

# Postmodern Free Expression: A Philosophical Rationale for the Digital Age

Stephen M. Feldman  
*University of Wyoming*

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), and the [Law and Philosophy Commons](#)

---

### Repository Citation

Stephen M. Feldman, *Postmodern Free Expression: A Philosophical Rationale for the Digital Age*, 100 Marq. L. Rev. 1123 (2017).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol100/iss4/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

---

**POSTMODERN FREE EXPRESSION: A  
PHILOSOPHICAL RATIONALE FOR THE  
DIGITAL AGE**

STEPHEN M. FELDMAN\*

*Three philosophical rationales—search-for-truth, self-governance, and self-fulfillment—have animated discussions of free expression for decades. Each rationale emerged and attained prominence in American jurisprudence in specific political and cultural circumstances. Moreover, each rationale shares a foundational commitment to the classical liberal (modernist) self. But the three traditional rationales are incompatible with our digital age. In particular, the idea of the classical liberal self enjoying maximum liberty in a private sphere does not fit in the postmodern information society. The time for a new rationale has arrived. The same sociocultural conditions that undermine the traditional rationales suggest a self-emergence rationale built on the feminist concept of relational autonomy. This novel rationale constitutionally protects expression that fosters the ongoing creative and dynamic process of self-emergence. As such, the rationale justifies protecting expression concerned with the emergent self's struggle to define itself and the broader culture. The self-emergence rationale has important ramifications, especially for free-expression issues related to the Internet. The Roberts Court has invoked the traditional rationales in granting expansive first-amendment protections to corporations. Many Internet-related issues involve multinational corporations, such as Google, Verizon, and Facebook. But under the self-emergence rationale, publicly held business corporations should not have free-speech rights for two reasons.*

---

\*Visiting Scholar, Harvard Law School. Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law and Adjunct Professor of Political Science, University of Wyoming. I thank Alexander Tsesis and the other participants at the 2015 Yale Law School Freedom of Expression Scholars Conference for their comments on an earlier draft. I also thank James Grimmelman, Mark Tushnet, Harvey Gelb, Jim Delaney, Noah Novogrodsky, and Sam Kalen for their comments. Finally, I am grateful to computer scientist Noah Carnahan for his explanations of online technology.

*First, they have fixed rather than emergent natures. Second, they manipulate and limit the sociocultural space available for the autonomous self-emergence of individuals.*

I.	INTRODUCTION .....	1124
II.	THE HISTORY OF THE THREE PHILOSOPHICAL RATIONALES .....	1132
	A. The Search-for-Truth Rationale.....	1132
	B. The Self-Governance Rationale.....	1138
	C. The Self-Fulfillment Rationale.....	1142
III.	THE THREE PHILOSOPHICAL RATIONALES IN THE DIGITAL AGE ....	1148
	A. The Socially Constructed (Relational) Self.....	1148
	B. The Collapse of the Traditional Public-Private Dichotomy.....	1155
IV.	A SELF-EMERGENCE RATIONALE FOR FREE EXPRESSION .....	1162
	A. Relational Autonomy and the Self-Emergence Rationale.....	1162
	B. Implications of the Self-Emergence Rationale.....	1171
	1. In General.....	1171
	2. Free Expression and Publicly Held Business Corporations .....	1175
V.	CONCLUSION.....	1188

## I. INTRODUCTION

Three philosophical rationales animate discussions of free expression in American constitutional jurisprudence.<sup>1</sup> The search-for-truth or marketplace-of-ideas rationale maintains that the free exchange of ideas is the best means for society to identify truth and falsity. The self-governance rationale maintains that the free discussion of political issues is a prerequisite for democracy. The self-fulfillment rationale maintains that free expression is necessary for each individual to realize his or her potential and ambitions. Scholars occasionally have suggested alternative rationales, but these three have ruled the free-expression roost for

---

1. See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) [hereinafter SYSTEM] (summarizing philosophical rationales).

decades.<sup>2</sup>

The time for change has arrived. Each of the three primary rationales first attained prominence in American jurisprudence in specific historical and political settings.<sup>3</sup> All three rely on the foundation of the classical-liberal self: a self that exists prior to society and culture; is its own sovereign center of power; and enjoys maximum liberty so long as government is absent.<sup>4</sup> Life in our information society, however, casts the self into a different light. The self in the digital age is an emergent self.<sup>5</sup> It emerges through an ongoing creative and dynamic process always situated within a sociocultural context.<sup>6</sup>

An understanding of the emergent self reveals the shortcomings of the traditional philosophical rationales. Without the classical liberal self, those rationales collapse. The emergent self necessitates a new philosophical rationale that can elucidate free expression in the information society. I call this novel justification for free expression the self-emergence rationale.

The self-emergence rationale has important implications for numerous free-speech issues, particularly those involving digital technologies. For instance, on November 10, 2014, President Barack Obama recommended that the Federal Communications Commission (FCC) impose net neutrality—also referred to as an Open Internet—which would require Internet Service Providers (ISPs) to provide all customers with equal service.<sup>7</sup> Net neutrality would prevent ISPs, including multinational corporations (MNCs) such as Verizon, Comcast, and AT&T, from charging customers extra for faster service.<sup>8</sup> On February 4, 2015, the chair of the

2. See, e.g., LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986) (arguing that the underlying purpose of the First Amendment is to promote tolerance); MELVILLE B. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 1.04 (1984) (arguing that free expression provides a “safety valve” for society).

3. See STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY* (2008) (providing a comprehensive history of free expression).

4. ZYGMUNT BAUMAN & REIN RAUD, *PRACTICES OF SELFHOOD* 1–3 (2015); PHILIP CUSHMAN, *CONSTRUCTING THE SELF, CONSTRUCTING AMERICA* 30–33 (1995); CHARLES TAYLOR, *SOURCES OF THE SELF* 143–98 (1989).

5. See *infra* Part III. For an excellent introduction to digital technology and the Internet, see JAMES GRIMMELMANN, *INTERNET LAW: CASES AND PROBLEMS* 1–41 (4th ed. 2014).

6. KENNETH J. GERGEN, *RELATIONAL BEING* xv (2009) (emphasizing the ongoing process of relationships).

7. Edward Wyatt, *Obama Urges FCC to Adopt Strict Rules on Net Neutrality*, N.Y. TIMES, Nov. 10, 2014.

8. See TIM WU, *THE MASTER SWITCH* 260, 286–87 (2011 ed.) (discussing net neutrality).

FCC, Tom Wheeler, proposed new rules that would implement net neutrality.<sup>9</sup> On February 26, 2015, the FCC adopted the rules, which went into effect on June 12, 2015.<sup>10</sup> As expected, ISPs and trade organizations representing the wireless and cable industries sued on multiple grounds.<sup>11</sup> The industry has repeatedly challenged FCC regulations, including net neutrality, and one persistent issue has been whether the regulations violate the ISPs' first-amendment rights to free expression.<sup>12</sup> They claim a right to transfer or not transfer any information they desire and at any speed they desire.<sup>13</sup> Moreover, numerous other digital-related issues are percolating in the lower courts and might soon reach the Supreme Court.<sup>14</sup> Many of these issues involve MNCs, including Google, Verizon, and Facebook.<sup>15</sup> Most important, then, the Roberts Court has invoked the traditional rationales in granting expansive first-amendment protections to corporations. If the Court continues to uphold broad corporate free-speech rights in the context of digital-related cases, the expressive liberties of ordinary Americans will be severely diminished. Thus, one goal of this Article is to redeem individual autonomy, especially as related to free expression, in a world where MNCs control digital architecture, manipulate computer users for profit, and share surveillance data with

---

9. FEDERAL COMMUNICATIONS COMMISSION, FACT SHEET: CHAIRMAN WHEELER PROPOSES NEW RULES FOR PROTECTING THE OPEN INTERNET (Feb. 4, 2015); Tom Wheeler, *This Is How We Will Ensure Net Neutrality*, WIRED (Feb. 4, 2015).

10. Federal Communications Commission, *Open Internet*, <https://www.fcc.gov/general/open-internet> [<https://perma.cc/4PJ2-NNYZ>].

11. *E.g.*, State of Tennessee v. FCC, No. 15-3921/15-3555 (6th Cir. May 21, 2015); U.S. Telecom Assoc. v. FCC, No. 15-1063 (D.C. Cir. Mar. 23, 2015). In the latter case, the D.C. Circuit of Appeals relied on statutory interpretation and administrative law to hold that the Federal Communications Commission can define high-speed Internet service as a utility, which creates the possibility for broad regulation. *U.S. Telecom Assoc. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

12. Jon Brodtkin, *How Net Neutrality Violates the First Amendment (According to One ISP)*, ARSTECHNICA (Oct. 6, 2015) <http://arstechnica.com/tech-policy/2015/10/net-neutrality-violates-the-first-amendment-according-to-one-isp/> [<https://perma.cc/Z3QD-7P6R>]; Karl Bode, *AT&T Argues Net Neutrality Violates Its First Amendment Rights*, BROADBAND (May 26, 2015) <https://www.techdirt.com/blog/netneutrality/articles/20150526/06475031101/att-argues-net-neutrality-violates-first-amendment-rights.shtml> [<https://perma.cc/8VQK-BSPV>].

13. In *Verizon v. FCC*, Verizon argued that any FCC regulation of its activities amounted to a first-amendment violation. The court held that the FCC's imposition of net neutrality was, in effect, contrary to a previous FCC ruling, which the agency had not changed. 740 F.3d 623, 634 (D.C. Cir. 2014); see Susan Crawford, *First Amendment Common Sense*, 127 HARV. L. REV. 2343, 2347-91 (2014) (discussing *Verizon* case).

14. *E.g.*, *Bland v. Roberts*, 730 F.3d 368, 372-86 (4th Cir. 2013) (holding that clicking "like" on a candidate's Facebook page constituted speech).

15. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014); *Song fi, Inc. v. Google Inc.*, 72 F. Supp. 3d 53, 56 (D.D.C. 2014); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110 (N.D. Cal. 2011).

governments.<sup>16</sup> A repudiation of the traditional philosophical rationales and an acceptance of the self-emergence rationale would enhance individual autonomy and change the likely results in many of these upcoming digital-technology cases.<sup>17</sup>

This Article opposes two conceptions of the self: the classical liberal and the emergent. The classical liberal self is a modernist self,<sup>18</sup> philosophically rooted in Descartes's separation of a thinking self from the external world: "I think, [therefore] I am."<sup>19</sup> It is manifested in John Locke's focus on the self's unified experience of sense impressions.<sup>20</sup> In Locke's political philosophy, this unified self begins in a state of nature. It joins civil society and consents to government to protect its preexisting rights and liberties. Consequently, Lockean theory suggests that the limitation or absence of government maximizes individual liberty.<sup>21</sup> Mainstream (modernist) psychology similarly views "the self as individuated and autonomous, that is, as having core properties that are universal, bounded, atomic and detached from its cultural social and historical moorings."<sup>22</sup> The self therefore can attain a "progressively truer understanding" of itself, regardless of politics and culture.<sup>23</sup> From this perspective, characteristics

16. See BRUCE SCHNEIER, *DATA AND GOLIATH* 15–103 (2015) (explaining how corporations and governments use digitally-gathered data to control and manipulate individuals).

17. Anupam Chander & Uyên P. Lê, *Free Speech*, 100 IOWA L. REV. 501, 506–07 (2015) (emphasizing that digital technology makes this era especially important for free speech).

18. Some theorists would also refer to this self as the Enlightenment self because of its roots in Enlightenment philosophy. See *supra* note 4. For a discussion of modernity in philosophy and jurisprudence, see STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 15–28, 83–136 (2000) [hereinafter FELDMAN, *VOYAGE*].

19. René Descartes, *Meditations*, in *THE RATIONALISTS* 63, 97, 112–27 (John Veitch trans., Anchor Books 1974) (1641) (including Descartes's *cogito*). The modernist self also has roots in Christian theology and culture. LARRY SIEDENTOP, *INVENTING THE INDIVIDUAL: THE ORIGINS OF WESTERN LIBERALISM* (2014). One can read Kant as attempting to structure modernist philosophy and the modernist self to harmonize with Protestant theology. ROBERT C. SOLOMON & KATHLEEN M. HIGGINS, *A SHORT HISTORY OF PHILOSOPHY* 207–10 (1996).

20. JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (1690), reprinted in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 238 (Edwin A. Burt ed., 1939).

21. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 4–11 (Thomas P. Peardon ed., 1952) (emphasizing individual freedom in state of nature). As Michael Sandel characterizes the classical liberal self, "we are free and independent selves, capable of choosing our own ends." Michael J. Sandel, *Political Liberalism*, 107 HARV. L. REV. 1765, 1769 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

22. Sunil Bhatia & Henderikus J. Stam, *Critical Engagements with Culture and Self*, 15 THEORY & PSYCHOLOGY 419, 420 (2005).

23. Jack Martin & Jeff Sugarman, *Between the Modern and the Postmodern: The Possibility of Self and Progressive Understanding in Psychology*, 55 AMERICAN PSYCHOLOGIST 397, 397 (2000); Bhatia & Stam, *supra* note 22, at 420.

such as gender, race, and ethnicity are epiphenomenal to the true self.<sup>24</sup>

If the classical liberal self is a modernist self, then the emergent self—the primary *subject* of this Article—is a postmodern self.<sup>25</sup> To be clear, postmodernism is not merely about theory.<sup>26</sup> Social, cultural, and material changes have ushered in postmodernity.<sup>27</sup> Digital and online technology, in particular, have vividly changed our experience of our world and ourselves.<sup>28</sup> Postmodern theory tries to make sense of these changes.<sup>29</sup> Postmodern theory, though, has had a problem with individual autonomy;<sup>30</sup> postmodernists typically assert that sociocultural forces constitute the self,<sup>31</sup> but if the self is socially constructed, then how can it be free? Sociocultural forces would seem to determine the self at every turn.<sup>32</sup> This postmodern autonomy problem is especially pronounced in constitutional law. In a Constitution that articulates and protects individual rights and freedoms, how can we accept postmodern theory if it undermines autonomy? More specifically, what is free speech without autonomy?

24. Julie Cohen summarizes the classical liberal self as being “autonomous, fully individuated, and essentially immaterial.” JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF* 132 (2012) [hereinafter COHEN, *CONFIGURING*]; see Richard Harvey Brown, *Narration and Postmodern Mediations of Western Selfhood*, in *THE POLITICS OF SELFHOOD* 189, 189 (Richard Harvey Brown ed., 2003) (explaining modernist self). Cohen elaborates her ideas in Julie E. Cohen, *What Privacy is For*, 126 *HARV. L. REV.* 1904 (2013) [hereinafter Cohen, *Privacy*].

25. By subject, I mean both the topic (of this Article) and the self being described (in this Article).

26. See Dennis Patterson, *Introduction*, in *POSTMODERNISM AND LAW* xi (Dennis Patterson ed., 1994).

27. STEVEN BEST & DOUGLAS KELLNER, *THE POSTMODERN ADVENTURE* 7–11 (2001); see FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 62 (1991) (describing postmodernism as cultural).

28. Sherry argues that postmodernism did not make sense to her until she became immersed in computer and online technology. SHERRY TURKLE, *LIFE ON THE SCREEN: IDENTITY IN THE AGE OF THE INTERNET* 15–18 (1995).

29. For contrasts between modern and postmodern theory, from a philosophical standpoint, see NANCEY MURPHY, *ANGLO-AMERICAN POSTMODERNITY* 1 (1997); Patterson, *supra* note 26, at xi, xii–xiv. For a description of eight overlapping postmodern themes, see FELDMAN, *VOYAGE*, *supra* note 18, at 37–45, 137–87.

30. See Michel Foucault, *Afterword: The Subject and Power*, in HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* 208, 211–12 (2d ed. 1983).

31. HUBERT L. DREYFUS & PAUL RABINOW, *MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS* 120 (2d ed. 1983); Foucault, *supra* note 30, at 211–12; David Couzens Hoy, *Introduction to FOUCAULT: A CRITICAL READER* 1, 4–5 (David Couzens Hoy ed., 1986).

32. See SOLOMON & HIGGINS, *supra* note 19, at 303 (explaining the critique of postmodernism as undermining freedom).

Significantly, feminist theorists reject the conclusion that social construction necessarily ends in determinism. Building on seminal research in psychology, conducted by Nancy Chodorow and Carol Gilligan, feminist theorists have articulated the concept of a relational self: a self that arises, develops, and exists in and through relationships with others.<sup>33</sup> Although the terminology differs, this feminist relational self equates with the postmodern socially constructed self.<sup>34</sup> Either way, the self is fundamentally a social creature.<sup>35</sup> Yet, feminist theory is ultimately political, seeking social transformations that will relieve women from patriarchal oppression and subjugation.<sup>36</sup> If the relational (socially constructed) self were determined, then women would seemingly lack the autonomy to advocate for and create such political change.<sup>37</sup> Thus, feminist theorists extended the concept of a relational self to a concept of relational autonomy. They developed a notion of autonomy based not on isolation, independence, and self-reliance, but rather on the existence and cultivation of nurturing and empowering relationships.<sup>38</sup> This Article builds on the feminist concept of relational autonomy to articulate the self-

33. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (2d ed. 1999); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); see Jane Flax, *Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics*, in *DISCOVERING REALITY* 245, 250 (Sandra Harding & Merrill B. Hintikka eds., 1983) (developing concept of relational self). For a collection of essays on the relational self, see *FEMINISTS RETHINK THE SELF* (Diana Tietjens Meyers ed., 1997).

34. See Seyla Benhabib, *Subjectivity, Historiography, and Politics: Reflections on the 'Feminism/Postmodernism Exchange'*, in *FEMINIST CONTENTIONS* 107, 108 (1995).

35. Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 *MICH. J. GENDER & L.* 157, 169–70 (2010) (recognizing the emergence of an explicitly postmodern feminism); Nancy J. Hirschmann, *Autonomy? Or Freedom? A Return to Psychoanalytic Theory*, in *AUTONOMY, OPPRESSION, AND GENDER* 61, 73 (Andrea Veltman & Mark Piper eds., 2014) (“our desires and preferences are socially constructed”); see Amy Allen, *Foucault, Feminism, and the Self: The Politics of Personal Transformation*, in *FEMINISM AND THE FINAL FOUCAULT* 235 (Dianna Taylor & Karen Vintges eds., 2004) (discussing the connection between Foucault and the feminist relational self); Margaret A. McLaren, *Foucault and Feminism: Power, Resistance, Freedom*, in *FEMINISM AND THE FINAL FOUCAULT* 214, 215–19 (Dianna Taylor & Karen Vintges eds., 2004) (linking feminism with Foucauldian postmodernism).

36. See Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in *RELATIONAL AUTONOMY* 3, 3–4 (Catriona Mackenzie & Natalie Stoljar eds., 2000) (emphasizing the need to understand oppression and subjection).

37. For this reason, some feminists initially rejected postmodernism. ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS* 153–59, 220–21 (1991).

38. Helpful books developing the concept of relational autonomy include the following: JENNIFER NEDELSKY, *LAW'S RELATIONS* (2011); MARILYN FRIEDMAN, *AUTONOMY, GENDER, POLITICS* (2003); *PERSONAL AUTONOMY AND SOCIAL OPPRESSION: PHILOSOPHICAL PERSPECTIVES* (Marina A.L. Oshana ed., 2015); *AUTONOMY, OPPRESSION, AND GENDER* (Andrea Veltman & Mark Piper eds., 2014); *RELATIONAL AUTONOMY*, *supra* note 36.



emergence rationale for free expression.

Part II explains the historical emergence of the three primary philosophical rationales while emphasizing their shared foundational commitments to the classical liberal self. Part III demonstrates that circumstances in our digital age render the concept of the classical liberal self incongruous. The structures and culture of the postmodern information society reveal that the self is socially constructed—each individual self forms and exists in a network of social relations—and that the traditional separation of society into preexisting public and private spheres is no longer coherent. If the idea of the classical liberal self enjoying maximum liberty in a private sphere is undermined, then the traditional rationales collapse. Part IV draws on feminist theory to elaborate the self-emergence rationale and its implications. The same digital-age sociocultural conditions that undermine the primary rationales lead to the concept of relational autonomy and the self-emergence rationale. This new rationale constitutionally protects expression that fosters the ongoing creative and dynamic process of self-emergence. As such, the rationale justifies protecting expression concerned with the emergent self's struggle to define either itself or the broader culture and society in which the self emerges. The second section in Part IV focuses on free-expression rights vis-à-vis the use and control of the Internet and digital information. Because MNCs play a prominent role in designing and managing Internet architecture, I emphasize the first-amendment rights of business corporations, particularly publicly held corporations. In short, such business corporations should not enjoy free-expression rights because they neither protect nor facilitate self-emergence. Part V, the conclusion of the Article, compares the self-emergence rationale to an alternative rationale for the digital age proposed by Jack Balkin.<sup>39</sup> A crucial advantage of the self-emergence rationale is that it builds on feminist theory to articulate and emphasize a postmodern type of individual autonomy and thus avoids dwelling on an antihumanist determinism.

Two caveats are in order at the outset. First, the Roberts Court has proven to be remarkably receptive to corporate legal claims, whether

---

39. Balkin's rationale emphasizes democratic culture. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2009) [hereinafter Balkin, *Future*]; Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) [hereinafter Balkin, *Digital*]. Balkin's more recent article on free expression in the digital age does not focus on this democratic-culture rationale. Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014) [hereinafter Balkin, *Regulation*].

under the First Amendment or otherwise.<sup>40</sup> Empirical studies show that the Roberts Court, until Justice Scalia's death, was the most pro-business Supreme Court since World War II.<sup>41</sup> Including Scalia, five of the justices ranked among the top ten justices most favorable to business during that time; Alito and Roberts are first and second on the list.<sup>42</sup> Obviously, the nomination and confirmation of a new justice to fill Scalia's open seat might swing the political balance of the Court and affect the Court's receptivity to corporate legal claims, though just as obviously, strongly pro-business justices will continue to sit on the Court for the foreseeable future.

Second, a comprehensive discussion of the constitutional framing and the adoption of the First Amendment is beyond the scope of this Article. But some scholars, it should be acknowledged, would argue that the framers constitutionalized the classical liberal self as central to our government system.<sup>43</sup> Richard Epstein recently declared: "In its enduring provisions, our Constitution is most emphatically a classical liberal document."<sup>44</sup> Consequently, Epstein, who claims to follow a "guarded" originalism,<sup>45</sup> depicts our constitutional government as no more than "a necessary evil."<sup>46</sup> But Epstein's view of the framing is historically inaccurate. The framers did not fully adopt classical liberalism (or the classical liberal self).<sup>47</sup> Rather, they attempted to straddle the divide between civic republicanism and liberalism. They drew as much from republican writers, such as John Trenchard and Thomas Gordon, the

---

40. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding that Federal Rules of Civil Procedure protected corporation from class-action claim); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding that a discrimination claim against Goodyear was time-barred).

41. Lee Epstein et al., *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431 (2013) (quantitative study of all postwar business-related cases); see Corey Ciocchetti, *The Constitution, the Roberts Court, and Business*, 4 WM. & MARY BUS. L. REV. 385 (2013) (emphasizing how strongly the Roberts Court supported business in the 2011–2012 term).

42. Epstein, *supra* note 41, at 1449–51, 1472–73.

43. See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* (2014).

44. *Id.* at 53. "[T]he United States Constitution . . . can best be explained in light of classical liberal theory." *Id.* at ix.

45. *Id.* at 45. Thus, Epstein refers to "the original classical liberal constitutional order." *Id.* at 6.

46. *Id.* at 6.

47. Stephen M. Feldman, *Is the Constitution Laissez Faire?: The Framers, Original Meaning, and the Market*, 81 BROOK. L. REV. 1 (2015) (exploring the framers' attitudes toward the government and the economic marketplace).

authors of *Cato's Letters*, as from John Locke and Adam Smith.<sup>48</sup> The framers, one can reasonably conclude, attempted to achieve a balance between republican and liberal outlooks.<sup>49</sup>

## II. THE HISTORY OF THE THREE PHILOSOPHICAL RATIONALES

The history of the three philosophical rationales—search-for-truth, self-governance, and self-fulfillment—demonstrates two important points. First, each rationale emerged and attained prominence in American constitutional jurisprudence in specific political and cultural circumstances.<sup>50</sup> In other words, for each of the respective rationales, its influence is historically contingent. Second, all three rationales share a foundational commitment to the classical liberal self.<sup>51</sup>

### A. *The Search-for-Truth Rationale*

The Supreme Court did not explicitly decide a free-expression case under the First Amendment until the World-War-I era.<sup>52</sup> Before that point, free-expression doctrine had developed in the lower courts, which treated free expression similarly to other individual rights under republican democracy, the predominant view of American government from the founding through the 1920s.<sup>53</sup> Individual rights and liberties were protected from undue government interference but were always subordinate to the government's power to act for the common good.<sup>54</sup> In

---

48. ADAM SMITH, *THE WEALTH OF NATIONS* (1776); *THE ENGLISH LIBERTARIAN HERITAGE* (David L. Jacobson ed., 1994 ed.) (writings of Trenchard and Gordon); see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969) (emphasizing the civic republican nature of the framing).

49. “Madison’s political thought was characterized by an often agonized effort to find a working balance between the rights of property and republican principles.” JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* 12 (1990); see Stephen M. Feldman, *The Interpretation of Constitutional History, or Charles Beard Becomes a Fortuneteller (With an Emphasis on Free Expression)*, 29 *CONST. COMMENTARY* 323 (2014) (arguing that framers aimed for balance between public and private spheres). Neither the framers nor the first Congress, which drafted the First Amendment, commented much about the substantive meanings of free speech or a free press. FELDMAN, *supra* note 3, at 60–69.

50. *Infra* II.A, B, C.

51. *Infra* III.A, B, C.

52. The Supreme Court had previously decided a handful of due process cases that involved issues related to free expression. *E.g.*, *Halter v. Nebraska*, 205 U.S. 34 (1907) (upholding flag desecration statute).

53. FELDMAN, *supra* note 3, at 101–290.

54. James Kent explained that “private interest must be made subservient to the general interest of the community.” JAMES KENT, 2 *COMMENTARIES ON AMERICAN LAW* 276 (New York, O.

other words, the republican democratic principles of the common good and civic virtue informed the legal doctrine of free expression and engendered limited judicial protections for speech and writing. Courts prohibited prior restraints but allowed governments to punish speech or writing that was likely to produce bad tendencies or harmful consequences because such expression undermined virtue and contravened the common good.<sup>55</sup>

The Supreme Court's first free-expression decisions arose from World War I Espionage Act prosecutions. In *Schenck v. United States*, the general secretary of the Socialist party and an Executive Board member were convicted for printing several thousand copies of a leaflet and mailing it to draft-eligible men.<sup>56</sup> The leaflet advocated for the repeal of the draft law and argued that conscription violated the Thirteenth Amendment's proscription of slavery.<sup>57</sup> Justice Oliver Wendell Holmes, Jr., wrote an opinion for a unanimous Court upholding the convictions.<sup>58</sup> In response to the defendants' argument that the First Amendment protected their expression, Holmes articulated a doctrinal test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>59</sup> While Holmes's clear and present danger terminology was novel (and apparently derived from his book, *The Common Law*), his application of the test demonstrated that he did not intend to articulate a new standard for delineating the scope of free expression.<sup>60</sup> For Holmes, clear and present

---

Halsted 1827).

55. *Knowles v. United States*, 170 F. 409 (8th Cir. 1909); *Castle v. Houston*, 19 Kan. 417 (1877); *Perkins v. Mitchell*, 31 Barb. 461 (N.Y. Sup. 1860); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824); *Commonwealth v. Morris*, 3 Va. 176 (1811). Courts sometimes stated that a criminal defendant must also have intended harmful consequences. Under the doctrine of constructive intent, however, the courts typically reasoned that a defendant was presumed to have intended the natural and probable consequences of his or her statements. If a defendant's expression was found to have bad tendencies, then the defendant's criminal intent would be inferred. Margaret A. Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to Gitlow*, in *THE FIRST AMENDMENT RECONSIDERED* 14 (Bill F. Chamberlin & Charlene J. Brown eds., 1982).

56. 249 U.S. 47 (1919).

57. *Id.* at 50–51.

58. *Id.* at 53.

59. *Id.* at 52.

60. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 66–68 (1881, Dover 1991); see G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 414–19 (1992) (discussing Holmes's understanding of criminal attempts and

danger meant bad tendency. The First Amendment proscribed prior restraints but otherwise allowed the government to punish any speech or writing that would contravene the common good.<sup>61</sup>

One week later, the Court unanimously upheld convictions in two more Espionage Act cases: *Frohwerk v. United States*, and *Debs v. United States*.<sup>62</sup> Writing the Court's opinions in both cases, Holmes followed bad tendency doctrinal principles while disregarding his clear and present danger terminology.<sup>63</sup> This first set of World War I cases revealed that all of the justices, including Holmes, considered free expression to be an individual liberty like any other under republican democracy, subordinate to government actions furthering the common good. The government could punish any speech or writing that impeded the national war effort because such expression would be deemed harmful or with bad tendencies.

The Court would not decide its next Espionage Act case, *Abrams v. United States*, for another eight months.<sup>64</sup> Before that time, a young Harvard professor, Zechariah Chafee, published an article that apparently shaped Holmes's surprising dissent in *Abrams*.<sup>65</sup> Chafee was part of a burgeoning civil libertarian movement that had emerged precisely because of the government's continuing efforts at suppression even after the war's end.<sup>66</sup> As a civil libertarian, Chafee sought to demonstrate that the Court should interpret the First-Amendment protection of free expression expansively.<sup>67</sup> More specifically, he wanted to show that criticisms of the war and draft were protected speech.<sup>68</sup> Consequently, he rejected the bad tendency test because it allowed the government far too much power to punish expression.<sup>69</sup> A crucial problem for Chafee was that

---

how it shaped his clear and present danger test). *But see* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1271-78 (1983) (arguing that this connection was probable but not definite).

61. FELDMAN, *supra* note 3, at 260.

62. *Frohwerk*, 249 U.S. 204 (1919), and *Debs*, 249 U.S. 211 (1919).

63. For instance, *Debs* upheld a jury instruction that presented the bad tendency test in conventional terms. 249 U.S. at 216.

64. 250 U.S. 616 (1919).

65. *See* Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) [hereinafter Chafee, *War Time*]. Chafee built this article on an earlier essay. Zechariah Chafee, Jr., *Freedom of Speech*, NEW REPUBLIC, Nov. 16, 1918, at 66.

66. *E.g.*, Ernst Freund, *The Debs Case and Freedom of Speech*, NEW REPUBLIC, May 3, 1919, at 13; *see* MARK A. GRABER, *TRANSFORMING FREE SPEECH* 75-121 (1991) (discussing civil libertarian movement).

67. Chafee, *War Time*, *supra* note 65, at 967-72.

68. *Id.* at 960.

69. *Id.* at 953.

the right to free speech under the First Amendment was an individual right.<sup>70</sup> In wartime, most judges, politicians, and commentators had assumed that the national or social interest in security, in pressing for victory, necessarily outweighed any individual right.<sup>71</sup> How could the right of a single individual—a classical liberal self—outweigh the needs of all of American society?

Chafee's solution was the search-for-truth rationale, first articulated by John Milton during the English Civil War, then reiterated by John Stuart Mill in the nineteenth century.<sup>72</sup> "Let [truth] and falsehood grapple," Milton had written, "[and] who ever knew truth put to the worse, in a free and open encounter?"<sup>73</sup> Chafee linked a social interest in the search for truth with the individual speaker's interest in or right to free expression. "The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion . . ." <sup>74</sup> Chafee did not argue, though, that this social interest rendered free expression an absolute right. To the contrary, freedom of speech often must be balanced against other government purposes and interests.<sup>75</sup> In the context of wartime and the Espionage Act,

[t]he true boundary line of the First Amendment can be fixed only when Congress and the courts realize that the principle on which speech is classified as lawful or unlawful involves the balancing against each other of two very important social interests, in public safety and in the search for truth.<sup>76</sup>

But, as Chafee underscored, one must be careful not to underestimate the

70. *Id.* at 957.

71. *Id.* at 959.

72. *Id.* at 960.

73. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644), <http://www.constitution.org/milton/areopagitica.htm> [<https://perma.cc/VLW3-F9YN>]. JOHN STUART MILL, ON LIBERTY 21–27 (Liberal Arts Press 1956) (1859). Chafee cited both Milton and Mill. Chafee, *War Time*, *supra* note 65, at 932–33 n.1, 954–55.

74. Chafee, *War Time*, *supra* note 65, at 956.

75. *Id.* at 956–57.

76. *Id.* at 959–60.

social value of free expression in the search for truth. “[F]reedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.”<sup>77</sup>

Chafee continued by linking the search for truth with Holmes’s clear and present danger language from *Schenck*.<sup>78</sup> But while Holmes had applied his clear and present danger test as if it were no different from the bad tendency test, Chafee now imbued it with significant bite. In Chafee’s hands, the clear and present danger test became highly protective of expression. Thus, consistent with the civil liberties movement, Chafee bolstered the protection of the individual right to free expression by connecting it to a broad societal interest in the search for truth.<sup>79</sup> The individual—each individuated liberal self—acted for the greater good of society by contributing his or her ideas to the search for truth.<sup>80</sup> In this vein, the clear and present danger test could become a doctrinal standard that would provide a suitable level of constitutional protection for speech and writing.<sup>81</sup>

Holmes would never acknowledge that Chafee had influenced his conception of free expression, but his dissenting opinion in *Abrams* would follow Chafee’s argument as if it had been a roadmap.<sup>82</sup> The defendants in *Abrams* had been convicted for printing and distributing leaflets that criticized President Wilson’s leadership during the war.<sup>83</sup> Affirming the convictions, the Court brushed aside the defendants’ first-amendment arguments by reasoning that *Schenck* and *Frohwerk* controlled.<sup>84</sup> Holmes and Justice Louis Brandeis dissented, with Brandeis joining Holmes’s opinion. Holmes asserted the correctness of the Court’s previous decisions in *Schenck*, *Frohwerk*, and *Debs*, and then reiterated his clear and present danger phrasing from *Schenck*. Now, though, Holmes imbued this phrase with new vigor; it no longer equated with the bad tendency test. He justified this invigorated clear and present danger test by emphasizing the

---

77. *Id.* at 957.

78. *Id.* at 960, 967.

79. *Id.* at 959–60.

80. See Roscoe Pound, *Interests of Personality (Part II)*, 28 HARV. L. REV. 445, 453 (1915).

81. Chafee was following the methods of his mentor, Roscoe Pound, who was a leader of the sociological jurisprudence movement. FELDMAN, *supra* note 3, at 271–72; see, e.g., Pound, *supra* note 80, at 454–56 (linking individual interests with societal interests).

82. See FELDMAN, *supra* note 3, at 272–81 (explaining Holmes’s changed attitude toward free expression).

83. *Abrams v. United States*, 250 U.S. 616, 617–20 (1919).

84. *Id.* at 618–19.

societal search for truth:<sup>85</sup>

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>86</sup>

Holmes explicitly linked the search-for-truth rationale with the clear and present danger test.<sup>87</sup> “[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death,” he explained, “unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”<sup>88</sup> The government, that is, should allow speech and writing to flow into a marketplace of ideas. From this free exchange of ideas, the truth will emerge. Harmful ideas must be met with better ideas—counterspeech—rather than with force or suppression. The only ideas (speech and writing) that should be restricted are those that would inhibit the further exchange of ideas—namely, those that would engender a clear and present (or imminent) danger of unlawful or harmful conduct.<sup>89</sup>

Holmes analogy between the search for truth and the economic marketplace underscored that his (and Chafee’s) free-expression approach rested on the classical liberal self. Each individual needs to do no more than contribute his or her ideas to the marketplace. The invisible hand of the marketplace will then naturally lead society to truth. The constitutional protection of the individual self will ultimately benefit society. Eventually vindicating Holmes’s view, other justices have persistently reiterated the search-for-truth theory. In *Chaplinsky v. New*

---

85. *Id.* at 627–31 (Holmes, J., dissenting).

86. *Id.* at 630.

87. *Id.*

88. *Id.*

89. Holmes did not use the precise phrase, “marketplace of ideas.” See Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 13 & n.41, 24 & n.80 (on the first uses of this phrase, more than fifteen years after Holmes’s *Abrams* dissent).



*Hampshire*, the Court concluded that certain types of speech, particularly so-called fighting words—“those which by their very utterance inflict injury or tend to incite an immediate breach of the peace”—do not deserve constitutional protection.<sup>90</sup> “[S]uch utterances are no essential part of any exposition of ideas,” the Court reasoned, and thus do not contribute to the discovery of “truth.”<sup>91</sup> In *Red Lion Broadcasting v. FCC*, a unanimous Court wrote that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>92</sup> The Court used the marketplace of ideas as recently as 2010.<sup>93</sup>

### B. *The Self-Governance Rationale*

Through the 1920s, the Court continued to interpret the First Amendment narrowly, in accord with republican democratic principles. Holmes and Brandeis often dissented while relying on the clear and present danger test, as distinct from the bad tendency test.<sup>94</sup> During World War I and a subsequent Red Scare period (1919–1920), numerous states had passed criminal syndicalism statutes—laws that prohibited violence or advocacy of violence as a means of accomplishing political change—and challenges to convictions under these laws began to reach the Court in mid-decade.<sup>95</sup> The Court upheld one such conviction in *Whitney v. California*.<sup>96</sup> California had convicted Charlotte Whitney, a member of the Communist Labor Party, for organizing and belonging to an organization advocating criminal syndicalism, even though Whitney personally sought peaceful political change.<sup>97</sup> Brandeis, joined by Holmes, wrote a separate opinion that functioned as a dissent though it technically concurred in the judgment (because Whitney had not adequately raised the free-expression issues).<sup>98</sup> Brandeis acknowledged that the parameters of the clear and present danger test remained obscure,<sup>99</sup> so he articulated three philosophical rationales to elucidate the test and its protection of speech

---

90. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

91. *Id.*

92. 395 U.S. 367, 390 (1969).

93. *Citizens United v. FEC*, 558 U.S. 310, 354 (2010).

94. For one such case, see *Gitlow v. New York*, 268 U.S. 652 (1925).

95. *Whitney v. California*, 274 U.S. 357, 369 (1927) (lists cases where similar Criminal Syndicalism statutes in other states have been challenged).

96. 274 U.S. 357 (1927).

97. *Id.* at 359–66.

98. *Id.* at 372–80 (Brandeis, J., concurring in judgment).

99. *Id.* at 374.

and writing—philosophical justifications that theorists would develop over the next decades into the primary rationales for an expansive interpretation of the First Amendment.<sup>100</sup> First, Brandeis reiterated the search-for-truth or marketplace rationale, emphasizing that counterspeech “affords ordinarily adequate protection against the dissemination of noxious doctrine.”<sup>101</sup> Second, Brandeis linked free expression to democratic government, though he did not argue that freedom to express one’s opinion on political issues is prerequisite to full democratic participation.<sup>102</sup> Rather, consistent with republican democracy, he maintained “that public discussion is a political duty” and that free discussion of “supposed grievances and proposed remedies” nurtures stable government.<sup>103</sup> Through public discussion of political issues, Brandeis implied, the virtuous citizenry discerns the common good and discourages government corruption. Third, Brandeis alluded to the inherent importance of individual liberty: The founders “valued liberty both as an end and as a means.”<sup>104</sup> Free expression not only was a means to truth or free government; it was valuable in and of itself.<sup>105</sup>

In 1931, when the Court decided its first two cases validating free-expression claims, the justices still conceptualized free expression within the structures of republican democracy.<sup>106</sup> Yet, by the late-1920s and early- to mid-1930s, republican democracy was crumbling, and the

100. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878 (1963) [hereinafter *Toward*]; Rabban, *supra* note 60, at 1346–47; G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech In Twentieth-Century America*, 95 MICH. L. REV. 299, 300–02 (1996).

101. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring in judgment).

102. *Id.* at 375–76.

103. *Id.* at 375.

104. *Id.*

105. Brandeis used these three philosophical rationales, particularly the search-for-truth and democratic-governance rationales, to explain the clear and present danger test. “[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion,” Brandeis wrote. *Id.* at 377. “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” *Id.* The only expression that should be punished is that which would likely engender an imminent (or “present”) danger of unlawful or harmful conduct and would therefore preclude any further discussion or exchange of ideas. Meanwhile, for expression to constitute a “clear” danger, Brandeis explained that it must generate a probability of “serious evil” or injury. *Id.* at 376. Because free expression is so significant to republican democratic government, punishment “would be inappropriate as the means for averting a relatively trivial harm to society.” *Id.* at 377.

106. *Near v. Minnesota*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931).

practices of pluralist democracy were crystallizing under the pressures of industrialization, immigration, and urbanization.<sup>107</sup> “In the republican system, an alleged lack of civic virtue could preclude one from participating in democratic processes.”<sup>108</sup> On this ground, the exclusion of women, African Americans, Irish-Catholic immigrants, and other peripheral groups had supposedly been justified during long stretches of American history.<sup>109</sup> But by the 1930s, mainstream and old-stock Protestant values, which had long been manifested in conceptions of virtue and the common good, were being balanced with the values of other Americans who constituted the demographically diverse population.<sup>110</sup> Thus, the key to pluralist democracy lay not in the specification of supposedly objective goals, such as the common good, but rather in the following of processes that allowed all citizens to voice their particular values and interests within a free and open democratic arena.<sup>111</sup> Under pluralist democracy (first manifested politically in the New Deal), no single set of values or interests is inherently predominant.<sup>112</sup> Each individual citizen—each individuated self—supposedly has an equal right to express his or her respective interests and values.<sup>113</sup>

During the post-World War II years, Robert A. Dahl comprehensively articulated pluralist democratic theory.<sup>114</sup> Because pluralist (or polyarchal) democracy accepted the inevitable pursuit of self-interest—rather than the pursuit of an objective substantive goal (the common good)—pluralist democracy required the institutionalization of a “process” that would allow the people to determine which interests would be at least temporarily enshrined as communal goals.<sup>115</sup> A communal goal

---

107. FELDMAN, *supra* note 3, at 166–97.

108. THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 638–39 (Mark Tushnet et al. eds., 2015).

109. ROGERS M. SMITH, CIVIC IDEALS 209 (1997) (quoting Samuel Morse criticizing Irish Catholics).

110. FELDMAN, *supra* note 3, at 314–16.

111. JOHN DEWEY, FREEDOM AND CULTURE 176 (1939).

112. FELDMAN, *supra* note 3, at 316–19.

113. WILFRED E. BINKLEY & MALCOLM C. MOOS, A GRAMMAR OF AMERICAN POLITICS 113 (1949); V. O. KEY, JR., POLITICS PARTIES AND PRESSURE GROUPS (1942).

114. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS (1989) [hereinafter DEMOCRACY]; ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter PREFACE]; see IRA KATZNELSON, DESOLATION AND ENLIGHTENMENT 107–76 (2003) (arguing that Dahl and several other post-World War II scholars sought to articulate an approach to politics and democracy that made sense in the shadow of recent world tragedies).

115. DEMOCRACY, *supra* note 114, at 83, 106; PREFACE, *supra* note 114, at 67–71.

was legitimate only if the conditions for democracy were satisfied—if the proper process were followed. Thus, Dahl identified the conditions, such as the identical weighing of each individual vote, which were requisite to the operation of a democratic process.<sup>116</sup> The most important component of the democratic process, according to Dahl, is “effective participation”: Citizens must have “adequate” and “equal” opportunities “for expressing their preferences... for placing questions on the agenda and for expressing reasons for endorsing one outcome rather than another.”<sup>117</sup> If these free-expression rights are absent, Dahl insisted, then “the democratic process does not exist.”<sup>118</sup> The pluralist democratic process provided a means for each individual citizen to contribute his or her interests and values to the institutionalized identification of the community’s political goals.

Dahl was neither the first nor the last political (or constitutional) theorist to accentuate the importance of free expression within the pluralist democratic regime.<sup>119</sup> Pursuant to the self-governance rationale, no liberty or right—not even voting—is more crucial to the pluralist democratic process than free expression. Free speech and writing allow diverse groups and individuals to contribute their views in the pluralist political arena. If government officials interfere with the pluralist process, if they dictate or control public debates, then they skew the democratic outcomes and undermine the consent of the governed. As Alexander Meiklejohn emphasized, the need to protect political expression “springs from the necessities of the program of self-government.”<sup>120</sup>

Under pluralist democracy, free expression became a constitutional “lodestar.”<sup>121</sup> In a stark about-face from the Court’s consistent repudiation of free-speech rights during the republican democratic era, the justices upheld numerous first-amendment claims.<sup>122</sup> For example, in *Thornhill v. Alabama*, the Court emphasized that government cannot be allowed to

---

116. PREFACE, *supra* note 114, at 67; see DEMOCRACY, *supra* note 114, at 109–11 (discussing voting equality).

117. DEMOCRACY, *supra* note 114, at 109.

118. *Id.* at 170; see *id.* at 169–75 (discussing free speech and other rights integral to the democratic process).

119. *E.g.*, *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940); Harry Kalven, Jr., *The New York Times Case*, 1964 SUP. CT. REV. 191, 208.

120. ALEXANDER MEIKLEJOHN, FREE SPEECH: AND ITS RELATION TO SELF-GOVERNMENT 26 (1948).

121. White, *supra* note 100, at 300–01.

122. *E.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940) (holding that labor picketing is protected free speech); *Schneider v. State*, 308 U.S. 147 (1939) (invalidating conviction for distributing handbills); *Hague v. C.I.O.*, 307 U.S. 496 (1939) (upholding right of unions to organize in streets).

“diminish the effective exercise of rights so necessary to the maintenance of democratic institutions.”<sup>123</sup> In *West Virginia State Board of Ed. v. Barnette*, Justice Robert Jackson reasoned for the Court: “We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.”<sup>124</sup> Jackson elaborated in strong ringing language: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”<sup>125</sup> The self-governance rationale was invoked as recently as 2014.<sup>126</sup>

### C. *The Self-Fulfillment Rationale*

An individualist ethos has always permeated American culture.<sup>127</sup> In 1800, Tunis Wortman, a lawyer and political theorist, proclaimed that “[a]ll our prospects of improvement . . . depend upon the industry and exertion of individuals. It is almost impossible to conceive the extensive effects which may be produced by the agency of a single person.”<sup>128</sup> In fact, in the 1830s, Tocqueville first coined the term, individualism, and linked it to the American conception of government.<sup>129</sup> In the first-half of the nineteenth century, a distinctly American literature emerged, emphasizing individual independence, self-improvement, and an iconoclastic wariness toward authority.<sup>130</sup> Even so, during the late-nineteenth and early-

123. 310 U.S. at 96.

124. 319 U.S. 624, 641 (1943).

125. *Id.* at 642.

126. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (Thomas, J., concurring in the judgment); *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 756 (2011) (Kagan, J., dissenting).

127. See ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 263–64 (1995) (emphasizing connection between American individualism and democracy).

128. TUNIS WORTMAN, *A TREATISE CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS* 128 (Da Capo Press 1970) (1800).

129. ALEXIS DE TOCQUEVILLE, *1 DEMOCRACY IN AMERICA* 98–105 (Henry Reeve text, revised by Francis Bowen, edited by Phillips Bradley, Vintage Books 1990) (first published in French in 1835 & 1840) (discussing individualism and explaining its “democratic origin”); see JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER* 15 (1984) (discussing emergence of individualism as a concept).

130. “A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.” Ralph Waldo Emerson, *Self-Reliance* (1841), reprinted in *SELECTED WRITINGS OF RALPH WALDO EMERSON* 262, 269 (William H. Gilman ed., 1965); see Henry David

twentieth centuries, the American individualist ethos intensified and transformed.<sup>131</sup> Around the turn of the century, a developing historicist attitude suggested that social, cultural, and political arrangements were contingent and changeable and that human inventiveness could produce endless progress.<sup>132</sup> Driven by human ingenuity, history could be a tale of progress, not a repetitive and cyclical story of the rise and fall of one civilization after another.<sup>133</sup> Intellectuals now perceived a distinct separation between past and present.<sup>134</sup> People appeared free to remake the present and to determine the future.<sup>135</sup> Rather than being controlled by historical principles, Americans seemed to control “historical change.”<sup>136</sup>

This sense of control led politicians and scholars to emphasize individual expertise. Before World War I, Progressives and sociological jurists had hailed the potential contributions of trained scientific and social scientific experts.<sup>137</sup> For many Americans, this belief in the worth of the expert grew even stronger after the war.<sup>138</sup> Charles Merriam, the leader of the University of Chicago’s political science department, argued in the 1920s that empirical methods would enable political scientists to further human control over the future and make for a better social world.<sup>139</sup> Legal scholars (the legal realists) similarly believed that expertise garnered through empirical studies could cure societal ills and produce progress.<sup>140</sup>

---

Thoreau, *Resistance to Civil Government* (1849), reprinted in 1 THE AMERICAN INTELLECTUAL TRADITION 307 (David A. Hollinger & Charles Capper eds., 1989) (emphasizing the priority of individual independence and conscience over governmental control). This individualist ethos also blossomed in the religious realm during the Second Great Awakening, which swept across America in the first decades of the nineteenth century. See GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 332 (1991) (emphasizing individualist component of Second Great Awakening).

131. See FELDMAN, VOYAGE, *supra* note 18, at 100–01.

132. FELDMAN, VOYAGE, *supra* note 18, at 19, 84–85; G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 506 (2002).

133. DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 6 (1991).

134. *Id.* at xv.

135. *Id.* at 7.

136. *Id.* at xv, 3–4.

137. *Id.* at 53.

138. *Id.* at xiv–xv.

139. CHARLES E. MERRIAM, NEW ASPECTS OF POLITICS (1925); CHARLES EDWARD MERRIAM & HAROLD FOOTE GOSNESL, NON-VOTING: CAUSES AND METHODS OF CONTROL (1924).

140. See, e.g., William O. Douglas, *Wage Earner Bankruptcies—State v. Federal Control*, 42 YALE L.J. 591, 593 (1933) (explaining how to improve bankruptcy system).

Moreover, an increasing social-science emphasis on the causes of individual behavior influenced law and political science. For instance, in 1922, Walter Lippmann contemplated the ramifications of Freudian psychology for politics.<sup>141</sup> In 1929, he observed that modern American civilization worked “to dissolve . . . psychological bonds, to break up clannishness and personal dependence.”<sup>142</sup> Thus, individuals tended “to become more or less independent persons rather than to remain members of a social organism.”<sup>143</sup> Meanwhile, when Merriam advocated that political scientists adopt the empirical methods of science, he especially emphasized psychology, which had advanced “from a speculative philosophy to an experimental science, from introspection to objective measurement.”<sup>144</sup> As such, psychology could provide “a much clearer view of the human ‘personality,’” and could facilitate “the understanding of the process and the modes of control over social and political behavior.”<sup>145</sup>

To be clear, research in psychology, both from Freudian and behaviorist perspectives, suggested that individual choices and actions often were irrational. Harold Lasswell, a political scientist, concluded that “[t]he findings of personality research show that the individual is a poor judge of his own interest.”<sup>146</sup> In jurisprudence, such views led legal realists to question whether individuals could truly follow legal principles and the rule of law. Karl Llewellyn suggested that individual conduct constituted the very substance of the law:

[The] doing of something about disputes . . . is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself.<sup>147</sup>

Joseph Hutcheson, a federal judge himself, claimed that judges decide cases

---

141. WALTER LIPPMANN, PUBLIC OPINION 25–28 (1922).

142. WALTER LIPPMANN, A PREFACE TO MORALS 267 (1929).

143. *Id.*

144. CHARLES E. MERRIAM, NEW ASPECTS OF POLITICS 95 (3d ed. 1970).

145. Charles E. Merriam, *Preface to the Second Edition* (1931), in NEW ASPECTS OF POLITICS 33, 39 (3d ed. 1970).

146. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 103 (1973) (quoting HAROLD D. LASSWELL, PSYCHOPATHOLOGY AND POLITICS 194 (1930)).

147. K. N. LLEWELLYN, THE BRAMBLE BUSH 3 (1930) (emphasis omitted).

based on intuitive hunches.<sup>148</sup> Jerome Frank explained that these judicial hunches arise from psychological stimuli as arbitrary as the hair color of a witness or the nasal twang of an attorney.<sup>149</sup>

To a degree, the “new individualism” that emerged in the 1920s and 1930s emphasized individual choice and self-fulfillment rather than rational self-determination.<sup>150</sup> In fact, during this time, a developing mass-consumer culture sought to capitalize on the irrationality of individuals.<sup>151</sup> Advertisers aimed to reformulate individual preferences so that purchasing particular products seemed necessary to personal satisfaction and well-being.<sup>152</sup> Individual consumers would choose to buy not because of a rational assessment of their self-interest but because of a desire for personal fulfillment—or so advertisers hoped.<sup>153</sup> In 1929 and 1930, John Dewey published a series of essays, *Individualism, Old and New*, which lamented “the irony of the gospel of ‘individualism.’”<sup>154</sup> Businesses increasingly manipulated individuals while seeming to celebrate their individuality.<sup>155</sup>

The United States changed significantly in the 1930s as it suffered through the Great Depression, which facilitated the emergence of pluralist democracy and the New Deal.<sup>156</sup> Despite these changes, Americans in the late 1940s and after became ever-more intent on personal satisfaction in the economic marketplace, on self-fulfillment in and through their purchases of products.<sup>157</sup> Indeed, the mass-consumer culture began to infiltrate pluralist democracy, changing it into a consumers’ democracy, where voters acted as if they were shopping for political candidates.<sup>158</sup>

148. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

149. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 571, 580 (1932).

150. WIEBE, *supra* note 127, at 185–87.

151. See *id.* at 197–98.

152. See *id.*

153. *Id.* at 197–98; see EDWARD L. BERNAYS, *PROPAGANDA* (1928) (explaining how small number of individuals shaped desires of the masses).

154. John Dewey, *Toward a New Individualism*, THE NEW REPUBLIC, Feb. 19, 1930, at 13, 14–15; see John Dewey, *‘America’—By Formula*, THE NEW REPUBLIC, Sept. 18, 1929, at 117, 118. Dewey published these and other essays in the series, in expanded form, in a book. JOHN DEWEY, *INDIVIDUALISM, OLD AND NEW* (1930).

155. See *id.*

156. See FELDMAN, *supra* note 3, at 314–28 (discussing pluralist democracy and the New Deal).

157. LIZABETH COHEN, *A CONSUMERS’ REPUBLIC* 114 (2003).

158. *Id.* at 14; FELDMAN, *supra* note 3 at 337–40.



Advanced marketing techniques transformed political campaigns into a series of commercial-like advertisements.<sup>159</sup> Americans did not object. For the most part, during the post-World War II era, Americans celebrated their consumers' democracy.<sup>160</sup> According to Will Herberg, writing in 1955, the American way of life

synthesizes all that commends itself to the American as the right, the good, and the true in actual life. It embraces such seemingly incongruous elements as sanitary plumbing and freedom of opportunity, Coca-Cola and an intense faith in education—all felt as moral questions relating to the proper way of life.<sup>161</sup>

In 1959, Vice President Richard Nixon proclaimed that the variety and availability of consumer goods in the United States symbolized “‘our right to choose. We do not wish to have decisions made at the top by governmental officials,’ whether about [our] ‘kind of house’ or [our] ‘kind of ideas.’”<sup>162</sup>

In this context, a free-expression theory grounded on self-realization and -satisfaction seemed to follow naturally. In other words, the self-fulfillment rationale flowed from the practices of the consumers' democracy. In 1963, Thomas Emerson articulated one of the earliest scholarly statements of this rationale.<sup>163</sup> He began with “the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.”<sup>164</sup> From this premise, Emerson reasoned that “every man—in the development of his own personality—has the right to form his own beliefs and opinions.”<sup>165</sup> Moreover, it “follows, that he has the right to express these beliefs and opinions.”<sup>166</sup> Free expression, in other words, is necessary to avoid the stunting of personal development. It allows the individual “to

159. COHEN, *supra* note 157, at 331–32.

160. *Id.* at 124–25.

161. WILL HERBERG, *PROTESTANT-CATHOLIC-JEW* 75 (1955); *see* LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955) (emphasizing American individualism as rooted in Lockean philosophy).

162. COHEN, *supra* note 157, at 126 (quoting Nixon).

163. *Toward*, *supra* note 100.

164. *Id.* at 879; White, *supra* note 100, at 303–08, 352–57 (connecting modernist thought with Emerson's self-fulfillment rationale).

165. *Toward*, *supra* note 100, at 879.

166. *Id.*

realize his potentiality as a human being.”<sup>167</sup> Expression, Emerson concluded, must be “an integral part of the development of ideas, of mental exploration and of the affirmation of self.”<sup>168</sup>

Other scholars would reiterate and elaborate the self-fulfillment theory. Several have traced the concern for self-fulfillment back to Immanuel Kant’s moral philosophy, particularly his respect for the individual dignity and autonomy of the classical liberal self.<sup>169</sup> Charles Fried, for one, wrote: “Freedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others.”<sup>170</sup>

The justices began using the self-fulfillment rationale in the latter-twentieth century. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, Justice David Souter described “the fundamental rule of protection under the First Amendment [to be] that a speaker has the autonomy to choose the content of his own message.”<sup>171</sup> Justice Thurgood

167. *Id.*

168. *Id.* Emerson elaborated his views in a subsequent book. SYSTEM, *supra* note 1, at 6. While Emerson might have been the first scholar of the pluralist democratic era to articulate the self-fulfillment rationale, his argument resonated with the republican democratic past. During the 1798 Sedition Act crisis, George Hay and John Thomson had developed libertarian theories of expression. GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS (1803), reprinted in TWO ESSAYS ON THE LIBERTY OF THE PRESS (Da Capo Press 1970) (1803); JOHN THOMSON, AN ENQUIRY CONCERNING THE LIBERTY, AND LICENTIOUSNESS OF THE PRESS, AND THE UNCONTROULABLE NATURE OF THE HUMAN KIND (1801). During the late-nineteenth and early-twentieth centuries, John W. Burgess, Ernst Freund, and especially Theodore Schroeder had also articulated libertarian theories of free expression. JOHN W. BURGESS, THE RECONCILIATION OF GOVERNMENT WITH LIBERTY 358–83 (1915); JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 86–89, 178 (1890); ERNST FREUND, THE POLICE POWER § 475 (1904); THEODORE SCHROEDER, “OBSCENE” LITERATURE AND CONSTITUTIONAL LAW 12–13, 94 (De Capo Press 1972) (1911); Theodore Schroeder, *Liberty of Conscience, Speech, and Press* (1906), reprinted in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 279 (Harold L. Nelson ed., 1967). Emerson did not cite any of these intellectual predecessors.

169. CUSHMAN, *supra* note 4, at 380–81; Willett, et al., *Feminist Perspectives of the Self*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2015); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992).

170. Fried, *supra* note 169, at 233; see C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011) [hereinafter Baker, *Autonomy*] (elaborating the autonomy rationale); Pound, *supra* note 80, at 453; Sylvia A. Law, *Addiction, Autonomy, and Advertising*, 77 IOWA L. REV. 909, 925 (1992) (proclaiming that “the function of the First Amendment is to protect expression as critical to human self-realization”); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court’s First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 165–70 (1997) (elaborating Kantian philosophy and its implications for free expression jurisprudence).

171. 515 U.S. 557, 573 (1995). The Court at least alluded to the self-fulfillment rationale in

Marshall captured the expansive nature of this rationale in his concurrence in *Proconier v. Martinez*.<sup>172</sup> Free expression, he wrote, “serves . . . the needs of . . . the human spirit—a spirit that demands self-expression.”<sup>173</sup> The self-fulfillment rationale was relied upon as recently as 2010.<sup>174</sup>

### III. THE THREE PHILOSOPHICAL RATIONALES IN THE DIGITAL AGE

In light of when the three philosophical rationales—search-for-truth, self-governance, and self-fulfillment—developed, they all are unsurprisingly grounded on the classical liberal self. But times change. While the rationales might have seemed reasonable when they first arose, in their original historical circumstances, they no longer fit in our postmodern information society.<sup>175</sup>

#### A. *The Socially Constructed (Relational) Self*

The classical liberal self is a sovereign center of power that exists separately from society and culture. Life in the postmodern digital age, however, underscores that the self is socially and culturally constructed.<sup>176</sup> In other words, one’s experience of the self or identity is generated from within cultural practices and societal structures. The self or human consciousness is not some ultimate foundational source of control and progress that exists prior to or outside of society and culture.<sup>177</sup>

1943. *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 631 (1943) (invoking “a right of self-determination in matters that touch individual opinion and personal attitude”).

172. 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

173. *Id.*

174. *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 248 (2002); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 710 (1990) (Kennedy, J., dissenting), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010). While the justices often rely on only one rationale, they do not hesitate to use the rationales in combination. *See, e.g.*, *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008) (combining search-for-truth and self-governance rationales); *Proconier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (invoking all three rationales); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (alluding to both self-governance and search-for-truth rationales).

175. *See* YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006) (discussing how digital technology changes both the economy and cultural production); TURKLE, *supra* note 28, at 15–18 (emphasizing how digital and online technology changes our experiences).

176. COHEN, *CONFIGURING*, *supra* note 24, at 5.

177. Cohen, *Privacy*, *supra* note 24, at 1904–06; Martin & Sugarman, *supra* note 23, at 398. Foucault discusses the social and historical constitution of the subject. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., 1977); Michel Foucault, *Afterword: The Subject and Power*, in HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208 (2d ed. 1983). In jurisprudence, Pierre Schlag has written about the social

At birth, one is thrust into a preexisting yet evolving sociocultural community.<sup>178</sup> One matures by absorbing the values, interests, and expectations endorsed in that community.<sup>179</sup> The child learns both patent and latent lessons not only from parents and other caregivers but also from television, friends, computers, video games, and so on.<sup>180</sup> The self, that is, does not exist prior to or outside society and culture. Rather, society and culture constitute the self and its awareness of itself and others.<sup>181</sup> Feminist theorists emphasize that, at a fundamental level, the self is relational rather than atomistic;<sup>182</sup> “human beings are created in and through relations with other human beings.”<sup>183</sup> Many feminists add that social relations can be positive, negative, or both.<sup>184</sup> A nurturing parent can empower a child, but a manipulative and narcissistic parent can engender an emotionally damaged child. Elaborating this point, feminists describe the self as intersectional, “as a site constituted and fragmented, at least partially, by the intersections of various categories of domination/oppression such as race, gender, and sexual orientation. [One’s identity, then] is made up of the various discourses and structures that shape society and one’s experience within it.”<sup>185</sup>

Life in an information society starkly magnifies the processes of social

---

construction of the self. Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990). Some communitarians have also criticized the classical liberal or modernist self. ALISDAIR MACINTYRE, *AFTER VIRTUE* (2d ed. 1984); MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

178. Martin & Sugarman, *supra* note 23, at 400–01.

179. *See id.* at 399, 402.

180. *See id.* at 399.

181. BAUMAN & RAUD, *supra* note 4, at 55–56 (arguing that the self emerges only in interaction with others); GERGEN, *supra* note 6, at xv (“we exist in a world of co-constitution”).

182. Virginia Held, *Mothering versus Contract*, in *BEYOND SELF-INTEREST* 287, 288–90 (Jane Mansbridge ed., 1990) (arguing to imagine society in accord with a relationship of mothering).

183. Flax, *supra* note 33, at 250; *see* FRIEDMAN, *supra* note 38, at 94 (describing relational or social self).

184. Willett et al., *supra* note 169 (discussing social and cultural relations in terms of feminist and philosophical theories).

185. *See* John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1483 (1997) (discussing intersectional self). *See generally* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990). “Once we move away from the notion of subjectivity as bounded, rational and autonomous, we embrace the idea of a socially situated and historically mediated subjectivity intersected by gender, race, class, sexuality and other social categories.” Maria Pallotta-Chiarolli & Bob Pease, *Recognition, Resistance and Reconstruction*, in *THE POLITICS OF RECOGNITION AND SOCIAL JUSTICE* 1, 1–2 (Maria Pallotta-Chiarolli & Bob Pease eds., 2014).

construction, the ongoing development of the relational self.<sup>186</sup> Individuals literally and often self-consciously create an online self that exists in relation to other online selves.<sup>187</sup> One's online self is unequivocally social, cultural, and interactive. "Internet speech," writes Jack Balkin, "is a social activity that involves exchange, give and take."<sup>188</sup> Consider Facebook. Each person creates a Facebook persona or self. You post photographs, identify your favorite movies, music, and books, and communicate with friends. It is thoroughly social—it is social media, after all—because one's Facebook self always exists in relation with other Facebook selves. Significantly, the Facebook digital structure enables each individual, with online access, to construct this self, but the structure also channels such self-construction. Facebook tells the user what are the appropriate categories of information and communication.<sup>189</sup>

More broadly, we exist on the Internet in a "built environment," a constructed architecture of social life.<sup>190</sup> As Tim Wu puts it, the "information environment," the structure that digital communication industries provide for individuals, shapes how individuals can perceive and express themselves.<sup>191</sup> In this sense, digital technology is no different from prior communicative or information media. An oral culture engendered particular types of individuals and social life, distinct from those of a scribal culture, distinct from a print culture, and distinct from our digital culture.<sup>192</sup> For instance, the development of print technology facilitated mass communication, including the dissemination of political

---

186. Online technology "is bringing a set of ideas associated with postmodernism . . . into everyday life." TURKLE, *supra* note 28, at 18.

187. *See id.* at 14.

188. Balkin, *Digital*, *supra* note 39, at 34.

189. SCHNEIER, *supra* note 16, at 4 (emphasizing how Google builds on human existence as "social animals").

190. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 86 (1999).

191. WU, *supra* note 8, at 13; *see* ANTHONY ELLIOTT, *CONCEPTS OF THE SELF* 143–44, 153 (3d ed. 2014) (arguing that postmodern technology changes our sense of self and identity).

192. Lauren Langman, *From Subject to Citizen to Consumer: Embodiment and the Mediation of Hegemony*, in *THE POLITICS OF SELFHOOD* 167, 170 (Richard Harvey Brown ed., 2003).

[D]ifferent kinds of media shape differing forms of subjectivity and the bodies and identities that find emotional gratifications from the ideologies that constitute them. Scribal cultures fostered subjects of the throne, print cultures fostered citizens of the state, and electronically mediated amusement cultures foster consumers at the mall and audiences to the spectacles of globalized capital.

*Id.* at 187.

information, and thus was crucial to the development of democracy.<sup>193</sup> Significantly, digital technology, like earlier communicative technologies, enables individuals to communicate but also simultaneously limits or constrains them. The digital infrastructure that facilitates unprecedented communication across the globe also facilitates surveillance and suppression. The technology of communication, surveillance, and suppression are one and the same.<sup>194</sup> Digital technology differs from earlier technologies only insofar as it magnifies the influence of technology on our experiences of our selves and our world. As Sherry Turkle explains, her sense of self changed after she became immersed in online computer technology; only then did she experience her self as “multiple, fluid, and constituted . . . .”<sup>195</sup> More important, an online self knows there is no escape, no outside of the Internet. One does not exist as an online self unless one is using the Internet, and the Internet consists of a constructed environment. There is literally no state of nature on the Internet.<sup>196</sup>

The conspicuousness of the socially constructed relational self in the digital world illuminates the nature of our being or existence beyond the Internet.<sup>197</sup> In other words, the social construction of the self that we can so readily observe on the Internet exemplifies a crucial aspect of our overall and everyday being or existence. Whether or not we are surfing the Internet, we emerge and exist only in relation to others, as we speak and listen to others, as we observe and are observed by others. From the time we are born, our most basic perceptions of others, the world, and ourselves are generated by and from within our sociocultural context, by and from our relations with others. The relational self cannot exist or stand prior to or outside of society and culture. We live in a culturally

193. See FELDMAN, *supra* note 3, at 38 (linking the spread of suffrage to the development of the steam-driven printing press); PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* 1–2, 110 (2004) (emphasizing the connection between media technology and political development).

194. Balkin, *Regulation*, *supra* note 39, at 2297–98, 2301–07; see BAUMAN & RAUD, *supra* note 4, at 80 (arguing that Internet technology is both a “blessing and curse”); SCHNEIER, *supra* note 16, at 1–7 (emphasizing how Internet corporations surveil their users).

195. TURKLE, *supra* note 28, at 15; see BAUMAN & RAUD, *supra* note 4, at 80 (emphasizing that the Internet is now crucial to the production of our selves).

196. “If there is any place where nature has no rule, it is in cyberspace. If there is any place that is constructed, cyberspace is it.” LESSIG, *supra* note 190, at 24.

197. “The legal, technical, and institutional conditions that shape flows of information to, from, and about us . . . shape the sort of subjectivity that we can attain, the kinds of innovation that we can produce, and the opportunities for creation of political and ethical meaning that we can claim to offer.” COHEN, *CONFIGURING*, *supra* note 24, at 5.

saturated world.<sup>198</sup>

In recent years, media professors and bloggers have been debating about digital dualism—a debate akin to the mind-body problem of modernist philosophy.<sup>199</sup> Mind-body dualism assumes that individuals possess both an immaterial mind—think of the classical liberal self—and a material body. The mind-body problem asks how (or if) the immaterial mental states of the mind can affect or control the physical actions of the material body.<sup>200</sup> In a similar fashion, digital dualism sharply distinguishes our existence online from our existence offline.<sup>201</sup> Offline is physical and real. Online is virtual and secondary—or supplemental to our primary (real) offline existence.<sup>202</sup> Dualism imagines that we live in a world resembling the movie, *The Matrix*.<sup>203</sup> Either we are awake and living in reality, or we are anesthetized and dreaming in the virtual delights of the artificial Matrix. We can cross from reality to the Matrix, and vice versa, but we cannot be in both simultaneously.<sup>204</sup> Dualists often worry about how virtual experiences (online) impinge on or detract from real life.<sup>205</sup> Life in the Matrix, we might say, prevents us from experiencing real life.

198. “Culture infuses individuals through the social practices of the everyday world, shaping and forming in the most fundamental ways how humans conceive of the world and their place within it.” CUSHMAN, *supra* note 4, at 17.

199. Nathan Jurgenson, *Responding to Carr’s Digital Dualism*, CYBORGOLOGY (Mar. 1, 2013), <http://thesocietypages.org/cyborgology/2013/03/01/responding-to-carrs-digital-dualism/> [<https://perma.cc/SW6H-7G66>] [hereinafter Jurgenson, *Responding*] (rejecting dualism); David Banks, *Always Already Augmented*, CYBORGOLOGY (Mar. 1, 2013), <https://thesocietypages.org/cyborgology/2013/03/01/always-already-augmented/> [<https://perma.cc/5EGY-3T8S>] (rejecting dualism); Nicholas Carr, *Digital Dualism Denialism*, ROUGH TYPE (Feb. 27, 2013), <http://www.roughtype.com/?p=2090> [<https://perma.cc/4X7Q-9BNV>] (supporting dualism); Nathan Jurgenson, *Digital Dualism versus Augmented Reality*, CYBORGOLOGY (Feb. 24, 2011), <http://thesocietypages.org/cyborgology/2011/02/24/digital-dualism-versus-augmented-reality/> [<https://perma.cc/6J66-QJ5W>] [hereinafter Jurgenson, *Augmented*] (articulating alternative to dualism).

200. See FELDMAN, *VOYAGE*, *supra* note 18, at 22–23 (tying Cartesian dualism to Protestant Reformation); D. W. HAMLYN, *A HISTORY OF WESTERN PHILOSOPHY* 135–43 (1987) (rooting mind-body dualism in Descartes); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 45–61 (1979) (rejecting mind-body dualism); JOHN R. SEARLE, *MIND, LANGUAGE, AND SOCIETY* 39–45 (1998) (critiquing the mind-body problem from analytical perspective).

201. See Jurgenson, *Augmented*, *supra* note 199; Carr, *supra* note 199; Jurgenson, *Responding*, *supra* note 199.

202. Jurgenson, *Augmented*, *supra* note 199; see Carr, *supra* note 199.

203. *THE MATRIX* (Warner Bros. 1999).

204. Jurgenson, *Augmented*, *supra* note 199.

205. NICHOLAS CARR, *THE SHALLOWS* (2010) (criticizing the effects of digital technology); SHERRY TURKLE, *ALONE TOGETHER* (2011) (arguing online relationships undermine real relationships).

Numerous commentators, however, question digital dualism. To be sure, we experience being offline and online in different ways, at least partially.<sup>206</sup> Even so, our experiences offline and online are—and always have been—characterized by intersubjective communication and the exchange of information. In other words, we have always lived in a sociocultural context—in a world of information media—even if the existing media were no more complex than the spoken voice.<sup>207</sup> Online and offline experiences differ, then, only in degree and not in kind, if or when they differ at all. As one computer gamer said, “RL [real life] is just one more window.”<sup>208</sup> Online and offline intermingle in the experience of the relational self.<sup>209</sup>

“Interaction on Facebook is different than at a coffee shop,” writes Nathan Jurgenson, “but both Facebook and the coffee shop inhabit one reality.”<sup>210</sup> In fact, an individual’s Facebook profile reflects elements of offline experience, just as offline behavior can change because of Facebook experiences.<sup>211</sup> In our digital age, online and offline experiences intertwine experientially and temporally. Suppose I am at a coffee shop with my wife, and my smartphone buzzes. I look at it and see that I have received a text from our son. I read the text to my wife, and we discuss how to reply. I then text a response to our son. Is my experience online or offline? As I watch my wife eat her sticky bun, I decide to take a Snapchat photo of her and send it, via my smartphone, to our son and daughter. They both respond with their own Snapchat photos, which I save with screen shots. My wife and I then drive home, sit together in front of a computer, open our joint Facebook account and add the saved Snapchat photos of our children. Are we living online or offline? From my perspective, I am deeply enmeshed in intersubjective relationships, especially with my family, with those relationships unfolding on media both online and offline.<sup>212</sup>

When we—you, me, and anyone else—momentarily look away from

---

206. See Carr, *supra* note 199 (emphasizing the differences between online and offline experiences).

207. Jurgenson, *Responding*, *supra* note 199; Banks, *supra* note 199.

208. TURKLE, *supra* note 28, at 13.

209. *Id.* at 14, 21–22.

210. Jurgenson, *Responding*, *supra* note 199.

211. Jurgenson, *Augmented*, *supra* note 199.

212. Thus, numerous commentators now reject the concept of cyberspace because it suggests digital dualism, as if cyberspace were distinct from reality. *E.g.*, GRIMMELMANN, *supra* note 5, at 10–12. “The spatial metaphor of ‘cyberspace’ is and always has been misleading.” Banks, *supra* note 199.



our computers, tablets, and smart phones, we do not transform into classical liberal selves. Rather, we always are and have been socially constructed relational selves. Our experience online accentuates an aspect of our existence that previously might have been obscure but was nonetheless present. Even if the classical liberal self appeared to fit in certain historical circumstances, its sharp separation of the self from sociocultural context was always a myth.<sup>213</sup> And if the classical liberal self does not exist, then the three traditional philosophical rationales resting on this ostensible foundation can no longer stand. Both the search-for-truth and self-governance rationales treat speech as an instrument. The classical liberal self, a sovereign source of power and control, uses speech as a tool to achieve the self's desired goals: either the identification of truth or democratic self-government. But if the self is relational and socially constructed, if the self is not as atomistic and independent as classical liberalism theorizes, then any such use of expression is far more complex than the rationales acknowledge. Using speech is not the same as using a hammer to drive a nail into wood (an action that itself is more complicated than we typically realize). Communication through speech and writing is an inherently intersubjective (relational) activity that necessarily builds on preexisting culture but also reconstructs and adds to that culture.<sup>214</sup> Meanwhile, the self-fulfillment rationale views the self as preexisting and in search of fulfillment or realization. But the social construction of the relational self suggests that the self is always in an ongoing process of emerging or becoming. The self does not realize its preexisting potential; it continually emerges through interaction with society and culture, through engagement with others.<sup>215</sup>

---

213. "[T]he liberal self who is the subject of privacy theory and privacy policymaking does not exist." Cohen, *Privacy*, *supra* note 24, at 1905; see Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637 (2015) (arguing that First-Amendment Internet issues should not be treated as exceptional).

214. Habermas rejects the atomistic and instrumental self precisely because communication and discourse are social actions that are crucial to our beings. JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984); JÜRGEN HABERMAS, 2 THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1987); see JAMES GORDON FINLAYSON, HABERMAS 51 (2005) (explaining Habermas's concept of lifeworld); Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296 (2005) (explaining Habermas in comparison with Gadamer and Derrida).

215. BAUMAN & RAUD, *supra* note 4, at 132–33; NEDELSKY, *supra* note 38, at 50; Edward McGushin, *Foucault's Theory and Practice of Subjectivity*, in MICHEL FOUCAULT: KEY CONCEPTS 127, 141 (Dianna Taylor ed., 2011).

*B. The Collapse of the Traditional Public-Private Dichotomy*

The three philosophical rationales assume that the classical liberal self is a source of sovereign power. In theory, then, the absence or limitation of government maximizes individual liberty. Without government restriction, the self's sovereign power supposedly has free rein. This public-private dichotomy animates free-expression doctrine (and much of constitutional law, in general). Government, from the public sphere, is understood to threaten individual rights and liberties, while the private sphere is supposedly the realm of individual freedom.<sup>216</sup> This theoretical division between public and private is the basis for libertarian and neoliberal ideology, which celebrates private-sphere freedom and denigrates government.<sup>217</sup> In the digital age, however, this traditional public-private dichotomy collapses.

Because of the technological structure of the Internet, online communicative expression always passes through intermediaries. At the simplest level, an Internet speaker (or writer) must rely on an ISP merely to get online. But many other intermediaries can be involved, depending on the type of media and online activity.<sup>218</sup> These intermediaries can bar content, direct users in particular directions, tailor results to individual users, and otherwise control the individual's experience.<sup>219</sup> No matter whether one is using Facebook, YouTube, Google, or Amazon, the experience can be controlled and channeled. Online sellers have an obvious interest in collecting information about individual consumers and then directing those consumers to purchases. Internet architecture allows merchants and advertisers "to use information they already possess or can easily buy to tailor what they say, how they say it, and to whom they say it."<sup>220</sup> And merchants and advertisers use that capability frequently and capaciously. "Advertisers using software that tracks user identities across the Internet can select advertisements for individual users that appeal to their tastes, preferences, heuristics, and biases."<sup>221</sup> For instance, I shopped

216. See F.A. HAYEK, *THE ROAD TO SERFDOM* 80–81 (50th Anniversary ed., 1994).

217. *E.g., id.* at 16–17 (articulating libertarian position); DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* (2012) (discussing the development and influence of neoliberalism).

218. Andrew Tutt, *The New Speech*, 41 *HASTINGS CONST. L.Q.* 235, 244–47 (2014).

219. *Id.*; see SCHNEIER, *supra* note 16, at 54–72 (discussing the corporate business of surveillance).

220. Tutt, *supra* note 218, at 244.

221. *Id.*; see SCHNEIER, *supra* note 16, at 58–59, 130 (emphasizing advertising as business model for Internet businesses and the tailoring of pop-up advertisements based on browsing

online for an office chair six months ago and have been bombarded ever since with pop-up advertisements for office chairs.

Algorithms ranking search results are readily manipulated.<sup>222</sup> “You are what you search,” writes Carl Franzen.<sup>223</sup> “That’s definitely the case on Google, where any search query turns up a personalized set of results based upon your prior Google search history data, even if you’re completely logged out of your Google account.”<sup>224</sup> Consequently, different users will reach different results when entering identical search terms, whether they are shopping for shirts or researching politically controversial topics like abortion.<sup>225</sup> In fact, corporate websites will charge different users different prices for the same product based on the accumulated surveillance data for the respective users.<sup>226</sup> And when a meme—a discrete cultural unit often referring to an Internet concept or idea—goes viral on the Internet, its popularity often is managed or produced.<sup>227</sup> It is not a spontaneous or haphazard event.<sup>228</sup> In short, the Internet is a controlled environment.

Significantly, most of these Internet intermediaries are corporations, often MNCs. In the early years of the Internet, at least until the mid-1990s, many participants and observers believed the Net was beyond control, either by the government or by massive corporations bent on monopolization.<sup>229</sup> As James Grimmelmann points out, “computers are general-purpose devices, capable of carrying out all kinds of tasks, including ones their designers never dreamed of.”<sup>230</sup> In particular, many early personal computers (PCs) were open and flexible; the Apple II is a prototypical example of a machine that encouraged tinkering and

---

history).

222. An algorithm is “a step-by-step process for carrying out a calculation.” GRIMMELMANN, *supra* note 5, at 25.

223. Carl Franzen, *Impersonal Google Search Results Are Few and Far Between, DuckDuckGo Finds*, TPM (Oct. 15, 2012), <http://talkingpointsmemo.com/idealab/impersonal-google-search-results-are-few-and-far-between-duckduckgo-finds> [<https://perma.cc/WN88-VMV3>].

224. *Id.*

225. See Tutt, *supra* note 218, at 274 (discussing algorithms).

226. SCHNEIER, *supra* note 16, at 128–30.

227. MIKE HAWKINS, *SOCIAL DARWINISM IN EUROPEAN AND AMERICAN THOUGHT, 1860–1945*, at 16 (1997) (defining meme).

228. Doug Bock Clark, *The Bot Bubble: How Click Farms Have Inflated Social Media Currency*, THE NEW REPUBLIC (Apr. 20, 2015); Tutt, *supra* note 220, at 274.

229. LESSIG, *supra* note 190, at 4–5.

230. GRIMMELMANN, *supra* note 5, at 24.

experimentation.<sup>231</sup> Likewise, the early Internet was accessible and adaptable to multiple uses.<sup>232</sup> When the PCs were linked together via the Internet, digital technology became an incredible font of individual creativity and social exchange. Jonathan Zittrain aptly calls the early PCs and Internet “generative.”<sup>233</sup> Their architectures, especially when conjoined, invited anyone and everyone to innovate, build, and contribute to the ever-changing digital environment.<sup>234</sup> One innovation could be the foundation for another innovation, and those two together could generate yet additional innovations. The Internet appeared to be a collection or web of peers with no one in charge or control.<sup>235</sup> Turkle described this young Internet as “a dizzyingly free zone.”<sup>236</sup>

Zittrain contrasts the generative early Internet with the proprietary networks, such as America Online (AOL) and Prodigy, which prospered through much of the 1990s.<sup>237</sup> These proprietary networks were closed systems that individuals paid to enter because they supposedly offered users unique and worthwhile content.<sup>238</sup> Such closed systems, however, were non-generative or “sterile.”<sup>239</sup> The corporate owners believed that, for purposes of profits, they needed to keep the systems controlled and exclusive, thus discouraging interaction and innovation. But ultimately, these sterile systems could not compete with the generative system of the open Internet. In 2000, AOL and Time Warner announced a celebrated merger of media giants, but soon afterward, the speed and openness of Internet broadband services rendered AOL and other proprietary services obsolete.<sup>240</sup>

As the years passed, though, entrepreneurs realized the Internet was leaving money on the table. They learned how to harness the Internet for profit. It became apparent that unfettered individual freedom, initiative, and inventiveness are not inherent to online (Internet) architectures, even

---

231. WU, *supra* note 8, at 275–77; JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET—AND HOW TO STOP IT 2–3 (2008) [hereinafter ZITTRAIN, FUTURE]; Jonathan Zittrain, *The Internet is Closing to Innovation*, NEWSWEEK INTERNATIONAL (Nov. 8, 2008).

232. ZITTRAIN, FUTURE, *supra* note 231, at 3.

233. *Id.* at 2–4, 70–74.

234. *Id.* at 3.

235. Paul Ford, *Reboot the World*, NEW REPUBLIC, July/Aug. 2016, at 18, 19–20.

236. TURKLE, *supra* note 28, at 246.

237. ZITTRAIN, FUTURE, *supra* note 231, at 3, 81; see LESSIG, *supra* note 191, at 66–71 (describing America Online).

238. See LESSIG, *supra* note 191, at 67.

239. ZITTRAIN, FUTURE, *supra* note 231, at 3.

240. WU, *supra* note 8, at 257–68 (describing the rapid and surprising collapse of AOL).

outside the old proprietary networks.<sup>241</sup> Rather, the architecture itself, the “built environment,”<sup>242</sup> determines the degree of individual autonomy as well as government and corporate control.<sup>243</sup> And the manipulation of that architecture helped usher in the mass commercialization of the Internet.<sup>244</sup>

What other factors commercialized the Internet and led to the creation of MNCs? The need for capital was one. The equipment and know-how necessary to manage and link massive amounts of information or data, such as is needed for an ISP or a search engine like Google, is expensive and requires heavy capital investment, which of course leads to the corporate form.<sup>245</sup> Moreover, the Internet itself facilitated the rapid development of MNCs over the last twenty-five years.<sup>246</sup> The advanced communication technologies, together with advanced transportation technologies and the “free mobilization of capital,” allow corporations to produce and sort information, to mine data, and to otherwise create or manufacture products wherever labor costs are low and environmental restrictions are lax and then to sell such products where incomes are high.<sup>247</sup> Plus, the corporations can still locate their offices where taxes are minimal, the views are enticing, the culture is exciting, or anywhere else. Indeed, because of the combined corporate capabilities to shift capital and to ship their respective products rapidly around the world, corporations can pressure nations to minimize labor demands, lower taxes, and diminish environmental regulations.<sup>248</sup>

Digital technology has created massive new markets for the products of these MNCs. Millions of people around the world stream media, purchase DVDs, use Facebook, and buy from Amazon. Information, data, and media, today, are sources of enormous wealth.<sup>249</sup> Most important, Big Data has become big business.<sup>250</sup> The corporate gathering, processing, and

---

241. See LESSIG, *supra* note 190, at 88–89.

242. *Id.* at 86.

243. *Id.* at 5–6.

244. *Id.* at 102–04 (discussing the commercialization of the Internet).

245. Tutt, *supra* note 218, at 247–48; see Barton Gellman et al., *How the NSA is Infiltrating Private Networks*, WASHINGTON POST, Oct. 30, 2013 (depicting graphically the Google system, including front-end servers and data centers).

246. JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* 74–76 (2013).

247. *Id.* at 75; JOEL BAKAN, *THE CORPORATION* 22–25 (2004); Brian Roach, *A Primer on Multinational Corporations*, in *LEVIATHANS* 19, 35–36 (Alfred D. Chandler & Bruce Mazlish eds., 2005).

248. STIGLITZ, *supra* note 246, at 74–77.

249. Balkin, *Digital*, *supra* note 39, at 13–14.

250. FRANK PASQUALE, *THE BLACK BOX SOCIETY* 5–6, 19 (2015).

analysis of data, including metadata, can be mined for profits in multiple ways.<sup>251</sup> Most online users believe they access nearly all websites with no strings attached, but in reality, users gain such access only because they simultaneously relinquish data about their personalities and habits—data that corporations can turn into profits.<sup>252</sup> As Bruce Schneier explains: “If something is free [on the Internet], you’re not the customer; you’re the product.”<sup>253</sup> In other words, Internet MNCs—search engines, social media sites, and so forth—effectively sell their users to advertisers, which attempt to steer the users to other websites where they can purchase products and services.<sup>254</sup> We (Internet users) are like cattle. MNCs feed us with website access and information—and we happily think such access is the point—but in reality, we are being cultivated for slaughter, for sale as a product to another business entity. With so much money being made from online data-gathering and related businesses, we have unsurprisingly reached a point where several MNCs are practically synonymous with segments of the Internet: Google, Apple, Microsoft, Facebook, Yahoo, and Amazon are among the most renowned. The leading ISPs, Verizon, Comcast, and AT&T, are also MNCs.<sup>255</sup> Yet, it is worth adding that many corporations engaged in mass surveillance are relatively unknown.<sup>256</sup>

The heavy corporate presence on the Internet threatens free expression.<sup>257</sup> Nowadays, corporations generally have one goal: to maximize profits. Business consultant and professor, Peter Drucker, declared, “If you find an executive who wants to take on social responsibilities, fire him. Fast.”<sup>258</sup> MNCs, in particular, do not care about

251. SCHNEIER, *supra* note 16, at 6–7, 39. Metadata is “data about data—information a computer system uses to operate or data that’s a by-product of that operation. In a text message system, the messages themselves are data, but the accounts that sent and received the message, and the date and time of the message, are all metadata.” *Id.* at 17.

252. *Id.* at 49–53.

253. *Id.* at 53.

254. *Id.* at 46–61.

255. John Ribeiro, *Verizon Enters India’s Long-Distance Telecom Market*, NETWORK WORLD (Feb. 7, 2007); Gagan Mehra, *32 Leading Internet Service Providers*, PRACTICAL ECOMMERCE (Mar. 12, 2015); Numerous lists of MNCs are available on the Internet. *E.g.*, Abby Rogers, *The 25 Best Multinational Companies to Work For*, BUSINESS INSIDER (Oct. 28, 2011).

256. SCHNEIER, *supra* note 16, at 48.

257. See Deven R. Desai, *Constitutional Limits on Surveillance: Associational Freedom in the Age of Data Hoarding*, 90 NOTRE DAME L. REV. 579, 590–91 (2014) (focusing on constitutional issues related to surveillance); Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465 (2015) (explaining empirical study showing that surveillance chills free expression).

258. BAKAN, *supra* note 247, at 35 (quoting Drucker); see Milton Friedman, *The Social*

democracy, the health of nation-states, or issues of government. MNCs care only about the maximization of profits, regardless of where they can be accrued.<sup>259</sup> The massive intermediary-MNCs therefore control and readily suppress online expression for their own purposes—profit.<sup>260</sup> They have no principled concern for the First Amendment. If it is to their benefit (profit) to invoke the First Amendment, they will do so. If it is to their benefit (profit) to suppress expression, then they will do so. MNCs manipulate the First Amendment and channel individual freedoms for business purposes only.<sup>261</sup> Thus, in one instance, Google might insist that its search algorithms and results are expressive content protected as free expression.<sup>262</sup> But in another instance, Google might maintain that it merely provides a conduit or pipeline for content supplied by others. As such, Google would enjoy diminished first-amendment protection, but it would also be relieved of any liability for defamatory messages.<sup>263</sup> To be sure, despite the looming presence of corporate power on the Internet, digital technologies and online communication remain sources of creativity and social exchange. Yet, the existence or protection of free expression in the digital age “depends far less on our abstract values than on the structure of the communications and culture industries. We sometimes treat information industries as if they were like any other enterprise, but they are not, for their structure determines who gets heard.”<sup>264</sup>

Without doubt, *government* might still suppress expression or gather massive amounts of information about citizens. The Edward Snowden revelations about the National Security Agency (NSA) and its incredible collection of metadata demonstrate the potential for such government

---

*Responsibility of Business is to Increase its Profits*, THE NEW YORK TIMES MAGAZINE (Sept. 13, 1970).

259. KENICHI OHMAE, *THE END OF THE NATION STATE* 2–5 (1995).

260. PASQUALE, *supra* note 250, at 5; Wu, *supra* note 8, at 205–06.

261. See Crawford, *supra* note 13, at 2375–78 (emphasizing invocation of First Amendment for profit); Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2032–33 (2013) (emphasizing the use of Big Data for profit).

262. PASQUALE, *supra* note 250, at 3–6.

263. *Id.* at 77–78; see Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013) (arguing against full search-engine first-amendment protection); EUGENE VOLOKH & DONALD M. FALK, *FIRST AMENDMENT PROTECTION FOR SEARCH ENGINE SEARCH RESULTS* (2012), <http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf> [<https://perma.cc/C64D-88LR>] (arguing for constitutional protection of search engine results). Not incidentally, Google commissioned the Volokh and Falk paper.

264. Wu, *supra* note 8, at 13.

abuse of digital technology.<sup>265</sup> But a crucial point to understand is that, in the digital age, it is not only the government that can widely suppress expression or manipulate information. Suppression in the digital age transcends the traditional public-private dichotomy.<sup>266</sup> Often, the government enlists the assistance of private corporations in monitoring and gathering data about citizens.<sup>267</sup> But even without government involvement, corporations constantly control expression, gather information, and manipulate individuals—all in pursuit of corporate profit. And even while corporations gather massive amounts of data about individuals—data that they sell or use to generate profits—those same corporations will jealously hide their algorithms as trade secrets—which of course generate profits.<sup>268</sup> In the words of Frank Pasquale, Big Data corporations are “black boxes.”<sup>269</sup> Data goes in, information comes out (for profit), but we have no idea what goes on inside, as the corporate algorithms churn.<sup>270</sup>

The concept of the classical liberal self and the three philosophical rationales for free expression assume that the absence of government regulation maximizes individual liberty. But in the digital age, this assumption is patently false. MNCs have the means—control of digital architecture—and the motive—profit—to manipulate, coerce, and suppress individuals. Individual liberty is, to a large degree, a matter of corporate discretion. Thus, for instance, according to the search-for-truth rationale, if the government is precluded from infringing on the marketplace of ideas, then individuals will freely contribute ideas until the truth emerges.<sup>271</sup> But now, MNCs channel and limit the ideas that can be

265. PASQUALE, *supra* note 250, at 50–51 (discussing Snowden’s revelations); Barton Gellman, *Edward Snowden, After Months of NSA Revelations, Says His Mission’s Accomplished*, WASHINGTON POST, Dec. 23, 2013; Kennedy Elliott & Terri Rugar, *Six Months of Revelations on NSA*, WASHINGTON POST, Dec. 23, 2013.

266. PASQUALE, *supra* note 250, at 10 (“the distinction between state and market is fading”); SCHNEIER, *supra* note 16, at 6 (emphasizing a “public-private surveillance partnership”); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1935, 1951–52 (2013) (arguing that “surveillance transcends the public/private divide”) (emphasis omitted).

267. PASQUALE, *supra* note 250, at 21, 45; SCHNEIER, *supra* note 16, at 121–22; Balkin, *Regulation*, *supra* note 39, at 2297–98, 2305, 2324–25; Richards, *supra* note 266, at 1940–41.

268. PASQUALE, *supra* note 250, at 3–6.

269. *Id.*

270. Pasquale also analogizes Big Data corporations to one-way mirrors. “Important corporate actors have unprecedented knowledge of the minutiae of our daily lives, while we know little to nothing about how they use this knowledge to influence the important decisions that we—and they—make.” *Id.* at 9.

271. *See supra* Part II.A.



contributed to public intercourse on the Internet. From the corporate perspective, truth (or self-governance or self-fulfillment) is no more valuable than is individual liberty. All such notions are subservient to the only real corporate value: profit. Yet, if an individual were to challenge corporate control over expression as violating the First Amendment, the corporation has a ready answer. It is not a state actor, and therefore, the constitutional limitations of the First Amendment do not apply.<sup>272</sup>

In sum, the three philosophical rationales arose in specific historical contexts. All were based on the existence of the classical liberal (modernist) self. But in the context of the digital age, the three rationales are no longer apt. The idea of the classical liberal self enjoying maximum liberty in a private sphere does not fit our information society. The digital age underscores that the self is socially constructed and that the traditional public-private dichotomy has collapsed, at least insofar as it relates to free expression.<sup>273</sup>

#### IV. A SELF-EMERGENCE RATIONALE FOR FREE EXPRESSION

Although the primary philosophical rationales for free expression do not comport with our current circumstances, we should not conclude that free expression itself has no justifiable place in the digital age. To the contrary, we must reimagine the importance of free expression in a world of digital technology. If the self is relational and socially constructed, if the traditional public-private dichotomy has collapsed, then why is the constitutional protection of free expression significant?

##### *A. Relational Autonomy and the Self-Emergence Rationale*

The importance of free expression arises from a proper conception of the self as an emergent social being. Unlike the classical liberal self, the emergent self is socially constructed. It neither preexists society and culture nor stands as a sovereign and independent source of power. Rather, the self is fundamentally relational. The self “is in basic ways constituted by networks of relationships of which they are a part—

---

272. *E.g.*, *Young v. Facebook, Inc.*, No. 5:10-CV-03579-JF/PVT, 2010 WL 4269304 (N.D. Cal. Oct. 25, 2010) (dismissing claim against Facebook because of lack of state action); see Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2253–58 (2014) (emphasizing state-action doctrine issues).

273. Wu suggests the irrelevance of the three philosophical rationales to the practical experience of free expression in the digital age. “The public square is a fine conceit,” he writes, “but in an information society it matters little that one is free to speak one’s mind in public; the public square, if it exists, is an information network nowadays.” Wu, *supra* note 8, at 306.

networks that range from intimate relations with parents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy.”<sup>274</sup>

The emergence of the relational self is an ongoing creative and dynamic process. The process is ongoing because our selves neither fully form at birth nor finish developing at some specific age, as might be suggested by rituals (often religious) that supposedly mark passage into adulthood.<sup>275</sup> The emergence of the self, we might say, ends only at death. “Human beings are in a constant process of becoming, in interaction with the many layers of relationship in which they are embedded.”<sup>276</sup> The process is creative and dynamic because it does not follow a set of predetermined and mechanical steps.<sup>277</sup> It is not rote. As the self emerges, the process of emergence adjusts and transforms, depending on the self and its surroundings. The self that emerges has consciousness, including self-consciousness, reflexivity, memory, and imagination.<sup>278</sup> The self therefore participates in its own creation.<sup>279</sup>

The intersubjective or social existence of the self, in relation to and with others, is crucial for understanding autonomy. From the time of birth, we are constantly being normalized and modulated, pushed and pulled by social and cultural forces that often operate invisibly.<sup>280</sup> Think of radioactive rays. Their wavelengths are beyond those perceivable by human eyes.<sup>281</sup> We do not see them, yet they not only exist but also can

274. NEDELSKY, *supra* note 38, at 19. Judith Butler adds that the relational self seeks recognition from others. We cannot simply choose who we want to be. In a sense, each individual negotiates with other individuals in an effort to be recognized in particular ways or roles, as a friend, a lover, a scholar, an artist, an actor, a writer, an athlete, and so on. JUDITH BUTLER, UNDOING GENDER 131–51 (2004); *see* AMY ALLEN, THE POLITICS OF OUR SELVES 173–74 (2008) (discussing Butler and recognition); JEFFREY NEALON & SUSAN SEARLS GIROUX, THE THEORY TOOLBOX 43, 261 (2d ed. 2012) (discussing recognition).

275. “[T]he idea of selfhood as an on-going process, a lived practice, something we do rather than are.” BAUMAN & RAUD, *supra* note 4, at 132.

276. NEDELSKY, *supra* note 38, at 38.

277. Martin & Sugarman, *supra* note 23, at 400; *see* Cohen, *Privacy*, *supra* note 24, at 1905 (referring to “dynamic, emergent subjectivity”). “People are born into networks of relationships, practices, and beliefs, and over time they encounter and experiment with others, engaging in a diverse and ad hoc mix of practices that defies neat theoretical simplification.” Cohen, *Privacy*, *supra* note 24, at 1910.

278. Martin & Sugarman, *supra* note 23, at 401–02; *see* NEALON & GIROUX, *supra* note 275, at 48 (explaining that the self is not a mere “passive receptor”).

279. *See* BAUMAN & RAUD, *supra* note 44, at 102 (discussing self-creation); NEDELSKY, *supra* note 38, at 167–70 (same).

280. *See* Cohen, *Privacy*, *supra* note 24, at 1915 (explaining modulation).

281. *Types of Radiation*, RADIATION ANSWERS (2007),

affect our bodies.<sup>282</sup> The forces of social construction are similar—they affect us whether or not we know it—though they are not necessarily damaging or harmful.<sup>283</sup> In fact, the forces of social construction can be positive, negative, or both concurrently. Cultural and social forces both empower and limit us.<sup>284</sup> We are empowered, for instance, because we are acculturated to speak a particular language (or languages). We can directly interact with others who speak the same language. But simultaneously, we are limited because we cannot speak other languages.

Autonomy lies in the space between the empowering and limiting effects of sociocultural forces. It is a capacity to participate in the ongoing and dynamic process of self-creation.<sup>285</sup> Most important, then, autonomy itself is relational. Our relationships can facilitate the development of a capacity for self-creation and self-determination—for self-emergence.<sup>286</sup> Autonomy cannot exist unless it arises from “human connections, including those manifested in love, friendship, appropriate care, and even loyalty and devotion.”<sup>287</sup> Even further, autonomy does not merely arise from but is dependent upon social relations.<sup>288</sup> Autonomy, in other words, is “a mode of interacting with others.”<sup>289</sup> Because self-emergence is an ongoing creative and dynamic process, it is always in relation with and to others. If one is to exercise a capacity for self-creation and self-determination (in one’s self-emergence), it can occur only within a social context. It cannot happen in isolation.<sup>290</sup>

Consider an actor in a play.<sup>291</sup> The actor is given a script, which limits

<http://www.radiationanswers.org/radiation-introduction/types-of-radiation.html>  
[<https://perma.cc/8CQR-8PWZ>] (“Radiation waves are generally invisible.”).

282. *See id.*

283. Pierre Bourdieu argues that personal dispositions adjust to the logic of societal positions. PIERRE BOURDIEU, IN *OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY* (Matthew Adamson trans., 1990); Pierre Bourdieu & Loïc J.D. Wacquant, *The Purpose of Reflexive Sociology, in AN INVITATION TO REFLEXIVE SOCIOLOGY* 61, 74, 81 (1992).

284. CUSHMAN, *supra* note 4, at 350.

285. FRIEDMAN, *supra* note 38, at 4–6, 19–21; NEDELSKY, *supra* note 38, at 45.

286. FRIEDMAN, *supra* note 38, at 4–6, 19–21.

287. VELTMAN, *supra* note 38, at 4.

288. NEDELSKY, *supra* note 38, at 46.

289. *Id.* at 55; *see* Pallotta-Chiarolli & Pease, *supra* note 185, at 5 (“agency is not an attribute of a subject or something that someone has, but is rather a relationship that is enacted in the world”).

290. “Relations are . . . constitutive of autonomy rather than conditions for it.” NEDELSKY, *supra* note 38, at 46.

291. *See* NEALON & GIROUX, *supra* note 274, at 265 (discussing agency in relation to reading Shakespeare).

the actor's possibilities. An actor playing Macbeth in the Shakespearean tragedy confronts different constraints than an actor playing Max Bialystock in *The Producers*. Yet, in either *Macbeth* or *The Producers*, the script also empowers or enables the actor to become the respective character. Without the script, the actor cannot be Macbeth or Bialystock. That empowerment invests the actor with a degree of autonomy. To be sure, the actor is limited, whether playing Macbeth or Bialystock, but each actor nonetheless enjoys a capacity to interpret the character. Zero Mostel and Nathan Lane embody different Bialystocks. The script, that is, does not reduce the actor to a mechanical puppet.<sup>292</sup> And quite clearly, neither Mostel nor Lane can play Bialystock unless he is immersed in a network of relationships, with the other actors in the play, with the director, with the stage crew, and so on.

In short, an appreciation for the relational self is central to understanding autonomy. Under the traditional philosophical rationales, freedom or autonomy equates with liberation of the classical liberal self so that the self can enjoy and express its independence and self-reliance.<sup>293</sup> The self-fulfillment rationale, in particular, maintains that the classical liberal self must be able to speak or write to fulfill or satisfy its preexisting and inherent nature.<sup>294</sup> From this modernist perspective, social construction is a threat to autonomy.<sup>295</sup> How can one be free if social and cultural forces are shaping and limiting one's expression?

But in truth, we can exercise autonomy only in the context of social relationships. Autonomy is always relational autonomy. As Jennifer Nedelsky writes: "What is essential to the development of autonomy is not protection against intrusion, but constructive relationship."<sup>296</sup> Consequently, because all social relations and forces are partly empowering and partly limiting, autonomy is always a matter of degree.<sup>297</sup>

292. The emergent self is "both socially and culturally constructed . . . and capable of critique and of critically directed self-constitution and social transformation." Allen, *supra* note 274, at 177; see Benhabib, *supra* note 34, at 110–11 (emphasizing the need to conceptualize agency).

293. CUSHMAN, *supra* note 4, at 30–31; Willett et al., *supra* note 169.

294. See Part II.

295. See Dianna Taylor, *Introduction: Power, Freedom and Subjectivity*, in MICHEL FOUCAULT: KEY CONCEPTS 1, 2 (Dianna Taylor ed., 2011) (describing this criticism as it is applied to Foucault).

296. NEDELSKY, *supra* note 38, at 98.

297. *Id.* at 46; Susan J. Brison, *Relational Autonomy and Freedom of Expression*, in RELATIONAL AUTONOMY 280, 284–86 (Catriona Mackenzie & Natalie Stoljar eds., 2000); Marilyn Friedman, *Autonomy, Social Disruption, and Women*, in RELATIONAL AUTONOMY 35, 41 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

Any particular vector of social force has both positive and negative spins or connotations. An autonomous individual must have the capacity to evaluate the positives and negatives of various vectors.<sup>298</sup> This evaluation cannot be reduced to a simple cost-benefit analysis; rather it requires a developed capacity to judge complex social relations.<sup>299</sup> If a particular vector of social force is manipulative or coercive, then its limiting effects probably would offset any empowering or enabling effects.<sup>300</sup> An autonomous individual—to maintain autonomy—would, then, not only need to judge that particular social force or relation as diminishing to autonomy but would also need to have sufficient power (wealth, bureaucratic position, and so forth) to resist or reject that relationship.<sup>301</sup>

Expanding on this geometrical metaphor, it is useful to describe autonomy as requiring space.<sup>302</sup> Autonomous space is not for individual isolation, for protection behind fences. Rather, it is a sociocultural space open for empowering interactions with others, where one can exercise a capacity for self-emergence. A caring and nurturing parent-child relationship would be a prototypical example of a relationship generating space for autonomous thought and conduct. Autonomous space facilitates the ongoing creative and dynamic process of becoming, opening to the most profound levels of self-creation and self-determination.<sup>303</sup> It is not mere freedom to buy a product—though such marketplace action might manifest autonomy—rather, it is freedom to experiment, to change, and to

---

298. Bourdieu emphasizes fields of power. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987) (focusing on legal profession); DAVID SWARTZ, CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU 117–42 (1997) (discussing Bourdieu and entry into a field of power).

299. For characterizations of autonomy as a capacity, see FRIEDMAN, *supra* note 38, at 4–6, 19–21; NEDELSKY, *supra* note 38, at 45.

300. See FRIEDMAN, *supra* note 38, at 4–6, 19–21 (emphasizing coercion and manipulation); NEDELSKY, *supra* note 38, at 98 (arguing to protect “constructive relationships”).

301. See FRIEDMAN, *supra* note 38, at 5 (arguing that autonomy requires ability to overcome “interfering conditions”); Brison, *supra* note 297, at 283–84 (emphasizing that “personal, familial, social, political, and economic relations with others are what enable or inhibit our access to a range of significant options”).

302. See ELLIOTT, *supra* note 191, at 157 (arguing that some postmodernists, drawing on psychoanalysis, emphasize the “enlarging of psychic space”).

303. Michel Foucault, *The Ethic of Care for the Self as the Practice of Freedom* (J.D. Gauthier trans., 1984), in THE FINAL FOUCAULT 1, 2–3 (James Bernauer & David Rasmussen eds., 1988) (discussing the care of the self as a practice of freedom); see McGushin, *supra* note 215, at 134–35, 141 (emphasizing that the Foucauldian self, as in the care of the self, is not the modernist foundational self).

continue to become or emerge.<sup>304</sup> This type of open space, facilitating individual transformation, is especially important in our postmodern or “liquid” society of accelerated change—of digital technology, of rapid and frequent travel, of changing and multiple jobs, of global capital, of multitasking, of Bitcoin, of Airbnb, of Uber, and on and on *ad infinitum*.<sup>305</sup> We do not live in the world of a post-World War II sitcom, like *Leave It to Beaver*, where an individual’s job, gender role, economic status, and social position in general appeared relatively stable, if not fixed.

It is worth reiterating and emphasizing that not all relationships are the same vis-à-vis autonomy. Some relationships are better or worse.<sup>306</sup> Relational autonomy is always a matter of degree.<sup>307</sup> Autonomy is never a matter of metaphysical or ultimate liberation from social construction and relations.<sup>308</sup> Therefore, autonomy requires a space sufficient to allow an individual to evaluate different relationships and to continue participating in the ongoing and dynamic process of self-emergence. Autonomy or freedom, explains the feminist philosopher Dianna Taylor, is “the ability to navigate power relations in ways that mediate against and attempt to minimize constraints (such as direction and management) while maximizing capacities, rather than . . . the ability to extricate oneself from relations of power.”<sup>309</sup> For example, an autonomous individual would seek relationships that are mutual and reciprocal, where other individuals do not seek to manipulate, deceive, or coerce her or him—and also vice versa, where one is not manipulating, deceiving, or coercing others.<sup>310</sup> Such relationships depend on and engender autonomy, while manipulative, deceptive, and coercive relationships usually undermine autonomy.<sup>311</sup>

304. Todd May, *Foucault’s Conception of Freedom*, in MICHEL FOUCAULT: KEY CONCEPTS 71, 77–81 (Dianna Taylor ed., 2011) (arguing that Foucault, in his later writings, suggested an opening of space for or of freedom). Julie Cohen writes similarly about privacy. Privacy “enables situated subjects to navigate within preexisting cultural and social matrices, creating spaces for the play and the work of self-making.” Cohen, *Privacy*, *supra* note 24, at 1911.

305. ZYGMUNT BAUMAN, *LIQUID MODERNITY* (2000); BAUMAN & RAUD, *supra* note 4, at 10.

306. NEDELSKY, *supra* note 38, at 122–23.

307. *Id.* at 46.

308. *See id.* at 115–17.

309. Dianna Taylor, *Practices of the Self*, in MICHEL FOUCAULT: KEY CONCEPTS 173, 180 (Dianna Taylor ed., 2011).

310. Allen, *supra* note 35, at 175–79.

311. *See* FRIEDMAN, *supra* note 38, at 4–6, 19–21 (emphasizing avoidance of coercion and manipulation). Amy Allen especially emphasizes relationships of “mutual recognition.” Allen, *supra* note 35, at 179. Allen synthesizes Foucault, Jürgen Habermas, Butler, and Seyla Benhabib. *Id.* at 1–10.

The concept of relational autonomy underscores that free expression is crucial to the individual emergent self in its ongoing process of creative and dynamic development. Because autonomy is inherently relational, it cannot exist without intersubjective communication and interaction. The emergent self must have free expression in order to develop and maintain its autonomy. The flip side is that free expression cannot exist without the nurturing of positive (empowering) relations and protection against destructive or limiting relations. That is, expression is not free unless the individual is embedded within a set of relations appropriate for the development and support of autonomy.<sup>312</sup>

Disputes between modern and postmodern theorists often devolve into disputes over the appropriate questions. For instance, modernist philosophers asked how the independent and isolated self could access firm epistemological foundations for knowledge.<sup>313</sup> Postmodern philosophers disregard that question and instead investigate the process of interpretation.<sup>314</sup> To understand free expression in the digital or postmodern age, we must ask different questions from those asked in the modern era, including most of the twentieth century.<sup>315</sup> And as Zygmunt

312. The concept of emergence underscores that social and cultural forces do not completely determine the nature of the self. Autonomy is possible. An emergent computer system can make connections based on experience: It is “nondeterministic,” “spontaneous,” and “nonprogrammed.” TURKLE, *supra* note 28, at 133.

Emergent properties are often used to distinguish complex systems from applications that are merely complicated. They can be thought of as unexpected behaviors that stem from interaction between the components of an application and the environment. . . . [H]owever, there is considerable disagreement about the nature of ‘emergent properties.’ Some include almost any unexpected properties exhibited by a complex system. Others refer to emergent properties when an application exhibits behaviors that cannot be identified through functional decomposition. In other words, the system is more than the sum of its component parts.

CHRISTOPHER W. JOHNSON, WHAT ARE EMERGENT PROPERTIES AND HOW DO THEY AFFECT THE ENGINEERING OF COMPLEX SYSTEMS?, (2006), <http://www.dcs.gla.ac.uk/~johnson/papers/emergence.pdf> [<https://perma.cc/BJ6-2Q8T>] (internal citation omitted).

313. *E.g.*, DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (Lorne Falkenstein ed., 2011) (1748).

314. Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992); *e.g.*, HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989).

315. Thus, for example, G. Edward White wrote about Emerson and the self-fulfillment rationale: “Emerson was no less enlisted in the premises of modernist jurisprudence than Chafee or Meiklejohn. . . . Emerson gave an overview of the ‘main premises’ of a ‘system of freedom of expression in a democratic society’ that amounted to a textbook summary of modernist

Bauman and Rein Raud emphasize, our life in the digital age has “enabled us to formulate the basic questions about selfhood much more accurately and precisely than has previously been possible.”<sup>316</sup> I introduced this section with the question: If the self is relational and socially constructed, if the traditional public-private dichotomy has collapsed, then why is the constitutional protection of free expression significant? As it turns out, that question is misleading, although it is the traditional (modernist) question asked by free-speech theorists such as Chafee (search-for-truth), Meiklejohn (self-governance), and Emerson (self-fulfillment).<sup>317</sup> The more illuminating question is not why, but how: How can we promote free expression if the self is relational and socially constructed?<sup>318</sup> The answer is that we must cultivate and protect social relationships that foster relational autonomy. Without such relationships, without relational autonomy, free expression cannot exist.

Significantly, robust constitutional protection of free expression becomes part of the societal culture that constructs the emergent self. As such, constitutional protection can shape both the emergent self and the surrounding society. At the societal level, free expression functions “as a sort of social Rorschach test.”<sup>319</sup> By protecting free expression, American society can commit to creating and protecting the sociocultural space needed to facilitate relational (individual) autonomy.<sup>320</sup> Free expression can help Americans build and maintain an open society. This constitutional commitment also has ramifications for individual emergent selves precisely because the society commits to the creation and

---

epistemology.” White, *supra* note 100, at 354–55.

316. BAUMAN & RAUD, *supra* note 4, at 138.

317. See *supra* Part II (discussing the development of the three primary philosophical rationales). As Erwin Chemerinsky writes, there “is a voluminous literature debating why freedom of speech should be regarded as a fundamental right.” ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 969 (5th ed. 2015). Sometimes, the question of “why” has been formulated as a question of function. For example, Emerson asked “what it is that the first amendment attempts to maintain: the function of freedom of expression in a democratic society.” *Toward*, *supra* note 100, at 878.

318. In explaining autonomy more broadly (not only with regard to free expression), Nedelsky writes: “The central question then for inquiries into autonomy (legal or otherwise) is how to structure relationships so that they foster rather than undermine autonomy.” NEDELSKY, *supra* note 38, at 98.

319. COHEN, *CONFIGURING*, *supra* note 24, at 149.

320. The robust constitutional protection of free expression can manifest “a culture’s normative, collective commitments regarding the scope of movement, both literal and metaphorical, accorded to its members.” *Id.*



protection of relational autonomy.<sup>321</sup> Quite simply, an individual is more likely to be autonomous in a society committed to free expression. In turn, an autonomous emergent self can cultivate empowering social relationships, experiment with and recreate its own relational self, and also challenge or accept particular societal norms.<sup>322</sup> In short, free expression allows the emergent self to participate autonomously in its own social construction as well as the construction of the society and culture.

The intertwined concepts of relational autonomy and free expression underscore that the process of self-emergence is a type of political struggle.<sup>323</sup> The emergent self's struggle to participate autonomously in its own social construction manifests a continual "negotiation over what it means to be human."<sup>324</sup> Simultaneously, the politics of the emergent self reflects and influences "the very foundations of social life and everyday living."<sup>325</sup> In this context, it is important not to romanticize resistance against widely held social and cultural norms. As explained, robust free expression allows the emergent self to question, challenge, or accept particular norms.<sup>326</sup> Acceptance of norms arises in part because of the force of the norms themselves, the pressure to conform to the mainstream. But resistance to or challenging of norms does not connote liberation from sociocultural context. Rather, resistance itself arises from the interaction of the emergent self with the preexisting social and cultural norms as well as with other selves.<sup>327</sup> To be sure, resistance often is more difficult than

321. Cohen, *Privacy*, *supra* note 24, at 1905.

322. "[T]he person's agency is manifested in her appropriating, resisting or reworking societal discourses, in negotiating material conditions, and in co-constructing the subject positions she inhabits." Rachel Joffe Falmagne, *On the Constitution of 'Self' and 'Mind': The Dialectic of the System and the Person*, 14 *THEORY & PSYCHOLOGY* 822, 840 (2004). Free expression can help the emergent self avoid "the seamless imposition of patterns predetermined by others." COHEN, *CONFIGURING*, *supra* note 24, at 150.

323. Willett et al., *supra* note 169 (emphasizing that questions of the self are always political).

324. CUSHMAN, *supra* note 4, at 332. Kwame Anthony Appiah explains:

[B]ecause we are human beings, we are frail, and we are *formed*; it is our nature to shape our natures. . . . Soul making is a part of politics, if not in that Platonic sense wherein it is the purpose of politics, then at least in the sense that political decisions must take into account the effects they have on the character of citizens. And so it would be pointless to praise or dispraise soul making in itself, to characterize it as an ally or adversary of individuality . . .

KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 211 (2005).

325. CUSHMAN, *supra* note 4, at 332.

326. *Id.* at 332–33.

327. *Id.* at 332.

acceptance, but resistance can bring its own unique set of rewards for the emergent self. Especially in the American context, resistance can feed the ethos of rugged individualism, which itself is a widely held norm. Put in different words, in a culturally saturated world, sometimes it is difficult to disentangle resistance from acceptance of mainstream norms.<sup>328</sup> All of which means, again, that relational autonomy is always a matter of degree.

### B. *Implications of the Self-Emergence Rationale*

#### 1. In General

The self-emergence rationale for free expression engenders an expansive interpretation of the First Amendment. The rationale protects expression that fosters the ongoing creative and dynamic process of self-emergence. As such, the rationale encompasses expression that either directly protects or indirectly facilitates self-emergence. Direct protection of self-emergence would include expression concerned with the emergent self's autonomous participation in its own social construction. Indirect facilitation would include expression that creates or preserves sociocultural space for the self to emerge—that is, expression that engenders relationships promoting autonomy. Thus, the rationale justifies protecting expression concerned with the emergent self's struggle to define either itself or the broader culture and society in which the self emerges.<sup>329</sup>

Expression directly concerned with self-emergence encompasses much of what individuals might wish to say or write. For instance, if I were to write a poem or a novel, such writings would be part of my own social construction. The same would be true if I painted a picture or published a photograph. Expression facilitating the creation or preservation of sociocultural space would include much of what we consider to be political speech. Thus, for example, if I advocated in favor of a higher capital gains tax, such expression would be protected. Or if I argued that college students should be taught more about both creative and expository writing, then I would be attempting to create sociocultural space for the self-emergence of others. But expression that opens sociocultural space

---

328. See Cohen, *Privacy*, *supra* note 24, at 1918–19 (discussing innovation).

329. My notion of an emergent self resonates with James Grimmelmann's emphasis on the active listener. James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868 (2014) [hereinafter *Engines*]; cf. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. Ill. L. Rev. 1015 (2015) (arguing free speech entails consideration of how a restriction affects an individual's sense of identity and personal aims as well as the relevant community's collective life).

might not be patently political (though it is always political, at least latently). For example, the contrast between generative and sterile digital environments, discussed earlier, illustrates the difference between the opening and closing of sociocultural spaces.<sup>330</sup> If, on the one hand, an individual were to write computer code that created generative Internet architecture, then the writing of that code would be opening sociocultural space for emergent selves. Generative digital architecture, by definition, facilitates individual innovation and social interaction.<sup>331</sup> Therefore, the writing or creating of such digital architecture would be protected expression under the self-emergence rationale. If, on the other hand, an individual were to write code that sterilized Internet architecture, that narrowed or destroyed the generative environment, such expression would not be creating or preserving sociocultural space for emergent selves. Sterile architecture tends to limit individuals and discourages creativity and interaction. Such code writing or expression, consequently, should not be protected.

More generally, expression that neither protects nor facilitates self-emergence would be constitutionally unprotected. For instance, speech directly impeding the self-emergence of others would be unprotected. Thus, expression that manipulates, deceives, or coerces others falls outside of First-Amendment protection.<sup>332</sup> Because the self-emergence rationale emphasizes creating sociocultural space for the creative and dynamic development of individual emergent selves, expression that distorts or limits the space of listeners does not deserve protection. Hence, for example, hate speech directed at denying the humanity of certain societal groups would fall into this unprotected category.<sup>333</sup> Hate speech would limit the victims' sociocultural space for autonomous self-creation and self-determination.<sup>334</sup>

Speech constituting true threats would also be unprotected. *Elonis v. United States*, decided in 2015, raised a true-threats issue: Must the prosecution prove that the defendant subjectively intended to

---

330. ZITTRAIN, *FUTURE*, *supra* note 231, at 2–4, 70–74.

331. *Id.* at 70–71.

332. *See* Allen, *supra* note 35, at 96–122 (discussing Habermas's notion of distorted subjectivity).

333. *See* Stephen M. Feldman, *Hate Speech and Democracy*, 32 CRIM. JUST. ETHICS 78 (2013) (reviewing JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012)) (discussing the constitutional protection of hate speech).

334. *See* Brison, *supra* note 297, at 286–93 (arguing that hate speech is unprotected because it undermines autonomy).

communicate a true threat, or could the prosecution merely prove that the defendant's speech would threaten a reasonable person?<sup>335</sup> This issue was raised under both the First Amendment and the true-threats statute.<sup>336</sup> The defendant in *Elonis* had posted threats against his former wife on Facebook. The defendant claimed, however, that he had not subjectively intended to threaten his former wife, regardless of whether a reasonable person in his wife's position might have found the Facebook posts threatening.<sup>337</sup> According to the defendant, he was merely echoing the lines of rap artists for self-therapeutic purposes.<sup>338</sup> The Court held that the criminal statute required proof of subjective intent and therefore did not reach the constitutional issue.<sup>339</sup>

If a court were to decide the First-Amendment issue in the future, the self-emergence rationale suggests that a reasonable-person rather than a subjective standard would be appropriate.<sup>340</sup> If the facts resembled those of *Elonis*, the defendant undoubtedly would argue that his self-emergence required that he be allowed to express himself as a rapper.<sup>341</sup> And to be sure, the defendant should be allowed to fume about his ex-wife to other individuals, such as his friends at a bar. But the reach of his protected expression must end where it would impede the self-emergence of others, such as those who would reasonably be threatened. When the defendant posted the threats online through Facebook, then the expression could reasonably threaten the self-emergence of the targeted individual. Indeed, this case nicely illustrates the important ramifications of relational autonomy for free expression. The crux of the problem is a relationship: namely, the relationship between the former husband and wife. It is precisely the nature of that relationship that can expand or diminish the former wife's autonomy. A woman who reasonably fears attack will necessarily experience a diminished sense of autonomy—a diminished capacity to make choices and take actions in her ongoing process of self-

---

335. *Elonis*, 135 S. Ct. 2001 (2015).

336. 18 U.S.C. § 875(c) (2012).

337. See *Elonis*, 135 S. Ct. at 2011–12.

338. *Id.* at 2004–07.

339. *Id.* at 2012.

340. For discussions of true threats as a constitutional issue, see the following: Virginia v. Black, 538 U.S. 343 (2003); Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337 (2006); Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541 (2004).

341. See *Elonis*, 135 S. Ct. at 2004–07.

emergence.<sup>342</sup>

False speech presents an interesting problem underscoring that relational autonomy is always a matter of degree. In *United States v. Alvarez*, the defendant lied about receiving the Congressional Medal of Honor when he attended his first public meeting as a member of a water board.<sup>343</sup> As the Court phrased it, his lying was “a pathetic attempt to gain respect.”<sup>344</sup> The defendant was prosecuted under the Stolen Valor Act of 2005, but the Court held that the First Amendment protected the speech.<sup>345</sup> In a plurality opinion, Justice Kennedy explained that the expression did not fall into a previously recognized unprotected (or low-value) category of free speech such as obscenity or fighting words.<sup>346</sup> In particular, the defendant’s lies did not constitute defamation or any other low-value category involving falsehoods.<sup>347</sup> Kennedy refused to recognize a new low-value category for lies, in general, and thus instead applied strict scrutiny, which requires the government to show that the restriction is narrowly tailored (or necessary) to achieve a compelling purpose.<sup>348</sup> Predictably, the government could not satisfy that rigorous standard; the speech was constitutionally protected.<sup>349</sup>

Under the self-emergence rationale, however, lying should sometimes be outside First-Amendment guarantees.<sup>350</sup> When such lying is likely to mislead others, potentially affecting their attitudes and actions in a way that diminishes or distorts their sociocultural space, then the lie should be unprotected. In such circumstances, which would include the *Alvarez* situation, the lie is likely to interfere with the self-emergence of other people. But in other circumstances, a lie might be constitutionally protected. If the lie is unlikely to detrimentally affect others or, more important, is likely to provide benefit to others, then constitutional

---

342. FRIEDMAN, *supra* note 38, at 140–59 (explaining how domestic abuse diminishes relational autonomy); see Baker, *Autonomy*, *supra* note 170, at 255–56 (arguing from perspective of self-fulfillment rationale that true threats should not be protected).

343. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

344. *Id.* at 2542.

345. *Id.* at 2551. Stolen Valor Act of 2005, 18 U.S.C. § 704 (2012).

346. 132 S. Ct. at 2544.

347. *Id.* at 2544–46; see *New York Times v. Sullivan*, 376 U.S. 254 (1964) (articulating an actual malice standard for certain defamation actions).

348. 132 S. Ct. at 2548.

349. *Id.* at 2549.

350. For a subtle treatment of lying and free expression, from the perspective of the traditional rationales, see Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435 (2015).

protection would be appropriate. For example, if a reporter lies about her identity to gain access to a factory operating illegally—suppose it is an unclean meatpacking plant—the reporter’s lie might have significant public benefit.<sup>351</sup> The lie might alleviate a public health danger. Ultimately, because relational autonomy is a matter of degree, a court would need to evaluate a case of lying by weighing the potential benefits and detriments to sociocultural space and self-emergence. Presumably, in many instances, the lie might benefit the speaker (until the fact of the lie is divulged), but that benefit alone cannot be the end of the analysis. A court would need to consider the consequences for other people. The speaker’s purposes would be an important but not necessarily determinative factor in ascertaining such consequences.<sup>352</sup>

## 2. Free Expression and Publicly Held Business Corporations

The self-emergence rationale has enormous ramifications in the digital age. As discussed, MNCs manipulate and control much of the information-flow on the Internet. These business corporations (as well as other corporations) often invoke the First Amendment to protect their activities.<sup>353</sup> The Roberts Court, to this point, has strongly favored corporate legal claims, whether constitutional or otherwise.<sup>354</sup> The Court’s most important recent decision protecting corporations is, perhaps, *Citizens United v. Federal Election Commission*.<sup>355</sup> *Citizens United*, it should be mentioned, was a nonprofit corporation, but the Supreme Court generally has not distinguished among types of corporations for constitutional purposes.<sup>356</sup>

During the Rehnquist Court years, the Court had vacillated over the

351. *See id.* at 1454–71 (explaining a concept of high value lies).

352. To be clear, a lack of constitutional protection does not necessarily mean that the government should criminally proscribe lying in general, but rather that the First Amendment should not prohibit the government from doing so. In this instance, the government claimed that it had a compelling interest in upholding “the integrity of the military honors system in general, and the Congressional Medal of Honor in particular.” *Alvarez*, 132 S. Ct. at 2548.

353. Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119, 1125, 1140–41 (2015).

354. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding that Federal Rules of Civil Procedure protected corporation from class-action claim); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (holding that a discrimination claim against Goodyear was time-barred); *see* Cohen, *The Zombie First Amendment*, *supra* note 353, at 1120 (arguing that the Court’s free-speech doctrine is in the service of economic power).

355. 558 U.S. 310 (2010).

356. *Id.* at 319.

degree to which the government could regulate corporate spending on political campaigns, but *Citizens United* ended the uncertainty.<sup>357</sup> *Citizens United* invalidated provisions of the Bipartisan Campaign Reform Act of 2002, which maintained limits on corporate spending for political campaign advertisements.<sup>358</sup> The majority opinion began by articulating two first-amendment premises. First, the Court reiterated the maxim, initially stated in *Buckley v. Valeo*,<sup>359</sup> that spending on political campaigns constitutes speech.<sup>360</sup> Second, the Court emphasized that, as stated in *First National Bank of Boston v. Bellotti*,<sup>361</sup> free-speech protections extend to corporations.<sup>362</sup> With these premises in hand, the Court could focus on the crux of its reasoning: the self-governance rationale for free expression. “Speech is an essential mechanism of democracy,” Kennedy wrote.<sup>363</sup> “The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.”<sup>364</sup> Under the First Amendment, in other words, free expression is a constitutional lodestar in American democracy and must be vigorously protected. Moreover, corporate expenditures on political campaigns, from the Court’s perspective, go to the core of the First Amendment.<sup>365</sup> Restrictions on such political speech and writing destroy “liberty” and are necessarily unconstitutional,<sup>366</sup> unless the government can satisfy strict scrutiny by showing that the regulation is necessary to achieve a compelling purpose.<sup>367</sup>

The Court acknowledged that the prevention of corruption constituted a compelling government purpose, but then so severely narrowed the definition of corruption that any evidence (of corruption) was rendered practically irrelevant. Only a direct contribution to a candidate or officeholder can constitute corruption or its appearance, according to the

---

357. *Id.*

358. *Id.* at 321.

359. 424 U.S. 1, 19 (1976) (per curiam).

360. 558 U.S. at 336–41.

361. 435 U.S. 765 (1978).

362. 558 U.S. at 340–42.

363. *Id.* at 339.

364. *Id.*

365. *Id.* at 343.

366. *Id.* at 354 (quoting THE FEDERALIST NO. 10, at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961)).

367. *Id.* at 340.

*Citizens United* Court.<sup>368</sup> An independent expenditure, even on behalf of a specific candidate or officeholder, cannot do so.<sup>369</sup> In other words, anything short of a bribe or the appearance of a bribe is permissible.<sup>370</sup> Given this narrow view of corruption, the Court concluded that the government could not satisfy strict scrutiny.<sup>371</sup> The Court reinforced its conclusion by invoking another of the traditional philosophical rationales, the search-for-truth.<sup>372</sup> Restrictions on corporate campaign expenditures, the Court reasoned, interfere “with the ‘open marketplace’ of ideas protected by the First Amendment.”<sup>373</sup> Ultimately, in *Citizens United* and its progeny, the Roberts Court proclaimed that corporations and other wealthy entities and individuals can spend unlimited sums in their efforts to determine elections and government policies.<sup>374</sup>

As *Citizens United* illustrates, the Roberts Court justices rely on the traditional rationales to protect corporate spending as expression.<sup>375</sup> But the traditional rationales, based on the classical liberal self, are inapt in the digital age. Meanwhile, the self-emergence rationale strongly suggests that publicly held business corporations should not have free-expression rights under the First Amendment for two reasons. First, the rationale protects expression related to the emergent self’s autonomous participation in its own social construction, but a business corporation does not have a creative and dynamic emerging self. To the contrary, to the degree that a corporation has a nature or personality at all, it is predetermined and static: to pursue profit. The Model Business Corporation Act (MBCA) allows a corporation to engage “in any lawful business,”<sup>376</sup> but ultimately, the word, corporation, means “corporation for profit.”<sup>377</sup> Thus, a

---

368. *Id.* at 356–57.

369. *Id.*

370. The Court reiterated this crucial point in *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

371. *Citizens United*, 558 U.S. at 357–65.

372. *Id.* at 355, 372.

373. *Id.* at 354 (quoting *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008)).

374. *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *American Tradition Partnership, Inc. v. Bullock*, 567 U.S. 516 (2012) (per curiam); *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (Kagan, J., dissenting).

375. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (Thomas, J., concurring in the judgment); *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008).

376. MODEL BUSINESS CORPORATION ACT (MBCA) § 3.01(a) (CORP. LAWS COMM. 2010).

377. *Id.* § 1.40(4). Many states have followed the MBCA in crafting their state incorporation statutes. ROBERT W. HAMILTON, *THE LAW OF CORPORATIONS* 18–19 (4th ed. 1996); HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* 8 (3d ed. 1983).



corporation's values and goals do not evolve over time in reaction to its sociocultural context. A corporation is created to profit, and it indefatigably pursues profit throughout its existence.<sup>378</sup> Of course, a corporation can change—for instance, it might introduce a new product to sell—but the corporation changes only in its quest to better satisfy its preexisting and fixed goal: profit.

Second, the self-emergence rationale protects expression that creates or preserves sociocultural space fostering autonomy. A business corporation neither creates nor preserves such space. Instead, business corporations attempt to manipulate, narrow, or distort sociocultural spaces. A business corporation, in its resolute pursuit of profits, strategically attempts to channel preexisting preferences or to mold new desires so that individuals use or purchase the corporate products or services.<sup>379</sup> A business corporation does not want to create or preserve the opportunity for individual autonomous choice—unless that choice is to buy. As Peter Drucker emphasized, the only valid purpose for a business is “to create a customer.”<sup>380</sup> Consider commercial advertisements. Whether the advertisement is an unsophisticated and direct urge to buy a product or a complex and subtle association of a product with an attractive lifestyle, the business corporation that pays for the advertisement always has the same goal. The corporation does not care whether the individual viewer enjoys an amusing or exciting lifestyle or autonomously chooses what is truly in the viewer's best interest. The corporation cares only whether the advertisement successfully induces the viewer to become a purchaser or other source of corporate revenue.<sup>381</sup> A viewer's decision to purchase the product might even generate bad (or disastrous) consequences for that particular individual. Maybe, the individual buys a car instead of investing in higher education, which would lead to a more rewarding job. Or maybe, the individual buys a plane ticket to Las Vegas even though he or she suffers from a gambling addiction. It is all the same

---

378. See ROBERT L. KERR, *THE CORPORATE FREE-SPEECH MOVEMENT* 10 (2008) (emphasizing that “the profit imperative is . . . a fundamental obligation of the corporate charter”); TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT* 148–52 (2012) (emphasizing corporate profit motive).

379. See BAUMAN & RAUD, *supra* note 4, at 110–15 (emphasizing that corporate marketing seeks to shape desires for profit); SCHNEIER, *supra* note 16, at 5–6 (emphasizing corporate processing and analysis of data for profit).

380. PETER F. DRUCKER, *THE PRACTICE OF MANAGEMENT* 37 (HarperCollins 2006) (emphasis omitted).

381. See PIETY, *supra* note 378, at 31–32 (emphasizing commercial expression as aiming for profit).

to the business corporation. All is well so long as it accrues profits. In short, a business corporation seeks to manipulate individuals and distort sociocultural space for the corporation's benefit—profits.<sup>382</sup>

Like the business corporation, the classical liberal self is an entity or being that (supposedly) has a preexisting nature, with goals that exist regardless of sociocultural context. Maybe for this reason, the Roberts Court can readily conceptualize corporations as selves deserving of free-speech rights. The corporate entity, at least to a degree, resembles the classical liberal self. Indeed, a business corporation is like *homo economicus writ large* (an MNC is *homo economicus* on steroids). *Homo economicus* is an economic self that seeks only to maximize the satisfaction of its own (economic) interests.<sup>383</sup> Contrary to feminist theory, “[e]conomic man . . . has neither a childhood nor a context. He grows out of the ground like a mushroom.”<sup>384</sup> As such, *homo economicus*, first developed by neoclassical economists, can be understood as an extreme form of the classical liberal self.<sup>385</sup> And because the corporate personality resonates with the classical liberal self, the Court can reason that corporations, like classical liberal selves, must enjoy first-amendment protection pursuant to the traditional philosophical rationales.<sup>386</sup>

382. See SCHNEIER, *supra* note 16, at 54–56 (emphasizing that the Internet manipulates users). Habermas emphasizes how strategic actions, appropriate in the economic sphere, can coerce and distort communication in the (symbolic) lifeworld. HABERMAS, 2 THEORY, *supra* note 214, at 150–52; HABERMAS, 1 THEORY, *supra* note 214, at 340–43; Jürgen Habermas, *The Hermeneutic Claim to Universality* (1971), reprinted in JOSEF BLEICHER, CONTEMPORARY HERMENEUTICS 181, 205 (1980); see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 322–23 (William Rehg trans., 1996) (explaining validity claims in communication).

383. “The neoclassical economists’ *Homo Economicus* has several characteristics, the most important of which are (1) maximizing (optimizing) behavior; (2) the cognitive ability to exercise rational choice; and (3) individualistic behavior and independent tastes and preferences.” Chris Doucouliagos, *A Note on the Evolution of Homo Economicus*, 28 J. ECON. ISSUES 877, 877 (1994); see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (discussing and criticizing concept of *homo economicus*); Tanina Rostain, *Educating Homo Economicus: Cautionary Notes on the New Behavioral Law and Economics Movement*, 34 LAW & SOC’Y REV. 973 (2000) (same).

384. KATRINE MARÇAL, WHO COOKED ADAM SMITH’S DINNER? A STORY ABOUT WOMEN AND ECONOMICS 61 (Saskia Vogel trans., 2016).

385. The prototypical classical economist, Adam Smith, can also be understood to be a proponent of the classical liberal self. ADAM SMITH, THE WEALTH OF NATIONS (1776); see ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 100–13 (20th Anniversary ed., 1997) (discussing Smith’s varied depictions of human nature); Stephen Holmes, *The Secret History of Self-Interest*, in BEYOND SELF-INTEREST 267, 267–83 (Jane Mansbridge ed., 1990) (discussing Smith’s conceptualization of the self).

386. In fact, the Roberts Court occasionally characterizes the citizen-self as if it were *homo*

But the repudiation of the traditional rationales and their replacement with the self-emergence rationale reveal the weakness of the Court's constitutional protection of corporations. An entity, such as a corporation, that neither protects nor facilitates self-emergence does not have any free-expression rights under the self-emergence rationale. A corporate relationship to a customer is not mutual and reciprocal. The corporation manipulates the customer for its own profit. To be sure, the customer might garner benefit from the interaction, but such benefit is incidental to the corporation—unless customer benefit will produce additional corporate profits. If a caring and nurturing relationship is a prototype for creating autonomous space, then the corporate-customer relationship is an archetype for destroying space. As feminists have emphasized, the economic marketplace undervalues caring and nurturing interactions.<sup>387</sup> Such relationships are either unpaid or low paid and are often denigrated as unproductive.<sup>388</sup> Given this, a First-Amendment jurisprudence grounded on relational autonomy would not extend free-expression rights to business corporations (because corporations seek to destroy autonomous space). Unsurprisingly, then, the pro-business Roberts Court's First-Amendment decisions overvalue the economic marketplace to the detriment of individual (relational) autonomy.

To underscore the contrast between the traditional rationales and the self-emergence rationale, notice that we could reasonably discuss the self-fulfillment of a corporation. A corporation has a preexisting goal, to profit, and hence the accrual of profits would fulfill or realize that goal. The self-emergence rationale, however, is not the same as the self-fulfillment rationale. The self-fulfillment rationale assumed the self (the classical liberal self) to be a being with a preexisting nature. Free expression, then, was necessary to allow the self to fulfill or realize its nature. But this conception of the self is patently inapt in the digital age.<sup>389</sup>

---

economicus. In *Citizens United*, the Court stated: "The censorship we now confront is vast in its reach. The Government has 'muffle[d] the voices that best represent the most significant segments of the economy.'" 558 U.S. at 354 (quoting *McCannell v. Federal Election Commission*, 540 U.S. 93, 257-58 (2003) (Scalia, J., concurring in part, concurring in judgment in part, dissenting in part)) (emphasis added). From this perspective, "segments of the economy" are speakers with protected constitutional rights. *Id.*

387. MARÇAL, *supra* note 384, at 16-17, 30, 59.

388. *See id.* at 32-36 (emphasizing that even when economists accounted for caregiving and similar work, they concluded that women deserved less pay than men).

389. Significantly, even though a business corporation should not enjoy free-expression rights, each officer of (or other participant in) the organization should still enjoy his or her own individual rights.

If anything, in the digital age, we should not be stuck discussing whether publicly held business corporations have free-expression rights. Instead, we should recognize that MNCs threaten the sociocultural spaces of individual emergent selves. Ordinary people, in other words, have much to fear from business corporations. The collapse of the traditional public-private dichotomy underscores the degree to which MNCs control and manipulate individuals. MNCs have constructed Internet architectures that facilitate their power to gather information about individuals, control the expression of individuals, and direct individuals to choices commensurate with corporate goals.<sup>390</sup> And of course, the corporate goals, in the end, are always the same: profit. Internet corporations work to produce (and reproduce) socially constructed selves that willingly, even joyously, feed the corporate coffers.<sup>391</sup> In the political struggle over self-emergence, business corporations do not want to create space for autonomous individuals to emerge or to resist predominant cultural norms. Rather, corporations want to mold selves not only to accept but to fervently execute their roles as consumers. With the power of Internet architecture (and other resources) at their disposal, corporations wield enormous political strength and thus are highly successful in this endeavor.<sup>392</sup> Indeed, many individuals seem to believe that they express their freedom and individuality by choosing to purchase particular products, which are marketed to fulfill that very purpose.<sup>393</sup> Think of Apple and its basket full of “I” products: iPhones, iPads, iPods, and iMacs. As the Apple commercials with Justin Long (“Hello, I’m a Mac”) and John Hodgman (“And I’m a PC”) suggested, Apple products are for special people (like me, or “I”).<sup>394</sup>

---

390. See SCHNEIER, *supra* note 16, at 1–7, 33–34, 47–49 (emphasizing how Internet corporations pursue profit); WU, *supra* note 8, at 273 (emphasizing how a handful of corporations “disproportionately determine what the Internet is in the 2010s”).

391. Corporations have been attempting to shape individual preferences since long before the digital age. See GARY CROSS, *AN ALL-CONSUMING CENTURY: WHY COMMERCIALISM WON IN MODERN AMERICA* (2000) (emphasizing the turn to consumerism in twentieth century); CUSHMAN, *supra* note 4, at 6–7 (discussing post-World War II consumerism); STUART EWEN, *CAPTAINS OF CONSCIOUSNESS* (1976) (explaining how capitalists sought to transform workers into consumers in the early-twentieth century).

392. See SCHNEIER, *supra* note 16, at 78–79; see Balkin, *Future*, *supra* note 39, at 440–41 (emphasizing that commodification or propertization threaten free expression in the digital age).

393. See Strahilevitz, *supra* note 261, at 2023.

394. See *id.* (discussing Apple marketing). One might wonder whether Grimmelmann’s emphasis on the active listener would lead to a contrary conclusion: that corporate speech should be protected if the listener (or Internet user) would benefit. See *Engines*, *supra* note 329 (emphasizing active listeners). Even so, I would argue that an emphasis on the listener should

In an ideal (rather than an iDeal) world, we would be discussing whether individuals can invoke their free-expression rights against publicly held business corporations that unduly limit the spaces of our emergent selves. But in our present situation, any constitutional challenge to corporate control over Internet expression would likely be deflected by the state-action doctrine: The constitutional limitations of the First Amendment do not apply because corporations are not traditional state actors.<sup>395</sup> Significantly, the state-action doctrine itself resonates with the classical liberal self. The state-action doctrine implies that constitutional limits need apply only to government actors.<sup>396</sup> The absence of government action supposedly equates with individual liberty.<sup>397</sup> In our digital age, though, we need to acknowledge that the lingering appeal of the classical liberal self subtly bolsters corporate power over our emergent selves. The *rhetoric* of the classical liberal self socially constructs us to be (and want to be) classical liberal selves (and happy active consumers)—to believe that the absence of government maximizes individual liberty.<sup>398</sup> Hence, many individuals vigorously oppose and denounce government actions, including government regulations of the Internet.<sup>399</sup> But in the digital age, corporate power is as much a threat to individuals as is government power, if not more so.<sup>400</sup> In a democracy, however imperfect it might be, the people at least have some opportunity to affect the government's goals. With a business corporation, people have only one choice: to buy or not to buy. The goal is clear: corporate profit.<sup>401</sup>

---

also account for how business corporations might try to manipulate listeners for corporate profit.

395. *E.g.*, *Young v. Facebook, Inc.*, No. 5:10-CV-03579-JF/PVT, 2010 WL 4269304 (N.D. Cal. Oct. 25, 2010) (dismissing claim against Facebook because of lack of state action); *see* Tushnet, *supra* note 272, at 2253–58 (discussing state-action problems). The self-emergence rationale might justify constitutional attacks on statutes, such as the Digital Millennium Copyright Act of 1998 (DMCA), which otherwise insulate business corporations from liability. Pub. L. No. 105-304, 112 Stat. 2860, 2877; *see* PASQUALE, *supra* note 249, at 93–94 (discussing DMCA). In other words, if a statute shields a corporation that is infringing on free expression, as understood pursuant to the self-emergence rationale, then the statute might be open to constitutional challenge. *See* *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006) (Google invoked DMCA safe harbor provision as protecting it from liability for copyright infringement).

396. *See* Tushnet, *supra* note 272, at 2253–54.

397. *See* HAYEK, *supra* note 216, at 17; STEDMAN JONES, *supra* note 217, at 2.

398. *See* HAYEK, *supra* note 216, at 80–81.

399. *See* Tushnet, *supra* note 272, at 2255–57.

400. *See* SCHNEIER, *supra* note 16, at 78–87 (emphasizing a public-private partnership in digital surveillance).

401. *See* CUSHMAN, *supra* note 4, at 20 (arguing that concept of the classical liberal self reinforces existing power relations); NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE, AND

Since individuals are unlikely to be able to bring successful constitutional challenges against publicly held business corporations, legislation or agency action regulating corporations might be necessary.<sup>402</sup> In other words, in the digital age, we might need government regulations of Internet corporate activities to preserve individual liberty, to clear space for our selves to emerge. It is worth reiterating that *both* government and private entities, especially large corporations, can limit expression in the digital age—hence, the self-emergence rationale justifies protecting against both public and private suppression—yet appropriate government regulation of Internet corporations can also enhance freedom of expression. In any event, legislating in this area would face numerous obstacles. At a practical level, federal action would be more effective than state legislation because the threat to individual liberty is a national rather than a local problem (in fact, it is more of a global than a national problem). Yet, over the past few years, Congress has not demonstrated an ability to respond expeditiously to most needs or problems, to say the least.<sup>403</sup> Moreover, Internet-related MNCs are likely to lobby strenuously in opposition to any efforts at regulation, whether in Congress, state legislatures, or administrative agencies. But even if legislative or agency action were possible, we would then circle back to the prospect of corporate claims to first-amendment protections.<sup>404</sup>

Potentially significant Internet-related issues involving business corporations loom on the horizon. For instance, is computer source code speech and therefore protected under the First Amendment?<sup>405</sup> Or is data, in general, speech and therefore protected under the First Amendment?<sup>406</sup>

---

GENDER IN CONTEMPORARY SOCIAL THEORY 26–27, 45 (1989) (arguing that the classical liberal framework masks the operation of power and domination).

402. One possible way to sidestep the first-amendment arguments of ISPs, at least, is to categorize ISPs as common carriers. Whether this argument will work remains unclear. Crawford, *supra* note 13, at 2365–73; see WU, *supra* note 8, at 57–58, 311–12 (discussing doctrine of common carriers); Balkin, *Future, supra* note 39, at 428–29 (discussing common carriers and net neutrality).

403. Drew Desilver, *Congress Ends Least-Productive Year in Recent History*, PEW RESEARCH CENTER (Dec. 23, 2013), <http://www.pewresearch.org/fact-tank/2013/12/23/congress-ends-least-productive-year-in-recent-history/> [<https://perma.cc/NG2K-2ZUH>].

404. To be clear, the government should not necessarily suppress all corporate expression merely because corporations should not enjoy First-Amendment protections. The determination of free-expression rights is distinct from the issue of whether to suppress particular speech or writing.

405. See, e.g., *Bernstein v. U.S. Dep't of Justice*, 176 F.3d 1132, 1135 (9th Cir. 1999), *reh'g granted, opinion withdrawn*, 192 F.3d 1308 (9th Cir. 1999) (holding that source code is speech).

406. Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014) (arguing that data is

Or more particularly, does the First Amendment protect search-engine results?<sup>407</sup> One of the most important issues is net neutrality. One way for ISPs, including MNCs Verizon, Comcast, and AT&T, to increase profits is by discriminating among their customers.<sup>408</sup> If allowed, ISPs can create fast and slow lanes of Internet access.<sup>409</sup> The ISPs then would discriminate among customers based on willingness to pay for faster service. Customers unwilling (or unable) to pay a premium would be relegated to the slow lane of Internet access. Customers paying the premium would slide into the fast lane. Corporate customers, such as Netflix, which rely on ISPs to provide access to their end users, would effectively be forced to pay for fast-lane access.<sup>410</sup> On February 26, 2015, the FCC adopted new rules mandating net neutrality, thus requiring ISPs to provide all customers with equal service.<sup>411</sup> Under these rules, ISPs are not allowed to discriminate based on willingness to pay a premium. ISPs and related trade organizations sued the FCC, challenging the rules on multiple grounds.<sup>412</sup> One issue is whether net neutrality violates the ISPs' first-amendment rights to free expression. They argue, in effect, that they have a right to control their networks.<sup>413</sup>

The Roberts Court, to date, has decided only two cases explicitly involving digital information.<sup>414</sup> In both cases, the Court reached the pro-

speech).

407. *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003) (holding Google's search rankings were protected speech); see Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013) (arguing that algorithms are speech); Oren Bracha, *The Folklore of Informationalism: The Case of Search Engine Speech*, 82 FORDHAM L. REV. 1629 (2014) (arguing that search engine results are not speech).

408. Balkin, *Future*, *supra* note 39, at 428–29 (discussing net neutrality).

409. *Id.*

410. See Wu, *supra* note 8, at 260, 286–87 (discussing net neutrality); Balkin, *Future*, *supra* note 39, at 428–29 (same).

411. Federal Communications Commission, *Open Internet*, <https://www.fcc.gov/general/open-internet> [<https://perma.cc/485W-696D>].

412. *E.g.*, *State of Tennessee v. FCC*, Nos. 15-3291/15-3555 (6th Cir. May 21, 2015); *U.S. Telecom Assoc. v. FCC*, No. 15-1063 (D.C. Cir. Mar. 23, 2015); see *U.S. Telecom Assoc. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (holding, pursuant to statutory interpretation and administrative law, that FCC can define high-speed Internet service as a utility, which creates the possibility for broad regulation).

413. Brodtkin, *supra* note 12; Bode, *supra* note 12.

414. If one includes *Elonis v. United States*, 135 S. Ct. 2001 (2015), because it involved Facebook postings, then there are three cases. Discussed above in the text, *Elonis* involved true threats, but was decided on statutory grounds. In a limited number of cases, the Rehnquist Court leaned toward the invalidation of government regulations of the Internet. These cases were decided at a time, however, when many still viewed the Internet as inherently free and beyond

business decision. In *Brown v. Entertainment Merchants Association*, the Court invalidated a state law that prohibited “the sale or rental of ‘violent video games’ to minors.”<sup>415</sup> The Court began by invoking the self-governance rationale and explaining that, at its core, the First Amendment protects “discourse on public matters.”<sup>416</sup> Nevertheless, the Court added that “we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”<sup>417</sup> Hence, effectively piggy-backing on the self-governance rationale, the Court granted full first-amendment protection to video games in general. “Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world).”<sup>418</sup> Video games, therefore, are presumptively protected unless the expressive content of the game falls into a previously recognized low-value category of expression. But even violent video games, the Court found, are not within a low-value category.<sup>419</sup> Moreover, the state failed to demonstrate that a new low-value category should be recognized.<sup>420</sup> Thus, the only way the government could justify this statutory restriction was by satisfying the strict scrutiny standard.<sup>421</sup> While protecting children from portrayals of violence might be a compelling state interest, the Court concluded that the regulation in this case was not narrowly tailored to achieve that end.<sup>422</sup> The regulation of video games was, for instance, underinclusive because it still allowed children to be exposed to depictions of violence in sources other than video games.<sup>423</sup>

---

control. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004) (invalidating federal statutory provisions that criminalized the transmission of obscene or indecent materials possibly accessible by minors); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (invalidating federal statute protecting children from online material of prurient interest because not the least restrictive means); see *United States v. American Library Assn., Inc.*, 539 U.S. 194 (2003) (plurality opinion) (upholding requirement for libraries to install filtering software if libraries accepted federal funding for Internet access).

415. 564 U.S. 786, 789 (2011).

416. *Id.* at 790.

417. *Id.*

418. *Id.*

419. *Id.* at 792.

420. *Id.* at 792–93.

421. *Id.* at 799.

422. *Id.* at 804.

423. *Id.* at 799–804.



*Sorrell v. IMS Health Inc.*, involved the gathering and business-use of medical data, which is now a widespread enterprise—and merely one example of the ubiquitous and highly profitable data mining.<sup>424</sup> When pharmacies process prescriptions, they routinely record information such as the prescribing doctor, the patient, the dosage, and so forth.<sup>425</sup> Data mining businesses, like IMS Health Inc., buy this information, analyze it, and sell or lease their reports to pharmaceutical manufacturers.<sup>426</sup> When armed with this information, pharmaceutical salespersons are able to market their drugs more effectively to doctors.<sup>427</sup> Vermont enacted a law to prevent pharmacies from selling this information.<sup>428</sup> The legislature had two primary purposes: first, to protect the privacy of patients and doctors, and second, to improve public health by, for example, encouraging doctors to prescribe drugs in their patients' best interests rather than because of effective pharmaceutical marketing.<sup>429</sup> Justice Stephen Breyer's dissent, joined by two other justices, characterized the statute as a police power regulation of the economic marketplace that did not trigger free-speech concerns.<sup>430</sup> The Court's conservative majority disagreed.<sup>431</sup> It viewed the statute as raising an unusual commercial speech issue.<sup>432</sup> Commercial speech cases typically involve advertising, and as the Court admitted, the statute in *Sorrell* did not restrict advertising per se.<sup>433</sup> Yet, the Court reasoned that the First Amendment not only applied but also required "heightened judicial scrutiny,"<sup>434</sup> a standard more rigorous than the *Central Hudson* balancing test ordinarily applied in commercial speech cases.<sup>435</sup> The Court, in the end, invalidated the statute and thus protected

---

424. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011); see PASQUALE, *supra* note 249, at 27–30 (discussing medical records); SCHNEIER, *supra* note 16, at 33–45 (discussing data mining).

425. *Sorrell*, 564 U.S. at 558.

426. *Id.*

427. *Id.*

428. *Id.* at 558–59.

429. *Id.* at 572.

430. *Id.* at 591 (Breyer, J., dissenting). In other words, the Court should have concluded that this case was not within the scope or coverage of the First Amendment at all. The Court, therefore, should not have been discussing First-Amendment protections. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004) (distinguishing First-Amendment coverage from protection).

431. *Sorrell*, 564 U.S. at 591.

432. *Id.* at 563–67.

433. *Id.* at 561–63, 572.

434. *Id.* at 563.

435. *Id.* at 563, 583; see *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S.

marketplace activities that were only tenuously connected to expression.

*Brown* and *Sorrell*, when combined with the Roberts Court's generally solicitous attitude toward business corporations, do not bode well for individual liberty if the Court were to rule on net neutrality or the other potential Internet-related issues (of course, the nomination and confirmation of Scalia's replacement might change the political tilt of the Court). If a corporate ISP, for example, were to challenge a federal net neutrality requirement, the Court would likely side with the corporation and invalidate the federal rule. The conservative justices probably would reason as follows. First, corporations enjoy first-amendment free-speech rights. Second, free expression is a constitutional lodestar. Third, the government must therefore satisfy the strict scrutiny standard. Finally, the government cannot satisfy this rigorous judicial standard. Consequently, corporate ISPs would be able to maximize profits, while their customers would be forced either to pay a premium or to suffer inferior or limited Internet access. In such a case, the Court would be complicit (with corporations) in limiting the free expression of many online users while ostensibly protecting corporate free expression.

Judicial recognition and application of the self-emergence rationale would clarify such Internet-related free-expression issues. If an ISP, such as Verizon, or a search engine corporation, such as Google, were to invoke the First Amendment and its protections, the result would be unequivocal. Business corporations should not enjoy First-Amendment protections because they neither protect nor facilitate self-emergence. Corporations have fixed natures rather than emerging selves, and they try to close, narrow, or distort rather than create or preserve sociocultural space for emergent selves. Thus, the first step in the above argument—that corporations enjoy First-Amendment free-speech rights—would be repudiated.<sup>436</sup> When the justices, though, instead invoke the traditional philosophical rationales, the rationales skew the judicial results—or at least facilitate the justices' attempts to legitimate the constitutional protection of corporations. But the foundational assumptions of the traditional rationales—the classical liberal self and the concomitant public-private dichotomy—are incongruous with the digital age and can

---

557, 566 (1980). The *Sorrell* Court reasoned that it would have invalidated the law even if it had applied *Central Hudson*. *Sorrell*, 564 U.S. at 571–72. See also *United States v. Stevens*, 559 U.S. 460 (2010) (invalidating federal statute prohibiting animal crush videos).

436. Cf. *Baker*, *Autonomy*, *supra* note 170, at 272–74 (arguing from perspective of autonomy or self-fulfillment rationale that commercial speech should not be protected).

no longer undergird the rationales. Relying on the search-for-truth, self-governance, or self-fulfillment rationale would be like relying on the assumption that the earth is the center of the solar system. It would be a mistake, and any argument built on that assumption would be erroneous.<sup>437</sup>

## V. CONCLUSION

The self-emergence rationale overlaps to a limited degree with the traditional philosophical rationales. Most obviously, the self-emergence rationale evokes the self-fulfillment rationale, but there are crucial differences. The self-fulfillment rationale was built on the classical liberal self, a being with a preexisting nature. Free expression, from this vantage, enabled the self to fulfill or realize its nature. The self-emergence rationale rejects the classical liberal self. Instead, this rationale emphasizes autonomous self-emergence and the sociocultural space needed for such a creative and dynamic process. Ultimately, self-emergence is what self-fulfillment must become in the digital age.

---

437. Corporations that qualify as the press would still have First-Amendment rights under the free press clause. Thus, the ruling in a case such as *New York Times v. Sullivan* would be unaffected. 376 U.S. 254 (1964).

The Court generally has not distinguished among various types of corporations for constitutional purposes, but the self-emergence rationale would suggest doing so. To discuss all types of corporations (including non-profits), alternative business organizations, and other types of organizations and associations would expand this Article far beyond its intended scope. The advantage of the Court's indiscriminate granting of free-expression rights to all corporations is simplicity. That is, the Court's current approach creates a bright line rule. The large disadvantage of this bright line approach is that it produces untoward conclusions. If courts instead were to apply the self-emergence rationale, they would necessarily be engaged in more ad hoc decision making. In each instance, a court would need to ask whether the corporation or other entity either protects or facilitates self-emergence. For example, the NAACP is a nonprofit corporation that advocates for civil rights. More precisely, its mission "is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination." *Our Mission*, NAACP (2017), <http://www.naacp.org/pages/our-mission> [<https://perma.cc/2LGZ-PK89>]. Thus, in litigation before the Supreme Court in 1957, the NAACP explained that it advocated for the "achievement of desired social, economic and political reforms within the framework of our democratic society." Brief for Petitioner at 4, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91, 1957 Term). In effect, the NAACP stated that it sought to create sociocultural space for emergent selves. The NAACP brief declared that its members believed that "if the American public became aware of the injustices which Negroes suffered and the circumscribed lives which they were forced to lead solely because of color discrimination," *id.* at 2, then public opinion would demand "social, economic and political reforms," *id.* at 4. The Court, therefore, has correctly recognized that the NAACP deserves First-Amendment rights. *NAACP v. Button*, 371 U.S. 415, 428–29 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The political element inherent to self-emergence suggests a partial connection to another traditional rationale: self-governance.<sup>438</sup> And, in fact, Jack Balkin has suggested a possible reformulation of the self-governance rationale for the digital age. He focuses this reformulation on what he calls “democratic culture.”<sup>439</sup> Balkin’s democratic-culture rationale is the mirror image of the self-emergence rationale. In other words, the self-emergence and democratic-culture rationales are complementary. The self-emergence rationale revolves around the interaction of society, culture, and the individual in the creative and dynamic emergence of the self. Balkin’s democratic-culture rationale similarly revolves around the interaction of society, culture, and the individual, but it emphasizes culture rather than the individual self.<sup>440</sup> When Balkin talks of democratic culture, he is not referring to the culture that is necessary for or nurturing of democratic government processes per se.<sup>441</sup> Rather, he is describing a widely participatory culture.<sup>442</sup> “A democratic culture is not democratic because people get to vote on what culture should be like. It is democratic because people get to participate in the production of culture through mutual communication and mutual influence. Democratic culture invokes a participatory idea of democracy.”<sup>443</sup> For Balkin, the traditional self-governance rationale, emphasizing participation in representative or democratic self-government, “seems altogether too narrow in the age of the Internet.”<sup>444</sup>

The harmony between the self-emergence and democratic-culture rationales is such that I agree with Balkin’s description of the functional importance of free expression:

---

438. One could possibly argue that the creation of social and cultural space for self-emergence also overlaps to a degree with the search-for-truth rationale. Yet, the concept of truth in the digital age, as well as before, is so thorny that I do not believe it worthwhile to pursue this argument. See FREDERICK F. SCHMITT, *TRUTH: A PRIMER* (1995) (presenting multiple views of truth).

439. Balkin, *Future*, *supra* note 39, at 438; Balkin, *Digital*, *supra* note 39, at 3.

440. Balkin, *Future*, *supra* note 39, at 438; Balkin, *Digital*, *supra* note 39, at 3–4.

441. Numerous political theorists have argued that only a democratic culture, encouraging negotiation and compromise, can sustain the interest-group conflicts of pluralist democracy. *E.g.*, DEMOCRACY, *supra* note 114, at 172; PREFACE, *supra* note 114, at 4, 143; DEWEY, *supra* note 111, at 162, 175.

442. Democratic culture “is a culture in which ordinary people can participate, both collectively and individually, in the creation and elaboration of cultural meanings that constitute them as individuals.” Balkin, *Future*, *supra* note 39, at 438.

443. *Id.*

444. *Id.*; see Balkin, *Digital*, *supra* note 39, at 34 (arguing that self-governance should encompass culture and not merely representative government).

Freedom of speech allows us, each of us, to participate in the growth and development of the cultures and subcultures that, in turn, help constitute us as individuals. Freedom of speech is part of an interactive cycle of social exchange, social participation, and self-formation. We speak and we listen, we send out and we take in. As we do this, we change, we grow, we become something other than we were before, and we make something new out of what existed before.<sup>445</sup>

Nevertheless, the self-emergence rationale has two intertwined advantages over Balkin's democratic-culture rationale. First, Balkin insufficiently attends to the importance of individual autonomy.<sup>446</sup> More specifically, he ignores the feminist concept of relational autonomy. Lacking this crucial concept, Balkin might have evaded a reliance on autonomy precisely because critics of postmodernism maintain that a socially constructed self necessarily ends in determinism.<sup>447</sup> In fact, Balkin has suggested that we should understand life in the digital age from an "antihumanist" perspective,<sup>448</sup> which treats "human beings as the constructions and unwitting agents of larger forces."<sup>449</sup> But the concept of

---

445. Balkin, *Digital*, *supra* note 39, at 34.

446. To be sure, Balkin does not ignore autonomy, but he purposefully chooses to build his philosophical rationale on the traditional self-governance rationale, which he argues downplayed individual autonomy. Balkin, *Future*, *supra* note 39, at 439–40; Balkin, *Digital*, *supra* note 39, at 28–29. Thus, when he articulates "free speech values," Balkin, *Digital*, *supra* note 39, at 6, he specifies "interactivity, mass participation, and the ability to modify and transform culture." *Id.*

447. Taylor, *supra* note 295, at 2. Balkin himself is a postmodernist. Even so, in recent years, Balkin has rarely invoked postmodernism explicitly, but he has written about the topic in the past. J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993); Jack M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992). Balkin's democratic-culture rationale can be fairly characterized as based on postmodern insights, although he does not use the term in the text of either of his articles focused on the rationale. Balkin, *Future*, *supra* note 39; Balkin, *Digital*, *supra* note 39; see Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 185–201 (1996) (suggesting that Balkin is not a thoroughgoing postmodernist because of how he conceives of deconstruction in relation to justice).

448. Jack M. Balkin, *Information Power: The Information Society from an Antihumanist Perspective*, in *THE GLOBAL FLOW OF INFORMATION* 232, 233 (Ramesh Subramanian & Eddan Katz eds., 2011).

449. *Id.* Balkin nonetheless writes: "The point of this analysis is not to deny the role that human agency plays in making the world we inhabit." *Id.*

relational autonomy harmonizes human agency and autonomy with the socially constructed (or relational) self.<sup>450</sup> Feminist theory, in other words, obviates any inclination to emphasize an antihumanist determinism.<sup>451</sup>

This serious lacuna in Balkin's argument, his disregard for the concept of relational autonomy, leads to the second advantage of the self-emergence rationale. By emphasizing an autonomous and emergent individual, the self-emergence rationale resonates strongly with the individualist ethos that has always permeated American culture. A drawback to the democratic-culture rationale is precisely that it emphasizes culture. An emphasis on culture is unlikely to engage many Americans because, quite simply, it does not resonate with the predominant American culture. But the self-emergence rationale is likely to have widespread appeal. A focus on the autonomous emergent self harmonizes with typical American concerns. Thus, while I agree with Balkin that "speech involves cultural participation *and* self-formation,"<sup>452</sup> a focus on self-formation rather than cultural participation will engender a more effective rationale for the expansive protection of free expression.<sup>453</sup>

Consider the history of the search-for-truth rationale. As mentioned, Milton articulated it in the seventeenth century, Mill reiterated it in the nineteenth century, and Chafee restated it yet again mere months before the Court decided *Abrams*.<sup>454</sup> When Holmes, in his *Abrams* dissent, followed Chafee, he nonetheless added an important rhetorical twist. Holmes seized upon the contemporary, if controversial, passion for the economic marketplace to bolster his argument.<sup>455</sup> Whereas Chafee

---

450. See RELATIONAL AUTONOMY, *supra* note 36.

451. Thus, on the one hand, my self-emergence rationale might be viewed as a humanist response to Balkin's antihumanist approach. On the other hand, I do not believe that humanist-antihumanist dichotomy is helpful. My views overlap considerably with Balkin's views, as I explain in this Conclusion. Ultimately, my main criticism of Balkin, in this regard, is his invocation of and emphasis on this dichotomy.

452. Balkin, *Digital*, *supra* note 39, at 34 (emphasis added).

453. It is possible that Balkin himself realized that a focus on culture would be a hard sell. While I am conjecturing here, he might have decided for that reason to join his emphasis on culture with an emphasis on democracy. A concern for democracy, after all, would resonate more strongly with many Americans than would a concern for culture. Hence, a democratic-culture rationale might be more appealing than a bald "culture" or "participatory culture" rationale.

454. MILTON, AREOPAGITICA, *supra* note 73; MILL, *supra* note 73, at 21–27; Chafee, *War Time*, *supra* note 65, at 933, 954.

455. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See Chafee, *War Time*, *supra* note 65, at 960.

invoked the value of “unlimited discussion,”<sup>456</sup> Holmes suggested that ideas (speech and writing) operate like products in an economic marketplace.<sup>457</sup> Individuals should have the opportunity to choose, unburdened by governmental restrictions—whether choosing products or ideas. At a time in American history when laissez-faire ideology was especially strong, the poetic Holmes seemingly recognized that a marketplace metaphor would vividly symbolize to his contemporaries a realm of individual liberty beyond government control.<sup>458</sup> Indeed, after Holmes’s *Abrams* dissent, many scholars and judges would refer to the search-for-truth rationale as the marketplace-of-ideas rationale.<sup>459</sup>

Once again, in the United States of the early-twenty-first century, laissez-faire ideology (or neoliberalism) carries weight with many Americans.<sup>460</sup> At such a time, an emphasis on the autonomous and emergent individual self is likely to resonate far more strongly than an emphasis on the production of culture. As Nedelsky underscores in her book integrating feminist theory with American jurisprudence, the concept of autonomy has an “iconic value” in American culture.<sup>461</sup> To be sure, the rhetorical appeal of the self-emergence rationale is, in a sense, ironic. After all, the rationale rejects the classical liberal self, perhaps the prototypical manifestation of the American individualist ethos. Even so, in our digital age, the self-emergence rationale might generate a nod of recognition from many who would otherwise react to a democratic-culture rationale with indifference.

---

456. Chafee, *War Time*, *supra* note 65, at 956.

457. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

458. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (2001 ed.) (emphasizing strength of laissez-faire ideology in late-nineteenth and early-twentieth centuries).

459. *E.g.*, *Davenport v. Washington Educ. Ass’n*, 551 U.S. 177, 188–89 (2007).

460. See STEDMAN JONES, *supra* note 217.

461. NEDELSKY, *supra* note 38, at 42; see TURKLE, *supra* note 28, at 15 (arguing that everyday life encourages us to view ourselves as autonomous intentional agents).