

Free Speech Capability

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ABSTRACT

Free speech has become incompetent, obsolete, and weaponized. This regrettable situation is due partly to the weakness of theories. Existing theories of free speech have failed to provide adequate justification and appropriate guidance for this fundamental liberty because they are flawed in three aspects. First, the existing theories are based on the rights discourse, defining freedom of speech mainly as a negative and formal right. But this conception does not recognize the vulnerability of individuals nor the huge gap between formal guarantee and actual enjoyment. Second, they have built upon the traditional mode of communication in which the state is the only regulator. This mode, however, is unable to accommodate the new power dynamics on the internet where private digital platforms exert tremendous power over online expression. Third, each major theory has justified free speech upon a single value and struggled between substantive and procedural accounts of the value. The inability to identify the exact relationship between free speech and human values renders those theories parochial, vague, and incoherent.

To address these problems, a new theory is needed. This Article argues that the capabilities approach (“CA”) proposed by Amartya Sen and Martha Nussbaum can be used to construct a new theory of free speech. The new theory reformulates the formal and negative right of free speech as a capability—the actual capacity and power to engage in individual and collective lives through dialogic means. Unlike the justifications provided by the traditional theories, free speech capability offers a new justification that is based upon the two functions it serves for the human capabilities lists: instrumental and constitutive. On the one hand, free speech capability facilitates the development of other capabilities through its role in shaping public opinion and mobilizing collective action. On the other hand, the exercise of free speech capability defines the contents of both the individual and the collective capabilities list. By linking individual value-formation with collective value-formation, free speech capability constitutes the two processes simultaneously.

Reframing free speech as a central capability has both theoretical and practical implications. Theoretically, the new theory can overcome the three shortcomings of existing theories because it transforms free speech from a formal right to the actual capacity of achieving beings and doings, from a negative limit on the state to a perfectionist norm of the whole community, and from a freedom oriented towards a single value to a relational book linking the whole human value system. Practically, it can be used as a guide to constitution making, constitutional interpretation, legislation, and private rulemaking.

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INTRODUCTION

Free speech is in peril. As a fundamental liberty that is universally endorsed by the world's constitutions, it is becoming *incompetent*, *obsolete*, and *weaponized*.

The burgeoning of fake news, the widening of social divisions, and the growing salience of violence instead of dialogue amid conflicts have thrown into doubt the capacity of public discussion to generate consensus and bridge cleavages.¹ Various surveys indicate that both Americans² and Europeans³ have experienced a decline of trust in online speech and media environments, and expressive freedom online has been in continuous recession for several years.⁴ At the same time, the emergence of private platforms or intermediaries poses new challenges to freedom of speech online.⁵ These private regulators are unimaginable for traditional conceptions of free speech, which focus almost exclusively on the relationship between the state and individuals.⁶ This is troublesome, for the very reason we put freedom of speech into constitutions is to take it away from the swinging will of elected representatives and officials. But now, ironically, we have placed such a treasured liberty into the hands of private internet platforms, which are less accountable and more invisible than the government.⁷ What is worse, free speech in recent years has been weaponized⁸ and Lochnerized⁹ as a tool to attack political opponents and entrench the current distribution of interests. In an age of populism and polarization,

1. One example of the resort to violence rather than dialogue is the tragic incident of Jan. 6, 2021. For the introduction of the event, see Brian Duignan, *January 6 U.S. Capitol Attack*, BRITANNICA (Feb. 7, 2024) <https://www.britannica.com/event/January-6-U-S-Capitol-attack> [https://perma.cc/9FD3-HN46].

2. See The Editorial Board, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html> [https://perma.cc/7MFG-6DEZ].

3. See *Trust in institutions continues to fall in EU, despite declining unemployment and phasing out of pandemic restrictions*, EUROFOUND (July 7, 2022), <https://www.eurofound.europa.eu/en/news/2022/trust-institutions-continues-fall-eu-despite-declining-unemployment-and-phasing-out> [https://perma.cc/5DME-CLC7].

4. See Adrian Shahbaz, Allie Funk & Kian Vesteinsson, *Freedom on the Net 2022*, FREEDOM HOUSE, at 3 (Oct. 2022), <https://freedomhouse.org/report/freedom-net/2022/countering-authoritarian-overhaul-internet>.

5. See generally Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006); Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1151 (2018).

6. Even though some European countries such as Germany have recognized the horizontal effect or “third party” effect of fundamental rights, such effect is still functioning under the shadow of the state, since its basis is derived from private law that is applicable to private parties, and private law is itself supported and enforced by the state power. See Stephen Gardbaum, *The Horizontal Effect of Constitutional Rights*, 102 MICH. L. REV. 387, 403 (2003).

7. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2296 (2014); Balkin, *supra* note 5, at 1167; Kreimer, *supra* note 5, at 27–33.

8. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting); see generally Catharine MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA L. REV. 1223 (2020).

9. “Lochnerized” is a word that scholars generally used to criticize jurisprudence that has made similar mistakes as the U.S. decision *Lochner v. New York*, 198 U.S. 45 (1905). Though its exact meaning is debated, it generally refers to the practice of treating rights as formally protected, without considering background socioeconomic conditions. See generally Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020).

free speech has been widely used as an instrument to consolidate the wall that separates “us” and “them.”

The weakness, obsolescence, and weaponization of free speech are due at least partly to the failure of free speech theories. Current theories of free speech, highly influenced by the libertarian tradition, have taken the freedom to express mainly as a negative liberty and assume that individuals are fully capable of exercising this freedom if only the state does not interfere. Such a formalistic understanding of free speech ignores the complex socio-economic conditions in which it is located.¹⁰ Born in an era when the state was the only regulator of speech, the channel of expression was severely limited and open only to a few, and there were gatekeepers responsible for hosting public discussions, traditional theories are experiencing an uneasy fit with the new age. The failure of existing theories to adapt to new realities explains, at least partly, the U.S. courts’ diminishing reliance on theories and values in deciding free speech cases and also the diminishing clarity of those values in the judgments, for they have become unable to justify the protection of free speech.¹¹ As a result, free speech jurisprudence is now less principled and more manipulable for political purposes. When free speech has been deprived of theoretical robustness and doctrinal clarity, and is frequently being used as an ideological weapon, it is not surprising that skepticism and cynicism toward it would ensue.

Before delving into the flaws of theories, we may wonder why theories are needed in the area of free speech. First, in this field, the constitutional text, history, original intent, precedent, underlying purpose, and spirit are vague, complex, and even inconsistent. The uncertainty, complexity, and instability thus created are reasons why we need guidance from theories.¹² Second, free speech inevitably clashes with other rights or interests that we hold dear, such as security, privacy, and dignity. When value collisions appear, theories can help balance them in a consistent, rather than arbitrary, manner. Third, theory provides us with a groundwork for constitutional discourse upon which we can engage with each other. Without theories, two parties of a dispute would lack the standard of measuring which arguments are good and which are bad.¹³

We are not without theories. Quite the contrary: free speech theories are abundant in the literature. There are three major theories of free speech: the

10. Lakier, *supra* note 9, 1245–7, 1332.

11. See R. George Wright, *Freedom of Speech as a Cultural Holdover*, 40 PACE L. REV. 235, 240–41, 249 (2019).

12. See Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 447 (2019) (footnote omitted) (“[d]octrinal questions like whether, why, and to what extent the First Amendment protects artistic expression, commercial speech, or professional speech are hard to answer based purely on constitutional text, history, or sometimes even precedent. They depend, in important ways, on normative suppositions about the value of free speech.”).

13. See Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice and Vice Versa*, 6 CONST. COMMENT. 231, 241 (1989) (footnote omitted) (“A constitutional theory is an argument for or against a particular interpretive style of constitutional discourse that has been put in question...It aims to justify or revise a particular style of constitutional discourse.”); see also Thomas E. Baker, *Constitutional Theory in a Nutshell*, 13 WM. & MARY BILL RTS. J. 57, 122 (2004) (arguing that the chief function of constitutional theories is to help us differentiate between good arguments and bad arguments).

theory of truth, which justifies free speech upon its facilitative role of pursuing truth,¹⁴ the theory of democracy, which justifies free speech upon its connection with democratic decision-making and legitimacy,¹⁵ and the theory of autonomy, which explicates the special role of free speech in promoting individual autonomy and self-realization.¹⁶ These existing theories of free speech, however, share three flaws that render them incapable of justifying, guiding, and evaluating this fundamental liberty.

First, existing theories are based on the rights discourse, framing the freedom of speech mainly as a negative and formal right. However, the formal guarantee is far from actual enjoyment, and such a gap is further widened by new technological and social contexts. Truth cannot emerge automatically in the marketplace of ideas; likewise, “uninhibited, robust, and wide-open”¹⁷ public discussion cannot appear by itself, much less consensus for collective governance. If we agree that free speech is not protected for speech’s own sake, but for the external values it facilitates, we should step out of the traditional rights discourse and think of the actual conditions for its meaningful exercise and the realization of those values.¹⁸

Second, current theories cannot respond adequately to the challenges posed by the internet. As mentioned earlier, the private moderation of speech by on-line platforms makes the traditional paradigm of bipolar regulation obsolete.¹⁹ The new power dynamics generated by private intermediaries are beyond the expectation of traditional theories. The huge power vacuum untouched by these theories and the corresponding doctrines of jurisprudence has left much, if not most, of our expressive and dialogic conduct uncovered by the constitutional protection. They are at best at the mercy of the private intermediaries’ self-regulatory decisions, subject to competing considerations such as the companies’ commercial interests, public images, and expressive interests, without any principled limitations from the constitution.²⁰

Third, current theories have justified free speech upon a single value and struggled between the substantive and procedural role of free speech in promoting the value. Each theory has two versions. One centers upon the substantive outcome of free speech and the other stresses the importance of process.

14. See generally JOHN STEWART MILL, ON LIBERTY (Glasgow: Collins, 1979) (1859); *Abrams v. United States*, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1 (1995); Blocher, *supra* note 12.

15. See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (New York: Harper & Brothers Publishers) (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011); Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053 (2016).

16. See generally EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1992); Martin Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Seana Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

17. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

18. See *infra* Part I.A.

19. Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2013–14 (2018).

20. See *infra* Part I.B.

The upshot of such parochial accounts is that free speech theories are not only too narrow to cover all the reasons that we afford special protection to this liberty but also too inconsistent internally because they cannot reconcile the sometimes-conflicting aspects of the substantive and the procedural. The value parochialism of these theories reflects their inability to build free speech upon the human value system.²¹

Part I of this Article will examine the three flaws in more detail. As will be shown, these flaws persist because, on the one hand, the current theories are predicated on old models and paradigms of communication, unable to adjust to the new scenarios on the internet. On the other hand, as liberal theories, they have relied on questionable assumptions about individuality, rationality, and the rigid distinction between private and public spheres. The complex and plural world in our days, however, has rendered these theoretical grounds not only outdated, but also absurd.²²

The only way to cure the “ills that beset contemporary free speech law” is to reformulate free speech as a positive liberty.²³ This is of course not a tweak to the existing rules, structures, and modes of thinking, but a reconstructive effort that must be supported by theoretical underpinnings.²⁴ Without justification and guidance from theory, we would still divide on issues like whether free speech binds only the state or also the social, whether the underlying value of free speech is substantive or procedural, and whether such freedom covers only the behavior of expression or the necessary conditions and resources for its exercise as well. Only by rethinking the exact rationale of protecting free speech and relocating its role in the constitutional system can we build a firm theoretical basis for it and guide its practice accordingly.

Therefore, we need a new theory—a theory that accounts for the triangular power relationship on the internet, provides an accurate and systematic justification of free speech that combines the substantive with the procedural, and supplements the formalistic rights-based approach with a realistic perspective. Coherent and practical guidance from a new theory is essential to fostering robust protection of free speech and a vivid public sphere. In the rest of this Article, I will argue that the Capabilities Approach (“CA”) proposed by Amartya Sen, Martha Nussbaum, and others can be borrowed in constructing a new free speech theory that meets these challenges. CA was presented precisely as a response to the shortcomings of the rights-based approach; it can also overcome

21. See *infra* Part I.C.

22. See Moran Yemini, *Missing in “State Action”: Toward a Pluralist Conception of the First Amendment*, 23 LEWIS & CLARK L. REV. 1149, 1171–72 (2020) (arguing that the private-public distinction is hard to maintain strictly, especially in the internet era); Toni Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631, 1646 (2021) (“Meaningful counterspeech thus may not be a realistic option for those without the resources or expertise to confront well-aimed lies with rebuttals of equal volume, speed, and listener-targeted precision.”).

23. Lakier, *supra* note 9, at 1248.

24. Cf. Massaro & Norton, *supra* note 22, at 1652–55 (arguing for tweaks or incremental changes to the existing theory and doctrine of free speech, out of the respect for doctrinal stability and the dim likelihood of substantial change).

the other two difficulties and serve as a general theory of free speech. Inspired by CA, the new theory reframed the right of free speech as free speech capability. Instead of being a formal negative right, it is the actual capacity and power of individuals to engage in the promotion and definition of both individual and collective values in an expressive and dialogic manner. This new theory anchored free speech capability upon the holistic system of human values and emphasized individuals' vulnerabilities and the actual conditions needed to empower them in exercising this capability. It is thus more systematic, realistic, and powerful than traditional theories. Reformulating free speech right as free speech capability, as will be argued later, can provide better justification, guidance, and evaluation for practice in this field.

To argue for such reconceptualization, the Article first introduces the capabilities approach and its inherent relevance to free speech in Part II. This offers background for knowing the key features of this new approach. Parts III to V illustrate why CA can help reformulate free speech. A new theory of free speech needs to answer two questions: why we need to protect free speech and how free speech should be protected. In this sense, the theory of free speech capability must provide a new justification for free speech, as well as guidance on how to approach such freedom in practice. Part III offers justification of why free speech should be protected. Unlike traditional theories, the new justification is not based on any single value, such as truth-seeking or democracy, but upon the relationship between free speech and the whole value system (capabilities list) of humans. On one hand, it facilitates the development of other capabilities through its role in shaping public opinion and mobilizing public action. On the other hand, it defines the contents of other capabilities that individuals and collectives have. By linking the two lists, free speech capability constitutes them both.

Such a justification of free speech has both theoretical and practical implications. Theoretically, as argued by Part IV, the new theory can overcome the three shortcomings of existing free speech theories because it transforms free speech from a negative limit on the state to a perfectionist norm of the political community, from a single value-oriented freedom to a relational hook that links the whole human value system, and from formal right to actual capacity of doing and being. Practically, as shown in Part V, the theory of free speech capability can be used as a guide in various contexts, such as constitution making, constitutional interpretation, legislation, and private rulemaking.

I. WHY A NEW THEORY?

The undesirable status of free speech in our time may have multiple and complicated causes. We may reasonably argue, for example, that the growing polarization of politics and the dysfunction of free speech are two factors that mutually facilitate each other. One important cause, this Part argues, is the outdatedness and incompetence of free speech theories. As a highly normative right that deeply reflects cultural commitments and values, as well as a

highly abstract right that can hardly be aided by the constitutional text for its interpretation, free speech desperately needs theoretical support to guide its explication and application in real contexts. Without adequate support from theories, as illustrated below, such freedom would not only become detached from reality but also lose much of its normative appeal, in both intellectual and political life.

A. *Limits of the Rights Approach*

The first shortcoming of the existing theories of free speech derives from their liberal roots. Defined as a first-generation right,²⁵ freedom of speech means primarily a negative freedom from interference by the state. But such negativity and thinness cannot fit with the value-oriented feature of free speech. If we do not want to protect speech for speech's own sake and collapse this freedom into general liberty, then there must be some external value(s) upon which free speech can be justified. And if free speech is in this sense value-oriented, then the bare act of speaking or expressing is far from adequate. Rather, individuals must be able to speak effectively and meaningfully to realize the external values, and this requires a myriad of conditions other than mere expression. In other words, there exists a huge gap between potentiality and actuality: the freedom to enjoy something is not equal to the actual enjoyment of something.²⁶ That is what the first-generation right misses.²⁷ The liberal tradition underlying freedom of speech assumes that individuals are capable, rational, and self-supportive—that they can engage in meaningful dialogues with others by their own capabilities and resources. This is simply wrong because free speech cannot be separated from its surrounding circumstances and conditions. Freedom is not free, and all freedoms, be they negative or positive, require social and economic resources to be actualized.²⁸

The emergence of the internet has underlined the absurdity of such a myth. Traditional theories were born in an era when the mode of communication was few to few (e.g., mailing, streets, parks) or few to many (e.g., newspapers,

25. First-generation rights are civil and political rights, as compared to second-generation rights, which are socio-economic rights. See D. M. Davis, *Socio-Economic Rights*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1020, 1022 (Michel Rosenfeld & Andras Sajó eds., 2012).

26. See generally AMARTYA SEN, *THE IDEA OF JUSTICE* (2009); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

27. See Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: Perception against Lofty Formalism*, 121 *HARV. L. REV.* 4, 21 (2007) (“The idea of negative rights, however, is confused and confusing. All rights and liberties are liberties to do something (they are positive), and they all require something negative as well”); See also Martha C. Nussbaum, *Human Rights and Human Capabilities*, 20 *HARV. HUM. RTS. J.* 21, 21 (2007) (“Producing capabilities requires material and institutional support, and the approach thus takes issue with the facile distinction of rights as ‘first-generation’ (political and civil) and ‘second-generation’ (economic and social). All rights, understood as entitlements to capabilities, have material and social preconditions, and all require government action.”).

28. See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 *Geo. L. J.* 257, 258 (1985) (“There is no such thing as a free speech. All communication, like its absence, entails costs for both speakers and listeners.”); see also Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 *U. COLO. L. REV.* 935, 949 (1993) (arguing that apart from material resources, other factors like reputation and persuasive force can also affect the practical effect of speech).

broadcasting, television).²⁹ At that time, information was scarce, and the cost of distributing information was high. The typical scenario of free speech in the pre-internet era was a few lonely speakers expressing themselves under the pressure of state suppression or punishment; and only a few listeners on site are at stake. In such a scenario, guaranteeing people a chance to speak, as traditional free speech jurisprudence aims to achieve, is a significant advancement to their freedom. All traditional theories aim to protect those lonely speakers—pamphleteers in the parks, protesters in the streets, or journalists in the press—from the undue regulation of the state, which is often assumed to be vicious and evil.³⁰

In the information age, however, the threshold and cost of expression have been reduced dramatically, so that nearly everyone is a potential speaker—the communication mode now is many to many.³¹ What is more, information explosion makes speech not the scarce resource anymore. Attention is.³² In this context, simply giving everyone a chance to speak is far from enough. On the one hand, this goal has been mostly achieved by technological development. On the other hand, there is a larger distance between mere chances of expression and the ability of expression to be meaningful and effective (to realize the external values), considering that the internet not only brings reduced costs of expression, but also fake news, information manipulation, and an echo chamber effect.³³ We should not simply presume that individuals are rational and capable enough to engage in public discussion effectively on their own.

In every age, technologies create new affordances and possibilities for the realization of human freedoms. What the law should do is adapt to and make use of those changes in new circumstances. The rights discourse, however, naively assumes that rights exist in a vacuum and fails to recognize that there are huge gaps between the granting of a formal right and the actual enjoyment of that right. The result of such a formalistic understanding of free speech would be what Nelson Tebbe warned: an anticlassificatory conception of rights and a tendency to naturalize private market distributions.³⁴ If no substantive or realistic argument is introduced in the consideration, it is only the status quo and entrenched interests that will be favored.

29. Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1795 (1995).

30. See generally OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 8–30 (1996).

31. MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 8 (2003).

32. See M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459, 1482 (1989).

33. See generally CASS SUNSTEIN, #REPUBLIC: *DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* (2017); see also Sunstein, *supra* note 29, at 1783; Philip M. Napoli, *What If More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 59–60 (2018).

34. Nelson Tebbe, *A Democratic Political Economy for the First Amendment*, 105 CORNELL L. REV. 959, 993–1002 (2020).

B. Challenges from the Internet

That the internet has brought challenges to free speech is not a new idea. Commentators have discussed, for example, the burgeoning of fake news,³⁵ the echo chamber effect,³⁶ and manipulation by information.³⁷ The biggest challenge the internet poses to free speech theories is the shift of regulatory paradigm and the corresponding role of private regulators. In the traditional scenario, the structure of free speech regulation is dyadic, in which individuals as speakers confront governments as regulators. The emergence and salience of internet intermediaries, such as service providers, search engines, and social media, changed this scenario into a triangle mode³⁸ or a pluralist environment³⁹ in which these intermediaries, acting as “new governors,”⁴⁰ exert tremendous power to regulate speech online.

Modern democracies have never seen such huge power of private bodies over the public life of citizens. It can facilitate robust public discussion worldwide, as well as massively spread the incitement of violence at unprecedented speed. It can enhance the quality of public debate by enforcing necessary rules of expression, as well as use its censorial power to suppress unpopular content. Much of our expressive freedom, then, is moderated by and dependent upon “Facebookistan” and “Twitterland.”⁴¹ They enact general rules,⁴² enforce those rules by removing violative speech or muting the speaker, and adjudicate cases or controversies regarding the enforcement decisions.⁴³ In a nutshell, they have exercised legislative, administrative, and judicial powers, just like the government, notwithstanding the fact that they are not governments, but private entities.

It is not easy to keep the benefits of those platforms while at the same time taming their exercise of power. These power-holders remain largely uncovered by free speech jurisprudence, and theories are struggling to deal with them. Traditionally, freedom of speech is depicted as a negative freedom, and the state is its major or only threat. Fred Schauer has accurately summarized that the distrust of government is a common theme that underlies all free speech theories.⁴⁴ This exclusive focus on state power is anachronistic in an age of

35. See Jared Schroeder, *Marketplace Theory in the Age of AI Communicators*, 17 FIRST AMEND. L. REV. 22, 26–30 (2018).

36. See generally SUNSTEIN, #REPUBLIC, *supra* note 33.

37. See Braden R. Allenby, *Information Technology and the Fall of the American Republic*, 59 JURIMETRICS 409, 415–17 (2019).

38. Balkin, *Free Speech is a Triangle*, *supra* note 19, at 2014–15.

39. Yemini, *supra* note 22, at 1197.

40. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1599, 1603 (2018).

41. Rikke Frank Jørgensen, *Human Rights and Private Actors in the Online Domain*, in NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE 243, 245–46 (Molly Land & Jay Aronson eds., 2018).

42. See, e.g., *Facebook Community Standards*, META, <https://transparency.fb.com/policies/community-standards/> [https://perma.cc/56TB-7C8Y].

43. For example, Facebook has sponsored an oversight board to adjudicate cases regarding the decisions it made toward speech in its platform. See *Oversight Board*, META, <https://www.oversightboard.com/> [https://perma.cc/C27N-7CVQ].

44. Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989).

power pluralism. Leaving private powers unbound by the freedom of speech means removing much, if not most, of our speech from the protective citadel of the constitution, and placing it in the hands of the owners, managers, and employees of the giant platform companies. Such a parochial vision of free speech would make such freedom incompetent, as a constitutional liberty would be transformed into a contractual privilege that only finds its refuge in the terms of service of the platforms.

We need a new theory, then, to account for the role of private actors, especially their rights and duties in the free speech landscape. Such a theory is expected to provide justification, guidance, and evaluation to build a more comprehensive constitutional protection of free speech.

C. *Value Parochialism*

Each major theory of free speech identifies a single value (e.g., truth, democracy, autonomy) as the basis for justifying freedom of speech. However, intuition tells us that free speech does not link to only one value. For example, the theory of democracy fails to see the importance of non-political speech, and the theory of truth ignores the fact that much speech that we have reason to protect cannot promote the discovery of truth. In fact, many commentators acknowledge that free speech serves multiple and diverse values,⁴⁵ and the values can neither be summarized into one value, nor be ranked in a hierarchy. Grounding the rationale of free speech protection upon a singular value is too narrow to explain real world cases⁴⁶ and may also run afoul with the ideal of individualism.⁴⁷

The restricted focus of current theories also makes them struggle between the substantive and procedural accounts. The theory of truth advocated by Milton and Mill, for example, argues for the pursuit of substantive truth as the ground of free speech protection.⁴⁸ Even if substantive truths do exist and human beings are always rational enough and lucky enough to find them, the exclusive focus on substantive outcomes risks sacrificing individual freedom for those ambiguously defined “truths.” Another strand of the theory of truth tries to escape this trap by defining truth as merely procedural: what’s protected is not the quest for objective or transcendental truth, but the process of pursuing truth. In other words, whatever wins out in the process is truth.⁴⁹ This revised version, however, cannot answer the question of why truth is

45. See Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 695 (1983) (“That there is no agreement among the commentators on one value served by the first amendment is clear.”); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 961 (1978) (“the wisdom of first amendment jurisprudence is its recognition that the interests promoted by the first amendment are numerous”).

46. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 126 (1989).

47. Schlag, *supra* note 45, at 695–96.

48. See generally JOHN MILTON, *AREOPAGITICA* (Camb. Univ. Press., 1918) (1644); MILL, *supra* note 14.

49. Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 5 (1996).

important anyway⁵⁰ and falls into another trap of circular reasoning, as under this theory, the process is valuable for its finding of truth, and truth is whatever the process may lead to.⁵¹

The theory of democracy advanced by Meiklejohn and Bork justifies free speech upon its facilitative function for collective self-government.⁵² By saying “what is essential is not that everyone shall speak, but that everything worth saying shall be said,”⁵³ Meiklejohn is explicit that his theory focuses more on the collective endeavor of better decision making rather than individual acts of expression. Under this theory, it may be acceptable to allow individual speech to be suppressed in order to achieve “better” collective decision making—if “better” can be appropriately defined.⁵⁴ A revised and procedural version of the theory of democracy was proposed by Robert Post and James Weinstein, who have built the protection of free speech upon its role in facilitating the process of public participation, regardless of whether the process leads to good outcomes.⁵⁵ This process is indispensable for political legitimation, argues Post, because participation could generate a feeling of authorship of state laws and policies among individual citizens.⁵⁶ However, this account ignores the fact that apart from speech that contributes to the public opinions that can influence lawmaking and policymaking, there are other types of speech that also merit protection and need justification from theories. In other words, the political is a vital reason for free speech protection, but not the only reason.

Likewise, the theory of autonomy also contains two versions. The substantive version grounds the value of free speech on its connection with the development of certain rational and intellectual faculties. The hard task of this theory is to define the content of those faculties and the exact relationship between free speech and the development of the faculties. Moreover, the identification of pre-determined values as the ends of free speech, just as the substantive versions of other theories, contains the risk of violating value neutrality and individual freedom.⁵⁷ The procedural theory of autonomy, by contrast, argues that individuals, as masters of their own body and mind, should be entitled

50. Greenawalt, *supra* note 46, at 154 (“Unless an independent notion of truth is supposed, an argument that truth is what emerges from the marketplace of ideas does not yield distinctive support for a free speech principle.”).

51. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2366 (2000) (“In the absence of such a morality, it is merely tautological to presume that truth is what most people come to believe after open discussion.”).

52. See generally MEIKLEJOHN, *supra* note 15; see also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 266; Bork, *supra* note 15, at 26.

53. MEIKLEJOHN, *supra* note 15, at 26.

54. Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1117–25 (1993) (arguing that the judgment of what is good and the design of the procedural rules may dangerously implicate some predetermined values and might also encroach individual liberty).

55. Post, *supra* note 15, at 483; James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 493 (2011).

56. See generally Post, *supra* note 15.

57. Schlag, *supra* note 45, at 720.

to freely express themselves⁵⁸ as well as freely evaluate the expressions of others.⁵⁹ It is the process of expression per se that matters. The problem with this individualistic theory is that, if the constitution protects speech for speech's own sake (i.e., it is the simple act of self-expression that merits protection) and treats all individual expressions as equally protected, then the theory may be too broad to be manageable and may collapse into a general theory of liberty.⁶⁰

The struggle of these theories reflects their failure to identify the exact relationship between free speech and human values. Linking free speech with one specific value is underinclusive, since intuition tells us that free speech can facilitate truth-seeking, democratic governance, and self-realization, rather than merely one of these values.⁶¹ In this case, we have to either stick to the clarity of the substantive accounts while tolerating the cases where individual freedom to speak may be subordinated to the collective enterprise of achieving such substantive outcome, or shift to the procedural version and tolerate its ambiguity, since processes, internal mental states, or autonomy interests are vague, hard to define, slippery, and easy to collapse into a general liberty. In essence, value parochialism which focuses on a singular and static value to justify speech, whether substantively or procedurally, is doomed to fail.

II. WHAT IS THE CAPABILITIES APPROACH (CA) AND WHY IS IT RELEVANT FOR FREE SPEECH?

A. A Brief Introduction to CA

The capabilities approach ("CA") was initially proposed by the economist Amartya Sen and then developed by many other scholars, such as the philosopher Martha Nussbaum.⁶² Sen introduced this new approach out of his discontent with the traditional theories of justice, such as utilitarianism, Dworkin's theory of resources, and Rawls's theory of primary goods.⁶³ Utilitarian approaches, which use subjective well-being in the forms of desire, preference, or happiness as the central benchmark of evaluating social justice and political institutions, fail to grasp the importance of objective factors in influencing people's well-being and are unable to deal with the problem of adaptive preferences—severe deprivations from surrounding contexts can cause an individual to adapt her preference and become easily satisfied, making subjective utility a poor indicator in assessing her real well-being. Resources and primary goods

58. See Shiffrin, *supra* note 16, at 285–87.

59. See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215–16 (1972).

60. See Steven Shiffrin, *Freedom of Speech and Two Types of Autonomy*, 27 CONST. COMMENT. 337, 342 (2011); see also Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 CAL. L. REV. 422, 476 (1980).

61. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1017, 1042.

62. For an overview of the theoretical specifications of Sen's approach by other scholars, see Thomas Wells, *Sen's Capability Approach*, section 6, in INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://www.iep.utm.edu/sen-cap/> [https://perma.cc/U2WZ-MXAY]; see generally NEW FRONTIERS OF THE CAPABILITY APPROACH (Flavio Comim et. al. eds., 2018).

63. See generally SEN, THE IDEA OF JUSTICE, *supra* note 26.

are also insufficient because they are just means, rather than ends. And different people vary substantially in their ability to convert those means into the good lives they want to achieve. Many internal and external factors can affect such conversion. In a word, theories that focus only on subjective utility or means have built upon an informational base that is too underinclusive. They ignore the complexity of both the social and the individual.⁶⁴

To broaden the informational base, Sen introduced two concepts, proposed to supplement the traditional benchmarks to measure human well-being: functioning and capability. Functioning refers to an individual's actual state of being and doing, such as, being well-nourished or receiving education. Capability is the real freedom of choosing from sets of functionings. While functionings are activities or states of existence,⁶⁵ capabilities are the choices or opportunities that are effectively (not only legally or formally) available to the individual agent.⁶⁶ The former is achievement, while the latter is the freedom or ability to achieve.⁶⁷ Whereas traditional rights discourse presumes the individual's capacity of achieving as long as no government interference exists, CA, by contrast, treats capabilities, or the people's *actual* freedom to achieve the lives they have reason to value, as the index of comparing, evaluating, and measuring issues of justice. It explicitly recognizes the obvious gap between formal liberty to be left alone and actual capacity to live flourishing lives. This recognition paves the road for reforming our current rights-based theories of free speech.

Martha Nussbaum has developed the capabilities approach towards a thicker and more ambitious version. Three ideas are central in her approach: humans have some natures in common that define them as humans, those commonalities consist of both potentials and vulnerabilities, and governments have the duty to help citizens realize the potentials and protect the vulnerabilities. Based on these premises and inspired by Aristotelian essentialism that entails who we humans are, what we should be, and how to lead flourishing lives,⁶⁸ Nussbaum has presented a list of central human capabilities.⁶⁹ For her, the items on the list are the common values shared by humans as equal and

64. Those criticisms of existing theories of justice can be found in many of Sen's works. See, e.g., Amartya Sen, *Equality of What?*, in MCMURRIN S TANNER LECTURES ON HUMAN VALUES VOLUME I, 218–19 (1980); Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 169, 195–200 (1985); Amartya Sen, *Justice: Means versus Freedoms*, 19 PHIL. & PUB. AFF. 111, 112–17 (1990); Amartya Sen, *Presidential Address: The Nature of Inequality*, in ISSUES IN CONTEMPORARY ECONOMICS 13–15 (Kenneth Arrow ed. 1991); AMARTYA SEN, *INEQUALITY REEXAMINED* 148–49 (1992).

65. Amartya Sen, *Well-Being, Agency and Freedom*, *supra* note 64, at 197–98.

66. Ingrid Robeyns, *The Capability Approach*, STAN. ENCYC. PHIL. (Oct. 3, 2011), <https://plato.stanford.edu/archives/win2016/entries/capability-approach/> [<https://perma.cc/PRZ8-J5L5>].

67. See *id.*

68. Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202, 214–16 (1992).

69. Nussbaum has offered her list on several occasions and her list has been modified by herself several times. For the most recent version of the list, see Martha C. Nussbaum & Rosalind Dixon, *Abortion, Dignity, and a Capabilities Approach*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 64, 80–81 (Beverly Baines et al. eds., 2012); Nussbaum, *Human Rights and Human Capabilities*, *supra* note 27, at 23–24.

dignified beings. They are *combined capabilities*, which include both the internal characteristics of humans and the external conditions that affect them.⁷⁰

While Sen has used CA primarily as a theoretical tool in development economics and a criterion of cross-country measurement, Nussbaum, by contrast, has constructed the approach as a grand ethical and political theory, the function of which is to guide constitutional interpretation, legislation, and public policymaking. For Nussbaum, CA can be a constitutional theory,⁷¹ mandating that governments fulfill their obligation to promote each and every citizen's capabilities on the list.⁷²

It should also be noted that there is no single use of CA. Rather, it can be used in many fields, such as poverty reduction, gender equality, education, disability, children's rights, animal rights, and technology.⁷³ They are areas where injustices are both severe and covert. CA, as its applications show, provides us with a promising way to identify and end injustices effectively. In the field of freedom of speech, however, CA has received relatively little attention. There are scholars who have touched upon this issue: for example, some have used CA to analyze the issue of hate speech,⁷⁴ some have reasoned on CA's impact on communication studies,⁷⁵ and some have argued for understanding free speech under the framework of CA and proposed several implications for such understanding.⁷⁶ Though illuminating, these pieces of scholarship are inadequate in coverage and depth. They either use CA to solve specific issues of free speech or propose very general thoughts on viewing free speech as a capability. There is no systematic endeavor to using CA to critically review current theories and justify the freedom of speech through a new theoretical approach. In particular, they have not addressed why the justification of free speech is different under CA as compared to traditional theories or how the new approach can

70. Martha C. Nussbaum, *Women and Equality: The Capabilities Approach*, 138 INT'L LAB. REV. 227, 237 (1999).

71. Nussbaum, *Foreword: Constitutions and Capabilities*, *supra* note 27, at 58.

72. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 1, 12 (2001).

73. See generally Sudhir Anand & Amartya Sen, *Concepts of Human Development and Poverty: A Multi-dimensional Perspective*, in READINGS IN HUMAN DEVELOPMENT 228 (Sakiko Fukuda-Parr & A.K. Shiva Kumar eds., 2nd ed. 2003); NUSSBAUM, *supra* note 72; Martha C. Nussbaum, *Education and Democratic Citizenship: Capabilities and Quality Education*, 7 J. HUM. DEV. 385 (2006); CHRISTOPHER RIDDLE, *DISABILITY AND JUSTICE: THE CAPABILITIES APPROACH IN PRACTICE* (2014); CHILDREN'S RIGHTS AND THE CAPABILITY APPROACH: CHALLENGES AND PROSPECTS (Daniel Stoecklin & Jean-Michel Bonvin eds., 2014); MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); *THE CAPABILITY APPROACH, TECHNOLOGY AND DESIGN* (Ilse Oosterlaken & Jeroen van den Hoven eds., 2012).

74. See generally Katharine Gelber, *Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory*, 9 CONTEMP. POL. THEORY 304, 304 (2010).

75. See generally William Birdsall, *Human Capabilities and Information and Communication Technology: The Communicative Connection*, 13 ETHICS & INFO. TECH. 2, 93 (2011); Thomas Jacobson, *Amartya Sen's Capabilities Approach and Communication for Development and Social Change*, 66 J. COMM'N 789 (2016).

76. See generally Katharine Gelber, *Nussbaum's Capabilities Approach and Freedom of Speech*, in *THE CAPABILITY APPROACH: DEVELOPMENT PRACTICE AND PUBLIC POLICY IN THE ASIA-PACIFIC REGION* 38 (Francesca Panzironi & Katharine Gelber eds., 2012).

reformulate our future decision making. This Article fills those gaps. To see why CA can be used to systematically reformulate free speech theory, we need to look at the connection between the two fields that seem quite distinct at first glance.

B. *The Connection between CA and Free Speech*

1. *Free Speech Guarantees and Promotes Public Reasoning Under CA*

To see why free speech features prominently under the CA, we have to take seriously the notion of public discussion or public reasoning underscored by Sen. For Sen, and most other capability theorists, the capabilities approach is incomplete without recognizing the central place of and providing a full account for public discussion.⁷⁷ First, the issue of which capabilities are centrally important shall be left to public discussion. Sen refused to give a predetermined list of central capabilities because this is simply not his job: “To have such a fixed list, emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why.”⁷⁸ Rather, the conception of the good life is to be decided by the individuals themselves, through public reasoning. Second, how to measure the capabilities, either of an individual or of a society, should also be determined through democratic deliberations. The pertinent issues include how to weigh different capabilities, what to do if conflicts occur between them, and which public policies should be enacted to promote the capabilities.⁷⁹ These questions cannot be answered by a full theory but can only be considered in local contexts.

It is worth noting that Sen does not suggest that issues of capabilities should be specified by each individual, but by individuals in a collective sense, through the exercise of *public* reason. For Sen, the use of reason publicly and collectively serves two vital functions: the instrumental function and the constitutive function. The instrumental function operates as public reasoning—through the exercise of free speech and free religion—which facilitates the realization of other functionings and capabilities. For example, free speech allows for the distribution of information, advocacy for justice, and promotion of the interests of marginalized people.⁸⁰ As Sen argued, “[c]ivil and political

77. SEN, *THE IDEA OF JUSTICE*, *supra* note 26, at 242 (“The connection between public reasoning and the choice and weighting of capabilities in social assessment is important to emphasize.”); *see also* Iris van Domselaar, *Nussbaum’s Capabilities Approach: In Need of a Moral Epistemology*, 38 *RECHTSFILOSOFIE & RECHTSTHEORIE* 186, 192–93 (2009).

78. Amartya Sen, *Capabilities, Lists, and Public Reason: Continuing the Conversation*, 10 *FEMINIST ECON.* 77, 77 (2004).

79. Amartya Sen, *From Income Inequality to Economic Inequality*, 64 *S. ECON. J.* 384, 397 (1997) (“However, in arriving at an agreed range for social evaluation... there has to be some kind of a reasoned consensus on weights or at least on a range of weights. This is a social choice exercise and requires public discussion and a democratic understanding and acceptance.”); *see also* SEN, *DEVELOPMENT AS FREEDOM*, *supra* note 26, at 78–79 (arguing that the measurement and the identification of weights of different capabilities should be discussed by the public, using the participatory freedoms).

80. SEN, *THE IDEA OF JUSTICE*, *supra* note 26, at 335–37 (discussing the important functions a free and healthy media serves for a democracy).

rights give people the opportunity not only to do things for themselves, but also to draw attention forcefully to general needs, and to demand appropriate public action.”⁸¹ One of the examples Sen cites frequently is that freedom of speech and the press can prevent famines.⁸² This relates to the core of democracy, since democracy is not just about ballots and elections, but about “government by discussion.”⁸³ The constitutive function of free speech/public discussion refers to the idea that free exchange of ideas with others and open deliberation in the public sphere help form our values and conceptions of the good, and help scrutinize our needs to ensure they are real, unbiased, and rational.⁸⁴ As will be discussed further in the next Part, these two functions are how free speech could be justified under CA.

2. *Free Speech Directly Relates to and Influences Several Central Capabilities*

Unlike Sen, Nussbaum has proposed a list of ten capabilities, which she believes are essential for humans to live a dignified and flourishing life. The most recent version of her list includes the following items:

- 1). Life.
- 2). Bodily health.
- 3). Bodily integrity.
- 4). Senses, imagination, and thought.
- 5). Emotions.
- 6). Practical reason.
- 7). Affiliation.
- 8). Other species.
- 9). Play.
- 10). Control over one’s environment (material and political).⁸⁵

It is important to note that this is only one version of the human capabilities list, and it is tentative, as Nussbaum herself admits.⁸⁶ Still, this list is a helpful starting point to reveal significant connections between CA and free speech.

At least six capabilities on the list directly relate to free speech: 4) senses, imagination, and thought; 5) emotions; 6) practical reason; 7) affiliation; 9) play; and 10) control over one’s environment (political).⁸⁷ On “senses, imagination, and thought,” Nussbaum explicitly wrote that this capability includes

81. Amartya Sen, *Legal Rights and Moral Rights: Old Questions and New Problems*, 9 *RATIO JURIS* 153, 161 (1996).

82. SEN, DEVELOPMENT AS FREEDOM, *supra* note 26, at 178–84.

83. SEN, THE IDEA OF JUSTICE, *supra* note 26, at 324.

84. Sen, *supra* note 81, at 162.

85. Nussbaum & Dixon, *supra* note 69, at 80–81.

86. Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 286 (1997).

87. Some scholars, such as Katharine Gelber and William Birdsall, have identified four items on the Nussbaum list as relating to free speech or communication: 4) senses, imagination, and thought; 6) practical reason; 7) affiliation; and 10) control over one’s environment. See Gelber, *supra* note 74, at 315; Birdsall, *supra* note 75, at 99. I have added “5) emotions” for its obvious connection with speech.

“[b]eing able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise.”⁸⁸ The reason is obvious: without externalizing one’s senses, imagination, and thought (and cultivating, scrutinizing, and modifying them through the communication with others), those cognitive capabilities would be suppressed and withered. For “emotions,” Nussbaum admits that “[s]upporting this capability means supporting forms of human association that can be shown to be crucial in their development.”⁸⁹ It is commonsense that social associations and communications are the major forms through which humans express, perceive, and manage their emotions such as love, care, and grievance. It is also unsurprising that free speech is necessary for the capability of play, which entails “[b]eing able to laugh, to play, to enjoy recreational activities.”⁹⁰ Many forms of recreation and entertainment are themselves communicative or interactive⁹¹—suppression of free speech would undoubtedly make our leisurely life duller.

As for practical reason, Nussbaum defines it as the capability “to form a conception of the good and to engage in critical reflection about the planning of one’s life.”⁹² As a member of a community (or multiple communities), an individual cannot form conceptions of a good life solely on her own. Rather, practical reason must be practiced publicly, as Sen has emphasized.⁹³ This reminds us of the constitutive function of public reasoning. A similar capability is “affiliation,”⁹⁴ which reflects the relational needs of human beings living communal lives and exercising practical reason publicly. In addition, the “control over one’s environment” includes the control of both the material and the political environment. The latter means “[b]eing able to participate effectively in political choices that govern one’s life; having the right of political participation, protections of free speech and association.”⁹⁵

In sum, free speech plays a key role under the CA. It is both instrumental and constitutive for the approach, as Sen argues, and it directly facilitates at least six central capabilities on Nussbaum’s list. As the next Part will argue, Sen’s and Nussbaum’s perspectives together provide insights on how to justify this fundamental freedom through CA: because of the role of free speech in both instrumentally promoting and constitutively defining central capabilities, it is worth special protection, and the constitutional systems of the world are obliged to promote and facilitate the exercise of this freedom.

88. Nussbaum & Dixon, *supra* note 69, at 80.

89. *Id.*

90. *Id.* at 81.

91. Consider, for example, TV plays, social clubs, and interactive video games.

92. Nussbaum, *Capabilities and Human Rights*, *supra* note 86, at 287.

93. For a detailed explanation of this point, see *infra* Part III.B.

94. Nussbaum, *Capabilities and Human Rights*, *supra* note 86, at 287. This capability entails “protecting the freedoms of assembly and political speech.” *Id.*

95. Nussbaum & Dixon, *supra* note 69, at 81.

III. JUSTIFYING FREE SPEECH UNDER THE CAPABILITIES APPROACH

All theories of free speech must offer an argument for why free speech should be constitutionally protected. Such justification can and should guide legislative and constitutional decision making in a principled way. The new theory proposed by this Article construes freedom of speech as a central human capability and justifies its protection upon its role for the human capabilities list. Free speech capability not only facilitates the development and realization of other central capabilities, but also defines the contents and priorities of all other capabilities. These dual functions—instrumental and constitutive—confer special importance onto free speech under a constitutional order and provide the conceptual basis for reformulating the theories of free speech.

A. *Instrumental Function*

The instrumental function of free speech refers to its role in enabling, facilitating, and promoting the possession, development, and realization of the other capabilities that we humans have reason to value. Free speech is a channel to shape public opinion and mobilize collective action. These opinions and actions can urge and motivate government and other public organizations to take actions to protect, promote, and realize certain capabilities through various methods, such as enacting legislation, taking preventive measures, or making public spending plans. By taking control over the political environment, individuals take control over their own lives. The importance of collective action, as facilitated by free speech, lies in the fact that acting jointly is far more effective than acting individually. Through public action, free speech can facilitate many capabilities including life, health, and material conditions of living, arguably the three most basic capabilities of humans. This Section uses these three capabilities as examples to illustrate the instrumental function of free speech.

The right to life can be promoted by free speech. One of the most famous research findings by Sen is his thesis on the cause of famines. He cogently explains why most famines are preventable, and how public pressure, facilitated by free press, can offer the government strong incentives to undertake preventive measures.⁹⁶ Another example is the mortality rate of infants. The Tamil Nadu Government of India, for example, has started the Cradle Baby Scheme to build government reception centers for abandoned female babies and adopted legal measures to punish acts of infanticide. The project has successfully reduced the infant mortality rate, saving the lives of many babies. A key facilitator of the project, self-help groups (“SHGs”) for women, supervise the government policies and offer support to fellow women who face pressures from families.⁹⁷ By embodying the collective voice, these groups “speak to the

96. SEN, DEVELOPMENT AS FREEDOM, *supra* note 26, at 51–52.

97. D. Narayana, *Intensifying Infant Mortality Inequality in India and a Reversal by Policy Intervention*, 9 J. HUM. DEV. 265, 278–79 (2008).

families on the rights of girl children” as well as coordinate directly with the local police to deter the cases of infanticide.⁹⁸

Health, another fundamental human capability, is also an institutional right, depending heavily on collective effort and institutional support. The Constitution of the World Health Organization (“WHO”) suggests that “[i]nformed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.”⁹⁹ Health depends on people’s entitlements to socio-economic resources, and such entitlements are in turn “influenced by an array of institutional arrangements, social systems, economic and political structures and cultural practices.”¹⁰⁰ Without access to health information and participation in institutional practices, citizens would lose control over those socio-economic entitlements and, in turn, their own health. The redistribution of socio-economic resources is key for health care provision and malnutrition reduction. Empirical evidence suggests that citizen involvement can have positive impact on public governance of health by improving the quality of bureaucracy and checking government corruption in the field of health spending.¹⁰¹ A positive example comes from Uganda, where a model called “citizen voice and action” (“CV&A”) was adopted for local citizens to associate, deliberate, and mobilize, as well as to identify appropriate duty-bearers of the health capability. By influencing those duty-bearers, tremendous changes could be brought about. The model usually underdoes four stages:

In Stage 1 (“scaling across”), communities diagnose systemic accountability traps and pursue solutions via an agreed action plan, upwardly delegating unresolved issues which cannot be resolved locally including those requiring central-level inputs. In Stage 2 (“scaling upwards”), community representatives raise unresolved issues at sub-national forums (barazas) and feedback decisions to communities. Subnational dialogues deliberately match strategic decision-making government levels, in sub-counties and districts. In Stage 3 (“scaling together”), community representatives take remaining unresolved issues to national forums (barazas), while NGOs support community claims in wider campaigns. Stage 4 feeds back answers, and outcomes of action from these forums to local communities.¹⁰²

This mechanism works because public officials feel pressure from the voices of the public. For example, “parliamentarians who broke promises could be

98. *Id.*

99. World Health Organization [WHO] Constitution pmb. ¶ 9, July 22, 1946.

100. Keerty Nakray, *Addressing “Well-Being” and “Institutionalized Power Relations” in Health Policy*, 12 J. HUM. DEV. & CAPABILITIES 595, 596 (2011).

101. Bingjie Hu & Ronald U. Mendoza, *Public Health Spending, Governance and Child Health Outcomes: Revisiting the Links*, 14 J. HUM. DEV. & CAPABILITIES 285, 292–99 (2013).

102. David Walker, *Leveraging Communities’ Capabilities to Increase Accountability for Health Rights: The Case of Citizen Voice and Action*, 19 J. HUM. DEV. & CAPABILITIES 181, 188–89 (2018).

exposed through mass media, risking their reputation and prospects for re-election.”¹⁰³ The degree of government accountability is also enhanced by the use of “social auditing and media publicity.”¹⁰⁴ In this case, the role of free speech is reflected in nearly all phases of the Ugandan project—from raising awareness to informed discussion, from dialogue with the government to media supervision, and from deliberating on feedbacks to monitoring the outcomes of actions. The four stages epitomize the process by which free speech instrumentally facilitates other capabilities through the control of the political environment.

Reducing poverty and improving the material living standards of individuals are also closely related to free speech. The logic is clear: voice and action have an impact on power relations, which determine the distribution of resources, entitlements, rights, and duties, which in turn determines the material environment we will live in. The cause of poverty can be multifarious. But one key factor is institutional background since, in many cases, poverty is institutional.¹⁰⁵ And the eradication of poverty is an institutional matter, which needs to be addressed by dialogue, not only nationally, but also on a global level.

This is mirrored in the dynamics of property rights and entitlements. After studying the issue of access to water in Sahelian countries in Sub-Saharan Africa, Lorenzo Cotula has concluded how the property right is institutional-oriented and power-related:

{T}ackling property rights is not a purely technical matter, but raises important issues of power and distribution of benefits. Access to water is a function not only of the availability of water points and irrigation schemes, but also of who has what right over such water facilities. This is exemplified by the findings of this study relating to gendered property rights and the impact of creating small-scale irrigation schemes; to the competition for irrigated land between agribusiness and smallholders, particularly in large-scale irrigation schemes; and to the competition for access to water points between different pastoral groups. This raises the need to pay greater attention to equity in water policies and programmes, and to strengthen institutions and processes for mediating competing property right claims and for addressing power imbalances.¹⁰⁶

Institutional change requires collective action through the collective exercise of free speech capability. An empirical study conducted in Ghana has suggested that political participation has a positive impact on farmers' capability

103. *Id.* at 191.

104. *Id.* at 192.

105. Thomas W. Pogge, *Eradicating Systemic Poverty: Brief for a Global Resources Dividend*, 2 J. HUM. DEV. & CAPABILITIES 59, 61–63 (2001).

106. Lorenzo Cotula, *The Property Rights Challenges of Improving Access to Water for Agriculture: Lessons from the Sabel*, 9 J. HUM. DEV. 5, 20 (2008).

in maize-based farming systems.¹⁰⁷ The function of institutional voice has also been compared at the different levels of capabilities realized between males and females, and between the aged and the young. The study shows that because men and the aged often have greater voice and access to political process, their farming capabilities are better achieved as compared to women and the young.¹⁰⁸

Hence, free speech capability can effectively promote key capabilities of humans, including life, health, and material conditions of living. As social beings, humans cannot achieve the most desirable functionings without engaging in collective action and living communal lives. And the exercise of free speech capability plays an indispensable link between individuals and the community they live in. In this regard, the traditional values associated with free speech—truth, democracy, and autonomy—can also be appropriately accommodated by the capability theory. The reason is simple: the processes of knowledge production, democratic participation, and self-realization would be meaningless if individuals could not effectively engage with others by exercising the free speech capability.

B. *Constitutive Function*

As mentioned earlier, Sen and Nussbaum have both stressed the central role of public reasoning in defining human capabilities on the list. This is exactly where the constitutive function of free speech capability lies. However, neither author provides a detailed account of why this is so. This Part fills the gap. Borrowing findings from multiple disciplines, I construct a theoretical narrative that explains why free speech capability is indispensable for the constitution of the capabilities list.

1. *There Are Two Kinds of Lists, Not One*

CA uses capability, or the freedom to achieve actual beings and doings, as the central benchmark of social justice and human flourishing. However, both Sen and Nussbaum did not examine in depth “the fundamental question of how individuals and societies come to value certain beings and doings.”¹⁰⁹ In fact, it is precisely through the exercise of free speech that human beings form their valued capabilities. To understand why this is so and how it is done, we need to look closer at the capabilities list.

Unlike what one may presume, there exists not only *one* list, but *two* lists: an individual list and a collective list. A list of central capabilities is a list of values or conceptions of the good that have been held sincerely and deeply. The generative process for a list is the process of value-formation. On the one hand,

107. Isaac G. K. Ansah et. al., *Ghana's Planting for Food and Jobs Programme: A Look at the Role of Capability in Farmers' Participation*, 21 J. HUM. DEV. & CAPABILITIES 161, 173–74 (2020).

108. *Id.* at 177.

109. Antonio Andreoni et. al., *The Missing Dimensions of the Human Capabilities Approach: Collective and Productive*, 33 EUR. J. DEV. RES. 179, 188 (2021).

an individual human being, as a moral agent, reasonably possesses ideas about what she wants and needs in order to live a life of her own. The individual develops these values or conceptions of the good to form a list. Each of us has such a list, by which we plan our courses of action and make moral choices in our lives. On the other hand, a collective or community also has a list to guide its collective action. The list is the basis for the collective to make norms and policies regulating the behaviors of its members, and to distribute rights and duties among them. The reason why a collective like a state needs a list is obvious: the list serves as a meta-norm for the state in enacting laws, regulations, and rules of all kinds; it comprises the most central values that the state pursues as a collective entity. In other words, the individual list is the value guide for individual life, while the collective list is the framework for collective endeavors of a community.

Nussbaum's list can be interpreted in both individual and collective terms. In one sense, the items on her list are the basic needs and desires of all individuals: health, integrity, imagination, practical reason, etc. They are what each individual has reason to value, at least according to Sen.¹¹⁰ In another sense, as Nussbaum herself mentions, the list serves as a leading guide for nations' constitutions: as collective values, they mandate governments to ensure the realization of those values.¹¹¹ CA's moral focus on individuals has been justifiably criticized as too individualistic.¹¹² However, focusing exclusively on the individual facet of the list misses the whole story.¹¹³ Only by comprehending the list's individual-social duality and the interconnected relationship between the two sides can we defend CA from those attacks as well as get a clear sense of the constitutive function of free speech capability.

Sen has grappled with the distinction between the list-making at the individual level and that at the social level. He has characterized the latter as a "social choice" practice of resolving the tensions between different weights accorded to the capabilities by different individuals:

For a particular person, who is making his or her own judgements, the selection of weights will require reflection, rather than any

110. SEN, DEVELOPMENT AS FREEDOM, *supra* note 26, at 18.

111. Nussbaum, *Foreword: Constitutions and Capabilities*, *supra* note 27, at 58; NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT, *supra* note 72, at 12.

112. See, e.g., Peter Evans, *Collective Capabilities, Culture, and Amartya Sen's Development as Freedom*, 37 *STUD. COMP. INT'L DEV.* 54, 56 (2002); see also Solava Ibrahim, *From Individual to Collective Capabilities: The Capability Approach as a Conceptual Framework for Self-help*, 7 *J. HUM. DEV. & CAPABILITIES* 397, 401–402 (2006); Jérôme Ballet et. al., *Responsibility for Each Other's Freedom: Agency as the Source of Collective Capability*, 8 *J. HUM. DEV. & CAPABILITIES* 185, 186 (2007).

113. Some scholars have stressed the collective side of the list, while deemphasizing the individual side. See Susan Wolf, *Comments on Martha C. Nussbaum: Human Capabilities, Female Human Beings*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 105, 108 (Martha C. Nussbaum & Jonathan Glover eds., 1995) ("[Nussbaum's lists] are not to be applied as tests for the humanity or the quality of individual lives . . . Nussbaum's references to human forms of life suggest that we do better understanding these lists as a basis for assessing communities, or more importantly, as constituting a set of needs and goals to which we must widely and persistently attend in devising and directing social, political, and economic policy.")

interpersonal agreement (or consensus). However, in arriving at an 'agreed' range for *social evaluation* (for example, in social studies of poverty), there has to be some sort of reasoned 'consensus' on weights, or at least on a range of weights. This is a 'social choice' exercise¹¹⁴

Mozaffar Qizilbash has offered a more explicit account of the duality of the list:

Agreement on such a set [list] was required, as we saw earlier, for the 'dominance partial order' to generate shared judgements. A list which some particular person uses to plan her life no doubt emerges from reflection and experience. Such reflection may lead members of society to endorse a wide range of lists of capabilities or functionings. For public decision-making, the identification of a list (or lists) would require a procedure for filtering these diverse lists into an agreed or widely endorsed list or set of lists.¹¹⁵

To further develop the argument set forth by these theorists, this Section argues that the constitutive function of free speech capability (or public reason, in Sen's term) lies exactly in its role of linking the individual list and the collective list. The cross-fertilization of the two lists is constitutive of the selection of items on the list, the assignment of weights to them, and the specification of methods that implement them. In other words, the interaction between the formation of the two lists is a process that defines the two. And this process is not possible without the exercise of free speech capability.

2. *Why must the Collective List be Formed through the Participation of the Individuals?*

Sabina Alkire has commented that a "participatory processes of discussion and deliberation" is required to make sure the list formation is "collaborative, visible, defensible and revisable."¹¹⁶ There are two reasons why individual participation is indispensable for collective list-making. One is epistemic. Wide-open inputs from individuals can remedy the epistemic limits of a few experts, elites, or legislators. This argument reminds us of the literature on the epistemic justification of democracy. Aristotle famously argued that the decisions made by the many are generally better than those made by the few because of the pooling of information and insights.¹¹⁷ Condorcet developed this argument through his "Jury Theorem," which "proved mathematically that when a sizable group of people is collectively required to answer a question, if each member knows the correct answer with a probability higher than 0.5, then the

114. SEN, DEVELOPMENT AS FREEDOM, *supra* note 26, at 78–79.

115. Mozaffar Qizilbash, *Social Choice and Individual Capabilities*, 6 POL., PHIL. & ECON. 169, 178 (2007).

116. Sabina Alkire, *Dimensions of Human Development*, 30 WORLD DEV. 181, 194 (2002).

117. See Jeremy Waldron, *The Wisdom of the Multitude*, 23 POL. THEORY 563, 564 (1995).

likelihood of their combined answer being right approaches 1 as the size of the group increases.”¹¹⁸ Democratic deliberation is epistemically superior, it has been argued, because it can help detect logical fallacies, transform bad preferences, and compare information from different sources.¹¹⁹ Even non-democratic communities sometimes use “democratic” means to fulfill the need of information gathering. For example, Greg Distelhorst and Yue Hou have found that local governments in China are highly responsive to the citizens’ appeals, comparable to the practices in democratic regimes. According to them, this high responsiveness is not to prevent collective action but to gather information and insights from citizens, which are deemed to be useful in improving local governance.¹²⁰

Likewise, in the making of a collective capabilities list, democratic participation and deliberation provide information and insights that a small circle of experts may not have acquired or possessed before. Any single individual is limited in knowledge, however smart or experienced he or she may be. A wise decision for an individual may be disastrous for a collective. Even if we trust the knowledge of some elites, “we do not and will never have an identifiable pool of moral and political experts.”¹²¹ The convergence of knowledge from different corners can cure, or at least alleviate, this problem. If each person is an expert in a small area, the best method for wise governance is to consult everyone. This matters because the CA list is a constitution of a collective, prescribing values, goals, rights, and duties for its members living together. A blueprint and metarule for communal lives must incorporate the experiences from its constituents as widely as possible, to overcome parochialism and myopia. Of course, due to divisions of labor and expertise, “[w]e inevitably rely on a complex and mediating division of epistemic labour in the process of public deliberation,”¹²² such as those institutions with credibility and trustworthiness. But the role of institutions does not deny the importance of individual participation, and the former must be reviewed and checked by the latter.

Another reason for individual engagement is legitimacy. CA is an approach that puts individual liberty and agency at the center. It favors the agential freedom of choice (capability) rather than actual state of enjoyment (functioning). More importantly, it also recognizes the central role of individuals themselves in defining lists. Only by respecting the inputs from each individual member can the list of a collective be legitimate. This principle derives from

118. Dan Priel, *Are Jurisprudential Debates Conceptual: Some Lessons from Democratic Theory*, 50 OS-
GOODE HALL L. J. 359, 370 (2012).

119. John Min & James Wong, *Epistemic Approaches to Deliberative Democracy*, 13 PHIL. COMPASS 1,
4–5 (2018).

120. Greg Distelhorst & Yue Hou, *Constituency Service under Nondemocratic Rule: Evidence from China*,
79 J. POL. 1024, 1025, 1032 (2017).

121. Cheryl Misak, *Truth and Democracy: Pragmatism and the Deliberative Virtues*, in DOES TRUTH
MATTER? DEMOCRACY AND PUBLIC SPACE 29, 35 (Raf Geenens & Ronald Tinnevelt eds., 2009).

122. Matthew Festenstein, *Truth and Trust in Democratic Epistemology*, in DOES TRUTH MATTER?
DEMOCRACY AND PUBLIC SPACE 69, 73 (Raf Geenens & Ronald Tinnevelt eds., 2009).

the value of freedom and dignity of individuals as moral agents.¹²³ Unlike the individual list, the collective list governs the collective life. It defines the relationships between each member in the community and prescribes the rules of distributing interests and resources among the individual members. Under the conditions of equal citizenship and moral pluralism, it is preferable for disagreements to be resolved and consensual plans are to be made through deliberative reasoning.¹²⁴ Reasoned consensus based on free discourse among individuals is necessary for justifying the rules that affect the interests of them all, as Habermas has cogently argued.¹²⁵ Even though consensus is sometimes hard to reach, compromising and balancing also require collective deliberation among individuals.

Ensuring individual involvement in the making of the collective list can also counter the risks that are inherent in the exclusive reliance on experts or government. Take the capability to health as an example. Health is a very professional sphere, containing expert knowledge about physiology, nutritional science, and medicine. We may wonder why the general public should be involved in defining and specifying the health capability on the list.¹²⁶ The point is: with larger questions of what is “health” and how it should be promoted, there are no definite and universal answers.¹²⁷ Wide participation can prevent the dominance of the “elitist conceptions”¹²⁸ of health. In addition, because overall resources are limited and trade-offs are unavoidable in defining and implementing the central capabilities, including health, individual participation is a crucial check on the government or other resource-distributing bodies. It is “a mechanism whereby the State parties can be prevented from justifying an inadequate policy by invoking an arbitrarily chosen set of trade-offs.”¹²⁹ Invisible evils and closed-door bargains must be scrutinized by wide participation and open deliberation.

Emphasizing the role of public participation in the formation of collective values does not mean that deliberation and reasoning can generate consensus at all times and on all issues. Disagreements on deeply held beliefs are norms

123. For an account of equal respect for individuals and its implications to justice, see generally RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000).

124. Joshua Cohen, *Reflections on Habermas on Democracy*, 12 *RATIO JURIS* 385, 404–05 (1999).

125. See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

126. For example, the discussion on health issues is generally considered as belonging to professional speech, which is heavily regulated and conducted mainly within institutional and professional settings, rather than the general public sphere. See Claudia E. Haupt, *Professional Speech*, 125 *YALE L.J.* 1238, 1246–47 (2016).

127. See Philip Kinghorn, *Exploring Different Interpretations of the Capability Approach in a Health Care Context: Where Next?*, 16 *J. HUM. DEV. & CAPABILITIES* 600, 612–14 (2015) (offering various constructions and definitions of the health capability).

128. David A. Clark, *Adaptation, Poverty and Well-Being: Some Issues and Observations with Special Reference to the Capability Approach and Development Studies*, 10 *J. HUM. DEV. & CAPABILITIES* 21, 35 (2009).

129. Siddiqur Rahman Osmani, *Human Rights to Food, Health, and Education*, 1 *J. HUM. DEV.* 273, 292 (2000).

rather than exceptions in a heterogeneous society.¹³⁰ Even though perfect consensus might be unavailable, partial agreements can be reached. For example, we may agree on the ends but disagree on the justifications; we may consent on some intermediate ends while being agnostic on the hierarchy of those ends; we may agree on a final end while holding competing views on its specification; we may devise through discussion a new end that can be specified in two complementary lower-order ends; and we can compromise on some issues and reach temporary consensus, rather than fixed ones.¹³¹ Impossibility of the final and complete consensus should not be a reason to refute the feasibility and value of the deliberative process of collective value formation.

3. *Why must the Individual List be Reviewed and Scrutinized by the Collective?*

Sen has rightly mentioned that only through discussions that transcend separate groups and engage with the public can we recognize, validate, and compare our desires as needs.¹³² There are three reasons why the individual value formation must be reviewed and scrutinized by engaging with the public.

The first reason is epistemic. Not only does the collective need to pool information and insights from individual members, but each individual also needs to expand her knowledge base by interacting with the collective. The epistemic function operates bi-directionally in the value formation process. The list is about what kinds of lives we want to live. Such a plan of life necessarily derives from one's understandings of self-identity and relationship with both others in the community and the natural world. The understanding evolves and develops during one's engagement with the political and material environment. In this process, wrong, partial, or distorted knowledge can cripple the development of an individual's understanding and the formation of her values. Participation in the collective can be a corrective.

Before the project initiated by Bayer and the self-help groups ("SHGs"), the local villagers in Karnataka of South India regularly consumed the official water, which triggered several adverse effects, such as joint pain.¹³³ Discussion in the SHG facilitates the flow of scientific information and informs the members of the benefits of purified water.¹³⁴ Likewise, self-help groups in Chench district of Southern Ethiopia raised the awareness of local women about the agricultural experience and economic potential of growing apples in the land

130. Adela Cortina, *An Agency-Focused Version of Capability Ethics and the Ethics of Cordial Reason: The Search for a Philosophical Foundation for Deliberation Democracy*, in *AGENCY AND DEMOCRACY IN DEVELOPMENT ETHICS* 306, 312 (Lori Keleher & Stacy Kosko eds., 2019).

131. David Crocker, *Sen and Deliberative Democracy*, in *CAPABILITIES EQUALITY: BASIC ISSUES AND PROBLEMS* 155, 184 (Alexander Kaufman ed., 2005).

132. See Jay Drydyk, *Capabilities, Public Reason and Democratic Participation*, in *THE CAMBRIDGE HANDBOOK OF THE CAPABILITY APPROACH* 660, 672 (Enrica Chiappero-Martinetti et al. eds., 2021) ("recognition, validation and comparison of wants as needs benefits from discussion that transcends separate groups and classes to engage the public as a whole").

133. Regina Moczadlo et al., *Corporate Contributions to Developing Health Capabilities*, 16 *J. HUM. DEV. & CAPABILITIES* 549, 559 (2015).

134. *Id.*

they live. Researchers found that “coming together as a group has the benefit that they share information among themselves which increases their understanding about their rights, the rules of the community and the state, business opportunities, and the problems which affect individuals and the community at large.”¹³⁵ For these men and women to identify their “real” needs, rather than thinking only about here and now, dialogue and engagement with other community members are crucial.

The second reason is that engagement with the collective can help identify, correct, and overcome adaptive preferences. Preferences distorted by the deprivations in external circumstances are called adaptive preferences—simply put, what we want can be shaped by what we can get.¹³⁶ A fox that cannot reach a grape on a tree may complain that the grape is sour. Such preferences are bad because on the one hand, they are not true values and needs of individuals, so they serve as poor indexes or bases for list making, and on the other hand, by concealing the real values, they perpetuate the current inequalities and oppressions in the community.

However, not all preferences that are adapted to the environment are condemnable. We regularly form our preferences according to the external conditions that constrain us, and sometimes we make adaptations out of reasonable calculations and considerations. For adaptive preferences to be culpable, they have to be unreliable, irrational, and shaped by covert influences.¹³⁷ To assess whether adaptive preferences truly reflect values and needs of an individual, we need a theory or mechanism to determine the true values. In other words, an account of the conception of the good or human flourishing is indispensable because it is believed that “choices made against flourishing absent options for flourishing are not real.”¹³⁸ Making this determination is difficult because first, we can hardly tell a person’s real needs or desires according to her expressed preferences, and second, different cultures can have very different understandings about real human flourishing. We sometimes confuse rational trade-offs with distorted adaptations or misread cultural differences as deprivations.¹³⁹

To identify and correct adaptive preferences, engagement with the collective is an effective method.¹⁴⁰ The living conditions of individuals are always limited, and such limitations constrain the range of choices that the individual has. In the process of value formation, inputs from the collective offer new

135. Sintayehu Hailu Alemu et al., *Women Empowerment Through Self-Help Groups: The Bittersweet Fruits of Collective Apple Cultivation in Highland Ethiopia*, 19 J. HUM. DEV. & CAPABILITIES 308, 325 (2018).

136. JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 110–28 (1983).

137. See Jessica Begon, *Disability, Rationality, and Justice: Disambiguating Adaptive Preferences*, in *THE OXFORD HANDBOOK OF PHILOSOPHY AND DISABILITY* 343, 345–48 (Adam Cureton & David T. Wasserman eds., 2020) (arguing that not all adaptive preferences are equally unjust and suspect).

138. Serene Khader, *Adaptive Preferences and Procedural Autonomy*, 10 J. HUM. DEV. & CAPABILITIES 169, 185 (2009).

139. SERENE KHADER, *ADAPTIVE PREFERENCES AND WOMEN’S EMPOWERMENT* 54–59 (2011).

140. See Clark, *supra* note 128, at 26 (“In so far as value judgments are informed by intercultural exchanges and ‘improved’ through public reasoning, we can expect them to be more reliable (and less susceptible to adaptation).”) (footnote omitted).

possibilities for the individual to rethink, reflect, and critically scrutinize the choices that she has made before.¹⁴¹ Research shows that when asked about their personal well-being, children's answers cover only their own immediate concerns. Adaptive preferences can be overcome by detaching the individuals from their current life experiences, making them impartial and distant spectators.¹⁴² Such detached and transcendent thinking can be facilitated by deliberation. Deliberation with other members of the community helps the individual identify counterfactual preferences, gain consciousness about more opportunities,¹⁴³ respond to perspectives beyond her own, reflect upon opposing positions, and hold herself answerable to external and critical challenges.¹⁴⁴

Deprived conditions not only constrain the range of choices, but also, more viciously, severely suppress the capacity and willingness to imagine transcendentally. Unequal power structures curb individuals' imagination and encourage adaptation by making what they do into habits, a process in which daily behaviors are taken for granted, routinized, and ritualized.¹⁴⁵ As a result, individual agents get used to the status quo, disable their capacity for critical thinking, and facilitate the reproduction of the power structure. Discursive scrutiny through engagement with others enables individuals that are trapped in their conditions to review, rethink, and reimagine the status quo: to reflect on their routines, to stop taking them for granted, and to consider how to change them.¹⁴⁶ Through dialogical reflection, participants are more likely to discover and understand power asymmetry and oppression.¹⁴⁷ Joshua Cohen has argued that the power inequalities and subordination can be neutralized by the use of reason in deliberation.¹⁴⁸ The key is to encourage individuals to imagine what, if the current conditions of deprivation were to be eliminated, they would choose to value. Interaction with the collective allows individuals to listen to the stories of others, and in this process, to think beyond their own situations and thereby pursue new possibilities.

141. See Qizilbash, *supra* note 115, at 180 ("Engagement in public discussion can lead people to revise and correct their views (as John Stuart Mill noted) and can thus lead them to form more enlightened or informed preferences. These preferences are less likely to be distorted by the conditions in which people find themselves.") (citations omitted).

142. Alexandre Frediani et al., *Human Development and the Capability Approach: The Role of Empowerment and Participation*, in *THE CAPABILITY APPROACH, EMPOWERMENT AND PARTICIPATION: CONCEPTS, METHODS, AND APPLICATIONS* 3, 15–16 (David A. Clark et al. eds., 2019).

143. Begon, *supra* note 137, at 356–57.

144. Andrea Westlund, *Rethinking Relational Autonomy*, 24 *HYPATIA* 26, 39 (2009).

145. See Frances Cleaver, *Understanding Agency in Collective Action*, 8 *J. HUM. DEV. & CAPABILITIES* 223, 239 (2007) (arguing that humans can internalize hegemonic norms, which limit what is materially possible as conceived by the individual).

146. Jordi Peris et al., *Expanding Collective Agency in Rural Indigenous Communities in Guatemala: A Case for El Almanario Approach*, 34 *INT'L DEV. PLAN. REV.* 83, 85–87 (2012) (arguing that critical reflection can raise consciousness and generate transformative power, so that dialogue is the core element for agency in development planning).

147. See Mary Walsh, *Feminism, Adaptive Preferences, and Social Contract Theory*, 30 *HYPATIA* 829, 839–41 (2015).

148. Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17, 25–26 (Alan Hamlin & Philip Pettit eds., 1989).

Third, engagement with the collective can help individuals transcend their moral parochialism. Not only are individuals' knowledge and vision limited, but their moral convictions are also partial and fallible. Preferences can be distorted, as in the case of adaptive preferences, as well as objectionable, as when someone believes that certain social groups should be subordinated. Therefore, "critical distance from and scrutiny of" the preferences are crucial.¹⁴⁹ In other situations, individual preferences are not objectionable per se, but what is rational for an individual may not be rational for a collective. Vaccination is an example. If individuals rationally choose not to get vaccinated due to the relatively high costs, there would not be herd immunity.¹⁵⁰ But engagement collectively through free speech can help individuals understand the importance of such immunity: they learn from others that if they "get vaccinated . . . [they can] protect themselves, their families and their wider community circles."¹⁵¹ There are also occasions where individuals do not hold pre-formed preferences before collective deliberation. This is because some issues are too complex and socially sensitive for citizens to have a judgment independent of others and the society.¹⁵² The field of sustainable development is an example. That is why Sen stated that "in matters of public judgment, there is no real escape from the evaluative need for public discussion."¹⁵³

In the above-mentioned situations where individual preferences are objectionable, socially irrational, or non-existent, dialogical engagement with the collective is indispensable. Collective deliberation stimulates the individuals to form new and transcendental values in the dialogic process, rather than simply aggregating the values held by them. And during the process, individual participants can critically internalize the opinions of the collective rather than simply conform with them.¹⁵⁴ The mechanism by which deliberation forms transcendent values is "social learning," a process for "participants to learn from each other, form reasoned opinions, evaluate positions and reach informed decisions."¹⁵⁵ It is a process through which "each individual helps others to enhance their perspective and transcend the limitations of their own moral judgement."¹⁵⁶

149. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544 (1988).

150. Jennifer Prah Ruger, *Health Economics and Ethics and the Health Capability Paradigm*, 16 J. HUM. DEV. & CAPABILITIES 581, 589 (2015).

151. *Id.*

152. Neil Ravenscroft, *A New Normative Economics for the Formation of Shared Social Values*, 14 SUSTAINABILITY SCI. 1297, 1298 (2019).

153. SEN, DEVELOPMENT AS FREEDOM, *supra* note 26, at 110.

154. See Mackenzie B. Murphy et al., *Comparing Group Deliberation to Other Forms of Preference Aggregation in Valuing Ecosystem Services*, 22 ECOLOGY & SOC'Y 17, 24 (2017). To be sure, the study cited here also mentions the occurrence of "groupthink," indicating that it is not always easy for individual group members to critically evaluate the others surrounding them. But deliberation with peers at least provide a possibility of thinking beyond one's own circumstances.

155. Jasper O. Kenter et al., *The Deliberative Value Formation Model*, 21 ECOSYSTEM SERV. 194, 198 (2016).

156. Héctor Oscar Arrese Igor, *Freedom of Speech and Moral Development in John Milton's Political Thought and Johann Gottlieb Fichte's Revolutionary Writings*, 8 LAS TORRES DE LUCCA 9, 29 (2019).

The idea of social engagement as a way of transcending the moral limits of an individual was expressed elegantly by Rawls, when he said, following the spirit of Humboldt:

[I]t is through social union founded upon the needs and potentialities of its members that each person can participate in the total sum of the realized natural assets of the others. We are led to the notion of the community of humankind the members of which enjoy one another's excellences and individuality elicited by free institutions, and they recognize the good of each as an element in the complete activity the whole scheme of which is consented to and gives pleasure to all.¹⁵⁷

Remember that Sen has described capability as the freedom to choose what people have *reason* to value. That means one must subject "one's choices—of actions as well as of objectives, values, and priorities—to reasoned scrutiny."¹⁵⁸ Many individual values or interests are only legitimate after being reviewed or scrutinized by the collective. As socially embedded beings, individuals need the process of deliberation to help form values that they did not previously hold, to correct values that are objectionable, and to transcend values that are proved to be parochial. In such a process, individuals are engaged in what Habermas called "ideal role taking": "[m]oral behavior is a matter of modifying one's own interests in the light of one's understanding and recognition of the interests of everyone else, a process that leads to the development of a 'larger self,' a self that identifies with the interests of others and is wont to adopt 'the attitude of the whole community.'"¹⁵⁹ This requirement "protects social bonds on which the integrity of moral agents and their individuality depend."¹⁶⁰

To sum up the arguments so far: there is a synergistic relationship between the individual and the collective,¹⁶¹ and free speech acts as a bridge that facilitates the synergy. Individuals participate in collective value-formation as the authors of their own lists. In the meantime, the collective also reviews and reshapes the values of the individuals' lists. On the one hand, the collective list cannot be formed without the inclusion, incorporation, or synthesis of the individual lists from each member of the collective. On the other hand, the formation of the individual lists must be reviewed and scrutinized by the collective as a whole. Free speech, by bridging the two lists, constitutes the processes of value-formation of both sides.

The two processes are not sequential, but simultaneous. When an individual engages with the collective (i.e., deliberates with her fellow community members), she exercises free speech publicly. In this process, she shapes her

157. JOHN RAWLS, *A THEORY OF JUSTICE* 459 (Rev. ed. 1999).

158. AMARTYA SEN, *RATIONALITY AND FREEDOM* 4 (2002).

159. JAMES G. FINLAYSON, *THE HABERMAS – RAWLS DEBATE* 39 (2019) (internal citation omitted).

160. *Id.*

161. Julie A. Mertus, *Beyond the Solitary Self: Voice, Community, and Reproductive Freedom*, 3 COLUM. J. GENDER & L. 247, 286 (1992).

fellow community members and the values list of the collective, and also exposes her own values to review and scrutiny by other members of the community. Mutual influence occurs in this process. The individual and the collective have been bridged, and the past and the present have also been synchronized. In this regard, free speech, as an architectonic capability, constitutes both the individual and the collective.¹⁶² Because of this dual function, free speech capability is too important to be left to the political processes. Thus, this capability justifiably enjoys special protection as a fundamental freedom.

The interactive relationship between the individual and the collective is what distinguishes CA's justification of free speech from traditional justifications. The logical sequence of reasoning is the following: the capabilities list is a vital concept under CA as it delineates the values of humans—both individuals and collectives need such lists—and the two kinds of list cannot be legitimately and meaningfully formed without each other. Through the theoretical lens provided by CA, especially the capabilities list, we acquire a clearer sense of the individual-collective relationship and the unique role of free speech in facilitating such relationship.

IV. THEORETICAL REFORMULATION

According to the theory proposed by this Article, freedom of speech should be seen as a central human capability instead of a (negative and formal) right. Free speech capability has been defined as the actual capacity and power of individuals to engage in the promotion and definition of both individual and collective values in an expressive and dialogic manner. The justification elaborated in Part III revealed a new perspective on free speech: by linking public action and other capabilities on the list on the one hand, to individual value-formation and collective value-formation on the other, free speech capability serves instrumental and constitutive functions under the CA framework. If CA could be viewed as a prescription for constitutions, the central position of free speech merits special protection from constitutional and legal systems. By reformulating free speech as free speech capability, the three shortcomings of the existing theories of free speech can be overcome. And in overcoming these shortcomings, free speech capability reveals itself as a more competent, holistic, and realistic theory.

A. *From Formal Right to Realistic Power of Being and Doing*

Traditional theories of free speech, which are based on the rights discourse, fail to recognize that there exists a huge gap between a formal right to do and an actual state of doing. Achieving actual states of being and doing requires

162. James Fleming has mentioned a similar idea about deliberative democracy and deliberative autonomy: the former refers to individuals constructing the social, the latter refers to individuals constructing their own conceptions of good life, and that both processes "may involve individual or collective deliberation." See James Fleming, *Securing Deliberative Autonomy*, 48 *STAN. L. REV.* 1, 32, (1985).

a myriad of conditions and resources that far surpass what a mere negative freedom could cover. CA is a theoretical tool that helps us bridge this gap. It was developed by the theorists who were discontented with the formalism of existing theories, which focus on means rather than ends, formal institutions rather than actual behaviors and lives, and mere freedom to enjoy rather than actual enjoyment. By defining capability as actual freedom of achieving beings and doings, CA abandons the formalistic thinking of the rights approach: “a people in country C don’t really have the right to political participation just because this language exists on paper; they really have this right only if there are effective measures to make people truly capable of political exercise.”¹⁶³ In a word, CA recognizes that the realization of freedoms requires social conditions and resources,¹⁶⁴ which cannot be taken as given.

As a more contextual approach, CA pays substantial attention to concrete stories of individuals’ real lives.¹⁶⁵ It recognizes the central importance of those internal and external conditions (conversion factors) that promote the actual beings and doings of individuals. Overcoming formalistic thinking, CA holds that capability is power, and having freedom of speech does not necessarily create the power to speak. Only an armed freedom—capability—can capture the reality of our world in which power inequalities are severe and deprivations are prevalent. CA redefines the right of free speech as “a positive claim on the state and other duty-holders to take reasonable action”¹⁶⁶ to secure the free speech capability, not in terms of formal liberties, but as actual power of exercise and enjoyment.

The republican tradition views individuals as free and equal agents, but CA warns us that they are also vulnerable and not competent to make all decisions.¹⁶⁷ The state and other actors must play a role in empowering vulnerable individuals to engage in the exercise of defining and achieving the lives they want to live. “This is because without laws we cannot assume, nor does history teach us, that people will easily ‘get what they need.’”¹⁶⁸

To be sure, that states and other entities have duties to promote the free speech capability does not mean that all parties are equally bound, or their duties are identical. Here, the distinction between perfect and imperfect duties

163. Nussbaum, *Women and Equality*, *supra* note 70, at 240.

164. See Nussbaum, *Human Rights and Human Capabilities*, *supra* note 27, at 21; Jean De Munck, *Human Rights and Capabilities: A Program for a Critical Sociology of Law*, 44 *CRITICAL SOCIO.* 921, 933 (2018) (arguing that three conversion factors are needed for formal and legal freedoms to become real capabilities: a favorable culture, intermediaries, material and institutional resources); Bernard Williams, *The Standard of Living: Interests and Capabilities*, in *THE STANDARD OF LIVING* 94, 97–98 (Geoffrey Hawthorn ed., 1987) (arguing that capability could not be equal to choice, since choosing incurs opportunity costs).

165. Nussbaum, *Foreword: Constitutions and Capabilities*, *supra* note 27, at 30 (“the close scrutiny of history and context is more important for the powerless, who face unequal obstacles to opportunity”).

166. Polly Vizard, *The Capability Approach and Human Rights*, in *THE CAMBRIDGE HANDBOOK OF THE CAPABILITY APPROACH* 624, 633 (Enrica Chiappero-Martinetti et al. eds., 2021).

167. Richard Arneson, *The Capabilities Approach and Political Liberalism*, in *THE CAMBRIDGE HANDBOOK OF THE CAPABILITY APPROACH* 165, 181 (Enrica Chiappero-Martinetti et al. eds., 2021).

168. Katharine Gelber, *Capabilities and the Law*, in *THE CAMBRIDGE HANDBOOK OF THE CAPABILITY APPROACH* 643, 650–51 (Enrica Chiappero-Martinetti et al. eds., 2021).

is important. Proposed by classical writers like Grotius¹⁶⁹ and Kant,¹⁷⁰ the notion of imperfect duty was developed to supplement and enrich the traditional account of legal duty, which is deemed to be strict, rigid, and binding. Perfect duties address specific agents and do not leave the agent any discretion with regard to whether and how to discharge the duty.¹⁷¹ By contrast, imperfect duties do not have clearly defined contents and permit latitude or discretion as to their fulfillment.¹⁷² Imperfect duties, argued by scholars, are ubiquitous. Both negative and positive rights (civil and socioeconomic rights) can generate perfect and imperfect duties.¹⁷³ Amartya Sen has highlighted the importance of imperfect duties in realizing the value of human rights. As he posits, legally binding force is only one function of human rights. The imperfect duties—which can be fulfilled by advocacy, exposure, public discussion, and social monitoring—play pivotal roles as well.¹⁷⁴ For example, as Sen pointed out, groups such as Human Rights Watch and Amnesty International have played critical roles in advancing the “effective reach of acknowledged human rights.”¹⁷⁵ In this regard, legally binding and coercive means are not the only route for human rights protection. There can be a mixture of perfect and imperfect duties that are assigned to various entities to provide a flexible and comprehensive system of protection for free speech capability.

Similarly, these duties need not all be fulfilled immediately. Due to limitations of resources, it is reasonable to distinguish those capability needs that are urgent and those which can be achieved in the long run. A similar dichotomy can be found in the jurisprudence of the Constitutional Court of South Africa in dealing with socioeconomic rights cases.¹⁷⁶ As the government cannot ensure that all its citizens actually enjoy the socioeconomic or welfare rights (such as health care and housing) that are guaranteed by the constitution due to resource limitations, the Court has adopted a two-tier approach that mandates that, except for fulfilling the most basic and urgent needs, the government should enact reasonable plans (including short, medium, and long term) that

169. S. Andrew Schroeder, *Imperfect Duties, Group Obligations, and Beneficence*, 11 J. MORAL PHIL. 557, 561–62 (2014).

170. Simon Hope, *Kantian Imperfect Duties and Modern Debates over Human Rights*, 22 J. POL. PHIL. 396, 398–403 (2014).

171. Julio Montero, *Global Poverty, Human Rights and Correlative Duties*, 22 CAN. J. L. & JURIS. 79, 87 (2009).

172. Elizabeth Ashford, *The Alleged Dichotomy between Positive and Negative Rights and Duties*, in GLOBAL BASIC RIGHTS 92, 100 (Charles R Beitz & Robert E Goodin eds., 2009). For a more systematic comparison between the perfect and imperfect duties, see generally Abdallah Salam, *Perfect and Imperfect Rights, Duties, and Obligations: From Hugo Grotius to Immanuel Kant* (2014) (D.Phil. Dissertation, University of Oxford).

173. See Henry Shue, *Mediating Duties*, 98 ETHICS 687, 687–91 (1988); SEN, THE IDEA OF JUSTICE, *supra* note 26, at 383.

174. SEN, THE IDEA OF JUSTICE, *supra* note 26, at 365.

175. *Id.* at 364–65.

176. Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR 1169 (CC) (S. Afr.); Minister of Health and Others v. Treatment Action Campaign and Others, 2002 (10) BCLR 1033 (CC) (S. Afr.).

aim to realize the constitutional commitment progressively.¹⁷⁷ The first tier is basic, current, and urgent, relating to perfect duties that are specified and legally binding, while the higher standard is ideal, prospective, and remote, relating to imperfect duties that are general and politically or socially binding, but not legally binding. The progressive and flexible approach used to guide the promotion of socio-economic rights can also be usefully borrowed in the area of free speech capability.

In sum, the new theory defines and justifies freedom of speech as not merely a right, but also, more importantly, a central and relational capability that instrumentally promotes and constitutively defines other human capabilities. Such a relational account is thick rather than thin, as it prescribes constitutional duties for all powers, not only the state; inclusive rather than parochial, as it justifies free speech upon a holistic system of human values; and realistic rather than formalistic, as it recognizes that the realization of those functions and values of free speech requires a myriad of conditions, resources, and institutional arrangements.

B. From a Bridle of State to a Shared Norm of the Whole Community

Traditional theories describe free speech as a negative right against the state and focus on curbing excess state power. One loophole in the traditional theories of free speech is that they overlook non-state, private actors that play a significant role in limiting speech. The transfer of speech from offline fora to the internet exacerbates this flaw since many infrastructures, channels, and platforms of the internet are privately owned. The conceptual incompetence of these traditional theories in today's world is not merely due to the textual obstacles of constitutions—the First Amendment of the U.S. Constitution, for example, mentions no private entities but only mandates that “congress shall make no law . . . abridging the freedom of speech . . .”¹⁷⁸ It is also because those theories were born in a time when power over speech was unitary. The liberal tradition defines liberty as the antithesis of governmental power, and—as seen with free speech—endorses a strict dichotomy between the interest of the state and the interest of the individual, while ignoring the place of private non-state actors whose interests and actions may compromise individual liberty.

CA offers an alternative: a holistic and perfectionist conception of the constitutional values. It holds that “a key task of a nation's constitution, and the legal tradition that interprets it, is to secure for all citizens the prerequisites of a life worthy of human dignity—a core group of ‘capabilities’—in areas of central importance to human life.”¹⁷⁹ It treats the constitution not only as a binding document for the government, but also as a shared norm for all living

177. Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 395–96 (2007).

178. U.S. CONST. amend. I.

179. Nussbaum, *Foreword: Constitutions and Capabilities*, *supra* note 27, at 7.

in the community. It prescribes the common values that all community members cherish and the corresponding duties (of not only the government but also other entities) to fulfill these values. This holistic view of the constitution holds all powerholders, whether states or private companies, accountable to these shared norms. Even though these norms should not be imposed, but chosen by the people themselves, the protection of free speech capability must be guaranteed because it facilitates the realization of other norms and defines their exact content.

CA takes the constitution as prescribing the good life for a political community and the process of defining this life. This positive role of the constitution and government is not antithetical to political liberalism because some conditions are necessary for the very functioning of a liberal democracy, one of which is the freedom of speech. In other words, free speech is the precondition for human agency, rather than a paternalistic imposition on human agency. Without this architectural capability, political liberalism would lose its foundation.

Under this theoretical reformulation, the spirit and ideal of free speech capability will serve as a guide to not only the lawmaking of the state, but also, no less importantly, the private rulemaking and behavior of private parties. Considering that private powers, like the dominant internet platforms, wield tremendous influence on the speech environment nowadays, it is especially important to have a general theoretical benchmark for them to “regulate” the speech channels they host. Free speech capability is exactly one such benchmark.

C. *From a Single-Value Theory to a Relational Theory in the Whole Value System*

The third shortcoming of existing theories, that they are too narrow and parochial, can also be resolved by the new theory of free speech capability. Existing theories are all deductive (arguing from one basic value as the starting point) and reductionist (reducing the justification of free speech into one particular value).¹⁸⁰ Theorists have tried to build the justification of free speech upon one single value, such as truth, democracy, or autonomy. They do not recognize that free speech serves *multiple* values. For “it is likely that any longstanding practice serves more purposes than any single human mind can comprehend.”¹⁸¹ As a result, those theories provide few clear guides to decisionmakers, and sometimes they even lead to objectionable results due to their partiality.¹⁸² For example, if free speech only cares about the search for

180. Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1412–14 (1987).

181. Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 671 (2013) (citing generally Ronald J. Allen, *Constitutional Adjudication, the Demands of Knowledge, and Epistemological Modesty*, 88 NW. U. L. REV. 436 (1993); Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998)).

182. Cass, *supra* note 180, at 1417–18.

truth, then why should pure opinions—which, unlike statements of facts, may not be true or false—be protected? Likewise, if political participation is the only rationale for free speech, then government prohibition of privately kept diaries would not be a problem. Here we can see why these theories all struggle to validate a hierarchy or lexical ordering of values, and to prove that other values are inferior to the identified “central” value. This is unnecessary. The multiplicity and flexibility of human values are undeniable facts. As argued before, such value parochialism also renders the current theories incapable of reconciling the substantive with the procedural justifications of free speech.

By placing free speech into the holistic system of human values, the new theory captures the justification of free speech in a more systematic and inclusive way and solves the tension between the substantive and procedural justifications of free speech. The central capabilities list is the collection of human ideals that are most fundamental. It is a comprehensive conception of the good for an individual or a community. It can include epistemic, democratic, and autonomic values. In other words, the substantive values free speech promotes are much more inclusive than what existing theories imagine. In addition, free speech is also procedurally valuable. Unlike the values under the traditional theories which are singular and fixed, the list of the new theory is dynamic and fluid. One architectonic feature of the CA list is its open-ended nature. It is the constitutive exercise of freedom of speech that determines which values are on the list, what are the specific contents of those values, and how to fulfill them. The two functions of free speech—facilitative and constitutive—correspond to the substantive and procedural account, respectively. The very reason these two accounts can be reconciled in the CA-based theory is that free speech here is not protected *per se*, nor as an instrument for some singular value, but as a link to all the other human values through its instrumental and constitutive functions. The systematic, inclusive, and dynamic list of human values (capabilities) is where the substantive and the procedural cohabitate.

The new theory’s reformulation in this aspect can also be seen from its difference with the theory endorsed by Post, Weinstein, and Balkin. At first glance, the theory of free speech capability may look like the theory of democratic participation, as both theories stress public discussion, political legitimacy, and equal participation. But they differ substantially in two aspects. First, the theory of democratic participation is far less inclusive than the theory of free speech capability. Post and Weinstein have broadened the substantive account of Meiklejohn with the procedural account of democratic participation,¹⁸³ but they mainly focus on the political sphere, which cannot account for speech’s importance in other areas. And even though Jack Balkin has further expanded the fields of democratic participation to include cultural matters,¹⁸⁴ the theory of democratic participation is still incomparable to the theory of free speech

183. See generally Post, *supra* note 15; Weinstein, *supra* note 55.

184. 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, 33–45 (2004).

capability which anchors free speech unto the whole system of human values. Second, under the theory of democratic participation, the relationship between individuals and the collective is still unidirectional—free speech offers legitimacy to the collective rule by soliciting inputs from each individual. However, this account overlooks the role of the collective in the values of individuals. The new theory justifies free speech based upon mutual engagement in a bi-directional way. It then reconciles the substantive and procedural as well as the individual and collective.

V. PRACTICAL USAGE

The theory of free speech capability is highly normative. It prescribes what national, subnational, and supranational legal orders should do. It is also abstract since it is derived from a general framework of achieving and assessing social justice. For moral and philosophical principles to be applied in practical contexts, they must first be transformed and specified into legal mandates and rules. In other words, the new theory must be able to not only construct a logically viable framework for theoretical reasoning, but also stipulate pathways for practical decision making in real life.

This echoes the distinction between theory and doctrine. There are both theories and doctrines in the free speech field. If theory provides a normative justification for why free speech should be protected,¹⁸⁵ then doctrine is a framework that dictates how free speech can facilitate that normative value, and what rights and duties should be extended to relevant parties “(e.g., the state, individuals, and other entities) accordingly.¹⁸⁶ The theoretical part answers the why question, while the doctrinal part deals with the how question.¹⁸⁷ For example, traditional theories anchor free speech in the fundamental values of democracy or autonomy, while existing doctrines contain legal principles, tests, and rules that implement and embody the value, such as the professional

185. Thomas Scanlon, *Comment on Baker's Autonomy and Free Speech*, 27 CONST. COMMENT. 319, 320 (2011) (“One central task of theoretical reflection on freedom of speech is that of clarifying these interests: understanding what they are, why they are important, and in what ways they are at stake when restrictions on expression are in question.”).

186. Emerson, *supra* note 16, at 878 (“We must therefore undertake . . . a statement of the general principles upon which such legal doctrine must be based, and . . . an attempt at a formulation of some detailed rules of law that should govern the various types of first amendment problems which arise in our society today.”).

187. Susan Williams has offered a similar account by dividing a theory into three levels: legal doctrine, conceptions of values, and deep commitments. Her first level is the same as my category of doctrine; her second and third levels resemble my category of theory, even though the last level, deep commitments, may be deeper and broader than the theory in my dichotomy and partly overlaps with political or moral theories. See Susan H. Williams, *Democracy, Freedom of Speech, and Feminist Theory: A Response to Post and Weinstein*, 97 VA. L. REV. 603, 604 (2011).

speech doctrine,¹⁸⁸ the “actual malice” standard,¹⁸⁹ and the Central Hudson test¹⁹⁰ in American free speech jurisprudence. These doctrines bridge abstract theory and practical decisions in concrete cases.¹⁹¹

Space does not permit this Article to explore all the doctrines that correspond to or are prescribed by the theory of free speech capability. This part, instead, sketches some general requirements of the theory and some doctrinal adjustments that can be made to fulfill the requirements. This can be done in many ways, such as constitution making, constitutional interpretation, legislation, private rulemaking, and international evaluation and comparison. Even though some of the following examples are extracted from the U.S. context, the theory is a global approach that may be applied in any jurisdiction. Indeed, CA is itself a universal ideal.¹⁹² These proposed applications, to be sure, are preliminary and tentative. Their aim is to invite more scholarly effort to explore the practical use of the new theory.

A. *Constitutional Design*

The most important legal instrument for applying the CA-based theory is the constitution. As a blueprint for political communities in which individuals live together and form different kinds and levels of collectives, the capabilities list requires national constitutions to seriously consider the list and strive to realize the items on it. Through constitution-making or amendment processes, the theory of free speech capability reminds the drafters that the constitution is not only a shield from the state, but more importantly, a perfectionist vision or ideal that aims to achieve the common values of the members of the polity. In the meantime, the new theory treats free speech as an actual capability, rather than a formal right. This would require the state to act positively to offer conditions for its realizations, rather than merely refrain from interference. The conditions include duties to be fulfilled not only by the state, but also by

188. See Haupt, *supra* note 126, at 1258–64 (summarizing the professional speech doctrines developed by the courts in deciding First Amendment cases). This doctrine mainly is for the promotion of the truth-seeking value of free speech.

189. *New York Times v. Sullivan*, 376 U.S. at 279–80. This standard is raised for endorsing the democratic functions of free speech.

190. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 606 (1980). The non-misleading requirement of the test shows the Court's concern over the autonomy interest underlying free speech.

191. Post, *Reconciling Theory and Doctrine*, *supra* note 51, at 2355–56 (“First Amendment doctrine veers between theory and the exigencies of specific cases. The function of doctrine is both to implement the objectives attributed by theory to the Constitution and to offer principled grounds of justification for particular decisions.”); see also Clay Calvert, Stephanie McNeff, Austin Vining & Sebastian Zarate, *Fake News and the First Amendment: Reconciling a Disconnect between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 105 (2018) (identifying the marketplace of ideas and democratic self-governance as theories of free speech, and strict scrutiny and under-inclusiveness as doctrines). But see Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1141 (1983) (“one can inquire into the merits of a particular constitutional doctrine or body of doctrine by asking whether that doctrine, *understood as political-moral theory*, is sound”).

192. See Amartya Sen, *Ethics and the Foundation of Global Justice*, 31 ETHICS & INT'L AFF. 261, 261 (2017).

private entities. One proposal for the constitutional provision of free speech could be: “*freedom of speech is a fundamental human liberty; the state shall take reasonable measures of providing necessary conditions, channels, and resources to individuals to ensure and promote the effective exercise of this freedom; other parties should also respect this freedom and provide reasonable assistance or convenience to its exercise.*”

Apart from general provisions guaranteeing free speech, constitutional designers may also consider including doctrines that prescribe the rights and duties of relevant parties for the promotion of free speech capability. For example, they may design an institutional framework that contains the necessary conditions for realizing free speech values, including the right of control over information, the right to know, the right of access to platforms, and the behavioral rules of public discussion.¹⁹³ This is of course only one of many versions that may be considered by constitutional designers.

Drafting or amending the constitutional text, however, may not be a workable option for all the nations in the world, considering the different levels of difficulties for constitutional amendment. For the U.S. Constitution, one of the most difficult in the world to amend,¹⁹⁴ the approach of incorporating CA into constitutional systems by amending the text is not a promising route, at least in the short term. For some other jurisdictions, especially those undergoing regime transition or constitution-making, textual amendment may be a sensible choice. Designing legal rules at the highest level brings about the authority and stability that legislation could not achieve.

B. Constitutional Interpretation

The judicial branch plays a significant role in shaping the constitutional landscape. European courts can issue general interpretations on the constitution while American courts do it through deciding individual cases.¹⁹⁵ In either case, courts could use holistic and progressive methods of construction to interpret the constitution as mandating more realistic and inclusive protection of free speech. This is not always easy since constitutional interpretation will inevitably be bound by the constitutional text. The negative phrase in the U.S. First Amendment, for example, may prevent courts from developing the right of free speech into a completely positive right. However, the CA-based theory can provide theoretical support for U.S. courts to revisit and revise some existing doctrines in free speech jurisprudence. I provide two instances here.

First, the theory of free speech capability provides strong theoretical resources for loosening the state action doctrine, arguably the biggest hurdle

193. Tao Huang, *A Quadruple Doctrinal Framework of Free Speech*, 53 COLUM. HUM. RTS. L. REV. 467, 475–93 (2022).

194. See Sanford Levinson, *Still Complacent After All These Years: Some Ruminations on the Continuing Need for a ‘New Political Science’*, 89 BOS. U. L. REV. 409, 422 (2009); Richard Fallon, *American Constitutionalism, Almost (But not Quite) Version 2.0*, 65 MAINE L. REV. 77, 92 (2012).

195. The European courts often do abstract reviews, while the U.S. courts only interpret the Constitution through specific cases and controversies. For a brief comparison, see Wojciech Sadurski, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence* (Syd. L. Sch., Research Paper No. 11/15, 2011), <http://ssrn.com/abstract=1754209> [<https://perma.cc/AQU2-GW9Y>].

to bringing platforms under the constitutional purview. Historically, the U.S. Supreme Court was flexible with this doctrine. It once used the public function exception to grant constitutional review to a private town square in *Marsh v. Alabama*.¹⁹⁶ It ruled that when a private property was “built and operated primarily to benefit the public” and its “operation is essentially a public function,” it can be taken as a state actor bound by the constitution.¹⁹⁷ However, the Court has significantly narrowed this ruling in subsequent decisions, adopting a historical test to determine the existence of public functions.¹⁹⁸ And providing channels for public discussion is not a traditionally exclusive function of the state.¹⁹⁹

This is not an end to the issue. In any case, nothing prevents the Court from loosening the state action doctrine again due to changed circumstances.²⁰⁰ Indeed, it was the Rehnquist Court that significantly transformed the state action doctrine and made it “into a significant barrier to applying constitutional scrutiny to private conduct.”²⁰¹ Returning to the years prior to that is not an impossible vision.²⁰² To disentangle platforms from the historical test, the Court may need more theoretical foundations as the basis for reasoning because traditional liberalism is no longer suitable in this multiple power scenario and merely arguing the importance of the platform is far from enough. CA can offer the Court more profound justifications for its expansive and creative interpretations of the state action doctrine. In reconstructing the doctrinal landscape, the Court should reconsider the fundamental issues like what is free speech, why it is important, and how to realize it. Only then could it detach the state action doctrine from the formal analysis of whether a certain function has been historically carried out by the state and rebuild the doctrine upon a realistic test that asks whether a certain function resembles state power in shaping individuals’ freedoms in a substantive and significant way. CA’s realistic stance empowers the Court to interrogate power relations in the public realm. The power exercised by big platforms is no different than traditional state power regulating speech, thus they should also be bound by constitutional norms for the realization of free speech values.

Second, the Court may, armed with the new theory, grant more space for the regulatory efforts of the state in building a more egalitarian, inclusive, and

196. *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

197. *Id.*

198. For example, the Court ruled that only when the power exerted by the private entity was traditionally and exclusively reserved to the state, such exercise of power can be viewed as public function. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); see also *Manhattan Comty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1929 (2019) (ruling that public access cable channels do not exercise public function).

199. Matthew P. Hooker, *Censorship, Free Speech & Facebook: Applying the First Amendment to Social Media Platforms via the Public Function Exception*, 15 WASH. J.L. TECH. & ARTS 36, 61 (2019).

200. Geoffrey R. Stone, *Reflections on Whether the First Amendment is Obsolete*, KNIGHT FIRST AMEND. INST. (NOV. 1, 2017), <https://knightcolumbia.org/content/reflections-whether-first-amendment-obsolete> [<https://perma.cc/NFY8-ECL3>].

201. Andrew Keane Woods, *Public Law, Private Platforms*, 107 MINN. L. REV. 1249, 1269 (2023).

202. *Id.* at 1292–93.

accessible speech environment. For example, proposals to reform the Section 230 immunity of platforms²⁰³ to build such immunity upon the condition of more responsible moderation practices,²⁰⁴ as well as regulations that impose disclosure, notice, and non-discrimination duties to platforms,²⁰⁵ should generally be allowed to pass constitutional scrutiny. Similarly, regulatory schemes to make speech platforms more open to a wider array of sources, especially marginalized or less powerful speakers, such as net neutrality and fairness doctrine, should generally receive a more lenient view by the Court, rather than get struck down under strict scrutiny. Finally, courts should recognize that to meaningfully protect free speech, the property rights and editorial discretion of private platforms should be reasonably curtailed so that moderate regulations can survive constitutional scrutiny to make these platforms more open, inclusive, and accountable. To be sure, the state should not be allowed to do whatever it wants. But it also should not be barred from taking necessary steps to curb excess private power and make its exercise more transparent and accountable.

The brief overview above reveals that even in the United States, where the negative right tradition receives strongest support (as illustrated by the strict state action doctrine), free speech capability offers judges some theoretical insights, tools, and levers with which to make free speech jurisprudence more competently adaptable to the modern world through constitutional interpretation. In other jurisdictions, the CA-based theory can play a similar role, namely empowering judges, within the hermeneutic constraint, to construct the freedom of expression as an actual and relational capability and to explore its full meaning in specific contexts and scenarios.

C. Legislation and Regulation

Legislation is a crucial way of implementing the constitution. This is especially so in contexts that lack judicial review.²⁰⁶ Legislatures and governments can pass laws and regulations that reflect, specify, and fulfill the ideals of free speech capability. The laws and regulations that substantially affect free speech include those that touch upon the responsibilities of social media companies, the public's right to know, and the rules on hate speech, for example.

One issue that received wide attention recently is the regulation of social media platforms. Legislative efforts can play a significant role here to ensure that content moderation of social media conforms to fundamental free speech ideals. Several states in the United States have passed such laws, and heated

203. Section 230 was passed by the U.S. Congress and added to the Communications Decency Act of 1996 (CDA). This Section has provided platforms legal immunity from liability that may be generated by third-party content. See 47 U.S.C. § 230.

204. See Jack Balkin, *How to Regulate (and not Regulate) Social Media*, 1 J. FREE SPEECH L. 71, 93 (2021).

205. See Kathleen Hidy, *The Speech Gods: Freedom of Speech, Censorship, and Cancel Culture in the Age of Social Media*, 61 WASHBURN L. J. 99, 144, 152–57 (2021).

206. See, e.g., Yan Lin, *Constitutional Evolution Through Legislation: The Quiet Transformation of China's Constitution*, 13 INT'L J. CONST. L. 61, 87–88 (2015).

debate has ensued.²⁰⁷ Justice Thomas, when commenting on the controversies, pointed out two possible ways that legislatures might regulate digital private platforms: laws of common carriers and public accommodations.²⁰⁸ He made a convincing argument that the online platforms can be properly analogized with common carriers and public accommodations. But the laws traditionally regulating these properties only “restrict the platform’s right to exclude”²⁰⁹ or impose the duty of “non-discrimination” on them.²¹⁰ More expansive regulations, such as those requiring provision of equal and wide access, or those imposing due process requirements on the settlement of free speech disputes on these platforms, and those that ensure the speech rules of these platforms are consistent with constitutional norms and values, are beyond the doctrinal reach of both common carrier laws and public accommodation laws. A more comprehensive legislative package, justified and supported by a new theory of free speech, can be put into place.

Future legislative efforts in these areas can be significantly inspired by the theory of free speech capability. Unlike traditional theories, CA does not have a deregulatory bias: it does not treat regulations as natural enemies of freedom. Rather, CA not only permits but also requires the positive efforts of governments to promote their citizens’ capabilities.²¹¹ Capabilities are not only “options open to choice,” but also “the power of choice.”²¹²

Guided by the theory of free speech capability, federal and state legislatures can act in at least three ways. First, bearing in mind that free speech is an actual capability rather than a formal right, legislatures should enact laws that provide conditions and resources for people to speak effectively, such as lowering the threshold of internet access,²¹³ facilitating e-voting and e-deliberation to make public discussion more convenient,²¹⁴ and mandating the disclosure of government and corporate information to make the public more informed.²¹⁵ Second, recognizing that free speech is influenced by both government actions and private regulations, legislatures should pass laws to regulate the governance of platforms, such as requiring those platforms to publish more detailed, empowering, and transparent rules governing speech and conforming to due process requirements when they remove content or ban accounts on their platform. Third, in regulating areas that are closely related to free speech, such as

207. For examples of judicial review of such laws, see generally *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022); *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022).

208. *Biden v. Knight First Amend. Inst.*, 141 S.Ct. 1220, 1222 (2021) (Thomas, J., concurring).

209. *Id.* at 1226.

210. *Id.* at 1225–26.

211. Nussbaum, *Capabilities and Human Rights*, *supra* note 86, at 290.

212. David Crocker, *Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 2*, in *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 153, 184 (Martha C. Nussbaum & Jonathan Clover eds., 1995).

213. See Ryan Shandler & Daphna Canetti, *A Reality of Vulnerability and Dependence: Internet Access as a Human Right*, 52 *ISR. L. REV.* 77, 98 (2019).

214. See Michael Carpin et al., *Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature*, 7 *ANN. REV. POL. SCI.* 315, 334–35 (2004).

215. See Tao Huang, *Freedom of Speech as a Right to Know*, 89 *U. CIN. L. REV.* 106, 127–30 (2020).

the press, telecommunications, and data protection, legislatures should adhere to the spirit and requirement of free speech capability, ensuring that the actual freedom to dialogically engage with others is duly protected and adequately promoted.

D. Private Rulemaking

One remarkable phenomenon in our time is the ubiquity of the private governance of speech. Major online platforms have all published rules regarding expressive behavior in the form of community standards,²¹⁶ terms of service,²¹⁷ industry initiatives,²¹⁸ and internally binding judgments issued by the platforms themselves.²¹⁹ For example, Facebook's Community Standards contain rules that "prohibit the usage of slurs that are used to attack people on the basis of their protected characteristics."²²⁰ Such hate speech bans are not allowed by the Constitution if done by the government, but they are ubiquitous in the social media ecosystem. This scenario is unimaginable to the designers of traditional theories and rules. To account for the private governance of speech, new theoretical tools must be available. The theory of free speech capability can play such a role. It could guide private rulemaking on these platforms by offering a more powerful, egalitarian, and transparent channel for citizens to express themselves and deliberate with one another. For example, platforms should enable the users to participate in the rulemaking process, for the speech rules are only legitimate when they are formed by collective deliberation. In reviewing the free speech disputes, the adjudicative body (such as the Facebook Oversight Board) should take CA into account as an important supplement to its consultation with the laws of specific jurisdictions.

As a normative theory that mandates the general requirement of justice and the aspirational goal of the constitution, CA also provides digital platforms, many of which are transnational entities, with a benchmark and framework with which to build a minimally uniform standard of speech regulation that can be applied across different jurisdictions. One of the most formidable problems these internet giants face is the multiple legal orders they have to comply with, some of which may contain overly repressive rules of speech.²²¹

216. See *Facebook Community Standards*, FACEBOOK, <https://transparency.fb.com/policies/community-standards/> [<https://perma.cc/66ZT-X3QS>]; *Google Help Communities Content Policy*, GOOGLE, <https://support.google.com/communities/answer/7425194?hl=en> [<https://perma.cc/2UKH-LXVW>]; *Rules and Policies*, TWITTER, <https://help.twitter.com/en/rules-and-policies> [<https://perma.cc/T6V8-LSYG>].

217. See *Terms of Service*, YOUTUBE (last visited Apr. 13, 2024), <https://www.youtube.com/static?template=terms> [<https://perma.cc/3TJZ-37UU>].

218. For example, the Global Network Initiative was established in 2008 and aims to provide a common venue for internet companies to address privacy and free speech concerns. See *Global Network Initiative*, GLOB. NETWORK INITIATIVE, <https://globalnetworkinitiative.org/> [<https://perma.cc/HJ8J-T9C2>].

219. For example, the Facebook Oversight Board's decisions on free speech issues are binding on both Facebook and the Board. See Oversight Board Charter Art. 2, Section 2, META OVERSIGHT BOARD (last visited Apr. 13, 2024), <https://www.oversightboard.com/governance/> [<https://perma.cc/DKA2-3BZB>].

220. *Hate Speech*, FACEBOOK, (last visited Apr. 13, 2024) <https://transparency.fb.com/policies/community-standards/hate-speech/> [<https://perma.cc/FE8K-8SAE>].

221. See LAWRENCE LESSIG, CODE: VERSION 2.0, at 294–302 (2006).

Compliance with multiple state laws may result in a race to the bottom in which the platforms may be forced to adopt the most restrictive rules regarding speech out of fear of compliance sanctions.²²²

CA, as a global approach to constitutional justice,²²³ can embolden platforms to enact some uniform rules of speech that apply across borders. Unlike traditional theories of free speech which assume a functioning democracy as their basis, the theory of free speech capability builds upon the universal needs of individuals as dignified agents living in a community. It applies to both democratic and non-democratic countries. And by anchoring free speech upon human values as a whole, it has stronger logical, normative, and rhetorical force that can be used to push back repressive speech regimes. In any case, private companies have to weigh the risk of legal sanctions by certain jurisdictions with their commitment to maintain the integrity of free speech on their platform. But armed with the CA-based mandate to fulfill their imperfect duties, they can insist on free speech values and mandates at least on some occasions.²²⁴ The insistence on a minimally uniform standard and adherence to the norms of free speech capability can help generate public pressure from the international community to compel restrictive regimes to improve their practices.

CONCLUSION

In an age of free speech cynicism, it is important to keep faith in this fundamental liberty. Nonetheless, the legal protection of free speech is unprincipled, incoherent, and fatally weak. For free speech to fulfill its expected functions, we must reformulate the theories underlying the law. Theories are indispensable because the field of free speech is so broad, so important, and so complex. Theories provide the normative bases and analytical structures that are necessary for free speech laws to be legitimate, effective, and competent. However, current theories of free speech are significantly flawed. They cannot account for the new power dynamics on the internet, the justifications they provide are parochial and incoherent, and the rights discourse underlying them is too feeble to facilitate free speech values. The result is not only a decreasing descriptive match with the fast-changing realities, but also the fading normative force of those theories in guiding practices.

This Article proposes a new theory of free speech based on the capabilities approach. Under this theory, free speech is not only a right, but also, more importantly, a capability—the actual power to effectively participate in and actively shape one’s individual as well as collective life. Free speech should receive special protection in a constitutional system because it serves two important functions. First, it is instrumental for the development and realization of all the other central capabilities of human beings. Second, it is constitutive

222. See JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 147, 158–60 (2006).

223. Cf. Sen, *Ethics and the Foundation of Global Justice*, *supra* note 192, at 261.

224. See *supra* Part IV.C.

for the value-formation process of the individual as well as that of the community—it helps bridge the individual with the collective through the process of public reasoning. Such theoretical reformulation of free speech can overcome the shortcomings of traditional theories—it is a more inclusive, systematic, and realistic narrative of this liberty. Under this new theory, free speech is reshaped as a relational capability that builds the holistic human value system. Apart from its theoretical contributions, the theory of free speech capability is applicable in various practical contexts, such as constitution-making, constitutional interpretation, legislation, and private governance of speech.

The theory proposed by this Article is not as radical as it may seem. Jurists have already envisioned some versions of positive speech rights, and CA has always contained the basic concept of public discussion being both instrumentally and constitutively fundamental. In addition, the new theory, which builds upon these previous theoretical explorations, in no way denies the values endorsed by the current theories. Rather, the new theory supplements and develops existing theories into a more realistic and powerful one, offering new insights on reforming free speech law.

To further elaborate and implement the theory of free speech capability, more work is needed to explore potential doctrines, principles, and rules under this theoretical framework. This Article gives a very preliminary sketch, leaving much more to scholarly efforts in the future.

