FREE SPEECH AND PUBLIC SELF-DEFINITION

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ABSTRACT

This Article elucidates the First Amendment interest in public self-definition—the freedom to craft the contours of one's own public personas in the manner of one's choosing. This interest, which is rooted in a broad conception of speaker autonomy, is a vital aspect of the First Amendment's protection of free speech, underlying areas of First Amendment jurisprudence such as compelled speech, anonymity, and false statements of fact. Yet the interest is frequently overlooked, with relatively little discussion of it within First Amendment scholarship. This is unsurprising, given the tendency of the interest to fade into the background of many First Amendment analyses.

Understanding the public self-definition interest, however, is vital to a comprehensive understanding of the First Amendment. Although often overshadowed by more traditional instrumental rationales for speech protection, the interest exerts a gravitational pull on the Court's resolution of a wide range of cases, both substantively and rhetorically. Indeed, four recent Supreme Court cases—Mahanoy Area School District v. B.L.*,* Americans for Prosperity Foundation v. Bonta*,* Kennedy v. Bremerton School District*, and* 303 Creative LLC v. Elenis—*illustrate the growing power of the interest.*

This Article first describes the public self-definition interest and sets forth its theoretical and doctrinal foundations. It then maps out some of the analytical dimensions of the interest as illustrated by the four recent Supreme Court cases noted above. These cases shed light on different aspects of the interest, and they suggest a growing inclination by the present Court to accord significant analytical weight to it, elevating speakers' autonomy interests at the expense of the government's regulatory interests. The Article then reflects upon the broad ways in which the practical contours of public self-definition have shifted—and will

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continue to shift—in an age where the internet and social media play an outsized role in how people craft their public personas.

INTRODUCTION

Consider a typical Friday in the life of John, a thirty-something American adult. John wakes up in the morning, then has a brief conversation with his young children over breakfast. After breakfast, he heads off to work, where he has a few superficial conversations with his co-workers in the morning; a meeting with his boss at midday; and a formal presentation to prospective clients in the afternoon. After he gets home, he gets a call from his parents, who perpetually worry about how he's doing. He then goes out on a long-awaited date night with his spouse, where they have the opportunity to unwind and chat for an extended period of time. Afterwards, they meet up with some old friends and spend the rest of the night catching up over (perhaps too many) drinks.

Of course, throughout the day, John is also checking his various social media accounts. He scrolls through his Twitter feed, liking tweets, posting both trivial and (in his mind) profound thoughts, and continuing various online debates he has been having with others on issues ranging from politics to pop culture. He upvotes, downvotes, and posts comments on Reddit, taking care, of course, to differentiate between his two different Reddit accounts: one openly associated with

his name and occupation, and another anonymous burner account he uses for more private, clandestine, or controversial comments and activities. At dinner, he takes a painstakingly staged picture of his entrée and posts it on Instagram. And before he sleeps, he posts "Just had a fantastic meal at [restaurant link] with [link to spouse's profile]!" on his Facebook timeline.

In all of this, who exactly is John? That might depend on who you ask. To his children, he may be a stern authority figure; to his parents, a dutiful son and father; to his co-workers, an amiable if bland nonpresence; to his old friends, a partier with a tendency for excess; and to his spouse, an overworked parent struggling through tough financial times. To his Facebook friends and Instagram followers, he may be a fun-loving person always living his best life, but to those on Reddit, he may be either a sober, highly competent professional or an outrageous purveyor of highly offensive viewpoints (depending on which account he is using).

The answer, of course, is that John is all of the above. He is the sum of all the different public personas that he establishes for each specific social context, whether in person or online. And all of us, like John, actively craft and calibrate each distinct persona that we present to the world. We carefully curate which personal facts we share with our co-workers, our significant others, our parents, our children, or our Twitter followers. We decide when we want to lurk anonymously in the shadows and when we want to loudly proclaim our support or criticism. And we painstakingly tailor these personas for a wide variety of reasons: perceived social norms, personal preferences, religious obligation, a desire to achieve material gain, and so forth.

This interest in public self-definition—the freedom to craft the contours of one's own public personas in the manner of one's choosing[1]—is a vital yet frequently overlooked aspect of the First Amendment's protection of free speech. The interest, which is rooted in a broad conception of speaker autonomy, underlies substantial portions of First Amendment jurisprudence, including cases dealing with compelled speech, anonymity, and false statements of fact.[2] And while aspects of

1. In my previous work, I have referred to this as an interest in "individual self-definition." *See* David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 72 (2012). In this Article, however, I refer to it as the interest in public self-definition, as I think this formulation more clearly captures the essential outward-looking nature of the interest, as opposed to the more traditional right to self-definition or self-realization that focuses on the internal development of one's beliefs and identity. *See infra* Section I.A (distinguishing between these two interests).

2. *See infra* Section I.C.

this interest have featured prominently in other jurisprudential contexts—most notably, in analyses of privacy law[3]—academic discussion of the interest within the First Amendment context has been relatively sparse.[4]

This is unsurprising due to two characteristics of the interest. Like all interests rooted in autonomy-based values, its boundaries are necessarily fuzzy.[5] If construed broadly, the interest may be viewed as virtually omnipresent, thereby diluting its analytical significance. Furthermore, the interest is often overshadowed by more traditional instrumental rationales underlying the protection of speech, such as the pursuit of truth and the promotion of democratic self-governance.[6]

Understanding the public self-definition interest, however, is vital to a comprehensive understanding of the First Amendment. Although often overshadowed, the interest exerts a gravitational pull on the Court's resolution of a wide range of cases, both substantively and rhetorically. Indeed, four recent Supreme Court

3. *See infra* Section I.B. As I discuss in greater detail below, scholars have explored aspects of the public self-definition interest within the privacy context, typically in discussions of privacy- and publicity-based tort claims. *See, e.g.*, Lisa M. Austin, *Privacy and Private Law: The Dilemma of Justification*, 55 MCGILL L.J. 165, 203 (2010) (referring to "an individual's capacity for identity formation in the sense of 'self-presentation'" in a discussion of privacy torts); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 PITT. L. REV. 225, 285 (2005) (arguing, with respect to the right of publicity, that "every individual should be able to control uses of her identity that interfere with her ability to define her own public character"); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1039-40 (2003) (observing, in an analysis of laws providing privacy protection against factual disclosures, that "[s]ociety protects privacy because it wants to provide individuals with some degree of influence over how they are judged in the public arena").

4. To the extent that First Amendment scholars have touched on this interest, they have done so in largely cursory terms. The most notable explication of the interest within the First Amendment context is from Laurence Tribe, who discussed it in his seminal constitutional law treatise. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 887-90, 1304 (2d ed. 1988) (discussing "the individual's ability to control what others are told about his or her life," premised on the aspiration "to be master of the identity one creates in the world"). Tribe's brief discussion, however, did not delve deeply into the theoretical and doctrinal ramifications of the interest. *See id.* Furthermore, Tribe did not frame the interest as an integral aspect of the First Amendment's protection of free speech (as I argue here) but rather as a privacy interest standing in *opposition* to First Amendment values. *See id.* at 890 (distinguishing "free speech values" from "those of informational autonomy").

In a previous article, I discussed the public self-definition interest specifically as it relates to the First Amendment's treatment of autobiographical lies. *See generally* Han, *supra* note 1. This Article expands upon my preliminary discussion in that article, elucidating the theoretical, doctrinal, and practical dimensions of the interest in more comprehensive terms.

5. *See, e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 905 (1994) ("[A]utonomy-based arguments seem unlikely to possess clear and uniquely determining power in very many contexts.").

6. *See* Vikram David Amar & Alan Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. ILL. L. REV. 1, 21 (2020) (observing that "with regard to most of the conventional [First Amendment] rules, instrumental values dominate, and dignitary values are simply of secondary importance").

cases—*Mahanoy Area School District v. B.L.*,[7] *Americans for Prosperity Foundation v. Bonta*,[8] *Kennedy v. Bremerton School District*,[9] and *303 Creative LLC v. Elenis*[10]—suggest the growing power of the interest.

This Article seeks to explicate both the theoretical and practical dimensions of the First Amendment interest in public self-definition, and it proceeds as follows. Part I describes the interest and sets forth its theoretical and doctrinal foundations. Part II maps out some of the analytical dimensions of the interest as illustrated by the four recent Supreme Court cases noted above. These cases shed light on different aspects of the interest, and they suggest a growing inclination by the Court to accord significant analytical weight to it, elevating speakers' autonomy at the expense of the government's regulatory interests. Part III reflects upon the broad ways in which the practical contours of public self-definition have shifted—and will continue to shift—in an age where the internet and social media play an outsized role in how people craft their public personas. Part IV concludes.

I. THE THEORETICAL AND DOCTRINAL FOUNDATIONS OF THE PUBLIC SELF-DEFINITION INTEREST

A. The Nature and Ubiquity of Public Persona-Building

The interest in public self-definition, viewed within the First Amendment context, recognizes that people are entitled to craft the contours of their public personas in the manner of their own choosing. As illustrated in the example of John set forth above, every person interacts with the world through a multitude of constructed personas; we paint a different picture of ourselves to all of the different people that we meet. How we present ourselves to our spouses, for example, is different than how we present ourselves to our co-workers or our parents. It is also, of course, different than how we present ourselves online through Twitter, Facebook, or Instagram. And this is all perfectly natural and sensible. For example, while you would be unlikely to expound upon your youthful indiscretions during a job interview, you might happily share these stories while catching up with old friends at a bar.

7. 594 U.S 180 (2021).
8. 594 U.S. 595 (2021).
9. 597 U.S. 507 (2022).
10. 600 U.S. 570 (2023).

This public self-definition interest is thus distinguishable from what courts and commentators often refer to as the right to self-realization or self-actualization.[11] The interest in public self-definition is concerned solely with one's control over how one is portrayed *externally to others*, rather than with how one develops one's own *internal* faculties, views, and identity.[12] Although these two interests are certainly linked—how I develop my own internal faculties as an autonomous individual will inevitably affect (and be affected by) how I choose to portray myself externally—the specific focus here is on one's interest in defining oneself *to others* through the crafting of public personas.

The public self-definition interest is thus ultimately rooted in our ability to shape and compartmentalize the contours of our public personas. We do so most directly by managing the content and manner of our communications—the facts we choose to disclose or not disclose, the opinions we choose to reveal, or the tone and vocabulary by which we communicate. We may share intimate details of our lives with our family; we usually would not do so with a new business client. If we hold controversial opinions on political or religious issues, we may rant accordingly in the company of our closest friends but remain conspicuously silent at a formal event with distant acquaintances. We may speak in stern and authoritative terms to our young children, but communicate deferentially and circumspectly when speaking to our bosses.[13]

We also manage our personas by controlling the extent to which we expose our identity to others. There is a reason, of course, why customer feedback is often given anonymously: people are usually far more willing to speak honestly when they know they cannot be identified. The same is true when it comes to sharing one's views that might be highly unpopular or dangerous to express; people will more willingly do so when they can compartmentalize such expression to an

11. *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that "the constitutional guarantee of free speech ultimately serves only one true value" of "individual self-realization"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (discussing the "liberty theory" of the First Amendment that protects conduct in order to "foster[] individual self-realization and self-determination").

12. *See* Redish, *supra* note 11, at 593 (describing "individual self-realization" as referring "to development of the individual's powers and abilities"); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) ("Autonomy is the foundation of all basic liberties, including liberty of expression. . . . Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons.").

13. As Daniel Solove has observed, "The self has public and private dimensions. . . . Public roles require the repression of private aims to meet the expectations of others. People groom themselves and clothe themselves before emerging in public, and when playing public roles they are careful in how they foster impressions. In private roles, the individual expresses aspects of the self that are often inappropriate in public roles. In private, people are generally more relaxed and at ease." Solove, *supra* note 3, at 1037-38.

anonymous or pseudonymous persona, freeing their "real name" from the negative consequences of such expression.[14] On the other hand, we may sometimes want to loudly proclaim our support or opposition to a cause—going out of our way to associate our speech with our real name—because we feel that it's important to do so or because of the benefits associated with publicly allying with or opposing the cause in question.

We manage our public personas for a wide variety of reasons. We may do so out of a desire for self-preservation: perhaps expressing certain personal facts or ideas might cause us social embarrassment or make us a target of government or private retribution, so we choose either not to express them or to express them under the cloak of anonymity. Conversely, we may want to openly express certain facts or ideas as a means of self-declaration or self-fulfillment: we may deem it important to announce certain things widely and openly, whether in order to effect social change, or because we think that doing so is the morally right thing to do, or because we think it is essential to our own internal self-conception.

We might also manage our public personas for financial, social, or any other gain.[15] We may present ourselves in a particular manner to win business or get hired for a job, or to win the admiration of a new set of acquaintances, or to fulfill our perceived religious duties. We may open ourselves up emotionally to a close friend or a psychiatrist in order to help ourselves work through difficult personal issues. We may close ourselves off from co-workers out of a desire to separate our working life from our social life, or we may open ourselves to those co-workers out of a desire to have more meaningful workplace relationships.

This sort of persona building, built through direct interactions with people in our daily lives, has long been a ubiquitous aspect of our social lives. Everyone naturally calibrates the tone, content, and context of what they communicate to others based on a wide range of different considerations. But the rise of social media has drastically increased the potential scope and complexity of this project. Social media allows for the more formal construction of multiple, precisely calibrated personas that may range anywhere on the spectrum of public to private. One might have distinct social media personas for a small group of

14. *See, e.g.*, Talley v. California, 362 U.S. 60, 65 (1960) (observing, in a case striking down an ordinance that prohibited anonymous leafletting, that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance").

15. *See, e.g.*, RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 233 (1981) ("[P]eople 'sell' themselves as well as their goods by professing high standards of behavior to induce others to engage in advantageous social or business dealings with them . . . .").

intimate friends and family; a larger group of potential romantic partners; and for the public at large.[16] Each of these personas can be carefully calibrated based on the photos the person posts, the personal information she shares, and the tone of her communications.

There are two aspects of the public self-definition interest that are integral to its viability. The first is separation—the ability to create distinct boundaries between the different public personas that we create.[17] There is little utility in crafting various public personas if any observer can immediately and effortlessly connect all of these personas to the same person. There's no point, for example, in crafting a sober professional persona if anyone could immediately connect that persona to the person's various other personas (for example, the recreational drug user, or the single person looking for a date, or the angry consumer looking for customer service reparations). The public self-definition interest assumes some capacity to separate different personas such that distinct personas can be presented to specific audiences without the immediate incursion of other personas that they may have crafted for different contexts.

This separation, however, need not be perfect or absolute for the public self-definition interest to remain viable. Given sufficient time, resources, and effort, a skilled investigator could presumably connect a typical person's various public personas without much difficulty. But separation in this context is not a binary concept, but rather one of degree. Someone viewing another person's LinkedIn profile might eventually be able to connect that profile to a private Facebook account or a Tinder profile. But depending on the circumstances, this might require significant time and effort, and the vast majority of people viewing that profile would not bother to do so (at least without a specific reason). So even if separation in this context is not absolute, it is sufficient in practical terms such that a person can meaningfully construct different personas to fit different audiences and contexts.

A second integral aspect of the public self-definition interest is the idea of purposeful curation. The interest rests on personal control—the ability to carefully calibrate the contours of our public personas in

16. Furthermore, separating and maintaining these distinct personas is aided by the diversity of different online platforms with distinct purposes. One might be an ambitious go-getter on LinkedIn; a sentimental family man on Facebook; a political firebrand on Twitter; a cosmopolitan bon vivant on Instagram; and an outrageous and offensive social commentator on Reddit.

17. *Cf.* J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966, 1988 (1992) ("Each of us has both a public and a private self . . . . Our ability alternatively to provide or withhold aspects of our private selves preserves and constitutes our autonomy.").

the manner of our choosing.[18] It is eroded, for example, when we are forced to disclose information we would prefer not to disclose, or if personal information is revealed to a group of people for whom we would prefer it hidden, or if we are forbidden to say things we might otherwise want to say (or compelled to say something we don't want to say). Under these sorts of conditions, we cede some control over our own public self-definition project to the government or to others (such as, for example, the press, who may want to report things about us that we prefer to remain hidden).

Although one might conceptualize this idea as "curation," one might also frame it in more negative terms as artifice or even deception.[19] And there is certainly an element of truth to this characterization. Just as celebrities employ publicists to carefully manage how they are publicly perceived, we act as our own publicists in the personas that we craft, calibrating our words, appearance, and tone in different contexts to fit our various purposes and desires. To be sure, some of this curation may be directly deceptive—like, for example, the autobiographical lies in *United States v. Alvarez*, where Alvarez falsely claimed to be a recipient of the Congressional Medal of Honor in order to impress people at a neighborhood meeting.[20] But even beyond these sorts of direct lies, managing one's public personas arguably carries with it some element of deception. A student, for example, may constantly speak to her parents about schoolwork to portray herself as hardworking and ambitious when she is in fact lazy and unmotivated.[21] Or someone might post dozens of photos of themself doing strenuous outdoor activities on their Match.com profile, when they in fact spend nearly all of their time sitting on the couch at home.

It is overly reductive, however, to dismiss the idea of public self-definition as mere artifice and deception. Public persona-building is simply a product of the fact that we do not interact with any two people in an identical manner.[22] We have a unique and distinct relationship

18. *Cf.* Solove, *supra* note 3, at 1040 ("Society accepts that public reputations will be groomed to some degree. People are often careful to keep their public reputations free of dirt and grime. Because it is possible to separate out certain aspects of life as private, and because people can prevent information about their private lives from reaching the public, people can exercise some amount of control over how others judge them in public.").

19. *See, e.g.*, Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 12 (1994) ("[T]he plea for privacy is often a plea for the right to misrepresent one's self to the rest of the world."); POSNER, *supra* note 15, at 234 (observing that people "want to manipulate the world around them by selective disclosure of facts about themselves").

20. 567 U.S. 709, 714 (2012).

21. Han, *supra* note 1, at 101.

22. *See* Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1219 (1998) ("Consider how differently we act, and rightly so, between work and home. Only an unsophisticated psychology assumes one true, essential personality, with all other personae spurned as deceitful masks.").

with each person with whom we interact, including our closest friends and family. We may be a relaxed jokester with a friend who tends to be overly serious, or a sober voice of reason to a friend who tends to make poor life decisions.[23] Although there may be some aspect of artifice and deception in our project of public self-definition, it is also an inevitable result of the fact that our "self" is, by nature, manifold and complex. We are not solely the jokester, or the sober voice of reason, or the fun-loving partier, or the stern parent, or the highly ambitious professional. We are all of these things, and we manifest these different aspects of our selves to different audiences in different contexts. To this extent, there may be no irreducible, singular "self" to whom our various personas may be compared—rather, it may be these many personas, viewed together, that constitute our true "self."[24]

B. Theoretical Foundations of the First Amendment Interest in Public Self-Definition

As may be apparent from the above description, the interest in public self-definition, writ large, is closely related to the right to privacy. In its traditional sense, the privacy right is a broad "right to be let alone,"[25] and a significant aspect of this right is the ability to control which aspects of one's self are broadcast for public consumption and which aspects are retained within a veil of seclusion.[26] The public self-definition interest is thus reflected in privacy tort claims for public

23. C.S. Lewis vividly illustrated this dynamic in reflecting on the loss of his friend Charles Williams, who was part of a close circle of friends that included J.R.R. Tolkien. Lewis stated, "In each of my friends there is something that only some other friend can fully bring out. By myself I am not large enough to call the whole man into activity; I want other lights than my own to show all his facets. Now that Charles is dead, I shall never again see Ronald's [Tolkien's] reaction to a specifically Caroline joke. Far from having more of Ronald, having him 'to myself' now that Charles is away, I have less of Ronald." C.S. LEWIS, THE FOUR LOVES 92.

24. *See* Solove, *supra* note 3, at 1038 ("I posit that neither the public nor private self represents the true self; these are just dimensions in a very complex multifaceted personality, one that is shaped by the roles a person plays. People express different sides of their personalities in different relationships and contexts."); Kang, *supra* note 22, at 1219-20 ("[A]ll our masks, all our roles, constitute integral facets of our personalities, none of which is necessarily privileged, true, or authentic. This is not to say that no core personality exists. But this core personality is a weighted composite of the multiple personalities we experience and cultivate.").

25. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

26. As Samuel Warren and Louis Brandeis stated in their seminal article on the right to privacy, "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury." *Id.* at 196.

disclosure of private facts,[27] intrusion upon seclusion,[28] and appropriation of one's name or likeness.[29] The interest is similarly reflected in right of publicity claims that protect public figures' ability to control the uses of their own public personas—and to reap the economic benefits associated with those personas—by protecting them from unauthorized appropriation.[30]

It is therefore unsurprising that most scholarly commentary touching upon a public self-definition interest has been within the context of privacy law and its associated private law contexts.[31] Daniel Solove, for example, has argued in favor of information privacy laws in part upon the premise that "[s]ociety protects privacy because it wants to provide individuals with some degree of influence over how they are judged in the public arena."[32] Scholars have observed that the public disclosure of private facts tort—which establishes liability for publicizing private, non-newsworthy facts about a person when such disclosure would be highly offensive to a reasonable person[33]—reflects the idea that our status as autonomous individuals presupposes some capacity to dictate how we present ourselves to the world.[34] As Sean Scott has argued, if the concept of individual autonomy assumes "the right to make choices about one's life," publicly disclosing private facts about another "may offend the principle of autonomy because it violates the individual's right to choose who shall be privy to" deeply private facts.[35]

Scholars have also notably discussed the public self-definition interest in the context of both privacy- and publicity-based appropriation

27. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977) ("One who gives publicity to a matter concerning the private life of another is subject to liability . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.").

28. *See id.* § 652B ("One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.").

29. *See id.* § 652C ("One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."); *infra* note 36.

30. *See, e.g.*, Joe Dickerson & Assocs. v. Dittmar, 34 P.3d 995, 1000 (Colo. 2001).

31. *See supra* note 3; *see also* Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371, 398-404 (2003).

32. Solove, *supra* note 3, at 1040.

33. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

34. *See, e.g.*, Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 722 (1996).

35. *Id.*

claims—claims in which others exploit one's name, likeness, or identity for commercial gain.[36] As Mark McKenna has observed, these claims directly implicate the interest: "[B]ecause an individual bears uniquely any costs attendant to the meaning of her identity, she has an important interest in controlling uses of her identity that affect her ability to author that meaning," and this rings true whether the plaintiff is a private or public figure.[37] We ultimately construct our identity in part through "the choices we make with respect to the cultural objects and images we incorporate into our lives," and our autonomy in this project is violated when these personal associational decisions are made by others.[38]

There has been relatively little scholarly commentary, however, with respect to a First Amendment interest in public self-definition—one that may serve as a basis for striking down government restrictions on self-defining speech.[39] This interest extends beyond the traditional privacy context, encompassing not only the freedom to dictate which aspects of one's self will be hidden from public view, but

36. *See, e.g.*, Joe Dickerson & Assocs. v. Dittmar, 34 P.3d 995, 999-1000 (Colo. 2001). Appropriation claims have traditionally been divided into privacy claims and right of publicity claims. In somewhat simplified terms, privacy claims are premised on the dignitary harms suffered by private figures who wish to avoid public attention, while right of publicity claims are premised on the economic harm suffered by public figures whose valuable names and likenesses have been appropriated without proper compensation. *Id.* Thus, a private person whose likeness is plastered on bags of flour sold by the defendant without her permission may raise a privacy-based appropriation claim, while a celebrity whose likeness is used to promote a fast-food restaurant without her permission may raise a right of publicity claim. In the former case, the private figure plaintiff's primary concern is largely dignitary in nature, while in the latter case, the celebrity plaintiff's primary concern might be more purely economic, as she would care more about the compensation she had lost as a result of defendants' appropriation of her commercially valuable name or likeness.

37. McKenna, *supra* note 3, at 279.

38. *Id.* at 281. As McKenna notes, being associated with a commercial product without our consent violates our autonomy to craft our own public image in the way we desire. A person who chooses to abstain from alcohol on moral grounds, for example, would be justifiably aggrieved if their likeness were used in an alcohol advertisement. To allow others to use our names or likenesses to promote products and services without our permission contravenes the broad interest in public self-definition: it wrests away our freedom to calibrate the various public personas through which we engage with the world in the manner of our own choosing. *Id.* at 280-82.

39. As I noted above, academic commentary regarding a broad First Amendment interest in public self-definition has been sparse at best. *See supra* note 4. Laurence Tribe, in his seminal constitutional law treatise, set forth probably the most notable explication of the interest within the First Amendment context, but his brief discussion did not delve deeply into the theoretical and doctrinal ramifications of the interest; furthermore, he characterized the interest as a privacy interest standing in opposition to First Amendment values rather than as an integral aspect of the First Amendment's protection of free speech. *See* TRIBE, *supra* note 4, at 887-90 (describing the tension between "free speech values" and "informational autonomy" values).

also the freedom to choose exactly how one will craft, calibrate, and project a wide array of distinct public personas to the world.[40]

An expansive First Amendment interest in public self-definition fits naturally within traditional First Amendment theory.[41] At the theoretical core of the First Amendment's protection of free speech is the basic idea that speech is entitled to greater protection from government regulation than non-speech conduct.[42] If this were not the case, the provision would be meaningless. But neither the sparse text of the Free Speech Clause[43] nor the historical background surrounding its drafting[44] provide much useful guidance in elucidating exactly *why* speech is entitled to this special degree of protection.

Although the Supreme Court has never adopted a single, unified theory of free expression,[45] four particular rationales have tended to dominate both the academic and judicial discourse. The first is the idea that unfettered speech has special value as a means of uncovering truth,[46] an idea famously encapsulated by Justice Holmes's statement

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40. *See, e.g.*, *infra* Section I.C (discussing the public self-definition interest as reflected in *United States v. Alvarez*, where the Court struck down a statute that criminalized lying about having received military honors); *see also* TRIBE, *supra* note 4, at 1303 (distinguishing between the "inward-looking face of privacy" and the "outward-looking aspects of self that are expressed . . . through seeking to project one identity rather than another upon the public world").

41. Portions of the discussion in this section draw from my previous work. *See* David S. Han, *Compelled Speech and Doctrinal Fluidity*, 97 IND. L.J. 841, 857-59 (2022); Han, *supra* note 1, at 97-99.

42. *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 8 (1982) ("When there is a Free Speech Principle, a limitation of speech requires a stronger justification, or establishes a higher threshold, for limitations of speech than for limitations of other forms of conduct. This is so even if the consequences of the speech are as great as the consequences of other forms of conduct.").

43. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

44. *See* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 6-7 (2d ed. 2003); Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 26-27, 29 (2011) (observing, after undertaking a detailed historical survey, that "the evidence regarding the original meaning of the Speech and Press Clauses is anything but easy to sort out" and that "[i]n the face of such deeply conflicting evidence, most scholars of the First Amendment have despaired of producing any coherent originalist account of the Speech and Press Clauses"). *See also id.* at 29 ("[T]he difficulties in identifying the original meaning of the First Amendment are a function of the reality that the meaning of free speech and a free press was something of a moving target in the eighteenth and nineteenth centuries.").

45. *See, e.g.*, Redish, *supra* note 11, at 591 ("There seems to be general agreement that the Supreme Court has failed in its attempts to devise a coherent theory of free expression."); Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 560 (2011) ("No theory has dominated the Court's complex accommodations.").

46. Probably the most notable expositor of this theory was John Stuart Mill. *See* JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) (arguing that the free exchange of ideas provides society with "the opportunity of exchanging error for truth").

that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[47] The second is the idea that unfettered speech is necessary for democratic self-governance; if the citizens in a democracy are the ultimate sovereigns, they must have the freedom to openly debate and discuss matters of public concern to govern themselves effectively.[48]

Apart from these instrumental justifications, a third rationale for protecting speech is deontological in nature: the idea that free speech is an essential aspect of individual autonomy and personhood, and thus represents a good in itself.[49] Under this view, "[o]ur ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."[50] And a final theoretical rationale for protecting speech is to check government abuse in managing public discourse.[51] That is, the reason to protect speech might have less to do with the value produced by such speech and more to do with the significant harm potentially caused by government intervention in the marketplace of ideas.[52]

The link between freedom of speech and the interest in public self-definition is readily apparent. The primary means by which we craft the contours of our public personas is through expressive activity—by selectively sharing (or not sharing) aspects of our selves under conditions of our own choosing. And at its core, the public self-definition interest is rooted in an autonomy-based view of the First Amendment. This view recognizes that free speech holds intrinsic value apart from instrumental considerations—it is a good in itself as a means to define, develop, and express ourselves as individuals.[53] Thus, if speech is the primary means by which we present our identities to the world, having

47. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

48. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16-17 (1948); *id.* at 26 (observing that for democratic self-governance to function effectively, "unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American").

49. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

50. Fried, *supra* note 12, at 233.

51. *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing "that First Amendment law . . . has as its primary, though unstated, object the discovery of improper governmental motives"); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RSCH. J. 521, 523.

52. *See* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CALIF. L. REV. 761, 782 (1986) (describing "negative" theories of free speech that "stress[] the harmful consequences of regulating speech rather than its intrinsic value").

53. *See* Fried, *supra* note 12, at 233.

the freedom to determine how we approach this project is an integral aspect of individual autonomy.[54]

More specifically, the public self-definition interest is rooted in a strong conception of *speaker* autonomy—the idea that we have a right to express ourselves as we please, without government interference.[55] The interest is thus among what Laurence Tribe has called "[the] outward-looking aspects of self that are expressed . . . through seeking to project one identity rather than another upon the public world."[56]

Autonomy, of course, is an amorphous and messy term, and one of the persistent issues with autonomy-based theories of free speech is the difficulty of drawing clear boundaries, given that essentially all conduct beyond speech can be regarded as essential to individual autonomy.[57] But if speech, broadly speaking, must be protected in order to preserve the freedom to "judge for myself what is good and how I shall arrange my life in the sphere of liberty that the similar spheres of others leave me,"[58] then an essential aspect of being an autonomous individual is the ability to exercise control over who you are. And who you are is, to a significant extent, a function of who you define yourself to be to others.[59] It is therefore difficult to conceive of any meaningful autonomy-based account of free speech that would not include within it a protected interest in public self-definition.

Although ultimately rooted in an autonomy-based conception of the First Amendment, the public self-definition interest can also be conceptualized in a manner that encompasses instrumental justifications for protecting speech. With respect to democratic self-governance, the freedom to craft the contours of one's public personas is vital in establishing the preconditions for effective democratic debate. Participating in public discourse on issues of public concern requires a certain degree of public exposure, and such exposure renders speakers vulnerable to

54. Han, *supra* note 1, at 98.

55. This stands in distinction to a *listener*-based view of autonomy, which focuses instead on our right to be exposed to different ideas within public discourse as a means of pursuing individual self-realization. *See, e.g.*, Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1300-01 (2014) (describing the "very strong strain of anti-paternalism [that] underlies our free speech jurisprudence" in which "the government should not be deciding what information audiences can or cannot access").

56. TRIBE, supra note 4, at 887-89.

57. *See, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (rejecting the argument that speech deserves special protection because of its ability to promote self-development, since other activities can also achieve this objective); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 479-80 (2011) (finding autonomy-based rationales unpersuasive because "the value of autonomy extends not merely to the speech of persons but also to the actions of persons").

58. Fried, *supra* note 12, at 233.

59. Han, *supra* note 1, at 99.

the potential costs of such speech—for example, public anger or ridicule regarding unpopular ideas or proposals.[60] This sort of response, of course, is itself speech entitled to protection, and this kind of back-and-forth interaction—even if it is sometimes uncivil—represents the backbone of democratic discourse.

Given these potential costs, however, many people would be less likely to partake in such discourse without the ability to control the conditions under which they participate in it: deciding whether they voice their opinions to the public at large or only to a select group of friends; determining whether they do so anonymously or semi-anonymously; or selecting which issues they will focus on given the particular audience in question, the social context, the potential costs of participation, and other factors. If I cannot control the conditions under which I partake in public discourse through the management of my various public personas, this may produce a chilling effect wherein I simply prefer to stay on the sidelines rather than face the potentially negative consequences of public engagement that are out of my control.[61] People are most comfortable engaging in such discourse on their own terms, through personas crafted to reflect their personal preferences. Thus, to the extent this right is eroded, democratic discourse is chilled.

A similar argument can be made based on the pursuit of truth rationale. Discourse regarding issues of factual truth—just as much as political discourse—may be subject to all sorts of potential chilling effects. Certain claims of factual truth may be unpopular or divisive, leading to potential negative consequences for the speaker. Without the ability to calibrate, *ex ante*, the personas by which such truths may be expressed—through which speakers may be able to moderate such negative consequences—speakers may be less inclined to participate in the open marketplace of ideas, thereby limiting the discovery of truth through constant challenge.

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60. *See, e.g.*, Solove, *supra* note 3, at 993-96 ("Privacy encourages uninhibited speech by enabling individuals to direct frank communication to those people they trust and who will not cause them harm because of what they say.").

61. *Cf.* David L. Bazelon, *Probing Privacy*, 12 GONZ. L. REV. 587, 590 (1977) ("[P]rivacy shelters the emerging individual's thoughts from public disclosure and control so that the fear of being watched, exposed, ridiculed, or penalized does not crush the seeds of independent thinking before they can mature."); Solove, *supra* note 3, at 1040 ("[T]he degree of control that privacy affords people over how others judge them brings important benefits—it helps them to feel more confident in the public sphere, participate in public activities more freely, and play private roles with more gusto."). As discussed below, this dynamic has been recognized in the context of disclosure laws, where donors have argued that disclosure requirements chill protected speech given the social sanctions often levied upon supporters of unpopular candidates or causes. *See infra* Section II.D.

Both of these observations also link to a negative theory of free speech based on the risk of government abuse or incompetence in actively managing the marketplace of ideas. Certainly, one way in which the government could seek to stifle dissent would be by limiting citizens' freedom to craft public personas of their own choosing. An obvious example of this dynamic would be a statute criminalizing anonymous leafletting (or, in the twenty-first century, anonymous blogging)—a clear means by which the government can chill speech that might bring government or social retribution upon the speaker.[62] Restricting our freedom to craft the public personas by which we mediate our discourse with others can thus serve as an effective means by which the government can manipulate the contours of public discourse to serve its own ends.

The public self-definition interest, however, cannot be absolute, as exercising complete and exclusive control over the crafting of our various public personas would also conflict with fundamental First Amendment principles. For example, the dissemination of truthful information regarding issues of legitimate public concern serves vital First Amendment interests even if the subject of such information—whether a public or private figure—may prefer that the information remain hidden.[63] A private person may prefer not to publicly disclose their recent arrest for armed robbery; a politician may prefer not to publicly disclose their acceptance of bribes from constituents. But while First Amendment principles establish some degree of protection for one's ability to define one's own public personas, they also dictate limits.[64] Democratic self-governance, for example, can only flourish

62. *See, e.g.*, Talley v. California, 362 U.S. 60, 64-65 (1960) (observing, in striking down a law prohibiting anonymous leafleting, that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," given the risks of retribution).

63. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 469 (1975) (deeming tort judgment against a broadcaster for publicly disclosing the name of a sexual assault victim unconstitutional under the First Amendment).

64. Indeed, these limits are specifically recognized with respect to tort claims implicating the interest in public self-definition. The public disclosure of private facts tort, for example, dictates that liability cannot attach if the publicized information is of legitimate public concern—an attempt to capture the appropriate balance between the right to seclusion from public scrutiny on the one hand and the public's right to obtain truthful factual information on the other. *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977). And privacy and right of publicity claims based on the appropriation of one's name or likeness are similarly limited by First Amendment considerations. Although people are entitled to some degree of control over the uses of their name and likeness, such control becomes antithetical to free speech values when it deprives listeners of valuable facts or commentary. *See, e.g.*, Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 397 (Cal. 2001) ("Because celebrities take on public meaning, the appropriation of their likenesses may have important uses in uninhibited debate on public issues, particularly debates about culture and values."). As a result, different jurisdictions have developed different First Amendment limitations on the scope of these torts. *See, e.g.*, *id.* at 407 ("[W]hen an artist is faced with a right of publicity

when information regarding matters of public concern is disseminated freely amongst citizens.[65] And autonomy is similarly a two-way street. While speakers retain autonomy to calibrate the various public personas that they present to the world, listeners also retain autonomy to receive information and to form and share their own opinions of others.[66]

The public self-definition interest thus represents merely one side of a balance with respect to First Amendment principles. On the one hand, exercising control over the contours of one's public personas is a fundamental aspect of individual autonomy, and it allows people to participate more comfortably in public discourse. On the other hand, if this control were absolute, it would constrain the free flow of information necessary for democratic self-governance to flourish while impinging upon the autonomy of others to receive, process, and react to such information.

Furthermore, the public self-definition interest may be outweighed by countervailing government interests. The government simply could not function if we had absolute control over the contours of our public personas. I may prefer that my compensation not be publicly disclosed in an SEC filing, but that interest is outweighed by the government's significant interests in reducing fraud and promoting transparency in the context of securities regulation.[67] Thus, the key practical question in cases implicating this interest is the relative weight the interest should hold when balanced against conflicting First Amendment values and the government's regulatory interests. Although we all have an interest in crafting our public personas, this interest is necessarily

challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame.").

65. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' ").

66. *See* Corbin, *supra* note 55, at 1298-1308 (distinguishing speakers' autonomy to "ensur[e] that the individual rather than the government controls what she says and what she thinks" from listeners' autonomy, which is premised on the idea "that the government should not be deciding what information audiences can or cannot access"); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1090 (2000) ("[S]urely it is not for government agents—whether judges or jurors—to dictate the relevant criteria for people's political choices, and to use the coercive force of law to keep others from informing them of things that they may consider relevant to those choices. I may disagree with what you base your vote on, but I must defend your right to base your vote on it, and the right of others to tell you about it.").

67. *See* 17 C.F.R. § 229.402 (2019) (requiring "clear, concise and understandable disclosure of all plan and non-plan compensation awarded to, earned by, or paid to" designated executive officers and directors).

limited, as some aspects of our public personas must lie beyond our own control.

C. The Public Self-Definition Interest within First Amendment Doctrine

Although the Supreme Court has never explicitly articulated a standalone First Amendment interest in public self-definition, the roots of such an interest can be clearly discerned when one digs beneath the surface of the Court's First Amendment jurisprudence.[68] As a starting point, the Court has frequently articulated the idea that the First Amendment protects speech in order to preserve individual autonomy and promote individual self-realization.[69] And it has specifically singled out the interest in individual self-expression as a discrete value protected by the First Amendment, stating, for example, that "our people are guaranteed the right to express any thought, free from government censorship" in order "to assure self-fulfillment for each individual."[70] As discussed above, the public self-definition interest is an aspect of this speaker-based interest in autonomous self-expression; it is a reflection of the Court's observation that "[i]t is through speech that our personalities are formed and expressed."[71]

Yet while the Court has explicitly characterized the protection of individual self-expression as a significant First Amendment concern, it has very rarely centered its constitutional analyses around this interest. Rather, it has tended to focus on instrumental rationales such as the pursuit of truth or the promotion of democratic self-governance, typically calling upon the self-expression interest merely to provide additional support for its primary arguments or to add a rhetorical flourish to its assertions.[72] This fits into Richard Fallon's observation that "autonomy-based arguments seem unlikely to possess clear and

68. Portions of the discussion in this section draw from my previous work. See Han, supra note 1, at 103-08.

69. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) (observing that the First Amendment was "designed and intended to remove governmental restraints from the arena of public discussion" based on "the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests").

70. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

71. United States v. Playboy Ent. Grp., 529 U.S. 803, 817 (2000).

72. Han, *supra* note 1, at 105. For example, in *First National Bank of Boston v. Bellotti* and *Consolidated Edison v. Public Service Commission*—cases in which the Court struck down state restrictions on corporate speech—the Court relied primarily on truth- and democracy-based concerns with the restrictions, referring to the self-expression interest only in footnotes. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-78 (1978); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 533-35 (1980). Similarly, in cases like *Mosley* and *Playboy*, where the Court explicitly delineated a First Amendment interest in self-expression, it is difficult to identify how exactly the interest concretely impacted the Court's analysis outside of its rhetorical force.

uniquely determining power in very many [First Amendment] contexts, [since] the influence of autonomy would occur mostly in the background, not the foreground, and a number of competing values are likely to be in play."[73]

This relegation of autonomy-based rationales to the background is unsurprising, given the fuzzy and open-ended nature of such arguments for speech protection. As noted above, it is difficult to draw clear boundaries when working with autonomy-based theories of the First Amendment, since nearly all human speech and conduct can be characterized, to some extent, as implicating autonomy interests.[74] Indeed, nearly any speech regulation—anytime one is prevented from saying something, or compelled to say something, or constrained in the circumstances under which one is allowed to speak—can be regarded as an infringement of one's public self-definition interest to some degree.

The sprawling breadth associated with autonomy-based theories thus tends to dilute the analytical significance of the public self-definition interest in the Court's resolution of many First Amendment cases. Instead, more concrete instrumental theories such as the pursuit of truth or the promotion of democratic self-governance typically feature more prominently, as they are more uniquely tied to the particular nature of speech and the underlying system of government contemplated by the Constitution,[75] and they often offer more meaningful analytical guidance in close cases.[76]

In certain precincts of First Amendment jurisprudence, however, the public self-definition interest has taken on a more central and meaningful role in the Court's analyses. These have generally been areas in which concerns regarding the infringement of the interest are uniquely strong given the particular nature and context of the speech regulations in question.

The influence of the public self-definition interest has been most visible in cases dealing with compelled speech—cases in which the Court made clear that the First Amendment prohibits the government from compelling people to express ideological positions that they do not support. As Vikram Amar and Alan Brownstein have observed, "there is something uniquely personal about speech that renders coerced

73. Fallon, *supra* note 5, at 905.

74. *See supra* Section I.B.

75. Han, *supra* note 1, at 105.

76. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451-53 (2011) (relying on the democratic self-governance theory to justify extending greater constitutional protection to speech on matters of public concern as opposed to speech on matters of private concern); *see also* David S. Han, *The Value of First Amendment Theory*, 2015 U. ILL. L. REV. SLIP OPS. 87, 92-93 (describing this dynamic).

communication an intrusion into personal autonomy"; thus, while instrumental rationales tend to overshadow autonomy-based rationales in traditional First Amendment doctrine, "[t]his ordering is inverted when it comes to compelled speech."[77] For example, in *West Virginia Board of Education v. Barnette*, the Court held that the government cannot require students to stand for the pledge of allegiance, under the rationale that the First Amendment "guards the individual's right to speak his own mind," which includes the ability to refrain from saying something one does not agree with.[78] It framed its analysis in terms suggesting a public self-definition interest, characterizing the speaker's interest as a "right of self-determination in matters that touch individual opinion and personal attitude."[79] This characterization reflected the core issue in the case: the government seeking to force students to broadcast a public persona that conflicts with the students' own preferred personas (dictated here by their religious beliefs).[80]

Along similar lines, the First Amendment protects people's ability to speak anonymously—that is, to separate certain public statements from any of the speaker's traceable public personas. Thus, for example, in *McIntyre v. Ohio Elections Commission*, the Court struck down an Ohio law prohibiting the distribution of anonymous campaign literature, observing that "an author generally is free to decide whether or not to disclose [his or] her true identity," whether it is "motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[81]

The public self-definition interest is also implicated in the Court's expressive association jurisprudence. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, the Court held that the organizers of a St. Patrick's Day parade could not constitutionally be required to include an LGBT advocacy group in the parade.[82] In doing so, the Court articulated the "general rule that the speaker has the right to tailor . . . speech," which "applies . . . to expressions of value, opinion, or endorsement, [and] to statements of fact the speaker would rather avoid"—a rule grounded on the "principle of autonomy to control one's

77. Amar & Brownstein, *supra* note 6, at 21-22.

78. 319 U.S. 624, 634 (1943).

79. *Id.* at 631; *see also* Han, *supra* note 1, at 105-06 (discussing the public self-definition interest within the Court's compelled speech jurisprudence).

80. *See* Wooley v. Maynard, 430 U.S. 705, 715, 717 (1977) (striking down New Hampshire's requirement that drivers carry the state motto of "Live Free or Die" on their license plates, given individuals' "First Amendment right to avoid becoming the courier for [the government's] message").

81. 514 U.S. 334, 341-42 (1995).

82. 515 U.S. 557, 559-60 (1995).

own speech."[83] And in *Boy Scouts of America v. Dale*, the Court deemed unconstitutional the forced inclusion of an openly gay member into the Boy Scouts, characterizing such action as tantamount to compelled speech.[84] In the Court's view, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior"[85]—a message that the Boy Scouts did not support.

These doctrines—and the rhetoric used by the Court in establishing them—reflect an understanding that the interest in public self-definition carries meaningful constitutional weight under the First Amendment. At a certain point, the government cannot constitutionally interfere with an individual's right to define herself by her own speech.[86] Thus, an individual cannot be forced to attach all of her public expression to a traceable name. She cannot be forced to act as a public billboard for an ideological message that she does not support.[87] And an expressive association—composed of members who share a specific set of views—cannot be forced to accept members that, by their presence, contradict the association's collective self-definitional goals. Through these doctrines and others,[88] the Court has recognized that speakers are entitled to some control over how they define themselves to the world.

Indeed, the public self-definition interest provides a strong theoretical underpinning for the Court's decision in *United States v. Alvarez*.[89] In that case, Xavier Alvarez falsely claimed to have received the Congressional Medal of Honor during a neighborhood water district board meeting.[90] As a result, he was convicted under the Stolen Valor Act, a federal statute that criminalized lying about having received military honors.[91]

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83. *Id.* at 573-74.

84. 530 U.S. 640, 653 (2000).

85. *Id.*

86. Han, *supra* note 1, at 107.

87. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977).

88. The public self-definition interest is reflected in other areas of First Amendment doctrine, such as cases dealing with the right to display signs on residential property and cases dealing with the public disclosure of charitable donations. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) ("Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else . . . . Precisely because of their location, such signs provide information about the identity of the 'speaker.'"); Ams. for Prosperity Found. v. Bonta, 594 U.S. 595 (2021) (striking down California statute that mandated charitable organizations to disclose the identities of their major donors).

89. 567 U.S. 709 (2012) (plurality opinion).

90. *Id.* at 713-14.

91. *Id.*

It is difficult to see how protecting these sorts of private, empirically verifiable lies about oneself would promote any of the traditional instrumental goals of the First Amendment. Such lies do little to promote the pursuit of truth; because nobody knows more about the speaker than the speaker herself, an audience will likely accept and propagate the speaker's false statement rather than challenge it and generate a greater understanding of the truth.[92] Nor do they typically aid in promoting democratic self-governance; they usually have little to do with issues of public concern and thus any regulation is unlikely to chill politically valuable speech.

Nevertheless, the Court struck down the Stolen Valor Act. In doing so, the Court did not articulate a clear theoretical basis for attributing any sort of constitutional value to such autobiographical falsehoods; rather, it focused primarily on the risk of government abuse associated with criminalizing lies.[93] But perhaps the clearest basis for deeming such falsehoods worthy of constitutional protection is a sense that people have some limited freedom to lie about themselves, at least when those lies don't result in material harm or encroach upon others' ability to craft their own public personas.[94] As Judge Kozinski observed in his opinion accompanying the Ninth Circuit's denial of rehearing en banc in *Alvarez*, the autobiographical lies in that case implicate "[a]n important aspect of personal autonomy[:] the right to shape one's public and private persona by choosing when to tell the truth about oneself, when to conceal and when to deceive."[95] This fundamental intuition likely underlies the Court's ultimate decision in *Alvarez*, even if the Court did not articulate it in precise terms.

II. THE ANALYTICAL DIMENSIONS OF THE PUBLIC SELF-DEFINITION INTEREST

How, then, is the public self-definition interest manifested analytically? The practical dimensions of the interest can be difficult to pin down; as noted above, it is often relegated to the background of courts' analyses, given the potentially unlimited breadth of its application and its tendency to be overshadowed by more concrete, instrumental justi-

92. *See* Han, *supra* note 1, at 93.

93. *See* 567 U.S. at 723 (plurality opinion) ("Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle.").

94. *Cf. id.* at 723 (distinguishing the lies prohibited under the Stolen Valor Act from contexts "[w]here false claims are made to . . . secure moneys or other valuable considerations").

95. United States v. Alvarez, 638 F.3d 666, 675 (9th Cir. 2011) (Kozinski, C.J., concurring) (denying of rehearing en banc).

fications for speech protection. The Supreme Court, however, has recently confronted four cases that strongly implicate the public self-definition interest: *Mahanoy Area School District v B.L.*,[96] *Americans for Prosperity Foundation v. Bonta*,[97] *Kennedy v. Bremerton School District*,[98] and *303 Creative LLC v. Elenis*.[99] These cases shed light on different factors that shape the interest and illustrate the different ways in which the interest may carry analytical weight. Furthermore, they suggest a shift within the current Court towards a more robust vision of the interest.

A. Context and Compartmentalization

As discussed above, the ability to separate and compartmentalize one's various public personas lies at the heart of the public self-definition interest. Without such separation, we lack the freedom to craft distinct public personas that are calibrated to distinct social contexts. These social contexts are defined by a wide variety of factors, such as time, geography, setting, audience, or personal role. My public persona may shift depending on whether I am at work, at a PTA meeting, or at a social event with friends; whether I'm speaking to my boss, to my parents, or to anonymous Redditors; and so forth. The public self-definition interest thus mandates some capacity for separation and compartmentalization of public personas—an ability to curate an array of distinct public personas that are deployed in varied social contexts.

Context also matters, however, for the other side of the equation: the government's ability to regulate speech in the face of speakers' public self-definition interest. As has long been reflected in First Amendment doctrine, the government's latitude in regulating speech depends on the prevailing social or institutional context. This is illustrated most prominently in cases where the government acts in a special capacity with respect to the speaker—for example, where the government acts as an educator[100] or an employer[101] rather than a mere regulator. In these contexts, the government is broadly afforded greater regulatory freedom,[102] which translates to a greater capacity to limit speakers' public self-definition interests.

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96. 594 U.S. 180 (2021).

97. 594 U.S. 595 (2021).

98. 597 U.S. 507 (2022).

99. 600 U.S. 570 (2023).

100. *See, e.g.*, Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969).

101. *See, e.g.*, Connick v. Myers, 461 U.S. 138, 140 (1983).

102. *See Tinker*, 393 U.S. at 513 ("[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not

Take, for example, the Court's recent decision in *Mahanoy Area School District v. B.L.*[103] In *Mahanoy*, B.L.—a public high school student who was angry because she didn't make the school's varsity cheerleading squad—posted a photo on Snapchat depicting her and a friend raising their middle fingers.[104] The photo was taken at a local convenience store outside of school hours, and it was captioned, "Fuck school fuck softball fuck cheer fuck everything."[105] Although the photo was sent only to her Snapchat friends and was only accessible to them for 24 hours, at least one of her friends took a picture of the post, and it spread throughout the school.[106] As a result, the school suspended B.L. from the junior varsity cheerleading squad, deeming her use of profanity in connection with an extracurricular activity to be a violation of team and school rules.[107] In an 8-1 decision, the Supreme Court held that the school violated B.L.'s constitutional rights. It observed that "the leeway the First Amendment grants to schools in light of their special characteristics is diminished" in the context of off-campus speech.[108] Although it declined to set forth any categorical rules governing the wide variety of off-campus speech contexts, the Court held that in this particular case, there was little tying B.L.'s speech to the on-campus context.[109]

The theoretical fulcrum in *Mahanoy* was the distinction between on-campus speech—in which the government, serving as educator, has greater freedom to impose restrictions on student speech—and off-campus speech.[110] In its most literal form, the on-campus/off-campus distinction is geographic in nature: when a student is physically inside the schoolhouse gates, the government takes on a special role as educator and as such retains a significant degree of latitude in regulating student speech. It loses this latitude, however, once the student steps outside of school property. But as the facts of the case indicate, the on-campus/off-campus distinction has grown murkier and more complex,

immunized by the constitutional guarantee of freedom of speech."); *Connick*, 461 U.S. at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.").

103. 594 U.S. 180 (2021).

104. *Id.* at 184-85.

105. *Id.* at 185.

106. *Id.*

107. *Id.*

108. *Id.* at 190.

109. *Id.* at 189-193. As the Court noted, the speech was made outside of school hours while B.L. was geographically off-campus. It was made on her personal device, and it was sent only to her Snapchat friends. The postings made no direct references to the school or to any specific students or teachers, nor was there any indication that they caused any disruption in the school. *Id.* at 191-193.

110. *Id.* at 187-190.

particularly given the advent of the internet and social media. A school soccer coach might create a team Facebook page in order to communicate with players or post announcements; students might create speech while off-campus but using school equipment; and so forth.[111] Furthermore, physically off-campus speech can cause significant on-campus effects, such as making a bomb threat or severe bullying.

Of course, granting the government greater regulatory leeway in the public school setting makes sense, as the government cannot effectively educate students without some ability to limit student speech: a high school student cannot interrupt a class lesson to pontificate on irrelevant matters, nor could she refuse to participate in a required class presentation without negative consequences. But the *Mahanoy* Court made clear that this broad regulatory power has limits—limits that can be understood through the lens of the students' interest in public self-definition.

As the Court framed the issue, while the government possesses considerable latitude to regulate on-campus student speech, it cannot interfere with students' freedom to construct off-campus personas that are distinct from their on-campus personas. As B.L.'s actions here suggest, while one's on-campus persona might be one that properly adheres to the social norms and rules regarding in-school conduct, one's persona outside of the school context might be irreverent, profane, and openly critical of school authority figures. And as the Court's analysis suggests, the First Amendment mandates that the government preserve *some* capacity for students to develop separate and distinct off-campus personas:

> [F]rom the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all.[112]

Thus, even when acting in its special role as educator, the government cannot exert control over the entirety of students' public personas. In other words, the government cannot effectively require that students maintain an on-campus persona at all times. Rather, students must retain the freedom to craft distinct off-campus personas that may be at odds with the expressed norms, views, and values of their government-dominated on-campus personas.

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111. *See id.* at 189 (describing the murky boundary between on-campus and off-campus speech, particularly given "the advent of computer-based learning").

112. *Id.* at 189-90.

Mahanoy thus highlights the continued vitality of the public self-definition interest—one that persists even with respect to minor public school students. And it highlights the central significance of *context* in delineating the boundaries of this interest: while students in an on-campus context necessarily cede much of this freedom to shape their own public personas, the First Amendment requires that they retain significant freedom to shape their off-campus public personas.

A similar pattern can be seen in *Kennedy v. Bremerton School District*.[113] In that case, Kennedy—a football coach at a public high school—sued the school district after he lost his job for kneeling and praying at the 50-yard line immediately following football games.[114] Kennedy is a practicing Christian, and he felt that due to his religious beliefs, he was "compelled to offer a 'post-game personal prayer' of thanks at midfield."[115] Over time, groups of players started to join Kennedy in his prayer, and Kennedy began to give "short motivational speeches" containing religious content during this time.[116] In a 6-3 decision, the Supreme Court held that Kennedy's speech was "doubly protected" under both the Free Exercise Clause and the Free Speech Clause.[117] With respect to Kennedy's free speech claim, the Court held that although Kennedy was a government employee, his speech was constitutionally protected because he prayed in his capacity as a private citizen rather than pursuant to his official duties.[118] The Court also rejected the school district's argument that its actions were necessary to avoid an Establishment Clause violation;[119] as a result, it held that the school district violated Kennedy's constitutional rights.[120]

On the face of it, *Kennedy* follows the same conceptual path as *Mahanoy*. Just as in *Mahanoy*, the degree of protection afforded to Kennedy's speech rested directly on the Court's judgment regarding its context, as the government possesses greater latitude to regulate speech when acting in its special capacity as an employer rather than as a mere regulator.[121] And just as the government cannot shut off students' capacity to define their own off-campus personas, it cannot shut

113. 597 U.S. 507 (2022).
114. *Id.* at 512-515.
115. *Id.* at 517.
116. *Id.* at 515.
117. *Id.* at 543.
118. *Id.* at 532-34
119. *Id.* at 532-43.
120. *Id.* at 543-44.
121. *See id.* at 527-29.

off employees' capacity to define their own public personas outside of the work context.[122]

Kennedy, however, suggests an even more expansive view of the public self-definition interest than *Mahanoy*. As the Court noted in *Mahanoy*, any connection between B.L.'s speech and the in-school context was highly attenuated: she sent a quickly expiring Snapchat message to a few friends outside of school hours while physically outside of school property.[123] By contrast, Kennedy sought to pray openly on the fifty-yard line in a crowded high school football stadium directly following a game.[124] To be sure, the Court, as a doctrinal matter, categorized Kennedy's speech as private speech falling outside of his official duties.[125] But practically speaking, the factual context evinces a close association between Kennedy's speech and his government employment: Kennedy had directly refused to wait until everyone had left the stadium before praying at the fifty-yard line, which the school district would have deemed sufficient to comply with their directives.[126] Rather, he specifically desired to pray on the fifty-yard line of the school football field, during a time when he was still "on the clock" with respect to his job duties, immediately following a football game in which he was prominently involved, at a time when players and many spectators were still present, in a specific location at which his prayer would be maximally visible to all observers.

Thus, in practical terms, Kennedy wanted to incorporate expressive aspects of his religious identity (here, a public prayer) into his public persona *as a football coach*, seeking to make his act of religious devotion an outward, expressive aspect of this particular public persona. In other words, unlike B.L.—who sought to retain an off-campus persona that is distinct from her on-campus persona—Kennedy sought to *integrate* and *publicly broadcast* aspects of his outside-of-work persona into his role as a public high school football coach. Viewed in this manner, the *Kennedy* Court's holding suggests an even more expansive view of the public self-definition interest—one in which government

122. *See id.* at 528 ("[W]hen an employee 'speaks as a citizen addressing a matter of public concern,' our cases indicate that the First Amendment may be implicated.").

123. Mahanoy v. B.L., 594 U.S. 180 (2021).

124. *Kennedy*, 597 U.S. at 514-15.

125. *Id.* at 529-30.

126. For one game, Kennedy waited until the stadium had emptied to conduct his prayer; the school district deemed this to be "complying with its directive that allowed [Kennedy's] religious activity, so long as he avoided 'the perception of endorsement.'" Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1011-12 (9th Cir. 2021) (en banc). Kennedy, however, would subsequently return to praying on the field immediately following the game's conclusion. *Id.* at 1012.

employees may retain significant freedom to shape their public personas even within the employment context, through performative acts purposefully designed to be viewed by a public audience.

B. Attribution and Interpretation

Another dimension of the public self-definition interest revolves around how self-defining speech is—or should be—perceived. Perception issues may revolve around attribution: to whom should the speech be attributed in a particular context? Or they might revolve around interpretation: how exactly should the speech in question be interpreted? Furthermore, questions of attribution and interpretation are often intertwined: how exactly particular speech is interpreted may rest, to a significant extent, on one's perception of who is actually speaking.

Questions regarding the attribution and interpretation of self-defining speech have arisen in recent cases involving First Amendment challenges to public accommodation statutes. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court confronted a First Amendment challenge to Colorado's Anti-Discrimination Act (CADA).[127] The "Accommodation Clause" of the CADA stated, in relevant part: "It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."[128]

In that case, Jack Phillips, a Colorado baker, refused to make a customized cake for a same-sex couple's wedding reception because of his religious opposition to same-sex marriages.[129] The Colorado Civil Rights Commission deemed this to be a violation of the CADA and imposed remedial measures on the bakery.[130] Phillips argued that this violated his free speech rights because it compelled him "to convey a celebratory message about same sex marriage"; he also argued that it violated his rights under the Free Exercise Clause.[131] The Supreme Court held that the Commission's order was unconstitutional, ruling purely on Free Exercise grounds and demurring on Phillips's compelled speech argument.[132]

127. 584 U.S. 617, 621-22 (2018).

128. *Id.* at 627.

129. *Id.* at 626.

130. *Id.* at 630.

131. *Id.* at 629-30.

132. *Id.* at 639-40. The Court held that the Commission violated Phillips's Free Exercise rights because of its "clear and impermissible hostility toward [Phillips's] sincere religious beliefs." *Id.* at 634.

This past Term, the Court decided *303 Creative LLC v. Elenis*[133]—a similar case that focused narrowly on the compelled speech question left open in *Masterpiece Cakeshop*. In *303 Creative*, a website designer named Lorie Smith brought a pre-enforcement challenge to the CADA, challenging both the Accommodation Clause and the Communication Clause, which states:

> [A] public accommodation . . . may not[] directly or indirectly . . . publish any communication . . . that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused . . . or that an individual's patronage . . . is unwelcome, objectionable, unacceptable, or undesirable because of . . . sexual orientation.[134]

Although Smith stated that she was "willing to work with all people regardless of . . . sexual orientation," she had a sincere religious objection to same-sex marriage.[135] Given that she planned to offer wedding-related website design services in the future, she wanted to make clear that she would not create websites celebrating same-sex marriage, in accordance with her beliefs. She therefore intended to post the following statement on her website:

> These same religious convictions that motivate me also prevent me from creating websites promoting and celebrating ideas or messages that violate my beliefs. So I will not be able to create websites for same-sex marriages or any other marriage that is not between one man and one woman. Doing that would compromise my Christian witness and tell a story about marriage that contradicts God's true story of marriage—the very story He is calling me to promote.[136]

Smith argued, among other things, that the CADA violated the Free Speech and Free Exercise Clauses of the First Amendment.[137] After the district court granted summary judgment in Colorado's favor, the Tenth Circuit affirmed.[138] In granting certiorari review, the Supreme Court limited review to the question of "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment,"[139] and it ultimately ruled in Smith's favor, stating that Colorado sought "to use its law to

133. 600 U.S. 570 (2023).

134. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1168-69 (10th Cir. 2021), *rev'd*, 600 U.S. 570 (2023).

135. *303 Creative*, 600 U.S. at 582.

136. *303 Creative*, 6 F.4th at 1170.

137. *Id.*

138. *Id.* at 1190.

139. 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (mem).

compel [Smith] to create speech she does not believe," in violation of the First Amendment.[140]

Both of these cases directly implicate the public self-definition interest; at root, they revolve around the degree of control individuals retain to craft the contours of their public personas. In the eyes of Phillips and Smith, creating a customized cake or designing a website for a same-sex wedding would publicly communicate something contrary to their sincerely held religious beliefs—a communication that would distort the public personas that they wish to project to the world. This position is clearly articulated in Smith's proposed statement, in which she stated that designing the websites in question would "compromise my Christian witness" by "contradict[ing] . . . the very story [of marriage] [God] is calling me to promote."[141] In other words, in Smith's view, her religious beliefs are an essential aspect of the persona that she wishes to project to the world as a Christian witness. Thus, forcing her to communicate something contrary to those beliefs robs her of her right to craft that persona as she pleases.

Furthermore, both of these cases highlight one particular way by which the public self-definition interest can carry analytical weight: through judgments regarding the attribution and interpretation of the "speech" in question. Take, for example, the *Masterpiece Cakeshop* case. Underlying the compelled speech issue is the fundamental question of whether creating a customized cake for a wedding constitutes "speech" protected by the First Amendment.[142] This speech-conduct distinction—distinguishing constitutionally protected "speech" from unprotected conduct—has long been a particularly messy and unsettled area of First Amendment doctrine,[143] as the Court's sole effort to

140. *303 Creative*, 600 U.S. at 578-79, 581.

141. *303 Creative*, 6 F.4th at 1170.

142. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

143. *See, e.g.*, Robert Post, *NIFLA and the Construction of Compelled Speech Doctrine*, 97 IND. L.J. 1071, 1079 n.43 (2022) (characterizing the speech-conduct distinction as "notoriously vague and indeterminate").

delineate a test in *Spence v. Washington*[144] has been broadly recognized as unworkable.[145]

How, then, might a court determine whether creating a customized cake constitutes self-defining speech or mere conduct? In Phillips's view, creating the cake would shape the contours of his public persona: it would outwardly express an endorsement of same-sex marriage, which would contradict his desire to construct a public persona that reflects his religious views. One might argue, however, that a reasonable observer of Phillips's cake would *not* interpret it as self-defining speech at all. Perhaps creating a cake wouldn't be viewed as communicating *anything*, just as a hardware store selling tools to a customer wouldn't be viewed as communicating anything regarding the store or its proprietor.[146] Or perhaps—even if creating the cake *does* communicate something (such as approval of same-sex marriage)—a reasonable observer would attribute that message solely to the *customer* rather than to the baker.

These sorts of judgments are often difficult to make in the abstract, as they are based on numerous contextual factors. For example, one might reasonably argue that whether the provision of a good or service meaningfully influences the proprietor's public persona largely depends on the particular good or service in question.[147] Few people

144. 418 U.S. 405 (1974) (per curiam). In *Spence*, the Court distinguished protected speech from unprotected conduct by examining whether "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Id.* at 410-11. The Court would later clarify that "a narrow, succinctly articulable message is not a condition of constitutional protection," as under this condition such protection "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995).

145. *See, e.g.*, Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250-60 (1995) (characterizing the test as "transparently and manifestly false"). As many have noted, the *Spence* test is far too broad, as it would extend to many types of communicative conduct that clearly do not trigger First Amendment scrutiny such as political assassinations or navigational charts. *See id.* at 1254 ("Navigation charts for airplanes . . . are clearly media in which speakers successfully communicate particularized messages. And yet when inaccurate charts cause accidents, courts do not conceptualize suits against the charts' authors as raising First Amendment questions.").

146. *See* Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 265 (2015) ("[A] shop providing a service, even a creative service, even on commission, does not generally convey endorsement of its customers or their events. Consequently, the wedding bakers' compliance with public accommodation laws does not merit free speech scrutiny unless there is something about the context that changes the social meaning of cake-baking by a bakery open to the public.").

147. *See, e.g.*, Brief of Prof. Dale Carpenter, Prof. Eugene Volokh, Ilya Shapiro, Am. Unity Fund, and Hamilton Lincoln Law Institute as Amici Curiae Supporting Petitioners at 17-19, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (distinguishing the creation of a wedding website—which is "uncontroversially speech"—from "[t]he great bulk of goods and services" that are "not inherently expressive").

would likely construe a hardware store proprietor's sale of a screwdriver as affecting that proprietor's public persona in any meaningful way. If, however, a freelance writer were commissioned to compose an epic poem celebrating a particular social cause, people would likely view things very differently. Furthermore, contextual factors beyond the nature of the good or service in question can potentially alter this judgment. Suppose, for example, that a neo-Nazi customer in a crowded hardware store loudly proclaims that he wants to purchase some lumber in order to build a memorial celebrating racial purity. If, in this context, the store proprietor helps the customer find the lumber and sells it to him (rather than refuse to do business with him), this would likely alter others' perception of the proprietor.

Furthermore, even if one assumes that the provision of the good or service communicates *something* about the proprietor, the exact nature of this communication is often complex and reasonably disputed. By providing the good or service, is the proprietor endorsing the underlying subject or endeavor in question? Or is she merely communicating a general willingness to provide goods or services evenhandedly, regardless of the subject or endeavor?[148] A T-shirt maker, for example, may have no problem making customized shirts with the phrase "Yankees suck." Some observers may construe this as an endorsement of the message (the proprietor agrees that the Yankees suck), while others may interpret this as mere indifference to a customer-requested message with which the proprietor may not necessarily agree (the proprietor may be a diehard Yankees fan yet have no problem printing the shirts).

The particular cause or message underlying the customer's request might also influence how the proprietor's actions are interpreted by others. Merely providing the good or service in question arguably communicates, at the very least, some baseline level of acceptance of the subject or endeavor's social appropriateness. The Yankee fan proprietor, for example, might not agree that the Yankees suck, but she may have no problem making "Yankees suck" T-shirts. She might feel very differently, however, regarding a customer request to make T-shirts glorifying genocide: such a viewpoint is so reprehensible and beyond the pale that both the proprietor and external observers may view *any* support of it—even simply fulfilling a purely customer-designed order—as reflecting some degree of approval on the part of the proprietor.

148. *Cf.* Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 65 (2006) ("Nothing about recruiting suggests that law schools agree with any speech by recruiters . . . . We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.").

Given the complexity and indeterminacy of many of these judgments, the weight of the public self-definition interest may be manifested in the degree to which the *speaker's* judgments as to the attribution and interpretation of the "speech" in question are credited over those of, say, an objective observer. As discussed above, the public self-definition interest is rooted in a speaker-based view of the First Amendment—one that emphasizes one's right to speak as one chooses.[149] A robust self-definition interest would therefore prioritize speaker autonomy, placing a thumb on the scale with respect to speakers' subjective beliefs as to how the actions in question would shape their public personas. Thus, if a baker believes that creating a customized cake for a same-sex wedding undermines the public persona he wishes to present, a robust public self-definition interest would more readily extend First Amendment protection to the baker—even if, say, a reasonable observer might not agree with the baker's judgments regarding the attribution and interpretation of his actions. By contrast, a relatively weaker public self-definition interest would place greater weight on the government's regulatory interests, deemphasizing the baker's subjective beliefs in favor of a more objective standard.[150]

303 Creative thus potentially represented an interesting litmus test as to the relative weight accorded to the public self-definition interest, particularly insofar as it raised questions regarding both the attribution and interpretation of the speech in question. To whom should the speech on a wedding website be attributed—the designer, the clients, or both? And how exactly should designing the website be interpreted—as an endorsement of the wedding and same-sex marriage, or as a neutral act expressing neither approval nor disapproval? These sorts of questions regarding attribution and interpretation arose during oral argument, with the Justices testing the parties as to how wedding websites should be perceived.[151]

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149. *See supra* Section I.B.

150. This dynamic is reflected in the majority and dissenting opinions in *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, the Court struck down New Hampshire's requirement that all drivers display the state's motto ("Live Free or Die") on their license plates. *Id.* at 713. In an affidavit, Maynard, the driver in question, had stated, "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent." *Id.* In line with Maynard's statement, the Court held that the state cannot require drivers to act as a "mobile billboard" for the state's ideological message. *Id.* at 715. Justice Rehnquist's dissent, however, emphasized the fact that when drivers display required state tags, "the format of which is known to all as having been prescribed by the State," they would not generally be "considered to be advocating political or ideological views." *Id.* at 720-21 (Rehnquist, J., dissenting).

151. *See, e.g.*, Transcript of Oral Argument at 12, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) ("[Justice Sotomayor:] [W]hy is [the wedding website] your invitation? . . . [The clients] send it to their fam[ilies] and friends. You don't send it. . . . So how [does] it become your message?"); *id.* at 106 ("[Justice Jackson:] ["[W]hen you have an artist for hire and people come to them and say here's what I'd like you to make, there's a question about whether what they make is their statement or the customer's statement.").

On these questions, Smith explicitly expressed her view that she would be speaking by designing the website and that designing the website would, in her eyes, represent sufficient endorsement of same-sex marriage as to contradict the public persona she wishes to present—one that reflects her public "Christian witness."[152] On the other hand, the United States, arguing as amicus curiae in support of Colorado, argued that the impact of the law should be evaluated on an objective rather than a subjective basis,[153] and other amici argued that Smith could post a disclaimer on her website clarifying that she does not necessarily endorse anything on the websites she designs.[154]

The Court, however, did not ultimately shed much light on how one ought to evaluate questions of attribution and interpretation in these sorts of contexts. Rather, it relied heavily on the parties' stipulations that Smith's wedding websites "will be expressive in nature," that her websites will express *her* message " 'celebrating and promoting' her view of marriage," and that website viewers "will know that the websites are [her] original artwork."[155] The Court read these stipulations as establishing that Smith's wedding websites represent pure speech rather than conduct[156] and that the messages on those websites would (at least in part) be attributed to her,[157] thereby sidestepping any sort of detailed analysis on these issues.[158]

What is notable about the Court's opinion, however, is the extent to which it highlighted the significance of speaker autonomy with respect to First Amendment protection. It emphasized the First Amendment's protection of "an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or 'deeply misguided,' "[159] and it concluded its analysis by highlighting the First Amendment's vision of the United States "as a rich and complex place where all persons are free to think and speak as

152. 303 Creative LLC v. Elenis, 6 F.4th 1160, 1170 (10th Cir. 2021).

153. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 23, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

154. *See* Brief of Public Accommodations Law Scholars as Amicus Curiae Supporting Respondents at 33, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476).

155. 303 Creative LLC v. Elenis, 600 U.S. 570, 582 (2023).

156. *Id.* at 587 (stating that this conclusion "flows directly from the parties' stipulations").

157. *Id.* at 588 (stating that "[a]gain, the parties' stipulations lead the way to that conclusion").

158. *See id.* at 599 ("Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions. But this case presents no complication of that kind. The parties have *stipulated* that Ms. Smith seeks to engage in expressive activity . . . . Nothing the dissent says can alter this—nor can it displace the First Amendment protections that follow.").

159. *Id.* at 586.

they wish, not as the government demands."[160] *303 Creative* thus suggests a robust conception of speaker autonomy—one that might accord significant analytical and rhetorical weight to the speaker's subjective beliefs in evaluating questions regarding the existence, attribution, and interpretation of speech.

C. Motive

The idea that the weight of the public self-definition interest might depend on the speaker's specific *motive* for crafting her public persona seems dissonant to the very nature of the interest. As stated above, the interest rests on a strong conception of speaker autonomy. Thus, the particular reason *why* a speaker wishes to craft her public personas in a particular way should not ultimately matter; speakers ought to retain their autonomy to shape their public personas for any reason they choose, whether it is for financial gain, social standing, or highly idiosyncratic personal reasons.

Both the Court's opinion and Justice Thomas's concurrence in *Kennedy*, however, suggest that at least one particular motive might translate to a uniquely strong public self-definition interest: crafting one's public persona in accordance with one's religious beliefs. Kennedy had raised arguments under both the Free Exercise and Free Speech Clauses in challenging the school district's disciplinary actions against him, indicating that he felt "compelled" by his "sincerely-held religious beliefs" to offer a "post-game personal prayer" of thanks at midfield immediately following each game.[161] In discussing Kennedy's arguments, the Court observed, "[w]here the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities."[162] The Court thereafter described this sort of religiously motivated speech as "doubly protected" by the First Amendment.[163]

This idea of "double protection" can be read in two different ways. One might read this merely to state that religious speech is independently protected by both the Free Exercise Clause and the Free Speech Clause—a proposition that merely reflects established First Amendment doctrine.[164] One might alternatively read this "double protection" characterization, however, to suggest that religious motivation *strengthens* one's constitutional rights under the Free Speech

160. *Id.* at 603.

161. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 517 (2022).

162. *Id.* at 523.

163. *Id.* at 543.

164. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841 (1995) (observing that "the Free Speech and Free Exercise Clauses protect . . . private speech endorsing religion") (emphasis omitted).

Clause. In other words, while speakers generally retain a free speech right to craft their own public personas through speech, that right is strengthened if the particular *motive* for doing so is religious obligation. This characterization would suggest that if Kennedy had decided to kneel on the football field after the game as, say, a purely political gesture (perhaps emulating Colin Kaepernick), his self-defining speech would be entitled to incrementally less constitutional protection.

The Court did not clarify what it meant by "double protection" in this context, but all of the cases that the Court cited support only the former interpretation: that religious speech is independently protected by the two Clauses.[165] Indeed, one of the cases cited by the Court—*Capital Square Review and Advisory Board v. Pinette*—stated, "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is *as fully protected under the Free Speech Clause as secular private expression*."[166] This indicates merely that religious speech is protected by the Free Speech Clause to the same extent as secular speech, but it is not entitled to special protection beyond that afforded to secular speech.

Justice Thomas's brief concurrence, however, suggests the latter, more expansive conception of "doubly protected" religious speech. Thomas stated that although, under current doctrinal standards, the First Amendment protects public employee speech only when the speech involves a matter of public concern, "[i]t remains an open question . . . if a similar analysis can or should apply to free-exercise claims in light of the 'history' and 'tradition' of the Free Exercise Clause."[167] He observed that "the Court has never before applied *Pickering* balancing to a claim brought under the Free Exercise Clause"; thus, "[a] government employer's burden . . . might differ depending on which First Amendment guarantee a public employee invokes."[168] This suggests that public employees' *religious* speech may be subject to categorically greater protection than nonreligious speech, such that religious speech unrelated to matters of public concern may be entitled to First Amendment protection.[169]

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165. *See Kennedy*, 597 U.S at 523. The Court cited *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981), and *Rosenberger*, 515 U.S. at 841. Both of the cited passages merely emphasized that religious speech is protected under both the Free Speech Clause and the Free Exercise Clause.

166. 515 U.S. 753, 760 (1995) (emphasis added).

167. *Kennedy*, 597 U.S at 544 (Thomas, J., concurring).

168. *Id.* at 545.

169. In a separate concurrence, Justice Alito also appeared to leave the door open to this more expansive view, albeit in a more oblique manner. *See id.* at 545 (Alito, J., concurring) ("The Court does not decide what standard applies to [Kennedy's] expression under the Free

The expansive view that religiously self-defining speech is subject to heightened protection under the Free Speech Clause as a sort of free speech/free exercise hybrid would seem anomalous from a purely speech-based perspective, as it would veer from the principle of government neutrality that underlies so much of free speech theory and doctrine.[170] Elevating self-defining speech motivated by religious conviction over self-defining speech motivated by secular purposes would resemble a content-based speech distinction, as it affords people incrementally greater freedom to shape their public personas when motivated to do so by religious conviction as opposed to any other reasons (including strongly held political beliefs).[171] The presumptive counterargument to this is that preferential treatment of religiously motivated self-defining speech is mandated by the Constitution itself—a manifestation of the special treatment broadly afforded to religious beliefs over secular beliefs encapsulated by the Free Exercise Clause.[172] In any event, such a position would create some degree of tension between the two Clauses, and the extent of the Court's willingness to extend special free speech protection to religiously motivated self-defining speech remains to be seen.

D. Standards of Review

Finally, the analytical weight of the public self-definition interest may be manifested in how courts articulate and implement standards of review. Take, for example, the Court's decision in *Americans for Prosperity Foundation v. Bonta* ("*AFP*").[173] In *AFP*, two charitable organizations raised a First Amendment challenge to a California law that required such organizations "to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year."[174] The organizations refused to file this disclosure, arguing that donors may be deterred from giving if they knew that their identities

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Speech Clause but holds only that retaliation for this expression cannot be justified based on any of the standards discussed. On that understanding, I join the opinion in full.").

170. *See, e.g.*, Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.").

171. *Cf. id.* ("[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities.").

172. *See* Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1352-53 (2012) (observing that "the Free Exercise Clause identifies religion as the subject of special protection" and thus "any theory that seeks to explain the Religion Clauses must provide an account of what is special about religion in terms of both its disabilities and protections").

173. 594 U.S. 595 (2021).

174. *Id.* at 620.

would be disclosed to the state.[175] In a splintered 6-3 decision, the Supreme Court struck down the statute, holding that it failed to meet "exacting scrutiny" due to the lack of narrow tailoring between the government's interest in preventing charitable fraud and self-dealing and the broad reach of the statutory requirement.[176]

AFP directly implicates the interest in public self-definition, as it ultimately revolves around charitable donors' interest in anonymity. As the Court has recognized in the past, disclosure requirements might discourage people from associating with various organizations—whether as members or as donors—due to the fear of public backlash should their association be made public.[177] It has therefore recognized people's freedom to manage the connection between their speech activities—such as donating money to a charitable organization or political campaign—and their public identities.[178]

Thus, for example, in *NAACP v. Alabama*, the Court held that Alabama could not constitutionally compel the production of membership lists from the NAACP during the course of state litigation.[179] In that case, the Court recognized "the vital relationship between freedom to associate and privacy in one's associations," and it observed that such compelled disclosure would likely "affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate," because it may "induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure."[180] The Court ultimately characterized the members' interest as "the right of the members to pursue their lawful private interests privately"[181]—the ability to dictate which aspects of their lives would be revealed to the public at large and which would remain hidden from broad exposure.

This aspect of the case, however, was addressed only minimally by the *AFP* Court and the concurring and dissenting Justices. The opinions instead focused largely on the technical question of the standard of review—an issue on which the Court was hopelessly split. In her dissent, Justice Sotomayor, joined by two other Justices, argued that

175. *Id.*

176. *Id.* at 610-14.

177. *See, e.g.*, Doe v. Reed, 561 U.S. 186, 199-200 (2010).

178. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (observing that "compelled disclosure . . . can seriously infringe on privacy of association and belief guaranteed by the First Amendment").

179. 357 U.S. 449, 451, 466 (1958).

180. *Id.* at 462-63.

181. *Id.* at 466.

a relatively deferential version of "exacting scrutiny" should apply.[182] Chief Justice Roberts's opinion for the Court argued for a more stringent version of exacting scrutiny—one that requires that the disclosure requirement "be narrowly tailored to the government's asserted interest."[183] And Justice Thomas, in a concurring opinion, argued that strict scrutiny should be applied[184]—a position that Justices Alito and Gorsuch appeared to favor in a separate concurring opinion.[185]

Thus, analytically speaking, *AFP* is a fairly dull case—one that swings on abstract and hair-splitting judgments as to how stringently the standard of review ought to be articulated. But underlying this formal doctrinal veneer is a fundamental disagreement as to the analytical weight to be afforded to the public self-definition interest.

At the heart of the Justices' dispute is the practical question of how much concrete evidence a charitable organization must produce in order to support its assertion that the disclosure requirement would deter potential donors from donating to it. During the course of the litigation, the state had codified a policy that prohibited public disclosure of the donor lists.[186] Nevertheless, in the Court's view, the mere *potential* of such a deterrent effect was sufficient; the Court observed that "[w]hile assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it."[187] Justice Sotomayor, by contrast, argued that plaintiffs must provide "at least some record evidence demonstrating a risk of . . . objective harms" such as "threats, harassment, or reprisals from either Government officials or private parties."[188] She further stated that courts must "carefully scrutinize[] record evidence to determine whether a disclosure requirement *actually risks* exposing supporters to backlash."[189] In doing so, she criticized the Court for effectively holding that "a subjective preference for privacy . . . now subjects disclosure requirements to close scrutiny."[190]

The Justices' positions on this question are, in effect, a function of how much weight they attribute to the First Amendment interest in public self-definition. The Court's relatively lenient approach with respect to the evidentiary burden on the charitable organizations—and

182. Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 630-31 (2021) (Sotomayor, J., dissenting).

183. *Id.* at 608 (majority opinion).

184. *Id.* at 619-21 (Thomas, J., concurring in part and concurring in the judgment).

185. *See id.* at 622-23 (Alito, J., concurring in part and concurring in the judgment).

186. *Id.* at 605 (majority opinion).

187. *Id.* at 616 ("Exacting scrutiny is triggered by 'state action which *may* have the effect of curtailing the freedom to associate,' and by the '*possible* deterrent effect' of disclosure." (quoting NAACP v. Alabama, 357 U.S. 449, 460-461 (1958))).

188. *Id.* at 627 (Sotomayor, J., dissenting).

189. *Id.* at 628 (emphasis added).

190. *Id.* at 629.

its relatively stringent approach regarding the degree of tailoring necessary for the government to justify its disclosure requirement—reflects a robust vision of the interest. Under this vision, one's interest in shaping the contours of one's public personas—here, by controlling the extent to which one's associations with charitable organizations are disclosed to others—carries significant weight even in the absence of concrete evidence that the regulation in question will actually deter potential donors. Furthermore, the interest carries significant weight against the government's asserted interests, such that the government is required to tailor any disclosure regulations carefully. It thus places significant weight on speakers' autonomy—a broad view of the public self-definition interest that is not solely concerned with the actual or likely instrumental effects of the regulation, but rather recognizes, as a matter of right, substantial freedom to manage the contours of one's public personas based on one's preferences.

Justice Sotomayor's approach, by contrast, reflects a far weaker vision of the interest. In her view, the interest holds little weight in its purest, autonomy-based form; rather, it is only entitled to consideration if it can be clearly connected, via concrete evidence, to actual chilling effects on valuable speech activity. Furthermore, even if charitable organizations were able to produce such evidence, her approach would afford the government greater leeway in imposing disclosure requirements through looser tailoring requirements. This translates to a far more diminished public self-definition interest—one that deemphasizes speaker autonomy and subjective preference in favor of more robust evidentiary standards that afford the government greater regulatory control over charitable donors' public personas.

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Thus, although the contours of the public self-definition interest can often be murky and difficult to pin down, its practical dimensions may be reflected in a wide variety of analytical considerations, such as judgments regarding how self-defining speech is contextualized, judgments regarding attribution and interpretation of such speech, judgments as to the relevance of speaker motive, and judgments regarding applicable standards of review and evidentiary burdens. With respect to these judgments, a robust conception of the interest translates to a strong focus on speaker autonomy and freedom—that is, a greater tendency to credit and rely on speakers' own perceptions, beliefs, and preferences in crafting their public personas rather than more objectively focused analyses. And the Court's recent decisions in *Mahanoy*, *Kennedy*, *AFP*, and *303 Creative* suggest that the Court is increasingly

embracing a strong version of the public self-definition interest—one that may systematically broaden the scope of First Amendment protection in future cases.

III. PUBLIC SELF-DEFINITION AND PRIVATE SPEECH REGULATION

As discussed above, the public self-definition interest represents a significant if often unspoken aspect of the First Amendment's protection of free speech. In particular precincts of First Amendment doctrine that strongly implicate the interest—such as in cases dealing with compelled speech, anonymity, and expressive associations—it underlies many of the intuitions, rhetoric, and analytical frameworks that drive the doctrine. And the interest is merely a reflection of what we all have done for time immemorial: shaping the various public personas that we present to different people, in different contexts, under different conditions.

The advent of the internet and social media, however, has drastically expanded our capacity to shape and disseminate our different public personas to the world. As discussed above, it allows people to purposefully craft distinct public personas in a far more precise and effective manner than had been possible in the pre-internet era.[191] People can craft distinct profiles that are tailored to particular contexts, and they can do so in a highly precise and intentional manner, through the careful selection and curation of photos, statements, and postings on a wide variety of online speech platforms that are geared towards different purposes.

Online personas are also often far more robust and far-reaching than what might have been previously possible. In the pre-internet era, the scope of one's capacity for self-definition was broadly limited by geographic and other limitations (at least for most people). One might craft distinct personas through day-to-day interactions with different people, but these personas were generally limited by the range of one's direct and indirect social interactions. Thus, if people were to move to a distant city, their personas often would not follow them, except to the extent that they share direct or indirect social connections with people in their new home. Rather, people would often craft new public personas largely from scratch, building them up through direct personal interactions in different social contexts.[192] In the internet age, however, one's online public personas can immediately be shared with anyone across the world; a new arrival to a community may already

191. *See supra* Part II.A.

192. *Cf.* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1231 (7th Cir. 1993) (discussing, in a case dealing with a public disclosure of private facts claim, people's desire to "bury their past" by starting a new life).

have carefully curated Facebook, Twitter, Tinder, and LinkedIn profiles that she can immediately share with anyone she wishes.[193]

As many scholars have observed, the advent and growth of the internet and social media has also broadly altered the means by which speech is practically regulated in the digital age.[194] Today, public discourse no longer occurs primarily in government-controlled public forums like streets or parks. Rather, such discourse takes place largely on the internet, and primarily on the largest private speech platforms, such as Facebook, Twitter, and YouTube. As Jack Balkin has observed, "digital speech flows through an elaborate privately-owned infrastructure of communication," such that "our practical ability to speak is subject to the decisions of private infrastructure owners, who govern the digital spaces in which people communicate with each other."[195] Speech regulation in general has therefore undergone—and continues to undergo—a massive transformation: a shift away from a singular focus on First Amendment doctrine and towards systems of private regulation established by the "large private organizations that effectively govern how most people speak today online."[196]

This broad shift in speech regulation has played—and will continue to play—a significant role in shaping the practical contours of the public self-definition interest. To be sure, government regulation—and the constitutional constraints imposed on such regulation—will continue to play an important role in defining the boundaries of the interest, as the recent Supreme Court cases discussed above attest. But the relative significance of formal First Amendment doctrine will likely diminish over time, as the practical contours of the public self-definition interest increasingly rest upon the policies and procedures established

193. To be sure, the advent of the internet and social media can also make control and compartmentalization of one's various public personas more difficult. As the adage goes, "the internet never forgets," and many people may be a mere Google search away from having past transgressions or other personal information exposed to others that they prefer to keep under wraps. *See, e.g.*, Ross Douthat, *10 Theses About "Cancel Culture"*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/opinion/cancel-culture-.html [https://perma.cc/KF29-94EN] ("All you need to do is have a particularly bad day, and the consequences could endure as long as Google.").

194. *See, e.g.*, Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149 (2018); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

195. Balkin, *supra* note 194, at 1153.

196. *Id.* at 1153-54 ("In the Algorithmic Age, . . . the rights of free expression simultaneously face threats in multiple directions. . . . In this world, the judge-made doctrines of the First Amendment, although still necessary, are inadequate to provide sufficient guarantees of free expression.").

by private platform providers rather than direct government regulation.[197]

Each online speech platform broadly fashions itself as a distinct "community" (for example, the "YouTube community" or the "Facebook community"), and over time, each has adopted a distinct set of community guidelines.[198] Facebook, for example, has community standards that limit content related to a wide variety of subjects, such as suicide and self-injury, bullying and harassment, hate speech, violent content, nudity, spam, misinformation, and "inauthentic behavior."[199] Facebook also forbids anonymous profiles; users must "use[] the name they go by in everyday life."[200] While the government would of course be constitutionally constrained from instituting these sorts of limitations on public discourse, private platform providers such as Facebook are free to do so.

How are these guidelines formulated? As Kate Klonick has observed, they are the product of a wide range of factors, ranging from general American free speech principles to companies' particular sense of their social responsibilities and identity.[201] To a significant extent, however, these policies and practices are heavily influenced by prevailing public speech norms, for the simple reason that corporations in the business of maximizing profits must create a product that fits users' desires and expectations. As Klonick observed, "[i]f a platform creates a site that matches users' expectations, users will spend more time on the site and advertising revenue will increase."[202] This often requires a careful balance: a company may risk losing users if it retains content that many deem abhorrent or deeply uncomfortable, but it may also risk losing users if it is perceived to suppress content with too heavy a hand.[203]

Thus, as online speech platforms play a more prominent role in advancing people's public self-definition interests, prevailing social

197. *See id.* at 1194 ("[A]lthough platform owners are private businesses, they are also governors—they govern the communities of people who use the applications, create and apply norms, and settle disputes among their end-users.").

198. *See, e.g.*, *Facebook Community Standards*, META, https://transparency.fb.com/policies/community-standards [https://perma.cc/DY9H-RHZ2] (last visited Jan. 15, 2024); *Community Guidelines*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/community-guidelines [https://perma.cc/65QR-S72H] (last visited Jan. 15, 2024). *See generally* Klonick, *supra* note 194 (discussing in detail the processes by which social media platforms moderate content).

199. *See Facebook Community Standards*, META, https://transparency.fb.com/policies/community-standards [https://perma.cc/UBU5-HXBP].

200. *See Names Allowed on Facebook*, META, https://www.facebook.com/help/229715077154790 [https://perma.cc/X7ZA-GUW2].

201. Klonick, *supra* note 194, at 1618-30.

202. *Id.* at 1627.

203. *Id.*

norms—as reflected in the platforms' community guidelines—will increasingly influence many of the practical contours of that interest. To be sure, social norms *always* play a central role in dictating how we craft our public personas: we internalize how the content and manner of our speech will likely be received by those around us, and we calibrate our expressive activities accordingly. But to the extent that prevailing social norms are integrated into private speech platforms' content moderation policies, they represent a concrete, external limitation on certain kinds of persona building: in effect, they dictate which sorts of public personas and methods of persona building are approved for mass public consumption and which are strictly off limits.

If, for example, one wants to construct a public persona via a Facebook profile, she cannot do so through language that constitutes hate speech[204] or that "celebrate[s] or promote[s] suicide, self-injury or eating disorders."[205] Access to a singularly powerful and unique speech platform like Facebook—one that is unparalleled in its reach and scope—requires that users conform to prevailing social norms, as reflected in Facebook's community guidelines, that are far more stringent than the boundaries of First Amendment protection.

To be sure, users who disagree with these limitations can always leave Facebook in favor of other platforms that more closely accord with their public self-definition preferences. One who wishes to create an anonymous online persona, for example, may instead choose to use a platform that allows pseudonyms, such as Twitter or Reddit.[206] Those who disagree with a platform's content moderation policies may switch to another platform with different policies. For example, when Facebook and Twitter removed users and posts that sought to delegitimize the 2020 United States presidential election, these actions drove many of the affected users to Parler, a social media platform that had become "a haven for groups and individuals kicked off mainstream platforms."[207]

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204. *See Hate Speech*, META, https://transparency.meta.com/policies/community-standards/hate-speech/ [https://pdfupload.io/docs/a9f76046] (last visited May 14, 2024).

205. *See Suicide, Self-Injury, and Eating Disorders*, META, https://transparency.meta.com/policies/community-standards/suicide-self-injury/ [https://perma.cc/2VN6-ZZK8] (last visited May 14, 2024).

206. *See What's in a Name? The Case for Inclusivity Through Anonymity*, TWITTER (Sept. 21, 2021), https://blog.twitter.com/common-thread/en/topics/stories/2021/whats-in-a-name-the-case-for-inclusivity-through-anonymity [https://perma.cc/J26Y-B2RL]; *Reddit Content Policy*, REDDIT, https://www.redditinc.com/policies/content-policy [https://perma.cc/H2FE-RNEY] (last visited Feb. 17, 2024).

207. Elizabeth Dwoskin & Rachel Lerman, *"Stop the Steal" Supporters, Restrained by Facebook, Turn to Parler to Peddle False Election Claims*, WASH. POST, (Nov. 13, 2020, 1:26 PM), https://www.washingtonpost.com/technology/2020/11/10/facebook-parler-election-claims [https://perma.cc/ESV3-KAE9].

Only a small number of platforms, however, dominate the social media market,[208] likely due to network effects wherein the value of the platform increases as the number of users increases.[209] Facebook alone accounts for approximately seventy percent of social media market share, with the top five platforms representing over ninety-eight percent of the total market.[210] Thus, other social media platforms may not prove to be adequate substitutes for the largest platforms. Indeed, Parler, which had been the preferred alternative platform for many of those fleeing Facebook and Twitter following the 2020 election, claims to have 16 million total registered users—a mere drop in the bucket compared the 3 billion people who actively use Facebook and the 400 million people who use Twitter.[211]

Furthermore, market forces and prevailing social norms are likely to channel the largest online speech platforms towards similar content moderation policies. The commercial imperative of the largest platforms—those whose reach surpasses that of niche platforms like Parler by many orders of magnitude—is to maximize revenue and drive growth through retaining as large and as active a user base as possible. One can therefore expect that the largest players will be loath to step far outside of mainstream social norms, lest they lose user accounts and activity to their competitors. Such losses would not only affect their bottom lines directly, but they would also erode any network-effect advantages associated with a large and active user base.

Indeed, a recent study comparing thirteen social media platforms' community standards found that the "platforms seem to converge toward common approaches in areas where society as a whole has

208. *See* Jane Bambauer et al., *Platforms: The First Amendment Misfits*, 97 IND. L.J. 1047, 1052-53 (2022) ("[A] small group of companies host most of the information produced and consumed by end users, and therefore wield significant power over the information environment.").

209. *See* Marina Lao, *Reimagining Merger Analysis to Include Intent*, 71 EMORY L.J. 1035, 1045-46 (2022) (observing that social media represents a "classic example" of a market characterized by strong network effects). *But see* Bambauer et al., *supra* note 208, at 1052, 1053 n.32 (stating that "the practical importance of network effects in social networking markets is still a matter of live debate," in part because "the 'market' for social networking is poorly defined").

210. *See Social Media Stats Worldwide*, STATCOUNTER, https://gs.statcounter.com/social-media-stats [https://perma.cc/9BXP-ERF7] (last visited Feb. 17, 2024); *Social Media Market Share*, T4 LABS, https://www.t4.ai/industry/social-media-marketshare [https://perma.cc/F62B-K5P4] (last updated Jan. 23, 2021).

211. *See* Shirin Ghaffary, *Does Banning Extremists Online Work? It Depends*, VOX (Feb. 23, 2022, 6:30 AM), https://www.vox.com/recode/22913046/deplatforming-extremists-ban-qanon-proud-boys-boogaloo-oathkeepers-three-percenters-trump [https://perma.cc/3HYD-LMXB].

achieved greater agreement," citing examples such as spam, terrorism-related content, contraband, violent threats, and impersonation.[212] In the wake of the January 6, 2021 riots at the Capitol, for example, nearly every major social media platform—including Facebook/Instagram, Twitter, YouTube, Snapchat, Reddit, and Twitch—took action in the form of user and content bans against Donald Trump, far-right groups, and election-related conspiracy theories.[213] Of course, where social norms are more contested, variation amongst platforms' community standards might persist;[214] as noted above, Twitter and Facebook—two of the largest and most influential platforms—have divergent policies regarding anonymous accounts, and the extent to which a particular platform regulates, say, speech that endangers civic integrity[215] may rest in part on the platform's particular sense of its mission and identity. But the more that public speech norms become concretized, the more they will be reflected consistently across the community guidelines of the largest online speech platforms.

This is not to say that stringent content-moderation policies across speech platforms are necessarily undesirable. Many might reasonably conclude that online public discourse—and the world at large—is better off when, say, terrorist advocacy, harmful disinformation, or speech promoting self-harm is removed from our social media feeds, and that the benefits of such removal justify any costs associated with line-drawing issues, chilling effects, or the risk of skewing public discourse. Many, however, might reasonably conclude the opposite.

This is only to highlight the fact that in an age when speech via private online platforms dominates public discourse, the evolution of prevailing social speech norms will increasingly shape our practical capacity to craft our public personas. And many of these norms remain

212. Jon Bateman et al., *How Social Media Platforms' Community Standards Address Influence Operations,* CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 1, 2021), https://carnegieendowment.org/2021/04/01/how-social-media-platforms-community-standards-address-influence-operations-pub-84201 [https://perma.cc/K3JL-BVU5].

213. *See* Hannah Denham, *These Are the Platforms That Have Banned Trump and His Allies*, WASH. POST (Jan. 14, 2021, 6:11 PM), https://www.washingtonpost.com/technology/2021/01/11/trump-banned-social-media/ [https://perma.cc/W5U2-W7YZ].

214. *See* Bateman et al., *supra* note 212 (observing that norms about areas such as "false information and hate speech . . . are much more globally diverse and contested" and "[p]latform community standards seem to reflect this reality").

215. *See id*. (indicating which platforms have policies regarding "civic integrity" and a wide range of other matters).

hotly contested flash points within today's culture wars. Debates continue to rage surrounding issues such as hate speech,[216] "cancel culture,"[217] and disinformation[218]—debates that mirror many of the debates central to traditional First Amendment theory and doctrine, in which the interest in unfettered expression is weighed against the social costs of such expression. And further complicating matters is the fact that while social norms shape the policies and procedures of online speech platforms, those policies and procedures can also work to shape social norms.[219] If, for example, all the major platforms were to ban certain speech, this would likely influence a society whose discourse occurs primarily on these platforms to increasingly regard that speech as verboten and unacceptable.

Thus, although government regulation and constitutional doctrine will continue to play a meaningful role, the future of the public self-definition interest will increasingly rest in our own hands. To the extent that our capacity to shape our public personas is now largely mediated by private online speech platforms, the boundaries within which we can develop these personas are dictated by those platforms' community guidelines.[220] And those guidelines, in turn, will reflect the public speech norms that we, as a society, have chosen to adopt. Thus, in the future, how we ultimately resolve the many heated debates over speech norms that dominate our present culture wars may prove to matter far more in dictating the practical contours of our public self-definition interest than how courts resolve cases implicating formal First Amendment doctrine.

IV. CONCLUSION

The First Amendment interest in public self-definition is both concrete and elusive. As a conceptual matter, its presence and significance

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216. *See, e.g.*, Erik Nielson, *If We Silence Hate Speech, Will We Silence Resistance*, N.Y. TIMES, (July 10, 2020 6:02 AM), https://www.nytimes.com/2018/08/09/opinion/if-we-silence-hate-speech-will-we-silence-resistance.html [https://perma.cc/5BQJ-6HMH].

217. *See, e.g.*, Ligaya Mishan, *The Long and Tortured History of Cancel Culture; Notes on the Culture*, N.Y. TIMES (Dec. 3, 2020 3:45 PM), https://www.nytimes.com/2020/12/03/t-magazine/cancel-culture-history.html [https://perma.cc/J46E-XFT9]; David S. Han, *Disentangling "Cancel Culture"*, *in* MINORITIES, FREE SPEECH AND THE INTERNET 167-80 (Oscar Pérez de la Fuente et al. eds., 2023).

218. *See, e.g.*, Steven Lee Myers & Zolan Kanno-Youngs, *Partisan Fight Breaks Out Over New Disinformation Board*, N.Y. TIMES (May 2, 2022, 9:29 AM), https://www.nytimes.com/2022/05/02/technology/partisan-dhs-disinformation-board.html [https://perma.cc/QU8H-ZGFS].

219. *See* Bateman et al., *supra* note 212.

220. *Cf.* Moody v. NetChoice, LLC, 603 S. Ct. 707, 2024 WL 3237685 (July 1, 2024), at *15 ("When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection.").

is clear: we interact with the world through the various public personas that we create, and our capacity to control how we construct and share these personas is undoubtedly a vital aspect of our individual autonomy. Yet the interest is elusive because it is both ubiquitous and evanescent, often fading to the background in First Amendment analyses to be overshadowed by more traditional instrumental rationales for speech protection. Nevertheless, the public self-definition interest continues to represent a significant aspect of the First Amendment's protection of free speech, and its doctrinal influence may be growing thanks to a Court that appears increasingly sympathetic to arguments premised on speaker autonomy. And as discussed above, the future dimensions of the interest will likely be shaped not only by constitutional doctrine, but—to an increasing extent—by the resolution of ongoing social debates regarding public speech norms, as those prevailing norms will ultimately be absorbed and reflected in the community guidelines of the dominant online speech platforms.

Furthermore, the constitutional significance of the public self-definition interest is not limited solely to the Free Speech Clause. The Free Exercise Clause, for example, preserves people's freedom to craft their public personas through actions consistent with their religious beliefs.[221] The Fourth Amendment's protection against unreasonable searches and seizures allows people to shape their public personas by preserving private spaces free of unwarranted government intrusion, as such spaces allow us to control which aspects of our lives are exposed to public scrutiny and which are hidden behind a veil of privacy.[222] And substantive due process doctrine—at least at the moment—establishes constitutional protection for many of the intimate relationships that play an essential role in defining our public selves, such as marriage, family relationships, and child rearing.[223] The public self-definition interest therefore represents a vital link connecting the Free Speech Clause to the broader constellation of constitutional rights. Just as much as the ability to worship as one pleases, or the ability to retain a safe personal space free of government interference, or the ability to make decisions regarding "the most intimate and personal choices a person may make in a lifetime,"[224] the ability to expressively shape the contours of one's own public personas is ultimately

221. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

222. *See id.* amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

223. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573-74 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."). *But see* Dobbs v. Jackson Women's Health Org., 594 U.S. 215, 231 (2022) (holding that abortion is no longer a constitutionally protected right under substantive due process doctrine).

224. *See Lawrence*, 539 U.S. at 574.

inextricable from the foundational right to individual personhood and autonomy that stands at the very core of the Bill of Rights.