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Gay Self-Identification and the Right to Political Legibility

Abstract

Over twenty years after the Sixth Circuit held that a bisexual public employee could be dismissed for coming out, courts remain split on the question of constitutional protection for gay coming-out speech. In addressing that question, this Article begins with a more fundamental one: What is the legal harm of suppressing coming-out speech? This Article suggests that a distinct legal harm follows from whether one conceives of coming-out as “persuasive,” “creative,” or “descriptive” speech—establishing a framework that applies to all minorities whose status is not readily apparent. Arguing that courts and scholars have adopted persuasive and creative conceptions of the value of coming-out, respectively, this Article advocates a descriptive conception: That coming-out is legally significant because it functions, in the context of the political process, as identity-reporting, allowing homosexuals to become “politically legible.”

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Introduction

While the United States Constitution protects us, to varying degrees, from discrimination on the bases of race, religion, sex, national origin, and disability, that protection is meaningless if we are restricted from acknowledging our particular status within each of these categories. If a light-skinned person of color does not speak, she may be presumed to be white; if a Jewish person does not speak, he may be assumed to be Gentile. Speech is required to assert and claim numerous identities: “I am black,” “I am Arab,” “I am transgender.” Self-identifying speech, because it makes us susceptible to discrimination, is often the first casualty of that discrimination. The question of legal protection for self-identification affects us all: everyone has an identity that is physically invisible, everyone can pass.¹ In this paper, I address the paradigm modern example of self-identifying speech: coming out as gay, lesbian, or bisexual.²

The presence of openly gay people has begun to transform institutions of every kind. At the same time, many of these institutions have attempted to discourage their members from self-identifying as gay. The U.S. military’s policy of discharging servicemembers who come out as gay is well publicized and often debated. Less often discussed is the response of public employers to employees who come out on the job. Can government employers fire these employees? In 1984, the Sixth Circuit, the highest federal court to address the question, held in *Rowland v. Mad River Local School District* that “a bisexual public employee constitutionally may be dismissed for ‘talking about it.’”³ But in the modern constitutional age, is speech such as “I am gay” entitled to special protection in the workplace?⁴ Over twenty years after *Rowland*, courts have still not definitively resolved the question of whether coming-out speech is constitutionally protected.

That constitutional protection depends on a more fundamental, and yet poorly theorized, question: What is the harm of suppressing coming-out speech? In Part I, I suggest that the harm of suppression depends on which of three conceptions of the role of coming-out speech one chooses to adopt. I begin with the work of linguistic philosopher J.L. Austin, suggesting that speech generally can serve three functions, often simultaneously: “persuasive,” in attempting to affect the thoughts or feelings of the listener; “creative,” in engendering a promise, a bet, or another social contract or obligation; and “descriptive,” in stating a neutral and verifiable fact.

¹ “Passing means the underlying identity is not altered, but hidden.” Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 772 (2002).

² For the sake of simplicity, I use the term gay elsewhere in this paper to refer to gays, lesbians, and bisexuals.

³ *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from denial of certiorari).

⁴ While some scholars have posed this question and speculated as to the answer, none have addressed it in detail. See Yoshino, *supra* note 1, at 833 (“[I]f that underlying status is unproblematic, then why does identifying it make it problematic?”); *id.* at 834 (“[S]o long as there is a ‘right to be’ a particular kind of person, I believe it follows that there is a ‘right to say what one is’”). Cf. Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 218 (“[I]t cannot be a crime simply to be who you are.”).

Through both narrative and historical analysis, I illustrate that coming-out speech possess Austin's three dimensions. I first elaborate a "persuasive conception" of gay self-identification. Consider, for example, an individual who comes out as a way of responding to a homophobic comment. This individual states "I am gay" primarily for the purpose of convincing another person of the necessity of gay equality. While the words she utters are "I am gay," her intent is both affirmation of homosexuality and a plea for gay equality. I then elaborate a "creative conception" of gay self-identification, ascendant in the initial act of coming-out, and its subsequent encapsulation in the narrative of the coming-out story, told and retold throughout many gay peoples' lives. I suggest that in this context, an individual declares (and re-declares) her sexuality to create an identity around her same-sex sexual attraction—coming out in this way actually constitutes her gay identity. Finally, I elaborate a "descriptive conception" of gay self-identification: That an individual might come out simply to report an otherwise hidden alternative sexual orientation.

In Part II, I focus on the "persuasive conception" of coming-out speech in legal discourse. Through a review of four disparate areas of law, I argue that this view of coming-out speech is judicially dominant. While coming-out may influence some to support gay equality, it may also provoke an emotional or hostile reaction in both those who are and are not swayed—thus the persuasive conception has two interrelated components: the positive persuasive and the negative disruptive effect. Thus conceived of as advocacy, the harm which flows from suppressing coming-out speech is the First Amendment harm of stifling public discourse. The legal remedy invoked by courts worried about the negative disruptive effect of coming out is the First Amendment's public employee speech doctrine, and by those worried about the pure positive persuasive effect, the expressive association case law embodied by *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*. I conclude that the harm of suppression under this conception is insufficient to provide theoretical grounds for protection: because of both its disruptive effects and its affirming message about homosexuality, the persuasive conception can sometimes be correctly applied to quash gay self-identification.

In Part III, I examine the "creative conception" of coming-out speech, arguing that it has emerged as law-and-sexuality scholars' response to the judicially dominant persuasive conception, which is ineffective at protecting coming-out speech. Under a creative conception, the harm that flows from the suppression of coming-out speech is the erasure of gay status itself. I argue that such a conception theoretically provides complete protection for the speech itself: if gay status is protected under the Fourteenth Amendment's Equal Protection Clause, so too should the speech that constitutes that status. The harm enacted by restrictions on the creative conception is prohibited under the classification strand of the Equal Protection Clause. Yet, turning to a more practical analysis, I suggest that this harm will never be correctly recognized by courts. I conclude that a creative conception too will be ineffective at protecting self-identification.

In Part IV I propound a new theory, a "descriptive conception" of coming-out speech, the third and least explored category suggested by Austin's theory. Although this view of coming-out speech is the simplest, it is currently entirely absent from the debate. I argue that, under a descriptive conception, coming-out speech plays a central role in the democratic political process. I accept Bruce Ackerman's contention that, contrary to the familiar *Carolene Products* framework, discreteness and insularity are bargaining

advantages in a modern pluralist democracy. These advantages follow from what I term a discrete and insular minority's increased "political legibility" vis-à-vis invisible and non-insular minorities. For homosexuals and any invisible, non-insular minority—what Ackerman calls "anonymous and diffuse" minorities—self-identification is the means of becoming politically legible. I outline a community's Fourteenth Amendment right to equal political participation, suggesting that under a descriptive conception, restricting self-identifying speech implicates the gay community's right because it disadvantages gay people in comparison with minorities who already enjoy heightened political legibility, usually by virtue of their physical visibility. I ultimately endorse a descriptive conception of coming-out speech, arguing that unlike either a persuasive or creative one, it is both a stable theoretical ground for protecting self-identification and is likely to be adopted by courts.

I. Three Conceptions of Coming-Out Speech

A. J.L. Austin's Tripartite Theory of Speech

In exploring the different effects of coming-out speech, I begin with J.L. Austin's theory of speech acts. In a printed compilation of his lectures, *How To Do Things with Words*, Austin theorizes about the different functions of words or phrases. Austin initially proposes a binary classification model, suggesting that all speech is either "constative" or "performative." Constative speech states a fact that is either true or false.⁵ "The chair is red" or "His hair is blond" are examples of constative declarations—they are independently verifiable statements of fact. On the other hand, performative speech is speech "in which *by* saying or *in* saying something we are doing something."⁶ By saying the statements "I promise" or "I bet," we engage in the acts of promising and betting, respectively.⁷ In contrast to the constative, these statements do not simply describe an independently existent reality, but rather create that to which they refer.

However, Austin ultimately rejects the premise that all speech can be categorized as either constative or performative.⁸ Such a model is unworkable because many statements do not fit neatly into either the constative or the performative box. A statement such as "There is a bull in the field" might be either constative, in describing the presence of a bull—similar to the statement "There is a tree in the field,"—or performative, in creating a warning—similar to the statement "I warn." (We can hear this difference if we read aloud the sentence "There is a bull in the field" with or without an exclamation point.)

Austin's resulting tripartite model of speech incorporates this realization that every statement has elements of both the constative and performative. He suggests that all statements have three aspects: "locutionary," "illocutionary," and "perlocutionary."

⁵ J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 1 (2d ed. 1999) (1975) (Constative speech "describe[s] some state of affairs, or . . . state[s] some fact, which it must do either truly or falsely.") (quotations omitted).

⁶ *Id.* at 12.

⁷ *Id.* at 94-98.

⁸ *Id.* at 91 (explaining that "it is often not easy to be sure that . . . an utterance is performative or that it is not" and "mak[ing] a fresh start on the problem.").

While each of these aspects of speech is always present, the balance between them changes. Thus, while all speech possesses each characteristic, different words or phrases—or the same ones, said in different contexts—will rate markedly higher on one of these three dimensions.

First, speech *describes*: What Austin terms the “locutionary” capacity of speech is its basic function of communicating the meaning of the words themselves to describe a reality that is otherwise verifiable. This dimension is, in substance, much like a constative classification. In the statement “The book is red,” speech’s descriptive or locutionary aspect is ascendant. Similar to constative declarations, such phrases are simply statements of fact.

Second, speech *creates*: What Austin calls the “illocutionary” capacity of speech is its ability to bring some intangible thing into being. This dimension is, in substance, much like Austin’s performative classification. Rather than describing any previously existing thing, these declarations actually create that to which they refer. In the performance or creation of a warning (“I warn” or “Look out!”), a promise (“I promise” or “I swear”), or a bet (“I bet” or “I wager”),⁹ the creative or illocutionary aspect of speech is ascendant.

Third, speech *persuades*: What Austin identifies as the “perlocutionary” capacity of speech is its effect on the feelings or thoughts of the listeners—in his words, “what we bring about or achieve by saying something, such as convincing, persuading, [or] deterring,” whether intended or unintended.¹⁰ In shouting “Fire!” in a crowded theater, the persuasive or perlocutionary aspect of speech is ascendant. While we can imagine the word “fire” being heavily descriptive in another context—“Look, what a pleasant fire,” say—here the effect is primarily to induce fear and panic, causing people to flee the theater.

B. Coming-Out Speech Under the Tripartite Model

Throughout the history of the gay rights movement, individuals and factions have at different times invoked the three characterizations of gay self-identification suggested by Austin’s work. The words “I am gay” have been alternately characterized as an attempt to persuade, to create, or to describe.

1. The Persuasive Conception

Coming out is often used persuasively, to convince individuals to recognize the need for gay equality. What Austin calls the “perlocutionary” act,¹¹ we might think of generally as a focus on the effect of the speech on the feelings or thoughts of the listeners, whether intended or unintended. This focus on the effect of self-identification encompasses the positive as well as the negative—including, for example, both the ability of coming-out speech to challenge people’s stereotypes about homosexuals and promote

⁹ *Id.* at 94-98.

¹⁰ *Id.* at 101, 109.

¹¹ *Id.* at 109 (defining “perlocutionary acts [as] what we bring about or achieve by saying something, such as convincing, persuading, deterring”).

gay equality (to “br[ing] to our side” family and friends¹²), and its capacity to provoke hostility and disruption. There will inevitably be uncertainty about whether the positive (affirming) or negative (disrupting) effects of gay self-identification predominate under a persuasive conception.¹³

A person instinctively relies on this dimension of coming-out speech when, for example, he responds to a homophobic comment by coming out to the commenter. Coming out in this way is intended to force the listener to reconcile abstract homophobic words or beliefs with a real person. It is through this conception, for example, that we understand the impact Justice Powell’s now notorious closeted gay clerk might have had by coming out to the Justice prior to the decision in *Bowers v. Hardwick*.¹⁴ And when a Catholic priest, responding to the Catholic Church’s recently proposed restrictions on gay priests, comments that the silence of “gay priests, like myself, [who] have been prevented from speaking about our own experiences,” “only breeds prejudice, fear and hatred,”¹⁵ he is invoking a persuasive conception. By coming out, he suggests, priests could promote equality, comfort, and acceptance for gay people.

In the 1970s, many members of the gay community adopted such a conception to argue that coming out was the best way to end gay oppression.¹⁶ This conception can be seen in the shift in the names adopted by gay activist groups, from the disguised “Mattachine Society” to the out “Gay Liberation Front.”¹⁷ There was “no talk among these new activists of disguising their mission with ambiguous titles—no homophile, no Mattachine, no Bilitis”¹⁸—only the sense that merely by being out and visible, equality for gays would increase.¹⁹ Scientific studies have since confirmed their underlying instinct that, by revealing oneself to be homosexual, one positively affects the opinions of close friends regarding homosexuality and gay rights.²⁰

In these situations, while an individual actually says “I am gay,” the intended meaning is closer to, “I’m here, I’m queer, get used to it”²¹ and “Gay is good.”²² I call

¹² EVE KOSOFSKY SEDGEWICK, *EPISTEMOLOGY OF THE CLOSET* 70-71 (1990).

¹³ This is in part because of the nature of the perlocutionary effect of any statement—Austin himself admits that the task of determining that effect is fraught with uncertainty. AUSTIN, *supra* note 5, at 122 (“[J]udges should be able to decide, by hearing what was said, what locutionary . . . but not what perlocutionary acts were achieved”).

¹⁴ JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 521-22 (1994).

¹⁵ Paul Michaels, *Don’t Dare to Speak its Name*, THE TABLET (Britain), Sept. 24, 2005, available at <http://www.thetablet.co.uk/cgi-bin/register.cgi/tablet-01084> (last visited Sept. 25, 2005).

¹⁶ Yoshino, *supra* note 4, at 816-18.

¹⁷ DUDLEY CLENDININ & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD THE GAY RIGHTS MOVEMENT IN AMERICA* 31 (1999) (noting that before the formation of the Gay Liberation Front, “no other major homosexual rights group had used the word ‘gay’ in its name . . . [and] few even dared to use the word ‘homosexual’”).

¹⁸ *Id.*

¹⁹ *Id.* at 32 (quoting the Gay Liberation Front’s Statement of Purpose as saying: “We are going to be who we are.”).

²⁰ Gregory M. Herek & John P. Capitanio, “Some of My Best Friends”: *Intergroup Contact, Concealable Stigma, and Heterosexuals’ Attitudes Toward Gay Men and Lesbians*, 22(4) *Personality & Social Psychology Bulletin* 412-24 (1996).

²¹ This was one of the slogans popularized by the short lived pamphlet *Queer Nation*, begun in the summer of 1990 by Michaelangelo Signorile. See also *The Simpsons*, *Jaws Wired Shut*, episode DABF05 (Group: :chanting: We’re here, we’re queer, get used to it! Lisa: You do this every year, we’re used to it!

this understanding of the way coming out is spoken and received, the “persuasive conception” of gay self-identifying speech—an account that emphasizes the persuasive effect that self-identification has on others in convincing them of the need for gay equality. Under this account, self-identification plays a crucial role in achieving gay rights.

2. The Creative Conception

The phrase “I am gay,” rather than simply describing an identity which already exists, can also be thought of as creating that identity. In the same way that statements such as “I promise” or “I bet” bring an intangible agreement into being—what Austin terms the statements’ illocutionary capacity—coming-out speech can be seen as constituting the speaker’s gay identity. In declaring their homosexuality an individual establishes a gay identity not only in the minds of those to whom they reveal their sexuality, but also in themselves.

The creative conception is embodied in the coming-out story—the personal narratives through which openly gay individuals tell and retell of their initial acceptance and declaration of a gay or lesbian identity.²³ Consider the adolescent who does not even know words to describe the same-sex attraction she feels. In learning, embracing, and then uttering the words “I am gay” or “I am lesbian,” she places herself within a larger community. Coming-out stories often begin with the speaker fearing that he is the “only one in the world,”²⁴ yet by publicly acknowledging her sexuality the speaker has necessarily grown past this fear and realized that she shares sexual characteristics with a larger community.

We can conceptualize the act of identity creation as the “ontological shudder” that passes through individuals when they declare their homosexuality for the first time.²⁵ It is this change that writers of coming-out tales have variously described as an “instance of illumination”²⁶ and as “power.”²⁷ In these situations, while an individual actually says “I am gay,” her actual meaning is more akin to “I am out therefore I am.”²⁸ I call a narrow focus on self-identifying speech as creating gay identity the “creative conception.”

Guy: Spoil sport!). “Out of the Closets and into the Streets” is another Queer Nation slogan similarly founded on the idea that outness a requirement for successful gay activism.

²² This slogan was coined by activist Frank Kameny in the summer of 1968.

²³ Coherence in Coming-Out Stories, in *QUEERLY PHRASED: LANGUAGE, GENDER, AND SEXUALITY* 287, 290 (Anna Livia & Kira Hall, eds., 1997) (“[T]he existence of the coming-out story is evidence that individuals do manage to incorporate gay ness into their identities.”); *id.* at 294 (“That coming-out stories exist at all and are recognized by members indicates their centrality in defining a gay identity as well as a gay culture.”).

²⁴ Bonnie McElhinny, *Language, Sexuality and Political Economy*, in *LANGUAGE AND SEXUALITY: CONTESTED MEANING IN THEORY AND PRACTICE* 111, 125 (Kathryn Campbell-Kibler, et al., eds., 2002).

²⁵ Yoshino, *supra* note 1, at 826 (“This may explain the transformation - a kind of ontological shudder - that some gays describe on intoning these words for the first time.”).

²⁶ Introduction, *BOYS LIKE US*, at xvi (Patrick Merla, ed. 2002).

²⁷ Adrienne Rich, Foreword, in *THE COMING OUT STORIES* xi, xii-xiii (Susan J. Wolfe & Julia Penelope Stanley eds., 1980) (“I have an indestructible memory of walking along a particular block in New York City, the hour after I had acknowledged to myself that I loved a woman, feeling invincible. . . . I knew my life was decisively and forever different; and that change felt to me like power.”).

²⁸ DOUGLAS CRIMP & ADAM ROLSTON, *AIDS DEMO GRAPHICS* 103 (1990).

3. The Descriptive Conception

Just as gay self-identification has creative and persuasive aspects, so too does it have a simple descriptive aspect: Coming out serves to reveal an individual's homosexuality. What Austin calls the "locutionary" dimension of speech is its basic function in communicating the meaning of words themselves to describe a reality that is either true or false. This aspect of self-identifying speech allows an individual to report an otherwise invisible personal characteristic. In this basic sense, the statement "I am gay" conveys a piece of information about a person and operates much like the statement "The book is red."

This conception of coming out is invoked, for example, when an individual is already out and is simply describing her sexuality. Under this account, when an individual says "I am gay," it is heard as "I am gay"—as a revelation of fact, as identity-reporting. The descriptive aspect of self-identification is stable: While the balance between self-identification's creative and persuasive effects varies depending on the context of the revelation, every act of self-identification is necessarily descriptive. I call an emphasis on coming-out speech as merely reporting a homosexual identity the "descriptive conception."

C. Three Links Between Speech and Status

Throughout the remainder of this paper, I will explore each of the previously articulated conceptions of self-identifying speech—persuasive, creative, and descriptive—as adopted in legal discourse. While legal scholars continually rely on Austin's initial binary classification in assessing self-identifying speech,²⁹ none have employed the three-part model that he ultimately endorsed. These conceptions each provide a basis from which to address the lingering question in judicial opinions and legal scholarship regarding the nature of the link between gay self-identification and gay status.

Justices Brennan and Marshall, dissenting from the Supreme Court's denial of certiorari in *Rowland v. Mad River Local School District*, bring this question to the fore. The plaintiff in that case, Marjorie Rowland, was a high school guidance counselor who was dismissed after telling several colleagues that she was bisexual and had a female lover³⁰; her dismissal was upheld by the Sixth Circuit. In attempting to separate the free-speech-based liberty interest from the equal protection interest, the circuit court remarked in apparent frustration that "it is impossible to tell whether the . . . plaintiff was suspended and transferred merely for being bisexual or for talking about it."³¹

²⁹See, e.g., Jennifer Minear, Note, *Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J.L. & PUB. POL'Y 601, 623 (2001) (relying on Austin's distinction between constative and performative speech in assessing self-identification).

³⁰In special verdict part VIII(1) and VIII(5) the jury concluded that Rowland would not have been suspended and that her contract would have been renewed had she not come out as bisexual. *Rowland v. Mad River Local School District*, 730 F.2d 444, 460 (6th Cir. 1984).

³¹*Rowland v. Mad River Local School District*, 730 F.2d 444, 450 (6th Cir. 1984)

The Justices provide the obvious answer: *Both*—she was dismissed “because she is bisexual *and* revealed this fact.”³² Brennan and Marshall recognize that Rowland’s statement of sexuality is entangled with her homosexual status—and thus, any First Amendment analysis of gay self-identification will necessarily blur with a Fourteenth Amendment inquiry. They emphasize that “petitioner’s First Amendment and equal protection claims may be seen to converge because it is realistically impossible to separate her spoken statements from her status,”³³ recognizing that Rowland’s termination fundamentally threatened “her right both to be what she was and to state the fact.”³⁴ This proposition is at first somewhat confusing—after all, Rowland had *been* living with her partner openly as a lesbian for years. Other plaintiffs make this same confusing shift: In defending his decision to speak about his sexuality, one plaintiff argued, “I have every right to be what I am”³⁵ (rather than, “I have every right to *say* what I am”).

How is these plaintiffs’ right to be homosexual threatened by the suppression of their speech? The answer to that question follows from the realization that self-identification has three distinct dimensions. A focus on any one aspect of coming-out speech—persuasive, creative, or descriptive—provides a starkly different understanding of the importance of that speech in relation to gay status. The suppression of each dimension of gay self-identification corresponds to a distinct status-based harm. And each of these conceptions, and the distinct harm which follows from its suppression, is necessarily met by a separate constitutional remedy.

Scholars and courts have failed, first, to perceive that these three aspects of gay self-identification coexist and, second, to attribute any significance or devote any discussion to self-identification’s descriptive aspect in particular. As a result, their analysis of coming-out speech often reflects a narrow focus on either the creative or the persuasive aspect. (In this sense, they ignore one of the broad lessons of Austin’s work, that speech, including coming-out speech, cannot be exclusively categorized.) I will argue that distinct segments of the legal community—courts and scholars—have embraced the persuasive and creative conceptions, respectively, while the third has been left unacknowledged.

In the remaining three Parts, I address each of self-identifying speech’s three dimensions: first articulating a legal remedy to respond to the status-harm that follows from its suppression, then determining whether the remedy completely responds to the harm, and finally predicting whether the remedy has or is likely to be correctly adopted by courts. Through an account of the current state of the law, in Part II, I will argue both that the persuasive conception is currently dominant in case law and that it can be correctly applied to quash gay self-identification. Under this account, an individual’s right to be homosexual is threatened by restrictions on self-identification because of the crucial role self-identification plays in achieving gay equality. This emphasis can be seen running through public employee speech doctrine, “Don’t Ask, Don’t Tell,” public school censorship, and parade case law, in that these bodies of law all concentrate on the

³² *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1011 (1985) (Brennan, J., dissenting from denial of certiorari) (emphasis added).

³³ *Id.* at 1016 n.11

³⁴ *Rowland*, 730 F.2d at 453 (Edwards, J., dissenting).

³⁵ *Acanfora v. Board of Education*, 359 F. Supp. 843, 846 (D. Md. 1973).

reaction of third parties to gay self-identification. With a focus on the parade case law, specifically *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,³⁶ I suggest that courts may be correct not to protect self-identification on some occasions when the persuasive dimension of the speech is ascendant.

Scholars have responded to courts' narrow focus on the reaction of third parties, as I explain in Part III, by adopting a creative conception—yet this conception, too, will fail to protect self-identification. There exists a strong theoretical ground for protection: Under this account, because of self-identification's role in constituting an individual's gay identity, restrictions on self-identification directly threaten the existence of that identity and thus, I argue, find complete constitutional protection. Yet, because it is based on a subtle distinction between status and speech, I suggest that this theory is unlikely to be adopted by the courts.

In Part IV I propound a new theory, which both protects coming-out speech more completely than the persuasive conception and is more likely than the creative conception to win favor in the courts—namely, the descriptive conception. The simplest account, which emphasizes the descriptive aspect of self-identifying speech as merely revealing a homosexual identity, has been absent from the legal debate. The stable nature of self-identification's descriptive effect makes the descriptive conception a convenient, easily applicable model—it is peculiar that neither a majority opinion nor any legal scholar has ever endorsed it.

II. The Persuasive Conception of Gay Self-Identifying Speech in Law

The California Supreme Court, in *Sipple v. Chronicle Publishing Co.*, remarked that gay self-identification is most significant when it acts persuasively, “to dispel the false public opinion that gays [are] timid, weak and unheroic figures.”³⁷ Legal scholars addressing gay self-identification have also largely adopted this framework, conceiving of the value of self-identification as the political act of directly increasing homosexual visibility and acceptance.³⁸ For John Hart Ely, for example, gay self-identification serves to “neutralize our prejudices.”³⁹ Ely illustrates his point with a hypothetical declaration: “Hold it, Lester, I'm gay, and my wrist's not the least bit limp.”⁴⁰ Underlying Ely's account is the notion that coming out is legally significant primarily for its persuasive effects.⁴¹

³⁶ 515 U.S. 557 (1995).

³⁷ *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 1049 (Cal. Ct. App., 1984)

³⁸ See, e.g., Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 89-90 (1998) (“[C]oming out is often considered an important—indeed necessary—political goal.”); Jennifer Minear, Note, *Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J.L. & PUB. POL'Y 601, 622 (2001) (“[H]omosexuality is today essentially a form of political . . . dissent . . .”) (quoting Brent Hunter Allen, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 VAND. L. REV. 1073, 1089-90 (1994)).

³⁹ JOHN HART ELY, DEMOCRACY AND DISTRUST 162 (1980).

⁴⁰ *Id.* at 163.

⁴¹ See also CATHARINE A. MACKINNON, ONLY WORDS 71, 74 (1993). Catharine MacKinnon argues that words such as “nigger” and “cunt” persuade others to regard African Americans and women in a negative light, contributing to the disproportionate poverty of African Americans, and the

The persuasive conception embraces—indeed, emphasizes—the overlap between gay self-identification and gay advocacy. Scholars of sexuality and law who have adopted this framework are quick to embrace the idea that “to come out is to implicitly, or often explicitly, affirm the value of homosexuality.”⁴² This overlap is succinctly captured in the Supreme Court’s use of the phrase “avowed homosexual” in *Boy Scouts of America v. Dale*, with its connotations of affirmation and promotion.⁴³ (Other courts, in contrast, have used phrases such as “acknowledged homosexual[]”⁴⁴ or “known homosexual,”⁴⁵ which are much less suggestive of advocacy.) Modern courts which reach a pro-gay decision are more likely to refer to openly gay individuals without suggesting that they are advocates⁴⁶—suggesting, as I will illustrate in detail in Section B, that under a persuasive conception self-identification fails to find protection.

Current case law emphasizes a different, but no less accurate, aspect of the persuasive conception. Every act of gay self-identification presents the possibility of a hostile or disruptive reaction from coworkers or fellow servicemembers. Indeed, countless stories have suggested that even the positive perlocutionary effect of challenging homophobic stereotypes is emotional and disruptive⁴⁷—that the positive transformation coming out works on the world has a concomitant destabilizing effect.

A. Before *Lawrence*: The Rise of the Persuasive Conception

The vast majority of case law on coming-out speech, while adopting a persuasive conception, focuses only such speech’s negative disruptive effects. This emphasis on the

disproportionate number of female prostitutes. MacKinnon’s argues for robust legal recognition of the fact that words can impact equality, both positively and negatively. At its core, her conception of speech is a primarily persuasive one.

⁴² Nan Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1704 (1993) [hereinafter Hunter, *Speech and Equality*]; Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 28 (2000) (criticizing courts for their “avoidance of acknowledging the message of self-worth inherent in self-identification”) [hereinafter Hunter, *Expressive Identity*].

⁴³ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644, 646, 652, 655 (2000). “Avowed” is derived from the latin root *advocare* (to advocate). It is defined as “To acknowledge openly, boldly, and unashamedly” or “to state positively.” AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (emphasis added).

⁴⁴ *Watkins v. United States Army*, 875 F.2d 699, 701 (9th Cir. 1989) (observing that a soldier was discharged “solely because of his acknowledged homosexuality”).

⁴⁵ *Acanfora v. Board of Education*, 359 F. Supp. 843, 854 (D. Md. 1973). The case involved a teacher removed from his duties following his participation in a televised discussion of the “difficulties homosexuals encounter.” *Id.* at 500. However, Acanfora never self-identified on campus, but was rather unwillingly outed—“[t]he cause of the publicity was, in the immediate sense, independent of plaintiff’s speech.” *Id.* at 854. For the *Acanfora* court, his lack of an affirmative desire to identify as homosexual removes the suggestion of advocacy. In ordering him reinstated, the court emphasizes that Acanfora never “sa[id], here I am, a homosexual,” *id.* at 846., and thus “[Acanfora] did not advocate homosexuality” on campus, *id.*

⁴⁶ Compare *Watkins*, 875 F.2d at 701 (using “acknowledged homosexual,” finding for the gay plaintiff) and *Acanfora*, 359 F. Supp. at 854 (using “known homosexual,” finding for the gay plaintiff) with *Dale*, 530 U.S. at 644 (using “avowed homosexual,” finding against the gay plaintiff).

⁴⁷ Consider the “gay panic defense” cases, in which just such a disruptive and emotional reaction is used to explain and justify violence against homosexuals. See generally Kara S. Suffredini, Note, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 279 (2001).

provocative is rooted in the characterization of gay self-identification as incitement speech prior to the Court's decision in *Lawrence v. Texas*.⁴⁸ As the Court stated in *Brandenburg v. Ohio*, the First Amendment allows speech to be sanctioned "where such advocacy is directed to inciting or producing imminent lawless action."⁴⁹ Until *Lawrence*, which ended the criminalization of homosexual sodomy, gay self-identifying speech was susceptible to the charge that it was a solicitation to perform a criminal act. Court decisions interpreting state statutes prohibiting criminal solicitation suggest that "I am gay," said in the correct context, would be sufficient to constitute solicitation to commit sodomy.⁵⁰ Even courts that reached pro-gay results acknowledged that self-identification was susceptible to this characterization,⁵¹ and often rejected the incitement argument only because the danger of lawless action, though clear, was not imminent.⁵²

The effect was to attach to the declaration "I am gay" a legally significant presumption of criminal activity. As one commentator noted, "[T]he implication of *Bowers v. Hardwick* was effectively to tar lesbians and gays as a social group as potential criminals,"⁵³ and thus to tar a revelation of one's homosexuality as a declaration of that potential criminality. In her concurring opinion in *Lawrence*, Justice O'Connor recognizes that "the word homosexual imputes the commission of a crime."⁵⁴ The statement immediately calls to mind the underlying act, just as the statement "I am a thief" calls to mind the act of stealing. To use the words of Nan Hunter, this link between statement and conduct represents a legal "focus on identity . . . as defined by conduct."⁵⁵ As courts rearticulated the incitement arguments, they connected, and in fact defined, a statement of homosexuality as one of sodomy.

This focus on criminal conduct has the effect of evoking in the listener a fear of potential disruption or even danger. Consider the potential perlocutionary effects of a declaration of criminal identity, such as "I am a thief:" fear, danger, and anxiety. The confluence between naming oneself a homosexual and naming oneself a criminal⁵⁶

⁴⁸ 539 U.S. 558 (2003).

⁴⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Justice Holmes, writing for a unanimous court, famously observed that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47 (1919). See generally STEVEN H. SHIFFRIN AND JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES – COMMENTS – QUESTIONS* 3-50 (3d ed. 2001) (discussing the legal development of the carve-out in First Amendment protection of advocacy of illegal action).

⁵⁰ See, e.g., *Commonwealth v. Schnarrs*, 222 Pa. Super. 134, 137 (Pa. Super. Ct. 1972) (in determining whether solicitation for criminal sodomy occurred, intent is dispositive and "the intent may be inferred under the surrounding circumstances") (interpreting Pa. Stat. Ann. tit. 18, § 4502 (prohibiting assault and solicitation to commit sodomy)).

⁵¹ See, e.g., *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548 (11th Cir. 1997) (reaching a pro-gay ruling *in spite* of the potential for incitement, noting that even "incitement of imminent lawless action is not bereft of constitutional protection").

⁵² *National Gay Task Force v. Board of Education*, 729 F.2d 1270, 1274 (10th Cir. 1984) (quoting *Hess v. Indiana*, 414 U.S. 105, 109 (1973)) ("The First Amendment does not permit someone to be punished for advocating illegal conduct at some indefinite future time.").

⁵³ Sonia Katyal, *Exporting Identity*, 14 *YALE L.J.* 97, 106 (2002) (quoting Nicholas Bamforth, *Sexuality, Morals and Justice: A Theory of Lesbian and Gay Rights Law* 37 (1997)).

⁵⁴ *Lawrence*, 539 U.S. at 583-84 (O'Connor, J., concurring).

⁵⁵ Nan D. Hunter, *Identity, Speech, and Equality*, 79 *VA. L. REV.* 1695, 1718 (1993). Professor Hunter, however, views this period as starting to wane in the 1970s. *Id.*

⁵⁶ *Lawrence*, 539 U.S. at 575 ("The stigma this criminal statute imposes, moreover, is not trivial.").

results in a legally significant presumption of disruption which has implicitly colored courts' views of gay self-identification under the persuasive conception.

B. The Dominance of the Persuasive Conception in Modern Case Law

The historical emphasis on disruption, and more broadly, courts' exclusive characterization of "I am gay" as persuasive speech, continues unchanged in modern self-identifying speech case law. In this Section, I review three legal regimes for censoring self-identification—public employee speech, the military's "Don't Ask, Don't Tell" policy, public high schools—to illustrate the dominance of the persuasive conception.

At first blush, these regimes evince two systems of classification for silencing speech: that it is personal, and that it is disruptive. The larger story, however, suggests that these concepts meld together—that the classification of self-identification as personal is both a rationale for and a response to its disruptive effects on the listener. Self-identification is labeled as something that ought to be kept personal because it is disruptive. At the same time, self-identification is seen as disruptive because it touches on private aspects of one's sexuality.

In reviewing these three areas of law, I will show not only that the persuasive conception is dominant, but also that it is pernicious for two central reasons—suggesting that courts should not tolerate the suppression of gay self-identifying speech due to disruption under a persuasive conception. First, gay self-identification is often disruptive solely because of the discriminatory reactions of colleagues and supervisors,⁵⁷ and a persuasive conception hides too much about the *motive* for disruption and the resulting restrictions on speech. As judges have acknowledged, restricting self-identifying speech because of bias-based disruption legitimizes the underlying anti-gay bias.⁵⁸ What's more, through use of "personal" and "disruptive" classifications, the suppression of self-identification becomes framed as desire to accede to a gay individual's wishes, and to protect her. Couched in this sympathetic way, restrictions on self-identification are a clear instance of what Reva Siegel has called "preservation-through-transformation,"⁵⁹ such that across these three contexts, the same restrictions on self-identification that have been in place for decades are preserved through a simple change in rationale. It is a persuasive conception which animates the placement of the onus for avoiding discrimination not on the audience but on the "disruptive" gay individual.

⁵⁷ In the context of the military's Don't Ask, Don't Tell policy, Five Ninth Circuit judges dissenting in *Holmes* called coming out, "speech[] which . . . neither harms nor endangers anyone." *Holmes v. California Army Nat'l Guard*, 155 F.3d 1049, 1050 (9th Cir. 1998).

⁵⁸ See *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (1998) ("Although the Constitution cannot control prejudices, neither this court nor any other court should, directly or indirectly, legitimize them."); *Shahar v. Bowers*, 114 F.3d 1097, 1128 (11th Cir., 1997) (en banc) (Birch, J., dissenting) ("If the public's perception is borne of no more than unsupported assumptions and stereotypes, it is irrational and cannot serve as the basis of legitimate government action."); *Rowland v. Mad River Local School Dist.*, 470 U.S. 1009, 1013 (1985) (Brennan, J., dissenting from denial of certiorari) (emphasizing the difference between "statements that arguably had some disruptive effect in the workplace" and the "mention of a fact . . . that apparently triggered certain prejudices held by [a] supervisor.").

⁵⁹ Reva Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996).

1. Public Employees

More than twenty-five years ago, the California Supreme Court observed “that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers.”⁶⁰ Under the current public employee speech doctrine, we can understand this “must” as a legally sanctioned mandate. The state in its capacity as an employer cannot usually suppress an employee’s First Amendment right to free speech through the threat of dismissal.⁶¹ Yet this First Amendment protection is limited. The doctrine articulated by the Supreme Court in *Pickering v. Board of Education*⁶² and its progeny, most notably *Connick v. Myers*,⁶³ outlines two requirements for the First Amendment protection of the speech of public employees: An employee’s speech must both be on a subject of public concern and be non-disruptive. The “public concern” requirement means that government employees can be terminated for statements of “personal interest,” whether made on or off the job.⁶⁴ This threshold “public concern” inquiry has been difficult for gay plaintiffs to overcome, and as a result the *Connick-Pickering* doctrine has not proven effective at protecting self-identification by gay employees.⁶⁵ Employees continue to be reprimanded for even bringing up the subject of homosexuality.⁶⁶

In *Rowland v. Mad River Local School District*, recognized as the “highest existing authority”⁶⁷ directly on the question of gay self-identifying speech, the Sixth Circuit held that gay self-identifying speech constitutes a valid basis for termination. When Rowland challenged her dismissal, the court analyzed her claim under the “public concern” prong of the *Connick-Pickering* test. It concluded that when self-identifying as bisexual Rowland “was speaking only in her personal interest”⁶⁸ and thus that her revelation was not protected under the public employee speech doctrine.

⁶⁰ *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 488 (Cal. 1979).

⁶¹ *See Pickering v. Board of Education*, 391 U.S. 563, 574 (1968). If discharged for exercising her First Amendment right to free expression, an employee may be entitled to reinstatement. *See Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987) (“[E]ven if [McPherson] could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.”).

⁶² 391 U.S. 563 (1968).

⁶³ 461 U.S. 138 (1983).

⁶⁴ *City of San Diego v. Roe*, 2004 U.S. LEXIS 8165, *4 (2004); *see also Pereira v. Commissioner of Soc. Servs.*, 733 NE 2d 112, 119 n.17 (applying *Connick-Pickering* analysis to a racist joke made by a Massachusetts Department of Social Services employee when speaking at a private dinner honoring outgoing city council members).

⁶⁵ *See* 10-168 EMPLOYMENT DISCRIMINATION § 168.08 (“In contrast with the type of public expression in these cases, the mere admission of homosexuality by a teacher is not ‘speech’ protected by the First Amendment . . .”). This lack of protection, however, passes unacknowledged by at least one major sexuality and law textbook. *See Eskridge & Hunter, Sexuality, Gender, and the Law 344* (suggesting that “[i]n general, [*Pickering*’s public employee speech] doctrine has protected gay employees,” but citing as example *Van Ooteghem v. Gray*, 654 F.2d 304 (5th 1981), a case involving protection for gay advocacy).

⁶⁶ *Collins v. Faith Sch. Dist.*, 46-2, 1998 SD 17, 8 n.2 (S.D. 1998) (reinstating a teacher who was terminated after presenting an objective description of oral and anal sex to his sex education class in response to a student question, but noting repeatedly that “his description of homosexual intercourse was ill-advised”).

⁶⁷ Yoshino, *supra* note 1, at 831.

⁶⁸ *Rowland v. Mad River Local School District*, 730 F.2d 444, 449 (6th Cir. 1984).

Although it rejects Rowland’s claim for failing *Connick-Pickering*’s initial public concern requirement, the *Rowland* court in truth relies on the disruption prong of that framework. To support classifying the speech as personal, the court attributes that characterization to Rowland, explicitly relying on her own request for confidentiality regarding her sexual orientation.⁶⁹ Yet Rowland’s request for privacy is more likely to indicate apprehension at her colleagues’ potential reaction than to suggest that “she did not consider her statements to be on matters of public concern.”⁷⁰ Like many gay individuals in the workplace, Rowland herself gauged the potential disruption of her self-identification, and as a result treated her sexuality as “personal.” By relying on her characterization, the *Rowland* court inadvertently relies on a disruption rationale even in the threshold public concern analysis.

The only other court to directly address gay self-identification by a public employee reached a different result from *Rowland*. In *Weaver v. Nebo School District*,⁷¹ a Utah district court considered the claim of Wendy Weaver, a high school psychology and physical education teacher and volleyball coach. Weaver’s bisexuality, already the subject of some speculation in her workplace,⁷² was confirmed when she responded affirmatively to a volleyball team member’s question whether she was gay.⁷³ Weaver was subsequently removed from her position as volleyball coach and instructed “not to make any comments, announcements or statements to students, staff members, or parents of students regarding [her] homosexual orientation,” even in settings outside of the classroom,⁷⁴ on threat of “termination.”⁷⁵

In contrast to *Rowland*, the *Weaver* court declares this restriction on speech unconstitutional under *Connick-Pickering*, holding that Weaver’s self-identifying speech is on a subject of public concern. But *Weaver* is more significant for what it concedes: The school’s right to prohibit Weaver’s self-identification on campus was not even contested.⁷⁶ The case’s limited scope is in tension with its seemingly pro-gay holding. The court is willing to classify Weaver’s self-identification as public, but only after Weaver has agreed that the term “public” will not include her workplace. By accepting Weaver’s own narrow definition of “public” the *Weaver* court echoes *Rowland* in silently incorporating into its holding a restriction on speech adopted by the plaintiff herself, one that most likely originates in the plaintiff’s fear of disruption.

This reading of *Weaver* is reinforced by the court’s suggestion that the central error committed by the Nebo School District was not firing Weaver, but making her sexuality public. The court emphasizes that it was “the *defendant* [that] . . . transmuted what should have been a private issue into a matter of public concern” through its

⁶⁹ *Rowland*, 730 F.2d at 449.

⁷⁰ *Id.*

⁷¹ 29 F. Supp. 2d 1279, 1285 (1998).

⁷² *Id.* at 1281.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 1282.

⁷⁶ *Id.* at 1285 (“[R]estrictions to speech made in the classroom . . . [is] a limitation that all parties’ now seem to agree would be reasonable.”); *id.* at 1283 (“[T]he dispute centers on . . . whether the School District’s restrictions go beyond the classroom and unconstitutionally infringe on Ms. Weaver’s right to speak in public”).

reaction.⁷⁷ *Weaver*, then, is subject to a criticism similar to that which Kenji Yoshino levels at *Rowland*—that “private” is operating as “an a priori normative concept that describes *what* ought to be kept private.”⁷⁸ But *Weaver* and *Rowland* also describe the *where*—sexuality ought to be kept private at work—and the *why*—sexuality should be kept private because it is potentially disruptive and uncomfortable.

In these opinions, sexuality is designated private not because the defendant-employers “don’t want to hear it,” but because the plaintiffs “don’t want to say it.” The *Rowland* court relies on “Ms. Rowland’s request for confidentiality,”⁷⁹ and the *Weaver* court, on Weaver’s “agree[ment] that . . . [she] may not speak about her sexual orientation in the classroom.”⁸⁰ This reliance on the plaintiffs’ own desire appears to be progress, but should be understood as an instance of “preservation-through-transformation”: Underlying both the desire not to speak and the desire not to hear is the same fear of disruption.

The disruption inquiry is a crucial step in any *Connick-Pickering* analysis. Prong two of the balancing test instructs courts to weigh the value of the speech against its disruptive effect in the workplace. Considerations include the employee’s own performance, harmony between coworkers, discipline between supervisors and subordinates, regular operation of the agency, and public trust in the agency.⁸¹ One can readily imagine reactions to gay self-identification resulting from discomfort or homophobia registering on all these indices of disruption. Indeed, other scholars have criticized the public employee speech doctrine for failing to scrutinize the source of disruption.⁸²

2. Military Servicemembers

The military’s “Don’t Ask, Don’t Tell” (DADT) policy also restricts self-identification on the ground that it is potentially disruptive, but the military’s regime is both more explicit than the public employee speech doctrine in its focus on disruption

⁷⁷ *Weaver*, 29 F. Supp. 2d at 1284 (emphasis added).

⁷⁸ Yoshino, *supra* note 4 at 831 (emphasis removed) (emphasis added). The Court, in *City of San Diego v. Roe*, recently entrenched this blurring of what is in fact personal with what ought to be personal by articulating the public concern requirement in terms of “legitimate news interest,” something “of general interest and of value and concern to the public.” *City of San Diego v. Roe*, 2004 U.S. LEXIS 8165, *11 (2004). The case involved a police officer who was terminated after his employer discovered sexually explicit videos for sale online which depicted the employee stripping and masturbating while wearing an unofficial police uniform. Although the Ninth Circuit found the video-speech protected in that it took place “off-duty and away from his employer’s premises, and was unrelated to his employment,” *City of San Diego v. Roe*, 2004 U.S. LEXIS 8165, *4 (2004). *Roe* was “not a close case” in failing to meet this “public value” standard, and thus *Pickering*’s threshold inquiry. *Id.*

⁷⁹ *Rowland v. Mad River Local School District*, 730 F.2d 444, 449 (6th Cir. 1984).

⁸⁰ *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1283 (1998).

⁸¹ *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (mentioning discipline by superiors, harmony among coworkers, performance of the speaker’s duties are considerations in gauging disruption) (citing *Pickering v. Board of Education*, 391 U.S. 563, 570-73 (1968)); *Connick v. Myers*, 461 U.S. 138, 151 (1983) (mentioning discipline, morale, harmony, and efficiency) (citing *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Kennedy, J., concurring)).

⁸² Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U.L. REV. 1007, 1019 (“The core of the employee’s free speech right is entirely dependent on the likely reaction of co-workers and the public to the employee’s speech.”).

and more revealing about what lies at the heart of that disruption. DADT has been called the “harshest regime in U.S. law for penalizing coming out speech.”⁸³ The statute provides that “[a] member of the armed forces shall be separated from the armed forces”⁸⁴ if that “member has *stated* that he or she is a homosexual or bisexual, or words to that effect.”⁸⁵ This restriction has been found to include statements such as “I am gay,” “I am homosexual,” or “I am lesbian.”⁸⁶

Under DADT, just as under the pre-1993 complete ban, gay self-identification is effectively grounds for separation from the military. But DADT is narrowly tailored in ostensibly targeting only the “telling” of sexuality. The “unit cohesion” argument, that openly gay soldiers will disrupt the close working relationship among soldiers necessary for effective combat, is routinely advanced in support of the policy. The perceived effects of self-identifying speech lie at the core of the “unit cohesion” argument. Neither courts⁸⁷ nor the military itself⁸⁸ deny that homosexuals have always served. It is not the presence of homosexual soldiers, but rather their self-identification as such, that leads to disruption. As one U.S. general noted, “A *statement* [of homosexual orientation] alone will cause disruption within the unit.”⁸⁹

⁸³ WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, *SEXUALITY, GENDER, AND THE LAW* (2d ed. 2004).

⁸⁴ 10 U.S.C. § 654(b) (2000).

⁸⁵ *Id.* § 654(b)(2) (emphasis added). The statute is actually worded such that it does not categorically ban all coming out speech, exempting such speech in the case of “a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.” 10 U.S.C. § 654(b)(2). This should nonetheless be regarded as a complete ban for two reasons. First, as many scholars have argued, in practice the presumption created by self-identification is nearly irrebuttable, and thus operates in practice like a complete ban. *See, e.g.,* Thomasson v. Perry, 80 F.3d 915, 932 (4th Cir. 1996) (“[T]he military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct.”) (quoting Steffan v. Perry, 41 F.3d 677, 686 (D.C. Cir. 1994)); Yoshino, *Covering*, *supra* note 4, at 828 & n.332 (stating that “[a]s a practical matter, this presumption has proved very difficult to rebut,” and collecting cases in support of that proposition).

Second, to the extent that an exception does exist, the sort of speech allowed by 10 U.S.C. § 654(b)(2) is gay self-identification which is shown in some sense to be *insincere*—under which, for example, an individual lacks all desire to engage in intimate homosexual acts. *See* AUSTIN, *supra* note 5, at 14-17 (describing abuses of certain speech acts such as “when I say ‘I promise’ and have no intention of keeping it,” and calling such statements as “insincere” and “hollow”). The statute only allows gay self-identifying speech when, in effect, there is evidence that the self-identification at issue doesn’t function in same important ways that gay self-identification normally does, *see* discussion *infra* Section I.B (outlining the three dimensions of gay self-identification), rendering the exception meaningless in remedying the harm of such suppression.

⁸⁶ *Able v. United States*, 88 F.3d 1280, 1294 (2d Cir. 1996) (“The DoD has interpreted the phrase ‘statement that a member is a homosexual or bisexual, or words to that effect’ to include statements such as ‘I am a homosexual,’ ‘I am gay,’ ‘I am a lesbian,’ and ‘I have a homosexual orientation.’”) (citing Department of Defense Directive 1332.30, encl. 8, at B.4.b.).

⁸⁷ *See, e.g.,* *Able v. United States*, 88 F.3d 1280, 1286 (2d Cir. 1996), *rev’d on other grounds* 155 F.3d 628 (2d Cir. 1998) (“It is not aimed at the separation of homosexuals based on status alone.”).

⁸⁸ *See, e.g.,* Kendall Thomas, *Shower/Closet*, 20 *ASSEMBLAGE* 80 (1993) (quoting an ex-Navy Captain as saying that “‘we all know’ that ‘we’ve been able to live with homosexuals in our military quite well.’”); ABC NEWS, May 19, 1992 (“[G]ays in the military, . . . of course exist[.]”).

⁸⁹ Policy Concerning Homosexuality in the Armed Forces: Hearings on S. 1298 Before the Senate Comm. on Armed Services, 103d Cong. 595-96 (1995) at 821 (statement of John P. Otjen, U.S. General).

In the military's model, the source of disruption is straight servicemembers.⁹⁰ The regime highlights the fact that disruption due to gay self-identification stems not from the content of or motivation for the speech (since gay status is legally permissible) so much as the fact that it was spoken. In this way we can understand DADT's prohibition on *asking* as well as *telling*. Direct questioning of a servicemember's sexuality is prohibited⁹¹ not because of homosexual status but because of a belief in the necessity of suppressing the communication of homosexual status. (In this regard the regime is more consistent than that contemplated in *Weaver*: In that case, the plaintiff was directly asked about her sexuality by a volleyball team member but then disciplined for providing a truthful answer.⁹²)

3. Public School Students

Public school administrators use a strikingly similar rationale to the military's to prohibit gay self-identification by students. In *Tinker v. Des Moines School District*, the Supreme Court famously noted that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁹³ But *Tinker* has had limited effectiveness in protecting gay self-identifying speech because it articulated limits on any First Amendment expression that substantially interferes with school discipline. Schools can, and have, offered countless reasons why disruption might follow a student's self-identification, most obviously citing fears of verbal or physical harassment when a student "flaunts" his sexuality.⁹⁴

Many high school officials continue to silence the self-identification of gay students, often effectively, because they anticipate negative reactions from non-gay students. Missouri high school student Brad Matthewson was disciplined when he came to school wearing a t-shirt that read "I'm gay and I'm proud," was forced to turn the shirt inside out, and was prohibited from wearing it again.⁹⁵ The justification offered—much like in the DADT context—was potential disruption rooted in the reaction of peers: The shirt was "offensive, and distracting to other students."⁹⁶ Similarly, North Carolina high school student Jarred Gamwell was recently prohibited from hanging campaign signs for

⁹⁰ Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 Yale L.J. 485, 553 (1998) ("[T]he justifications for 'don't ask, don't tell'—unit cohesion, privacy, and sexual tension—primarily focus not on the gay servicemember but on the straight servicemember.").

⁹¹ *Able v. United States*, 88 F.3d 1280, 1287 (2d Cir. 1996) ("Applicants for enlistment, appointment, or induction shall not be asked or required to reveal whether they are heterosexual, homosexual or bisexual.").

⁹² See discussion accompanying note 73. One of the advantages of DADT contemplated by President Clinton was that through its prohibition on "asking," soldiers would no longer be required to lie.

⁹³ 393 U.S. 503 (1969). On the subject of sexual expression in schools, see generally Sean P. Greene, *Discussion and Expression of Gender and Sexuality in Schools*, 4 GEO. J. GENDER & L. 421 (2002)

⁹⁴ See, e.g., Matthewson, Memorandum in support of preliminary injunction *3

⁹⁵ ACLU Sues Missouri High School for Censoring Gay Student, at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=17071&c=106> (last visited May 17, 2005).

⁹⁶ Memorandum in Support of Plaintiffs Motion for a Preliminary Injunction, *Matthewson v. Webb City School District*, November 27, 2004 at *1.

student government elections that explicitly indicated he was gay.⁹⁷ The administration claimed such identification was “disruptive of the educational process” and thus fell within its “‘right to control and censor speech,’”⁹⁸ and a state court agreed.⁹⁹

Admittedly, the threat to openly gay students in today’s public schools is not insignificant:¹⁰⁰ Jamie Nabozny was verbally and physically harassed throughout his three years in a Wisconsin public high school for being openly gay,¹⁰¹ eventually withdrawing.¹⁰² In this light, restrictions on self-identification couched in the interest of protecting gay students seem reasonable. And yet this protection rationale is perniciousness in the same way as those which animate the public employee and military contexts: Homophobia underlies both the disruptive reaction of fellow students and the response by administrators. In *Nabozny v. Podlesky*, the Seventh Circuit acknowledged that homophobia served as the basis for the lack of reaction by school officials to the harassment of Jamie Nabozny: As the school’s principal told Nabozny, “if he [is] ‘going to be so openly gay,’ he should ‘expect’ such behavior from his fellow students.”¹⁰³ Homophobia on the part of school administrators underlies their insistence that gay students remain silent (rather than simply reprimanding their attackers).

* * *

I have argued that when gay self-identification is disruptive, it is so only because of the homophobic biases of colleagues—that it is not, in any sense, what we might think of as “inherently disruptive” speech.¹⁰⁴ I concede that in certain scenarios it may be objectively *reasonable* for an employer, officer, or administrator to conclude that there will be a negative reaction to gay self-identification.¹⁰⁵ To the operator of a business

⁹⁷ See letter from Leslie Cooper, Staff Attorney, ACLU, to Bill Williamson, Principal, James Baxter Hunt Jr. High School (Apr. 26, 2004), *available at* <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=15537&c=106> (last visited Sept. 30, 2005) (noting that the campaign signs read “Queer Eye for Hunt High” and “Gay Guys Know Everything!”);

⁹⁸ Michael Winerip, *On Education; Officials Vote for the Closet at Hunt High*, N.Y. TIMES, May 5, 2004, at B11.

⁹⁹ See *id.* (observing that the ACLU challenged the removal in state court and lost).

¹⁰⁰ Amy Lovell, Comment, “*Other Students Always Used to Say, ‘Look at the Dykes’*”: *Protecting Students from Peer Sexual Orientation Harassment*, 86 CALIF. L. REV. 617, 623 (1998) (“[S]tudies show that a substantial percentage of queer youth are harassed in regard to their sexual orientation. . . [and] suggests that student-to-student sexual orientation harassment is a frequent occurrence in American schools.”).

¹⁰¹ *Nabozny v. Podlesny*, 92 F.3d 446, 449 (7th Cir. 1996) (“Nabozny decided not to ‘closet’ his sexuality, and considerable harassment from his fellow students ensued.”).

¹⁰² *Id.* at 452.

¹⁰³ *Id.* at 451.

¹⁰⁴ By this I mean speech to which a failure to react results from irrationality or doubts about the statement’s accuracy. Paradigm examples of this type of speech are incitement speech and “fighting words”; both can be restricted under current First Amendment doctrine. See WILLIAM COHEN, *THE FIRST AMENDMENT: CONSTITUTIONAL PROTECTION OF EXPRESSION AND CONSCIENCE* 67 (2003) (describing the categories of “low value” speech).

¹⁰⁵ Cf. *Waters v. Churchill*, 511 U.S. 661, 677 (U.S., 1994) (suggesting that the court “consider[] the reasonableness of the employer’s conclusions” regarding the context and effect of the employee’s statement).

concerned with “harmony among co-workers,” or “close working relationships,”¹⁰⁶ an officer concerned with “unit cohesion,” or a principal concerned with school order, the hostile reaction of others to the identification of a gay colleague is disruptive within the traditional meaning of the word. Yet courts should not tolerate any regime which attempts to suppress self-identification due to its negative disruptive effects.

By restricting speech under this aspect of the persuasive conception, courts legitimize the underlying discriminatory views. In the highly structured employment, military, and education contexts, there are less severe methods than complete restriction—such as targeted discipline or punishment—for controlling and limiting disruption. A public employer, for example, can leverage the threat of termination against the audience as well as the speaker. In the case of self-identification, because the root of disruption is so clearly bias, the cost of eliminating that disruption should fall on the audience. Coworkers, other servicemembers, and classmates could all be reprimanded effectively to quash disruption, rather than singling out the speaker alone.¹⁰⁷

C. Parades: Legitimate Restrictions on Self-Identification Under a Persuasive Conception

While most case law on gay self-identifying speech focuses on the negative disruptive effects of such speech, a few contexts focus on the pure, positive persuasive effects. As an example, consider the contexts of parades: Unlike the employment, military, or education contexts, a parade organizer who restricts gay self-identification does not do so because of the negative persuasive effects—that is, out of a fear of disruption—but out of recognition of and disagreement with the positive persuasive effects—the normative claim for gay equality embodied therein. In the parade context, the same rationale used by John Hart Ely and the California Supreme Court in *Sipple* in arguing for the protection of self-identification becomes a rationale for its suppression. In such contexts courts can sometimes correctly rely on a persuasive conception of self-identification to quash coming-out speech.

It is a persuasive conception that animates the Supreme Court’s decision in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, which upheld a St. Patrick’s Day parade organizer’s right to exclude members of a gay group from marching in the parade under a banner identifying their sexual orientation.¹⁰⁸ Gay marchers can, and did, march—openly gay legislator Elaine Noble marched, unidentified, in the same St. Patrick’s Day parade decades earlier.¹⁰⁹ The *Hurley* Court acknowledges that it is the self-identification of gay marchers in the parade, through their banner, that expresses the view “that people of [homo]sexual orientations have as much claim to unqualified social acceptance as heterosexuals.”¹¹⁰ Embracing a persuasive conception of that statement, the Court takes this equality claim as part of the message of “I am gay.”

¹⁰⁶ Rankin v. McPherson, 483 U.S. 378, 388 (U.S. 1987).

¹⁰⁷ Gamwell, for example, describes an incident of harassment as a result of his self-identification, and notes how the student was subsequently suspended.

¹⁰⁸ 515 U.S. 557 (1995).

¹⁰⁹ Matthew Breilis, *From Closet to Campaign Trail*, BOSTON GLOBE, Aug. 30, 1998, at E1.

¹¹⁰ *Id.* at 574. The sense that self-identification constitutes advocacy is clearly evident in many newspapers which covered the controversy surrounding the Irish-day parade. *See, e.g.,* Ana Puga, *High*

Under the persuasive conception, because the Court understands “I am gay” as advocacy for gay equality—as “Gay is good”—the *Hurley* Court is arguably correct in permitting that declaration to be restricted in the context of Boston’s St. Patrick’s Day parade. Unlike the contexts discussed above, a parade organizer cannot completely counter the positive persuasive effect of self-identification except through suppression. And unlike a neutral statement regarding one’s status, a normative claim about the *acceptability* of homosexuality is a viewpoint with the potential to disrupt another speaker’s message.

Under a persuasive conception suppressing gay self-identification is sometimes reasonable. However, a narrow focus on the persuasive aspect of self-identification is itself unreasonable: A consideration of all three distinct aspects of gay self-identification is required to determine whether such speech is protected. Thus I turn in the next Part to a consideration of the legal remedy for the suppression of the creative aspect of self-identification.

III. The Creative Conception of Gay Self-Identifying Speech in Law

Legal scholars have argued that restrictions on the right to gay self-identification threaten one’s right to be homosexual, and these scholars embrace in part the idea that self-identification creates identity. This creative conception is primarily a scholarly one, and it should be understood as the academic reaction and alternative to the judicially favored persuasive conception. Many scholars have emphasized the creative aspect of gay self-identification in articulating its importance. Judith Butler,¹¹¹ Janet Halley,¹¹² Nan Hunter,¹¹³ and others¹¹⁴ begin with the premise that “[s]elf-identifying speech . . . [i]s a major factor in constructing identity.”¹¹⁵ A strong version of the creative conception views homosexuality as one of “the identities whose *existences* are contingent upon expression.”¹¹⁶ For these theorists, the value of self-identification is foremost as an illocutionary act, in creating one’s gay identity.

As I elaborate in Section A, speech creates identity not all at once but through a complex series of social interactions—it thus depends on a recognition of the continuous nature of gay self-identification. By threatening its formation, restrictions on the creative aspect of self-identification threaten gay identity itself. I thus argue in Section B that coming-out speech, under a creative conception, finds protection under the First

Court Says Veterans Can Bar Gays from Parade, Boston Globe, June 20, 1995 at 1 (calling GLIB’s message “sexual-political” and paralleling it to “signs saying ‘queers should die’”).

¹¹¹ See JUDITH BUTLER, *EXCITABLE SPEECH: POLITICS OF THE PERFORMATIVE* (1997).

¹¹² See Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

¹¹³ See Nan Hunter, *Speech and Equality*, *supra* note 42, at 1704.

¹¹⁴ See, e.g., Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 116-124 (1998) (arguing that the law should view gay coming out as a major factor in identity construction).

¹¹⁵ Nan Hunter, *Speech and Equality*, *supra* note 42, at 1718; see also Yoshino, *supra* note 1, at 836 (“Sometimes self-identifying speech can constitute one’s identity.”).

¹¹⁶ *Id.* at 49 (emphasis added).

Amendment's prohibition on coerced speech, and the Fourteenth Amendment's mandate of class-based Equal Protection.

However, the creative conception will not be readily accepted in the courts: As I explain in Section C, courts have ignored and will continue to ignore the creative conception because it draws too subtle a distinction between status and speech. Courts are content to rest on the simple proposition that gay people can be gay without saying so. The law's recognition of only an out/closeted binary, and not the continuous nature of coming-out, is further evidence that it will never articulate a creative conception. No courts have validated this conception of self-identifying speech,¹¹⁷ and I predict that none will.

A. How Speech Creates

Hunter has said that “[s]elf-identifying speech does not merely reflect or communicate one’s identity; it is a major factor in constructing identity.”¹¹⁸ More than that, she suggests that “[gay i]dentity cannot exist without it. . . . [because] expression is a component of the very identity itself.”¹¹⁹ Neither Hunter nor many of those who cite her elaborate on this complex proposition,¹²⁰ and the process by which speech can create identity is not immediately obvious. But we can understand her assertion as resting on the idea that “[i]dentity encompasses explanation and representation of the self.”¹²¹ Like every identity, homosexuality is at once private orientation and social role.¹²²

In representing herself as gay, an individual does not only changes the way she is publicly perceived.¹²³ Public (exterior) representation is not merely the presentation of a

¹¹⁷ Although in *Dale v. Boy Scouts*, New Jersey Supreme Court Justice Handler recognizes the illocutionary aspect of gay self-identification, he ultimately suggests that it isn't legally significant. See *Dale v. Boy Scouts*, 160 N.J. 562, 639 (N.J. 1999) (explicitly recognizing that “the statement ‘I am gay’ is illocutionary.”) (Handler, J., concurring) (quoting Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 550 (1998)).

¹¹⁸ Nan Hunter, *Speech and Equality*, *supra* note 42, at 1718.

¹¹⁹ *Id.*

¹²⁰ See, e.g., N. Nicole Endejann, Note, *Coming Out is a Free Pass Out: Boy Scouts of America v. Dale*, 34 AKRON L. REV. 893, 913 (2001) (“Self-identifying speech . . . is crucial to constructing one's identity or status.”) (citing Hunter, *supra* note 42, at 1718); *Dale v. Boy Scouts*, 160 N.J. at 639-40 (Handler, J., concurring) (quoting Hunter, *supra*, at 1718); see also Alan B. Handler, *Judging Public Policy*, 31 RUTGERS L. J. 301, 317 (former Associate Justice of the New Jersey Supreme Court suggesting that Nan Hunter's proposition “supported the court's determination that Boy Scouts' decision to exclude him based on his self-identification as a gay man amounted to status discrimination”).

¹²¹ Nan Hunter, *Speech and Equality*, *supra* note 42, at 1696.

¹²² Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 117 (2002) (“[S]ocial constructionists approached homosexuality as a social role, rather than a discrete identity”). Scholars such as Kenji Yoshino have explicitly recognized the difficulty in defining gay identity. See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1834 n.3 (1996). He defined “gay identity” to “mean nothing more than the shared experience of having a sexual attachment to persons of the same sex and the oppression experienced because of that attachment.” *Id.*

¹²³ Eve Sedgwick tells a story of two best friends, one male, one female, which illustrates how shifts in this public representation can influence even the most private relationships. (The story is also striking for the near absence of a descriptive aspect to the self-identification, in that the woman already knew that “the man's eroticism happen[ed] to focus exclusively on men.”) EVE KOSOFSKY SEDGEWICK, *THE EPISTEMOLOGY OF THE CLOSET* 4 (1990). Sedgwick notes that:

predeveloped (interior) identity, but a continuous dialogue with society that shapes that identity. As Halley, an advocate of a creative conception, has said, “Social agents work with social meaning”¹²⁴—in other words, gay self-identification establishes a representation available for social interpretation.¹²⁵ As individuals we are instinctively aware of the important identity revelation, of the fact that “an individual interprets himself to a world interpreting him.”¹²⁶ This is why, for example, instead of a teenager offering to the world the truest representation of her current identity (i.e., sexually confused), she will often offer the identity she wants to occupy (i.e., homosexual)—sensing that, by perceiving her in a specific way, society will help her realize her desired identity.

Central to the idea that self-identification is creative is the realization that gay self-identification is a continuous process. The continuous need to self-identify to colleagues, friends, and acquaintances both establishes an exterior representation, and affects an individual’s interior gay identity.¹²⁷ Marjorie Rowland, for example, self-identified as gay on multiple occasions: to a secretary, an assistant principal, and several teachers; long before that, of course, she self-identified to the woman who became her partner.¹²⁸ Each of these steps was generative of her personal gay identity. Coming out cannot be captured by a simple binary of “closeted” or “out,” because “coming out of the closet is not an all-or-nothing matter.”¹²⁹

Kenji Yoshino explains how this “representation” of sexual identity is tied to, and constitutive of, its “essence.” Building off the work of Judith Butler, Yoshino espouses a weak performative model of identity, in which identity is created through acts.¹³⁰ Specifically, he suggests that one’s interior homosexual identity may be “created not through single acts, but through a set of infinite and infinitesimal acts on the part of the individual and those around her.”¹³¹ For example, in the public employee context, conversations about family or dating, attendance at work-related social gatherings, and

[I]t was only after one particular conversational moment, fully a decade into this relationship, that it seemed to either of these friends that permission had been given to the woman to refer to the man, in their conversation together, as *a gay man*. . . . even in the context of years and years beforehand of exchange predicated on the man’s *being* gay.

Id. The woman in this story had permission to call her friend “gay” only after he “use[d] about himself the phrase ‘coming out’—to mention, as if casually, having come out to someone else.” *Id.* The man’s self-identifying speech to another individual helped create his gay public identity with respect to this friend.

¹²⁴ Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. Rev. 915, 934 (1989).

¹²⁵ *Id.* at 934 (distinguishing between the “essence of sexual orientation” and “the representation of it available for social interpretation.”).

¹²⁶ *Id.* at 953.

¹²⁷ Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 239, 250-51 (Edward Stein ed. 1990) (describing sexual identity as “a complex developmental outcome, the consequence of an interactive process of social labeling and self-identification”).

¹²⁸ *Rowland v. Mad River Local School District*, 730 F.2d 444, 446 (6th Cir. 1984).

¹²⁹ William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2453 (1997).

¹³⁰ Yoshino, *supra* note 1, at 868 (weak performative model as suggesting that identity is culturally dependent since the biological component of an identity, such as sex, is unknowable and so “we can only apprehend it through culture”).

¹³¹ Yoshino, *supra* note 1, at 874.

pictures of a partner at work are just a few examples of what might influence the way an employee conceives of her homosexuality.

B. Constitutional Protection for Status Creation

In contesting their termination for self-identifying as gay, plaintiffs often allege two distinct sorts of discrimination, first “against homosexuals” and “further . . . against ‘manifest’ homosexuals.”¹³² The former is an accusation of complete exclusion, the latter of an enforced passing regime in which employees are dismissed for self-identifying as gay. A creative conception challenges this distinction more directly than either a descriptive or a persuasive one, suggesting that because self-identifying speech in part constitutes identity, a public employee’s dismissal for gay self-identification is one element of a larger regime of suppression which threatens the very identity itself.

Under a creative conception, restrictions on gay self-identifying speech should find constitutional protection under a combination of the First and Fourteenth Amendments. Coming out is creative in part because it contradicts the identity a heterosexual presumption would otherwise create. We might think of the First Amendment prohibition on coerced speech as constitutional protection for the *means* of identity creation. Self-identification should also find constitutional protection under the classification strand of the Fourteenth Amendment’s Equal Protection Clause—what we might think of as constitutional protection for the *end result* of identity creation. Because at any given point an individual’s gay identity is both existent and its creation is ongoing, both of these threads together form the basis for protecting self-identification.

1. The First Amendment’s Prohibition on Coerced Identity Speech

The default sexual message spoken for every individual is heterosexuality—what Adrienne Rich has termed “compulsory heterosexuality”¹³³ and Michael Warner has called “heteronormativity.”¹³⁴ This message is visible everywhere, from advertisements to literature and politics, and infuses our daily interactions with other people.¹³⁵ There is reason to believe this message may be stronger in the workplace, the military, and public

¹³² *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*, 24 Cal. 3d 458, 465 (Cal. 1979).

¹³³ “The lie of compulsory female heterosexuality today afflicts . . . every profession . . . every organizing attempt, every relationship . . .” Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 177 (Ann Snitow et al. eds., 1983) (emphasis added).

¹³⁴ MICHAEL WARNER, *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (1993) (defining “heteronormativity” as the practice of basing patterns of thought, awareness, and beliefs on the presumption of universal heterosexuality).

¹³⁵ Jeffery P. Dennis, *Heteronormativity*, in *MEN AND MASCULINITIES: A SOCIAL, CULTURAL, AND HISTORICAL ENCYCLOPEDIA* (Michael Kimmel ed. 2003) (“[H]eteronormativity extends far beyond the arena of interpersonal relationships to imbue social institutions, artistic works, discourses of statehood, and individual lives with an underlying, unquestioned, and invisible presumption of universal heterosexual desire”); see also Eskridge *supra* note 129 (“conforming to compulsory heterosexuality harms those living it by giving their lives a mark of inauthenticity, disrupting their relationships with others, and hurting those whom they marry or otherwise implicate in the lie.”)

schools—historically sites of heterosexual male dominance—and that in those environments, the power to name oneself accurately is especially significant.

The Supreme Court has repeatedly held that “one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”¹³⁶ In *Hurley*, the Supreme Court upheld a St. Patrick’s Day parade organizer’s right to prevent members of a gay Irish group from marching in the parade under their own banner. The Court held that the parade organizers in *Hurley* could “remain[] silent” on the specific message of homosexuality by banning the “Gay, Lesbian, and Bisexual Group” signs from their parade.¹³⁷

The *Hurley* Court affirmed the broader principle of the right of a private speaker to avoid coerced expression. But homosexuals who are barred from self-identifying are subject to coerced expression every day. Our heteronormative culture presumes that every person is straight. Thus, when individuals are prevented from declaring their homosexuality, they are in fact being forced to express, through their silence, a message of heterosexuality.¹³⁸ To remain “silent” about heterosexuality, then, a gay person must be able to proclaim her homosexuality. The Court has recognized that the ability to remain silent encompasses the right to express a dissenting view. In *Wooley v. Maynard*,¹³⁹ the Court found that the mere display of New Hampshire’s “Live Free or Die” state motto on the license plate of a plaintiff who objected to its message offended the First Amendment “right of individuals to hold a point of view different from the majority.”¹⁴⁰ *Wooley* clearly encompasses a right to *passive* dissent—that the plaintiff’s could simply remove a message from their license plate. But it also encompasses a right to *active* dissent: While they were not allowed to replace the words “Live Free or Die” with a phrase of their own choosing, the plaintiffs, having removed the sign, were free to use a bumper sticker to then express their own message without interference. Yet, in this scenario there are two distinction options.

A gay person cannot erase the message “I am straight” without also adding in the message “I am gay”—unlike in *Wooley*, the distinction between active and passive dissent collapses. In this light, we can understand why Judges and scholars have explicitly extended the reasoning in *Hurley* and *Wooley* to gay self-identification. The First Amendment protection of the negative right to be free from coerced identity speech itself requires identity speech. Five Ninth Circuit judges recognized that, in the context of the military’s DADT policy, “silence . . . can lead others to presume that [homosexuals] assent to a view about their own sexuality that they do not espouse,” namely that they are

¹³⁶ *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm’n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion)).

¹³⁷ *Hurley*, 515 U.S. at 574; *see also Pacific Gas & Electric Co.*, 475 U.S. at 16 (“[F]or individuals, the choice to speak includes within it the choice of what not to say.”) (citations omitted); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (articulating “a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.”) (quoting *Estate of Hemingway v. Random House*, 23 N. Y. 2d 341, 348 (1968)).

¹³⁸ Nan Hunter, *Speech and Equality*, *supra* note 42, at 1718 (“suppression of identity speech leads to a compelled falsehood, a violation of the principle that an individual has the right not to speak as well as to speak”).

¹³⁹ 430 U.S. 705, 715 (1977).

¹⁴⁰ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

heterosexual.¹⁴¹ Scholars have argued that homosexuals have a right to avoid sanctioning the majority's view of sexuality and instead express a different view.¹⁴²

The link between self-identification and status implies that a homosexual high school student's Brad Matthewson's "Gay Pride" t-shirt is significant in a way that a heterosexual friend's "Straight Pride" t-shirt is not. The straight student lives against the background of the culture's presumption of heterosexuality, which his t-shirt merely reinforces; by contrast, the gay student's shirt is an act of self-differentiation and identity creation.¹⁴³ Courts, however, have reached the opposite result—in *Chambers v. Babbitt*, a federal district court upheld a heterosexual's right to where a "Straight Pride" shirt,¹⁴⁴ while courts have found against gay students like Matthewson.¹⁴⁵ Courts are correct only in their initial realization that a distinction is justified—the negative First Amendment right against coercion asserted when a gay student wears a self-identifying shirt is fundamentally different from the affirmative right to identity speech asserted when a straight student does so. For Matthewson, unlike his hypothetical straight friend, the shirt is more than just "attire that reflects [his] *political beliefs*"¹⁴⁶—it reflects, and constitutes, his identity itself.

The coercion at issue when suppressing gay self-identifying speech is even more basic than that in conventional coerced-speech cases. In *Wooley*, the Court characterized the harm as forcing an individual's *property*—the respondent's car—"to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable," effectively "a 'mobile billboard' for the State's ideological message."¹⁴⁷ In the case of coerced sexual identity speech, however, it is the individuals *themselves* who are commandeered as a "mobile billboard" for heterosexuality. The coerced-identity message co-opts not property, but a person. Prohibitions on the co-opting of an individual's body lie at the very core of substantive due process; as Laurence Tribe has stated, "the concept of privacy embodies the 'moral fact that a person belongs to himself and not to others.'"¹⁴⁸ The intersection between speech and personhood can be simply illustrated by

¹⁴¹ *Holmes v. California Army Nat'l Guard*, 155 F.3d 1049, 1050 (9th Cir. 1998) (dissenting from hearing en banc).

¹⁴² Tobias Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOKLYN L. REV. 1141, 1176-80 (1997) (recognizing that compelled affirmation of heterosexuality, even though forged through cultural and social norms, and potentially ambiguous, still finds protection within the Court's compelled speech First Amendment jurisprudence).

¹⁴³ While Matthewson, who is gay, was forced to change his shirt, when he switched shirts with his heterosexual friend, the friend was not disciplined by the administration. See Plaintiffs Motion for a Preliminary Injunction, *Matthewson v. Webb City School District*, November 27, 2004 at *2.

¹⁴⁴ *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (upholding a student's right to wear a sweatshirt with the message "Straight Pride").

¹⁴⁵ See discussion *supra* note 95 (upholding the decision by high school administrators to prevent a student from wearing an "I'm gay, I'm proud" t-shirt).

¹⁴⁶ Motion to dismiss at *6 (emphasis added).

¹⁴⁷ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). In *Pacific Gas & Electric v. Public Utilities Commission*, another seminal coerced-speech case, the Court prohibited the state commission from forcing the company to include messages that it opposed in its billing envelopes, another form of property. *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1 (plurality) (vacating a lower court decision which forced Pacific Gas to include in its billing envelopes political views which it opposed).

¹⁴⁸ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 15-1 at 1302 (2d ed. 1988) (citing *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S.Ct. 2169, 2187 n.5 (1986) (Stevens, J., concurring)).

imagining that an individual functions as a billboard—and has a right to display her own message.

The harm of coerced expression is standardization, but not just standardization of speech. Landmark free speech cases that, on the surface, dealt with issues of pure speech have been animated by similar fears of some deeper standardization.¹⁴⁹ In announcing the First Amendment standard for the suppression of obscene material, the Court in *Miller v. California* decried the “the absolutism of imposed uniformity.”¹⁵⁰ However, the Court was not referring to uniformity with respect to speech, but rather with respect to “tastes and attitudes” regarding sexually explicit material.¹⁵¹ In *West Virginia Board of Education v. Barnette*, the Court struck down under the First Amendment a law requiring all children to say the Pledge of Allegiance. Justice Jackson denounced the law as a “[s]truggle[] to coerce uniformity,”¹⁵² but his focus was those deeply personal sentiments of patriotism and nationalism, not the words themselves.¹⁵³

Though these sentiments are difficult to quantify, we can draw a parallel between these cases and sexual orientation. “I am gay” is more significant than other descriptive statements—for example, “I am hungry”—in the same way that the Pledge of Allegiance is more significant than a schoolhouse rhyme. Their significance lies in their relatively unique connection to an underlying identity: These words are, to quote Tribe, the way to “make the ‘statement’ . . . [of] a public identity,”¹⁵⁴ whether of sexuality or of patriotism.

2. The Fourteenth Amendment’s Mandate of Class-Based Equal Protection

Under the Equal Protection Clause of the Fourteenth Amendment, the government increasingly cannot discriminate based on gay status.¹⁵⁵ Although the appropriate standard of review for sexual orientation under the Equal Protection Clause is still

¹⁴⁹ The Establishment Clause is beyond the scope of the paper, though that clause’s very purpose is to prevent standardization of deeply held personal beliefs. Plaintiff’s have also brought Free Exercise challenges which turn exclusively on standardization. *See, e.g., Hicks v. Halifax County Bd. of Educ.*, 93 F. Supp. 2d 649 (E.D.N.C. 1999) (objecting to school uniform policy on First Amendment Free Exercise grounds, because the “spirit of the anti-Christ . . . requires uniformity, sameness, enforced conformity” and “[the plaintiff] objects, on religious grounds, to the fact that . . . uniformity is required”).

¹⁵⁰ *Miller v. California*, 413 U.S. 15, 33 (U.S., 1973) (articulating a “community standards” conception because “[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled”).

¹⁵¹ *Id.* at 33.

¹⁵² *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

¹⁵³ *Id.* at 641 (“The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own.”). For this Court, these invisible principles were arguably the most important defining aspects of personhood. *Endo and Korematsu*, decided one year after *Barnette*, were obsessed with loyalty, “a matter of the heart.”

¹⁵⁴ TRIBE, *supra* note 148, § 15-1 at 1303 (“[O]ne reason that rights of privacy cannot be confined to John Stuart Mill’s category of activities having impact only on the actor is that freedom to have impact on others—to make the ‘statement’ implicit in a public identity—is central to any adequate conception of the self.”).

¹⁵⁵ *Cf. Akhil Reed Amar, Attainder and Amendment 2: Romer’s Rightness*, 95 Mich. L. Rev. 203, 217 (1996) (suggesting, through by analyzing the *Romer* opinion in light of the Constitution’s No Bill of Attainders Clause, that *Romer* prohibits a government action that “impermissibly singles out persons for disfavored treatment based on their [queer] status”). It is also noteworthy that the Court has long disfavored criminalization on the basis of “status.” *See Robinson v. California*, 370 U.S. 660, 667-68 (1962) (striking down a law criminalizing the status of being a drug addict).

contested,¹⁵⁶ rather than revisit those arguments I suggest that gay-status-based discrimination fails even the lowest tier of scrutiny. A tenet of rational basis is to ensure that “classifications are not drawn for the *purpose* of disadvantaging the group burdened by the law.”¹⁵⁷ The Court’s decision in *Romer v. Evans*¹⁵⁸ establishes a legal presumption that a law or practice that classifies on the basis of gay status has as its purpose the disadvantaging of homosexuals. In *Romer*, the Court struck down Colorado’s antigay Amendment 2 because it was not rationally related to a legitimate state interest. In finding it constitutionally irrational, the Court emphasized both that the amendment targeted a “class of persons”¹⁵⁹ and that it was based on animus.¹⁶⁰ These dual observations are closely intertwined: The Court’s conclusion that Amendment 2 was based on animus largely followed from the fact that it broadly targeted homosexual status.¹⁶¹

By analogy, a public employment decision explicitly based on homosexual status and nothing more should similarly fail rational basis review because it is necessarily grounded in animus.¹⁶² There is no legitimate cost-saving reason to deny homosexuals employment. (Although under a persuasive conception limiting the disruption caused by the presence of a gay employee arguably increases efficiency—and is thus cost-effective—this reasoning ultimately validates the animus which underlies that disruption, rendering it illegitimate.¹⁶³) Negative public employment decisions based on homosexual status are thus unconstitutionally irrational.¹⁶⁴

¹⁵⁶ Some scholars have struggled to define the appropriate standard of review after *Lawrence*. See, e.g., Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 Mich. L. Rev. 1528, 1529 (recognizing that post-*Lawrence*, “[c]ourts may be reluctant to . . . [apply] upper tiers of Equal Protection review, but the extreme deference of old-fashioned rational basis review has now been complicated by the Court’s recognition that at least some adverse treatment of gay people is invidious and disfavored.”). Others reject the tiers of scrutiny altogether for homosexuals. See, e.g., Pamela S. Karlan, *Foreward: Loving Lawrence*, 102 MICH. L. REV. 1447, 1450 (“Gay rights cases ‘just can’t be steered readily onto the strict scrutiny or the rationality track’ . . .”). Some even assume, without explanation, that *Lawrence* adopted an ordinary rational basis standard. See, e.g., Benjamin C. Morgan, *Adopting Lawrence: Lawrence v. Texas and Discriminatory Adoption Laws*, 53 EMORY L.J. 1491, 1491 (“*Lawrence v. Texas* decreed that the State of Texas had failed to offer a rational basis for its statutory prohibition of homosexual sodomy.”) (footnote omitted).

¹⁵⁷ *Romer v. Evans*, 517 U.S. 620, 633 (U.S. 1996) (emphasis added) (citing *Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)).

¹⁵⁸ 517 U.S. 620, 633 (U.S. 1996).

¹⁵⁹ *Id.* at 633; see also *id.* at 632 (the amendment “impos[es] a broad and undifferentiated disability on a single named group”) (emphasis added).

¹⁶⁰ *Id.* at 632.

¹⁶¹ The Court notes that the fact “the disadvantage imposed is born of animosity toward the class of persons,” *Romer*, 517 U.S. at 634, is “related,” *id.*, to its characteristic of imposing an “undifferentiated disability on a single named group,” *id.* at 632.

¹⁶² *But cf.* *Able v. United States*, 155 F.3d 628, 634 (1998) (rejecting plaintiffs’ reliance on *Romer* and *Cleburne* in challenging “Don’t Ask, Don’t Tell” on grounds that “cannot survive even rational basis review because it is motivated by irrational fear and prejudice toward homosexuals,” but doing so only because “[t]hose cases did not arise in the military setting.”).

¹⁶³ *Cf.* discussion *supra* Part II, Section B (arguing that suppressing gay self-identification for being disruptive is equivalent to condoning anti-gay prejudice).

¹⁶⁴ See, e.g., William D. Araiza, *Enda Before it Starts: Section 5 of the Fourteenth Amendment and the Availability of Damages Awards to Gay State Employees under the Proposed Employment Non-Discrimination Act*, 22 B.C. THIRD WORLD L.J. 1, 29-36 (2002) (suggesting that workplace status-based sexual orientation discrimination cannot ever be rationally related to a legitimate state interest).

If the classification strand of the Fourteenth Amendment's Equal Protection Clause protects gay status, so too must it protect the speech acts that constitute that status. Suppressing the creative aspect of gay self-identification prevents the creation of gay identity. According to the creative conception, the purpose of condoning such suppression can only be to reduce the prevalence of the underlying status. When compared with laws or practices that burden status itself, burdening status creation is, if anything, more clearly animus-driven: Rather than penalizing the disfavored status, it eradicates it. Under a creative conception, gay self-identifying speech should be protected under the classification strand of the Equal Protection Clause.

C. The Inadequacy of the Creative Conception

Since the inception of “Don’t Ask, Don’t Tell,” courts have both been presented with and refused to acknowledge the creative conception. The military’s stated goals for the policy are to “promote[] unit cohesion, enhance[] privacy and reduce[] sexual tension.”¹⁶⁵ These ends were clearly achieved by the military’s pre-1993 categorical ban, which purported to assure servicemembers that they were not serving alongside homosexuals. Yet it is more difficult to rationalize DADT as serving these ends. While homosexuals have always served in the military,¹⁶⁶ DADT facially acknowledges and condones the presence of invisible gay servicemembers. In contrast to visibly gay servicemembers, invisible ones—whether on the battlefield, in the barracks, or in the showers—would seem to constitute a greater threat to military’s stated goals.

Only through a creative conception can we understand the government’s insistence, and courts’ acceptance, that the military’s goals of privacy and unit cohesion can be furthered simply by silencing the communication of sexuality. As Yoshino observes, by silencing speech the military believes it is also in some sense erasing the homosexual from its ranks: “Blocking gays from expressing their identity in any way leads to their ontic erasure in the minds of straights and possibly in the minds of gays as well.”¹⁶⁷

Why do courts at once accept the reasons given by the military, but fail to acknowledge the theory that appears to underlie them? There are two central reasons. First, the creative conception depends on the continuous nature of coming-out which the law does not recognize. Second, the creative conception is grounded in a very subtle distinction between status and speech—and courts’ refuse to acknowledge such a conception because they draw a sharp distinction between status and speech.

1. Absence of Legal Recognition of the Continuous Nature of Coming-Out

That the continual nature of gay self-identification is not recognized by the law may be one reason why the law has failed to validate a creative conception. The creative conception, grounded as it is in the generative power that repeated acts of coming-out have on an individual’s sexual identity, requires recognition of the continuous nature of

¹⁶⁵ *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998)

¹⁶⁶ *See Thomas*, *supra* note 88.

¹⁶⁷ *Yoshino*, *supra* note 90, at 549.

self-identification. Yet courts have understood “coming out” as a sudden transition from public to private. In articulating why a woman’s sexuality was private under the First Amendment, a California court reasoned that she kept her identity “secret from all but her . . . closest friends.”¹⁶⁸ Even as it acknowledged that the reality was more complicated, the court squeezes the plaintiff into its binary, in effect categorizing her as purely closeted.

Similarly, in the case of *Sipple v. Chronicle Publishing Co.*,¹⁶⁹ the court dismissed a gay man’s privacy suit against major newspapers for truthfully describing him as a homosexual, because his sexuality was known to “people in a variety of cities,” from frequenting gay bars, marching in gay parades, and associating with gay leaders. Although Sipple was not private about his sexuality in a conventional sense, he still referred to his homosexuality as a “*private* sexual orientation.”¹⁷⁰ We can understand his meaning by realizing that he rigorously contained knowledge of his sexual orientation to the gay subculture. For decades in gay community, there has been de facto recognition of and respect for this limited “community” outness. Beginning in the 1960s, homosexuals began to congregate in gay bars,¹⁷¹ spaces that outed everyone within their four walls. And yet, in the early years of the gay rights movement, being identified as gay within a bar was described as freedom, shelter, and escape¹⁷²—while being out in the heterosexual community was described as “potentially paralyzing social ostracism and professional ruin.”¹⁷³ Homosexuals recognized and preserved this distinction, then and now, through a “convention of silence and deception”¹⁷⁴—honestly discussing another’s sexual orientation only with lesbians or gay men.¹⁷⁵

2. The Legal Distinction Between Status and Speech

While I have argued that “I am gay” serves performatively to constitute gay identity, the statement is not classically performative: It does not completely create gay status in the way, for example, “I promise” creates a promise. The proposition that gay individuals are gay even when they cannot, or choose not to, declare that identity is inescapable. Because coming out is not both quickly and completely constitutive of status, courts are unwilling to see it as constitutive of status at all.

This sharp distinction between status and speech is most evident in decisions upholding the constitutionality of DADT. The Second Circuit in *Able v. United States*,

¹⁶⁸ *Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762, 772-73 (Ct. App. 1983) (female transsexual’s status was private under the First Amendment).

¹⁶⁹ 201 Cal. Rptr. 665 (Ct. App. 1984).

¹⁷⁰ *Id.* at 667.

¹⁷¹ CLENDININ & NAGOURNEY, *supra* note 17, at 17.

¹⁷² *Id.* at 18 (“[T]o young gay males trying to find the missing context of their lives, what a gay bar promised was much more: freedom, shelter, friendship, excitement, romance, seduction—escape.”).

¹⁷³ William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2444 (1997).

¹⁷⁴ David L. Chambers & Steven K. Homer, *Honesty, Privacy, and Shame: When Gay People Talk About Other Gay People to Nongay People*, 4 MICH. J. GENDER & L. 255, 258 (1997). However, this convention may be disappearing. *Id.* at 261 (“Eventually, perhaps, the convention may disappear because all straight people will be supportive or nonthreatening . . .”).

¹⁷⁵ *Id.* at 260.

even after assuming for the purpose of its analysis that the discharge of a servicemember based on homosexual orientation would be unconstitutional,¹⁷⁶ refused to find the statute's burden on the gay self-identification of five servicemembers unconstitutional.¹⁷⁷ The court stubbornly avoids even addressing the link between coming-out speech and gay status. Instead, the *Able* court characterizes speech as evidence of conduct,¹⁷⁸ and claimed conduct was the sole basis for discharge.¹⁷⁹ Further, the court maintains a firm distinction between conduct and status, noting that the military's policy "does not bar those who have a homosexual orientation but are not likely to engage in homosexual acts."¹⁸⁰ The *Able* court perceives speech and conduct as related—that the first creates a propensity for the second—but refuses to acknowledge either's link to status.

Courts will not adopt a creative conception due to their unwillingness, as illustrated by *Able*, to further aggregate speech and identity. An exclusively creative model of gay self-identification blurs description with advocacy. Legal theorists who espouse a creative conception fault current law for "falsely disaggregating viewpoint from identity,"¹⁸¹ recognizing that "[c]onstitutional law has made a mess of the relationship between expression and equality."¹⁸² An exclusively creative model would respond to the problem of false disaggregation by too heavily aggregating speech and identity.

To use Austin's example, the statement "There is a bull in the field" is potentially creative in the sense that it brings into being a warning—to encourage the listener to avoid strolling in the field.¹⁸³ However, the statement only creates a warning because of a shared understanding between speaker and listener that bulls are dangerous. The statement acts as creative by invoking—and thus validating—certain commonly held views about bulls. Put more broadly, a statement that creates a warning often validates and reinforces all those conceptions underlying the speaker's need to warn and the listener's ability to perceive the warning.

If gay self-identifying speech is to create gay identity, it must necessarily evoke the speaker's desire to have such an identity and, thus, the identity's desirability more generally. As the listener of "There is a bull in the field" can only understand the statement as a warning by recalling his own conception of bulls as dangerous, the listener of "I am gay" can only understand the statement as identity-creating by reflecting on her conception of gayness as a desirable identity. More than stating that gay *is*, period, this reinforces a notion that "Gay is good." In doing so, it validates a number of positive views about sexuality.

¹⁷⁶ *Able v. United States*, 88 F.3d 1280, 1297 n.10 (2d Cir. 1996).

¹⁷⁷ *Id.* at 1299.

¹⁷⁸ *Able v. United States*, 88 F.3d 1280, 1299 (2d Cir. 1996) (labeling speech and "indicator of propensity to engage in prohibited sexual conduct."); *id.* at 1298 ("[T]he evidentiary value of the admission ["I am gay"] is strongly linked to what it is used to prove: a likelihood of engaging in homosexual acts.").

¹⁷⁹ *Id.* at 1298 ("All three grounds for discharge are anchored in the need for a homosexual act, or at least the likelihood of such an act, before the member can be discharged.").

¹⁸⁰ *Id.*; *id.* at 1299 ("Congress intended to move away from the emphasis on homosexual orientation under the former policy and to substitute an act-based policy in its place.").

¹⁸¹ Hunter, *Expressive Identity*, *supra* note 42, at 21.

¹⁸² *Id.*

¹⁸³ AUSTIN, *supra* note 5, at 33.

As a result of courts' failure both to recognize the continuous nature of coming-out, and their desire to preserve a firm distinction between status and speech, they have and will continue to refuse to recognize a creative conception. Although the creative conception is in theory capable of providing complete constitutional protection for self-identifying speech, it is in fact unsuited. Scholars should look beyond the creative conception in searching for an alternative to the judicially dominate persuasive conception.

IV. The Descriptive Conception of Gay Self-Identifying Speech in Law

Essentially absent from the dialogue about gay self-identifying speech is a legal approach to gay self-identification as simple descriptive speech: coming-out speech's role as identity-reporting. Yet speech is the primary way for homosexuals to communicate their minority status. It is, as five Ninth Circuit judges have recognized, simply "a statement . . . which is truthful."¹⁸⁴ To focus on this aspect of the declaration is to conceive of gay self-identification like any ordinary descriptive statement. Under this model, to use the words of Justices Brennan and Marshall, an individual's self-identifying "'speech' perhaps is better evaluated as no more than a natural consequence of her sexual orientation," rather than the opposite.¹⁸⁵ This is less ambiguous than a focus on either the creative or persuasive effects of identification: As Austin himself observes, in contrast to the creative or persuasive effects, "judges should be able to decide, by hearing what was said, what locutionary [descriptive] . . . acts were achieved."¹⁸⁶ By comparison, the preceding Parts illustrate that even specialized scholars cannot agree on the precise nature of the creative or persuasive effects.

But surprisingly few judicial opinions have adopted a descriptive conception of self-identification. The dissent in *Rowland* arguably did so in recognizing that the self-identifying speech of Marjorie Rowland, and "[s]peech it was," was unique in that "[i]t revealed [her] status as a homosexual."¹⁸⁷ Similarly, in his concurring opinion for the New Jersey Supreme Court in *Dale*, Justice Handler specifically took up the question of "the significance of the connection between [Dale]'s speech and his identity when both relate to his sexual orientation."¹⁸⁸ Although he recognizes the creative value of self-identification, he sees its legal importance as its ability to communicate status information:¹⁸⁹

¹⁸⁴ *Holmes v. California Army Nat'l Guard*, 155 F.3d 1049, 1050 (9th Cir. 1998).

¹⁸⁵ dissent from denial of cert

¹⁸⁶ AUSTIN, *supra* note 5.

¹⁸⁷ *Rowland v. Mad River Local School District*, 730 F.2d 444, 453 (6th Cir. 1984) (Edwards, J., dissenting) (emphasis added); *see also* *Able v. United States*, 880 F. Supp. 968, 973 (E.D.N.Y. 1995) ("In stating that they are homosexuals, individuals 'have done no more than acknowledge . . . their status.'").

¹⁸⁸ *Dale v. Boy Scouts of Amer.*, 160 N.J. 562, 625 (N.J. 1999).

¹⁸⁹ Although Justice Handler explicitly rejects legally characterizing self-identification as creative, at least one scholar suggests that he does just that. *See* Andrew R. Varcoe, *The Boy Scouts and the First Amendment: Constitutional Limits on the Reach of Anti-Discrimination Law*, 9 LAW & SEXUALITY 163, 231 (2000) (observing, without further comment, that "Justice Handler quoted scholars who argue that gay or lesbian self-identification . . . realizes or constructs identity").

[T]he relevance of self-identifying speech is not so much in realizing identity, as in its singular role in revealing identity. The importance of self-identifying speech inheres in its legal effect—that is, in the functional capacity of such speech to *disclose or clarify* the status of a person when that status is entitled to protection against discrimination.¹⁹⁰

Justice Handler, unlike other courts which adopt a descriptive conception, recognizes the crucial function of descriptive self-identification as identity-reporting. In *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, the California Supreme Court found that a public utility unconstitutionally “discriminates . . . against persons who identify themselves as homosexual.”¹⁹¹ Yet the court compared that revelation to a disclosure by an employee that he “read books prohibited by the utility, visited countries disapproved by the utility, or . . . exhibited irrelevant characteristics of personal appearance . . . disliked by the utility.”¹⁹² The *Pacific Telephone* court clearly adopts a descriptive conception of self-identification: The parallel examples it mentions are neither creative—the statements “I read *Hamlet*” or “I visit England” do not serve, in a significant way, to create identity—nor persuasive—it is hard to imagine political consequences affixing to them. And yet—as suggested by its comparison to statements about taste in books, travel, or grooming—the court reads “I am gay” as an insignificant, neutral description (of same-sex sexual object preference). It fails to ascertain that the importance of descriptive status-revelation inheres in the status itself.

As Justice Handler warned in his concurring opinion in *Dale*, “Self-identifying speech . . . is always vulnerable to misinterpretation and misunderstanding based on stereotypes that are associated with the speaker’s status.”¹⁹³ Exclusively creative and persuasive conceptions classify as “speech” a message of advocacy that is sometimes neither intended nor even conceived of by the speaker,¹⁹⁴ without recognizing the alternative that she might merely be describing. By contrast, the descriptive aspect acknowledges that gay self-identification is not always affirming, an acknowledgement that comports more closely with reality. This collapse of speech and advocacy is one of the problems with an exclusively persuasive or creative conception of self-identification that I highlighted above.

Consider that some individuals self-identify as gay in order to publicly state their *disapproval* of homosexuality.¹⁹⁵ Such an individual’s self-identification clearly does not

¹⁹⁰ *Dale v. BSA*, 160 N.J. 562, 640 (N.J. 1999) (emphasis added).

¹⁹¹ 24 Cal. 3d 458, 488 (Cal. 1979). The court ultimately adopts articulates a perlocutionary conception of self-identification. *Id.* at 489.

¹⁹² *Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 492 (Cal., 1979) (adding that it “or simply exhibited irrelevant characteristics of personal appearance or background disliked by the utility.”)

¹⁹³ *Dale v. BSA*, 160 N.J. 562, 645 (N.J. 1999) (Handler, J., concurring). Justice Handler attempted to separate self-identification from advocacy. *See Dale v. BSA*, 160 N.J. 562, 642-43 (N.J. 1999) (Handler, J., concurring) (“Dale’s statement of his identity . . . does not express a view about homosexuality generally or specifically advocate that homosexuality is moral.”).

¹⁹⁴ It is a case of “[a]nother person . . . both articulating and hearing the supposed message.” James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 IOWA L. REV. 75, 94 (2001)

¹⁹⁵ *See generally* JOHN PAULK, NOT AFRAID TO CHANGE (1996) (autobiographical account of a self-identified homosexual who disapproves of homosexuality and was able to change to heterosexuality).

constitute advocacy and suggests more generally that self-identification is a poor proxy for advocacy. Imagine a timid, confused gay adolescent who comes out to a friend, parent, or psychiatrist. When he is revealing his identity, his impetus is more likely fear or confusion than a desire to advocate. And while his words have some creative effect, that is not the dimension he is emphasizing or of which he is even aware. In this moment, the descriptive aspect of self-identification is ascendant. But an exclusively creative or persuasive model would wrongly attribute to every act of gay self-identification a message of advocacy. In so doing, the models provide a legal vehicle by which an audience's views can be attributed to a speaker. They thus provide the legal means for expressive associations to ban openly homosexual members. (Collapsing identification with advocacy also discourages straight individuals from promoting gay rights, for fear of inadvertently self-identifying as gay.¹⁹⁶)

Under a descriptive conception, however, gay self-identifying speech serves primarily to reveal the speaker's homosexual status. At first, such a conception seems thin in comparison to a creative or persuasive one. After all, "coming out" as gay or lesbian is an event which can "change[] your whole life"¹⁹⁷ and which has been shown to impact physical¹⁹⁸ and emotional¹⁹⁹ health in direct and tangible ways. It is tempting, as Nan Hunter does, to criticize a descriptive conception of gay self-identification for "indicat[ing] that such speech communicates literally nothing more than a label."²⁰⁰

But adopting a legal model of gay self-identification as descriptive does not trivialize that speech, which is constitutionally valuable for its central role in facilitating the political participation of homosexuals. That gay people are a cognizable minority class in our pluralist democratic system is a clear example of modern "identity politics" which "generate[s] claims based on shared identity characteristics."²⁰¹ That identity, however, is invisible—causing scholars like Bruce Ackerman to label homosexuals "anonymous" minorities.

¹⁹⁶ See IAN AYRES & JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE SUPPORT FOR GAY RIGHTS 6 (2005) (noting that gay advocacy creates a presumption of homosexuality).

¹⁹⁷ Eskridge, *supra* note 207, at 2439-40 (internal quotations omitted); see also Robert Lipsyte, *A Major League Player's Life of Isolation and Secret Fear*, N.Y. TIMES, Sept. 6, 1999, at A1 (recounting the story of a closeted major league baseball player who "felt so alone" but after coming out "cannot remember when he has felt as free as he says he is beginning to feel now."); Tobias Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOKLYN L. REV 1141, 1143-44 (1997) (coming out changes even simple conversations with close friends).

¹⁹⁸ Miriam Saphira & Marewa Glover, *The Effects of Coming Out on Relationships and Health*, 5 J. LESBIAN STUDIES, no. 1/2, p. 183 (2001) ("Degree of outness and the average SF-36 scores indicated lower health scores for those who were least out.")

¹⁹⁹ Eskridge, *supra* note 129, at 2443 ("The closet diminishes . . . mental health" and "obstructs the development of an emotionally healthy life."); see also David Tuller, *A New Dimension in Snapshot of Gay Teenagers*, N.Y. TIMES, Dec. 24, 2002, at F7 ("In Minnesota . . . 31 percent of gay, lesbian and bisexual students had attempted suicide; in Massachusetts, 33 percent had tried cocaine compared with 7 percent of other students; and in Seattle, 9.2 percent had vomited or taken laxatives to lose weight in the previous 30 days compared with 2.8 percent of students who were not gay.")

²⁰⁰ Hunter argues that without "acknowledge[ing] that self-identification is more than a label" it is impossible to answer the "most obvious hypothetical," namely whether the KKK could be required to admit an African American." Hunter, *Expressive Identity*, *supra* note 42, at 28. The answer is simply that this standard hypothetical regarding a (presumably) visible status doesn't fit into the discussion about self-identification, required by *invisible* minorities.

²⁰¹ *Id.* at 1-2.

In Section A, I articulate the scope of the Fourteenth Amendment right to equal political participation under the Equal Protection Clause—the right to a “level political playing field.” In Section B, I explain how gay self-identification plays a crucial role in the political process and thus how its suppression implicates this right. This speech allows a minority group to achieve what I term “political legibility”—the transition from what Ackerman calls “anonymous and diffuse” to discrete and insular. This shift, contrary to the familiar language of *Carolene Products*, can be politically advantageous and thus representation-reinforcing.

This model focuses primarily on the descriptive aspect because it necessarily takes the ability to self-identify as speech that simply reveals status. This revelation is a neutral part of the political process in that it is already available to (and constantly exercised by) every *visible* minority group—for example, racial minorities or women—and many invisible or partially invisible ones—for example, religious minorities. For this reason, I argue that ensuring that homosexuals have the ability to self-identify is, to use John Hart Ely’s terminology, an issue of “procedural fairness.”²⁰² Under a creative or persuasive conception, by comparison, self-identification becomes group advocacy—it is cast as political advocacy (of which there are many forms) rather than as the more fundamental gateway to participation.²⁰³

At the outset, I will respond to the potential charge that this political process model actually relies on a creative conception in that self-identification creates discreteness. I concede that identification does “create” gay identity in the minds of listeners who are not familiar with an individual’s sexuality. However, this form of identity recognition is not completely equivalent to personal identity creation. Equating the two is akin to the mistake of collapsing gay passing (a closeted homosexual) with gay conversion (a homosexual-turned-heterosexual).²⁰⁴

A. A Level Political Playing Field

Many legal scholars have conceived of gay self-identification as political speech.²⁰⁵ This is in part due to their unspoken adoption of a persuasive or creative

²⁰² ELY, *supra* note 39, at 87 (1980); *see also id.* (concerned with “ensuring broad participation in the processes and distributions of government”).

²⁰³ The argument of course can be made that even closeted homosexuals can participate in the political process, tacitly advocating for gay equality. This, however, is a form of the long rejected concept of “virtual representation,” in which a group is publicly represented in government by a non group member. *See* ELY, *supra* note 39, at 82 (describing virtual representation as “anathema to our forefathers”).

²⁰⁴ *See* Yoshino, *supra* note 1.

²⁰⁵ *See, e.g.,* Darren Lenard Hutchinson, *Accommodating Outness: Hurley, Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 122-23 (1998) (“Coming out is also a form of political action”); Brent Hunter Allen, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 VAND. L. REV. 1073, 1074 (1994) (“homosexuality is today essentially a form of political . . . dissent on par with the best American traditions”); Jennifer Minear, Note, *Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J.L. & PUB. POL’Y 601, 622 (2001) (“[E]very act for which a homosexual individual might seek First Amendment protection, from holding the hand of a same-sex partner to publishing an editorial denouncing ‘gay bashing,’ is a form of political expression.”); Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigation “Outness” Under the Equal Protection Clause*, 47 STAN. L. REV. 269, 275-76 (1995)

model. Strategically, the argument is savvy: The protection of political speech is central to the First Amendment.²⁰⁶ Others imply that self-identification is more than speech and constitutes a “political act,”²⁰⁷ but do not elaborate. It seems clear that political advocacy is distinct from speech that affects the political process. While most scholars see gay self-identification as the former, I will argue that, through the speech’s descriptive aspect, it is also the latter.

In *Evans v. Romer (Evans I)*,²⁰⁸ the Colorado Supreme Court specifically articulated a Fourteenth Amendment right to equal political participation. This was the first of two decisions that court issued on the constitutionality of Amendment 2 to the Colorado Constitution, which prohibited the state or any municipality from protecting against discrimination on the basis of homosexual status.²⁰⁹ The *Evans I* court, in determining that the amendment need be evaluated under strict scrutiny, “conclude[d] that the Equal Protection Clause of the United States Constitution protects the fundamental right to participate equally in the political process.”²¹⁰

The *Evans I* court analyzed four types of voting rights cases: those involving direct restrictions on the right to vote,²¹¹ voter reapportionment,²¹² restrictions on the ability of minority party candidates to be placed on the ballot,²¹³ and restrictions on the ability of certain groups to have legislation implemented through the normal political process.²¹⁴ The *Evans* court articulated the broader principle which unifies these voting rights cases: “[L]aws may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest.”²¹⁵

In *Washington v. Seattle School District No. 1*, the Supreme Court struck down an initiative which would have stripped from local school districts the power to impose mandatory busing as a way of desegregating schools. In *Seattle School District*, the Court

(“[L]itigators should employ . . . the political nature of coming out” and encourage “courts [to] recognize the freedom to come out as a fundamental part of the political struggle for equality.”). Hunter, *Expressive Identity*, *supra* note 42, 11 (arguing that “[c]ourts interpret descriptions of oneself as nonheterosexual as distinctly and primarily a political viewpoint.”).

²⁰⁶ See *Whitney v. California*, 274 U.S. 357, 375 (1927) (describing freedom of speech as “indispensable to the discovery and spread of political truth”).

²⁰⁷ Professor Eskridge has said that “coming out of the closet as a gay person is also an explicitly political act.” While recognizing that “[t]he anonymity of closeted homosexuals in the 1950s was key to their political marginalization” he does not provide a coherent theory to explain why. William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411, 2443 n.130. Cf. Bernstein, *supra* note 205, at 287 (“[H]omosexuals as a group are handicapped by structural barriers that operate to make effective political participation unlikely if not impossible,” barriers erected by “pressures to conceal one’s homosexuality”) (quoting *Watkins v. United States Army*, 875 F.2d 699, 711 (9th Cir. 1989) (Norris, J., concurring)).

²⁰⁸ 854 P.2d 1270 (1993).

²⁰⁹ Amendment 2 would have effectively repealed existing ordinances in Denver, Boulder, and Aspen, preventing certain forms of discrimination against homosexuals. *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1277

²¹² *Id.* at 1277-78 (discussing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

²¹³ *Id.* at 1278 (discussing *Williams v. Rhodes*, 393 U.S. 23 (1968) which struck down a series of Ohio statutes which “made it virtually impossible,” for new political parties with widespread support to be placed on the state ballot to choose electors pledged to a specific candidate).

²¹⁴ *Id.* at 1279-82 (discussing *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982)).

²¹⁵ *Id.* at 1279.

distinguished between “laws [which] make it more difficult for *every* group in the community to enact comparable laws”²¹⁶ and those which only “mak[e] it more difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.”²¹⁷ In generalizing the principle animating *Seattle School District*, the *Evans I* court noted that “the Fourteenth Amendment reaches political structures that ‘distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.’”²¹⁸

Although some courts and commentators have stated otherwise,²¹⁹ the Supreme Court’s decision in *Romer v. Evans*—which affirmed the decision of the Colorado Supreme Court on other grounds—nowhere rejects the existence of a right to political participation. Indeed, Justice Kennedy implicitly acknowledges the right to political participation, saying that “[c]entral . . . to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.”²²⁰

How do restrictions on self-identification implicate the right recognized in these cases—that of each citizen to equal political participation? It is the basis for what I will term their “politically legibility”: Self-identification allows a member of a minority group to report her minority status, ensuring that her presence can be readily ascertained by both political allies and opponents. This is not only advantageous—as a focus on the persuasive aspect would suggest—because the voices of homosexuals are more effective in arguing that “gay is *good*,” by persuading others of the need for gay rights legislation. Rather, through the descriptive aspect, by reporting the fact of an individual’s homosexuality this speech establishes simply that “gay *is*.” Because other minorities usually can be recognized by virtue of their corporeal visibility, such gay identity-reporting increases the political influence of homosexuals so that they are on a level political playing field with other minorities.

That visibility is politically advantageous for gay people today represents a startling shift. It is, after all, precisely through their ability to hide that homosexuals historically avoided restrictions imposed on racial minorities. When gay people had no political voice, invisibility was an advantage; yet in a political climate where gay people can and do exercise a political voice, their invisibility weakens that voice. Modern

²¹⁶ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (U.S., 1982)

²¹⁷ *Id.* (quoting *Hunter v. Erickson*, 393 U.S. at 395 (emphasis added) (Harlan, J., concurring)) (emphasis removed).

²¹⁸ *Evans I*, 854 P.2d at 1281 (quoting *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982)).

²¹⁹ *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 294 (6th Cir., 1997) (“[T]he United States Supreme Court in *Romer* . . . rejected the reasoning of [the Colorado Supreme Court] which had posited the existence of a fundamental constitutional right to participate in the political process.”). *But cf.* Keith E. Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death Of Political Structure Equal Protection*, 27 *Cap. U.L. Rev.* 337, 380 (1999) (“Justice Kennedy’s *Romer v. Evans* decision certainly does not reject Political Structure Equal Protection, but the opinion also fails to endorse it.”).

²²⁰ *Romer v. Evans*, 517 U.S. 620, 633 (U.S. 1996); *see also id.* (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)); *id.* at 631 (Amendment 2 is constitutionally problematic because as a result “[h]omosexuals are forbidden the safeguards that others enjoy or may seek without constraint.”).

prohibitions on gay self-identification are a decisive deterrent to effective political participation by gay people, and they thus implicate the right to equal political participation.

In *Pacific Telephone*, the California Supreme Court condemned an employer's prohibition on self-identification because it "'tend[s] to control or direct the political activities or affiliations of employees' . . . [and] 'to coerce or influence . . . employees . . . to . . . refrain from adopting [a] particular course or line of political . . . activity.'"²²¹ In his concurring opinion in *Watkins v. United States Army*, Ninth Circuit Judge Norris echoes *Pacific Telephone* in calling the army's prohibition on self-identification a "structural barrier[]" to the political effectiveness of homosexuals, arguing that "pressures to conceal one's homosexuality operate to discourage gays from openly protesting anti-homosexual governmental action. . . [and] [a]s a result, the voices of many homosexuals are not even heard, let alone counted."²²²

The fear articulated by these courts is that prohibitions on gay self-identification may result in certain individuals completely removing themselves from the political process. Indeed, there is reason to believe that closeted gay people will refrain from advocacy for fear of being outed, and that restrictions on self-identification, by keeping these individuals closeted, will reinforce an antigay regime.²²³ (In fact, the presumption of homosexuality which attaches to those who engage in gay advocacy may deter heterosexuals from pro-gay political participation as well.²²⁴) Yet these cases hint at a more subtle fear, which I take up in the next Section: not only that certain individuals will be discouraged from participating but that—because those individuals are closeted—the community as a whole will be less politically effective.

B. The Right to Political Legibility

A consequence of each gay individual's ability to self-identity, in the aggregate, is the gay community's ability to be a discrete and, as a result, an insular minority group. It is instructive to begin with footnote four of *Carolene Products*, which famously declares that "prejudice against discrete and insular minorities may be a special condition . . .

²²¹ *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*, 24 Cal. 3d 458, 488 (Cal. 1979) (second, third, fourth, and fifth omission in original) (third alteration in original).

²²² *Watkins v. United States Army*, 875 F.2d 699, 727 (9th Cir. 1989) (Norris, J., concurring).

²²³ WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 100 (1999) ("[G]ay citizenship did not make much progress until gay people came out of their closets in substantial numbers.");

²²⁴ Although many straight individuals do engage in advocacy for gay rights, they often fear that it will create a suspicion that they are gay, thus "ambiguating" their sexuality. See AYRES & BROWN, *supra* note 196, at 6 (advocating for gay rights results in forgoing heterosexual privilege and ambiguates one's sexuality); see also Jennifer Gerarda Brown & Ian Ayres, *The Inclusive Command: Voluntary Integration of Sexual Minorities into the U.S. Military*, 103 Mich. L. Rev. 150, 158 (2004) ("[I]ntolerant soldiers are also likely to be less willing to ambiguate their own sexuality by expressing even minimal support for gay rights.").

This fear is stronger in a legal regime that punishes coming-out, because such a regime increases the likelihood that any homosexual is closeted, and thus lends validity to the suspicion that a particular heterosexual advocate is. In a legal regime that imposes no punishment for self-identification, this effect will be reduced because the presumption that gay individuals are closeted will fall.

curtail[ing] the operation of the political process.” However, outright exclusion of minorities is no longer a major political distortion. As Ackerman notes, traits that are discrete—that is, visible—are no longer a “decisive disadvantage.”²²⁵ In fact, absent overt discrimination, minority groups in a pluralist political system are *advantaged* for the exact reasons that they were previously excludable: their discreteness and insularity.²²⁶ Discreteness helps “form a well-organized lobby” by breeding solidarity,²²⁷ allowing effective social sanctions to be placed on free riders,²²⁸ reducing organizational costs (for example, by ensuring a dense intra-group communication network),²²⁹ and reducing the cost of selecting effective political leaders.²³⁰

In *Beyond Carolene Products*, Ackerman suggests that from a democratic process standpoint, “groups that are ‘anonymous and diffuse’ rather than ‘discrete and insular’” increasingly warrant Fourteenth Amendment protection.²³¹ Homosexuals are anonymous minorities—those whose unifying characteristic is invisible.²³² Homosexuals are also diffuse, whether we think of this characteristic as social or geographic, since homosexuality occurs with increased frequency in neither specific social nor geographic groups.²³³

Many have mischaracterized homosexuals as insular, Ackerman included,²³⁴ by failing to recognize that this insularity hinges on self-identification. Prior to self-identification, homosexuality is an identity trait which occurs in a socially and geographically diffuse manner (uncorrelated, for example, with social or geographic factors such as socioeconomic status). As a result I call homosexuals *naturally* diffuse. For such groups, discreteness in some form is a necessary condition for insularity.

While “discrete groups do not have to convince their constituents to ‘come out of the closet’ before they can engage in effective political activity,”²³⁵ homosexuals do. It is for this reason that anonymous and diffuse minorities “fail to achieve influence remotely

²²⁵ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 742 (1986).

²²⁶ *Id.* at 718 (“the groups most disadvantaged by pluralism in the future will be different from those excluded under the old regime.”); *id.* at 723 (In modern pluralist politics, “‘discreteness and insularity’ will normally be a source of enormous bargaining advantage.”).

²²⁷ *Id.* at 724-25.

²²⁸ *Id.* at 725.

²²⁹ *Id.* at 726.

²³⁰ *Id.*

²³¹ *Id.* at 724. Ely rejected the “discrete and insular” framing years earlier. ELY, *supra* note 39, at 153.

²³² Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 729 (“[D]efining a minority as ‘discrete’ when its members are marked out in ways that make it relatively easy for others to identify them.”); *id.* at 729 (defining homosexuals as anonymous because “[a] homosexual . . . can keep her sexual preference a very private affair”).

²³³ *Id.* at 726-27. Ackerman describes two distinct types of insularity: breadth, or the number of social settings in which interaction takes place, and intensity, or the importance of each social setting. *Id.* at 726 n.24. Homosexuals, once they self-identify, are socially insular in both these ways: gay student groups, gay workplace associations, and churches (for example, the Metropolitan Community Church) are a testament to their breadth, and the crucial role of gay bars (see discussion accompanying note 148) a testament to their intensity.

²³⁴ *Id.* at 729 (Homosexuals “may be somewhat insular.”); *see also* . Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (“homosexuals constitute a significant and insular minority of this country’s population”)

²³⁵ Ackerman, *supra* note 225, at 731.

proportionate to their numbers.”²³⁶ Building off Albert Hirshman’s book *Exit, Voice, and Loyalty*,²³⁷ Ackerman suggests that the political weakness of anonymous minorities stems from their dependence on the individual decision of each member to declare her group membership (voice) rather than stay silent and avoid prejudice (exit). Their political weakness is their dependence on members’ self-identification.

Some suggest that invisibility is a political boon because invisible groups have are better able both to evade and to alter prejudice than visible ones.²³⁸ Yet this argument fails to distinguish between individual and group: While the benefits of invisibility accrue to the individual, those of visibility accrue to the community. On an individual level, stigma and discrimination potentially become more prevalent with visibility; for the gay community, visibility is desirable. Consider that some gay activists continue to wish that all gays would turn blue²³⁹—suggesting that they, at least, think that on net visibility is a political boon.

A corporeal mark indicative of homosexuality is not just hypothetical: Throughout the 1980s, the purple sores of Kaposi Sarcoma—which some termed a “scarlet H”—functionally revealed not only one’s HIV status, but one’s sexuality as well.²⁴⁰ Visibility forced HIV-positive individuals to confront the realities of their illness—not only medical, but social.²⁴¹ As HIV-positive individuals became more visible, the positive community benefited: not only was the disease acknowledged, and society educated as to its transmission, money toward both prevention and treatment markedly increased as well. So too would corporeal visibility make it harder for gays to ignore daily expressions of inequality.

Homosexuals in many American cities are both visible and insular. To quote Ely, the crucial question is then “*why* the minority in question is discrete and insular.”²⁴² The answer, in the case of naturally anonymous and diffuse minorities like homosexuals, is self-identifying speech. Thus it is anonymous and diffuse minorities that are most hurt by the suppression, or the chilling, of self-identification. For anonymous minorities, self-revelatory speech is the key to achieving discreteness; for diffuse minorities it is the key to achieving insularity—and through these characteristic, establishing political legibility.

In *Boy Scouts of America v. Dale*, the Supreme Court alluded to this special role of self-identification. In *Dale*, the Court confirmed and legalized, in the words of one scholar, a “broad popular understanding of the expressive power of the ‘avowed homosexual.’”²⁴³ The difference between otherwise similarly situated individuals who

²³⁶ Ackerman, *supra* note 225, at 729.

²³⁷ ALBERT O. HIRSCHMAN, *EXIT, LOYALTY AND VOICE: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

²³⁸ Yoshino, *supra* note 90, at 492.

²³⁹ LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* 49 (1993) (citing Nancy Walker, *Yanking Them Out*, GAY COMMUNITY NEWS, May 14, 1983, at 5).

²⁴⁰ Gregory M. de Moore, et al., *Kaposi’s Sarcoma: The Scarlet Letter of AIDS: The Psychological Effects of a Skin Disease*, 41 *PSYCHOSOMATICS* 360-363 (2000), available at <http://psy.psychiatryonline.org/cgi/content/full/41/4/360> (last visited Oct. 3, 2005) (“In KS . . . it was the breach in privacy of their HIV status that was particularly important. . . and by implication, [their] sexuality.”).

²⁴¹ *Id.*

²⁴² ELY, *supra* note 39, at 151.

²⁴³ Nancy J. Knauer, “*Simply So Different*”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997 (2000-2001).

declare themselves as straight and gay, respectively, is that the fact of their sexual identity, when made discrete, complements and colors all their other expressive disagreements. Consider the *Dale* Court’s reliance on the fact that “[t]he presence of an avowed homosexual” who disagrees with the Boy Scout’s message on sexual orientation “sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is [also] on record as disagreeing.”²⁴⁴ So while, as Justice Stevens emphasizes in his vigorous dissent, “an openly gay male is irreversibly affixed with the label ‘homosexual,’”²⁴⁵ he is in some sense exactly right. (As is an openly straight male is constantly irreversibly affixed with the label “heterosexual.”) Once vocalized, like race or sex, sexual orientation “communicates a message . . . wherever [one] goes”²⁴⁶—that message is the simple fact of one’s minority status, and allows members to obtain the substantial political and community benefits that come from such legibility.

Conclusion

It is now well understood that “coming out of the closet” is a term that applies to identities other than homosexuality.²⁴⁷ The value of coming-out speech is not unique to homosexuals, but rather extends to any anonymous minority.²⁴⁸ And invisible minorities’ dependence on self-identification is broader than scholars and courts have recognized—such speech is important not only to persuade others of the need for equality, but to create one’s identity in the first place, and to describe its existence. When gay self-identification is restricted, these three dimensions—the creative, persuasive, and descriptive—are all suppressed. The suppression of each dimension of self-identifying speech corresponds to a different harm and, as a result, is necessarily met by a separate legal remedy.

As I have shown, a focus on the persuasive aspect of speech—its effect on the thoughts and feelings of the audience—is dominant in most existing case law on gay self-identifying speech. Courts hear “I am gay” as “We’re here, we’re queer, get used to it,” or “Gay is good.” Yet this dominant conception fail even in theory to completely protect gay self-identifying speech. The First Amendment’s public employee speech doctrine and the expressive association analysis present in *Hurley* provides a doctrinal framework for protecting such persuasive speech—but even when applied correctly, suppression is sometimes appropriate.

Scholars have reacted against this focus on the persuasive by emphasizing that it wrongly ignores the creative dimension of self-identification—and it is the creative conception which is dominant in sexuality-and-law scholarship. Sexuality-and-law scholars hear “I am gay” as “I am out therefore I am.” The creative aspect of self-identifying speech provides, in theory, a firm constitutional ground for protection: I suggest that we can understand the way that speech creates in light of compelled-

²⁴⁴ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655-56 (2000).

²⁴⁵ *Id.* at 696.

²⁴⁶ *Id.*

²⁴⁷ EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 72 (1990); *see also* Eskridge *supra* note 129, at 2441 (1997) (“[C]oming out of the closet is a metaphor that transcends homosexuality.”).

²⁴⁸ *Cf.* Eskridge, *supra* note 247, at 2442 (“The value of identity speech is greatest for the minority.”).

affirmation case law, since coming out creates gay identity in part by contradicting the presumption of heterosexuality. Because self-identification in part creates gay status, and that status is itself protected under the Equal Protection Clause, the speech acts that constitute it should find protection under the Fourteenth Amendment even under a rational basis standard of review. However, such a conception fails in practice to protect self-identification: it is not now, nor will it ever be correctly applied by courts, because it depends on recognition of the continuous nature of coming-out, and because courts draw a firm distinction between speech and status.

While judicially dominant, the persuasive conception fails to consistently protect self-identification; while theoretically absolute in its level of protection, the creative conception will not be adopted by the courts. However, there is a third, descriptive conception which has not received attention in current scholarship: the role of gay self-identification in reporting an invisible identity. When the descriptive aspect of self-identification is ascendant, “I am gay” is heard and intended as “I am gay.” The corresponding harm to the political process that results from the suppression of this aspect of gay self-identification has gone unrecognized. The descriptive dimension of self-identification implicates the gay individual’s right to equal political participation by allowing the gay community to achieve political legibility.

The descriptive conception gives courts a more secure foundation on which to base protection for self-identifying speech. Unlike the persuasive and creative conceptions—which are unpredictable and wax and wane in importance depending on the context—the descriptive conception’s effect is always the same simple revelation of status information. Advocates and scholars should pay attention to this potentially promising approach.

The question of the legal protection for self-identification is becoming even more important than it is today. Minority group members whose unifying characteristics we usually think of as discrete—such as race, gender, and nationality—must self-identify across certain high-tech mediums of interaction. In his article *Cyber-race*, Jerry Kang observes, for example, that “cyberspace can make racial anonymity easier”²⁴⁹ and can reduce social insularity by “increase[ing] the realm of communication partners with whom we interact.”²⁵⁰ As workplaces are increasingly spread across America and business takes place by phone or email, modern technologies, such as telephones or the Internet, are pushing many minority coworkers from discreteness to anonymity.

As our daily encounters occur increasingly in such a (visually and physically) sterile context, the political legibility of visible minorities is decreasing. More minority groups will come to depend on self-identifying speech, will need to indicate—whether over a business-related conference call phone, an online educational chat session, or an interactive military training program—their race, gender, nationality, or sexual orientation. And when an employer responds that such self-identification is unnecessarily personal or disruptive, a robust understanding of its descriptive dimension and the harm which results from the suppression of that aspect, is crucial in articulating why such identification is the constitutional right of every minority.

²⁴⁹ Jerry Kang, *Cyber-race*, 113 HARV. L. REV. 1131, 1136 (2000).

²⁵⁰ *Id.*