Postmodern Free Expression: A Philosophical Rationale for the Digital Age

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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.

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

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I. INTRODUCTION

Three philosophical rationales animate discussions of free expression in American constitutional jurisprudence.¹ 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

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decades.2

The time for change has arrived. Each of the three primary rationales first attained prominence in American jurisprudence in specific historical and political settings.3 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.4 Life in our information society, however, casts the self into a different light. The self in the digital age is an emergent self.5 It emerges through an ongoing creative and dynamic process always situated within a sociocultural context.6

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.7 Net neutrality would prevent ISPs, including multinational corporations (MNCs) such as Verizon, Comcast, and AT&T, from charging customers extra for faster service.8 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).


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).


FCC, Tom Wheeler, proposed new rules that would implement net neutrality. On February 26, 2015, the FCC adopted the rules, which went into effect on June 12, 2015. As expected, ISPs and trade organizations representing the wireless and cable industries sued on multiple grounds. 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. They claim a right to transfer or not transfer any information they desire and at any speed they desire. Moreover, numerous other digital-related issues are percolating in the lower courts and might soon reach the Supreme Court. Many of these issues involve MNCs, including Google, Verizon, and Facebook. 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


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).


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governments. 16 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. 17

This Article opposes two conceptions of the self: the classical liberal and the emergent. The classical liberal self is a modernist self, 18 philosophically rooted in Descartes’s separation of a thinking self from the external world: “I think, [therefore] I am.” 19 It is manifested in John Locke’s focus on the self’s unified experience of sense impressions. 20 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. 21 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.” 22 The self therefore can attain a “progressively truer understanding” of itself, regardless of politics and culture. 23 From this perspective, characteristics

such as gender, race, and ethnicity are epiphenomenal to the true self.24

If the classical liberal self is a modernist self, then the emergent self—the primary subject of this Article—is a postmodern self.25 To be clear, postmodernism is not merely about theory.26 Social, cultural, and material changes have ushered in postmodernity.27 Digital and online technology, in particular, have vividly changed our experience of our world and ourselves.28 Postmodern theory tries to make sense of these changes.29 Postmodern theory, though, has had a problem with individual autonomy;30 postmodernists typically assert that sociocultural forces constitute the self,31 but if the self is socially constructed, then how can it be free? Sociocultural forces would seem to determine the self at every turn.32 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?


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


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


32. See SOLOMON & HIGGINS, supra note 19, at 303 (explaining the critique of postmodernism as undermining freedom).
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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.\textsuperscript{33} Although the terminology differs, this feminist relational self equates with the postmodern socially constructed self.\textsuperscript{34} Either way, the self is fundamentally a social creature.\textsuperscript{35} Yet, feminist theory is ultimately political, seeking social transformations that will relieve women from patriarchal oppression and subjugation.\textsuperscript{36} If the relational (socially constructed) self were determined, then women would seemingly lack the autonomy to advocate for and create such political change.\textsuperscript{37} 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.\textsuperscript{38} This Article builds on the feminist concept of relational autonomy to articulate the self-

\begin{itemize}
\item \textsuperscript{33} Nancy Chodorow, \textit{The Reproduction of Mothering} (2d ed. 1999); Carol Gilligan, \textit{In a Different Voice} (1982); see Jane Flax, \textit{Political Philosophy and the Patriarchal Unconscious: A Psychoanalytic Perspective on Epistemology and Metaphysics}, in \textit{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 \textit{Feminists Rethink the Self} (Diana Tietjens Meyers ed., 1997).
\item \textsuperscript{34} See Seyla Benhabib, \textit{Subjectivity, Historiography, and Politics: Reflections on the 'Feminism/Postmodernism Exchange,'} in \textit{Feminist Contentions} 107, 108 (1995).
\item \textsuperscript{36} See Catriona Mackenzie & Natalie Stoljar, \textit{Introduction: Autonomy Refigured, in Relational Autonomy} 3, 3–4 (Catriona Mackenzie and Natalie Stoljar eds., 2000) (emphasizing the need to understand oppression and subjectivity).
\item \textsuperscript{37} For this reason, some feminists initially rejected postmodernism. Elizabeth Fox-Genovese, \textit{Feminism Without Illusions} 153–59, 220–21 (1991).
\item \textsuperscript{38} Helpful books developing the concept of relational autonomy include the following: Jennifer Nedelsky, \textit{Law’s Relations} (2011); Marilyn Friedman, \textit{Autonomy, Gender, Politics} (2003); \textit{Personal Autonomy and Social Oppression: Philosophical Perspectives} (Marina A.L. Oshana ed., 2015); \textit{Autonomy, Oppression, and Gender} (Andrea Veltman & Mark Piper eds., 2014); \textit{Relational Autonomy}, supra note 36.
\end{itemize}
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.39 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

under the First Amendment or otherwise. Empirical studies show that the Roberts Court, until Justice Scalia’s death, was the most pro-business Supreme Court since World War II. 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. 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. Richard Epstein recently declared: “In its enduring provisions, our Constitution is most emphatically a classical liberal document.” Consequently, Epstein, who claims to follow a “guarded” originalism, depicts our constitutional government as no more than “a necessary evil.” But Epstein’s view of the framing is historically inaccurate. The framers did not fully adopt classical liberalism (or the classical liberal self). 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
authors of *Cato’s Letters*, as from John Locke and Adam Smith. The framers, one can reasonably conclude, attempted to achieve a balance between republican and liberal outlooks.

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. 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.

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. 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. 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. In


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 II.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, 0.
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.55

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.56 The leaflet advocated for the repeal of the draft law and argued that conscription violated the Thirteenth Amendment’s proscription of slavery.57 Justice Oliver Wendell Holmes, Jr., wrote an opinion for a unanimous Court upholding the convictions.58 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.”59 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.60 For Holmes, clear and present

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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.
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. 61

One week later, the Court unanimously upheld convictions in two more Espionage Act cases: Frohwerk v. United States, and Debs v. United States. 62 Writing the Court’s opinions in both cases, Holmes followed bad tendency doctrinal principles while disregarding his clear and present danger terminology. 63 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. 64 Before that time, a young Harvard professor, Zechariah Chafee, published an article that apparently shaped Holmes’s surprising dissent in Abrams. 65 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. 66 As a civil libertarian, Chafee sought to demonstrate that the Court should interpret the First-Amendment protection of free expression expansively. 67 More specifically, he wanted to show that criticisms of the war and draft were protected speech. 68 Consequently, he rejected the bad tendency test because it allowed the government far too much power to punish expression. 69 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).

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).
68. Id. at 960.
69. Id. at 953.
the right to free speech under the First Amendment was an individual right.\textsuperscript{70} 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.\textsuperscript{71} 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.\textsuperscript{72} “Let [truth] and falsehood grapple,” Milton had written, “[and] who ever knew truth put to the worse, in a free and open encounter?”\textsuperscript{73} 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 . . . .”\textsuperscript{74} 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.\textsuperscript{75} In the context of wartime and the Espionage Act,

\begin{quote}
[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.\textsuperscript{76}
\end{quote}

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

\begin{itemize}
\item \textsuperscript{70} Id. at 957.
\item \textsuperscript{71} Id. at 959.
\item \textsuperscript{72} Id. at 960.
\item \textsuperscript{74} Chafee, \textit{War Time, supra} note 65, at 956.
\item \textsuperscript{75} Id. at 956–57.
\item \textsuperscript{76} Id. at 959–60.
\end{itemize}
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."

Chafee continued by linking the search for truth with Holmes's clear and present danger language from *Schenck*. 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. The individual—each individuated liberal self—acted for the greater good of society by contributing his or her ideas to the search for truth. 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.

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. The defendants in *Abrams* had been convicted for printing and distributing leaflets that criticized President Wilson's leadership during the war. Affirming the convictions, the Court brushed aside the defendants' first-amendment arguments by reasoning that *Schenck* and *Frohwerk* controlled. 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.
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).
84. *Id.* at 618–19.
societal search for truth:85

[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.86

Holmes explicitly linked the search-for-truth rationale with the clear and present danger test.87 “[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.”88 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.89

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. 90  "[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." 91  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." 92  The Court used the marketplace of ideas as recently as 2010. 93

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. 94  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. 95  The Court upheld one such conviction in Whitney v. California. 96  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. 97  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). 98  Brandeis acknowledged that the parameters of the clear and present danger test remained obscure, 99  so he articulated three philosophical rationales to elucidate the test and its protection of speech

91. Id.
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.
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and writing—philosophical justifications that theorists would develop over the next decades into the primary rationales for an expansive interpretation of the First Amendment. First, Brandeis reiterated the search-for-truth or marketplace rationale, emphasizing that counterspeech “affords ordinarily adequate protection against the dissemination of noxious doctrine.”

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. 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. 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.” Free expression not only was a means to truth or free government; it was valuable in and of itself.

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. Yet, by the late-1920s and early- to mid-1930s, republican democracy was crumbling, and the


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 averted a relatively trivial harm to society.” Id. at 377.

practices of pluralist democracy were crystallizing under the pressures of industrialization, immigration, and urbanization.\textsuperscript{107} “In the republican system, an alleged lack of civic virtue could preclude one from participating in democratic processes.”\textsuperscript{108} 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.\textsuperscript{109} 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.\textsuperscript{110} 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.\textsuperscript{111} Under pluralist democracy (first manifested politically in the New Deal), no single set of values or interests is inherently predominant.\textsuperscript{112} Each individual citizen—each individuated self—supposedly has an equal right to express his or her respective interests and values.\textsuperscript{113}

During the post-World War II years, Robert A. Dahl comprehensively articulated pluralist democratic theory.\textsuperscript{114} 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.\textsuperscript{115} A communal goal

\begin{itemize}
  \item \footnotesize{\textsuperscript{107} Feldman, supra note 3, at 166–97.}
  \item \footnotesize{\textsuperscript{108} The Oxford Handbook of The U.S. Constitution 638–39 (Mark Tushnet et al. eds., 2015).}
  \item \footnotesize{\textsuperscript{109} Rogers M. Smith, Civic Ideals 209 (1997) (quoting Samuel Morse criticizing Irish Catholics).}
  \item \footnotesize{\textsuperscript{110} Feldman, supra note 3, at 314–16.}
  \item \footnotesize{\textsuperscript{111} John Dewey, Freedom and Culture 176 (1939).}
  \item \footnotesize{\textsuperscript{112} Feldman, supra note 3, at 316–19.}
  \item \footnotesize{\textsuperscript{113} Welfred E. Binkley & Malcolm C. Moos, A Grammar of American Politics 113 (1949); V. O. Key, Jr., Politics Parties and Pressure Groups (1942).}
  \item \footnotesize{\textsuperscript{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].}
  \item \footnotesize{\textsuperscript{115} Democracy, supra note 114, at 83, 106; Preface, supra note 114, at 67–71.}
\end{itemize}
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. 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.” If these free-expression rights are absent, Dahl insisted, then “the democratic process does not exist.” 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. 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.”

Under pluralist democracy, free expression became a constitutional “lodestar.” 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. 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).
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.” 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.” 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.” The self-governance rationale was invoked as recently as 2014.

C. The Self-Fulfillment Rationale

An individualist ethos has always permeated American culture. 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.” In fact, in the 1830s, Tocqueville first coined the term, individualism, and linked it to the American conception of government. In the first-half of the nineteenth century, a distinctly American literature emerged, emphasizing individual independence, self-improvement, and an iconoclastic wariness toward authority. Even so, during the late-nineteenth and early-

123. 310 U.S. at 96.
125. *Id.* at 642.
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.131 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.132 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.133 Intellectuals now perceived a distinct separation between past and present.134 People appeared free to remake the present and to determine the future.135 Rather than being controlled by historical principles, Americans seemed to control “historical change.”136

This sense of control led politicians and scholars to emphasize individual expertise. Before World War I, Progressives and sociological jurisprudents had hailed the potential contributions of trained scientific and social scientific experts.137 For many Americans, this belief in the worth of the expert grew even stronger after the war.138 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.139 Legal scholars (the legal realists) similarly believed that expertise garnered through empirical studies could cure societal ills and produce progress.140


131. See Feldman, Voyage, supra note 18, at 100–01.
134. Id. at xv.
135. Id. at 7.
136. Id. at xv, 3–4.
137. Id. at 53.
138. Id. at xiv–xv.
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. In 1929, he observed that modern American civilization worked “to dissolve…psychological bonds, to break up clannishness and personal dependence.” Thus, individuals tended “to become more or less independent persons rather than to remain members of a social organism.” 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.” 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.”

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.” 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.

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

To a degree, the “new individualism” that emerged in the 1920s and 1930s emphasized individual choice and self-fulfillment rather than rational self-determination. In fact, during this time, a developing mass-consumer culture sought to capitalize on the irrationality of individuals. Advertisers aimed to reformulate individual preferences so that purchasing particular products seemed necessary to personal satisfaction and well-being. 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. In 1929 and 1930, John Dewey published a series of essays, Individualism, Old and New, which lamented “the irony of the gospel of ‘individualism.’” Businesses increasingly manipulated individuals while seeming to celebrate their individuality.

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. 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. 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.

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. We’re, 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).
155. See id.
156. See FELDMAN, supra note 3, at 314–28 (discussing pluralist democracy and the New Deal).
158. Id. at 14; FELDMAN, supra note 3 at 337–40.
Advanced marketing techniques transformed political campaigns into a series of commercial-like advertisements. Americans did not object. For the most part, during the post-World War II era, Americans celebrated their consumers’ democracy. 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.

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.'"

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. 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.” 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.” Moreover, it “follows, that he has the right to express these beliefs and opinions.” 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.
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.”

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. 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.”

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.” Justice Thurgood

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167. *Id.*
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 *Procunier v. Martinez*.

Free expression, he wrote, “serves ... the needs of ... the human spirit—a spirit that demands self-expression.”

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.

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. 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.


173. *Id*.


176. *Cohen, Configuring, supra* note 24, at 5.

At birth, one is thrust into a preexisting yet evolving sociocultural community. One matures by absorbing the values, interests, and expectations endorsed in that community. 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. 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. Feminist theorists emphasize that, at a fundamental level, the self is relational rather than atomistic; "human beings are created in and through relations with other human beings." Many feminists add that social relations can be positive, negative, or both. 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."


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); GEGEN, *supra* note 6, at xv ("we exist in a world of co-constitution").
183. Flax, *supra* note 33, at 250; *see FRIEDMAN, supra* note 38, at 36 (describing relational or social self).
184. Willett et al., *supra* note 169 (discussing social and cultural relations in terms of feminist and philosophical theories).
construction, the ongoing development of the relational self. Individuals literally and often self-consciously create an online self that exists in relation to other online selves. 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.” 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.

More broadly, we exist on the Internet in a “built environment,” a constructed architecture of social life. 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. 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. 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.” TURLE, supra note 28, at 18.
187. See id. at 14.
188. Balkin, Digital, supra note 39, at 34.
189. SCHNEIDER, supra note 16, at 4 (emphasizing how Google builds on human existence as “social animals”).

[Different 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.\footnote{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).} 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.\footnote{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).} 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 ….”\footnote{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).} 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.\footnote{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.} The conspicuousness of the socially constructed relational self in the digital world illuminates the nature of our being or existence beyond the Internet.\footnote{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. 198

In recent years, media professors and bloggers have been debating about digital dualism—a debate akin to the mind-body problem of modernist philosophy. 199 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. 200 In a similar fashion, digital dualism sharply distinguishes our existence online from our existence offline. 201 Offline is physical and real. Online is virtual and secondary—or supplemental to our primary (real) offline existence. 202 Dualism imagines that we live in a world resembling the movie, The Matrix. 203 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. 204 Dualists often worry about how virtual experiences (online) impinge on or detract from real life. 205 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.


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.

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Numerous commentators, however, question digital dualism. To be sure, we experience being offline and online in different ways, at least partially.206 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.207 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.”208 Online and offline intermingling in the experience of the relational self.209

“Interaction on Facebook is different than at a coffee shop,” writes Nathan Jurgenson, “but both Facebook and the coffee shop inhabit one reality.”210 In fact, an individual’s Facebook profile reflects elements of offline experience, just as offline behavior can change because of Facebook experiences.211 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.212

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.
209. Id. at 14, 21–22.
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.\(^2\) 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.\(^2\) 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.\(^2\)

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\(^{2}\) Cohen, Privacy, supra note 24, at 1905; see Mark Tushnet, Internet Exceptionalism: An Overview from General Constitutional Law, 56 W. & MARY L. REV. 1637 (2015) (arguing that First-Amendment Internet issues should not be treated as exceptional).\(^{2}\) Habermas rejects the atomistic and instrumental self precisely because communication and discourse are social actions that are crucial to our being. 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).\(^{2}\) Bauman & Raîd, 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. This theoretical division between public and private is the basis for libertarian and neoliberal ideology, which celebrates private-sphere freedom and denigrates government. 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. These intermediaries can bar content, direct users in particular directions, tailor results to individual users, and otherwise control the individual’s experience. 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.” And merchants and advertisers use that capability frequently and capiously. “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.” For instance, I shopped

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.222 “You are what you search,” writes Carl Franzen,223 “That’s definitely the case on Google, where any 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.”224 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.225 In fact, corporate websites will charge different users different prices for the same product based on the accumulated surveillance data for the respective users.226 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.227 It is not a spontaneous or haphazard event.228 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.229 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.”230 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

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224. Id.
225. See Tutt, supra note 218, at 274 (discussing algorithms).
229. LESSIG, supra note 190, at 4–5.
230. GRIMMELMANN, supra note 5, at 24.
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experimentation. Likewise, the early Internet was accessible and adaptable to multiple uses. 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.” Their architectures, especially when conjoined, invited anyone and everyone to innovate, build, and contribute to the ever-changing digital environment. 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. Turkle described this young Internet as “a dizzyingly free zone.”

Zittrain contrasts the generative early Internet with the proprietary networks, such as America Online (AOL) and Prodigy, which prospered through much of the 1990s. These proprietary networks were closed systems that individuals paid to enter because they supposedly offered users unique and worthwhile content. Such closed systems, however, were non-generative or “sterile.” 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.

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

233. Id. at 2–4, 70–74.
234. Id. at 3.
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. Rather, the architecture itself, the “built environment,” determines the degree of individual autonomy as well as government and corporate control. And the manipulation of that architecture helped usher in the mass commercialization of the Internet.

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. Moreover, the Internet itself facilitated the rapid development of MNCs over the last twenty-five years. 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. 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.

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. Most important, Big Data has become big business. 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).
248. STIGLITZ, supra note 246, at 74–77.
analysis of data, including metadata, can be mined for profits in multiple ways. 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." See, e.g., id. at 6–7, supra note 16.


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).


257. 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.\textsuperscript{259} The massive intermediary-MNCs therefore control and readily suppress online expression for their own purposes—profit.\textsuperscript{260} 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.\textsuperscript{261} Thus, in one instance, Google might insist that its search algorithms and results are expressive content protected as free expression.\textsuperscript{262} 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.\textsuperscript{263} 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.”\textsuperscript{264}

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

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


\textsuperscript{260} Pasquale, supra note 250, at 5; Wu, supra note 8, at 205–06.


\textsuperscript{262} Pasquale, supra note 250, at 3–6.


\textsuperscript{264} Wu, supra note 8, at 13.
abuse of digital technology. 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. Often, the
government enlists the assistance of private corporations in monitoring
and gathering data about citizens. 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. In the words of Frank Pasquale, Big Data
corporations are “black boxes.” Data goes in, information comes out (for
profit), but we have no idea what goes on inside, as the corporate
algorithms churn.

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. 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 Rupar, Six Months of Revelations on NSA,

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.
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. Id.
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.\(^{272}\)

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.\(^{273}\)

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—


\(^{273}\) 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.”

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. 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.”

The process is creative and dynamic because it does not follow a set of predetermined and mechanical steps. 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.

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. Think of radioactive rays. Their wavelengths are beyond those perceivable by human eyes. 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).

affect our bodies. The forces of social construction are similar—they affect us whether or not we know it—though they are not necessarily damaging or harmful. In fact, the forces of social construction can be positive, negative, or both concurrently. Cultural and social forces both empower and limit us. 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. 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. Autonomy cannot exist unless it arises from "human connections, including those manifested in love, friendship, appropriate care, and even loyalty and devotion." Even further, autonomy does not merely arise from but is dependent upon social relations. Autonomy, in other words, is "a mode of interacting with others." 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.

Consider an actor in a play. The actor is given a script, which limits


282. See id.
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-Chiariotti & 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 & GIOU, 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. 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. 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. From this modernist perspective, social construction is a threat to autonomy. 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.” Consequently, because all social relations and forces are partly empowering and partly limiting, autonomy is always a matter of degree.

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.


296. NEDELSKY, supra note 38, at 98.

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. This evaluation cannot be reduced to a simple cost-benefit analysis; rather it requires a developed capacity to judge complex social relations. If a particular vector of social force is manipulative or coercive, then its limiting effects probably would offset any empowering or enabling effects. 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.

Expanding on this geometrical metaphor, it is useful to describe autonomy as requiring space. 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. 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


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. 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. 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. Relational autonomy is always a matter of degree. Autonomy is never a matter of metaphysical or ultimate liberation from social construction and relations. 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.” 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. Such relationships depend on and engender autonomy, while manipulative, deceptive, and coercive relationships usually undermine autonomy.


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

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

307. Id. at 46.

308. See id. at 115–17.


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.312

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.313 Postmodern philosophers disregard that question and instead investigate the process of interpretation.314 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.315 And as Zygmun

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." TURKEL, 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.


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


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." 316 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). 317 The more illuminating question is not why, but how: How can we promote free expression if the self is relational and socially constructed? 318 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." 319 By protecting free expression, American society can commit to creating and protecting the sociocultural space needed to facilitate relational (individual) autonomy. 320 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

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.\textsuperscript{321} 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 re-create its own relational self, and also challenge or accept particular societal norms.\textsuperscript{322} 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.\textsuperscript{323} The emergent self’s struggle to participate autonomously in its own social construction manifests a continual “negotiation over what it means to be human.”\textsuperscript{324} Simultaneously, the politics of the emergent self reflects and influences “the very foundations of social life and everyday living.”\textsuperscript{325} 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.\textsuperscript{326} 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.\textsuperscript{327} To be sure, resistance often is more difficult than

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\textsuperscript{321} Cohen, Privacy, supra note 24, at 1905.
\textsuperscript{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.
\textsuperscript{323} Willett et al, supra note 169 (emphasizing that questions of the self are always political).
\textsuperscript{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. …
\textsuperscript{325} Kwame Anthony Appiah, The Ethics of Identity 211 (2005).
\textsuperscript{326} Cushman, supra note 4, at 332.
\textsuperscript{327} Id. at 332–33.
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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. 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.

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...

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

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.\footnote{Zittrain, Future, supra note 231, at 2–4, 70–74.} 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.\footnote{Id. at 70–71.} 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.\footnote{See Allen, supra note 35, at 96–122 (discussing Habermas’s notion of distorted subjectivity).} 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.\footnote{See Stephen M. Feldman, Hate Speech and Democracy, 32 CRIM. JUST. ETHICS 70 (2013) (reviewing Jeremy Waldron, The Harm in Hate Speech (2012)) (discussing the constitutional protection of hate speech).} Hate speech would limit the victims’ sociocultural space for autonomous self-creation and self-determination.\footnote{See Brison, supra note 297, at 286–93 (arguing that hate speech is unprotected because it undermines autonomy).}

Speech constituting true threats would also be unprotected. \textit{Elonis v. United States}, decided in 2015, raised a true-threats issue: Must the prosecution prove that the defendant subjectively intended to
communicate a true threat, or could the prosecution merely prove that the defendant’s speech would threaten a reasonable person? This issue was raised under both the First Amendment and the true-threats statute. 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. According to the defendant, he was merely echoing the lines of rap artists for self-therapeutic purposes. The Court held that the criminal statute required proof of subjective intent and therefore did not reach the constitutional issue.

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. 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. 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-

337. See Elonis, 135 S. Ct. at 2011–12.
338. Id. at 2004–07.
339. Id. at 2012.
emergence.342 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.343 As the Court phrased it, his lying was “a pathetic attempt to gain respect.”344 The defendant was prosecuted under the Stolen Valor Act of 2005, but the Court held that the First Amendment protected the speech.345 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.346 In particular, the defendant’s lies did not constitute defamation or any other low-value category involving falsehoods.347 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.348 Predictably, the government could not satisfy that rigorous standard; the speech was constitutionally protected.349

Under the self-emergence rationale, however, lying should sometimes be outside First-Amendment guarantees.350 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).
344. Id. at 2542.
346. 132 S. Ct. at 2544.
348. 132 S. Ct. at 2548.
349. Id. at 2549.
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. 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.

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. The Roberts Court, to this point, has strongly favored corporate legal claims, whether constitutional or otherwise. The Court’s most important recent decision protecting corporations is, perhaps, Citizen United v. Federal Election Commission. Citizen United, it should be mentioned, was a nonprofit corporation, but the Supreme Court generally has not distinguished among types of corporations for constitutional purposes.

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.
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).
356. Id. at 319.
degree to which the government could regulate corporate spending on political campaigns, but *Citizens United* ended the uncertainty.\textsuperscript{357} *Citizens United* invalidated provisions of the Bipartisan Campaign Reform Act of 2002, which maintained limits on corporate spending for political campaign advertisements.\textsuperscript{358} The majority opinion began by articulating two first-amendment premises. First, the Court reiterated the maxim, initially stated in *Buckley v. Valeo*,\textsuperscript{359} that spending on political campaigns constitutes speech.\textsuperscript{360} Second, the Court emphasized that, as stated in *First National Bank of Boston v. Bellotti*,\textsuperscript{361} free-speech protections extend to corporations.\textsuperscript{362} 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.\textsuperscript{363} "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."\textsuperscript{364} 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 the core of the First Amendment.\textsuperscript{365} Restrictions on such political speech and writing destroy "liberty" and are necessarily unconstitutional,\textsuperscript{366} unless the government can satisfy strict scrutiny by showing that the regulation is necessary to achieve a compelling purpose.\textsuperscript{367}

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

\textsuperscript{357} *Id.*  
\textsuperscript{358} *Id.* at 321.  
\textsuperscript{359} 424 U.S. 1, 19 (1976) (per curiam).  
\textsuperscript{360} 558 U.S. at 336–41.  
\textsuperscript{361} 435 U.S. 765 (1978).  
\textsuperscript{362} 558 U.S. at 340–42.  
\textsuperscript{363} *Id.* at 339.  
\textsuperscript{364} *Id.*.  
\textsuperscript{365} *Id.* at 343.  
\textsuperscript{366} *Id.* at 354 (quoting *The Federalist No. 10*, at 130 (James Madison) (Benjamin Fletcher Wright ed., 1961)).  
\textsuperscript{367} *Id.* at 340.
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Citizens United Court. An independent expenditure, even on behalf of a specific candidate or officeholder, cannot do so. In other words, anything short of a bribe or the appearance of a bribe is permissible. Given this narrow view of corruption, the Court concluded that the government could not satisfy strict scrutiny. The Court reinforced its conclusion by invoking another of the traditional philosophical rationales, the search-for-truth. Restrictions on corporate campaign expenditures, the Court reasoned, interfere “with the ‘open marketplace’ of ideas protected by the First Amendment.” 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.

As Citizens United illustrates, the Roberts Court justices rely on the traditional rationales to protect corporate spending as expression. 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,” but ultimately, the word, corporation, means “corporation for profit.” 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).
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)).
376. MODEL BUSINESS CORPORATION ACT (MBCA) § 3.01(a) (CORP. LAWS COMM. 2010).
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.\(^{378}\) 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.\(^{379}\) 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.”\(^{380}\) 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.\(^{381}\) 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


\(^{379}\) See Bauman & Raind, 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).


\(^{381}\) See Piety, supra note 378, at 31–32 (emphasizing commercial expression as aiming for profit).
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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.\(^{382}\)

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.\(^{383}\) Contrary to feminist theory, “[e]conomic man . . . has neither a childhood nor a context. He grows out of the ground like a mushroom.”\(^{384}\) As such, homo economicus, first developed by neoclassical economists, can be understood as an extreme form of the classical liberal self.\(^{385}\) 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.\(^{386}\)

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).


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.⁴⁸⁷ Such relationships are either unpaid or low paid and are often denigrated as unproductive.⁴⁸⁸ 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.⁴⁸⁹

⁴⁸⁸. 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).
⁴⁸⁹. 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. 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. 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. 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. 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”).

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).


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.395 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.396 The absence of government action supposedly equates with individual liberty.397 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.398 Hence, many individuals vigorously oppose and denounce government actions, including government regulations of the Internet.399 But in the digital age, corporate power is as much a threat to individuals as is government power, if not more so.400 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.401

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 SCHNEIDER, 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. 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. 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.

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? Or is data, in general, speech and therefore protected under the First Amendment?

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).


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).

Or more particularly, does the First Amendment protect search-engine results? 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. If allowed, ISPs can create fast and slow lanes of Internet access. 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. On February 26, 2015, the FCC adopted new rules mandating net neutrality, thus requiring ISPs to provide all customers with equal service. 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. 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.

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

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409. Id.

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


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. Brodärn, 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.”415 The Court began by invoking the self-governance rationale and explaining that, at its core, the First Amendment protects “discourse on public matters.”416 Nevertheless, the Court added that “we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”417 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).”418 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.419 Moreover, the state failed to demonstrate that a new low-value category should be recognized.420 Thus, the only way the government could justify this statutory restriction was by satisfying the strict scrutiny standard.421 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.422 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.423

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. When pharmacies process prescriptions, they routinely record information such as the prescribing doctor, the patient, the dosage, and so forth. Data mining businesses, like IMS Health Inc., buy this information, analyze it, and sell or lease their reports to pharmaceutical manufacturers. When armed with this information, pharmaceutical salespeople are able to market their drugs more effectively to doctors. Vermont enacted a law to prevent pharmacies from selling this information. 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. 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. The Court’s conservative majority disagreed. It viewed the statute as raising an unusual commercial speech issue. Commercial speech cases typically involve advertising, and as the Court admitted, the statute in Sorrell did not restrict advertising per se. Yet, the Court reasoned that the First Amendment not only applied but also required “heightened judicial scrutiny,” a standard more rigorous than the Central Hudson balancing test ordinarily applied in commercial speech cases. 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. Id.
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.436 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.437

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.naaccp.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).
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The political element inherent to self-emergence suggests a partial connection to another traditional rationale: self-governance.\(^{438}\) 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."\(^{439}\) 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 itself.\(^{440}\) 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.\(^{441}\) Rather, he is describing a widely participatory culture.\(^{442}\) "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."\(^{443}\) 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."\(^{444}\)

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.\footnote{445}

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.\footnote{446} 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.\footnote{447} In fact, Balkin has suggested that we should understand life in the digital age from an “anthropomorphic” perspective,\footnote{448} which treats “human beings as the constructions and unwitting agents of larger forces.”\footnote{449} But the concept of

\footnote{445}{Balkin, \textit{Digital}, supra note 39, at 34.}

\footnote{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, \textit{Future}, supra note 39, at 439–40; Balkin, \textit{Digital}, supra note 39, at 28–29. Thus, when he articulates “free speech values,” Balkin, \textit{Digital, supra note 39}, at 6, he specifies “interactivity, mass participation, and the ability to modify and transform culture.” \textit{Id.}}


\footnote{449}{\textit{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.” \textit{Id.}}
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relational autonomy harmonizes human agency and autonomy with the socially constructed (or relational) self. Feminist theory, in other words, obviates any inclination to emphasize an antihumanist determinism.

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,” a focus on self-formation rather than cultural participation will engender a more effective rationale for the expansive protection of free expression.

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. 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. 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.
invoked the value of “unlimited discussion,” Holmes suggested that ideas (speech and writing) operate like products in an economic marketplace. 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. Indeed, after Holmes’s Abrams dissent, many scholars and judges would refer to the search-for-truth rationale as the marketplace-of-ideas rationale.

Once again, in the United States of the early-twenty-first century, laissez-faire ideology (or neoliberalism) carries weight with many Americans. 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. 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.

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457. Abrams, 250 U.S. at 630 (Holmes, J., dissenting).
460. See Stedman Jones, supra note 217.
461. Nedelsky, supra note 38, at 42; see Turek, supra note 28, at 15 (arguing that everyday life encourages us to view ourselves as autonomous intentional agents).