ACCOMMODATING OUTNESS: *HURLEY*, FREE SPEECH, AND GAY AND LESBIAN EQUALITY

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I. INTRODUCTION

> Unelected heads of city departments and agencies, who are in other respects (as democratic theory requires) subject to the control of the people, must, where special protection for homosexuals are [sic] concerned, be permitted to do what they please.[1]

In *Romer v. Evans*,[2] the Supreme Court held that Amendment 2 to the Colorado constitution violated the Equal Protection Clause of the Fourteenth Amendment. Amendment 2 repealed then-existing ordinances in Colorado municipalities that afforded civil rights protection to individuals who face discrimination on the basis of sexual orientation.[3] In addition to invalidating existing legal protections for gays, lesbians, and bisexuals, Amendment 2 prohibited *any* state or local governmental entity from enacting legislation or regulations that would give gays, lesbians, and bisexuals a "protected status or claim of discrimination."[4] The Court, with three Justices dissenting,[5] found that Amendment 2 "impos[ed] a broad and undifferentiated disability on a single named group" and "seems inexplicable by anything but animus toward the class that it affects."[6] Based on these two findings, the Court concluded that Amendment 2 lacked a ra-

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[1] Equality Foundation v. City of Cincinnati, 116 S. Ct. 2519 (1996) (Scalia, J., dissenting).

[2] 116 S. Ct. 1620 (1996).

[3] *See id.* at 1623.

[4] *Id.* (citing COLO. CONST., Art. II, § 30). The infirm amendment provided that:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

COLO. CONST., Art. II, § 30.

[5] Justice Scalia wrote a dissenting opinion, in which Chief Justice Rehnquist and Justice Thomas joined. *See Romer*, 116 S. Ct. at 1628.

[6] *Id.* at 1627.

tional relationship to a legitimate state interest and was thus unconstitutional.[7] Although the Court declined to apply heightened scrutiny to the amendment, many gay and lesbian civil rights activists and legal scholars hailed the decision as a sign of greater tolerance for gay and lesbian legal equality by the Court.[8] Those who praised the Court particularly noted the contrast between the tone of the *Romer* decision and the widely criticized opinion in *Bowers v. Hardwick*,[9] in which the Court rejected a constitutional challenge to Georgia's sodomy statute.

Despite the apparent sensitivity the *Romer* majority displayed toward gay rights, the dissenting opinion demonstrates that at least three Justices of the Court will not approach future civil rights actions on behalf of gay, lesbian, bisexual, and transgendered individuals with the level of compassion desired by those who support gay and lesbian equality. For instance, in his dissent in *Romer*, Justice Scalia charged that the majority opinion "has no foundation in American constitutional law, and barely pretends to,"[10] and that by finding Amendment 2 unconstitutional, the opinion "places the prestige of [the Court] behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias."[11] Scalia also contended that the *Bowers* decision effectively bars any argument that "homosexuality cannot be singled out for disfavorable treatment."[12] Thus, Scalia would certainly reject arguments that sexual identity classifications should trigger heightened scrutiny.[13] Scalia

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[7] *See id.* at 1623.

[8] *See, e.g.*, Linda Greenhouse, *Gay Rights Laws Can't Be Banned, High Court Rules*, N.Y. TIMES, May 21, 1996, at A1 ([*Romer* marked] "a historic shift in the Court's response to anti-gay discrimination.") (quoting Suzanne B. Goldberg of Lambda Legal Defense and Education Fund).

[9] 478 U.S. 186 (1986) (finding no due process violation in the criminalization of "homosexual sodomy"). The *Bowers* Court was particularly criticized for framing the right at issue in the case in extremely narrow terms. Rather than considering whether the criminalization of adult, consensual sexual conduct without compelling societal interests contradicted traditional notions of fundamental justice, the Court instead searched the common law for a right to engage in "homosexual sodomy." Finding none, it ruled that the Georgia statute did not violate due process. In fact, the Court explicitly rejected attempts to place homosexual sexual conduct within a broader sphere of permissible sexual conduct. Instead, the Court likened homosexual activity to "adultery, incest, and other sexual crimes," *id.* at 195-96, which much of society deems distasteful. The Court, however, failed to distinguish *heterosexual* sexual activity from these other forms of sexual conduct.

[10] Romer v. Evans, 116 S. Ct. 1620, 1636 (1996).

[11] *Id.* at 1629. Because the Court analyzed Amendment 2 under a rational basis test, it never determined that sexuality classifications demand the same type of scrutiny as racial and religious distinctions.

[12] *Id.*

[13] By relying on *Bowers* as a bar to equal protection for gays and lesbians, Scalia's argument reduces gay and lesbian experience simply to the practice of illegal sodomitic acts. Scalia also ignores the distinct purposes of due process and equal protection. Several legal scholars have convincingly argued that the *Bowers* decision should not preclude protection for gays and lesbians under Equal Protection principles. These scholars point to the differences in the Due Proc-

concludes that Amendment 2 "[was] a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws."[14]

I explore the contrasting views of the members of the *Romer* Court not as a prelude to a more extensive analysis of the legal issues in that case, but rather to highlight the divisive and often politicized nature — both historically and contemporaneously — of attempts to address gay and lesbian inequality through civil rights litigation.[15] A number of commentators have argued that legal theory is often (or always) "indeterminate" and that judicial decision-making on highly contested social issues such as sexual oppression, racial hierarchy, and heterosexism may often reflect the personal views and the privileged social position of jurists and reinforce social inequality.[16] Perhaps there is a hint of postmodernism in Scalia's concluding com-

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ess Clause, under which *Bowers* was decided, and the suspect class prong of equal protection jurisprudence. The former principle guards against encroachments to fundamental rights, while the latter protects despised minorities. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). Thus, while the criminalization of homosexual sodomy, narrowly stated, may not violate notions of fundamental fairness, the oppression of the *class* of gay, lesbian, bisexual and transgendered persons by the state may violate notions of equality guarded by the Equal Protection Clause. This reasoning, however, opens up a dangerous conduct-status distinction which ignores the role of sexual conduct in constructing sexual identity.

[14] *Romer*, 116 S. Ct. at 1629. Scalia also claims that "those who engage in homosexual conduct tend to . . . have high disposable income . . . [and] they possess political power much greater than their numbers." *Id.* at 1634. Scalia's characterization of gays, lesbians, bisexuals and transgendered individuals as "politically powerful" suggests that at least three current Justices would disagree with any argument that classifications based on sexual orientation are "suspect" under an Equal Protection analysis. At least one circuit court has declined to treat sexual orientation as a suspect classification for this reason. *See* High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 574 (9th Cir.), *rehearing denied*, 909 F.2d 375 (1990) ("[H]omosexuals are not without political power; they have the ability to and do 'attract the attention of lawmakers' . . . .") (citation omitted). In a previous article, I criticized the argument that gays and lesbians are "wealthy" and "powerful" by observing that persons who advance such claims typically rely on misleading, but well-published statistics purporting to document gay and lesbian wealth. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 605-8 (1997) [hereinafter *Out Yet Unseen*]. These statistics inflate gay and lesbian wealth because they represent a "biased" sample of the gay and lesbian community. Notably, many of the surveys on gay income are based on the incomes of magazine subscribers, members of political organizations, white men, urbanites, and "out" gays and lesbians. The first three of these populations tend to have higher income levels—regardless of sexual orientation. *See id.* The latter group has higher income levels because wealth helps insulate against the detrimental effects of "coming out." *See id.*

[15] For an excellent discussion of the history of gay and lesbian civil rights litigation, see Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA L. REV. 1551 (1993).

[16] Critical legal scholars, critical race theorists, and feminist legal theorists have written extensively on this issue in contemporary jurisprudence. Nevertheless, the early "legal realism" movement served as the precursor to postmodernist claims of contemporary critics regarding the law's indeterminacy and its role in replicating social oppression. *See generally* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995).

ments in *Romer* in which he asserts that by invalidating Amendment 2, the Court has committed an "act . . . not of judicial judgment, but of *political will*."[17] Yet one could (quite persuasively) make a similar claim about Scalia's own reasoning and conclude that his dissent in *Romer* reflects his personal "political" judgments regarding how "reprehensible" (or not) he believes the marginalized status of gays, lesbians, bisexuals, and transgendered individuals is in our society. Consider Scalia's dissent, again joined by Justices Rehnquist and Thomas, in the Court's decision to vacate and remand a judgment rendered by the Sixth Circuit Court of Appeals in *Equality Foundation v. City of Cincinnati*.[18] The *Equality Foundation* cases involve a constitutional challenge to a Cincinnati ordinance which, like Amendment 2, prohibits that city from classifying sexual orientation as a protected status in its civil rights laws.[19] The language of the challenged ordinance tracks almost exactly the text of Amendment 2.[20] In a previous ruling the Sixth Circuit held that the ordinance was constitutional, but the Supreme Court remanded this ruling so that the court of appeals could reconsider the case in light of *Romer*.[21]

Despite the striking similarities between the Cincinnati ordinance and Amendment 2, the Sixth Circuit, on remand, recently upheld the regulation on the ground (in part) that *Romer* involved a "statewide" prohibition of civil rights protections for gays, lesbians and bisexuals, while the Cincinnati ordinance limits just one city.[22] This unprincipled "distinction" will likely not survive further judicial review. When the case was initially before the Supreme Court, Scalia offered an argument that was even more sweeping in its disregard for gay and lesbian equality; he reasoned that "where *special protection*" for gays, lesbians, bisexuals, and the transgendered is at issue, government officials "must . . . be permitted to *do what they please*."[23] This conclusion provides an additional "preview" of his position on whether gays and lesbians constitute a suspect class for Equal Protection purposes.

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[17] Romer v. Evans, 116 S. Ct. 1620, 1636 (emphasis added).

[18] Equality Foundation v. City of Cincinnati, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996) [*Equality I*], 128 F.3d 289 (6th Cir. 1997) [*Equality II*].

[19] *Id.*

[20] It provides that:

> The City of Cincinnati and its various Boards and Commissions may not enact, adopt, enforce or administer any ordinance, regulation, rule or policy which provides that homosexual, lesbian, or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.

Equality II, 128 F.3d at 291.

[21] *See Equality I*, 116 S. Ct. at 2519.

[22] *See Equality II*, 128 F.3d at 298-300.

[23] *Equality I*, 116 S. Ct. at 2519 (emphasis added).

Because *Romer* has preempted political/legal attempts (with the possible exception of the pending *Equality Foundation* litigation) to preclude gays, lesbians, bisexuals, and transgendered individuals from seeking civil rights protection in the "political" process, it is likely that future litigation in the area of "gay rights" will focus on traditional issues of state- and private-sponsored discrimination. Currently, the United States military ban against "openly" gay and lesbian troops and prohibitions of same-sex marriage dominate gay and lesbian civil rights litigation. A plurality of reasons explain the centrality of these issues in gay and lesbian politics and civil rights efforts. First, these issues reflect highly symbolic, sometimes material, and uniquely public forms of discrimination against gay and lesbian individuals. In addition, at least one of these issues — same-sex marriage — reinforces middle and upper class family structures and thus has the support of white and wealthy members of the gay and lesbian community who often define and direct gay civil rights strategy.[24] Furthermore, the anti-racist civil rights movement has helped to cultivate a legal culture that demands *formal* legal equality. As a result, gay and lesbian civil rights activists, in focusing on public forms of discrimination, have borrowed heavily from anti-racist civil rights strategies — even analogizing racism to homophobia — in order to advance claims of gay and lesbian equality before courts.[25]

An important component of the contemporary gay and lesbian civil rights strategy, in particular the military cases, has been the reliance on civil rights law as a vehicle for remedying and preventing the discrimination faced by gays, lesbians, bisexuals, and transgendered persons who "come out" — or who publicly reveal and construct[26] their socially despised sexual orientation. The coming out process has tremendous cultural and political significance in lesbian, gay, bisexual, and transgendered communities.[27] While "heterosexuals" also reveal their sexual and affectional orientation to others, the stigma attached to non-heterosexual sexual practice renders coming out for "sexual others" a complex, delicate, threatening, and often dangerous event. In addition, because the invisibility of "sexualized others" hinders their collective political action for civil rights, com-

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[24] *See* Hutchinson, *supra* note 14 (discussing how the enormous attention paid to same-sex marriage litigation reflects, to a large extent, the racial and class privileges of gay and lesbian civil rights activists and legal theorists).

[25] *See generally* Odeana R. Neal, *The Limits of Legal Discourse: Learning From the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679 (1996) (analyzing this strategy).

[26] *See* discussion *infra* Part IV.B.2. (describing coming out as a process of revelation *and* construction).

[27] Black lesbian theorist Jewelle Gomez states that "[t]he coming-out story has acted as a major unifying thread in a lesbian/gay community that is as diverse as the United States itself." JEWELLE GOMEZ, *Because Silence Is Costly*, *in* FORTY-THREE SEPTEMBERS 167, 169 (1993).

ing out is often considered an important — indeed necessary —political goal.[28] Furthermore, because the "closet" exacts such a costly psychological and emotional burden on sexual others, coming out may have a cathartic and psychologically beneficial effect on the individual.[29] These important cultural, political, and emotional dimensions of the coming out process have placed it — or at least gay and lesbian *visibility* — at the center of gay and lesbian civil rights litigation. In one case, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* [*Hurley*],[30] the issue of gay and lesbian outness reached the Supreme Court for the first time. In *Hurley*, the Court ruled that the application of Massachusetts' public accommodations law, so as to require the organizers of the Boston St. Patrick's Day Parade to include a contingent of gays, lesbians, and bisexuals as a parade unit, infringed the free speech rights of the parade organizers.[31] The state courts treated the parade as a "place of public accommodation" and, applying the doctrine set forth in the Court's *Roberts* trilogy,[32] found that application of the statute did not infringe the organizers' right of expressive association because the parade did not have a particularized message.[33] In a unanimous opinion, however, the Supreme Court departed from the public accommodations analysis and instead ruled that the parade itself *and* participation in the parade were forms of protected speech. As a result, the Court concluded that by compelling the organizers to accommodate GLIB (Gay, Lesbian and Bisexual Group of Boston, the group seeking access to the parade), the state would alter the message — albeit amorphous — of the parade, thereby infringing defendant's free speech rights.[34] By treating the parade and GLIB's participation in it as speech, the Court was able to avoid balancing the parade organizers' possible speech interests against the state's and GLIB's interest in gay and lesbian equality. The *Hurley* decision ended years of political and legal efforts by the group to participate in the parade.

As the first Supreme Court decision to decide an issue of sexual orientation discrimination under a state public accommodations statute, the *Hurley* decision will likely play a crucial role in determining the outcome of future litigation involving outness, and its reach

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[28] *See* discussion *infra* Part IV.B.3.

[29] *See id.*

[30] 515 U.S. 557 (1995).

[31] *See id.* at 566.

[32] *See* New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. United States Jaycees, 468 U.S. 609 (1984). Each of these cases involved a conflict between a civil rights statute and defendants' assertion of a right to discriminate, predicated upon the right of expressive association.

[33] *See Hurley*, 515 U.S. at 564.

[34] *See id.* at 572-73.

could likely extend well beyond the narrow context of parade participation. In this article I explore two important questions raised by the *Hurley* decision. First, although the Supreme Court did not analyze the case under the *Roberts* framework, it suggested at the conclusion of the opinion that the case would have the same outcome under that test.[35] The Court's dictum concerning the *Roberts* trilogy thus raises the question whether *Hurley* indicates that the Court might disturb the *Roberts* doctrine if presented with the opportunity. Second, the *Hurley* Court, in rejecting GLIB's claim, found that the parade organizers were not attempting to exclude gay and lesbian participants *as such*, but rather merely did not want the plaintiff to march in the parade as an organized unit with banners and other accouterments of parade participation.[36] This finding contradicts the state court's finding of fact that the exclusion of the unit amounted to invidious discrimination on the basis of sexual orientation.[37] The state court's rulings are plausible given the importance of outness and open declarations of sexual orientation in the struggle for gay and lesbian equality and in the construction of sexual identity. Because outness is intertwined with sexual identity, defendant's refusal to allow GLIB to march openly in the parade constituted an attempt to silence — or closet — non-heterosexual identity. Thus, even if the outcome of *Hurley* were justifiable on the narrow grounds of free speech, the Court's rejection of the lower court's finding of discrimination leaves open an important question for future cases involving gay and lesbian discrimination: that is, how will the Court treat future discrimination cases that turn on expressive activity of gays and lesbians, or, more precisely, will the Court resolve future disputes over outness in a way that fosters gay and lesbian equality.

This article considers these questions in three parts. In Part II, I discuss the legal and political history underlying the *Hurley* decision. I will specifically analyze the free speech framework applied in the Supreme Court opinion and contrast it with the *Roberts* test that governed the state courts' decisions. I will also discuss in greater detail the two compelling questions the decision raises. Parts III and IV attempt to answer these questions. In Part III, I examine the possible impact of *Hurley* upon the *Roberts* doctrine by analyzing how post-*Hurley* cases have treated speech and equality conflicts. I argue that the courts in these cases have rightfully limited the reach of *Hurley* and have preserved the balancing formula established in *Roberts*. In Part IV, I consider the negative implications, from a gay-sensitive perspective, that *Hurley* might have for cases involving discrimination

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[35] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 580 (1995).

[36] *See id.* at 572.

[37] *See id.* at 563-64.

on the basis of outness. Finally, I suggest a tentative approach for courts to follow in order to ensure that civil rights law recognizes the importance of outness and adequately protects gays, lesbians, and bisexuals from invidious discrimination.

II. OPENLY GAY, LESBIAN OR BISEXUAL? NOT IN MY PARADE

A. Hurley: Political and Procedural History

In *Hurley*, GLIB, a group of gays, lesbians, and bisexuals of Irish descent, challenged the defendant's denial of its application to participate in Boston's St. Patrick's Day-Evacuation Day Parade, held annually on March 17.[38] Every year since 1947, the City of Boston has granted defendant, the South Boston Allied War Veterans Council, authorization to organize and conduct the parade.[39] In 1992, GLIB organized for the purpose of participating in the parade.[40] In that year, a history of contestation between GLIB and parade organizers also began. When GLIB submitted an application to march in the 1992 parade, defendant rejected GLIB's application, ostensibly due to "safety reasons and insufficient information regarding GLIB."[41] Nevertheless, GLIB ultimately participated in the parade under a court order that restricted the extent of its participation.[42] In 1993, GLIB again sought permission to march in the parade, but defendant denied the group's application arguing that its "decision to exclude groups with sexual themes merely formalized that the Parade expresses traditional religious and social values."[43]

After the defendant denied GLIB's 1993 request to participate in the parade, the group filed a lawsuit in state court alleging, *inter alia*, that the defendant's decision to exclude it from the parade violated the Massachusetts public accommodations law.[44] The trial court first considered whether defendant's exclusion of GLIB resulted from invidious discrimination on the basis of sexual orientation. The court ruled that defendant's "inconsistent and changing explanations" for its denial of GLIB's repeated applications demonstrated that these

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[38] The parade honors "the feast of the apostle to Ireland . . . and . . . mark[s] the evacuation of royal troops and Loyalists from [Boston]." *Hurley*, 515 U.S. at 560.

[39] *See id.*

[40] *See id.* at 561.

[41] Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d 1293, 1295 (Mass. 1994) [*Hurley I*] *rev'd sub nom.* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (internal quotation omitted).

[42] *See id.*

[43] *Id.*

[44] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 561 (1995). That statute prohibits discrimination on the basis of "sexual orientation . . . in any place of public accommodation . . . ." MASS. ANN. LAWS. ch. 272, § 98 (Law. Co-op. 1992).

explanations were merely a pretext for discrimination and that GLIB was excluded solely because of its members' sexual orientation.[45]

The court then considered whether a parade, which is not explicitly mentioned in the statute, should be considered a place of public accommodation. The court concluded that the parade constituted a place of public accommodation, noting the parade's lack of selectivity and large size.[46] Defendant in turn raised an "expressive association" defense to the application of the antidiscrimination statute. This defense triggered an analysis of the Supreme Court's *Roberts* trilogy, which establishes the framework for deciding whether the application of an antidiscrimination statute violates the associational rights of the discriminator.[47]

B. The Roberts Doctrine

The conflict in *Roberts* began in 1974 when the Minneapolis chapter of the Jaycees began admitting women as "regular members," a move that violated the national organization's bylaws.[48] In 1975, the St. Paul chapter joined Minneapolis in its defiance of the organization's exclusionary policy.[49] When the president of the national organization threatened to revoke the membership of the two chapters, the chapters filed complaints with the Minnesota Department of Human Rights alleging that the organization's bylaws violated the Minnesota Human Rights Act.[50] The Department of Human Rights concluded that the Jaycees is a place of public accommodation under Minnesota law.[51] The Minnesota Supreme Court subsequently

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[45] *Hurley I*, 636 N.E.2d at 1295.

[46] *See id.* at 1295-98. Although most state public accommodations statutes list the type of organizations that are considered places of public accommodations, many state courts have held that these lists are not exhaustive and that the statutes should be liberally construed given their remedial purposes. *See, e.g., id.* at 1297-98 ("The language of [the statute] and our case law require that the statute be given a broad and inclusive interpretation."). Furthermore, courts commonly consider the following factors: large size, lack of selectivity, and recreational nature. *See, e.g.*, National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 531 (App. Div.), *aff'd*, 67 N.J. 320 (1974) (finding youth athletic organization a place of public accommodation due to its recreational, educational, and unselective nature).

[47] *See* Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d 1293, 1298-1301 (Mass. 1994) [*Hurley I*].

[48] Roberts v. United States Jaycees, 468 U.S. 609, 614 (1984). The bylaws established two classes of individual membership: "associate" and "regular." *Id.* at 613. Regular membership was limited to men between the ages of 18 and 35, and associate membership included all others (principally women and men outside of the age restriction). *See id.* Associate members could not vote, hold national office, or participate in certain organizational leadership training and awards programs. *See id.*

[49] *See id.* at 614.

[50] *See id.* The statute bans discrimination on the basis of sex in places of public accommodation. *See id.*

[51] *See id.* at 615.

affirmed the decision.[52] Upon this record, the national organization renewed an earlier federal action it had brought to enjoin enforcement of the public accommodations law.[53] The organization alleged that enforcement of the law would infringe its members' rights of "free speech and association."[54] After a trial, the district court entered a judgment for the state officials, but a divided Court of Appeals for the Eighth Circuit reversed that decision.[55] The Eighth Circuit held that the organization's right to select its members was protected by the First Amendment because "advocacy of political and public causes . . . [was] not [an] insubstantial part" of its activities.[56] The appeals court also concluded that the inclusion of women as regular members would produce a "direct and substantial" interference with the organization's expressive freedom because it would change the group's "philosophical cast."[57] Consequently, this ruling placed the tension between expressive freedom and equality before the Supreme Court, which granted plaintiff's petition for certiorari.[58]

The Court linked the Jaycees' speech and associational interests to two doctrinal roots. The first strand of precedent identified by the Court maintains that an individual's "[choice] to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State . . . ."[59] The affiliations protected by this right of *intimate association* include marriage,[60] the raising and education of children,[61] and cohabitation with one's relatives.[62] This right "receives protection as a fundamental element of personal liberty."[63] The second body of doctrine recognizes a "right of individuals to associate for the purpose of engaging in activities protected by the First Amendment: speech, assembly, petition for

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[52] *See id.* at 616. This decision turned on the organization's provision of goods and services, its unselective membership criteria, and its use of fixed and mobile sites for its various activities. *See id.* (citing United States Jaycees v. McClure, 305 N.W.2d 764, 768-74 (1981)).

[53] *See id.* The district court previously dismissed the suit without prejudice to renew, in the event of an adverse ruling against the Jaycees in the state administrative proceeding. *See id.* at 615.

[54] *Id.* at 615. After the administrative proceeding concluded, the Jaycees amended its complaint to add a claim that the statute was "unconstitutionally vague and overbroad." *Id.* at 616.

[55] United States Jaycees v. McClure, 534 F. Supp. 766 (1982), *rev'd* 709 F.2d 1560 (1983), *rev'd sub nom.* Roberts v. United States Jaycees, 468 U.S. 609 (1984).

[56] *See United States Jaycees*, 709 F.2d at 1570.

[57] *Id.* at 1571-72. The court also ruled that the Minnesota public accommodations statute was vague as construed and applied by the Minnesota Supreme Court. *See id.* at 1576-78.

[58] *See* Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878, 1880 (1984).

[59] *Roberts*, 468 U.S. at 617-18.

[60] *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

[61] *See* Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

[62] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[63] *Roberts*, 468 U.S. at 618.

the redress of grievances, and the exercise of religion."[64] As the Court held, this freedom of *expressive association* is an "indispensable means of preserving . . . individual [speech] liberties."[65]

The Court easily disposed of the Jaycees' intimate association defense, noting the organization's large size and unselective membership criteria.[66] The Jaycees' expressive association defense, however, demanded a more nuanced analysis because the leadership organization clearly engaged in some expressive activities.[67] Furthermore, the Court concluded that state interference with the membership composition of an organization might impede the enjoyment of this second associational freedom.[68] Thus, application of the statute, which would require the admission of women into the organization, implicated defendant's expressive associational rights.

Having located the particular associational right triggered by the application of the public accommodations law, the Court proceeded to consider whether that right was infringed in this case and to balance any infringement of that right against the state's interests in equality and a society free of invidious discrimination.[69] Given the cultural, political, and historical importance of both individual lib-

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[64] *Id.*

[65] *Id. See also id.* at 622 ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.") (citing Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294 (1981)); Linder, *supra* note 58, at 1887 ("Although the word 'association' appears nowhere in the first amendment . . . a right to associate has long been recognized as necessary to safeguard those activities specifically protected by the first amendment . . . . Obviously, neither political parties nor organized religion could flourish without association.").

William P. Marshall has argued that the Court should consider a third associational freedom — "the right of cultural association." William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68, 84-91 (1986). Although Marshall does not sharply define this right, he describes it as "[t]he right to associate along lines of national origin, race, or religious affiliation . . . ." *Id.* at 85. It is likely, however, that this right, as described by Marshall, is already protected by the rights of intimate and expressive association. *See, e.g., Roberts*, 468 U.S. at 618-19 (intimate associations "play[] a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.") (citations omitted); *id.* at 622 (expressive associational freedom "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." Thus, the Court protects the right to associate "in pursuit of . . . political, social, economic, educational, religious, and cultural ends.").

[66] *See* Roberts v. United States Jaycees, 468 U.S. 609, 621 (1984).

[67] *Id.* at 622 ("In view of the various protected activities in which the Jaycees engages . . . [the] right [of expressive association] is plainly implicated in this case."). Specifically, the Court found that the organization took public positions on political issues and engaged in "civic, charitable, lobbying, fundraising, and other . . . First Amendment [expression]." *Id.* at 627.

[68] *Id.* at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire . . . . Freedom of association therefore plainly presupposes a freedom not to associate.").

[69] *See id.* at 623-29.

erty (based on traditional liberalism) and group equality (a response to a history of group oppression) in the American social and political culture, Justice Brennan's careful approach provides a useful model for addressing conflicts between speech and equality in other contexts, such as gay and lesbian liberation efforts.[70] Douglas Linder correctly views the speech-equality conflict in *Roberts* as part of a greater tension between "egalitarian, rights-oriented liberalism," which seeks a "neutral" legal framework through antidiscrimination measures, and "communitarianism," which distrusts concentrating power within the state for fear of eroding community traditions and autonomy.[71] This dichotomy, however, is not as "clean" as Linder presents it. Oppressed "communities," for example, may desire *greater* state power (*e.g.*, welfare or antidiscrimination laws) to secure both individual liberty *and* community autonomy in response to a history of "private" (and state) subjugation.[72] Nevertheless, only a multilayered approach to expressive freedoms — one that resists treating these classical liberal rights as "absolute" — can ensure the achievement of the important social goal of equality.[73] Accordingly, under First Amendment doctrine, restrictions on the right of expressive association must be justified by policies that pursue "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[74]

The equality interest prevailed in *Roberts*. Indeed, although the Court formulated and employed a "balancing" test in order to preserve the competing speech and equality interests, the Court suggested that the antidiscrimination interest might *always* prevail in such instances — at least in the specific context of *publicly* provided

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[70] *See generally* William N. Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L. J. 2411 (1997) (arguing for a balanced approach to gay and lesbian jurisprudence that accommodates competing liberty and equality interests).

[71] Linder, *supra* note 58, at 1882.

[72] *See, e.g.*, Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988) ("[L]iberal legal ideology . . . perform[s] an important function in combating the experience of being excluded and oppressed."); PATRICIA J. WILLIAMS, *The Pain of Word Bondage*, *in* THE ALCHEMY OF RACE AND RIGHTS 153 (1991) ("For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being.").

[73] *See generally* Mari Matsuda, *Public Response to Racist Hate Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). This approach is also consistent with First Amendment jurisprudence. *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984) (The right to associate for expressive purposes is not . . . absolute."). *See also* Matsuda, *supra* at 2354-55 (discussing several categorical limitations on speech in First Amendment jurisprudence).

[74] *Roberts*, 468 U.S. at 623.

goods and services.[75] The Court thus viewed the state interest in the public accommodations context as particularly heavy, holding that the goal of eliminating discrimination in the provision of goods and services, "serves compelling state interests of the highest order."[76] Applying this standard to the facts in *Roberts*, the Court found that the organization failed to demonstrate how its political advocacy would change if women became full members of the organization. The Court also noted that any abridgment of the Jaycees' speech rights resulting from the inclusion of women was "incidental."[77] The Court applied the *Roberts* test in two subsequent opinions, in each of which the state's compelling goal of equality prevailed over the defendant's asserted expressive interest.[78] Thus, the *Roberts* formulation became the doctrinal test for resolving conflicts between antidiscrimination statutes and a discriminator's expressive associational freedom.

C. The (In)Application of Roberts in Hurley

The trial court in *Hurley* followed the *Roberts* doctrine and, like the *Roberts* court, emphasized public access to goods and services over the asserted speech interests of the parade organizers. In fact, the trial court found that the parade had *no* expressive interests, given the parade's lack of admission criteria and the plethora of groups participating.[79] Having made this important factual finding, the trial court's emphasis on equality over speech was inevitable.

On appeal to the Supreme Judicial Court, the defendant framed its defense in terms of free speech, rather than expressive association - arguing that the parade itself was speech.[80] Nevertheless, because the court accepted the trial court's finding that the parade lacked *any* expressive purpose,[81] defendant's free speech defense also failed, and plaintiff again prevailed. Justice Nolan, however, wrote a vigor-

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[75] *See id.* at 628 (stating that "acts of invidious discrimination *in the distribution of publicly available goods, services, and other advantages*.... [l]ike violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact... are entitled to *no* constitutional protection.") (emphasis added) (citing Runyon v. McCrary, 427 U.S. 160, 175-76 (1976)).

[76] *Id.* at 624. *See also* Marshall, *supra* note 65, at 77.

[77] *Roberts*, 468 U.S. at 626-29.

[78] *See* Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 537 (1987) (holding that the prohibition of gender discrimination by membership organization does not violate First Amendment); New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 1 (1988) (rejecting facial challenge, on First Amendment grounds, to civil rights statute).

[79] *See* Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d 1293, 1297 (Mass. 1994) [*Hurley I*] ("'[I]t is impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.... [T]he [council's] Parade is not an exercise of their [sic] constitutionally protected right of expressive association. It is an open recreational event....'") (bracketed text in original).

[80] *See id.* at 1298.

[81] *See id.*

ous dissent, arguing that the application of the statute would indeed violate defendant's right of free speech. Justice Nolan reasoned that GLIB's forced inclusion in the parade would amount to "compelled speech" because it would require defendant to admit individuals with an unwanted message.[82]

Although the *Roberts* trilogy played a central role in shaping the state court rulings in *Hurley*, these cases had virtually no significance in the Supreme Court proceeding.[83] *Roberts* was absent from the Supreme Court's decision because the Court decided the case on free speech rather than expressive association grounds. Yet, because the state courts decided that the parade was a place of public accommodation *under state law*, the Court was bound by this conclusion,[84] and should have applied the *Roberts* decisional law.[85]

The Court first endeavored to identify the protectable speech dimensions of the parade. It began its analysis of the speech interests implicated in the case by discussing the nature of parades. The Court distinguished "parades" from a mere "procession" in which marchers simply wish to "make [a] trip without expressing any message beyond the fact of the march itself."[86] It argued that parades, in contrast to such meaningless processions, "'are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and

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[82] *See id.* at 1302 (Nolan, J., dissenting) ("To compel the Veterans Council to express GLIB's message is not narrowly tailored to the State's interest."); *id.* at 1304 ("[m]andating mere association in this case may be constitutional; mandating a message is not.").

[83] *See* Eskridge, *supra* note 70, at 2458 ("Doctrinally, the queerest feature of [*Hurley*] is the way the Court's governing precedent, *Roberts*, disappeared into a legal closet."); Gretchen Van Ness, *Parades and Prejudice: The Incredible True Story of Boston's St. Patrick's Day Parade and the United States Supreme Court*, 30 NEW ENG. L. REV. 625, 627 (1996) ("While the Supreme Court chose to cast [*Hurley*] as a straightforward First Amendment dispute, it was tried in the state courts primarily as a public accommodations case.").

[84] Normally, the Court has no jurisdiction to disturb state court interpretations of state law. *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 521-65 (4th ed. 1996). The Court, however, was justified in conducting an independent review of the state courts' factual findings. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'") (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964)); Niemotko v. Maryland, 340 U.S. 268, 271 (1951) ("In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.") (citing Feiner v. New York, 340 U.S. 315 (1951).

[85] *See* Eskridge *supra* note 70, at 2458 (arguing that the Court was "stuck with the state determination of the [public accommodations] issue, because the Supreme Court has no jurisdiction to review state court constructions of state law") (citing FALLON, *supra* note 84, at 521-65).

[86] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995).

consideration.'"[87] The Court then linked parades to its precedents finding protected speech interests in "protest marches"[88] and in other acts of expressive conduct.[89] Resting on this anecdotal, "sociological," and doctrinal discussion, the Court concluded that "[p]arades are thus a form of expression, not just motion . . . ."[90]

Applying this principle to the Boston parade, the Court located expressive activity in the spectators lining the street, the marchers adorned in costumes and uniforms along with the banners they carry, the music of the various bands, and the television broadcast of the event.[91] Accordingly, the Justices firmly rejected the state courts' conclusion that the parade lacked expressive interests because it had no selection criteria and had a multitude of participants. The Court held that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."[92] After noting that speech interests inhere to the selection of material for cable programming,[93] the presentation of a newspaper opinion page,[94] and the selection of a paid noncommercial advertisement for inclusion in a newspaper,[95] the Court concluded that the organizers' decision to exclude (or include) a unit from (or in) the parade is entitled to similar First Amendment protection.

The Court's conclusion that the parade was free expression is susceptible to several points of criticism. First, the Court failed to engage in an adequate and comprehensive review of the entire factual record below. In particular, the Court raced through or ignored portions of the state court record which strongly suggested the parade should be considered a place of public accommodation — al-

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[87] *Id.* (quoting S. DAVIS, PARADES AND POWER: STREET THEATER IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986)).

[88] *See id.* at 568-69 (discussing Gregory v. Chicago, 394 U.S. 111 (1969) (holding that peaceful protest march falls within sphere of First Amendment activity); Edwards v. South Carolina, 372 U.S. 229 (1963) (holding that the march of "pride and protest," which included singing and the carrying of banners, was protected by the First Amendment)).

[89] See *Id.* at 569 (citing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)) (saluting a flag and refusing to do so); Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503, 505-06 (1969) (wearing an armband to protest war); Stromberg v. California, 283 U.S. 359, 369 (1931) (displaying a red flag); National Socialist Party of America v. Skokie, 432 U.S. 43 (1977) (displaying swastikas during procession)).

[90] *Hurley*, 515 U.S. at 568.

[91] *See id.* at 569-70.

[92] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569-70 (1995).

[93] *See id.* at 570 (citing Turner Broadcasting Sys., Inc. v. FCC, 521 U.S. 622, 636 (1994)).

[94] *See id.* (citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

[95] *See id.* (citing *New York Times*, 376 U.S. at 265-66).

beit one with possible speech interests — rather than speech alone.[96] Instead, the Court created an almost *per se* rule, which deems parades "speech" as a matter of law.[97] The Court also ignored important distinctions between the Boston parade and the examples of expressive conduct in the precedents it discussed. For example, one could easily distinguish a "protest march," the name of which signifies an expressive purpose, from the Boston parade, which the state courts found did not have any particular message.[98] By evading these important issues which problemized defendant's speech defense, the Court was able to avoid engaging in the difficult balancing of speech and equality.[99] In *Hurley*, once the parade and GLIB's participation in it were deemed speech, the equality interest diminished in importance; the application of the Massachusetts statute could then be seen as coercing the defendant to speak, thereby unconstitutionally depriving the parade organizers (as speakers) of the autonomy to determine the content of their speech (the parade).[100]

The *Hurley* Court's conclusion that GLIB's planned participation in the parade was speech is also vulnerable to criticism, but to a lesser degree. The Court addressed this issue in a relatively brief fashion. It held that:

> GLIB was formed for the very purpose of marching in [the parade], as the trial court found, *in order to* celebrate its members' identities as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support

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[96] For instance, the Court rather hastily rejected the state courts' determination that the parade lacked an expressive purpose, and it failed to inquire into the factual underpinnings of that decision. *See Hurley*, 515 U.S. at 569 ("To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But . . . ."). *See also* Eskridge, *supra* note 70, at 2460 ("The evidence of [communitarian] expression in the Boston parade case not only was mighty thin, but was rejected by the finder of fact."); Kathleen M. Sullivan, *Parades, Public Squares and Voucher Payments: Problems of Government Neutrality*, 28 CONN. L. REV. 243, 250 (1996) (characterizing Court's treatment of the parade as speech as "an exercise in postmodern semio-tics").

[97] *See Hurley*, 515 U.S. at 568 ("Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches."); *id.* at 569 ("Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them.").

[98] *See infra* text accompanying notes 167-82 (discussing distinctions between Boston parade and expressive conduct at issue in precedent upon which the Court relies).

[99] Van Ness, *supra* note 83, at 658 (arguing that the Court "turned away" from the "painful" analysis of competing speech and equality issues); Elliot M. Mincberg, *The Supreme Court and the First Amendment: The 1994-95 Term*, 13 N.Y.L. SCH. J. HUM. RTS. 223, 276 (1997) ("[B]y focusing on the threshold issue of whether the parade was an expressive activity, the Court avoided such a potentially difficult issue as whether the public accommodations law provided the basis for a compelling state interest justifying infringement of First Amendment rights.") (citation omitted).

[100] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 572-74 (1995).

the like men and women who sought to march in the New York parade.[101]

The Court's description of GLIB's purposes indicates that the group formed in order to transmit certain messages in the parade — or as the Court stated — to "communicate its ideas as part of the existing parade, rather than staging one of its own."[102] Gretchen Van Ness, an attorney for GLIB, has argued that this ruling conflates GLIB's purposes for forming with the organization's purposes for marching in the parade.[103] As Van Ness observes, the state courts' interpretation of GLIB's purposes does not blur the group's reasons for marching with its reasons for forming, as does Justice Souter's opinion.[104] The Court could have viewed GLIB's expressive interests as a membership organization separately from its participation in the parade. Nevertheless, given the combative political history between GLIB and the parade organizers, it seems that the interesting distinction Van Ness raises is, at best, subtle.

As a concluding matter, the Court assessed the state's interest in altering the message of the parade. Because the Court had found that both the parade and GLIB's participation in the parade were forms of expressive conduct, the speech interest of the organizers easily outweighed the state's interest in equality.[105] The Court framed the issue simply as one of compelled speech. It reasoned that the application of the antidiscrimination statute in this case would mean that "any contingent of protected individuals with a message would have the right to participate in petitioner's" speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own."[106] Thus, the statute, as applied under the Court's theory of the case, violated a fun-

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[101] *Id.* at 570 (emphasis added).

[102] *Id.*

[103] Van Ness, *supra* note 83, at 627-29.

[104] Specifically, the state courts found that:

> GLIB was formed to march in the annual St. Patrick's Day-Evacuation Day Parade held in South Boston. GLIB's purposes are to express its members' pride in their dual identities as Irish or Irish-American persons who are also homosexual or bisexual, to demonstrate to the Irish-American community and to the gay, lesbian, and bisexual community the diversity within those respective communities, and to show support for the Irish-American homosexual and bisexual men and women in New York City who were seeking to participate in that city's St. Patrick's Day Parade.

Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d 1293, 1295 (Mass. 1994) [*Hurley I*] (internal citation omitted).

[105] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568-72 (1995) (stating that the case "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

[106] *Id.* at 573.

damental tenet of First Amendment jurisprudence: the right to speak includes a concomitant right not to speak.[107]

D. Examining the Hurley Aftermath

Although the *Hurley* decision does not apply the *Roberts* doctrine, the decision nevertheless raises an important question regarding the *Roberts* line of jurisprudence: does the Court's opinion signal a potential weakening of the *Roberts* doctrine? In the final passages of *Hurley*, the Court briefly considered whether the outcome of the case would differ under the *Roberts* doctrine.[108] The Court held that it would not: "[Under the *Roberts* doctrine,] GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members."[109] The Court's view that private clubs can exclude applicants whose "positions" conflict with those of the existing members is fairly consistent with the test articulated in the *Roberts* line of cases. Yet, unlike the *Hurley* Court, the *Roberts* trilogy of cases closely scrutinized the expressive purposes of the organization in order to determine whether the forced inclusion of a protected class of individuals would substantially burden any clearly-defined expressive goals of a discriminating organization. This aspect of the *Roberts* test led the state courts to conclude that the parade had no particular expressive goals that would be infringed by GLIB's participation. Because nearly everyone who sought to participate in the parade was allowed to do so, the lower courts found that the parade had no explicit expressive goals; thus, the inclusion of an openly gay contingent would not burden the group's freedom of expressive association. The Supreme Court, however, took a more lenient approach to the question of the parade's expressive goals. It held that "a narrow, succinctly articulable message is not a condition of constitutional protection . . . ."[110] Under this less stringent rule, the parade organizers were not required to demonstrate why the admission of the protected class of individuals would complicate or burden any *specific* expressive purpose or that the parade even had a particular message. Accordingly, the Court's suggestion that the result in *Hurley* would not differ under the *Roberts* doctrine raises the question of whether the Court would apply a more lenient approach when assessing

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[107] Wooley v. Maynard, 430 U.S. 705, 714 (1977) ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (quoting Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[108] *Hurley*, 515 U.S. at 580-81 (considering outcome of case under *Roberts* and *New York State Club Ass'n*).

[109] *Id.*

[110] *Id.* at 569 (citing Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam)).

speech interests in the public accommodations context.[111] The next section of this article argues that *Hurley* should not lead to an erosion of the *Roberts* framework because the case rests on a problematic theoretical foundation and because the weakening of *Roberts* would unduly frustrate state antidiscrimination efforts.

A second question raised in *Hurley* concerns the Court's treatment of the issue of whether the exclusion of GLIB constituted invidious discrimination. The state courts determined that the parade organizers engaged in unlawful discrimination when they denied GLIB's request to participate in the parade. This conclusion seems highly plausible, given the organizers' shifting explanations for GLIB's exclusion and the (otherwise) almost "open" admissions policy with respect to participation in the parade.[112] The Supreme Court, however, treated the issue differently; it cast the group's exclusion as the rejection of unwanted speech, not as discrimination. Under this view, the Court concluded that the parade organizers:

> disclaim[ed] any intent to exclude homosexuals *as such*, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.[113]

Because the Court credited the defendant's argument that it did not intend to discriminate against gays, lesbians, and bisexuals, but rather simply wished to prevent them from carrying a banner, the Court found that the antidiscrimination statute was applied in a "peculiar" manner: to alter the content of the parade's speech.[114]

The Court, however, in its resolution of the question of impermissible discrimination by the parade organizers, failed to address many important issues. First, the Court did not consider whether defendant's refusal to allow GLIB to "carry its own banner" could have been a pretext for discrimination. In addition, the Court did not examine whether GLIB members had other meaningful opportunities to participate in the parade (rather than as a single unit); it just assumed that they could have marched in the other units. Most significant, however, is the Court's distinction between carrying a banner and simply *being gay* in the parade. This distinction reinforced the silencing of gays and lesbians. The Court's ruling implied that discrimination against non-heterosexuals is permissible if it only tar-

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[111] *See* Kristine M. Zaleskas, Note, *Pride, Prejudice or Political Correctness? An Analysis of Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 29 COLUM. J.L. & SOC. PROBS. 507, 547-48 (questioning whether *Hurley* indicates withering of the *Roberts* doctrine).

[112] *See* Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E.2d 1293, 1300 (Mass. 1994) [*Hurley I*].

[113] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 572 (1995) (emphasis added).

[114] *See id.* at 572-73.

gets openness — or the placing of sexuality on a "banner." Thus, the Court seems unwilling to accommodate "outness" or to view the rejection of outness (and the openly gay) as a form of sexual orientation discrimination.

The final part of this article explores this aspect of the Court's decision in greater detail and, by discussing the important role of outness as an instrument of sexual equality and identity construction, argues that the Court's vision in *Hurley* perpetuates the marginalization of gays, lesbians, bisexuals, and the transgendered.

III. *ROBERTS* REMAINS UNSCATHED

A. Hurley's Discussion of Roberts Is Simply Dictum

An easy response to the question of whether the *Hurley* decision alters the *Roberts* framework for analyzing speech-equality conflicts would note that the discussion of *Roberts* in *Hurley* is simply dictum and as such, has no precedential value in determining future *Roberts*-type cases.[115] Even dicta, however, may be "respected," if not followed, by courts in subsequent cases.[116] Indeed, in the few post-*Hurley* cases that have considered speech-equality conflicts in public accommodations and other antidiscrimination contexts, courts have *distinguished* the facts of *Hurley* rather than rejecting its analysis outright. These courts have considered *Hurley* relevant on the issue of whether application of various antidiscrimination statutes would alter the message of the discriminator so as to render the statutes unconstitutional as applied. Despite the emergence of *Hurley* in these cases, the courts generally have preserved the *Roberts* strict analysis of the defendants' expressive goals, rather than employing the more lenient test formulated in *Hurley*.

In *Elks Lodges 719 & 2021 v. Alcohol Beverage Control*,[117] for example, the Supreme Court of Utah ruled that application of the Utah Civil Rights Act[118] would not infringe plaintiffs' right of expressive association.[119] Plaintiffs, various Elks and Moose lodges in Utah, challenged (in a consolidated appeal) defendant's revocation of their licenses to sell liquor. Defendant suspended the licenses after the clubs failed to comply with a prior decision of the Utah Supreme

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[115] *See, e.g.*, Cohens v. Virginia, 19 U.S. 264, 398 (1 Wheat.) (1821) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.").

[116] *See id.*

[117] 905 P.2d 1189 (Utah 1995).

[118] UTAH CODE ANN. §§ 3-7-1 to 13-7-4 (1996).

[119] *See Elks Lodges*, 905 P.2d at 1200.

Court, in which the court held that the state's public accommodations statute applied to Elks Lodges (despite their "private" status).[120] The Elks Lodges discriminated against women in their admissions policies.[121] When plaintiffs continued to deny admission to women, defendant notified them that it would revoke their liquor licenses unless they ceased their discriminatory practices.[122] After defendant revoked the licenses, plaintiffs initiated a lawsuit, arguing that the suspension of their licenses for failure to admit women as full members violated their rights of expressive and intimate association.[123] Although the intimate association defense dominated much of the court's review of plaintiffs' associational rights, the court considered and rejected the expressive association defense using the *Roberts* framework.[124]

Further, the court specifically held that *Hurley* did not complicate its decision. The court distinguished *Hurley* on the grounds that *Hurley* (purportedly)[125] did not involve a question of protected groups participating in the parade but instead turned on the admission of GLIB as a unit with a banner. Unlike *Hurley*, the court reasoned, the *Elks Lodges* case did not concern a clash over unwanted speech but involved a "decision to wholly exclude an entire class of society from participation."[126] The court then applied *Roberts* and concluded that the club's expressive goals would not be impaired by the admission of women.[127]

The Second Circuit provided a more nuanced analysis of the *Hurley/Roberts* interplay in *Hsu v. Roslyn Union Free School District No. 3*.[128] Although *Hsu* did not involve a conflict between a public accommodations statute and the First Amendment, it nevertheless illustrates how courts might preserve the vitality of *Roberts* while recognizing the speech concerns the Court expressed in *Hurley*. In *Hsu*, a group of

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[120] *See id.* at 1191-92 (citing Beynon v. St. George-Dixie Lodge 1743, 854 P. 2d 513 (Utah 1993)).

[121] *See id.*

[122] *See id.* at 1191-92.

[123] *See* Elks Lodges 719 & 2021 v. Alcohol Beverage Control, 905 P.2d 1189, 1193 (Utah 1995). The intimate association defense is not relevant to this discussion.

[124] *See id.* at 1197.

[125] The equivocation reiterates my belief that the *Hurley* court failed to consider the parade organizer's reason for excluding GLIB as a pretext for invidious discrimination.

[126] *Elks Lodges*, 905 P.2d at 1196.

[127] *See id.* at 1197 n.7 ("[B]y arguing that women are already allowed access to the clubs' activities and therefore not discriminated against, the clubs cannot also maintain that they desire to exclude women for intimate or political purposes.") (citing *Roberts*, 468 U.S. at 627). For an additional example of a case "respecting" but distinguishing *Hurley*, see Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 797 n.12 (Cal. 1995) (applying California civil rights statute to private golf club and concluding that "[b]ecause the application of [the statute] . . . will have no appreciable effect on the club members' freedom of expressive association, [*Hurley*] . . . provides no support for the club's constitutional claim.").

[128] 85 F.3d 839 (2d Cir. 1996).

public school students who wished to form an after-school bible study group sued the school under the Equal Access Act[129] after the school denied them official recognition. The Equal Access Act provides that public school students who wish to form such groups have the same right to meet in school facilities as other extracurricular groups.[130] The school denied the group recognition because the group's charter provided that only "Christians" could hold leadership positions in the group.[131] The school contended that the exclusionary provision violated the school's antidiscrimination policy that forbids discrimination on the basis of religion.[132] The students, arguing that the school's denial of recognition violated their rights of free speech and association guaranteed by the Equal Access Act, sought a preliminary injunction ordering the school to recognize the group. The Second Circuit concluded that the Christian-only provision was essential to the group's expressive purposes and to the preservation of its identity.[133]

Plaintiffs' associational rights in *Hsu* were decided on statutory, rather than constitutional grounds.[134] The Equal Access Act provides that public schools receiving federal financial assistance may not "discriminate against . . . students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings."[135] Despite the statutory nature of the rights implicated in *Hsu*, the Second Circuit, nevertheless, drew upon the reasoning of both *Hurley* and the *Roberts* line of cases to assess the students' speech interests.[136]

In *Hsu*, the circuit court first turned to the plaintiffs' contention that application of the school's antidiscrimination policy violated their free speech rights. In examining this claim, the court recognized that *Hurley* found that a group's message often "depends upon its ability to exclude certain people, and that this exclusion may be protected by the First Amendment."[137] The *Hsu* court, however, carefully tailored its reading of *Hurley* and limited that case to its specific

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[129] 20 U.S.C. § 4071-74 (1990).

[130] *See Hsu*, 85 F.3d at 847.

[131] *See id.* at 848.

[132] *See id.*

[133] *See id.*

[134] *See* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 856-59 (2d Cir. 1996).

[135] 20 U.S.C. § 4071(a).

[136] *See Hsu*, 85 F.3d at 856 ("*Hurley* does not control this case, because . . . it concerns speech rights under the Constitution, not a federal statute . . . . Despite [this] . . . difference, *Hurley* remains instructive."); *id.* at 858 ("*Roberts* and *Rotary* . . . are analytically distinct from this case, because they involve constitutional rights, not statutory ones. Nevertheless . . . they assist our interpretation of the term 'speech' in the Equal Access Act."). The court relied upon constitutional law to construe the statute because the legislative history and case law under the act provided the court with "scant authority." *Id.* at 854.

[137] *Id.* at 856.

facts (as determined by the Supreme Court), leaving open the possibility for a different outcome under another set of facts. For example, the court stated that "[t]he lesson we draw from *Hurley* is that the principle of 'speaker's autonomy' gives a speaker the right, in *some* circumstances, to prevent *certain* groups from contributing to the speaker's speech, if the groups' contribution would alter the speaker's message."[138] The Second Circuit thus concluded that the logic of *Hurley* would control its decision only "to the extent that there is an *integral connection* between the exclusionary leadership policy and the 'religious speech' at the meetings."[139] The *Hsu* holding maintained the more stringent speech analysis formulated in the *Roberts* line of cases. Applying the principles of these cases, the circuit court found that the discriminatory policy was likely defensible with respect to the upper, but not lower, leadership positions of the group.[140] Specifically, the *Hsu* court held that the group's exclusionary policy probably furthered its expressive purposes with respect to the club President, Vice-President, and the Music Coordinator because these particular officers were responsible for conducting certain Christian prayers and devotions and for safeguarding the "spiritual content" of the group's meetings.[141] In reaching its conclusion, the *Hsu* court exhibited a great degree of sensitivity to the religious group's expressive interests. For instance, the court squarely refuted the school's argument that allowing plaintiffs to discriminate on the basis of religion would grant them "special rights."[142] The school contended that "since the Chess Club may not limit its officers to Muslims, even if its founding members trust only Muslims to lead them, then [plaintiffs' group] may not limit its officers to Christians."[143] The court correctly viewed this analogy as misplaced, concluding that:

> because [the club and its] purpose are religious and sectarian, the requisite level of commitment and belief is quite naturally expressed in terms of religious belief. Equal treatment should mean that the [group] enjoys the same latitude that other clubs may have in determining who is qualified to lead the Club. Thus, just as a secular club may protect its character by restricting eligibility for leadership to those who show themselves committed to the cause, [plaintiffs] may protect their ability to hold Christian Bible meetings by including the leadership provision in the club's constitution.[144]

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[138] *Id.* (emphasis added).
[139] *Id.* at 857 (emphasis added).
[140] *See* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 858 (2d Cir. 1996).
[141] *See id.*
[142] *See id.* at 860.
[143] *Id.*
[144] *Id.* at 860-61.

Thus, the court was particularly sensitive to the club's speech and associational interests. The court, however, also respected the goals of equality and concluded that the policy with respect to the remaining officers furthered no legitimate expressive goal of the group.[145] In *Hsu*, the Second Circuit, like the court in *Elks Clubs*, considered the Supreme Court's analysis in *Hurley*[146] but preserved the *Roberts* requirement that discriminatory policies of a private organization must relate to a *particular* expressive interest of the organization in order to sustain an expressive association defense against the application of a state antidiscrimination statute.[147]

Defendants in cases of alleged sexual orientation discrimination have also invoked *Hurley* in order to persuade courts and civil rights enforcement agencies that the decision erodes the *Roberts* requirement that a discriminatory practice can only support a defense of expressive association if it relates to a specific expressive goal of the discriminating party. For example, in *Dale v. Boy Scouts of America*,[148] a former Assistant Scoutmaster sued the Boy Scouts of America and one of its local chapters ("Boy Scouts") when they expelled him after a news article reported his participation in a college panel on gay and lesbian youth suicide.[149] Boy Scouts contended that application of the New Jersey Law Against Discrimination, which precludes discrimination on the basis of sexual orientation in places of public accommodation, would infringe its freedom of expressive and intimate association.[150] The trial court found that application of the statute would infringe Boy Scouts' speech rights.[151] Despite the lack of any discussion of homosexuality in the numerous handbooks utilized by Boy Scouts and the lack of any relationship between sexuality and the recreational activities of scouting,[152] the trial court concluded that the forced inclusion of a "publicly avowed active homosexual"[153] in the Boy Scouts "would be devastating to the essential nature" of the organization.[154] The court construed the various oaths that youth members of the Boy Scouts memorize as evidence of the organization's stand against homosexuality. Particularly, the court held that the requirement that youth members be "morally straight" and

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[145] *See id.* at 857-58.

[146] *See* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 856-58 (2d Cir. 1996).

[147] *See id.* at 859.

[148] No. MON-C-330-92, slip op. at 4-5 (N.J. Ch. Nov. 3, 1995) [hereinafter *Dale* slip op.].

[149] I, along with several other attorneys at the New York office of Cleary, Gottlieb, Steen and Hamilton, served as plaintiff's counsel.

[150] *See* Brief for Defendants-Respondents at 28-34, *Dale* (No. A-2427-95T3).

[151] *See Dale*, slip op., *supra* note 148, at 70-71.

[152] *See* Brief for Plaintiff-Appellant at 12-13, *Dale* (No. A-2427-95T3); *but see* Brief for Defendants-Respondents at 14-17, *Dale* (No. A-2427-95T3) (arguing that Boy Scout handbooks clearly, albeit indirectly, articulate a policy against homosexual leaders).

[153] *See Dale*, slip op., *supra* note 148, at 71.

[154] *Id.* at 70.

"clean" demonstrates that the organization's expressive goals include the condemnation of homosexuality.[155] The *Dale* court, like the *Hurley* Court, failed to see the Boy Scouts' policy as one of invidious discrimination unrelated to any expressive goal. For instance, despite the Boy Scouts' position that it expels gay men from leadership positions because it has as an expressive goal the condemnation of homosexuality, the organization does not expel *heterosexuals* who publicly criticize the discriminatory policy and who support gay and lesbian equality.[156] The disparate treatment of gay men and heterosexuals further evidences the Boy Scouts' discriminatory motive.

Hurley did not influence the lower court proceedings in *Dale* because the case was fully briefed prior to the opinion in *Hurley*. On appeal, however, defendants contended that *Hurley* controlled the analysis of their right of expressive association.[157] Defendants first attempted to overcome the evidence that their numerous publications and manuals which outline the mission of scouting do not contain any statements about the immorality of homosexuality.[158] To further this strategy, the Boy Scouts relied upon the holding in *Hurley* which concluded that a succinct message need not characterize all speech.[159] Plaintiff responded by distinguishing *Hurley* on legal (free speech versus expressive association) and factual (exclusion of a message versus exclusion of a person) grounds.[160] Plaintiff's appeal remains pending.

B. The Soundness of Post-Hurley Analyses

Although the *Hurley* court forcefully rejected the notion that expressive interests need a clear articulation in order to receive First Amendment protection, courts confronted with speech-equality conflicts in the post-*Hurley* world have continued to adhere to the teachings of *Roberts*, finding that the First Amendment shields only those discriminatory practices related to a demonstrable expressive pur-

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[155] *See id.*

[156] *See* Brief for Plaintiff-Appellant at 71, *Dale* (No. A-2427-95T3). *See also* Carol Ness, *Petaluma Boy Scout, 12, Says Gays Merit Inclusion*, S.F. EXAMINER, Jan. 15, 1998, at A-8 (reporting political efforts of twelve-year-old heterosexual scout to reverse Boy Scouts' anti-gay policy; the youth remains a member of scouting).

[157] *See* Brief for Defendants-Respondents at 28-34, *Dale* (No. A-2427-95T3).

[158] *See id.* at 14-17 (discussing the language of Boy Scout materials which purportedly condemns homosexuality).

[159] *See id.* at 24 ("The [*Hurley*] Court began by dispelling the notion that a group's message must be single-minded and direct in order to be protected. The Court observed that 'a narrow, succinctly articulable message is not a condition of constitutional protection.'") (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995)).

[160] *See* Brief for Plaintiff-Appellant at 65 n.14, *Dale* (No. A-2427-95T3).

pose.[161] By recognizing *Hurley*, yet preserving the strength of *Roberts*, these courts are developing a sound constitutional approach.

1. The *Hurley* Court Wrongly Departed From *Roberts'* Articulable Message Requirement.

Post-*Hurley* courts are correct in limiting *Hurley's* reach because the case stands on a fractured theoretical ground. The *Hurley* Court, as discussed above, narrowly reviewed the factual record, failed to discuss possible distinctions between the Boston parade, other parades, and other forms of expressive conduct, and incautiously credited defendant's statement that GLIB's exclusion was based on the group members carrying a "banner" (not their sexual orientation), thereby refusing to construe the exclusion as discriminatory.[162] For these reasons alone, courts should use restraint when applying *Hurley* in other factual settings.[163] In addition, courts should exercise particular caution when considering the applicability of *Hurley's* relaxed standard for assessing the expressive interests of a discriminator because that standard is also intellectually flawed. Recall that in *Hurley* the Court criticized the state courts for concluding that the parade lacked an explicit expressive interest that would be burdened by GLIB's participation in the parade.[164] The state courts made this finding because the record established that the parade was large and unselective and did not have a particular theme — other than the commemoration of Evacuation Day and St. Patrick's Day. Thus, the state courts, adhering to *Roberts*, concluded that the inclusion of GLIB in the parade would not burden any expressive activities of the parade organizers.[165] The Supreme Court rejected this analysis and held that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."[166] To support this expansive definition of speech, the Court cites to precedent involving expres-

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[161] *See supra* text accompanying notes 117-47 (discussing Elks Lodges 719 & 2021 v. Alcohol Beverage Control, 905 P.2d 1189 (Utah 1995); Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2d Cir. 1996)).

[162] *See supra* text accompanying notes 96-114 (discussing doctrinal flaws in *Hurley*, 515 U.S. 557 (1994)).

[163] *See* Eskridge, *supra* note 70, at 2463 ("My reading might make too little of *Hurley*, but the analytical problems with its reasoning suggest that it is a precedent to be applied cautiously.").

[164] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569-70 (1995).

[165] *See* Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston, 636 N.E. 2d 1293, 1299 (1994) [*Hurley I*] (upholding the trial court's finding that the parade lacked a specific message as not being clearly erroneous).

[166] *See Hurley*, 515 U.S. at 569 (internal citation omitted).

sive conduct and claims that "some" of these cases prove its proposition.[167]

These precedents, however, weigh against, rather than support, the Court's relaxed view of expressive conduct. In *West Virginia Bd. of Educ.*, for example, the Court held unconstitutional a school's requirement that students salute the flag and recite the "pledge of allegiance."[168] The Court found that students had a constitutional right to resist compliance with the salute on First Amendment grounds. Contrary to the representation of the *Hurley* court, the Court in *West Virginia Bd. Of Educ.* did not find that the salute and the refusal to salute constitute amorphous, inarticulable expression. Rather, the Court characterized the salute requirement as a "short-cut" substitute for the "slow and easily neglected route to aroused loyalties"[169] emerging from instruction in history and civics. The school board resolution that enacted the requirement also identifies the clear expressive purposes behind the salute; the resolution describes the requirement as a ritual "honoring the Nation represented by the Flag."[170] That the requirement and refusal to comply both represented clearly-defined speech interests was demonstrated in the resolution's warning for the noncompliant: "refusal to salute the Flag [shall] be regarded as an Act of insubordination, and shall be dealt with accordingly."[171] The speech interests of the plaintiffs were also equally articulated. The plaintiffs, a group of Jehovah's Witnesses, traced their opposition to the salute to biblical teachings and religious practice.[172] They refused to participate in the salute because they viewed the flag as a "graven image."[173] Accordingly, the speech interests in this case were clearly defined; thus, this case complicates the *Hurley* court's expansive standard.

The remaining cases invoked by the Court are equally insupportable of its proposition. In *Tinker*, the Court invalidated a public school regulation that forbade students from wearing black armbands to school.[174] The Court found that the policy infringed the

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[167] *See id.* (discussing West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), Stromberg v. California, 283 U.S. 359 (1931), and National Socialist Party of America v. Skokie, 432 U.S. 43 (1977)).

[168] *See West Virginia Bd. of Educ.*, 319 U.S. at 642.

[169] *Id.* at 631.

[170] *See id.* at 626. The Court held that the state:

> employ[ed] a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

Id. at 633.

[171] *Id.* at 626.

[172] *See id.* at 629.

[173] *Id.* (citing *Exodus* 20: 4-5).

[174] *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 514 (1969).

students' First Amendment rights because they chose to wear the armbands in order to "publicize their objections to the hostilities in Vietnam and their support for a truce."[175] The Court thus charged the school with punishing the "expression of one *particular opinion*."[176] Similarly, in *Stromberg*, the Court held unconstitutional a California statute that made it a felony to display publicly a "red flag."[177] The speech interests of the petitioner who was convicted under the statute were both "succinct" and clear. Petitioner was a member of the Young Communist League.[178] At a camp sponsored by the organization, petitioner displayed a reproduction of the Soviet flag.[179] In connection with the display of the flag, petitioner led the participants in a salute to "the worker's red flag, and to the cause for which it stands; one aim throughout our lives, freedom for the working class."[180] Therefore, petitioner's display of the flag was indisputably connected to her proven adherence to communist political thought. Finally, in the *Skokie* case, the Court reversed an order prohibiting petitioners from:

> [m]arching, walking or parading in the uniform of the National Socialist Party of America; [m]arching, walking or parading or otherwise displaying the swastika on or off their person; [d]istributing pamphlets or displaying any materials which incite or promote hatred against persons of Jewish faith or ancestry or hatred against persons of any faith or ancestry, race or religion.[181]

This order clearly sought to deter a particular expression — anti-Jewish bigotry. In sum, none of the precedent cited by the Court in *Hurley* supports its relaxed rule regarding the expressive nature of conduct.[182] Ironically, the Court's own "finding" that parades consist of "performers [who] *define* . . . what subjects and ideas are available for communication and consideration,"[183] conflicts with its lenient formulation. Because the Court's lax rule stands on weak intellec-

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[175] *Id.* at 504.

[176] *Id.* at 511 (emphasis added) (noting that the wearing of black armbands to protest the Vietnam War was singled out for punishment while other forms of symbolic speech were not).

[177] Stromberg v. California, 283 U.S. 359, 369-70 (1931).

[178] *Id.* at 362.

[179] *Id.*

[180] *Id.*

[181] National Socialist Party of America v. Skokie, 432 U.S. 43, 43 (1977).

[182] The Court also mentions *Gregory v. Chicago*, 394 U.S. 111 (1969) and *Edwards v. South Carolina*, 372 U.S. 229 (1963) as examples of expressive conduct. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568 (1995). It is unclear whether the Court intended to include them as examples of speech conveying an inarticulable message. In any event, the speech interests in these cases are also strongly defined; both cases involved 1960's marches by blacks to protest racial discrimination. *See Gregory*, 395 U.S. at 111; *Edwards*, 372 U.S. at 230.

[183] *Hurley*, 515 U.S. at 568 (emphasis added) (quoting S. DAVIS, PARADES AND POWER: STREET THEATER IN NINETEENTH-CENTURY PHILADELPHIA 6 (1986)).

tual and doctrinal grounds, lower courts should continue limiting its reach.

2. Places of Public Accommodation Are Not "Speech."

Assuming the Court was correct in identifying the parade as pure expression — albeit with an amorphous message — rather than as a place of public accommodation, the *Hurley* analysis should be limited to this fact and therefore should not control cases in which the public accommodations question is not at issue. Unless courts follow the *Roberts* doctrine's strict analysis of the speech interests that discriminating places of public accommodation claim to hold, the First Amendment will begin to shield an unprecedented amount of discrimination from state regulation.[184]

Consider the *Dale* case in which the Boy Scouts claims that it has an expressive goal the condemnation of homosexuality.[185] On appeal, Boy Scouts argued that "the [defendant] in *Hurley* was not required to propound any particularly good reason for excluding the participants with whose views they were in disagreement."[186] The Boy Scouts invoked this ruling in order to counter the lack of evidence demonstrating that the members of the organization come together to express animosity towards gay men. Thus, the Boy Scouts argued that any "organization engaged in expressive activity is entitled to exclude unwanted messages *even if its own expressive message does not directly address the subject matter of the unwanted message.*"[187] This standard, supportable under a moderate reading of *Hurley*, would erect an almost insurmountable barrier to state antidiscrimination efforts.[188] A discriminating organization would simply have to demonstrate that it engages in "some" inarticulable, vague expression, and that this murky expression would "somehow" be disturbed by the admission of members of a protected class.

Courts can prevent this expansion of the right to discriminate by limiting *Hurley* to pure "free speech," rather than "expressive association" cases. In a free speech case, where the subject matter is "pure speech," it seems clear that a state action that affects the content of the speech might burden the speaker's First Amendment rights.

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[184] *Accord* Runyon v. McCrary, 427 U.S. 160, 176 (1975) ("[I]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . [but] it has never been accorded affirmative constitutional protections.").

[185] *See* discussion *supra* Part III. A.

[186] Brief for Defendants-Respondents, *Dale* No. MON-C-330-92 (N.J. Super. Ct. Ch. Div. Nov. 3, 1995).

[187] *Id.* at 25 (emphasis added). *See also id.* at 31 ("The First Amendment does not require that Scouting become a noisy political opponent of homosexual rights for its expression to be protected.") (citation omitted).

[188] *See* Van Ness, *supra* note 83, at 660 (characterizing the "implications" of a strict application of *Hurley* as "staggering").

The expressive interests in cases that involve traditional places of public accommodation or membership organizations, on the other hand, are less obvious. Imagine, for example, that a restaurant denies service to a group of people of color. The same restaurant, however, routinely serves whites and never denies them service. It is an extremely popular restaurant, but people of color are consistently refused service. When confronted with a civil rights lawsuit, the restaurant alleges that enforcement of a public accommodations statute that prohibits racial discrimination would infringe upon its right of expressive association. The restaurant cites *Hurley* for the proposition that while its white supremacist message is subtle, amorphous, and hidden, it nevertheless exists. The restaurant says that by permitting people of color to dine on its premises, it would be compelled to convey a message to the public that dining with people of color is acceptable. Because dining is not typically considered a form of expressive conduct,[189] it is not clear how enforcement of the statute would burden the restaurant's expressive rights. Accordingly, a court in this situation should rigorously examine the defendant restaurant's claim in order to determine whether the enforcement of the statute would actually burden its asserted expressive interests. The *Roberts* framework provides for this exacting analysis; *Hurley* does not. Because the *Hurley* analysis rests on pure speech rather than associational grounds, it should not control the ordinary *Roberts*-type cases involving discrimination in places of public accommodation, which lack any obvious speech interests and which typically involve expressive association, rather than free speech, defenses.

3. Restoration of Balance.

Finally, courts should limit the reach of *Hurley* in order to maintain the balanced approach to speech-equality conflicts established by the *Roberts* doctrine. As the *Roberts* trilogy and the discussion in *Hsu* and *Elks Lodges* demonstrate, courts can respect both the tradition of free speech and group equality that are inextricably woven into our legal and political cultures. The *Hurley* court retreated from this delicate balancing. By restricting *Hurley*'s holding to the particular "facts" of that case, courts can again turn to the important, yet difficult, task of weighing the social goal of individual freedom against the interest in a society free of group oppression.

[189] Of course, the cessation of dining for the purpose of protesting — a "hunger strike" — has taken on an expressive meaning. Thus dining itself could arguably assume expressive meaning in certain contexts.

IV. TOWARD THE ACCOMMODATION OF OUTNESS IN ANTIDISCRIMINATION LAW AND LEGAL THEORY

A. Hurley: Reinforcing the Closet

The *Hurley* Court reversed the state courts' finding that the parade organizers denied GLIB's request to participate in the parade solely on the basis of sexual orientation. The state courts specifically noted the organizers' shifting excuses for refusing GLIB's numerous requests to participate in the parade as evidence of unlawful discrimination. The Supreme Court, however, reduced the issue to speech: GLIB's exclusion occurred because organizers did not want to hear the group speak.[190] The Court's conclusion that GLIB's exclusion did not constitute unlawful discrimination is questionable on several grounds.

First, the Court failed to engage the state courts' determination that the defendant's reason for excluding GLIB was pretextual. It is highly plausible that the organizers, given their history of presenting new justifications for GLIB's exclusion, were not completely forthcoming with respect to their true intentions in their argument before the Supreme Court. Furthermore, because the issue of the organizer's credibility is best determined in the trial courts, the Supreme Court should have taken greater care before disturbing this important factual issue.

Even if we assume the Court was correct in treating GLIB's participation in the parade as speech, this fact does not eliminate the possible disparate impact that the exclusion of this speech had upon gay, lesbian, and bisexual participation in the parade. By excluding GLIB's "speech" — or all speech relating to homosexuality — from the parade, the organizers may have effectively excluded any participation by non-heterosexuals in the parade. This disproportionate effect of the organizer's action could either prove or support a claim of discrimination and undermine the veracity of the organizers' compelled speech defense.[191] Furthermore, even if gays, lesbians, and bisexuals marched in groups other than GLIB's, this fact alone does not preclude discrimination against members of GLIB based solely on their sexual orientation. Generally, the fact that some members

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[190] *See Hurley*, 515 U.S. at 575.

[191] *See* BROOKS, CARRASCO, & MARTIN, CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES 447 (1995) (discussing disparate impact theory in civil rights actions). Although no published Massachusetts decisions apply a disparate impact theory in the public accommodations context, no cases preclude the application of this theory in such litigation. This issue has been litigated in at least two states. *See* Harris v. Capital Growth Investors XIV, 805 P.2d 873, 893 (Cal. 1991) (treating disparate impact as evidence of discriminatory intent in actions against places of public accommodation); Paper v. Rent-A-Wreck, 463 N.W. 2d 298, 300 (Minn. Ct. App. 1991) (disparate impact may prove prima facie case of discrimination in places of public accommodation).

of a protected class do not face discrimination does not negate a claim of discrimination by other individuals within that same class.[192]

The most troublesome aspect of the Court's dismissal of GLIB's allegation of discrimination, however, is the way in which it severely devalues the important role that speech plays in the construction of sexual identity and the achievement of gay and lesbian equality. Public declarations of sexual identity such as GLIB's are inextricably linked with gay, lesbian, bisexual and transgendered status and political equality. Thus, defendant's exclusion of GLIB's *message* subordinated non-heterosexual status. By legitimizing defendant's action as a permissible choice not to speak, the Court relegated "outness" back into its metaphorical closet. In order to explain more fully the negative impact of the Court's decision on gay rights efforts, I will discuss the significance of coming out as it relates to gay, lesbian, bisexual and transgendered identity and politics.

B. The Social Construction of Identity

1. General Framework

Historically, social identity categories such as race and sex have been treated as having a fixed, biological and genetic existence. Today, however, a growing number of scholars now understand these categories to be products of social construction. Influenced by postmodernist thought, science, and sociology, writers such as Ian F. Haney Lopez have persuasively argued that social identity categories are products of "fabrication," rather than nature.[193] Lopez, for example catalogues scientific literature that refutes the common perception that races are genetically distinct.[194] Finding no credible scientific definition of race, Lopez traces its meaning to social relations: "Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization."[195] Lopez identifies four important facets of "racial fabrication": (1) humans, not abstract forces, produce race; (2) races are an integral part of a multidimensional social fabric that includes gender and class; (3) racial meanings change quickly; and (4) races are constructed "rela-

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[192] *See* Connecticut v. Teal, 457 U.S. 440, 452-56 (1982) (Title VII context).

[193] *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27-28 (1994).

[194] *See id.* at 11 ("There are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites.") (citing R. C. LEWONTIN ET AL., NOT IN OUR GENES: BIOLOGY, IDEOLOGY, AND HUMAN NATURE (1984); Alan J. Almquist & John E. Cronin, *Fact, Fancy, and Myth on Human Evolution*, 29 CURRENT ANTHROPOLOGY 520 (1988); Bruce Bower, *Race Falls from Grace*, 140 SCI. NEWS 380 (1991)).

[195] Lopez, *supra* note 193, at 27 (referring to PETER L. BERGER & THOMAS LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966)).

tionally," in opposition to one another.[196] Although Lopez attributes race to social interaction, he nevertheless appropriately recognizes the role that morphological features have in the construction and maintenance of racial categories and racial power.[197] Lopez also does not allow the socially constructed nature of race to obscure its tangible — and *material* — significance.[198]

In addition to distributing social, political and economic power, race also serves to design — or construct — communities, which in turn help define individual identity. Race shapes communities as the social relevance of a shared morphological trait "provid[es] a common experience to people who earlier or in a different context may not have seen themselves as similar."[199] Communities influence personal identity because individuals often define themselves in relation to a social group to which they see themselves as belonging.[200] Thus, social race becomes a powerful component in the construction of personal identity.

2. Sexuality and Social Construction.

Lopez's analysis provides a useful lens for considering the construction of identity. Although Lopez focuses almost exclusively on race in his article, he acknowledges the importance of viewing race as merely one component of the social fabric that shapes community and individual identity.[201] Yet Lopez's analysis does not significantly engage the relationship between race and these other social identity categories.[202] This factor, however, does not greatly detract from the usefulness of Lopez's discussion.

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[196] *See id.* at 28.

[197] [Lopez] define[s] a 'race' as a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry. [He] argue[s] that race must be understood as a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics. In other words, social meanings connect our faces to our souls.

Id. at 7.

[198] *See id.* at 61 ("The absence of any physical basis to race does not entail the conclusion that race is wholly an hallucination. Race has its genesis and maintains its vigorous strength in the realm of social beliefs.").

[199] *Id.* at 55.

[200] *See id.* at 57 ("Communities form a core source of personal identity and provide a crucial base from which to interact with the larger society. The culture shared across a community lends 'significance to human experience by selecting from and organizing it.'") (citing RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS 26 (1989)).

[201] *See id.* at 60 ("The multiplicity of community allegiances each of us holds adds still more confounding intricacies to the connection between our morphology and personality. Each of us shares multiple allegiances across many different axes, like class, sexual orientation, and gender.").

[202] The heaviest docket of literature on the multilayered nature of social identity and the interlocking relationship between various systems of oppression is provided by feminist and antiracist scholarship on the impact of racism and patriarchy in the lives of women of color. For

The social construction of sexual identity has also been explored by commentators in the gay and lesbian context.[203] Like Lopez, many of these scholars acknowledge the multidimensionality of sexual identity but do not engage its particularities. Again, this omission does not diminish the tremendous insights these works provide, but it may mask the racially constituted nature of sexual subordination.[204] A younger body of scholarship, however, considers the relationship between race, racism, sexuality, and heterosexism.[205] This newer body of scholarship, other writings by gay and lesbian scholars, and Lopez's framework, supply the theoretical mechanism through which the following discussion of the socially constructed nature of sexual identity will occur. By considering the racial (and other) components of identity concurrently, this analysis furthers an ongoing project that illuminates the complexity of identity.[206]

Janet Halley offers one of the most thorough discussions of the social construction of sexual identity within legal theory.[207] As Halley's analysis reveals, both pro-gay *and* anti-gay activists have debated the issue of whether sexual identity is biologically determined or a product of social interaction.[208] Halley, however, directs her arguments primarily to activists concerned with gay and lesbian equality, attempting to find a "middle ground" between the constructivist-

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a recent anthology of leading literature in this field see CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 1997).

[203] *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).

[204] *See generally* Hutchinson, *Out Yet Unseen*, *supra* note 14, at 583-635 (arguing that gay and lesbian legal theorists and political activists fail to consider the implications of racial hierarchy in their work).

[205] *See id.* at 562-63 n.9.

[206] *See id.* at 636-44 (urging gay and lesbian legal theorists and political activists to recognize "multidimensionality" of oppression and identity). *See also* Darren Lenard Hutchinson, *Claiming and Speaking Who We Are: Black Gays and Lesbians, Racial Politics, and the Million Man March*, *in* INSIDE RACE (Devon Carbado ed., forthcoming 1998) . By focusing, in part, on the writings of gay and lesbian people of color, I do not wish to imply that white gays and lesbians do not possess a race or that their sexual identities are somehow less complex. As I have previously argued, my theory of "multidimensionality [attempts to] capture . . . the inherent complexity and irreversibly multilayered nature of *everyone's* identities and of oppression." Hutchinson, *Out Yet Unseen*, *supra* note 14, at 641 (emphasis in original). Furthermore, recent scholarship analyzes the social construction of whiteness in order to refute the common association of "race" with "people of color" and to reveal the existence and meaning of whiteness. *See, e.g.*, CRITICAL WHITE STUDIES: LOOKING BEYOND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997).

[207] *See generally* Halley *supra* note 203.

[208] *See* Halley, *supra* note 203, at 517 (categorizing essentialists and constructivists as "pro-gay" and "anti-gay"). Anti-gay essentialists believe that homosexual orientation is "fixed, immutable, and normatively bad or sick", *id.*; pro-gay essentialists believe that homosexual orientation is fixed and immutable and, therefore, should be protected from discrimination, *see id.*; anti-gay constructivists believe that homosexual orientation is mutable and that discrimination can help move gays and lesbians away from homosexuality, *see id.*; pro-gay constructivists contend that all forms of sexuality are mutable and that "social policy on sexual orientation should not impede these variations," *id.*

essentialist debate in gay and lesbian politics and legal theory. This debate has recently received growing attention due to the publication of several scientific studies that purport to "prove" the biological nature of homosexuality[209] as well as the advancement of immutability arguments by litigants claiming that sexual orientation classifications should receive heightened scrutiny under equal protection principles.[210]

Although Halley seeks to locate a compromise position between pro-gay essentialists and social constructivists,[211] her intellectual and political sensitivities clearly lie within the constructivist camp. Halley criticizes the essentialism proponents on several grounds. First, Halley questions the legitimacy of scientific claims that homosexuality is biologically based.[212] Halley also challenges the doctrinal characterization of homosexual identity as biologically determined and immutable in equal protection litigation.[213] Litigants have advanced these essentialist arguments in their attempt to persuade courts to apply heightened scrutiny to governmental classifications based on sexual orientation, arguing that because sexual orientation is an "immutable" characteristic, the state should not discriminate against individuals on this basis.[214] The development of immutability-based arguments in gay and lesbian equal protection litigation and civil rights scholarship responds to language in the Supreme Court's plurality opinion in *Frontiero v. Richardson*,[215] which concluded that strict scrutiny should apply to sex-based discrimination.[216] In *Frontiero*, the Court based its application of heightened scrutiny on a number of reasons: the "long and unfortunate history of sex discrimination,"[217] the highly visible nature of the "sex characteristic,"[218] and the fact that sex is an "immutable characteristic determined solely by the accident of birth."[219] Yet, as Halley observes, immutability serves merely as a *factor* — not a requirement — in the determination of whether a

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[209] *See id.* at 521-23, 529-46 (discussing J. Michael Bailey & Richard C. Pilland, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991) and Simon LeVoy, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991)).

[210] *See id.* at 507-16.

[211] Halley locates this compromise position in "weak behavioral constructivism." *See id.* at 560-62. Under a weak behavioral constructivist approach, sexual preferences are essential, possibly fixed, but vary across the social landscape. *See id.* at 558 ("Weak behavioral constructivism acknowledges the powerful reality of sexual-orientation categories as we know them, but posits that some *other* form or forms of human variance are primary. It thus challenges us to imagine *beyond* the sexual-orientation categories homo- and heterosexual.").

[212] *See id.* at 530-45.

[213] *See id.* at 507-16.

[214] *Id.* at 507, n.7.

[215] 411 U.S. 677 (1973) (plurality opinion).

[216] *See* Halley, *supra* note 203, at 507.

[217] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

[218] *Id.* at 686.

[219] *Id.* at 686. *See also* Halley, *supra* note 203, at 507.

particular classification is "suspect" for equal protection purposes.[220] Thus, the employment of immutability arguments by gay and lesbian civil rights litigants rests upon flawed doctrinal grounds.[221]

The treatment of homosexual identity as a fixed, biological characteristic also distorts the social reality of sexual identity. Although many gay men and lesbians have stated that they believe they were "born" as gay or lesbian individuals, scores of others view their sexual orientation as contingent, variable, and chosen.[222] Among the latter are bisexuals who feel constrained by dichotomous labels such as "gay" and "heterosexual," and other individuals who believe that biological accounts of sexuality ignore the political and social processes around which their identities are (or were) produced.[223] Thus, essentialist definitions of homosexual identity obscure differences among gays and lesbians and mask the political and social components of non-heterosexual identity. A closer examination of the "coming out" process helps to illuminate the social and political elements of sexuality.

3. Coming Out and Sexual Identity

Due to societal homophobia and heterosexism, which act in tandem with patriarchy, white supremacy, and class stratification,[224] gay and lesbian experience is often shrouded in secrecy; the "closet" has become the prevailing cultural metaphor to symbolize the invisibility of gay, lesbian, bisexual and transgendered individuals. Although the closet may serve to insulate gay and lesbian people from direct discrimination, violence, and emotional abuse, it nevertheless poses tremendous psychological and political costs upon gay and lesbian communities and individuals.[225] Furthermore, the harms caused by life "in" the closet negatively affect other marginalized communities

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[220] *See* Halley, *supra* note 203, at 507-10. *See also* Watkins v. United States Army, 847 F.2d 1329, 1347 (9th Cir. 1988), *withdrawn*, 875 F.2d 699 (9th Cir. 1989) ("The Supreme Court has never held that only classes with immutable traits can be deemed suspect.") (citing Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 n.10 (1985) (casting doubt on immutability theory); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (same); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (same)).

[221] The immutability argument is also subject to criticism for not questioning the legitimacy of society's stigmatization of homosexuality. Rather than demanding a justification for heterosexist practices, proponents of immutability/essentialism instead assert that such practices are morally wrong because their victims cannot change their status (the implication being that if non-heterosexuals can change their sexual identity, they should). *See* Halley, *supra* note 203, at 524.

[222] *See* Halley, *supra* note 203, at 526-28.

[223] *See id.*

[224] *See* Hutchinson, *Out Yet Unseen*, *supra* note 14 at 604.

[225] *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 299 (1994) ("Far from the innocuous safe haven pictured by opponents of gay rights, the closet exacts a high price in self-esteem, emotional health, and access to the community."); Eskridge, *supra* note 70 at 2442 ("The closet is a temptingly safe hiding place, but it forecloses psychological, social, and political opportunities.").

with which gays and lesbians are associated —communities of color and feminist communities. Racial, gender and class hierarchies in gay and lesbian communities, however, may actually add some tremendous costs to the coming out process for people of color.

Perhaps the greatest negative effect the closet has on individual gays and lesbians is to their emotional and psychological well-being. A plethora of psychological data has documented the debilitating impact that "internalized homophobia" — or the acceptance of societal homophobia by gay and lesbian people — has upon an individual's self-esteem, personal development, and emotional adjustment.[226] The closet harms gay communities because it hinders the ability of gays and lesbians to engage in collective political action to achieve equality.[227] Furthermore, as numerous scholars have argued, homophobia and gay and lesbian invisibility also divide communities of color and feminist communities, erecting barriers to social and political action in these social groups as well.[228] Similarly, racial, class and gender hierarchies also divide gay communities.[229] As a result of these collective and personal harms caused by the closet, heterosexism, and internalized homophobia, coming out has become a crucial instrument in the formation of gay and lesbian identity, communities, and politics (and in anti-racist and feminist communities and politics). These identities are multidimensional and are composed of racial, gender, and class layers. The GLIB conflict, for example, did not simply concern homophobia, as it is typically assumed; rather the dispute involved a challenge, by GLIB, over narrow, essentialist, and heterosexist constructions of Irish-American ("white ethnic") identity.[230]

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[226] *See* Eskridge *supra* note 70 at 2442 (citation omitted). *See also* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. & SEXUALITY 133, 145-46 (1991) ("lesbians and gay men probably maintain self esteem most effectively when they identify with and are integrated into the larger lesbian and gay community.").

[227] *See generally*, Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989). *See also* Eskridge *supra* note 70 at 2443 ("The closet . . . disabled gay people from forming social and political groups.").

[228] *See, e.g.*, Hutchinson, *Out Yet Unseen*, *supra* note 14 (discussing how homophobia and the closet impede black political action and promotes racist acts against black gays and lesbians); Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERK. WOMEN'S L. J. 191 (1989-1990) (arguing that homophobia and the marginalization of lesbians by feminists harm feminist theory and divide women).

[229] *See* Hutchinson, *Out Yet Unseen*, *supra* note 14 at 605-08.

[230] Similar contestations have occurred in communities of color. *See* Jungwon Kim, *India Day Dispute: Celebration Parade Bans Gay-Rights Marchers*, NEWSDAY, Aug. 13, 1997, at A8 (reporting exclusion of Asian-American gay, lesbian and bisexual group from New York City's India Day Parade); Teresa Wiltz, *Black Gays, Lesbians Begin to Fight Back*, CHIC. TRIB., Aug. 15, 1993, at C1 (reporting dispute over participation of black gay and lesbian group in Bud Billiken parade, a celebration in Chicago's South Side). Nevertheless, although it is popularly believed that communities of color are exceedingly more homophobic than the general population, many gays and lesbians of color have, after political activism, gained the opportunity to participate in these

Public self-identification plays an important role in the formation of complex social identities. In her work on lesbian theory, Shane Phelan's insightful analysis of the coming out process illustrates its importance to gay and lesbian identity. Phelan complicates the traditional, almost exclusive, understanding of coming out as an act of "revelation, an acknowledgment of a previously hidden truth."[231] Instead, Phelan seeks to understand coming out as a process of identity construction.

Drawing on postsmodernist thought, Phelan, like Lopez and Halley, views personal identity as a product of human interaction, history and political forces.[232] While Phelan concedes that gayness and lesbianism exist as "real" and tangible entities, she attributes their meanings not to nature, but to an intricate process of human interaction and political processes.[233] If we conceive of identity as a process, Phelan argues, then coming out of the closet no longer entails a decision simply to make one's identity public; instead, it is a crucial part of *becoming* gay or lesbian:

> If we think of identity as a process, the closet changes. Leaving the closet is not a matter of simple visibility, but is a reconfiguration of the self. It is a project rather than an event. Becoming lesbian is indeed a process of resistance to patriarchal heterosexuality. It is not the discovery or revelation of one's resistance but is the resistance itself. Furthermore, this project is never complete. One is never "finally," "truly" a lesbian, but becomes lesbian or not with the choices one makes.[234]

Thus, by coming out, the gay, lesbian, bisexual and transgendered individual does not merely reveal a hidden identity but is "*fashioning a self*... that did not exist before coming out began."[235] Coming out is also a form of political action; it is the resistance to

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cultural events. *See* Terry Wilson, *Gay Community Unites to Celebrate Its Pride*, CHIC. TRIB., June 6, 1994, at N1 (reporting participation of black and Latino groups in several parades hosted by Chicago's communities of color); Gamalier DeJesus *¿Quienes Somos? What Is This Thing Called Identity*, VILLAGE VOICE, July 2, 1996, at 27 (reporting that Latino/a gay and lesbian groups have openly participated in New York City's Puerto Rican Day Parade since 1989); Wiltz, *supra* (reporting a settlement in the Bud Billiken dispute under which a black gay group was allowed to participate).

[231] *See* SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS 51 (1994).

[232] *See generally id.* at 41-56.

[233] *See id.* at 52 ("There is in this view a reality, a stable horizon of what it means to be lesbian or gay, but that stability is not given by discovery of deep truth but by participating in particular historical communities and discourses.").

[234] *Id.* at 52.

[235] *See id.* (emphasis added). *See also* Eskridge *supra* note 70 at 2440 ("Coming out as lesbian, gay, or bisexual... [is] no longer understood merely as a discrete personal discovery and expression of one's sexuality, but is now seen as a process of continual discovery and exploration made possible through liberation from the clichés of 'compulsory heterosexuality.'") (citation omitted).

"patriarchal heterosexuality"[256] and a challenge to both narrow, heterosexist constructions of racial identity and white constructions of gayness.[257]

C. Accommodating Outness in Civil Rights Law

1. *Hurley*: No Room for Outness.

Because coming out serves as a crucial instrument in the development of gay, lesbian, bisexual, and transgendered identities, "outness" has become an inseparable part of gay identity. Hence, policies that discriminate on the basis of outness should be seen as discriminating on the basis of gay and lesbian identity as well.

The linkage between outness and gay identity, however, escaped the Court in *Hurley*. The Court concluded, despite the findings of the state courts, that the parade organizers did not engage in unlawful discrimination against gays and lesbians "as such" when they excluded GLIB from participating. The Court reasoned that gays, lesbians and bisexuals could participate in other parade units and that the dispute centered upon the organizers' desire to omit GLIB's particular message from the parade.[258]

GLIB's message (if any), however, was one of outness. By marching in the parade as a distinct, openly gay unit, GLIB could have celebrated the existence of gays, lesbians, and bisexuals of Irish descent. Indeed, the Court concluded that this was GLIB's very purpose for wanting to march in the parade. Thus, GLIB's outness would have documented the diversity of Irish-American communities, helped reconstruct essentialist visions of Irish sexuality, and served as a challenge to the heterosexist practices of the parade organizers — practices that were arguably distinct from the expressive purpose, if any, of the parade. GLIB's outness, therefore, was part of the complex process of identity construction, in which gay and lesbian identities are reconfigured beyond the closet and whereby homophobic norms that narrowly demarcate the boundaries of sexuality, gender, race, and class are resisted.[259] Viewed as such, the

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[256] *See* PHELAN, *supra* note 231, at 52. *See also* Halley, *supra* note 227, at 970-71 ("Public homosexual identity is so volatile, so problematically referential to a history of genital homosexual conduct, and so relentlessly controversial that it has become an element of political discourse distinguishable from the conduct that, *Hardwick* informs us, states may constitutionally criminalize.").

[257] *See generally* Hutchinson *supra* note 206 (arguing that black gay participation in *and* refusal to participate in the Million Man March, given the organizer's homophobic declarations, helped to challenge hetereosexist constructions of blackness) (emphasis added). *See also* GOMEZ, *supra* note 27, at 169 (Stating that because blackness is constructed as heterosexual and gayness as white, coming out for blacks entails "saying both *I am gay* and also declaring *I am still Black*") (emphasis in original).

[258] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 572 (1995).

[259] *See* PHELAN, *supra* note 231.

organizers' rejection of GLIB's message — its outness — constituted an act of discrimination based on gay, lesbian and bisexual identity. Accordingly, the Court's conclusion that the parade organizers did not engage in sexual orientation discrimination fails to realize the intricate connection between outness, gay and lesbian identity, and, more broadly, the socially constituted nature of sexual identity.

2. Making Space for Outness in Civil Rights Jurisprudence.

The Supreme Court's dismissal of GLIB's discrimination claim in *Hurley* has the potential to legitimate future acts of discrimination based on outness in a variety of contexts, including the area of public accommodations. For example, in the *Dale* case,[240] the Boy Scouts, relying on *Hurley*, argued that the organization excludes open or "avowed homosexuals" from scouting due to their message — not their sexual identity: "A known or avowed homosexual causes his exclusion from Scouting by conduct or advocacy, not orientation. Scouting does not concern itself with homosexuality or sexual orientation *per se*, but with homosexual conduct or affirmation."[241]

This simplistic distinction between outness and sexual orientation completely obfuscates the role that coming out has in the construction of gay, lesbian and bisexual identity. Yet, the severability of outness from gay identity is supportable under even a constricted reading of *Hurley*.[242] The doctrinal treatment of outness discrimination as a permissible form of discrimination, one distinct from gay and lesbian discrimination, would severely complicate gay rights efforts and provide discriminators with a convenient route to avoid compliance with civil rights regulations.

In order to protect fully gay, lesbian, bisexual, and transgendered individuals from invidious discrimination, civil rights jurisprudence must accommodate outness by recognizing that it is a central facet of gay and lesbian status. Under a legal framework which accommodates outness, discrimination against a publicly identified gay, lesbian or bisexual individual would constitute sexual orientation discrimination, and a discriminator could not defend against claims of discrimination by characterizing its policy as "anti-out" rather than anti-gay.[243] By accommodating outness in legal theory, courts and

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[240] *See supra* note 148.

[241] Defendant-Respondents Brief at 16, *Dale* (A-2427-95T3).

[242] The disaggregation of outness from gay and lesbian identity also informs the Defense Department's "Don't Ask, Don't Tell" policy, under which public self-identification by non-heterosexuals subjects them to discharge from the military.

[243] This approach has been taken by the New Jersey legislature in the construction of its civil rights statute. New Jersey law, which governed the *Dale* case, prohibits discrimination on the basis of affectional or sexual orientation in employment, business relations, and places of public accommodation. The state's definition of the protected class recognizes the importance of public self-identification to sexual identity. Under the New Jersey Civil Rights Statute, affectional or

scholars would recognize that coming out does not merely render visible a secret, fixed identity; rather, the process constitutes the formation of gay, lesbian, bisexual, and transgendered identity itself. Because outness is inextricably linked with the construction of gay and lesbian identity, outness discrimination is a form of gay and lesbian discrimination, which should be penalized under state civil rights statutes that prohibit sexual orientation discrimination.

V. CONCLUSION

As *Hurley* indicates, litigation involving claims of discrimination against gays and lesbians is deeply political. Three justices of the Supreme Court believe that elected officials should enjoy a seemingly boundless ability to discriminate against gays and lesbians. All nine Justices fail to appreciate or understand the importance of outness in the struggle for gay and lesbian equality. The political nature of gay rights litigation also results from the fact that, in such cases, courts often must weigh a plethora of competing, important social issues, including the protection of free speech and the goal of social equality.

The *Roberts* doctrine provides a useful framework by which to engage in this delicate, often volatile process. In *Hurley*, the Supreme Court abandoned the *Roberts* framework and elevated speech over equality, not only implying that speech interests outweigh equality goals, but that equality goals were not even implicated in the defendant's exclusion of the openly gay contingent. By expanding the scope of expressive conduct and disaggregating outness from sexual identity, the Court avoided confronting the collision between classical liberal traditions and modern and postmodern notions of equality. Although the *Hurley* decision arguably calls into question the vitality of *Roberts*, courts in the post-*Hurley* context have considered the *Hurley* Court's sensitivity to speech but have not abdicated the speech-equality balancing framework established in *Roberts* and its progeny. These courts have rightfully limited the reach of *Hurley* and have preserved the wise and fair approach of *Roberts*.

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sexual orientation "means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, *identity or expression*, having a history thereof or being perceived, presumed or identified by others as having such an orientation." N.J. STAT. ANN. § 10:5-5hh (West 1998) (emphasis added). In the area of discrimination by states rather than private actors, scholars and civil rights attorneys have framed claims of discrimination on both First Amendment and Equal Protection principles. *See* Bobbi Bernstein, *Power, Prejudice, and the Right to Speak: Litigating "Outness" Under the Equal Protection Clause*, 47 STAN. L. REV. 269 (1995) (discussing protection of outness under First Amendment and Equal Protection principles). *See also* Halley, *supra* note 227 (arguing that public expressions of non-heterosexual identity allow gays and lesbians to participate in the political process and should be guarded under Equal Protection principles). These arguments recognize the expressive nature of coming out, and the linkage between self-identification and identity construction.

Courts, however, have not yet considered whether *Hurley* mandates a distinction between outness and gay identity. Because of the important role that public self-identification has in the construction of gay, lesbian and bisexual identities, such a turn in civil rights jurisprudence would be detrimental to gay and lesbian equality. Future contestations will likely determine, at least momentarily, the precise reach of *Hurley*, and whether legal theory will (as it should) recognize that the accommodation of outness in civil rights jurisprudence is essential to the fulfillment of gay and lesbian equality.