, their interests are also closely related to the regulations of speech. On the one hand, they surely benefit from the general environment of an open and free debate, and the well-being that results from such debate, such as scientific progress or a more responsible and transparent government. On the other hand, they also bear the harm that results from a controlled, blocked, or distorted public sphere.[53] It is for this reason that Thomas Scanlon has concluded that the interests of free speech encompass the interest of the speaker, the interest of the audience, and the interest of other bystanders. Those of the latter two are more important.[54]

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

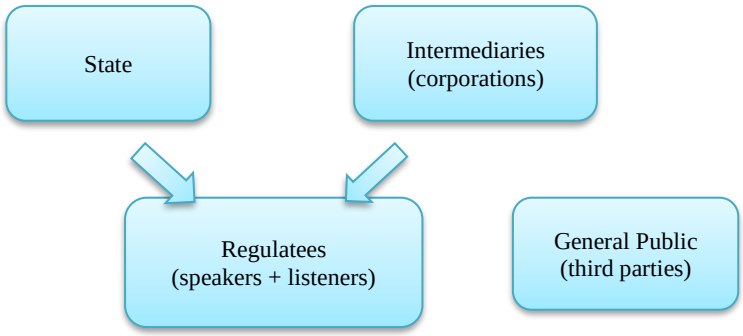
50. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 828-33 (1999).

51. *See* Yochai Benkler, *Freedom in Systems*, 127 HARV. L. REV. F. 351 (2013-2014); Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM.A L. REV. 1953, 2001 (2018).

52. *See supra* note 27 and accompanying text.

53. Kendrick, *supra* note 40, at 1777.

54. Thomas Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV.



In the system, the role of the right to know is to oversee the operation of the regulators—state and some intermediaries that carry out regulatory functions—and act as a corrective measure for the system.[55] This systematic perspective prompts us to move beyond the narrow notion of formal liberty to a synthesis of the formal and the substantive. In interpreting and implementing the constitution, all the subjects, including the regulators, the regulatees and third parties, should be taken into consideration. The constitutionality of a law or an administrative regulation is not judged only by determining on whether it is formally neutral, but on whether it substantively protects the rights of every subject in the system, and whether it has struck a legitimate and reasonable balance between their respective interests. Likewise, the promotion of freedom of speech should be based on the influence on the whole system, rather than the interests of one or several parties. A holistic mode of thinking is necessary in administrative decision-making, judicial adjudication, and legislative deliberation. The costs and benefits of the whole free speech system must be taken into account.

IV. HOW: INSTITUTIONAL DESIGN

A. Current Approaches

Though scholars have debated the relationship between the right to know and the freedom of speech, the constitutions and judicial practices of many countries have acknowledged that the right to know

519, 520 (1979).

55. Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L. Q. 1, 8 (1976) ("A major current problem in maintaining our system of freedom of expression is that various economic and technical factors tend to distort the system. Like most laissez-faire arrangements, the free market of ideas does not work perfectly. Consequently, it is necessary for the government to step in at times in order to regulate or expand the system. Such action is frequently taken in the name of the right to know.")

is an important part of the freedom of speech.[56] First, in international treaties and conventions, the two rights are generally contained in one clause, and their close ties are clearly stipulated.[57] Article 19 of the *Universal Declaration of Human Rights* states "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[58] Article 19 of the *International Covenant on Civil and Political Rights* states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[59] Similarly, Article 10 of the *European Convention on Human Rights* states "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[60]

Second, many constitutions of various nations include both the freedom of speech (or freedom of expression) and the right to know (or freedom of information). The majority of these constitutions put the two rights in one single article, and some even state that the freedom of speech encompasses the right to know. This approach corresponds with my argument in this Article. There are at least forty-three countries that have adopted this approach.[61] Thirteen countries

56. Tim Chi Hang Yu, *Constitutionality of the Code on Access to Information*, 43 HONG KONG L. J. 189, 192 (2013) ("While there may be differing views on the validity of incorporating the right of access to information into the right to freedom of speech in the academic world, most overseas human rights jurisprudence has established that such a right is inherent and necessary for the full enjoyment of the right to freedom of expression.")

57. For a summary of the right to know in international human rights law, see Henry Perritt & Christopher Lhulier, *Information Access Rights Based on International Human Rights Law*, 45 BUFF. L. REV. 899 (1997).

58. *Universal Declaration of Human Rights*, UNITED NATIONS, https://www.un.org/en/universal-declaration-human-rights/index.html(last visited Jan. 20, 2020).

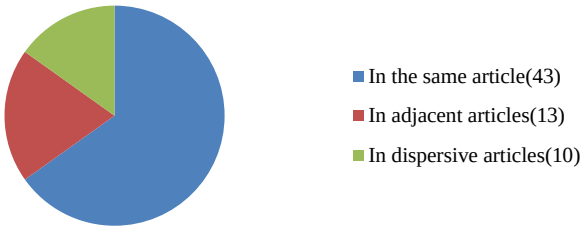
59. *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf (last visited Jan. 20, 2020).

60. European Convention on Human Rights, *available at* https://www.echr.coe.int/Documents/Convention_ENG.pdf(last visited Jan. 20, 2020).

61. Angola, Armenia, Cape Verde, Republic of Congo, Colombia, Croatia, Cyprus, Czech Republic, Dominican Republic, Ethiopia, Eritrea, Fiji, Finland, Germany, Guinea, Guinea Bissau, Hungary, Indonesia, Kazakhstan, Kenya, Kosovo, Latvia , Liberia, Lithuania, Macedonia, Mexico, Mongolia, Pakistan, Portugal, Russia, Serbia, Slovakia, Slovenia, Somalia, Sri Lanka, Spain, Sweden, Switzerland, Turkey, Turkmenistan, Ukraine, Uzbekistan, Vietnam. The statistics of this paper based on

have put freedom of speech and the right to know in adjacent articles, demonstrating that the two may be closely interrelated.[62] Ten other countries have not put the two rights in one article or adjacent articles, but in distinct places of the constitutions.[63] This preliminary survey shows that among the countries that recognized both freedom of speech and the right to know as constitutional rights, most of them realized that the latter is a constitutive part of the former, and that one central component of freedom of speech is the control of information.

Constitutions that include both the freedom of speech and the right to know



Among those constitutions which prescribe the two rights in one clause, we can classify them into three groups. The first group uses concise words to define the freedom of speech as including the right to "acquire" or "receive" information. For example, Section 12 of Finland's Constitution states that "[e]veryone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone."[64] The second group prescribes the two rights respectively in two paragraphs of the same clause, with concise language. For example, the constitution of Ukraine includes the freedom of speech and the right to know in the first and second paragraph of Article 34.[65] The third group also puts the two rights in separate paragraphs, explains extensively the meaning of them, and the scope of protection and the duty of government departments. Such a detailed stipulation can be seen in the constitution of Sweden—the first country in the world that constitutionalized the

CONSTITUTE PROJECT, https://www.constituteproject.org (last visited Apr. 26, 2019).

62. Albania, Bhutan, Belarus, Bolivia, Democratic Republic of the Congo, Côte d'Ivoire, Ecuador, Ghana, Morocco, Philippines, Romania, Venezuela, Zimbabwe.

63. Azerbaijan, Bulgaria, Egypt, Georgia, Haiti, Kyrgyzstan, Montenegro, Panama, Paraguay, Poland.

64. *Finland 1999 (rev. 2011)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Finland_2011 (last visited Jan. 20, 2020).

65. *Ukraine 1996 (rev. 2016)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Ukraine_2016 (last visited Jan. 20, 2020).

right to know.[66]

There are some national constitutions which only include the freedom of speech without touching upon the right to know. The United States is one typical case. The U.S. Supreme Court has considered the approach of interpreting the right to know as part of the free speech right, and recognized the important values served by the right to know; but it has ultimately ruled that the constitution has not granted a general and enforceable right to know.[67] Part of the reason is the enactment of the Freedom of Information Act ("FOIA") by Congress, which provides statutory protection of the right to know and diminished the necessity of constitutional protection.[68] FOIA has been accepted as a remedy to the judicial refusal to recognize the right to know.[69] But we can also argue that, as the United States' approach shows, the development of the statutory right to know and the practice of government information disclosure can sometimes thwart the development of the freedom of speech, blocking its incorporation of the right to know.

Other countries have taken a different approach than the United States. Even though the right to know is not in their constitutional texts, the courts in these countries have interpreted it as encompassed by the freedom of speech. Japan, India, France, and South Korea are typical cases of this type.[70]

Although a significant number of countries have recognized the right to know as an essential part of the freedom of speech, either through constitutional making, legislation, or judicial construction, how to design the institutions and rules to implement the right remains an issue underexplored. There are currently no agreements on the best design, and maybe there will never be, since legal and cultural backgrounds vary greatly among countries. To delve into the specific choices of different countries and to evaluate these choices go beyond the scope of this paper. My goal in the next Section is to examine the issue of institutional design in the most general sense. I will classify

66. *Sweden 1974 (rev. 2012)*, CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Sweden_2012 (last visited Jan. 20, 2020).

67. Laura Stein & Camaj Lindita, "*Freedom of Information*", in OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION, 1 May. 2019. http://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-97; Sullivan, *supra* note 4, at 14-17.

68. Sullivan, *supra* note 4, at 17-18.

69. Schauer, *supra* note 42, at 39.

70. DAVID BANISAR, PRIVACY INTERNATIONAL, FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT INFORMATION LAWS 17 (2006); KYU HO YOUM ET.AL., *Access to Government Information in South Korea: The Rise of Transparency as an Open Society Principle*, 7 J. INT'L MEDIA & ENT. L. 179, 190-91 (2017).

the issue into several sub-categories and explore the normative implications that the choice made in each sub-category will trigger. Some of my proposed answers are tentative and should be read as initiating, rather than ending, the debate.

B. Issues of Further Design

In constructing the freedom of speech as a right to know, there are at least five issues of institutional design that need to be carefully considered: (1) whether the right to know is conditional or unconditional; (2) whether the content of the right to know is merely institutional (i.e., mandating the establishment of institutions about information disclosure and sharing), or generally enforceable in ordinary lives of the general public; (3) whether the right to know is negative or positive; (4) whether the scope of information for disclosure is limited to public or general information; and (5) who can claim such rights and have legal standing to challenge violations of these rights.[71]

Questions 1 and 2 are relatively easy to answer. Even though there are some who advocated an absolutist approach to the freedom of speech, most have agreed that freedom is not without limits. Even the absolutists, like Justice Black, have retreated from their position and upheld some restrictions on free speech. The right to know is similarly not without limits. It is conditional in the sense that, positively, it should have a link with participation in public debates, and negatively, it should not interfere inappropriately with the whole structure of speech and the legitimate rights of others. As for question 2, the key is whether it is practicable and sufficient for some institutions to implement the right to know. Of course, we can set up some institutions, such as an office inside the government to oversee and conduct the obligation of information disclosure, without granting the right of requesting information to individual citizens. But such approach misses the central part of the normative underpinnings of the right to know—to empower the individuals against public authorities and to ensure their capabilities of democratic participation. Without using it as a direct shield and sword, the right to know would lose much of its force. Hence, the freedom of speech as a right to know is a conditional and generally enforceable right that can be used in daily lives.

Questions 3 and 4 can be discussed simultaneously, since the degree

71. Jeffrey J. Maciejewski & David T. Ozar, *Natural Law and the Right to Know in a Democracy*, 20 J. MASS MEDIA ETHICS, 121, 126-27 (2005).

and scope of protection are interrelated. As for the degree, the weaker case is the negative protection of non-interference—the government cannot impose illegitimate prohibition or limitation on information that has already been disclosed in the public sphere. The stronger case is for the positive protection—the government (or other entities) should disclose and provide (upon request or voluntarily) the information to the marketplace.[72] They correspond respectively to the negative and positive notions of free speech. As for the scope, we can also make a dichotomy. The narrow case is based on the narrowly defined notion of democracy: it delimits the information disclosure that is required by the right to know as those directly relevant to the democratic participation, such as the information about the administration of government agencies and the conduct of government officials. This narrow concept of the democracy theory of free speech was advocated by Bork.[73] The broad case, which is based on the democracy theory advocated by Meiklejohn,[74] requires that all information related to democratic governance, or all information that has public importance,[75] should be disclosed under the mandate of the freedom of speech. For the narrow case, only the government is the subject of duty. For the broad case, however, some corporations (intermediaries) may also be required for disclosure—as long as the information they possess concerns public interest.

We can combine the two dichotomies as follows:

Scope / Degree	Negative (non-interference)	Positive (duty of disclosure)
Narrow (government)	A	B
Broad (government +	C	D

72. Anthony Lewis, *supra* note 4, at 6-15 (1980) (describing the cases decided by the U.S. courts); Sullivan, *supra* note 4, at 72 (summarizing three occasions of the right to know: the former two belong to negative duties while the last one belongs to positive duties.)

73. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 35 (1971).

74. J. Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 633 (1968); Meiklejohn, *supra* note 13.

75. Gotkin v. Miller, 379 F. Supp. 859, 863 (E.D.N.Y. 1974). To be sure, it is not easy to judge whether a piece of information carries public importance or public interest. Media coverage is not a good standard, since it will grant the media authority of determining whether the speech of their own is protected, and the media tends to cover entertainment and sensational topics rather than serious ones. *See* Wright, *supra* note 74, at 632; For a general account on how to distinguish public speech from private speech, see Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure*, 53 DUKE L.J. 967, 1000-1013 (2003).

corporations)		

Four possible approaches appear in the above table, marked as A, B, C, and D. How should we choose? We can first exclude option A as too restrictive: government's duty of non-interference on the information directly relevant to democracy is already covered by current free speech jurisprudence. In fact, the negative liberty of political speech is at the core of the First Amendment. The newly formulated freedom will add nothing to the traditional one if we choose A.

Option D is the most powerful one, as it mandates both the government and corporations to disclose all information with public importance. Although it empowers individuals, its drawbacks are also obvious. First, a burdensome duty imposed on corporations will threaten their autonomy as market entities. Unlike the intrinsic individual autonomy that derives from the rationality of moral agents, corporate autonomy gains its rationale instrumentally from the market economy. Without sufficient autonomous space, market players will not have the motivation and capacity to co-generate a prosperous and ordered economy. Second, corporate intermediaries are not only platforms, but also important participants in the public sphere. Their participation, sometimes in the form of expressing a view directly and sometimes in the form of exercising editorial discretion, is a vital check on the power of the state. The requirement of disclosure of any information with public importance would give the government a trump card over the corporations. It may be abused to suppress some corporations for preserving the entrenched interests of the government, since "public importance" is a vague phrase and can easily be manipulated. Therefore, even if it is plausible to make the Constitution binding on the whole society, the duty of the government and the duty of the private parties should be distinguished.[76]

What remains are Options B and C. Option B imposes a positive duty on the government only, while Option C requires only a negative duty of non-interference on both the government and corporate bodies. However, we don't have to choose between a narrow, strong protection and a broad, weak protection. A combination of Options B and C is an alternative. That is, the government is both negatively required not to interfere and positively mandated to disclose public information, while

76. Balkin, *supra* note 30, at 2026 ("[I]t is generally a bad idea to hold social media spaces to the same standards as municipal governments under the First Amendment. Imposing the same First Amendment doctrines that apply to municipalities to social media companies would quickly make these spaces far less valuable to end users, if not wholly ungovernable.")

corporations only have the negative duty of non-interference.

What the right to know covers is first and foremost the government and its agencies. That is a corollary from the premises of the right: popular sovereignty and democratic participation. It also conforms to the modes of many countries' constitutions. In the constitutional text of countries like Armenia, Croatia, Cyprus, the Dominican Republic, Finland, Guinea, Lithuania, and Sri Lanka, it is explicitly stated that the right to know encompassed by the freedom of speech only touches upon the government and public institutions. Commercial information that is stored and processed by corporations is not within the scope of disclosure required by the constitution. With respect to corporations, the constitution only requires that they do not inhibit or distort the information currently in flow in the public sphere. To be sure, ordinary laws and regulations can prescribe some duties of disclosure for corporations, especially under certain specialized areas such as environmental protection, consumer protection and the securities. But then it is statutory right, not a constitutional right to know that is included in the freedom of speech.

It is evident that the combination of Option B and C is much less radical than Option D. It treats separately the government and corporations and assigns different degrees of duties to each of them. One can reasonably argue that on the internet, where the regulatory power of corporations seems to be no less than that of the government, it is arbitrary to treat them differently. It is also true that sometimes the information held by corporations is of great public importance and vital to the exercise of democratic deliberation by citizens. That urges us to rethink the plausibility of Option D and make a trade-off between the autonomy interests of corporations and the danger of their immense power.

There are two important caveats here. First, there is no power vacuum. Either the state or the commercial entities, or something else, will act as the leviathan, individually or jointly. The issue is not whether we should trust the state or the market (corporations), because neither should be trusted or distrusted unconditionally (since we have no other choices). Maybe we will have to resort to the old Madisonian idea of making them check one another. Although it may sound banal, the key is to strike a balance. Second, since the key is in the balance—and hence, the devil is in the details—we should be extremely cautious about imposing the duty of disclosure on market bodies. Even if we choose to adopt Option D, the scope and condition of disclosure by corporations should be demarcated clearly by constitutional interpretations (either through courts or through legislatures), to avoid the risk of potential abuse caused by uncertainty.

The last is question 5. The major difference between the reformulated freedom of speech as the right to know and the traditional freedom is that the new right entitles potential listeners – rather than mere speakers—to a claimed right. But it should never be read as a permission for every potential listener to request the disclosure of every piece of information that she wants to know. This would be formidable and impractical. Some threshold must be established. The central issue of controversy is whether the standing of requesting information should be limited to those with a direct interest in the information. This issue has generated hot debate in China since the regulation of government information disclosure enacted ten years ago. Chun Peng, for example, argued that the right to know should not be limited to the interested parties.[77] By contrast, Xiaojian Qin has insisted on maintaining the direct stake as a threshold, otherwise the government disclosure to the public, which is based on the logic of governance, would be confused with the government disclosure to the legislature, which based on the logic of sovereignty.[78] If we reinterpret the right to know as part of the freedom of speech, the argument of Chun Peng seems more convincing. As long as the information requested is of public importance, it is a building block of the public sphere, no matter whether the individual requesting that information is directly interested. Here, the logic of governance inherent in administrative law has been converted to the logic of sovereignty in constitutional law, through the reformulated freedom of speech. Information is not only vital for the government to sustain and improve its administrative governance, but is also indispensable to the formation of public opinion in the public sphere. It is a key element of citizens' democratic participation and deliberation. Without information, people could not be sovereigns.

After we consider the issues of institutional design, we must also bear in mind that the realization of the freedom of speech as a right to know depends on the specific practices of constitutional implementation in a country. In countries with judicial review, citizens with legal standing can file constitutional lawsuits to request the disclosure of information that falls within the scope prescribed by the constitution. In countries where the constitution has been implemented mainly through legislation, the legislatures should fulfill their constitutional duty by enacting the relevant laws to prescribe the concrete conditions and scope of the right to know.

77. CHUN PENG, *The Constitutional Logic of China's Government Information Disclosure, Wo Guo Zheng Fu Xin Xi Gong Kai Zhi Du De Xian Fa Luo Ji*, 2 FA XUE 94 (2019).

78. XIAOJIAN QIN, *The Constitutional Logic of the Government Information Disclosure, Zheng Fu Xin Xi Gong Kai De Xian Fa Luo Ji*, 3 ZHONG GUO FA XUE 25 (2016).

V. POSSIBLE CRITICISMS

The First potential criticism of the right to know is that to interpret the freedom of speech as a right to know is to constitutionalize it. This approach will change the statutory approach that was adopted in some countries, like the United States and China. Because implementing the new right is costly—at least in the sense that some institutions should be set up and some staff should be hired responsible for disclosure, not to mention the judicial costs incurred in managing new lawsuits—no small portion of public resources will be spent realizing the right. Some may argue that the redistribution of public resources is the task of the political branch—the legislature, rather than the court.[79] This argument, however, confuses constitutionalization with judicialization. Implementing the constitution is not only the duty of the judiciary. The legislature can make detailed plans and procedures in carrying out the duty of implementing the constitutional right to know, and the court's role is mainly to ensure that other branches have not breached basic constitutional requirements. While the propriety of judicial decisionmaking may be debated in information disclosure cases, courts can choose not to be entangled with the specific and highly specialized plans of public spending and administrative management; rather, courts can guard the foundational tenets from infringement.

It is important to differentiate between the constitutional right to know, which has been incorporated into the freedom of speech under my approach, and the statutory right to know, which might be prescribed by ordinary legislations in fields such as health care, consumer protection, and securities regulation. There might be some overlap between the constitutional and the statutory right to know. If the information covered by the statutory right to know carries public importance that is directly related to the public debate and democratic participation, it is also protected by the constitution. In other words, the freedom of speech as a right to know is only a subset of the broader notion of right to know.

Second, constitutionalization brings about issues of value judgment and prior restraint. If we admit that the right to know is included within the constitutional freedom of speech, we have to decide which information should be known (and disclosed) and which should not. In the process, it is inevitable to look at the content of the information, and undisclosed information may never have a chance to be heard. We may reasonably condemn that this constitutes prior restraint and value

79. Schauer, *supra* note 42, at 41.

judgment,[80] and the decision we made is content-based, which is highly problematic under the value neutrality principle of the freedom of speech. It seems contradictory that an alleged stronger freedom of speech contradicts with the basic spirit of free speech. But the prior restraint here is not the same as the prior restraint we fear traditionally. In the traditional scenario, there is a speaker who wants to express—she has a desire to disclose certain information, and the regulator predetermines the value and risk of that information and makes the decision of prohibiting the disclosure. Here, the conflict of values lies between freedom of speech on the one hand, and social welfare, such as security and order, on the other. The central meaning of free speech is that we cannot sacrifice it for more welfare, otherwise it would not be different with a general sense of liberty: in other words, it is a trump.[81] Free speech must enjoy priority and, in this sense, prior restraint is impermissible. But in the scenario of the right to know, by contrast, we have an unwilling speaker who does not wish to disclose the information and a potential listener who requests the information because of its public importance. Here, unlike the traditional scenario of prior restraint, the conflict of values lies between freedom of speech as a right to know and freedom of speech as a right not to know, or a right to keep silent.[82] When two rights of the same kind or two rights in the same level of priority happen to clash, we cannot rule that one of them automatically wins, but need to make a choice of balance in concrete cases. Thus, in circumstances where we rule that some information is not required to be disclosed, we ruled in favor of the autonomous right of free speech of the information-bearer, rather than suppress the autonomous right to speak of a willing speaker, like that in the traditional scenario. So the judgment in the right to know case is not the same prior restraint that we abhor.

As for the issue of value judgment, t is unavoidable in free speech jurisprudence, even though sometimes we do not wish to admit it. An absolute stance of value neutrality is not possible,[83] and maybe not preferable either. The decision of which kinds of speech are protected

80. James C. Goodale, *Legal Pitfalls in the Right to Know*, 1976 WASH. U. L. Q. 29, 32-34 (1976); David M. O'Brien, *Reassessing the First Amendment and the Public's Right to Know in Constitutional Adjudication*, 26 VILL. L. REV. 1, 7 (1981) ("First, the right to know inevitably leads to judicial determinations of what the public does and does not have a right to know, and thus invites restrictions on freedom of speech and press in the form of prior restraints. Moreover, judicial creation and construction of the contours of a directly enforceable right to know usurp congressional power to determine the wisdom, need, and propriety of public and press access to government information and facilities.")

81. For the description of rights as trumps over general public interests and welfare, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Jamal Greene, *Forward: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018).

82. It is obvious that the freedom of speech includes the freedom not to speak.

83. *See* LARRY ALEXANDER, IS THERE A RIGHT TO FREEDOM OF EXPRESSION? (2005).

and which are not is a value judgment; the decision of which kinds of speech receive a higher level of protection and which enjoy only limited protection (for example, arguably, commercial speech, pornography, and true threats) is a value judgment too. If we stick to the creed of value neutrality unconditionally, the doctrine of free speech will collapse. Actually, as scholars have pointed out, the idea of neutrality itself is not neutral: it is a liberal value and embedded in a particular tradition.[84] The argument of prior restraint and value judgment should not, therefore, be sufficient to deny the freedom of speech as a right to know. However, in practice, the judgment of which information is required to be disclosed and who is entitled to request disclosure can cause tremendous controversies. What we can do is improve our institutional design. On the one hand, every value judgment should conform to the constitutional values of democracy, equality, and human dignity. On the other hand, the standard and procedure of making judgments should be fair, transparent, and reviewable.

Third, as previously illustrated, the right to know is listener-based, and it tries to reconcile the listener's interest with the speaker's. Such effort of reconciliation is not always easy. Here, I list some possible scenarios of interest conflict that might appear in practice. In scenario A, a potential listener or a group of potential listeners wants to hear, but the information possessor does not want to speak and refuses to disclose the information. This is the standard case. The test would be to determine whether the information carries public importance and whether the possessor is constitutionally obliged under the right to know. Scenario B is a little more complicated. Sometimes one potential listener wants to know a certain piece of information, while another potential listener does not want the information to be disclosed, or asserts that the disclosure is harmful to her.[85] Moreover, the possessor of the information may not manage to disclose it within a limited scope or in a case-by-case manner (because, for example, it will be too costly to do so). It is not rare that the government may disclose some information that may be alleged by some individuals as private or by some corporations as business secrets. Here, the right to know of some potential listeners may clash with the autonomy rights of other potential listeners.

Even more complicated is scenario C, where some potential listeners do not want to know, but it might be beneficial for them to know. In other words, involuntary exposure to some information is

84. *See* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO, 102-138 (1994).

85. Kendrick, *supra* note 40, at 1798-1802.

not always illegitimate.[86] Such unwanted exposure may "force" the citizens to hear and review different viewpoints, cultivating the virtue of tolerance and the capacity of argumentation, which are salutary to the democratic self-government.[87] The problem is how to judge when such exposure is necessary and not unduly oppressive? Who judges? And how do we respond to the challenges of the encroachment of autonomy and the risk of paternalism? These are thorny issues that await further research. Some traditional debates might shed light on these issues, one of which is the captive audience problem that has been discussed under the public forum doctrine in the United States.[88] Even though the doctrinal landscape there is also messy. Caroline Corbin has identified "three prerequisites for a claim that mandated listening enhances autonomy: the message must be factual, secular, and autonomy-enhancing."[89] However, the precise meaning of the first two conditions are vague, and the reasoning of the last one is circular.

A Fourth criticism is the tension between democracy and autonomy, which can be observed in the three scenarios of the preceding two paragraphs. The duty of disclosure raises a question of compelled speech: the right to know of the listener clashes with the right to remain silent of the unwilling speaker. What the previous analysis missed is the tension between democracy and autonomy.[90] The right to know serves the value of democracy, while the compelled disclosure (speech) threatens the value of autonomy. Limiting the subject of disclosure to the government cannot solve this problem, because the government keeps plenty of information on individual citizens. Disclosing this information, which citizens do not necessarily want to disclose, is another way of compelling them to speak—the government here plays the role of a mouthpiece.

The argument from autonomy alone cannot be a sufficient argument for refuting a law, since "[l]aws generally limit autonomy, at least in the sense that they prevent people from doing what they would otherwise choose to do."[91] In some sense, law can be defined as necessary compromises of autonomy for the sake of public life. Second, freedom of speech is itself a complex idea, full of tensions,

86. Scanlon, *supra* note 54, at 524.

87. Sunstein, *supra* note 33.

88. For a general account, see Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233 (1974).

89. Caroline Mala Corbin, *The First Amendment Right against Compelled Listening*, 89 B.U. L. REV. 939, 992 (2009).

90. Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces*, 104 YALE L.J. 1639, 1644 (1995).

91. Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 151 (2006).

contradictions, and ironies. On the one hand, freedom of speech entails a right to know: more speech and more information is encouraged, for the value of democracy. On the other hand, freedom of speech entails the right not to speak, which results in less speech and less information, and serves the value of autonomy and privacy. Whether it is more desirable to have a world with more speech or less speech, or, put another way, whether people should be encouraged to go back to the private sphere and become individuals, or it is better for them to go out to the public sphere and become citizens, is not a simple question that calls for a definite answer. This is a judgment that we should make in concrete contexts, bearing all the values and contingencies in mind. To be sure, the freedom of speech as a right to know cannot provide us a definite answer here. It is a fundamental right that serves multiple values, and it may give way to other values in concrete cases. The inevitable conflict of values is not a reason to deny a right that entails such conflict. In addition, we may be comforted by the fact that what the right to know requires of the government and corporations is the disclosure of factual information, rather than opinions. Compared to opinions, facts contain less autonomy values. The compelled disclosure of facts has a limited harm on autonomy because it will not change or suppress the beliefs of individuals, and the danger of the distortion effect is much lower.[92]

Fifth, as the common normative basis of and the link between freedom of speech and right to know, democracy is itself a controversial notion.[93] What is democracy? What does democracy require? What does democracy disdain? These are questions with no definite answers. The democratic values of freedom of speech can be used by opposing parties in a dispute due to the uncertainty, flexibility, and manipulability of the idea of democracy.[94] For example, in *Citizens United v. Federal Election Commission*, those who support the regulations on campaign finance and those who oppose both ground their positions in a different understanding of democracy.[95] With regard to the topic of this Article, some may argue that the basis of freedom of speech and right to know is deliberative democracy or a republican version of democracy. This version may be incompatible

92. Caroline M. Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291-98 (2014).

93. *See* Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 277 (1996) ("Tying constitutional rights to 'democracy' would be problematic in any context. It requires some shared understanding of the term 'democracy' to ensure stable and consistent definition and application of constitutional guarantees. Yet, as a vast literature has demonstrated, there is little consensus worldwide on what constitutes 'democracy.'")

94. *See* David A. J. Richards, *Constitutional Legitimacy, the Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779 (1999).

95. Citizens United v. FEC, 558 U.S. 310 (2010).

with the representative democracy in the modern world.[96] The reason is, compared to the republican democracy where citizens participate in the decision-making of public affairs in a positive and normal basis, representative democracy organizes periodical elections to make the government responsible. With respect to the details of the governance and daily public affairs, the individual citizens are not required or even not encouraged to get involved.[97] In modern times, the general public does not have the leisure to participate in politics, and it may not be an affordable job for them, since politics nowadays is a highly specialized profession requiring special training. A deliberative and republican version of democracy, though appealing at first look, does not fit into reality. After all, the ideal type of Meiklejohn's democracy theory is the town meetings in pre-modern America,[98] not the parliament of modern states.

This argument is not without merit. The right to know aims to facilitate deliberation and discussion in the public sphere. But the republican version (deliberation) and the representative version of democracy (voting) are not incompatible. Rather, they are mutually supplementary and mutually supportive. Without a robust freedom of speech and a right to know about the information of what and how our representatives have done, we cannot make a fully rational choice in casting our vote. That is Meiklejohn's argument. What's more, the right to know is an important check on the government (and other entities that carry out public functions). Even though people are economic rather than political animals in modern times, they should be left with an option of participating in politics—when they want. While this might not always be the case, they must be entitled to that option. The question is not what will citizens actually do, but whether they have such a choice, or capability, to decide what to do. In addition, participation is far broader than dealing with affairs concerning the government. Politics is another word of public life, and there are many institutions that constitute our public life—schools, workplaces, churches, and civil associations of all kinds. Participation and deliberation in these spaces also contribute to the formation of the public opinion and the construction of the public sphere.[99] So the idea

96. *See* Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273 (1971); Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 503-06 (1980); Edward H. Levi, *Confidentiality and Democratic Government*, 30 REC. ASS'N B. CITY N.Y. 323, 326 (1975).

97. Sullivan, *supra* note 4, at 59.

98. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, 24-26 (1965); *see also* Patrick Birkinshaw, *Freedom of Information and Openness: Fundamental Human Rights*, 58 ADMIN. L. REV. 177, 191 (2006).

99. *See* Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive*

that the only way for citizens in modern democracies to participate in politics is voting seems to be too narrow, for it ignores the plurality of the public sphere. In this sense, the freedom of speech as a right to know, by facilitating the participation and deliberation through various channels, supplements and supports the representative democracy—it does not contradict with our idea and practice of democracy, but actually enlivens it.

VI. CONCLUSION

In the landmark case *New York Times v. Sullivan*, Justice Brennan famously remarked that "debate on public issues should be uninhibited, robust, and wide-open"[100]. Arguably, "uninhibited" refers to non-interference by government (and commercial entities) and "wide-open" can be achieved by guaranteeing access to channels of expression. These two elements have been surveyed extensively by commentators. However, the objective of the public debate being "robust" remains elusive and underexplored. To delve into it deeply requires a thorough examination of the normative values of free speech, which goes beyond the scope of this Article. What this Article contributes to the literature is that by highlighting the central importance of information, a fuller picture of free speech, as a normative tenet of modern constitutionalism, would emerge. Information serves as both the epistemic and democratic foundations of free speech: without the acquisition, possession, and processing of information, collective pursuit of knowledge and participatory deliberation of public policy would not be possible. To know is logically and practically anterior to discussion, debate, and deliberation. In this sense, freedom of speech can be reformulated as right to know, since it encompasses and also enlarges the meaning of the former. Freedom of speech as a right to know also carries important practical implications: it strikes a better balance between speakers and listeners, underscores the positive side of the freedom, and offers new perspectives in approaching the issues of professional speech and commercial speech. To fully actualize the freedom of speech as a right to know, both theoretical and doctrinal elaborations are needed. In particular, issues of institutional design, such as the scope, strength, and content of this "new" right, should be elaborated. Discussions of them, though, shall await another occasion

Theory of Language Rights in the United States, 36 HARV. C.R.-C.L. L. REV. 133, 135 (2001) ("Rather than thinking of political community in terms of a national conversation, we should understand it as a set of diversified and diffuse interactions that can occur in communities of all kinds through a variety of media.")

[100] New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

of future research.