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THE INDIVIDUAL RIGHT AGAINST BINARY IDENTITY

COLIN POCHIE*

INTRODUCTION

Identification documents encompass our lives and follow us from birth to death. Birth certificates, driver’s licenses, social security cards, passports—all serve to confirm one’s identity.¹ And to do so, each document bears necessary identifying information: name, date of birth, address, citizenship status, signature, and so on.² Some also carry information about our physical appearance and gender.³ Most states divide this latter designation between male and female.⁴

Yet many people do not slot neatly into this identification binary. Gender is necessarily core to an individual’s identity—it shapes the way they interact with others and with the world around them.⁵ In turn, gender manifests as an expression of self-perception.⁶ It functions

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¹ See, e.g., DEP’T OF STATE, U.S. PASSPORT APPLICATION 2 (Jun. 2016), <https://travel.state.gov/content/dam/passports/forms-fees/ds11.pdf>, (allowing use of documents like driver’s licenses and passports to establish identity); see also Alissa S. Kalinowski, Comment, *Compelling Agency Action: A Novel Regulatory Avenue for Correcting the Birth Certificates of Transgender Citizens*, 70 ADMIN. L. REV. 961, 968 (2018) (“[P]eople also frequently use their birth certificates as a form of identity documentation. Individuals utilize their birth certificates to acquire employment, receive government pension or insurance benefits, and obtain a passport, driver’s license, and Social Security number.”).

² See Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 747, 749 (2015) (asserting that identity can be presented through numerous factors like race and sex).

³ See 6 C.F.R. § 37.17(c) (2012) (requiring gender for REAL ID Act compliant driver’s licenses).

⁴ See NAT’L CTR. FOR TRANSGENDER EQUALITY, HOW TRANS-FRIENDLY IS THE DRIVER’S LICENSE GENDER CHANGE POLICY IN YOUR STATE? (2020), <https://transequality.org/sites/default/files/docs/resources/Drivers%20License%20Grades%20Jan%202020.pdf>.

⁵ See JULIA T. WOOD, GENDERED LIVES: COMMUNICATION, GENDER, AND CULTURE 23–27 (9th ed. 2011); see also Brian T. Ruocco, Comment, *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV. 193, 196 (2016) (observing that recorded legal gender helps structure an individual’s life and “affects how the individual navigates sex-segregated facilities, legal documentation, gendered expectations, and interactions with state and nonstate entities.”).

⁶ See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 146, 152–54 (2007) (listing examples of how gender manifests as an expression of self-perception by listing ways women would describe themselves as “masculine” or “feminine”).

as a social construct, as well as expression of one's perception of being a man, woman, or gender-nonconforming person.⁷ Gender is thus distinct from (although also informed by) sex, which is assigned at birth based in part on physically observable traits.⁸ Social construct even influences the assignment of sex; for example, doctors often choose intersex individuals' sex for them with invasive surgery.⁹

Nonbinary, agender, and genderfluid people, meanwhile, do not fall into the male/female binary.¹⁰ Instead, much of nonbinary experience is defined either by rejecting binary expression or mixing signals—everything from hair, clothing, speech, gait, and more—which collectively align with neither singularly male nor singularly female expression.¹¹ This contrasts with cisgender people, whose gender expression aligns with their sex assigned at birth; it also contrasts with some transgender people, who often adopt the expression most aligned with their gender identity.¹² Both nonbinary and transgender people sometimes suffer from gender dysphoria as well, which is defined as a continuous incongruence between one's "expressed/experienced gender and the gender others would assign" one.¹³

For both nonbinary and transgender people too, rejection of gender identity and repression of gender expression harms mental health and self-perception.¹⁴ While not present in all instances, this tension may involve significant psychological distress.¹⁵ Positive socialization and reinforcement of gender identity alleviates this harm.¹⁶ One exam-

⁷ *Id.* at 152–54.

⁸ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision between Law and Biology*, 41 ARIZ. L. REV. 265, 278 n.74 (1999).

⁹ Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 283–85 (1993).

¹⁰ See NAT'L CTR. FOR TRANSGENDER EQUALITY, UNDERSTANDING NON-BINARY PEOPLE 1 (2016), https://transequality.org/sites/default/files/docs/resources/Understanding-Non-Binary-July-2016_1.pdf (defining nonbinary, agender, and genderfluid people).

¹¹ Shelby Hanssen, Note, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in Law*, 96 OR. L. REV. 283, 287 (2017); see YOSHINO, *supra* note 6, at 24 (observing that identity is constructed not just by status or by mere existence, but also by conduct).

¹² See *Transgender FAQ*, GLAAD, <https://www.glaad.org/transgender/transfaq> (last visited Mar. 15, 2020) (discussing transgender identity); see also *Cisgender*, OXFORD ENGLISH DICTIONARY (3d ed. 2015).

¹³ AM. PSYCHIATRIC ASS'N, GENDER DYSPHORIA 1 (2013).

¹⁴ See Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOL. 832, 832 (2015).

¹⁵ *Id.*

¹⁶ *Id.*

ple is allowing individuals to use restrooms which align with their gender identity.¹⁷ Another is government documentation that reflects a person's lived gender. According to a.t. Furuya, a nonbinary person who won a gender-change petition in 2017, “[w]henever I go to the bank or a bar or the airport, I get anxious about showing my I.D. . . . this order means I am not on my own anymore—my state recognizes me.”¹⁸

Several jurisdictions allow modifications to one's name and gender on government identification.¹⁹ This option is helpful for transgender people and allows them to reinforce and live as their experienced gender.²⁰ But what of nonbinary people? Several states and Washington, D.C. now offer a third gender option for government identification.²¹ Some cities like Chicago will also allow a third gender option on their municipal identification.²² But that leaves out most states, which still force nonbinary people to adhere to binary identification.²³ If the First Amendment right not to speak is to mean anything, then state governments cannot force binary expression on nonbinary people.²⁴

Though others have argued for either abolishing binary gender identification or taking a contextual approach, this article addresses the individual rights of nonbinary people and advocates for third-gender identification options.²⁵ Part I of this article thus examines the law of

¹⁷ WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 1, 68 (7th ed. 2012), [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf) [hereinafter WPATH STANDARDS]; see Am. Psychological Ass'n, *supra* note 14, at 839.

¹⁸ *CA Court Issues Nonbinary Gender Change to Transgender Law Center Client*, TRANSGENDER L. CTR. (Feb. 10, 2017), <https://transgenderlawcenter.org/archives/13570>.

¹⁹ See *Identity Document Laws and Policies: Driver's License*, MOVEMENT ADVANCEMENT PROJECT (Mar. 11, 2020), <https://www.lgbtmap.org/img/maps/citations-id-drivers-license.pdf>.

²⁰ See WPATH STANDARDS, *supra* note 17, at 32; see also Am. Psychological Ass'n, *supra* note 14, at 841.

²¹ NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 4; see Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897 n.7 (2019) (collecting laws).

²² CHI., ILL. MUN. CODE ch. 2-176 (2019); see *Chicago Municipal ID Offers Third Gender Option*, HOWARD BROWN HEALTH (Dec. 18, 2017), <https://howardbrown.org/chicago-municipal-id-offers-third-gender-option/>; see also H.B. 3534, 101st Gen. Assemb. (Ill. 2019) (authorizing the addition of a third gender identity option on identifications statewide).

²³ See MOVEMENT ADVANCEMENT PROJECT, *supra* note 19.

²⁴ See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that “where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.”); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 31 (1989) (“Liberty must presumably include the opportunity for involvement in the choice of, or responsible acceptance and affirmation of, those elements of our world that are matters of human creation and that are important for a person’s self-definition and self-realization.”).

²⁵ See Clarke, *supra* note 21, at 902 (arguing for “a contextual approach to debates over sex and gender regulation”); see also Ruocco, *supra* note 5, at 197–98 (arguing for abolition of

gender nonconformity and how courts have viewed gender norms as expressive.²⁶ It also explores recent gender-change litigation for both transgender and nonbinary people.²⁷ Part II reviews the jurisprudence supporting the right not to speak, the right to identity expression, and the doctrine of government speech.²⁸ Part III in turn applies the right not to speak to nonbinary people and argues that compulsory binary identification constitutes compelled speech under the First Amendment.²⁹ In conclusion, this article recommends that states introduce uniform third-gender options on identification documents to vindicate the liberty interests of nonbinary people.

I. THE LAW OF GENDER NONCONFORMITY

Gender reclassification schemes vary from state-to-state.³⁰ Many require some proof of surgery—phalloplasty or vaginoplasty.³¹ Until January 1, 2019, New York State required a doctor’s letter certifying that the applicant identified as transgender or was otherwise gender-nonconforming.³² California does not.³³ Some states, like Tennessee, outright forbid gender reclassification.³⁴ Certain federal agencies like the State Department have similar requirements as well.³⁵

Sex itself is subject to its own constructs. Biological determinists³⁶ often insist that sex is determined by genitalia—the circumstance

gender markers); see also Anna James (AJ) Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. L. & GENDER 491, 494–95 (2016) (same).

²⁶ See *infra* Part I.

²⁷ *Id.*

²⁸ See *infra* Part II.

²⁹ See *infra* Part III.

³⁰ See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 736 (2008).

³¹ *Id.* at 736–37.

³² Brooke Sopelsa, *Gender ‘X’: New York City to Add Third Gender Option to Birth Certificates*, ABC NEWS (Sept. 12, 2018), <https://www.nbcnews.com/feature/nbc-out/gender-x-new-york-city-add-third-gender-option-birth-n909021> (last updated Dec. 29, 2018).

³³ CAL. HEALTH & SAFETY § 103430 (2019), https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=102.&title=&part=1.&chapter=11.&article=7.

³⁴ See Tenn. Code Ann. § 68-3-203(d) (2016).

³⁵ *Know Your Rights: Passports*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/know-your-rights/passports> (last visited Mar. 15, 2020).

³⁶ Generally defined as those who “think that sex and gender are coextensive.” Mary Mikkola, *Feminist Perspectives on Sex and Gender*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 25, 2017), <https://plato.stanford.edu/entries/feminism-gender/>.

of possessing a penis or vagina.³⁷ But intersex people exist.³⁸ Indeed, somewhere between 0.05% and 1.7% of all people are born with a mixture of sex characteristics.³⁹ The very existence of intersex people reflects that sex—at least, if derived from physical characteristics—exists across a spectrum, instead of a binary.⁴⁰ Yet doctors often decide an intersex person’s genital form for them, even when there is no medical need to do so.⁴¹

Determinists also point to secondary sex characteristics—like body hair and hormone levels—to determine sex.⁴² Hormone levels are alterable, however.⁴³ Their attendant characteristics change with those levels as well; for example, certain cisgender women can grow beards depending on their hormonal makeup.⁴⁴ Indeed, polycystic ovary syndrome causes hormonal imbalances that lead to that exact phenomenon.⁴⁵ Consider too those who take hormone supplements or inhibitors.⁴⁶ Hormone replacement therapy is common for both menopause and osteoporosis.⁴⁷ Despite those deviations, these people still retain their gender identity.⁴⁸

The argument comes to rest at the chromosomal level: boys have XY chromosomes, girls have XX chromosomes.⁴⁹ This idea betrays a juvenile understanding of biology, however.⁵⁰ Take men who suffer

³⁷ *Id.*

³⁸ *What is Intersex?*, INTERSEX SOC’Y OF NORTH AM., http://www.isna.org/faq/what_is_intersex (last visited Mar. 15, 2020).

³⁹ *Intersex 101*, LAMBDA LEGAL (Oct. 26, 2015), https://www.lambdalegal.org/blog/20151026_intersex-101.

⁴⁰ INTERSEX SOC’Y OF NORTH AM., *supra* note 38.

⁴¹ Paul D. Castillo, *Ask Lambda Legal—What Does “Intersex” Mean?*, LAMBDA LEGAL (Nov. 10, 2015), https://www.lambdalegal.org/blog/20151110_ask-lambda-legal-intersex.

⁴² *See* Mikkola, *supra* note 36 (stating that social forces, not hormones, shape the perception of sex).

⁴³ *See Hormone Therapy: Is it Right for You?*, MAYO CLINIC (Apr. 14, 2015), <https://www.mayoclinic.org/diseases-conditions/menopause/in-depth/hormone-therapy/art-20046372> (informing about various hormone treatments to treat menopausal symptoms).

⁴⁴ *Hirsutism*, MAYO CLINIC (Mar. 7, 2018), <https://www.mayoclinic.org/diseases-conditions/hirsutism/symptoms-causes/syc-20354935>.

⁴⁵ *See* Julie Mazziotta, *Woman Decides to Let Her Beard Grow Freely after 26 Years of Shaving: “I Was Ready”*, PEOPLE: BODIES (Jun. 15, 2016), <http://people.com/bodies/woman-decides-to-let-her-beard-grow-freely-after-26-years-of-shaving/>.

⁴⁶ *See* Eric Berlin, *Refocusing Your Identity in Menopause*, EVERYDAY HEALTH (Jul. 21, 2011), <https://www.everydayhealth.com/menopause/refocusing-your-identity.aspx>.

⁴⁷ *See* Yvette Brazier, *What You Need to Know about HRT*, MED. NEWS TODAY (May 25, 2017), <https://www.medicalnewstoday.com/articles/181726.php>.

⁴⁸ *See* Berlin, *supra* note 46.

⁴⁹ *See* Mikkola, *supra* note 36.

⁵⁰ *See How Common is Intersex?*, INTERSEX SOC’Y OF NORTH AM., <http://www.isna.org/faq/frequency> (last visited Mar. 15, 2020).

from Klinefelter syndrome—they may possess one or more extra X chromosomes and develop more feminine characteristics than other men.⁵¹ Women who suffer from congenital adrenal hyperplasia experience much the same—they develop masculine sexual characteristics, including masculinized genitals.⁵² In all these cases, few would accuse them of belonging to a different sex.⁵³ But it also shows the tension between the identity we derive and the moldable characteristics that identity is based upon.⁵⁴

As discussed above, gender is even more fraught.⁵⁵ It draws not just from sex characteristics, but also from the value we ascribe to those characteristics.⁵⁶ The identity that we create depends on the value that we place in those characteristics.⁵⁷ Nonbinary people, then, construct identity in a way that transgresses traditional gender constructs.⁵⁸ But that identity also mixes gender norms in ways that do not form a binary whole.⁵⁹

While little precedent on the status of nonbinary identity exists, a large body has accumulated on gender transgression and how it intersects with dignity.⁶⁰ Though dignity sounds in due process, it has a deep interplay with liberty and other First Amendment principles.⁶¹ To understand expressive rights in identity, it is therefore useful to look to dignity jurisprudence.⁶²

A. Cisgender Transgression, Transgender Identity, and Dignity

One of the earliest examples of the intersection of gender non-conformity and dignity is *Bowers v. Hardwick*.⁶³ There, a gay man challenged a Georgia statute criminalizing sodomy under which he had been

⁵¹ See *id.*

⁵² MARGARET M. MCCARTHY, HANDBOOK OF NEUROENDOCRINOLOGY 393–413 (2012).

⁵³ See Kerstin Hagenfeldt, et al., *Fertility and Pregnancy Outcome in Women with Congenital Adrenal Hyperplasia Due to 21-Hydroxylase Deficiency*, 23 HUM. REPROD. 1607, 1612 (2008).

⁵⁴ See *Self Identity*, DESTINY'S ODYSSEY, <http://destinysodyssey.com/personal-development/self-development-2/self-concepts-self-constructs/self-identity/> (last visited Mar. 15, 2020).

⁵⁵ See WOOD, *supra* note 5, at 23–24; see also Ruocco, *supra* note 5, at 202.

⁵⁶ See WOOD, *supra* note 5, at 23–24; see also Ruocco, *supra* note 5, at 202.

⁵⁷ See WOOD, *supra* note 5, at 23–24; see also Ruocco, *supra* note 5, at 202.

⁵⁸ See Hanssen, *supra* note 11, at 285.

⁵⁹ *Id.*

⁶⁰ See *infra* Part I-A.

⁶¹ See BAKER, *supra* note 24, at 87–88.

⁶² See *infra* Part I-A.

⁶³ See 478 U.S. 186, 187–89 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

charged.⁶⁴ In some sense, that case involved how Hardwick constructed his identity as a gay man; sexual autonomy is an essential part of identity for many.⁶⁵ Writing for the majority, Justice White characterized the case as demanding a right to sodomy.⁶⁶ In doing so, he rejected the notion that gay people had the same rights as heterosexual people.⁶⁷

That mischaracterization faced a reckoning in *Lawrence v. Texas*, which expressly overruled *Bowers*.⁶⁸ Under similar facts, the Court held that the liberty interest of dignity protected the sexual rights of gay people.⁶⁹ But what stands out is how the Court considered the concept of dignity.⁷⁰ Essential to that right of dignity was the ability for adults to relate to one another and find acceptance.⁷¹ Thus, the state cannot “define the meaning of . . . relationship[s] or . . . set [their] boundaries . . . adults may choose to enter upon this relationship . . . and still retain their dignity as free persons.”⁷²

That same articulation of dignity through self-determination found even more support in *Obergefell v. Hodges*.⁷³ The Court there expanded the right to include same-sex marriage.⁷⁴ Citing First Amendment precedent, the Court held that “these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”⁷⁵ That the ability to establish relationships is core to autonomy and identity, then, is clear.⁷⁶ One scholar observed too that equality for LGBT individuals

⁶⁴ *Id.* at 187–88.

⁶⁵ *See id.* at 187–89.

⁶⁶ *Id.* at 190.

⁶⁷ *Id.* at 190–91.

⁶⁸ *Lawrence*, 539 U.S. at 577.

⁶⁹ *Id.* at 567.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ 135 S. Ct. 2584, 2597, 2599, 2608 (2015).

⁷⁴ *Id.* at 2602.

⁷⁵ *Id.* at 2597–98 (citing *Griswold v. Connecticut*, 381 U.S. 479, 483–86 (1965) to support discussion of dignity and its intersection with the First Amendment freedom of association. That itself was based on the right to identity drawn from *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 631–36 (1943)).

⁷⁶ *See* Steven J. Heyman, *A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage*, 14 FIRST AMEND. L. REV. 1, 45 (2015) (stating “[a]s the whole line of cases from *Romer* through *Obergefell* makes clear, LGBT people should be free to form socially and legally recognized relationships on the same terms as heterosexuals can . . . [a]bove all, they have a right to live in accord with their own values and identities while being treated as full and equal human beings and citizens.”).

may only come about “when society stop[s] conditioning our inclusion on assimilation to straight norms.”⁷⁷

The Court has gone as far as recognizing that dignity—and all its attendant self-determinative concerns—may come from state identification schemes.⁷⁸ In *Pavan v. Smith*,⁷⁹ it held that Arkansas could not exclude one of a child’s same-sex parents from that child’s birth certificate.⁸⁰ Because the state allowed non-biological heterosexual parents to be listed, it denied same-sex parents the same dignity of legal recognition by excluding them from birth certificates.⁸¹ Indeed, the Court acknowledged that the certificate imparted “legal recognition that is not available to unmarried parents,” thus rendering it “more than a mere marker of biological relationships”⁸² Though Terrah and Marisa Pavan would have been their child’s legal parents regardless of what the birth certificate said, state recognition of their identities and relationship was still essential to their dignity rights.⁸³

A full-throated recognition of transgender and nonbinary individuals’ dignity rights in the same context has only recently emerged.⁸⁴ The court in *Gonzalez v. Nevares*⁸⁵ held that the Commonwealth of Puerto Rico violated transgender individuals’ privacy and autonomy by requiring their birth certificates to bear any struck-out information after legally changing their names or gender designations.⁸⁶ Just as the Court in *Pavan* acknowledged that excluding identity-affirming information from a legal document violated autonomy and dignity, the *Gonzalez* court acknowledged that including identity-contradicting information does the same.⁸⁷ Though resolved on privacy grounds, the decision shows how “speech and identity are often intimately linked” and how the former helps “construct queer identities and gender norms.”⁸⁸ It should come as little surprise then that nonbinary individuals have pushed for similar recognition in recent years.⁸⁹

⁷⁷ See YOSHINO, *supra* note 6, at 21.

⁷⁸ See *Pavan v. Smith*, 137 S. Ct. 2075 (2017).

⁷⁹ *Id.*

⁸⁰ *Id.* at 2076–77.

⁸¹ *Id.* at 2078.

⁸² *Id.* at 2078–79.

⁸³ See *Pavan*, 137 S. Ct. at 2077–78.

⁸⁴ See *Gonzalez v. Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018).

⁸⁵ *Id.*

⁸⁶ *Id.* at 328, 333.

⁸⁷ Compare *Pavan*, 137 S. Ct. at 2078–79 with *Gonzalez*, 305 F. Supp. 3d at 333.

⁸⁸ Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 901–02 (2018).

⁸⁹ See *infra* Part I-B.

B. Nonbinary People and the Law

Litigation over nonbinary identity is relatively new.⁹⁰ In one recent case, *a.t. Furuya*, a nonbinary individual, successfully argued for gender reclassification to nonbinary.⁹¹ Furuya argued that they had lived as a nonbinary person for over half their life, but still “regularly face[d] harassment and challenges because of the perceived incongruence between [their] gender nonconforming appearance and their stereotypically feminine name and female gender marker on their government-issued identification documents.”⁹² In a given example, Furuya detailed how they had to explain their situation when conducting business at their bank because their identification did not reflect their appearance.⁹³

Furuya argued that the First Amendment protected them from binary identification and described the binary requirement as state-compelled speech.⁹⁴ At the core of this assertion was that Furuya’s construction of identity inherently rejected binary gender.⁹⁵ To force them to accept it would be to violate the values that the First Amendment protects—it would compel them to speak.⁹⁶ The court ultimately granted *a.t.’s* request without ruling on the merits of their First Amendment argument, however.⁹⁷ Other courts faced with similar claims have followed suit.⁹⁸

Dana Zzyym’s struggle against the State Department’s binary-gender rules, meanwhile, has received significant attention over recent years.⁹⁹ Yet the court in *Zzyym v. Pompeo* also resolved the dispute under the Administrative Procedure Act and left Zzyym’s liberty claims unanswered.¹⁰⁰ The Department there had denied Zzyym—an intersex

⁹⁰ See *infra* Part I-B.

⁹¹ Memorandum of Points and Authorities in Support of Petition for Change of Name and Gender at 2, *In re a.t. Furuya*, No. 37-2016-00044778-CU-PT-CTL (Cal. Dec. 20, 2016); see also *CA Court Issues Nonbinary Gender Change to Transgender Law Center Client*, TRANSGENDER L. CTR. (Feb. 10, 2017), <https://transgenderlawcenter.org/archives/13570>.

⁹² Memorandum of Points and Authorities in Support of Petition for Change of Name and Gender, *supra* note 91, at 2.

⁹³ *Id.* at 2–3.

⁹⁴ *Id.* at 12.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Decree Changing Name and Gender, *In re a.t. Furuya*, No. 37-2016-00044778-CU-PT-CTL (Cal. Feb. 10, 2017).

⁹⁸ See, e.g., *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1261 (D. Colo. 2018).

⁹⁹ See Reuters, *U.S. Judge Rules for Colorado Intersex Veteran Denied Passport*, NBC NEWS (Sept. 20, 2018), <https://www.nbcnews.com/feature/nbc-out/u-s-judge-rules-colorado-intersex-veteran-denied-passport-n911391>.

¹⁰⁰ 341 F. Supp. 3d at 1260–61.

person—a nonbinary designation on their passport, and instead insisted that they choose either a male or female designation.¹⁰¹ Because Zzyym refused, the Department denied their passport; at the time, Zzyym commented that it was “a painful hypocrisy that, simply because I refused to lie about my gender on a government document, that the government would ignore who I am.”¹⁰²

The Department gave several justifications for the policy, each less successful than the last.¹⁰³ As the court found, three justifications—that the Department needs consistent sex data to ensure passport accuracy, to determine passport eligibility, and to verify a passport-holder’s identity—all boiled down to the same purported need to cross-check gender with other identity systems.¹⁰⁴ The court rejected all three in part because the Department already had identity-verification procedures that either worked independent of sex data from states and other federal agencies or disregarded sex data entirely.¹⁰⁵ What’s more, the International Civil Aviation Organization—the same organization that originally recommended binary gender markers on passports—now recommends nonbinary gender markers for passports.¹⁰⁶ The Department’s other claim that there is no medical consensus recognizing a third sex also fell because its relied-upon medical authority *does* recognize nonbinary genders.¹⁰⁷

The *Zzyym* court also rejected an argument often raised against nonbinary identification markers: that the time and cost of implementing a system to recognize a third gender classification would be unduly burdensome to state and federal agencies.¹⁰⁸ According to the Department, “it would take considerable time and resources for the Department . . . to alter their systems to add a third sex designation.”¹⁰⁹ It made no effort to calculate what those costs might be, choosing instead to rely on the suggestion of cost alone to carry its argument.¹¹⁰ While acknowledging that some cost was necessarily implicated, the Court rejected this

¹⁰¹ *Id.* at 1251–52.

¹⁰² *Victory for Intersex Client!*, LAMBDA LEGAL (Nov. 22, 2016), https://www.lambdalegal.org/blog/20161122_zzyym.

¹⁰³ *Zzyym*, 341 F. Supp. 3d at 1254–60.

¹⁰⁴ *Id.* at 1256.

¹⁰⁵ *Id.* at 1256–58.

¹⁰⁶ *Id.* at 1256–57.

¹⁰⁷ *Id.* at 1258.

¹⁰⁸ *Zzyym*, 341 F. Supp. 3d at 1258–59.

¹⁰⁹ Defendants’ Response Brief at 19, *Zzyym v. Tillerson*, No. 15-cv-02362-RBJ, 2017 WL 8792934 (D. Colo. Dec. 1, 2017).

¹¹⁰ *Zzyym*, 341 F. Supp. 3d at 1258–59.

last argument out of hand.¹¹¹ Without reaching Zzyym’s liberty claims, the Court thus found that the Department violated the APA.¹¹²

Without any examination of the expressive rights at stake, cases like Furuya’s and Zzyym’s leave space for the success of individual rights theories.¹¹³ Dignity plays a significant role as well and bolsters the already robust expressive rights of nonbinary people.¹¹⁴ As discussed below, the First Amendment values of autonomy and self-determination similarly protect against compelled gender expression.¹¹⁵

II. THE LAW OF COMPELLED SPEECH

The First Amendment prohibits the federal and state governments from “abridging the freedom of speech.”¹¹⁶ The values of autonomy, mutual recognition, and dignity are all enshrined within the First Amendment.¹¹⁷ As one scholar puts it, “respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself.”¹¹⁸ Autonomy too, reinforces the “authenticity” of self—it functions as a mechanism to construct identity.¹¹⁹ Said differently, “if there is a ‘right to be,’ there is a ‘right to say what one is.’”¹²⁰

A. *Autonomy, Self-Determination, and Expression*

The Lockean concept of self-determination is inherent in First Amendment values and protections.¹²¹ In the state of nature, all people can act as they wish within reason.¹²² Individualism necessarily exists in nature, but its existence also requires respect of that determination.¹²³

¹¹¹ *Id.* at 1259.

¹¹² *Id.* at 1260–61.

¹¹³ *Id.*; see also *In re Furuya*, No. 37-2016-00044778-CU-PT-CTL (Cal. Sup. 2017), <http://transgenderlawcenter.org/wp-content/uploads/2017/02/at-order.pdf>.

¹¹⁴ See BAKER, *supra* note 24, at 87–88.

¹¹⁵ See *infra* Part II-A.

¹¹⁶ U.S. CONST. amend. I. State application stems from the Fourteenth Amendment. U.S. CONST. amend. XIV; see *Gitlow v. People of the State of New York*, 268 U.S. 652, 666 (1925) (incorporating First Amendment).

¹¹⁷ See BAKER, *supra* note 24, at 47–48.

¹¹⁸ *Id.* at 59.

¹¹⁹ YOSHINO, *supra* note 6, at 190.

¹²⁰ *Id.* at 71.

¹²¹ JOHN LOCKE, *The Second Treatise, in TWO TREATISES OF GOVERNMENT* 267, 270–71 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

¹²² *Id.* at §§ 4, 63.

¹²³ See Heyman, *supra* note 76, at 59–60.

That autonomy in turn protects individuals from coercion—“a liberal state has no authority to coerce individuals to hold or express particular beliefs. Instead, all the state legitimately can do is to require individuals to act in a way that respects the rights of others.”¹²⁴

Expression is an essential part of self-determination as well; regardless of whether it is for oneself or for others, expressive acts help one define oneself to oneself as well as within society.¹²⁵ Every individual has veto power over how they use their bodies and minds—and, in turn, how they influence the world around them.¹²⁶ The First Amendment thus functions as an identity-producing mechanism free from government interference in most circumstances.¹²⁷ Any individual’s conduct “expresses and further defines the actor’s identity and contributes to [their] self-realization.”¹²⁸

Societal norms, however, can work to discourage disfavored identities.¹²⁹ Typically, these are enforced not through law but through verbal acts of disapproval, disassociation, and the like.¹³⁰ Unlike governmental interference, norms do not themselves interfere with individual rights.¹³¹ But the social pressure they produce influences those who make law and policy; problems then arise when the state chooses to enforce those norms.¹³² Recognition by government and by society is therefore essential to identity and individual liberty—otherwise, the state may “attempt[] to define who a person is,” which “clearly disrespects individual autonomy.”¹³³

While the First Amendment does not tolerate governmental prohibition of otherwise permissible expression, it does permit the government to place conditions and other restrictions on that expression.¹³⁴ Time, place, and manner restrictions have long been recognized in law, for example.¹³⁵ So too entry costs, taxes, and other barriers to entry.¹³⁶ Even when recognition and accommodation may cost the government—and society, through taxes—extra resources, it may shift that cost onto

¹²⁴ *Id.* at 70; *see also* BAKER, *supra* note 24, at 56–57.

¹²⁵ *See* BAKER, *supra* note 24, at 53.

¹²⁶ *Id.* at 58.

¹²⁷ *Id.* at 58–59.

¹²⁸ *Id.* at 53.

¹²⁹ *Id.* at 81–82.

¹³⁰ BAKER, *supra* note 24, at 81–82.

¹³¹ *Id.*

¹³² *Id.* at 82.

¹³³ *Id.* at 81–82.

¹³⁴ *Id.* at 75–78.

¹³⁵ BAKER, *supra* note 24, at 75–78.

¹³⁶ *Id.*

the recognized.¹³⁷ Thus, instead of forbidding certain identities, the government and unfavored groups may compromise by cost-shifting as a price of recognition.¹³⁸

Similarly, efficiency justifications may not work to abridge unfavored expression.¹³⁹ They subvert autonomy by presuming a desired end goal that preempts recognition and by defining efficiency relative to that goal.¹⁴⁰ Efficiency, therefore, must follow liberty and not precede it; it is relevant only when the state already treats groups as autonomous, moral beings deserving of equal respect and mutual recognition.¹⁴¹ These values underpin the First Amendment's protection of dissident identities and inform compelled-speech jurisprudence.

B. The First Amendment as an Identity-Producing Mechanism

The seminal compelled speech case is *West Virginia State Board of Education v. Barnette*.¹⁴² There, the Court held that the state board of education violated the First Amendment by requiring students to salute the flag and recite the Pledge of Allegiance.¹⁴³ The salute was violative enough by itself—as a discrete expression, it “comp[elled] students to declare a belief.”¹⁴⁴ The Court held that First Amendment protection “does not depend upon whether [government-mandated expression] be good, bad or merely innocuous.”¹⁴⁵

Significant too was that the challengers in that case were Jehovah's Witnesses.¹⁴⁶ Their challenge rested in part on their belief that the Bible forbids holding graven images—in this case, the flag—above God.¹⁴⁷ That belief functions as a core tenet of both faith and identity for Jehovah's Witnesses.¹⁴⁸ The Board thus could not require either “unwilling conver[sion]” or “assent by words without belief and by [] gesture barren of meaning.”¹⁴⁹ And though the Court decided the broader

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ BAKER, *supra* note 24, at 84.

¹⁴⁰ *Id.* at 85.

¹⁴¹ *Id.*

¹⁴² 319 U.S. 624 (1943).

¹⁴³ *Id.* at 625–29, 642.

¹⁴⁴ *Id.* at 631.

¹⁴⁵ *Id.* at 634.

¹⁴⁶ *Id.* at 629.

¹⁴⁷ *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943) (quoting *Exodus* 20:4–5).

¹⁴⁸ See *Images*, JEHOVAH'S WITNESSES (Oct. 2014), <https://www.jw.org/en/publications/magazines/g201410/veneration-of-images/>.

¹⁴⁹ *Barnette*, 319 U.S. at 633.

question of whether any individual could be required to salute the flag, the underlying principle remains the same: “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .”¹⁵⁰ Whether patriotism or faith, these beliefs contribute to how individuals perceive themselves and exercise autonomy over who they are.¹⁵¹

The Court later reaffirmed this principle in stronger terms in *Wooley v. Maynard*.¹⁵² The Maynards, also Jehovah’s Witnesses, insisted on covering the New Hampshire state motto “Live Free or Die” on their license plate.¹⁵³ They claimed that the motto was “repugnant to their moral, religious, and political beliefs” and that the state thus violated the First Amendment by requiring them to use the plate.¹⁵⁴ The Court agreed.¹⁵⁵ In doing so, it rejected the state’s arguments that the motto was needed to identify that someone had New Hampshire plates, especially given that the numbers on the plate itself did exactly that.¹⁵⁶ This case reinforces the concept that “[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”¹⁵⁷

This same principle holds true for direct expressions of identity.¹⁵⁸ The Court in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* faced this question in the context of the 1993 Boston Saint Patrick’s Day Parade.¹⁵⁹ Parade organizers there denied members of GLIB—an Irish LGBT advocacy group—permission to march in the parade.¹⁶⁰ Recognizing that “[p]arades are . . . a form of expression,” the Court held that compelling GLIB’s involvement would functionally alter the parade’s message.¹⁶¹ This decision in part rested on the parade organizers’ silence as for non-heterosexual elements of Irish identity.¹⁶² To make the parade organizers include LGBT marchers

¹⁵⁰ *Id.* at 642.

¹⁵¹ *Id.* at 641–42; see BAKER, *supra* note 24, at 53.

¹⁵² 430 U.S. 705 (1977).

¹⁵³ *Id.* at 707–08.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 717.

¹⁵⁶ *Id.* at 716.

¹⁵⁷ *Wooley*, 430 U.S. at 714 (quoting *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

¹⁵⁸ See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

¹⁵⁹ *Id.* at 560–61, 566.

¹⁶⁰ *Id.* at 561.

¹⁶¹ *Id.* at 568.

¹⁶² *Id.* at 574–75 (“The parade’s organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians . . .”).

in a decidedly heterosexual expression of Irish identity would violate their right not to speak under the First Amendment.¹⁶³

Government can compel speech in certain limited circumstances, however.¹⁶⁴ Take *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* for example.¹⁶⁵ The Court there held that conditioning federal funding to law schools on allowing military recruiters on campus did not violate the First Amendment.¹⁶⁶ FAIR, an association of law schools, sought an injunction against the condition because they opposed the military's "Don't Ask, Don't Tell" policy.¹⁶⁷ But as for speech, the Court found "that there was little likelihood that the views of [the military] would be identified with the [law schools], who remained free to disassociate [themselves] from those views . . ."¹⁶⁸ Unlike the parade in *Hurley*, the Court found that the mere act of allowing speakers access to facilities is not itself expressive.¹⁶⁹

Autonomy and self-realization necessarily require another element: recognition.¹⁷⁰ Mutual recognition "requires a concern for people's liberty . . . for restrictions on liberty disrespect a person's autonomy as a moral agent."¹⁷¹ In turn, rejection of one's identity counters the autonomy principles central to First Amendment freedoms.¹⁷² According to one scholar, groups have "no authority to act in ways that deny a person's equality or . . . autonomy."¹⁷³ This concept necessarily has limits, of course.¹⁷⁴ After all, if one's identity is based on denying the identity of another, that expression is illegitimate.¹⁷⁵ Nor does it reflect First Amendment values.¹⁷⁶

This concept, according to some scholars, is rooted in Hegelian principles of confrontation and compromise.¹⁷⁷ When the identity of two groups conflicts, the only solution that vindicates First Amendment value is for the groups to recognize one another as "free and independent

¹⁶³ *Hurley*, 515 U.S. at 574-75.

¹⁶⁴ See *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47 (2006).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 70.

¹⁶⁷ *Id.* at 52.

¹⁶⁸ *Id.* at 65.

¹⁶⁹ *Rumsfeld*, 547 U.S. at 64; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 568 (1995).

¹⁷⁰ See BAKER, *supra* note 24.

¹⁷¹ *Id.* at 42.

¹⁷² *Id.* at 50-51, 80-81.

¹⁷³ *Id.* at 50.

¹⁷⁴ *Id.* at 56.

¹⁷⁵ See BAKER, *supra* note 24 at 56.

¹⁷⁶ *Id.*

¹⁷⁷ See Heyman, *supra* note 76, at 62-63.

being[s].”¹⁷⁸ This in turn reinforces the rule of reason that underpins Locke’s view of autonomy.¹⁷⁹ Thus, “[w]ithin the state and the legal order that it establishes, everyone has a basic duty to respect the personhood and rights of others,” even if it means compromising away certain facets of one’s identity.¹⁸⁰

The case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* reflects this tension between recognition and identity conditioned on the destruction of another’s identity.¹⁸¹ The groups confronting one another there were members of the Christian faith who did not want to serve LGBT individuals because the latter’s existence conflicts with their faith and religious identity.¹⁸² But the concept of mutual recognition requires compromise—that a person “recognize that it is legitimate for another to embrace a particular identity and way of life, but only insofar as that identity and way of life are consistent with recognition of the basic status and rights of all persons.”¹⁸³ That the pivotal factor in the Court’s decision was a human rights commissioner’s negative comments about Christian history reflects this concept too.¹⁸⁴

Mutual recognition explains the outcome in *Hurley* as well.¹⁸⁵ The Court’s decision in part vindicates the autonomy of the parade organizers, but also asks GLIB to recognize the legitimacy of how the organizers constructed their identity.¹⁸⁶ Unlike in *Masterpiece*, GLIB’s exclusion did not deny its members’ identities—they were free to hold their own parade in celebration of their identities.¹⁸⁷ In *Masterpiece*, on the other hand, one group would deprive the other of access to public accommodations to a degree that threatens their existence.¹⁸⁸

C. Government Speech

The Court has held before that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of

¹⁷⁸ *Id.*; see also BAKER, *supra* note 24, at 47–48 (observing that individual liberty requires that, in clashes of individual agents, each party must treat one another as autonomous agents).

¹⁷⁹ Heyman, *supra* note 76, at 61; see also LOCKE, *supra* note 121, at 269, 309.

¹⁸⁰ Heyman, *supra* note 76, at 63.

¹⁸¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

¹⁸² *Id.* at 1723.

¹⁸³ Heyman, *supra* note 76, at 68 (emphasis omitted).

¹⁸⁴ *Masterpiece*, 138 S. Ct. at 1723–24.

¹⁸⁵ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 581 (1995).

¹⁸⁶ *Id.*

¹⁸⁷ Compare *id.* at 577–78, with *Masterpiece*, 138 S. Ct. at 1723–24 and Heyman, *supra* note 76, at 68.

¹⁸⁸ See *Masterpiece*, 138 S. Ct. at 1723–24; see also Heyman, *supra* note 76, at 68.

what it says.”¹⁸⁹ This is in part because the marketplace of ideas necessarily requires government input in a democratic society—it is essential to an informed public.¹⁹⁰ Without some protection for government statements, the government itself could not function.¹⁹¹ Government speech is thus essential for the government’s “protecting and enhancing democratic values . . . improving its leadership capacity; [] enforcing its public policies; and, in the end, [] securing its ability to survive.”¹⁹² Courts, however, have yet to acknowledge hybrid governmental/private speech and have instead defaulted to an all-or-nothing approach.¹⁹³

The case of *Walker v. Texas Div. Sons of Confederate Veterans, Inc.* demonstrates the problem.¹⁹⁴ There, the Sons of Confederate Veterans—a private nonprofit group that espouses the cause of the American Confederacy—proposed a specialty Texas license plate design featuring the Confederate battle flag.¹⁹⁵ The Texas Department of Motor Vehicles denied the license-plate proposal outright; it did the same for the group’s second identical proposal after a comment period yielded overwhelmingly negative public commentary.¹⁹⁶ After the second denial, the Sons of Confederate Veterans sued the Texas Department of Motor Vehicles and alleged that the denial violated the group’s First Amendment rights.¹⁹⁷

The Court held that the license plates were government speech.¹⁹⁸ So how does this square with *Wooley*?¹⁹⁹ For one, the government in *Walker* did not try to make the group speak a message it disagreed with; instead, it denied the group from making the government espouse a message with which it did not agree.²⁰⁰ The government had

¹⁸⁹ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–468 (2009)).

¹⁹⁰ *Id.* at 2245–46; see also Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental* 83 N.Y.U. L. REV. 605, 614–15 (2008) (acknowledging that viewpoint discrimination violates autonomy and distorts the marketplace of ideas); but see BAKER, *supra* note 24, at 24 (criticizing marketplace of ideas conception of First Amendment protection).

¹⁹¹ *Walker*, 135 S. Ct. at 2246.

¹⁹² MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 41 (1983).

¹⁹³ See Corbin, *supra* note 190, at 607–08, 610, 627 (discussing the courts’ failure to contend with mixed speech).

¹⁹⁴ 135 S. Ct. 2239 (2015).

¹⁹⁵ *Id.* at 2243–44.

¹⁹⁶ *Id.* at 2245.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Wooley v. Maynard*, 430 U.S. 705 (1977).

²⁰⁰ Compare *id.* at 713, with *Walker*, 135 S. Ct. at 2245.

a legitimate reason in denying the message too, as it stated “that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.”²⁰¹

The different outcomes in *Sons of Confederate Veterans* and *Wooley* is also explained by mutual recognition values.²⁰² The Maynards in *Wooley* rejected speech foisted upon them by the state because it did not comport with their identity.²⁰³ Yet doing so did little to threaten the government’s existence or the identity of those who subscribed to the values of the state motto.²⁰⁴ In contrast, the identity asserted by the Sons of Confederate Veterans was one that implicated violence and hate towards other groups.²⁰⁵ Its existence was based in part on rejecting the legitimacy of other identities and denying their autonomy.²⁰⁶

Even when government speaks, though, it doesn’t always speak in its capacity as sovereign.²⁰⁷ When an expression is a hybrid of governmental and private speech, the government’s interests do not always override those of the private speaker.²⁰⁸ That was the case in *Lehman v. City of Shaker Heights*.²⁰⁹ There, the city contracted with a private company to sell advertising space on its behalf on the Shaker Heights Rapid Transit System.²¹⁰ Despite the city’s maintenance of the advertising space, the Court still held that it did not speak through the advertisements.²¹¹ Instead, because it managed the advertising program to raise revenue, the city did not act as sovereign—it acted as a business manager.²¹² Thus, it could exclude political advertisements that might threaten the image of its business.²¹³

²⁰¹ *Walker*, 135 S. Ct. at 2245; but see *Am. Civil Liberties Union of Tenn. v. Bredesen*, 441 F.3d 370, 375–76 (6th Cir. 2006) (holding that direct control over message in license plate context determines the speaker).

²⁰² *Compare Wooley*, 430 U.S. at 713 (holding that the state may not “constitutionally require an individual to participate in the dissemination of an ideological message by displaying it” on his license plate), with *Walker*, 135 S. Ct. at 2245 (holding that specialty license plates are government speech which government can control); see also Heyman, *supra* 76, at 68 (explaining that “individuals have a duty to recognize the personhood and rights of others.”).

²⁰³ *Wooley*, 430 U.S. at 705.

²⁰⁴ *Id.*

²⁰⁵ *Walker*, 135 S. Ct. at 2245.

²⁰⁶ *Id.*; see also BAKER, *supra* note 24, at 56 (stating that autonomy protections do not protect speech if the speaker seeks to interfere with the rights of another).

²⁰⁷ See Corbin, *supra* note 190, at 681.

²⁰⁸ See *id.* at 607, 610 (discussing types of mixed speech).

²⁰⁹ 418 U.S. 298, 303–04 (1974).

²¹⁰ *Id.* at 299–300.

²¹¹ *Id.* at 299–300.

²¹² *Id.* at 303–05.

²¹³ *Id.*

There are still reasonable limits on this relationship, however.²¹⁴ Self-determinative interest cannot undo the government—the protection of the First Amendment does not extend that far.²¹⁵ That was the case in *Bowen v. Roy* when a Native American couple objected to the assignment of a Social Security number to their daughter.²¹⁶ The couple believed that spiritual purity required full autonomy, with no government interference whatsoever.²¹⁷ But the Court denied this theory; as Chief Justice Burger wrote, “[t]he [First Amendment] simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.”²¹⁸ As discussed above, autonomy values do not prevent all government interaction with identity—only that which would deny identity completely.²¹⁹

When government maintains some form of identification—whether license plates, driver’s licenses, or advertisements—part of that role is devoted to raising revenue.²²⁰ True, certain identification is used for internal administrative purposes.²²¹ But so too are license plates, as seen in *Sons of Confederate Veterans* and *Wooley*.²²² The essential interaction is that the government acts as an administrator or manager that facilitates speech in some way.²²³ And when that identification is used to express facets of identity, the government has even less power to dictate what form that must take.²²⁴

²¹⁴ See *Bowen v. Roy*, 476 U.S. 693 (1986).

²¹⁵ *Id.* at 696.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 693, 699.

²¹⁹ See *BAKER*, *supra* note 24, at 77–79 (explaining that general prohibitions often restrict liberty and the ability of actors to express their values, which should be avoided because they do not support society’s wellbeing).

²²⁰ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–05 (1974); see Tachana Marc, *Drivers License Suspension for Unpaid Fines Is Too Harsh*, S. FLA. SUN SENTINEL (Feb. 24, 2020), <https://www.sun-sentinel.com/opinion/commentary/fl-op-com-drivers-license-suspension-of-debt-20200225-dbvbc2mkezdv7aijyt7ypv33mi-story.html>; see also Tim McNicholas & Lana Hinshaw-Klann, *Illinois License Plate Fees for Some Trailers Have Jumped 555% in 2020*; ‘It Just Boggles the Mind’, CBS CHICAGO (Jan. 23, 2020), <https://chicago.cbslocal.com/2020/01/23/illinois-new-fees-for-trailer-plates-have-some-up-in-arms/>.

²²¹ See *Clarke*, *supra* note 21, at 937–38 (describing data collection practices and applications).

²²² *Wooley v. Maynard*, 430 U.S. 705, 716 (1977); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015).

²²³ *Lehman*, 418 U.S. at 303–05.

²²⁴ See *BAKER*, *supra* note 24, at 58–59 (claiming that the First Amendment demands protection of speech that supports the speaker’s autonomy and advocacy).

III. THE INDIVIDUAL RIGHT AGAINST BINARY IDENTITY

The First Amendment does not demand adherence to the gender binary.²²⁵ The rights to dignity, autonomy, and mutual recognition enshrined in its protections demand the opposite.²²⁶ If nonbinary individuals are to reify their identity, they must have access to the same government privileges that cisgender and transgender people do.²²⁷ States in turn must recognize that they cannot compel nonbinary people to identify with identities that they do not adopt.²²⁸ Any accommodation for nonbinary identity on government identification will also likely be of little burden to the government, given cases like *Wooley* and *Sons of Confederate Veterans*.²²⁹ And even if it is, those administrative costs can be shifted to license holders like with vanity license programs.²³⁰

Courts have repeatedly recognized that the First Amendment is a mechanism for constructing identity.²³¹ Every person has a right to assert identity positively as well as to be free from being told who they are or who they must be.²³² The oft-cited proposition of *West Virginia Board of Education v. Barnette* is that “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”²³³ This reflects the well-established principles of Lockean autonomy—the First Amendment guarantees self-determination within reasonable limits.²³⁴ Compelled speech, on the other hand, violates self-expressive autonomy in many cases.²³⁵

Nonbinary people exemplify that valuation of autonomy.²³⁶ Nonbinary identity itself is an amalgam of gender norms, falling into

²²⁵ See *infra* Part III.

²²⁶ See BAKER, *supra* note 24, at 47–48.

²²⁷ See WPATH STANDARDS, *supra* note 17; see also Am. Psychological Ass’n, *supra* note 14.

²²⁸ See *infra* Part III.

²²⁹ *Wooley v. Maynard*, 430 U.S. 705 (1977); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015).

²³⁰ See Corbin, *supra* note 190, at 642 (giving examples of cost-shifting for specialty license plates).

²³¹ See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569–70 (1995).

²³² *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 630–38 (1943).

²³³ *Id.* at 642.

²³⁴ See Heyman, *supra* note 76, at 59–61 (discussing Locke’s belief that every person has freedom of expression, body autonomy, and control of their property, but also that reason demands that they not use these powers to harm others).

²³⁵ Corbin, *supra* note 190, at 629.

²³⁶ See *infra* text accompanying notes 237–42.

neither male nor female categorization.²³⁷ To force a nonbinary person into either categorization is to ascribe an identity to them that they reject.²³⁸ The flip side is that nonbinary identity itself is a positive expression of identity—one that adheres to no single gender stereotype, but which spans the normative spectrum to construct the self.²³⁹ For a person to self-determine their nonbinary identity also requires a nuanced understanding of gender norms and how society constructs and values gender.²⁴⁰ Like the different Irish groups in *Hurley*, it requires differentiating between different permutations of identity.²⁴¹ The government can no more demand that the Maynards display “Live Free or Die” on their license plate than it can demand that nonbinary people assume binary gender identity.²⁴²

That right to self-determination is essential to living with dignity and equality with others.²⁴³ As the Court demonstrated in cases like *Lawrence* and *Obergefell*, continued repression infringes on the ability of individuals to associate with one another and to establish their identity.²⁴⁴ Repression may be forced through identification regimes like that in *Pavan*; yet the Court there acknowledged that dignity lies in state recognition—even through identification schemes.²⁴⁵ And while “[t]he majority would prefer to avoid the expressive activities’ predicted effects on people’s personality and behavior . . .” as in *Bowers* and *Rowland*, that paternalist approach must give way to individual rights.²⁴⁶

²³⁷ See Monica Hesse, *When No Gender Fits: A Quest to Be Seen as Just a Person*, WASH. POST (Sept. 20, 2014), https://www.washingtonpost.com/national/when-no-gender-fits-a-quest-to-be-seen-as-just-a-person/2014/09/20/1ab21e6e-2c7b-11e4-994d-202962a9150c_story.html?utm_term=.a9f781560798; see also YOSHINO, *supra* note 6, at 152–54 (listing various gender norms).

²³⁸ See Memorandum of Points and Authorities in Support of Petition for Change of Name and Gender, *supra* note 91, at 12.

²³⁹ See Virginia Soave, ‘Are You Really Non Binary?’: *The Power of Gender Expression at Work*, HUFF POST, https://www.huffingtonpost.com/virginia-soave/are-you-really-non-binary_b_11474070.html (last updated Aug. 20, 2017) (discussing the positive expressive aspects of nonbinary identity).

²⁴⁰ See Chase Strangio, *Can Reproductive Trans Bodies Exist?*, 19 CUNY L. REV. 223, 226 (2016) (discussing the impulse to rely on binary and inherently sexed male and female stereotypes when pursuing affirming care).

²⁴¹ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 560–61 (1995).

²⁴² *Compare* *Wooley v. Maynard*, 430 U.S. 705, 713 (1977), with Memorandum of Points and Authorities in Support of Petition for Change of Name and Gender, *supra* note 91, at 12.

²⁴³ See *BAKER*, *supra* note 24, at 58–59.

²⁴⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁴⁵ *Pavan v. Smith*, 137 S. Ct. 2075, 2076–79 (2017).

²⁴⁶ See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Rowland v. Mad River Local Sch. Dist.*, *Montgomery Cty., Ohio*, 730 F.2d 444, 446 (6th Cir. 1984); see also *BAKER*, *supra* note 24, at 87.

Meanwhile, some might argue that passports, driver's licenses, and the like are government speech.²⁴⁷ After all, the government creates them and assigns them to people.²⁴⁸ And it uses these documents for its own internal administration.²⁴⁹ But as in *Lehman*, the government acts as an administrator or business manager in issuing identification documents.²⁵⁰ True, it may use these documents for law enforcement purposes.²⁵¹ Though as in *Wooley*, the value of identification is just as important to the document-holder as it is to the government—handing someone a driver's license is an expressive act of communicating identity.²⁵² In this respect, the government is just as much an administrator of a revenue-generating identification program as it is a law enforcement entity.²⁵³

There is also little danger that providing nonbinary markers on documentation would be mistaken for a sponsorship of that identity.²⁵⁴ As in *Rumsfeld*, the government “remain[s] free to disassociate [itself] from those views.”²⁵⁵ In the case of the federal government, it is also odd to think of that being a concern when the State Department already allows binary gender changes on passports, thus acknowledging the shifting nature of gender.²⁵⁶ Regardless, a third-gender marker would be much like a private ad on public property; as in *Lehman*, any question of attribution is dispelled by the government's role as business manager instead of sovereign.²⁵⁷

²⁴⁷ See *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015).

²⁴⁸ See Corbin, *supra* note 190, at 631 (observing that likelihood of governmental attribution is strong when government controls message and retains power to approve every word disseminated at its behest).

²⁴⁹ See *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1256 (D. Colo. 2018).

²⁵⁰ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974).

²⁵¹ See *Zzyym*, 341 F. Supp. 3d at 1256.

²⁵² See *Wooley v. Maynard*, 430 U.S. 705 (1977); *cf.* Corbin, *supra* note 190, at 640–41 (analyzing the case of license plates and concluding that both the government and the individual are literal speakers: the government puts one's name on the plate, manufactures it, and owns it, while the private individual speaks by putting the plate on their vehicle to represent their identity to others).

²⁵³ See *supra* text accompanying notes 247–52.

²⁵⁴ See *infra* text accompanying notes 255–57.

²⁵⁵ 547 U.S. 47, 65 (2006).

²⁵⁶ *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1256 (D. Colo. 2018).

²⁵⁷ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974); *see also* Corbin, *supra* note 190, at 624–25 (observing that speech by private individuals on public property raises attribution questions).

Naturally, there are practical limits to what nonbinary individuals can demand.²⁵⁸ As in *Bowen*, nonbinary individuals can't demand that any and every permutation of gender non-conforming identity be accommodated.²⁵⁹ To do otherwise would violate the understanding that the First Amendment does not "require the Government to conduct its own internal affairs in ways that comport with the . . . beliefs of particular citizens."²⁶⁰ On the other hand, the government may avoid violating individual liberty by shifting costs onto license-holders.²⁶¹

Thus, as in the case of vanity license plates, there is little reason why the government cannot charge additional fees for specialty identification.²⁶² Whatever the cost of altering how identification documents are printed or administering identity checks, that may be placed on the document holder.²⁶³ And if applicants are the ones paying for it, there is little immediate cost to the government besides time input. There is also no parallel justification for denying the identification as there was in *Sons of Confederate Veterans*.²⁶⁴ Unlike in that case, there is no threat of violence or identity deprivation if nonbinary people elect a third gender on their identification.²⁶⁵ Though this sort of tax on identity is distasteful, it is not altogether different from the same premiums that vanity-license-plate owners bear.²⁶⁶

Because binary-gender schemes violate a fundamental right, they should be subject to strict scrutiny.²⁶⁷ On the other hand, some scholars have suggested that hybrid government/private speech calls for intermediate scrutiny.²⁶⁸ Regardless of which level courts employ, binary-gender schemes likely do not pass any level of scrutiny.²⁶⁹ As discussed above, efficiency interests cannot override individual autonomy, especially when cost-shifting is available to offset time and resource

²⁵⁸ See Ruocco, *supra* note 5, at 196 ("There is not an unlimited, unburdened right to define oneself").

²⁵⁹ See *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

²⁶⁰ *Id.*

²⁶¹ See *BAKER*, *supra* note 24, at 77–78.

²⁶² See *Wooley v. Maynard*, 430 U.S. 705 (1977); see also *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015).

²⁶³ See *BAKER*, *supra* note 24, at 77–78.

²⁶⁴ See *Walker*, 135 S. Ct. at 2245.

²⁶⁵ *Id.*

²⁶⁶ See *Corbin*, *supra* note 190, at 642.

²⁶⁷ See *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

²⁶⁸ *Corbin*, *supra* note 190, at 675.

²⁶⁹ See *infra* text accompanying notes 270–71.

drain.²⁷⁰ Advancing a particular policy goal is also not a strong enough interest to pass either level of scrutiny when no alternative avenue of nonbinary expression exists.²⁷¹ States must therefore recognize nonbinary individuals or risk litigation losses.

In contrast to a recognition model based upon individual rights, some call for the abolition of government-enforced gender identification; this may be the best route in the long-term.²⁷² Admittedly, there are inherent problems with any identification regime.²⁷³ The limits of a third-gender option will not necessarily accommodate all gender permutations in the same way that vanity license plate programs accommodate identity.²⁷⁴ And by enabling recognition, third-gender identification may make it easier for nonbinary people to be targeted for harassment and discrimination.²⁷⁵

But for all that, there is value in seeking third-gender identification if only as a stopgap measure.²⁷⁶ For one, it will affirm and reinforce the identity of at least some nonbinary individuals; indeed, it seems unlikely that a.t. Furuya and Dana Zzyym would have sought recognition if they did not value it in some way.²⁷⁷ Many transgender people also oppose abolition given the self-actualization benefits of the current identification regime.²⁷⁸ Identity reinforcement may also alleviate associated distress and heightened rates of self-harm for those who suffer from dysphoria.²⁷⁹

²⁷⁰ See BAKER, *supra* note 24, at 77–78; see also Corbin, *supra* note 190, at 681–82 (arguing that lack of threat to government’s role as business manager does not meet intermediate scrutiny).

²⁷¹ See Corbin, *supra* note 190, at 684 (observing that a policy may not pass intermediate scrutiny if the individual affected has no alternative avenue of expression).

²⁷² See Ruocco, *supra* note 5, at 197; see also Wipfler, *supra* note 25.

²⁷³ See *infra* text accompanying notes 274–75.

²⁷⁴ See Clarke, *supra* note 21, at 939–40 (arguing that “it may be impossible to recognize an unlimited variety of identities”).

²⁷⁵ *Id.* at 940.

²⁷⁶ *Id.* at 903.

²⁷⁷ See TRANSGENDER L. CTR., *supra* note 18; see also LAMBDA LEGAL, *supra* note 102; Am. Psychological Ass’n, *supra* note 14, at 842.

²⁷⁸ See Rosemary Newton, *The Gender Marker Debate: Is Gender Needed on Government-Issued ID?*, XTRA (Sep. 27, 2016, 5:50 PM), <https://www.dailyxtra.com/the-gender-marker-debate-is-gender-needed-on-government-issued-id-72051>.

²⁷⁹ See Ann P. Haas, et al., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 14 (Am. Found. for Suicide Prevention, Jan. 2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>; see also Kristie L. Seelman, *Transgender Adults’ Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. OF HOMOSEXUALITY 1378, 1396 (2016) (“Findings indicate relationship between denial of access to bathrooms . . . and increased risk of suicidality . . .”).

Legal recognition is also one step toward accommodation and integration.²⁸⁰ Like abolition, recognition obviates the need to explain the difference between one's appearance and the designation on one's license.²⁸¹ Though a third-gender option may lead to unintended outing for some, it may also eliminate conflict from identification incongruence.²⁸² On the other hand, integration is not necessarily a good thing; freedom from Western conceptions of gender and the liberal state is valuable in its own right.²⁸³

But nonbinary people should regardless be recognized as autonomous individuals who can choose for themselves whether to support a third-gender identification scheme.²⁸⁴ It gives them the ability to set the terms by which others will recognize them.²⁸⁵ It grants them “. . . personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”²⁸⁶ And it allows them to compromise their identity with others in mutual recognition of shared dignity and autonomy.²⁸⁷ These are the freedoms that the First Amendment guarantees.²⁸⁸

²⁸⁰ See Clarke, *supra* note 21, at 901.

²⁸¹ Memorandum of Points and Authorities in Support of Petition for Change of Name and Gender, *supra* note 91, at 7.

²⁸² *Identity Documents*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-identity-documents> (last visited Mar. 15, 2020); see NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE 16 (2017) http://avp.org/wp-content/uploads/2017/06/NCAVP_2016HateViolence_REPORT.pdf; see also Ruocco, *supra* note 5, at 215 (discussing Alexandra Glover's difficulty changing her driver's license photo because of state employee's perception of incongruence between her designated gender and appearance); Hayley Gorenberg, *Oregon Thinks Outside the (M/F) Box and Becomes First State to Allow Gender Neutral Marker on State IDs*, LAMBDA LEGAL (June 15, 2017), https://www.lambdalegal.org/blog/20170615_oregon-gender-neutral-state-id.

²⁸³ See Clarke, *supra* note 21, at 940.

²⁸⁴ See, e.g., LAMBDA LEGAL, *supra* note 102.

²⁸⁵ See WPATH STANDARDS, *supra* note 17, at 29–30; see also Am. Psychological Ass'n, *supra* note 14, at 835.

²⁸⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–98 (2015) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) & *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965)).

²⁸⁷ See WPATH STANDARDS, *supra* note 17, at 9; see also Am. Psychological Ass'n, *supra* note 14, at 852; Heyman, *supra* note 76, at 74–75.

²⁸⁸ See U.S. CONST. amend. I.

CONCLUSION

To this day, only a few states offer any sort of gender-nonconforming option for identity documentation.²⁸⁹ Yet Germany,²⁹⁰ Australia,²⁹¹ New Zealand,²⁹² India,²⁹³ Nepal²⁹⁴ and other countries besides all provide exactly that. So why does the United States lag behind? And if this is the direction that the rest of the world is starting to head in, would it not be prudent to follow their lead—especially when the State Department argues that it needs uniformity to better process passports?²⁹⁵

Perhaps full abolition of gender markers is the best route.²⁹⁶ Or maybe a context-based approach would work better.²⁹⁷ But for now, governments can take an immediate step that will start the path to both legal and societal recognition of nonbinary people.²⁹⁸ What is repressed under the current regime is nonbinary individuals’ “autonomy . . . the freedom to elaborate their authentic selves—rather than . . . a rigid notion of what constitutes an authentic . . . identity.”²⁹⁹ The First Amendment no more tolerates government-mandated religion than it does government-mandated gender.³⁰⁰ States should thus provide nonbinary people access to a third-gender option in government identification schemes.

²⁸⁹ See NAT’L CTR. FOR TRANSGENDER EQUALITY, *supra* note 4.

²⁹⁰ See Bill Chappell, *Germany Offers Third Gender Option on Birth Certificates*, NPR (Nov. 1, 2013, 1:37 PM), <http://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birthcertificates>.

²⁹¹ See *Australian Passports to Have Third Gender Option*, THE GUARDIAN (Sept. 15, 2011), <https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option>.

²⁹² See John Godfrey, *Kiwis First to Officially Recognize Third Gender*, NONPROFIT Q. (July 20, 2015), <https://nonprofitquarterly.org/kiwis-first-to-officially-recognize-third-gender/>.

²⁹³ See Sophie McBain, *India’s Supreme Court Recognises a Third Gender*, NEW STATESMAN AM. (Apr. 16, 2014), <https://www.newstatesman.com/world-affairs/2014/04/india-s-supreme-court-recognises-third-gender>.

²⁹⁴ See Kyle Knight, *Third-Gender Passports May be the Future of Trans Travel*, ADVOCATE (Oct. 26, 2015, 11:30 AM), <https://www.advocate.com/commentary/2015/10/26/third-gender-passports-may-be-future-trans-travel>.

²⁹⁵ See *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1261 (D. Colo. 2018).

²⁹⁶ See Ruocco, *supra* note 5, at 197–98; see also Wipfler, *supra* note 25, at 494.

²⁹⁷ See Clarke, *supra* note 21, at 902.

²⁹⁸ *Id.* at 901.

²⁹⁹ YOSHINO, *supra* note 6, at 93.

³⁰⁰ See *West Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).