

NLGLA MICHAEL GREENBERG WRITING COMPETITION

The Scarlet Letter “H”: The Brand Left After *Dale*

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*James Dale “put a banner around his neck when he . . . got himself into the newspaper He created a reputation He can’t take that banner off. He put it on himself.”*¹

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I. INTRODUCTION

The “[f]reedom of association . . . plainly presupposes a freedom not to associate.”² As state antidiscrimination statutes have expanded, inevitable challenges have been brought to contest the forced entry of certain individuals into public and private spaces.³ Prior to the proliferation of laws protecting the right of gay men and lesbian women to enjoy public accommodations, the Supreme Court’s jurisprudence carved a niche in the fundamental right of expressive association. It

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1. Boy Scouts of Am. v. Dale, 530 U.S. 640, 696 (2000) (Stevens, J., dissenting) (quoting counsel for the Boy Scouts at oral argument).

2. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

3. See *infra* Part II.

legitimized state efforts to eradicate discrimination if such laws advanced compelling state interests unrelated to the suppression of ideas.⁴ In *Boy Scouts of America v. Dale*, however, the Supreme Court made it clear that that constitutional niche did not include laws protecting gay and lesbian Americans.⁵ In *Dale*, the Court did not abandon the prior framework established in *Roberts v. United States Jaycees*, but opted instead to create a model homosexual identity designed to overcome the *Roberts* framework.⁶ The *Roberts* framework still exists; the Court simply created “the Homosexual Exception.”

The odious result of *Dale* is not limited to the holding that homosexuals can constitutionally be excluded from the Boy Scouts. Rather, in granting groups such as the Boy Scouts a “constitutional shield” from the enforcement of antidiscrimination laws prohibiting sexual orientation discrimination, the Court perpetuated the precise stereotypes that antidiscrimination laws aim to overcome.⁷ Instead of eliminating the constitutional shelter such antidiscrimination statutes enjoyed, or engaging in heightened scrutiny, the Supreme Court took control of what it means to be homosexual.⁸ No longer a mere status, homosexuality speaks. And with such forced speech, the Court has created a theoretical battle for the right to speak. The Court’s *Hurley* and *Dale* decisions have sabotaged any meaningful exercise of rights guaranteed by state antidiscrimination laws by homosexuals.⁹ As a result, the efficacy of legislative efforts to protect homosexuals from discrimination appears naked without the constitutional protections in which other civil rights efforts are clothed. The Court’s dubious handling of what it means to be homosexual places gay men and lesbian women in a perilous position: be silent and deny your self-worth or be honest about

4. See *Roberts*, 468 U.S. at 623.

5. See *Dale*, 530 U.S. at 656-59; see also Darren Lenard Hutchinson, “Closet Case”: *Boy Scouts of America v. Dale and the Reinforcement of Gay, Lesbian, Bisexual, and Transgender Invisibility*, 76 TUL. L. REV. 81, 87 (2001) (“[T]he Court might be carving out a separate expressive association doctrine in the context of gay, lesbian, bisexual, and transgender litigation.”).

6. *Dale*, 530 U.S. at 647-48; see also Hutchinson, *supra* note 5, at 86-87.

7. *Id.* at 700 (Stevens, J., dissenting) (stating that the harm and discrimination faced by homosexuals “can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers”); see also *id.* at 687 (“If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination on the other hand.”).

8. See *Roberts*, 468 U.S. at 623.

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

your identity in any forum and jeopardize rights seemingly guaranteed to you by state antidiscrimination laws.¹⁰

Part II of this Article details the Supreme Court's previous expressive association cases, highlighting the principles embodied in the unexpressed right of expressive association and the governmental interests compelling enough to impinge upon such a right.

Part III examines the Court's landmark decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.¹¹ The *Hurley* opinion represents the first time the Supreme Court reviewed the application of a state law prohibiting sexual orientation discrimination.¹²

Part IV examines the treatment of "homosexuality" by the Supreme Court in *Boy Scouts of America v. Dale*.¹³ Despite fundamental differences between the expressive elements of the parade marchers in *Hurley* and the former Boy Scout, James Dale, the Supreme Court hinged both opinions on the right of the nonhomosexual entities to control their respective messages.¹⁴ Both decisions intimate a strong connection between the status of sexual orientation and speech. Unfortunately, the fusion between the sexual orientation status and the expression that has been impressed upon an admission of homosexuality, creates a conundrum for gay Americans.

Part IV explores the post-*Dale* homosexual and the scarlet "H" the *Hurley* and *Dale* decisions metaphorically emblazon upon the homosexual citizen. Effectively, the "expressive identity" of homosexuality, as interpreted by the Court, threatens to undermine any legal protection provided by antidiscrimination laws.¹⁵ The Court must resolve to either interpret the status of homosexuality as necessarily entailing certain expressive elements such as self-identifying speech

10. See *Dale*, 530 U.S. at 687 (Stevens, J., dissenting) (claiming that the holding of the majority rendered civil rights laws a "nullity").

11. 515 U.S. at 557.

12. In *Romer v. Evans*, the Supreme Court tangentially confronted antidiscrimination laws protecting homosexuals, albeit municipal ordinances. 517 U.S. 620, 628 (1995). In *Romer*, a state constitutional amendment, "Amendment 2," invalidating and prohibiting all present and future laws protecting homosexuals from sexual orientation discrimination, was struck down as violative of Equal Protection. See *id.* at 635-36. In striking down the amendment, the Court avoided the issue of heightened scrutiny for sexual orientation equal protection analysis and employed rational basis review. *Id.* at 631-33.

13. 530 U.S. at 640.

14. See *id.* at 654 ("As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's [sic] choice not to propound a point of view contrary to its beliefs.>").

15. See generally, Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1 (2000).

(coming out), or the Court must refrain from deriving expressive elements from “gay” speech beyond the speech itself. The Court cannot continue the precedent of proxying that it established in *Hurley* and *Dale*. A failure of the Supreme Court to correct this impermissible machination of homosexual identity will continue to inscribe upon homosexuals a “constitutionally prescribed symbol of inferiority.”¹⁶ Such a result renders antidiscrimination laws impotent to protect gay Americans from discrimination, strips gay men and lesbian women of the right to define themselves, their values, and their beliefs, and reifies injurious stereotypes.

II. THE PRE-*DALE* RIGHT OF EXPRESSIVE ASSOCIATION AND THE *ROBERTS* FRAMEWORK

The Supreme Court has identified an unexpressed, concomitant freedom contained within the liberties guaranteed by the First Amendment: the freedom of association.¹⁷ This freedom exists as the building block upon which other explicit rights are exercised. As such, the Court has identified two separate components of the freedom of association—the right of intimate association and the right of expressive association.¹⁸ Addressing the contours of the right of expressive association, the Court stated, “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 these ends were not also guaranteed.”¹⁹ This guiding principle spawned a line of cases involving the application of antidiscrimination laws to private groups, the ability of political parties to craft membership, and the ability of individuals to join unpopular organizations.²⁰

The Supreme Court has most often dealt with invocations of the right of expressive association when groups have challenged the constitutionality of various antidiscrimination laws. With the 1964 Civil Rights Act serving as an historic polestar, state and local governments have subsequently passed and expanded antidiscrimination laws over the past half century.²¹ Initially tackling racial discrimination, such laws have

16. *Dale*, 530 U.S. at 696 (Stevens, J., dissenting).

17. *See Roberts*, 468 U.S. at 622.

18. *Id.* at 617-18.

19. *Id.* at 622.

20. For an historical review, see Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1486-91 (2001).

21. *See* Lambda Legal Defense and Education Fund, *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org>.

expanded to prohibit discrimination based on gender, age, alienage, disability, veteran's status, smoking status, religious belief, and gender identity.²² Beginning with employment protections, state and local laws have broadened their coverage to forums such as housing, public accommodations, and credit receipt, among others.²³ Among these forums, public accommodations have been defined very broadly by some polities.²⁴ In a few cases, such as New Jersey, the relevant statute defines public accommodations so broadly as to sweep under its auspices groups traditionally considered private, such as the Boy Scouts.²⁵ On the other hand, some state courts resisted the idea that groups like the Boy Scouts are "public accommodations."²⁶

As antidiscrimination laws flourished, however, control over group membership became a bigger issue than political parties or civil rights groups. For the first time, laws aiming to increase civic and political participation by groups traditionally marginalized were under attack. The autonomy of private groups was set in opposition to a state's power to provide for equal public participation.²⁷

The seminal pre-*Dale* case challenging the constitutionality of an antidiscrimination law is *Roberts*.²⁸ The United States Jaycees was

lambdalegal.org/cgi-bin/pages/documents/record?record=217 (last visited Jan. 28, 2001); see also Sean B. Dryun, Note, *A Call for a Modified Standard: The Supreme Court Struggles to Define When Private Organizations Can Discriminate in Contravention of State Antidiscrimination Laws in Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), 79 NEB. L. REV. 794, 794-95 and accompanying notes (2000) (discussing the expansion by states of the 1964 Civil Rights Act's protections through state lawmaking).

22. See Robert Post, *1998-1999 Brennan Center Symposium Lecture: Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 10-13 (2000).

23. See Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public-Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 216-18 (1978) (discussing the development of federal and state antidiscrimination laws as historically providing the most effective means of preventing discrimination).

24. See *id.* at 238-43 (discussing the expansion of the definition of public accommodation).

25. See *Dale*, 530 U.S. at 662-63 (appendix to Court's opinion (quoting N.J. STAT. ANN. § 10:5-5 (West Supp. 2000))); see also *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1209-10 (N.J. 1999).

26. See, e.g., *Curran v. Mount Diablo Council of the Boy Scouts of Am.*, 952 P.2d 218, 1238 (Cal. 1998); *Welsh v. Boy Scouts of Am.*, 993 F.2d 1267, 1278 (7th Cir. 1993); cf. *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities*, 528 A.2d 352, 360 (Conn. 1987); *Schwenk v. Boy Scouts of Am.*, 551 P.2d 465, 469 (Or. 1976); Peter J. Rubin, Essay, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564, 564-66 (1998) (discussing a rising perception that antidiscrimination laws provide special rights as opposed to equal rights).

27. See Rubin, *supra* note 26, at 564-66 (discussing a rising perception that antidiscrimination and public accommodations laws provide special rights, not equal rights).

28. 468 U.S. at 609.

undoubtedly a group dedicated to serving young men. The group's bylaws stated that its mission is to pursue

such educational and charitable purposes as will promote and foster the growth and development of *young men's* civic organizations in the United States, designed to inculcate in the individual membership of such organization a spirit of genuine Americanism and civic interest, and as a supplementary education institution to provide them with opportunity for personal development and achievement and an avenue for intelligent participation by *young men* in the affairs of their community, state, and nation, and to develop true friendship and understanding among *young men* of all nations.²⁹

Though the organization boasted seven classes of membership, the Jaycees withheld full membership in their civic club from women, only allowing women to achieve "associate membership."³⁰ Regular membership was limited to young men between the ages of eighteen and thirty-five.³¹ At the time of the case, the Jaycees had approximately 295,000 members in 7400 local organizations throughout the country.³²

In 1974, the Minneapolis and St. Paul chapters began admitting women as regular members.³³ When the national organization learned of the chapters' actions and threatened to revoke their charters, the chapters filed charges of discrimination with a state administrative agency, alleging that exclusion of women from full membership violated the Minnesota Human Rights Act which provided that places of public accommodation not discriminate based on gender.³⁴ Before an evidentiary hearing could take place, the Jaycees pursued a judicial challenge to the application of the Minnesota law, as violative of their fundamental right of association.³⁵ The hearing examiner's determination that the Jaycees were in violation of the Act was upheld by a federal district court, but was reversed by a divided Eighth Circuit Court of Appeals.³⁶ The Eighth Circuit held that, because a substantial part of the Jaycees' activities involved the advocacy of public and political causes, the First Amendment protected the group's right to select its

29. *Id.* at 612-13 (emphasis added).

30. *Id.* at 613.

31. *Id.*

32. *Id.*

33. *Id.* at 614.

34. *Id.* (citing MINN. STAT. § 363.03 (1982)).

35. *Id.* at 615.

36. *United States Jaycees v. McClure*, 534 F. Supp. 766 (D. Minn. 1982); *United States Jaycees v. McClure*, 709 F.2d 1560 (8th Cir. 1983).

membership.³⁷ The court further determined that the forced inclusion of women would work a “direct and substantial” interference with the group’s freedom to control and select its membership.³⁸ The court determined that the forced inclusion would result in a philosophical change to the group.³⁹ In a final blow to the Minnesota law, the Eighth Circuit held that the State’s interest in ending gender discrimination was outweighed by the constitutional harm to the Jaycees.⁴⁰ The Supreme Court, then, granted certiorari.⁴¹

In addressing the Jaycees’ claim that the law violated their fundamental right of expressive association, the Court restated why protection of expressive association was important: (1) “preserving political and cultural diversity,” and (2) “shielding dissident expression from suppression by the majority.”⁴² The Supreme Court recognized that “implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”⁴³ After citing the importance of expressive association, the Court noted that

[t]here 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. Such a regulation may impair the ability of the original members to express only those views that brought them together.⁴⁴

Despite the importance of protecting the group’s internal structure and affairs, according to the *Roberts* Court, the expressive association right was not unassailable.⁴⁵ The Court held that the right of expressive association may justifiably be infringed “by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”⁴⁶ The Court highlighted a wide array of interests that Minnesota possessed and took into account when passing its antidiscrimination law.⁴⁷ Those interests included ameliorating serious

37. *Id.* at 1570.

38. *Id.* at 1572.

39. *Id.* at 1571.

40. *Id.* at 1571-74.

41. *Gomez-Bethke v. United States Jaycees*, 464 U.S. 1037 (1984).

42. *Roberts*, 468 U.S. at 622 (citations omitted).

43. *Id.* (citations omitted).

44. *Id.* at 623.

45. *See id.* at 622-23.

46. *Id.* at 623 (citations omitted).

47. *Id.* at 624-26.

social and personal harms, such as “discrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes,” which (1) “forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities,” (2) “deprives persons of their individual dignity,” and (3) “denies society the benefits of wide participation in political, economic, and cultural life.”⁴⁸ Although the Court noted that the compelling interests cited by Minnesota emanated from a traditional understanding of public accommodations, such as restaurants and stores, it nonetheless upheld Minnesota’s proffered rationale for expanding its public accommodations antidiscrimination law to “quasi-commercial” groups.⁴⁹ The Court explained that “this expansive definition [of public accommodations] reflects a recognition of the changing nature of the American economy and of the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”⁵⁰

In applying Minnesota’s antidiscrimination statute to the Jaycees, the Court found that the group had alleged no serious infringement upon the group itself or its message substantial enough to trump the state’s compelling interests.⁵¹ Moreover, the Court went so far as to say that the group had demonstrated no burden in application of the law.⁵²

There is . . . no basis in the record for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views. The Act requires no change in the Jaycees’ creed of promoting the interests of young men, and it imposes no restrictions on the organization’s ability to exclude individuals with ideologies or philosophies different from those of its existing members. . . . [A]ny claim that admission of women as full voting members will impair a symbolic message . . . is attenuated at best.⁵³

Accordingly, the Court concluded that “[i]n the absence of a showing *far more substantial* than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee’s contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization’s speech.”⁵⁴

48. *Id.* at 625.

49. *Id.* at 625-26.

50. *Id.* at 626.

51. *See id.* at 628.

52. *See id.* at 626.

53. *Id.* at 627 (citations omitted).

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

More importantly, the Court intimated that some infringement of the speaker's speech would be allowed.⁵⁵ Ultimately, the Court held that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."⁵⁶

The Supreme Court's next foray into the development of its expressive association jurisprudence was *Board of Directors of Rotary International v. Rotary Club of Duarte*.⁵⁷ Like *Roberts*, *Duarte* involved a challenge to the constitutionality of an antidiscrimination ordinance requiring the Rotary Club to accept women into its membership.⁵⁸ The decision, rendered only three years after *Roberts*, was a predictably strict application of the *Roberts* framework.⁵⁹ In upholding the constitutionality of the antidiscrimination ordinance, the Court reiterated, "[P]ublic accommodations laws 'plainly serv[e] compelling state interests of the highest order.'"⁶⁰ The *Duarte* opinion also reaffirmed the critical point that some infringement on the group's message could be tolerated in light of the compelling interest states had in enacting antidiscrimination laws: "[e]ven if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women."⁶¹

The following year, the Court again addressed the constitutionality of a local antidiscrimination law prohibiting sex discrimination. In *New York State Club Association, Inc. v. City of New York*, a group of private clubs challenged as unconstitutional a New York City ordinance, Local Law 63, that prohibited discrimination on the basis of gender by groups that were not "distinctly private."⁶² In addressing the group members' right of expressive association, the Court was clear that the law in question did not impinge upon their expressive rights:

On its face, Local Law 63 does not affect in any significant way the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs 'to abandon or alter' any

55. See *id.* at 628-29. "[E]ven if enforcement of the act causes *some* incidental abridgement of the Jaycees' protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Id.* at 628.

56. *Id.* at 623.

57. 481 U.S. 537 (1987).

58. *Id.* at 539.

59. *Id.* at 544-45.

60. *Id.* at 549 (citing *Roberts*, 468 U.S. at 624).

61. *Id.*

62. 487 U.S. 1 (1988).

activities that are protected by the First Amendment. If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership.⁶³

The Court did recognize, however, that some forced association would be unconstitutional, stating that

[i]t is conceivable, of course, that an association might be able to show that it is organized for *specific* expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion.⁶⁴

As in *Duarte*, the Court employed the *Roberts* framework.⁶⁵

The Court's admission that some forced association would be unconstitutional should not, however, be read too broadly. The existence of a religious or other belief alone does not suffice to overcome a compelling governmental interest in eradicating discrimination.⁶⁶ In a pre-*Roberts* expressive association case, *Runyon v. McCrary*, the Supreme Court was faced with the application of a federal law prohibiting racial discrimination in private contracts to private schools.⁶⁷ The plaintiffs challenged their children's denials of admission under 42 U.S.C. § 1981, which provides that all persons have the same right to make and enforce contracts irrespective of race.⁶⁸ As a defense, the private schools raised their fundamental right of association.⁶⁹ In rejecting the defendants' claim of an unfettered right to free association, the Court stated:

In *NAACP v. Alabama* and similar decisions, the Court has recognized a First Amendment right "to engage in association for the advancement of beliefs and ideas." That right is protected because it promotes and may well be essential to the 'effective advocacy of both public and private points of view, particularly controversial ones' that the First Amendment is designed to foster. From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is

63. *Id.* at 13 (citations omitted).

64. *Id.* (emphasis added)

65. *Id.* at 12.

66. *See generally* *Runyon v. McCrary*, 427 U.S. 160 (1976).

67. *Id.*

68. *See id.* at 167-68.

69. *See id.* at 166-67.

desirable, and that the children have an equal right to attend such institutions. *But it does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.*⁷⁰

In denying the defendants' appeal, the Court explained that "there is no showing that discontinuance of the discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."⁷¹

Threading the *Roberts*, *Duarte*, and *New York State Club Ass'n* decisions together under the right of "expressive association" was the idea that "collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority."⁷² The Court made expressly clear, however, that the compelling state interest in ending discrimination justified even slight infringements upon group expressive associational rights.⁷³ In the *Roberts* trilogy, however, the Court never explicitly acknowledged that any of the laws in question infringed the groups' messages. The Court, instead, viewed these groups' challenges as shams, shielding discriminatory intent in the sheep's clothing of an alleged expressive message that, the groups claimed, contradicted the antidiscrimination laws.⁷⁴ Until the *Dale* decision, the Court's decisions reflected its unwillingness to accept such proxies. The pre-*Dale* Court balanced the right of expressive association against the state's interests in enacting the laws allegedly infringing upon that right. After *Dale*, however, the no proxy principle has been abandoned, leaving in question the efficacy of a right without a guiding principle.

III. *HURLEY V. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON*

In *Hurley*, a group of Irish-American gays and lesbians wished to march in the Boston St. Patrick's Day parade.⁷⁵ Massachusetts had previously passed a state law prohibiting sexual orientation discrimination in public accommodations, but parade organizers refused to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) to march in the parade and carry a sign displaying the name of

70. *Id.* at 175-76 (citations omitted) (emphasis added).

71. *Id.* at 76 (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975)).

72. *Roberts*, 468 U.S. at 622.

73. *See, e.g.*, *Duarte*, 481 U.S. at 549; *Roberts*, 468 U.S. at 623.

74. *Roberts*, 468 U.S. at 627-28; *Duarte*, 481 U.S. at 548-49; *N.Y. State Club Ass'n*, 487 U.S. at 13-14.

75. 515 U.S. at 561.

the group.⁷⁶ The organizers claimed that the group communicated a message by carrying the sign—a message that the organizers did not want to communicate.⁷⁷ The parade organizers, however, did not prohibit gay and lesbian *individuals* from marching in the parade as part of other groups.⁷⁸ They simply did not want people to self-identify as gay or lesbian and simultaneously participate in the parade.⁷⁹ Ultimately, the state forced the organizers to allow GLIB to march, which they did; the organizers subsequently challenged the inclusion of the group the following year.⁸⁰

Upon challenge, the Supreme Court initially noted the expressive nature of parades, and thereafter held that the protected expressive element in a parade lay not only in the banners carried and the songs played during the parade but also extended to the choice of participants.⁸¹ Equally expressive, the Court held, was the possible participation of GLIB:

GLIB was formed for the very purpose of marching in [the parade] . . . in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade.⁸²

While upholding the validity of the Massachusetts antidiscrimination statute, the *Hurley* Court distinguished between a law protecting a homosexual individual's legal right to participate in the parade and the ability of a law to shape and change the organizers' message, which was safeguarded by the First Amendment.⁸³ The former was constitutional, the latter was not.⁸⁴ The Court explained:

[O]nce the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in [the organizers'] speech.⁸⁵

76. *Id.* (citing MASS. GEN. LAWS § 272:98 (1992)).

77. *See id.* at 574.

78. *See id.* at 572.

79. *See id.* at 562-63.

80. *Id.* at 561.

81. *See id.* at 568-69.

82. *Id.* at 570.

83. *See id.* at 571-73.

84. The Court's *Dale* opinion casts serious doubt upon this proposition.

85. *Hurley*, 515 U.S. at 573.

The parade organizers did not challenge the participation of gay and lesbian individuals, but the organizers claimed that by allowing the homosexual *group* to participate in the parade with a sign indicating their presence as a unit, the organizers would have been signaling their seeming acceptance of homosexuals.⁸⁶ The Supreme Court agreed, stating that

a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.⁸⁷

Turning to the asserted First Amendment rights of the organizers, the Court emphasized the fact that “one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”⁸⁸ Addressing the denial of GLIB’s marching, the Court stated, “[T]he Council clearly decided to exclude a *message* it did not like.”⁸⁹ The parade organizers, however, had rarely ever used the selection or exclusion of groups to construct a particular message.⁹⁰ The organizers’ failure to exercise control over the messages of the various marching groups was a fact not lost upon the trial court.⁹¹ The trial court found that the organizers occasionally admitted groups who simply showed up at the parade without having submitted an application, and that the Council did not generally inquire into the specific messages of each group that applied for marching privileges.⁹² The Supreme Court admitted that the Council was “rather lenient in admitting participants,” but that leniency did not obviate the organizers’ right to control their own message.⁹³ Thus, the organizers retained their constitutional right to control their message sans a homosexual marching unit, despite the Massachusetts law.

86. *See id.* at 572-73.

87. *Id.* at 574.

88. *Id.* at 573 (quoting *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n of Cal.*, 475 U.S. 1, 16 (1986)).

89. *Id.* at 574 (emphasis added).

90. *See id.* at 563.

91. *Id.*

92. *Id.* at 562.

93. *Id.* at 569-70.

IV. *BOY SCOUTS OF AMERICA V. DALE*

James Dale was an excellent Boy Scout, achieving the rare rank of Eagle Scout.⁹⁴ No one ever doubted his abilities and talents that served the Boy Scouts of America (BSA) well for over a decade, from Scout to Scoutmaster.⁹⁵ Dale's quality of service to the BSA, however, was somehow changed when Dale was photographed for a newspaper article in which he admitted he was gay.⁹⁶ In the article, Dale mentioned the need for role models for gay and lesbian youth.⁹⁷ He never mentioned his involvement with the BSA, nor did he claim that gay scouts would be good role models or good scouts.⁹⁸ Weeks later, Dale was informed he was no longer a Boy Scout.⁹⁹ After asking why he had been expelled from the group, he was informed that "homosexual conduct" was incompatible with Scouting and its principles.¹⁰⁰ Dale subsequently brought a cause of action against BSA under New Jersey's antidiscrimination law that prohibited sexual orientation discrimination in places of public accommodation.¹⁰¹

When the case reached the Supreme Court, the Court began its analysis of BSA's claim by recognizing that implicit in the First Amendment was the right to associate "with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."¹⁰² The Court held that from the freedom to associate resounds a freedom not to associate.¹⁰³ The freedom to associate would be infringed upon if the forced inclusion of a third person "affects in a significant way the group's ability to advocate public or private viewpoints."¹⁰⁴ The freedom not to associate, however, was not absolute and could be overridden by laws serving compelling state interests, unrelated to the suppression of ideas that could not be achieved through means significantly less restrictive.¹⁰⁵ Thus, the Court was faced with three

94. *Dale*, 530 U.S. at 644.

95. *See id.*

96. *See id.* at 645.

97. *See id.*

98. *See id.* at 689-90 (Stevens, J., dissenting). In his dissent, Justice Stevens pressed the point that the majority gave heed to the Boy Scouts' implicit argument that James Dale would use his position as a "bully pulpit." *Id.* at 689. He strongly rebuked the majority: "Nothing . . . even remotely suggests that Dale would advocate any views on homosexuality to his troop." *Id.* at 690.

99. *See id.* at 645.

100. *See id.* at 644-45.

101. *Id.* at 645.

102. *Id.* at 647 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

103. *See id.* at 647-48.

104. *Id.* at 648 (citing *N.Y. State Club Ass'n, v. City of New York*, 487 U.S. 1, 13 (1988)).

105. *See id.* (citing *Roberts*, 468 U.S. at 623).

questions: (1) Did BSA engage in expressive association as to homosexuality?; (2) Would the presence of James Dale impermissibly interfere with the BSA's freedom of expressive association?; and (3) Was the BSA's freedom of expressive association outweighed by New Jersey's interest in combating discrimination?

The Court initially described BSA as an organization "engaged in instilling its system of values in young people."¹⁰⁶ Referencing those values, BSA claimed that homosexual conduct was inconsistent with the values it sought to instill, and was also contrary to its alleged policy against "active homosexuality" within the organization.¹⁰⁷ The BSA further claimed that homosexual conduct violated both the Scout Oath and the Scout Law.¹⁰⁸ The BSA pointed to the Scout Oath's pledge for boys to be "morally straight" and the Scout Law's promise to be "clean" as examples of the group's anti-homosexual views.¹⁰⁹

The Court determined, in a rather brief discussion, that the BSA engaged in "expressive association" concerning homosexuality.¹¹⁰ Admitting that nowhere in the Scout Law or Oath was sexuality mentioned, the Court added that "morally straight" and "clean" are highly subjective.¹¹¹ Despite the Court's admission of ambiguity, the Court relied upon statements made in BSA's brief: "[BSA] teach[es] that homosexual conduct is not morally straight" and that BSA does "not want to promote homosexual conduct as a legitimate form of behavior."¹¹² The Court cited position papers produced by the Scouts prior and

106. *See id.* at 644.

107. *See id.* at 644-45. The exact contours of the differences between homosexual status and homosexual conduct are debated. Opponents of homosexuality may be inclined to draw little difference between homosexual status and conduct. Indeed, those who define homosexuality by conduct alone will draw no difference, and argue that, since homosexual conduct may be criminalized, one's status as a homosexual should receive no special treatment. *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). However, many others will advance that homosexual conduct is very different from the experience or status of being gay or lesbian. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 168-77 (2000). Many courts have explicitly recognized no difference in the concept when adopting views from the Supreme Court's statement concerning Georgia's sodomy law in *Bowers v. Hardwick*. 478 U.S. 186 (1986). However, the Supreme Court appeared to draw a distinct line with its opinion in *Romer*. No resolution to this debate appears near.

108. *See Dale*, 530 U.S. at 650.

109. *Id.* at 649-50. The Scout Oath reads: "On my honor I will do my best To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight." *Id.* at 649. The Scout Law reads: "A Scout is: Trustworthy, Obedient, Loyal, Cheerful, Helpful, Thrifty, Friendly, Brave, Courteous, Clean, Kind, Reverent." *Id.*

110. *Id.* at 650.

111. *Id.*

112. *Id.* at 651 (citing Brief for Petitioners at 39; Reply Brief for Petitioners at 5).

subsequent to James Dale's dismissal from the group and from litigation in California during the 1980s as prime examples of the Scout's position against homosexuality.¹¹³

The Court next turned to the second, and most intriguing, question: Did James Dale's presence as a scoutmaster affect the BSA's message against "homosexual conduct?"¹¹⁴ From the outset, the Court stated that it would give deference to the opinion of the BSA as to how Dale's presence would likely affect them.¹¹⁵ The Court concluded that Dale was "open" about his homosexuality; was a "gay Scout . . . leader in the community;" and was "a gay rights activist."¹¹⁶ The Court, without analysis, stated that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, *both to the youth members and the world*, that the Boy Scouts *accept homosexual conduct as a legitimate form of behavior*."¹¹⁷

The Court then addressed the issue of whether a compelling state interest warranted such an intrusion. The Court took notice of the fact that states have compelling interests in ending gender discrimination, citing its earlier decisions in *Roberts* and *Duarte*.¹¹⁸ The Court endeavored to distinguish that line of cases, however, finding that enforcement of the statutes in question "would not materially interfere with the ideas that the organization sought to express."¹¹⁹ Addressing New Jersey's interest in ending discrimination against homosexuals, the Court curtly stated, "The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the BSA's rights to freedom of expressive association."¹²⁰ Upon finding that the statute imposes a significant burden on BSA's expressive message, the Court struck down the law as applied to BSA.¹²¹

V. WEARING THE SCARLET "H"

The Court in *Hurley* and *Dale* imports message after message onto homosexuals to the point that lesbian women and gay men come to

113. *Id.* at 651-53. See *Curran v. Mt. Diablo Council of Boy Scouts of Am.*, 952 P.2d 218 (1998).

114. See *id.* at 653.

115. See *id.* (citing *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981)).

116. *Id.* at 653.

117. *Id.* (emphasis added).

118. See *id.* at 657.

119. *Id.* at 657.

120. *Id.* at 659.

121. *Id.* at 661.

resemble walking billboards.¹²² In *Hurley*, participation by the homosexual marchers represented a demand for equality and a concession by the parade organizers that the homosexual “lifestyle” was “legitimate.”¹²³ In *Dale*, the presence of a gay scoutmaster was an immediate challenge to the validity of BSA’s policies of “moral straightness” and “cleanliness” and an implied assertion by James Dale that homosexuality was “straight” and “clean.”¹²⁴ Ironically, neither the Boston parade organizers nor BSA had any meaningful expression concerning homosexuality prior to the legally mandated inclusion of homosexuals in those groups.¹²⁵ Yet, upon inclusion, the groups amazingly found their “message” challenged. And, in both instances, homosexuals lost upon legal challenge, despite the express will of their home state to protect them from such invidious discrimination.

A. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*

In *Hurley*, the validity of Massachusetts’s antidiscrimination statute was not questioned by the Court, yet the ultimate resolution of the case leaves the potency of the law questionable. The truly troubling aspect of *Hurley* springs from the Court’s assumptions regarding the purported message communicated by the mere presence of GLIB in the parade. The group desired not to carry sloganeering banners like “Gay Rights Now!” or “We’re Here and We’re Queer,” but rather the group wished only to carry a simple sign indicating the group’s name.¹²⁶ Yet, the Court concluded that GLIB’s mere presence would “suggest their view that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics.”¹²⁷

122. *See id.* at 696 (Stevens, J., dissenting) (“Under the majority’s reasoning, an openly gay male is irreversibly affixed with the label ‘homosexual.’ That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism.”).

123. *See Hurley*, 515 U.S. at 574.

124. *See Dale*, 530 U.S. at 654 (“[T]he presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout’s [sic] choice not to profound a point of view contrary to its beliefs.”).

125. *See id.* at 672-73 (Stevens, J., dissenting); *see also Hurley*, 515 U.S. at 562.

126. *Hurley*, 515 U.S. at 570. Interestingly, not all signs in the parade were neutral. Many signs advocated a rejection of drugs while others commented on the political and cultural conflicts between Ireland and England. *Id.* at 569.

127. *See id.* at 574.

It remains to be seen, however, that the group itself was asking for acceptance in its “message.”¹²⁸ The Court noted that GLIB’s goals were to celebrate their identity as open Irish-American homosexuals, to demonstrate that gay and lesbian individuals existed in the community, and to show solidarity with like men and women who sought to march in the corresponding New York parade.¹²⁹ Nowhere, however, within those goals is a solicitation by GLIB for acceptance by the parade organizers. The Court seemed to conclude presumptively that the group would attempt to communicate a message beyond that of participation. The Court in fact concluded that, “GLIB understandably seeks to communicate its ideas as part of the existing parade.”¹³⁰ There is a myriad of possible messages to be communicated by the group’s inclusion, none of which would be universally understood.

Inclusion of the group would only communicate a message of existence. Existence, however, is not a request for acceptance. Indeed, the existence of homosexuals is evidenced by the antidiscrimination law itself. Civil rights laws have traditionally served a primary purpose of validation, of affirmative inclusion in a community that previously diminished the minority group’s existence.¹³¹ To qualify the parade organizer’s speech as protected if it merely sought to deny homosexuals’ existence is to allow a group to ignore the law altogether or, worse yet, ignore reality. If the Court is to allow groups to affirmatively seek protection from the enforcement of an antidiscrimination law on the grounds that enforcement would compel expression contrary to the group’s beliefs, the Court, then, has no choice but to demand a baseline showing of expression on the point.¹³² The Court must require more than a mere showing that the group does not want to endure the presence of the disfavored minority. This reason alone should not afford groups constitutional protection under the First Amendment.

To infer that GLIB needed or wanted acceptance is perhaps a result of an unfounded assumption of the Court that minority groups are constantly requesting and fighting for acceptance. Certainly, however, self-identification does not equal a solicitation for acceptance.¹³³ While it may express a belief in self-validity, to jump from self-identification to a

128. See Hunter, *supra* note 15, at 11 (“Expressive identity legal claims highlight a second misperceived message in coming out speech: a demand for agreement.”).

129. *Hurley*, 515 U.S. at 570.

130. *Id.*

131. See, e.g., *Roberts*, 468 U.S. at 622-26.

132. See, e.g., Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1542-49 (2001).

133. See Hunter, *supra* note 15, at 11.

solicitation for greater social acceptance, as the Court easily did, is an intellectual misstep.

The most damning question left in the wake of the *Hurley* opinion is how a homosexual group could ever participate. The answer is that they could only participate if they communicate no message or at least a message that the parade organizers can tolerate. This is not possible under the *Hurley* Court's analysis. If the mere presence of the group presupposes a message of requested acceptance, the group can never *not* communicate that message.¹³⁴

Additionally, while the Court attempted to distinguish GLIB from individual homosexuals marching with other groups, would the presence of individual homosexuals nonetheless be a testament to homosexual validity?¹³⁵ What if the homosexual was well known, such as Elton John or Ellen DeGeneres? A well-known but not Hollywood-famous Boston lawyer? Jane Doe on the street? Despite the Court's attempt to distinguish GLIB by the presence of a sign, to allow homosexual marchers to march at all appears to be social acceptance regardless of whether homosexuals march together or alone or with or without a banner.¹³⁶ If the parade itself was the speech vehicle, does not the presence of even a single homosexual contribute to the tapestry of the message? Should the parade organizers not be let alone to remove carte blanche any one individual from participating under that circumstance? Under the Court's faulty reasoning, the potency of the Massachusetts antidiscrimination law hinges upon the notoriety of the homosexual.

Despite the multitude of assumptions and stereotypes underlying it, the *Hurley* ruling could at least be rationalized, to some degree, by the fact that GLIB desired to carry an actual physical sign, albeit one intending to identify only the name of the group. In the Court's next foray into homosexual identity, however, when the gay individual involved carried no sign, the Court handed him one.¹³⁷

B. Boy Scouts of America v. Dale

Because the BSA briefed that they believed homosexuality was neither "legitimate" nor "morally straight," the Court proceeded to find

134. This seemingly Draconian result is a byproduct of the unique posture of the case with which the Court was confronted. As the Massachusetts law was applied, the sponsors' speech itself was a public accommodation. The Court never addresses this point. Indeed, if the parade really was speech, is not application of the Massachusetts law unconstitutional with respect to any protected class, to any quantity of that class?

135. See *Hurley*, 515 U.S. at 572-74.

136. *Id.*

137. See *Dale*, 530 U.S. at 653.

expressive association concerning sexual orientation.¹³⁸ The Court had never before found expressive association based purely on a litigant's brief to the Court.¹³⁹ Indeed, the Court's approach to determining the expressive nature of the BSA's views concerning homosexuality is a significant departure from the framework established with the *Roberts* trilogy, despite the fact that the majority opinion cited *Roberts* as the seminal authority for its analysis.¹⁴⁰ In *Roberts*, the Court made specific findings as to the activities of the Jaycees demonstrating "expression on political, economic, cultural, and social affairs."¹⁴¹ The Court's review of the statements that BSA asserted in its brief concerning homosexuality, however, was merely "instructive" as to the sincerity of BSA's views.¹⁴² The BSA was not required to trumpet its views for the Court to find expression on homosexuality.¹⁴³

The Court chastised the New Jersey Supreme Court's decision, in which the state high court found the dismissal of Dale as inconsistent with BSA's principles and overall objectives.¹⁴⁴ The U.S. Supreme Court explained that "our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."¹⁴⁵ The irony, of course, is that the New Jersey Supreme Court's analysis was singularly guided by the *Roberts* trilogy framework.¹⁴⁶ Beyond simply ignoring the doctrine of stare decisis, the Supreme Court misrepresented the New Jersey Supreme Court's analysis. The New Jersey high court did not uphold the constitutionality of the New Jersey law because it disagreed with BSA's position on homosexuality. Rather, the quoted text the Supreme Court provides in its reversal of the New Jersey Supreme Court's decision is the culmination of that court's *Roberts* analysis. The New Jersey Supreme Court was not baldly proclaiming that it was interpreting the Scouts' principles and itself deciding if the inclusion of homosexuals violated such principles. Its conclusion was based on a factual finding that BSA had not provided proof sufficient to demonstrate that such inclusion in fact violated the group's principles.¹⁴⁷

138. *See id.* at 653.

139. *See id.* at 685-86 (Stevens, J., dissenting).

140. *Id.* at 647-48.

141. *Roberts*, 468 U.S. at 626-28.

142. *See Dale*, 530 U.S. at 651.

143. *Id.* at 656.

144. *Id.* at 650-51.

145. *Id.* at 651.

146. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1222 (1999).

147. *Id.* at 1223 ("We find that the LAD does not violate Boy Scouts' freedom of expressive association because the statute does not have a significant impact on Boy Scout

The Court's deference to BSA regarding the effect Dale's presence would likely have on the group is yet another departure from the analytical framework developed in *Roberts*.¹⁴⁸ The *Roberts* Court condemned the use of gender as a proxy for individual [female] members' views on a range of subjects.¹⁴⁹

In claiming that women might have a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations, or that the organization's public positions would have a different effect of the group were not 'a purely young men's association,' the Jaycees relie[d] solely on unsupported generalizations about the relative interests and perspectives of men and women. Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, [the Court has] repeatedly condemned legal decisionmaking that relies uncritically on such assumptions.¹⁵⁰

Furthermore, in *Roberts*, the Court stated: "The [Minnesota] Act requires no change in the Jaycees' creed of promoting the interests of young men, and it imposes no restriction on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."¹⁵¹ Four years later, in *New York State Club Association v. City of New York* the Court reiterated its refusal to allow groups to bypass antidiscrimination laws by proxying an individual's status for a pre-packaged point of view:

If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership.¹⁵²

The Jaycees' charter included gender-specific goals.¹⁵³ Moreover, the bylaws of the Jaycees specifically referenced men in the

members' ability to associate with one another in pursuit of shared views. The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.").

148. *See Roberts*, 468 U.S. at 628.

149. *See id.*

150. *Id.* at 627-28 (emphasis added).

151. *Id.* at 627.

152. 487 U.S. at 13.

153. *Roberts*, 468 U.S. at 612-14.

organization's mission statement three times.¹⁵⁴ The argument thus became: "Can women advance the interests of men without accordingly pursuing their own interests also?"¹⁵⁵ The charter, goals, and values of the Boy Scouts, however, contain no sexual orientation-specific language, as admitted by the *Dale* majority.¹⁵⁶ In fact, BSA specifically forbade its leaders from addressing sexual issues, instead directing scouts to their families or religious leaders when inquiring about issues of sexuality.¹⁵⁷ To make the cases factually analogous, one must first premise that homosexuals are at odds with the goals of BSA—honor, loyalty, truth, etc.—just as women are at odds with the goals of men, as urged by the Jaycees in *Roberts*. Even if one grants this crude premise, the *Roberts* holding clearly dismisses the argument that one group cannot effectively advance the interests of another when it may appear that the groups have significant differences. The *Dale* opinion, when viewed in the context of the Court's rejection of the argument that women cannot effectively advocate the interests of the Jaycees, shocks the conscience with its antiquated perspective and uncritical acceptance of the argument that homosexuals interfere with BSA's objectives of honesty, obedience, and helpfulness. Further obscuring the reasoning of the *Dale* opinion is the fact that the New Jersey statute in question potentially required the admission of fewer individuals (homosexuals) than the Minnesota law in question in *Roberts* (women), thus making the absence of any statement in the Scouts' principles against homosexuality seemingly more important.¹⁵⁸

For support of the assertion that James Dale would compel a "message" upon the BSA, the Court cited *Hurley* as illustrative.¹⁵⁹ The Court's reliance on *Hurley*, however, is misguided. In *Hurley*, the holding that the Massachusetts antidiscrimination law impermissibly infringed upon the First Amendment rights of the parade organizers rested upon a distinction the Court drew between the actual parade itself and the "message" embodied in the selection of groups comprising the

154. *Id.* at 612-13.

155. *See Roberts*, 468 U.S. at 626-27.

156. *Dale*, 530 U.S. at 650. Some commentators have advanced that "heteronormativity" requires an admission that BSA's principle of "moral straightness" contains an implicit rejection of homosexuality. *See, e.g.*, Nancy Knauer, "Simply So Different": *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of Am. v. Dale*, 89 KY. L.J. 997, 1020-48 (2001).

157. *Dale*, 530 U.S. at 655.

158. *See* Daniel Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1497 (2001).

159. *See Dale*, 530 U.S. at 653-54.

parade.¹⁶⁰ The *Hurley* Court affirmed the validity of the antidiscrimination law and did not question the ability of individual gay and lesbian citizens to participate in the parade.¹⁶¹ The parade organizers also denied any attempt to preclude homosexual individuals from participating in the parade as individuals.¹⁶² The dispute in *Hurley* revolved around the participation of a homosexual *group* that would have identified itself during the parade by carrying a sign indicating the name of the group.¹⁶³ The facts of *Dale* are not so situated. James Dale had not requested to carry a sign while he was leading a Scout meeting, nor had he ever combined his participation in the Boy Scouts with anything “homosexual.”¹⁶⁴ In fact, Dale never explicitly challenged the Boy Scouts’ purported “policy” before he was expelled from the group.¹⁶⁵

Dale’s presence in BSA more closely reflected that of the hypothetical individual homosexual marchers in the Boston parade.¹⁶⁶ The parade organizers in Boston indicated their having no problem with such marchers, obviously because they perceived no “message” as being communicated.¹⁶⁷ The *Hurley* Court’s opinion intimates that there was no problem with the law providing for the participation of homosexual individuals in the parade when the Court remarked on the innocuousness of the statute on its face.¹⁶⁸

The reliance on *Hurley* to support the Court’s view on the impact James Dale would likely have on BSA is flawed in another respect. *Hurley*, as previously mentioned, turned upon the message desired to be conveyed by the parade organizers in Boston as protected by the First Amendment, versus the message the Court believed would be inferred by the participation of an identified homosexual group.¹⁶⁹ The problem was the conflicting messages. The right to control one’s message as guaranteed by the First Amendment trumps the right of the homosexual

160. See *Hurley*, 515 U.S. at 572-73.

161. See *id.* at 571-72.

162. See *id.* at 572.

163. *Id.* (“[T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner.”) (emphasis added).

164. See *Dale*, 530 U.S. at 689 (Stevens, J., dissenting) (“BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked.”).

165. See *id.* at 689-90.

166. See *Hurley*, 515 U.S. at 572 (noting that the posture of the case did not address any dispute about participation of openly gay individuals in different, nonsexually oriented parade groups).

167. See *id.*

168. See *id.*

169. See *id.* at 574.

group to be included.¹⁷⁰ In *Dale*, however, it is apparent that the reason for James Dale's dismissal from the Scouts was not about any specific message. When Dale advanced that the BSA did not expel heterosexual members who did not support the policy against homosexual conduct, the Court held that point irrelevant.¹⁷¹ As the Court stated, "The presence of an *avowed homosexual* and *gay rights activist* in an assistant scoutmaster's uniform *sends a distinctly different message* from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy."¹⁷² Despite drawing what is a difficult distinction, the Court provides no justification for it. If the BSA's message is one of exclusion, then both the heterosexual opposed to the purported policy and the avowed homosexual equally interfere with the Scout's ability to express that message.

The crux of the Court's argument is that the presence of Dale, as a gay man, is in stark defiance of the Scouts' anti-homosexual policy, whereas the presence of a heterosexual who disagrees with the policy is not an obvious, out-right aberration of the policy. It is a matter of degree. That argument would be more tenable if BSA's principles explicitly included a statement against homosexuality. But, they do not.¹⁷³ Instead, BSA advances that homosexuality is implicitly rejected in the Scout Oath and Scout Law principles of moral straightness and cleanliness.¹⁷⁴ Thus, BSA's exclusionary policy as against homosexuals hinges upon a specific interpretation of morality and "cleanliness."¹⁷⁵ The Supreme Court itself admitted that the touted terms were highly subjective.¹⁷⁶ Thus, a heterosexual person who opposes the policy of exclusion aimed at homosexuals not only disagrees with discrimination based on homosexuality, but also takes a different stance on the Court's interpretation of morality and the "cleanliness" of homosexuals upon which the *Dale* decision was premised. The straight, but gay-affirming scoutmaster, therefore, advances very different values than BSA portends to extol. And while the Court maintained that a group need not demonstrate universal agreement on group principles to afford themselves First Amendment protection, the difference between gay scoutmasters and heterosexual scoutmasters who oppose the policy is not

170. *See id.* at 581.

171. *Id.* at 655.

172. *Id.* at 655-56 (emphasis added).

173. *See id.* at 650.

174. *Id.*

175. *See id.*

176. *Id.*

as great as the Court intimates.¹⁷⁷ Both groups communicate a clear message of disagreement with the exclusionary policy of the BSA and, concomitantly, advance a different perspective of morality. If the BSA is truly concerned with the morals and ethics of its group leaders, the straight but gay-affirming scoutmaster is therefore just as “dangerous” as James Dale, if not more so.¹⁷⁸ The lack of distinction between the two groups clearly suggests that at issue in *Dale* is not forced expression but sexual orientation and the attendant messages the Court summarily attaches to a proclamation of homosexuality.

The only way the struggle in *Dale* could conceivably be construed to be about message is if the Court accepts the notion of an intrinsic message in homosexuality, a scarlet “H.” Evidently, the Court readily latched on to that notion. The Court dissembled that it was not allowing a group to exclude homosexuals based on their homosexuality alone, stating that “an expressive association can[not] erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message.”¹⁷⁹ The Court, however, determined that Dale was *more* than simply “from a particular group,” but that, “by his own admission, is one of a group of gay Scouts who have ‘become leaders in their community and are *open and honest about their sexual orientation.*’”¹⁸⁰ The problem with the Court’s analysis is that there was nothing “more.” At the time of his dismissal from BSA, James Dale had appeared in exactly one newspaper article, stating that he is gay and that gay teenagers need gay role models.¹⁸¹ Dale simply said, “I’m gay.” Of course, this admission was the necessary antecedent to BSA’s resulting action of dismissing Dale, and to legitimize his claim under New Jersey’s antidiscrimination law. Without “coming out,” James Dale could not be “from a particular group,” namely, homosexuals. If there was any “more” to James Dale, the Court created it.

Dale has led some academics to surmise that the Court failed to recognize the interconnectedness between an identity of homosexuality and “coming out.” Professor Darren Hutchinson, for example, states that “[t]he Court’s separation of outness and gay status fails to recognize the

177. *Id.* at 656.

178. See Hutchinson, *supra* note 5, at 118-19 (“Even assuming a possible separation of speech and identity, if the Boy Scouts’ homophobic discrimination relates solely to speech or viewpoint, rather than to identity, then the Court’s distinction between openly pro-gay heterosexuals and out gays is both unwarranted and unprincipled.”).

179. See *Dale*, 530 U.S. at 653.

180. *Id.* (citing Appellant’s Brief at 11) (emphasis added).

181. *Id.* at 645.

compelling linkages among outness, identity, and equality. Under the Court's constricted analysis, sexual identity exists apart from any expressive and associational activities."¹⁸² Ultimately, Professor Hutchinson views the Achilles' heel of *Dale* to be its failure to recognize the expressive components of sexual identity.¹⁸³ That failure "closets" homosexuals from future expressions of self-identification for fear that such expressions will poison any claim of discrimination they might later advance.¹⁸⁴

I must argue that *Dale's* failure is more egregious. Not only did the majority's opinion recognize the expressive components of sexual identity, it created them. Hutchinson views the Court's disaggregation of the status and expression of homosexuality in *Dale* as a signal that the Court rejects the notion that expression is vital to identity formation.¹⁸⁵ Because of this rejection, homosexuals are silenced such that any expression of homosexuality in which they engage, no matter how benign, is not protected under antidiscrimination laws. I believe the forecast is even less generous. Regardless of whether a homosexual engages in *any* expressive element concerning homosexuality, his or her status as a homosexual *alone* is enough to support his or her dismissal from an otherwise expressive group.¹⁸⁶ James Dale's *status* as a homosexual was magically transformed into an outright challenge to BSA's principles of "cleanliness" and "moral straightness" because of nothing more than his mere admission of homosexuality. James Dale never advanced that homosexuality is "clean" or "morally straight." And, while the Court portended to not pass judgment on "homosexuality" per se, the Court's "free pass" to BSA's required level of proof to demonstrate disruption of their "expressive association" exposes the Court's true view.¹⁸⁷ The Court's willingness to allow BSA to proxy the values of uncleanness and immorality for an admission of homosexuality strips gay and lesbian Americans of the ability to define themselves and leaves the constitution of gay identity to be defined by the very group seeking its ouster.

182. Hutchinson, *supra* note 5, at 110.

183. *Id.* at 109. By focusing on James Dale's admission of homosexuality, Professor Hutchinson concludes that the Supreme Court engaged in "outness discrimination." *Id.* at 116.

184. *Id.* at 140-41.

185. *Id.* at 110-15. "Outness . . . is a critical component of gay, lesbian, bisexual, and transgender identities." *Id.* at 108.

186. *See, e.g., Dale*, U.S. at 648.

187. *Id.* at 661 ("We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong . . .").

The Court obviously located a scintilla of reasonableness in the connection that BSA argued exists between “moral straightness” and “cleanliness” and heterosexuality.¹⁸⁸ To accede to the Court’s deference to its views, the BSA still needed to advance an argument that the majority concluded was tenable, and obviously BSA succeeded. If BSA had stated, “[W]e believe in fighting for an end to deforestation that threatens endangered species, and thus we do not accept homosexuality,” then even the Court’s great deference would not have been able to locate expressive association concerning homosexuality. When the Court concludes that James Dale’s presence in BSA “force[s] the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior,” the expressive elements the Court imbues in James Dale’s proclamation of homosexuality could not be more explicitly revealed.¹⁸⁹ Rather than rendering gay and lesbian identity invisible, as Professor Hutchinson decries, the Court’s decision emblazons every homosexual with a Scarlet “H,” loudly proclaiming the presence of homosexuality with all its attendant messages.¹⁹⁰

Turning to New Jersey’s interest in ending discrimination against homosexuals, the Court curtly stated, “[T]he state interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.”¹⁹¹ Of course, the Court adopted this “severe intrusion” conclusion from the briefs submitted by BSA, and not from any independent analysis.¹⁹² Without analysis, the Court announced, “[we] have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the

188. *See id.* at 650.

189. *Id.* at 653.

190. Hutchinson, *supra* note 5, at 110. The *Dale* Court’s analysis also makes clear that there is confusion as to whether James Dale was expelled from BSA over homosexual conduct or homosexual status. Citing the New Jersey Superior Court’s Chancery Division, the Supreme Court noted the Boy Scouts’ policy on “active homosexuality.” *See Dale*, 530 U.S. at 645-46. The preface “active” sheds light on the *expressive* elements the Court is placing upon a *status* of homosexuality. Since BSA never had any knowledge of James Dale’s sexual history, “active homosexuality” must mean something apart from being sexually active. In this context, “active” can only mean “out” or expressed homosexuality. Thus, the Boy Scouts’ policy would not apply to the “closeted” homosexual. The “active” component is expression. This must necessarily be different from the status of homosexuality. The phrase “active homosexuality” then could be held to demonstrate dual elements: status and expression.

191. *Dale*, 530 U.S. at 659.

192. *See id.* at 653 (citing Reply Brief for Petitioners at 5); *see also id.* at 654 (citing Reply Brief for Petitioners at 5).

organization's right to oppose or disfavor homosexual conduct."¹⁹³ Beyond simply announcing their next query, however, no analysis had taken place. The Court's statement that it had "already concluded" suggests that it had determined that inclusion of Dale would somehow force the BSA to "admit to the world" that homosexual conduct is a legitimate form of behavior.¹⁹⁴ As shown earlier, however, that conclusion relied upon a questionable invocation of the *Hurley* holding.¹⁹⁵

The Court's conclusion that James Dale would "significantly burden" BSA's message is in direct contradistinction with its restricting language in *Hurley*.¹⁹⁶ Distinguishing between a homosexual group such as GLIB and homosexual individuals, *Hurley* relied upon the fact that the law's application "[did] not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade."¹⁹⁷ Indeed, the Court's analysis was based upon the expressive component of GLIB as a group.¹⁹⁸ The Court spoke in varying terms: "the expressive character of . . . the marching GLIB contingent,"¹⁹⁹ "a contingent marching behind the organization's banner,"²⁰⁰ "organized marchers,"²⁰¹ and "GLIB . . . as an expressive contingent."²⁰² In dicta, the Court stated that GLIB was analogous to "an applicant [to a private club] whose manifest views were at odds with a position taken by the club's existing members," yet, the Court still required that some expression have occurred by composing the hypothetical applicant with "manifest views."²⁰³ In *Dale*, however, instead of searching for James Dale's "manifest views," the Court presumed a set of views concomitant with his status as a homosexual and proceeded to pit those views against the views of the Boy Scouts.²⁰⁴

Under the *Dale* analysis, any civil rights claim homosexuals are ever to make is automatically transformed by the perceived messages assigned by the Court's jurisprudence into "a proposal to limit speech in

193. *Id.* at 659.

194. *See id.* at 653.

195. *See id.* at 653-54; *see also* discussion *supra* Part III.

196. *See id.* at 656.

197. *Hurley*, 515 U.S. at 572.

198. *See, e.g., id.* at 572-73.

199. *Id.* at 573 (emphasis added).

200. *Id.* at 574.

201. *Id.*

202. *Id.* at 580-81.

203. *Id.* at 581.

204. *See Dale*, 530 U.S. at 653 (stating that "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior").

the service of orthodox expression.”²⁰⁵ The *Dale* majority attempted to maintain that it was not allowing mere statements by the Boy Scouts to circumvent the New Jersey law, yet, in concluding that Dale significantly burdened the expressive association rights of BSA, the Court pointed to no specific BSA policy.²⁰⁶ Instead, it relied on Dale’s admission of homosexuality, his leadership position in a college “gay and lesbian organization,” and his status as an alleged “gay rights activist.”²⁰⁷ In a few strokes of the pen, the Court shifted the battle between Dale’s equality claim under New Jersey’s antidiscrimination statute and BSA’s asserted defense, to a narrow concentration on *expression* vis-à-vis Dale’s homosexuality. While James Dale was not contesting his expulsion from BSA over the right to say anything, the Court focused its analysis on what Dale’s homosexual status *said* and what it thereby forced BSA to *say*: “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”²⁰⁸

Despite the Court’s irrational construction of the identity of the homosexual, what we do know is that when a group clamoring for equality does so on race or gender grounds, the Court has decidedly sided with the equality group and against the expression group.²⁰⁹ This stance, however, shifts dramatically when homosexuals attempt to claim the same societal discursive space. In both *Dale* and *Hurley*, the Court focused on the alleged damage to the speakers’ message with little ink spilled on the equality claims asserted by the homosexual parties involved. In *Dale*, the Court did not utter one word about the equality claim of homosexuals under the New Jersey antidiscrimination law. Beyond mentioning prior case law addressing gender discrimination, the Court presumptively concluded that any argument for protecting James Dale under the New Jersey statute was outweighed by the Boy Scouts’

205. See *Hurley*, 515 U.S. at 579.

206. See *Dale*, 530 U.S. at 651-52 (explaining that a review of the Boy Scouts’ policies and statements made outside the litigation in question were reviewed merely as “instructive” on the “sincerity” of the Boy Scouts’ beliefs).

207. See *id.* It is unclear how James Dale, at the time of his dismissal from the Boy Scouts, was a gay rights activist. Certainly, as his litigation continued on in time, he gained notoriety as a gay man fighting for his right to be in the Boy Scouts. But, is that enough to make one an activist? If the Court is asking how the inclusion of Dale, at the time of his dismissal, would have affected BSA’s message, the fact that the majority of justices view him as an “activist” is irrelevant to that analysis.

208. *Id.* at 653.

209. See discussion *supra* Part II.

First Amendment interests.²¹⁰ The Court explained that “a state requirement that the Boy Scouts retain Dale . . . would significantly burden the organization’s right to oppose or disfavor homosexual conduct. The state interests in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ rights to freedom of expressive association.”²¹¹ In place of evaluating the equality claims of homosexuals, the Court proceeded to transform their claims of equality under state antidiscrimination laws into claims of counter-expression against the very groups/public accommodations to which they sought entrance. Certainly members of the Jaycees felt it improper for women to be in the club, yet the Court found a more compelling societal need to include women in the *Roberts* decision. In stark contrast, members of both the Boston parade organizing group and the Boy Scouts felt it inappropriate to include homosexuals, and the Court located no great compelling societal need to include homosexuals, regardless of the express will of both New Jersey and Massachusetts.

The idea that a proclamation of homosexuality is imbued with speech beyond its immediate denotation is not necessarily novel. Prior legal analysis of any “expression” emanating from an “out” homosexual, however, has focused on the protections afforded such communication, in contrast to the majority opinion in *Dale*. In the landmark 1979 case, *Gay Law Students Ass’n v. Pacific Telephone & Telegraph Co.*, the California Supreme Court held that admission of one’s homosexuality constituted a “political activity” as defined in California’s labor code.²¹² The court stated:

[T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today, and the “gay liberation movement” encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities.

A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently, one

210. See *id.* at 657-61 (citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1 (1988)).

211. *Dale*, 530 U.S. at 659.

212. *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

important aspect of the struggle for equal rights is to induce homosexual individuals to “come out of the closet,” acknowledge their sexual preferences, and to associate with others in working for equal rights.²¹³

The court’s opinion incorporated sexual orientation into the protections accorded by California’s Labor Code, which had previously prevented employers from interfering in the rights of employees to engage in political activity.²¹⁴ Protections were subsequently extended to “closeted” homosexuals.²¹⁵ Embodied in the court’s approach is the rejection of the idea that homosexuality consists solely of conduct. Rather, the court cites the pressures, goals, fears, and challenges that are omnipresent for most gay and lesbian citizens.²¹⁶ Implicit in those fears of discovery that the court acknowledges is the recognition of the unique status that being open about homosexuality achieves, with its concomitant social, political, and economic consequences. While few courts have adopted this approach, the reasoning utilized by the California Supreme Court is compelling when considering the true nature and, more importantly, the realistic consequences of an individual’s openness regarding her or his homosexuality.²¹⁷ There is perhaps no better example of these “consequences” than James Dale’s expulsion from the Boy Scouts upon merely identifying himself as a homosexual. Certainly the California Supreme Court took early notice of the scarlet “H” of homosexuality.

The Supreme Court’s abandonment of the *Roberts* analytical framework in expressive association cases, along with its effect of branding homosexuals with “expression” in their “outness,” has not been universally perceived as a defeat. On the contrary, some commentators have viewed the opinion as a potential opening for the recognition that the expressive elements in being “out” deserve heightened protection.²¹⁸ Professor Nancy Knauer asserts just that, stating, “[The *Dale* majority opinion implicitly] recognize[s] that coming out speech sends a message

213. *Id.* (citations omitted).

214. *See* CAL. LAB. CODE § 1102 (West 1989). California later codified the *Gay Law Students Ass’n* opinion in § 1102.1 of the California Labor Code.

215. *See* *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77, 88 (Ct. App. 1991).

216. *See Gay Law Students Ass’n*, 595 P.2d at 610.

217. In his dissent over the denial of certiorari in *Rowland v. Mad River Local School District*, Justice Brennan also noted the unique political nature of an admission of homosexuality and stated that the state cannot condition employment on “any matter of political, social, or other concern to the community,” and that Rowland’s comments involved her in the political debate regarding sexual orientation. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1011-12 (1985) (Brennan, J., dissenting).

218. *See, e.g.,* Nancy J. Knauer, “*Simply So Different*”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 Ky. L.J. 997, 1003 (2001).

that goes beyond simple self-identification and necessarily involves the speaker in the ongoing and highly politicized homosexuality debate.”²¹⁹ Citing *Gay Law Students Ass’n*, Professor Knauer states,

Th[e] recognition of the expressive value of the openly gay individual potentially offers a new level of constitutional protection for coming out speech For public employment purposes, an avowal of homosexuality should now clearly be recognized as a matter of public concern, thereby granting openly gay public employees everywhere enhanced First Amendment protection.²²⁰

Knauer’s forecast even has pre-*Dale* validity at the federal level.²²¹

VI. CONCLUSION

Generally, state antidiscrimination laws have been promulgated to protect citizens from discrimination based upon their status, such as race or gender. In those two categories, the Court has consistently deferred to the will of the people of the enacting state, concluding that the compelling governmental interest in eradicating discrimination overpowers any contrary right.²²² Unlike race or gender, however, when the Court has been faced with the application of state laws prohibiting sexual orientation discrimination, it has framed homosexuality as more than a mere protected status. Instead, the Court treats homosexuality as constructed by two components: status and expression.²²³ Finding an expressive component in homosexuality in and of itself has allowed the Court to create an illusory battle between the First Amendment rights of opposed groups. Ultimately, the Court’s treatment of homosexuality as both a status and expressive activity has consequently affixed every gay and lesbian individual with a scarlet “H” on his or her breast. Unable to escape the expression the Court has transposed upon their status, homosexuals are thereby unable to enjoy the legal protections afforded them by local and state governments because their claims will dissolve into a battle of competing First Amendment freedoms. This morass may be overcome if appropriate doctrinal notice is taken of the perilous,

219. *Id.* at 1071-72.

220. Knauer, *supra* note 218, at 1072.

221. *See Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1284 (D.C. Utah 1998) (holding that a voluntary coming out or involuntary outing of a homosexual teacher would always be a matter of public concern for purposes of the *Pickering* balancing test).

222. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int’l. v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

223. *See* discussion *supra* Part IV.

unsolvable conflict the Court has created by defining homosexuality as, at once, both status *and* expression.

The impact of *Dale* was impressed upon Justice Stevens in his dissent. Alarmed at the ramifications of the decision, he stated:

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone, unlike any other individual's, should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." *That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism . . . [and] reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.*²²⁴

The ultimate and unfortunate irony of the majority opinion in *Dale* is the fact that the majority rests its decision on the right of a speaker to control his or her message, while the majority itself simultaneously takes away that control by sua sponte constructing and imposing expressive elements upon homosexual identity. Despite the rhetoric of a state's inability to "interfere with speech," the Court is the player who runs ultimate interference.²²⁵ By transforming James Dale's request for equality under the New Jersey antidiscrimination law into a battle between competing First Amendment expressive freedoms, the Court magically imbued homosexual status as expressing disagreement with "moral" principles, unwillingness to be "clean," and disdain for "values." Such vicarious expression emblazons homosexuals with a scarlet "H" to follow them wherever they may go. Most unfortunately, decisions such as *Hurley* and *Dale* effectively make homosexuals strangers to otherwise protective antidiscrimination laws.

224. *Dale*, 530 U.S. at 696 (Stevens, J., dissenting) (emphasis added).

225. *Id.* at 661.