Romer, Hurley, and Dale: How the Supreme Court Languishes with "Special Rights"

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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol89/iss4/9
INTRODUCTION

The past twenty-five years span the birth and dramatic increase in legal protections extended to gay and lesbian individuals on both state and local levels. In the past ten years, the Commonwealth of Kentucky alone has witnessed the defeat of the state’s sodomy statute, the passage of four municipal ordinances prohibiting sexual orientation discrimination, the extension of hate crime protection to crimes

* J.D. expected 2001, University of Kentucky. The author would like to thank those individuals without whose support this Note would not have been completed, specifically Matt Morrison, Jeff Jones, and my parents, Steve and Debbie Hargis.

1 Terminology can be confusing, much debated, and misleading in the dialogue concerning sexual orientation. The author has used the terms “homosexual,” “gay,” and “lesbian” interchangeably in the text. Each term has its own scope of coverage and connotation, and, for that reason, the author has included them all. No preference or alternative message is suggested by any use of any term other than simply signifying a non-heterosexual sexual orientation. For clarity, the author has omitted using the term “bisexual,” though that omission indicates nothing more than a search for clarity for the reader. Indeed, in the debate over the moral, societal, personal, and political ramifications surrounding sexual orientation, bisexuality is as fervently debated as any other orientation.

2 See Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992). Kentucky was the first state to overturn its sodomy statute after the Supreme Court’s decision in Bowers v. Hardwick, 478 U.S. 186 (1986).

3 Jefferson County, Ky., Ordinance No. 36-1999 (Oct. 12, 1999); Henderson, Ky., Ordinance No. 33-99 (Sept. 28, 1999); Lexington, Ky., Ordinance No. 201-99 (July 8, 1999); Louisville, Ky., Ordinance No. 9-1999 (Feb. 1, 1999).
motivated by sexual orientation animus, and a proposal to extend the state's civil rights protections to include sexual orientation. In 1999, the cities of Louisville, Lexington, and Henderson, along with Jefferson County, passed “fairness” ordinances prohibiting discrimination based on sexual orientation and, with the exception of Henderson’s ordinance, gender identity. The ordinances cover the areas of employment, housing, and public accommodations. Louisville’s ordinance, however, is limited to employment.

While Title VII of the Civil Rights Act of 1964 has been the federal statutory remedy for groups to attack private and public discrimination,

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6 The four ordinances recently passed in Kentucky were colloquially referred to as “fairness” ordinances by many. Ironically, the “fairness” of the ordinances is at the heart of the debate over the ordinances and this Note. The term was also used to refer to one of the primary bodies supporting the legislation throughout the state—the Kentucky Fairness Alliance. Irrespective of the origin of the phrase, the author has continued to use the term to refer to the laws for clarity purposes.
7 Gender identity is a concept included in three of the four ordinances passed in Kentucky and has increasingly been included in laws prohibiting sexual orientation discrimination. The author has refrained from discussing gender identity beyond noting its inclusion in three of Kentucky’s ordinances for clarity and brevity. Furthermore, almost all of the legal dialogue concerning this area is couched in terms of “sexual orientation.” While many, including those in the legal profession, group sexual orientation and gender identity together, the distinctness of the concepts from each other is debated. The confusion and misunderstanding surrounding the concepts are additional reasons the author has focused the discussion solely on sexual orientation. Hopefully, this will not add to the conundrum regarding these concepts.
8 Bowling Green, Kentucky has followed suit and become the fifth Kentucky city to take up the issue of legal protections for homosexuals. See Jason Riley, Gay Rights Issue Arrives, DAILY NEWS (Bowling Green, Ky.), Sept. 21, 1999, at 1A.
homosexuals have consistently been denied recovery under Title VII.\textsuperscript{11} Addressing the issue of sexual orientation discrimination has, thus, been left largely to state and local governments.\textsuperscript{12} Since the passage of the first municipal ordinance addressing discrimination against homosexuals in Lansing, Michigan in 1972,\textsuperscript{13} eleven states have banned discrimination based on sexual orientation,\textsuperscript{14} and, as of 1999, approximately 203 cities and counties had followed suit.\textsuperscript{15} In addition, seven states have banned sexual


orientation discrimination in public employment via executive order.\textsuperscript{16} These changes, however, have met with resistance. From a strong dissent in \textit{Romer v. Evans}\textsuperscript{17} to bitter opposition at the local level over recent "fairness" efforts in Kentucky,\textsuperscript{18} opponents of laws prohibiting sexual orientation discrimination have fought as fervently as the laws' proponents. The arguments erected against the passage of such efforts have been many and varied, ranging from the passage of laws prohibiting such ordinances,\textsuperscript{19} attacking the laws post-hoc on constitutional grounds,\textsuperscript{20} and advancing that such efforts are really "special rights" when such laws are considered.\textsuperscript{21}

This Note focuses on the current debates surrounding laws addressing sexual orientation discrimination. Specifically, what are the efforts mounted against such legislation? Are they effective? Moreover, what fallacies buttress such efforts?

Part I details recent ordinances passed in Jefferson County, Louisville, Lexington, and Henderson, Kentucky as prototypical examples of local efforts to end sexual orientation discrimination.\textsuperscript{22}

Part II explores the treatment federal courts have afforded state and local efforts to prohibit or overturn laws prohibiting sexual orientation discrimination.\textsuperscript{23} Part II also focuses on the Supreme Court's decision in \textit{Romer v. Evans}\textsuperscript{24} as contrasted to the Sixth Circuit's \textit{Equality Foundation of Greater Cincinnati v. City of Cincinnati}\textsuperscript{25} opinion.

\textsuperscript{19} See infra Part II.
\textsuperscript{20} See infra Part III.
\textsuperscript{21} See infra Part IV.
\textsuperscript{22} See infra notes 32-73 and accompanying text.
\textsuperscript{23} See infra notes 74-152 and accompanying text.
\textsuperscript{25} \textit{Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati}, 128 F.3d 289 (6th Cir. 1997) (\textit{Equality Foundation II}).
Part III examines challenges against laws prohibiting discrimination based upon conflicting constitutional values.26 The Supreme Court’s decisions in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.27 and Boy Scouts of America v. Dale28 stand as the first two examples of the Court balancing the interests behind such antidiscrimination laws and the interests allegedly infringed.

Part IV addresses the Supreme Court’s acknowledgment of the “special rights” argument29 and asks if such ordinances grant “special rights.” While the cases addressing statutory bars to fairness efforts contain arguments over “special rights,” the Supreme Court cases addressing the infringement of constitutional rights by such laws are riddled with presumptions and implied assertions about homosexuals—who they are, how they behave, and what they believe. Those assumptions will be critically examined. Part IV also briefly explores the treatment of homosexuality as “political activity” in response to a “special rights” argument.30

Despite the myriad of attacks launched against efforts to protect homosexuals from discrimination, this Note argues that the protection emanating from the laws prohibiting sexual orientation discrimination should be viewed as the Supreme Court viewed them in Romer: “nothing special.”31

I. ORDINANCES PROHIBITING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN KENTUCKY

A. Pre-“Fairness” Kentucky

Historically, laws addressing homosexuals have been criminal, not civil. Homosexual sodomy was punished at common law,32 and has been a

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26 See infra notes 153-238 and accompanying text.
29 See Romer, 517 U.S. at 626; Equality Foundation II, 128 F.3d at 298.
30 See, e.g., Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77, 87-88 (App. 1991) (holding that the expression of homosexual orientation was a protected political activity), petition for review granted, 4 Cal. Rptr. 2d 180 (1992), appeal dismissed per stipulation, 24 Cal. Rptr. 2d 587 (1993).
31 Romer, 517 U.S. at 631.
32 See, e.g., Commonwealth v. Wasson, 842 S.W.2d 487, 490-91 (Ky. 1993) (citing Commonwealth v. Poindexter, 118 S.W. 943 (Ky. 1909)).
criminal offense in Kentucky as far back as 1860. The 1860 statute criminalized anal intercourse between men, but did not address oral intercourse or conduct by women. However, the 1974 Penal Code, with the enactment of K.R.S. section 510.070, included “deviate sexual intercourse” within the scope of Kentucky’s sodomy law. This language included women and punished homosexual oral copulation. However, in 1992, the Kentucky Supreme Court held the criminalization of homosexual sodomy to be unconstitutional in Commonwealth v. Wasson. The Wasson court held that K.R.S. section 510.100 violated equal protection and the guarantees of individual liberty provided in the Kentucky Constitution by making “deviate sexual intercourse” with another of the same sex a crime. The court stated:

The statute before us is in violation of Kentucky constitutional protection in Section Three that “all men (persons), when they form a social compact, are equal,” and in Section Two that “absolute and arbitrary power over the lives, liberty and property of free men (persons) exists nowhere in a republic, not even in the largest majority.”

While also finding that the sodomy law impermissibly violated the right to privacy implicit in the Kentucky Constitution, the court invoked John Stuart Mill:

The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. . . . The principle requires liberty of taste and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we

33 1 KY. REV. STAT., ch. 28, art. IV, § 11 (1860).
34 See Commonwealth v. Poindexter, 118 S.W. 943 (Ky. 1909) (holding that two men could not be convicted under 1 KY. REV. STAT., ch. 28, art. IV, § 11 (1860) for oral intercourse because the statute only prohibited anal intercourse).
36 See id. § 510.100(1); see also id. § 510.010(1) (defining deviate sexual intercourse as “any act of sexual gratification involving the sex organs of one persons and the mouth or anus of another”).
37 Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).
38 Id. at 501.
39 Id. at 500 (emphasis added).
do does not harm them, even though they should think our conduct foolish, perverse, or wrong.\textsuperscript{40}

The notions of privacy and liberty that the court invoked in order to strike down the state's sodomy statute in 1992 resurfaced throughout the remainder of the decade. The state grappled with hate crime protection for homosexuals\textsuperscript{41} and the prohibition on same-sex marriages,\textsuperscript{42} eventually culminating in 1999 with the passage of four municipal ordinances prohibiting various types of discrimination against lesbians and gays.\textsuperscript{43}

\textbf{B. The Louisville Ordinance}

The "fairness" ordinance passed in Louisville\textsuperscript{44} stands as the first of its kind in Kentucky\textsuperscript{45} and the most limited ordinance in scope. Adopted in February 1999, the ordinance addresses employment discrimination based upon sexual orientation and gender identity.\textsuperscript{46} Unlike later Kentucky ordinances, the Louisville effort did not cover sexual orientation discrimination in the areas of housing or public accommodations.\textsuperscript{47} The ordinance was actually an amendment to the city's existing employment discrimination laws.\textsuperscript{48} The Louisville ordinance prohibited any discrimination based upon sexual orientation or gender identity, absent a bona fide occupational qualification.\textsuperscript{49} The ordinance did provide exceptions for

\textsuperscript{40} Id. at 496 (quoting Commonwealth v. Campbell, 117 S.W. 383, 386 (Ky. 1909) (quoting JOHN STUART MILL, On Liberty, in ON LIBERTY AND OTHER ESSAYS (MacMillion Co. 1926) (1859))).


\textsuperscript{43} See supra note 3 and accompanying text.

\textsuperscript{44} Louisville, Ky., Ordinance No. 9-1999 (Feb. 1, 1999).

\textsuperscript{45} The first city in Kentucky to adopt a provision protecting homosexuals was Henderson, Kentucky in 1996. The city of Henderson placed a non-discrimination clause in its application for city employment. Job application for city employment Henderson Ky. (1996) (on file with author).

\textsuperscript{46} Louisville, Ky., Ordinance No. 9-1999 (Feb. 1, 1999).

\textsuperscript{47} See id. § 98.15(A) (prohibiting discrimination in connection with employment).

\textsuperscript{48} See Louisville, Ky., Ordinance No. 9-1999 (Feb. 1, 1999).

\textsuperscript{49} CITY OF LOUISVILLE, KY. CODE OF ORDINANCES § 98.18(A). The ordinance defines "sexual orientation" as "[a]n individual's actual or imputed heterosexuality, homosexuality, or bisexuality" and "gender identity" as "(A) [H]aving a gender identity as a result of a sex change surgery; or (B) [M]anifesting, for reasons other than dress, an identity not traditionally associated with one's biological maleness
religious institutions and explicitly allowed the enforcement of dress codes.

C. The Lexington Ordinance

Lexington’s “fairness” ordinance, the second such effort in the state, stands as the broadest municipal provision addressing sexual orientation discrimination in the state. Passed by the Council of the Lexington-Fayette Urban County Government, the ordinance prohibits discrimination based upon sexual orientation and gender identity in the areas of employment, housing, and public accommodations. Before passage, the ordinance was amended to allow the enforcement of gender-specific bathrooms and dress codes appropriate to an employee’s sex. Like the ordinance in Louisville, the Lexington effort provided exceptions for religious groups, but any group receiving a majority of its funding from local, state, or federal funds was not exempt. The Lexington ordinance does not grant to an aggrieved individual the right to sue; rather, complaints are referred to the Lexington-Fayette Urban County Human Rights Commission for reconciliation. If reconciliation fails, then the Lexington-Fayette Urban County Human Rights Commission holds a public hearing.

D. The Henderson Ordinance

Henderson became the third Kentucky city to pass a “fairness” ordinance in September 1999. Unlike the ordinances of Louisville and

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50 Id. §§ 98.00, 98.18(B), (C).
51 Id. § 98.17(G)(1).
52 Lexington, Ky., Ordinance No. 201-99 (July 8, 1999).
53 Compare id. with Louisville, Ky., Ordinance No. 9-1999 (Feb. 1, 1999), Henderson, Ky., Ordinance No. 33-99 (Sept. 28, 1999), and Jefferson County, Ky., Ordinance No. 36-1999 (Oct. 12, 1999).
54 LEXINGTON-FAYETTE, KY., CHARTER AND CODE OF ORDINANCES § 2-33(1) (1999). The ordinance defines “sexual orientation” as “an individual’s actual or imputed heterosexuality, homosexuality, or bisexuality,” and “gender identity” as “having a gender identity as a result of a sex change surgery; or . . . manifesting, for reasons other than dress, an identity not traditionally associated with one’s biological maleness or femaleness.” Id. § 2-33(4)-(5).
55 Id. § 2-33(6)(b).
56 Id. § 2-33(6)(a).
57 Id. § 2-33(7).
58 Id. § 2-33(3).
59 Id. § 2-32(2)(e).
60 Henderson, Ky., Ordinance No. 33-99 (Sept. 28, 1999).
Lexington, which addressed gender identity, the ordinance in Henderson covered only sexual orientation. The scope of Henderson’s ordinance was as broad as the Lexington ordinance, covering employment, housing, and public accommodations. Like the previous ordinances, the Henderson ordinance provided exemptions for religious organizations, though, like Lexington, organizations were not entitled to the exemption if they received a majority of their funding from local, state, or federal funds. The ordinance carried a $250 fine for violations. The Henderson City-County Human Relations Commission had the ability to provide mediation services to involved parties.

On March 13, 2001, the Henderson City Commission voted to repeal the ordinance, eighteen months after the initial passage of the law. Between the passage of the ordinance and its repeal, an election occurred, shifting support for the ordinance to a minority on the Commission.

E. The Jefferson County Ordinance

Jefferson County, Kentucky became the fourth Kentucky polity to address sexual orientation discrimination in October 1999. The ordinance prohibited discrimination based upon sexual orientation and gender identity in the areas of employment, housing, and public accommoda-

61 Compare id. with Louisville, Ky., Ordinance No. 9-1999 (Feb. 1, 1999), and Lexington, Ky., Ordinance No. 201-99 (July 8, 1999). “Sexual orientation” is defined by the ordinance as “a person’s actual heterosexuality, homosexuality, or bisexuality of a person; or the supposed heterosexuality, homosexuality, or bisexuality of a person as perceived by another person.” Henderson, Ky., Ordinance No. 33-99, § 10-40 (Sept. 28, 1999).

62 Id. § 10-41(a)-(c).

63 Id. § 10-42(c).

64 Id. § 10-45.

65 Id. § 10-44.


67 Id.


69 JEFFERSON COUNTY, KY., CODE OF ORDINANCES § 92.02 (1999). The ordinance defines “sexual orientation” as “[a]n individual’s actual or imputed heterosexuality, homosexuality or bisexuality” and “gender identity” as “[m]anifesting an identity not traditionally associated with one’s biological maleness or femaleness.”

70 Id. § 92.06.

71 Id. § 92.03.
The Louisville and Jefferson County Human Relations Commission has the responsibility of handling complaints based upon the ordinance. The Louisville and Jefferson County Human Relations Commission has the responsibility of handling complaints based upon the ordinance.

II. LAWS PROHIBITING STATUTORY PROTECTIONS ON THE BASIS OF SEXUAL ORIENTATION

Laws protecting homosexuals from discrimination have drawn a myriad of responses. Such laws have been attacked by cries of "special rights" during their enactment and have been attacked on constitutional grounds after their promulgation. The first case, however, to reach the Supreme Court involving the legal protection of lesbian and gay citizens was Romer v. Evans. The case involved an effort to overturn protective ordinances passed in Colorado and, more importantly, to prohibit any such further legislation. Romer called into question the very ability of gay and lesbian groups to advocate for laws prohibiting sexual orientation discrimination. The victory in Romer was heralded as a turning point in the fight for civil rights for homosexuals. The hope that Romer captured has been short-lived as subsequent efforts have called into question its efficacy.

A. Romer v. Evans

In response to the passage of several municipal ordinances prohibiting discrimination based upon sexual orientation, Colorado voters passed Amendment 2 to the Colorado State Constitution. The Amendment precluded any legislative, executive, or judicial action at any state or local

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72 Id. § 92.05.
73 Id. § 92.08.
74 See infra Part IV.
75 See infra Part III.
77 See id. at 623-24.
78 See Louis Michael Seidman, Romer's Radicalism: The Unexpected Revival of Warren Court Activism, 1996 SUP. CT. REV. 67, 67-68.
79 See infra Part II.B; see also, e.g., Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (Equality Foundation II).
80 See ASPEN MUN. CODE § 15.04.570 (1977); BOULDER REV. CODE §§ 12-1-1 to 12-1-11 (1987); DENVER REV. MUN. CODE, art. IV, §§ 28-91 to 28-116 (1991). Discrimination was prohibited in areas such as employment, housing, public accommodations, education, and health and welfare services. Id.
81 COLO. CONST. amend. 2 (repealed 1996).
A trial court granted a preliminary injunction to prevent enforcement of Amendment 2. Upon appeal, the Colorado Supreme Court held that Amendment 2 was subject to strict scrutiny because it violated the fundamental right of gays and lesbians to participate in the political process. Upon remand, the trial court rejected the state’s arguments regarding the compelling interests behind the amendment and enjoined its enforcement. The Colorado Supreme Court subsequently affirmed Amendment 2’s enjoinment. After granting certiorari, the U.S. Supreme Court held that Colorado’s Amendment 2 violated the Equal Protection Clause.

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82 Id. The text of the amendment reads as follows:
No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. 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. This Section of the Constitution shall be in all respects self-executing.

Id.

85 Evans v. Romer, No. 92 CV 7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993), aff’d, 882 P.2d 1335 (Colo. 1994), aff’d on other grounds, 517 U.S. 620 (1996). The State argued that Amendment 2 was passed to (1) deter factionalism; (2) preserve the integrity of the State’s political functions; (3) preserve the State’s resources to fight discrimination against suspect classes not including homosexuals; (4) prevent government interference with personal, familial, and religious privacy; (5) prevent government from subsidizing special interest group legislation; and (6) promote the overall well-being of children. Id. at *2.
86 Id. at *13. The court found “only two compelling state interests that Amendment 2 serves—the promotion or religious freedom and the promotion of family privacy. As to those two interests, the Amendment is not ‘narrowly drawn to achieve that purpose in the least restrictive manner possible.’” Id. at *9.
The Court rejected Colorado’s claim that such ordinances provided gays and lesbians with special rights as “implausible,” stating:

‘[W]e cannot accept the view that Amendment 2’s prohibition on specific legal protection does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those person alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability. . . . We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.’

The Court also considered the amendment’s validity under the Equal Protection Clause of the Fourteenth Amendment. The Colorado Supreme Court had subjected Amendment 2 to strict scrutiny because it infringed upon the fundamental right of gays and lesbians to engage in the political process and was unable to find a compelling state interest to justify the infringement. Unlike the Colorado Supreme Court, the Supreme Court evaluated the amendment under rational basis review, announcing that the law was unconstitutional. Finding no rational relationship to any legitimate governmental interest, the Court stated that “[a] law declaring

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90 Id. at 626.
91 Id. at 631 (emphasis added).
92 See id. at 631-36.
95 See Romer, 517 U.S. at 631-32. The Court offered no guidance on its choice not to employ strict scrutiny review.
96 See id. at 635; see also James E. Barnett, Updating Romer v. Evans: The Implications of the Supreme Court’s Denial of Certiorari in Equality Foundation of Greater Cincinnati v. City of Cincinnati, 49 CASE W. RES. L. REV. 645, 654 n.66 (1999) (noting that this is particularly interesting when one considers that the Bowers Court found that “traditional morality alone was a rational justification for a criminal statute because the ‘law . . . is constantly based on notions of morality’”) (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).
that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.\textsuperscript{97} In rejecting the legitimate state interests that Colorado advanced,\textsuperscript{98} the Court held that a "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."\textsuperscript{99}

The Court's decision in \textit{Romer} was heralded as the "first major Supreme Court victory" for gays and lesbians.\textsuperscript{100} The impact of the decision, however, is unclear.\textsuperscript{101} While the decision explicitly prohibits laws blocking gay and lesbian political participation, the Court's approval of antidiscrimination laws protecting gays and lesbians is, at best, implicit from the Court's unwillingness to allow gays to be exiled from the political process. The majority found "nothing special in the protections Amendment 2 with[held]."\textsuperscript{102} but did not address whether homosexuals constituted a protected class or even could constitute such a class.\textsuperscript{103} Withholding suspect class status has led some federal courts to use \textit{Romer v. Evans} to uphold discriminatory legislation against gays and lesbians.\textsuperscript{104} Subsequent federal decisions, such as \textit{Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati},\textsuperscript{105} have left the impact of \textit{Romer} on even shakier ground.\textsuperscript{106}

\textsuperscript{97} \textit{Romer}, 517 U.S. at 633.

\textsuperscript{98} See \textit{id.} at 635 (rejecting Colorado's contention that Amendment 2 advances the legitimate state interest of respect for other citizens' freedom of association, in particular the liberties of citizens with objections to homosexuality, and the separate interest of conserving resources to fight discrimination against other groups).

\textsuperscript{99} \textit{Id.} at 634 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

\textsuperscript{100} See Seidman, supra note 78, at 67-68.


\textsuperscript{102} \textit{Romer}, 517 U.S. at 631.

\textsuperscript{103} See \textit{id.} at 631-32.

\textsuperscript{104} See Dodson, supra note 101, at 272.

\textsuperscript{105} Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (Equality Foundation II).

B. Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati

Equality Foundation stands as the first test of the Supreme Court's decision in Romer. In November 1993, a Cincinnati initiative known as "Issue 3" was enacted. Like Amendment 2 in Colorado, the initiative was a response to recently passed ordinances in Cincinnati that afforded gays and lesbians legal protection from discrimination. Upon passage, the initiative became Article XII of the City Charter of Cincinnati. The Article prohibited the city from enacting or enforcing any ordinance allowing homosexual orientation, status, conduct, or relationship to provide an individual with the basis to have any claim of minority or protected status, quota preference, or other preferential status. The Article effectively voided previous ordinances that extended protection to homosexuals, while also explicitly banning future ordinances.

The United States District Court for the Southern District of Ohio issued an injunction against enforcement of the Article. The Sixth Circuit Court of Appeals, however, reversed the judgment of the lower court and

107 Equality Foundation II, 128 F.3d at 289.
110 The Article read:

NO SPECIAL CLASS STATUS MAY BE GRANTED BASED UPON SEXUAL ORIENTATION, CONDUCT OR RELATIONSHIPS. 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. This provision of the City Charter shall in all respects be self-executing. Any ordinance, regulation, rule or policy enacted before this amendment is adopted that violates the foregoing prohibition shall be null and void and of no force or effect.

Cincinnati, Oh., City Charter art. XII (Aug. 25, 1993).
111 Id.
112 Id.
vacated its injunction, holding that the Cincinnati Charter Amendment offended neither the First nor the Fourteenth Amendment of the Constitution.114 The court found that homosexuals did not constitute a suspect class nor did the charter amendment violate any fundamental rights.115 Applying a rational basis test, the court concluded that the legislation furthered legitimate governmental interests.116 Subsequently, the Supreme Court granted certiorari and vacated the Sixth Circuit's decision, remanding the case "for further consideration in light of Romer v. Evans."

Upon remand, the Sixth Circuit distinguished the Romer decision,118 citing the involvement of "substantially different enactments of entirely distinct scope and impact, which conceptually and analytically distinguished the constitutional posture of the two measures."119 Highlighting the differing political structures and environments in which the two measures were born, the Sixth Circuit focused on the Supreme Court's comment that Amendment 2 possibly removed any and all legal protection from gays and lesbians, including generally applicable nondiscrimination provisions.120 In contrast, the Sixth Circuit interpreted the Cincinnati measure as only removing the ability of homosexuals to obtain special rights.121 The court stated:

[T]he language of the Cincinnati Charter Amendment, read in its full context, merely prevented homosexuals, as homosexuals, from obtaining special privileges and preferences (such as affirmative action preferences or the legally sanctioned power to force employers, landlords, and merchants to transact business with them) from the City. In stark contrast, Colorado Amendment 2's far broader language could be construed to exclude homosexuals from the protection of every Colorado state law, including laws generally applicable to all other Coloradans, thus rendering gay people without recourse to any state authority at any level of

115 See id. at 266-67 & 266 n.2.
116 Id. at 270.
119 Id. at 295.
120 Id. at 295-97.
121 Id. at 296.
government for any type of victimization or abuse which they might suffer by private or public actors.\(^{122}\)

The Sixth Circuit’s effort to distinguish between Colorado’s Amendment 2 and Cincinnati’s Issue 3 is plausible only if one assumes that the laws have vastly different scopes: Colorado’s law providing an out-right denial of legal protection of any law to homosexuals versus Cincinnati’s law merely preventing homosexuals from receiving “preferential treatment.”\(^{123}\) The validity of that approach, however, is undercut by three facts:

(1) the Romer Court’s statement that it would not construe Amendment 2 broadly enough to effectuate that result;\(^{124}\) (2) the Colorado Supreme Court’s previous refusal to interpret Amendment 2 with such breadth,\(^{125}\) and, most importantly, (3) the Sixth Circuit’s own admission that the Supreme Court did not construe Amendment 2 as a provision which denied homosexuals the protection of other state antidiscrimination laws.\(^{126}\)

While the U.S. Supreme Court doubted the Colorado Supreme Court’s narrow interpretation of Amendment 2,\(^{127}\) the Court explicitly analyzed Amendment 2 as a limited provision that solely disallowed preferential treatment of homosexuals.\(^{128}\) In the face of these facts, the effort of the Sixth Circuit to distinguish the Cincinnati initiative from the Colorado amendment is disingenuous at best, blatantly wrong at worst.

The Sixth Circuit held that the “narrow” language of the Cincinnati Amendment “eliminated only ‘special class status’ and ‘preferential treatment’ for gays as gays under Cincinnati ordinances and policies.”\(^{129}\) The Sixth Circuit followed the implicit precedent of *Romer* and refused to recognize homosexuals as a suspect class\(^{130}\) and any infringement on a fundamental right.\(^{131}\) Based on these refusals, the appropriate standard of

\(^{122}\) Id. (emphasis added).

\(^{123}\) Id. at 296-97.


\(^{126}\) See *Equality Foundation II*, 128 F.3d at 295.

\(^{127}\) See *Romer*, 517 U.S. at 631.

\(^{128}\) See id. at 638 (Scalia, J., dissenting) (agreeing with the majority stance that Amendment 2 did not deny homosexuals the protection of general laws prohibiting arbitrary discrimination).

\(^{129}\) *Equality Foundation II*, 128 F.3d at 297.

\(^{130}\) See id. at 297 n.8.

\(^{131}\) See id. at 297 (refusing to affirm district court’s recognition that fundamental right emanated from Constitution and that Article XII deprived Cincinnati gays and lesbians of exercising that right).
review was determined to be rational basis review, thus Cincinnati needed to show only a rational relationship between the legislation and a legitimate governmental end.132

The Romer Court held that the legitimate justifications Colorado had proffered for Amendment 2 fell short of any rational relation to the legislation.133 The Supreme Court’s failure to find a rational relationship between the law and any legitimate governmental interest primarily hinged on the sheer breadth of Amendment 2.134 The Court stated that “[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek assistance.”135 The Sixth Circuit held that those concerns were inapposite in Cincinnati’s situation.136

The court agreed with Romer that the state interests proffered by Colorado were not threatened by any local legislation which protected homosexuals through purely local means.137 The court then distinguished that from the Cincinnati legislation, where a municipality itself decided how to best allocate its resources and serve its interests.138 The court found Cincinnati’s interests to be “eliminat[ing] and forestall[ing] the substantial public costs that accrue from the investigation and adjudication of sexual orientation discrimination complaints.”139 The Sixth Circuit did not formally consider the proponents’ interests of associational liberty and moral disapproval of homosexuality, noting the Supreme Court’s disapproval of identical “interests” in Romer.140

When evaluating the rationality of Cincinnati’s proposed government interests, the Sixth Circuit failed to effectively address the primary component of Romer’s concern—the sheer breadth of the challenged act.141 The Romer Court was concerned with the broad infringement upon political participation that Amendment 2 imposed upon lesbians and gays, such as

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132 See id.
133 Romer, 517 U.S. at 635. The justifications included respect of other citizens’ freedom of association, especially those with personal or religious objections to homosexuality, and conserving resources to fight discrimination against other groups.
134 See id. “The breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them.” Id.
135 Id. at 633.
136 See Equality Foundation II, 128 F.3d at 300.
137 See id.
138 See id.
139 Id.
140 See id. at 301.
forcing them to pass a state-wide amendment repealing Amendment 2 if they desired to seek further legal protection from any level of government.\textsuperscript{142} Cincinnati’s amendment does not obviate this concern, despite the Sixth Circuit’s effort to distinguish the situations by focusing on the fact that Amendment 2 was a statewide measure while Issue 3 was a city-wide measure.\textsuperscript{143} Both pieces of legislation represented legislative hurdles not placed before any other group. While Cincinnati’s legitimate governmental interest in the protection of economic resources may demonstrate a rational relationship to the aspect of the legislation that arguably removed any “special status” that gays and lesbians had achieved, the legitimacy of this interest is negated by the fact that the amendment precluded future reinstatement of such ordinances.\textsuperscript{144} This fact undermines the Sixth Circuit’s rationale that Issue 3 represented the majority will of the smallest political unit possible.\textsuperscript{145}

By forcing homosexuals to first push for a repeal of Issue 3 and only then, subsequently, to seek legal protection legislation, Issue 3 is as disruptive as Amendment 2 was in \textit{Romer}. The Sixth Circuit’s effort to distinguish \textit{Romer} from Cincinnati’s Issue 3 based upon the size and political posture of the issues in Cincinnati actually cuts for invalidating Issue 3 because, in reality, Cincinnati’s Issue 3 represented a miniature version of Colorado’s Amendment 2. The same people, interests, barriers, protections, and reasons were found in Cincinnati as in Colorado, only on a smaller scale. In fact:

After these amendments passed, gay people in Colorado or Cincinnati would [both] need a two-thirds majority to obtain legislative protection against discrimination because they would first have to amend the constitution or city charter. At the same time, other groups would simply require a bare majority to create political change, since they would only need to enact more favorable legislation.\textsuperscript{146}

The only significant difference between the two amendments may be the greater availability for redress that may have been present in Cincinnati,

\textsuperscript{142} See id. at 631.
\textsuperscript{143} See \textit{Equality Foundation II}, 128 F.3d at 297 (noting that the Cincinnati amendment was subject to change by the City Council in the normal political process, unlike the repeal of a state-wide amendment as was required with Colorado’s Amendment 2).
\textsuperscript{144} See id. at 296, 300.
\textsuperscript{145} See id. at 297-300.
stemming from the fact that the city's action maintained the possibility of being blocked by the state. The fact remains, however, that, in order to seek protection from discrimination, homosexuals bore a heavier burden than other citizens. No amount of legal interpretation escapes this conclusion, which sits squarely in the text of Article XII of the City Charter of Cincinnati.147

Despite apparent inconsistency with Romer, the Supreme Court denied certiorari after the Sixth Circuit’s second opinion.148 The denial was not without an explicit warning from Justices Stevens, Souter, and Ginsburg not to imply the Court’s position from the certiorari denial.149 Justice Stevens pointed out that the Court relied upon the Sixth Circuit’s construction of the Cincinnati city charter as removing “special protections” for gays and lesbians.150 This position, unfortunately, is at odds with the Court’s decision in Romer in which the Court found “nothing special in the protections Amendment 2 with[held].”151 This inconsistency leaves open the question of the potency of Romer and the Supreme Court’s dedication to it. Furthermore, the contrasting opinions from the Sixth Circuit and the Supreme Court beg the question: Are Kentucky’s four ordinances prohibiting sexual orientation discrimination “special” rights?152

III. CONSTITUTIONAL CHALLENGES TO LAWS PROHIBITING SEXUAL ORIENTATION DISCRIMINATION

With no federal protection against private sexual orientation discrimination,153 state and local governments enacted their own remedies. Currently, eighteen states and approximately 203 localities have taken the

147 See supra note 110 and accompanying text.
149 See id.
150 See id. (Stevens, J., respecting denial of certiorari).
152 See discussion infra Part IV.
initiative to prohibit such discrimination. Typically, such laws prohibit discrimination based upon sexual orientation in areas such as public and private employment, housing, public accommodations, education, credit, and union practices. Passage of such laws has predictably spawned numerous legal challenges, questioning both the legal ability of state and local governments to enact such measures and the effect of such laws on the constitutional rights of others. To date, the Supreme Court has decided two cases addressing the efficacy of state laws prohibiting sexual orientation discrimination: Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston and Boy Scouts of America v. Dale. Both decisions addressed the proper balancing of one party’s free speech claim against another group’s ability to participate in a public accommodation as mandated by a non-discrimination state law. Both times the homosexual party was denied inclusion because of the free speech rights of the protesting group as interpreted by the Court.

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

In Hurley, a group of gay and lesbian marchers requested to march in the Boston St. Patrick’s Day parade. Massachusetts had 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 the group. The organizers claimed that the group communicated a message it did not want to convey by carrying the sign. The parade organizers did not prohibit gay and

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154 See supra notes 14-16 and accompanying text.
158 See infra Part III.A-B.
159 See infra Part III.A-B.
160 Hurley, 515 U.S. at 557.
161 See id. at 561.
162 See id.
163 Id.
164 Id. at 562.
lesbian individuals from marching in the parade as part of other groups, but they did not want people to self-identify as gay and lesbian and simultaneously participate in the parade. Ultimately, the state forced the parade organizers to allow the lesbian and gay group to march, and the organizers challenged the inclusion of the group the following year. Upon review, the U.S. Supreme Court noted the expressive nature of parades and held that the protected expressive element in a parade lay not only in the banners and songs within the parade, but also extended to the choice of participants. 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.

The Court then made the critical distinction in the case. While upholding the validity of the Massachusetts antidiscrimination law, the Court distinguished between the law protecting a gay or lesbian individual's legal right to participate in the parade and the ability of the law to shape and change the organizers' message, which received First Amendment protection. The former was constitutional, the latter not. The Court observed:

[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.

The parade organizers did not dispute that the state antidiscrimination law guaranteed the participation of gay and lesbian individuals, but the

165 See id. at 572.
166 See id. at 561.
167 See id. at 569-70.
168 Id. at 570.
169 See id. at 571-72.
170 See id. at 573.
171 Id.
172 See id. at 572.
organizers claimed that by allowing the gay and lesbian group to participate in the parade with a sign indicating their presence as a unit, it would have, in their opinion, signaled acceptance of homosexuals.\textsuperscript{173} The Supreme Court agreed, stating:

\begin{quote}
[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.\textsuperscript{174}
\end{quote}

Turning to the First Amendment rights of the organizers, the Court reiterated, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'\textsuperscript{175} Addressing the denial of GLIB's marching, the Court stated, "the Council clearly decided to exclude a message it did not like."\textsuperscript{176} The parade organizers, however, had rarely used the selection or exclusion of groups to construct a particular message. The organizers' failure to routinely exercise control over the messages of the marching groups was a fact not lost upon the trial court. The opinion stated that the parade organizers "occasionally admitted groups who simply showed up at the parade without having submitted an application, and [the Council] did not generally inquire into the specific messages" of each group that applied for marching privileges.\textsuperscript{177} 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.\textsuperscript{178} Thus, the organizers retained their constitutional right to control their message sans a homosexual marching unit, despite the Massachusetts law.\textsuperscript{179}

The validity of Massachusetts' antidiscrimination law was not addressed by the Court, yet the ultimate resolution of the case questions the potency of the law. The truly troubling aspect of \textit{Hurley} springs from the Court's assumptions regarding the message communicated simply by the

\begin{itemize}
\item \textsuperscript{173} \textit{Id.} at 574-75.
\item \textsuperscript{174} \textit{Id.} at 574.
\item \textsuperscript{175} \textit{Id.} at 573 (quoting Pac. Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 16 (1986) (plurality opinion)).
\item \textsuperscript{176} \textit{Id.} at 574 (emphasis added).
\item \textsuperscript{177} \textit{Id.} at 562.
\item \textsuperscript{178} \textit{Id.} at 569.
\item \textsuperscript{179} \textit{See id.} at 569-70.
\end{itemize}
presence of GLIB in the parade. GLIB desired not to carry slogan-bearing banners like "Gay Rights Now!" or "We’re Here and We’re Queer," but rather wished only to carry a simple sign indicating their name. 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."

The first response to the Court’s assumption about the presence of GLIB is "Exactly!" What else but social acceptance and equality could have been the motivating factor behind the passage of Massachusetts’s law in the first place? The existence of the law is a testament that the state intends to enforce the principle that gay and lesbian citizens have as much a right to social participation as any other citizen. While the state cannot force individuals to personally accept homosexuality, it can prevent individuals from discriminating against homosexuals and their participation in public accommodations. The Court’s conclusion regarding the message communicated by GLIB’s potential participation in the parade equates to telling an African-American that allowing him to sit at a lunch counter would give the impression he is equal to everyone else and entitled to use and enjoy public accommodations. When placed in such context, the Court’s analysis appears superficial and misplaced.

Secondly, it remains to be seen that the group itself was asking for acceptance in its “message.” The Court noted that GLIB’s goals were to celebrate their identity as open homosexuals, to demonstrate that gay and lesbian individuals existed in the community, and to show solidarity with like men and women participating in the corresponding New York parade. Nowhere, however, within those goals is a solicitation for acceptance by the parade organizers or anyone else for that matter. The Court seemed to conclude presumptively that the group would attempt to communicate a message beyond that of participation. “GLIB understandably seeks to communicate its ideas as part of the existing parade . . . .” There are a myriad of possible messages to be communicated by the group’s inclusion, none of which would be universally understood. At minimum, inclusion of the group would only communicate a message of

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180 See id. 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. See id. at 569.

181 Id. at 574.

182 Id. at 570.

183 Id.
existence. Existence, however, is not a request for acceptance. The group, perhaps, could not care less if anyone accepts them. For the Court to imply a request for acceptance from a group well versed in unacceptance is disingenuous. To infer that they needed or wanted acceptance is perhaps a subconscious result of the Court's internalized, biased approach to a marginalized group. Certainly self-identification does not equal a solicitation for acceptance. While it may express a belief in self-validity, to jump from self-identification to a solicitation for acceptance, as the Court easily did, is an intellectual misstep.

The most damning question left in the wake of the Hurley opinion is how the homosexual group could have ever participated? The answer is that they could only participate if they communicated no message at all or at least communicated a message that the parade organizers would tolerate. Neither of these is a possible answer under the Court's analysis in Hurley. If the presence of a group infers a message of requested acceptance, that group can never not communicate that message.

Despite the multitude of assumptions and stereotypes, the Hurley ruling could at least be rationalized by the fact that the group literally desired to carry a physical sign, albeit one only intending to identify the name of the group. In the Court's next foray into homosexual identity and its concomitant implications with laws prohibiting sexual orientation discrimination, when the gay individual involved carried no sign, the Court handed him one.

**B. Boy Scouts of America v. Dale**

James Dale was an excellent Boy Scout, achieving the rare ranking of Eagle Scout. From Scout to Scoutmaster, no one ever doubted his abilities and talents that served the Boy Scouts of America ("BSA") well for over a decade. Dale's quality of service to the Boy Scouts apparently changed, however, when Dale was photographed for a newspaper article in which he admitted he was gay. In the article, Dale mentioned the need for role models for gay and lesbian youth. He never mentioned his involvement with the Boy Scouts, nor did he claim that gay Boy Scouts would be good role models or good scouts. Weeks later, Dale was informed he was no

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186 *Id.* at 645.
longer a Boy Scout. After requesting why he had been expelled from the group, he was informed that homosexual conduct was incompatible with scouting and its principals. Dale subsequently sued under New Jersey’s antidiscrimination law that prohibited sexual orientation discrimination in public accommodations.

The Supreme Court began its analysis of the Boy Scouts’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.” From the freedom to associate, the Court held, redounds a freedom not to associate. 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.” 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 cannot be achieved through means significantly less restrictive.” Thus, the Court was faced with three questions: (1) Did the Boy Scouts engage in expressive association as to homosexuality?; (2) Would the presence of James Dale impermissibly interfere with the Boy Scouts’s freedom of expressive association?; and (3) Was the Boy Scouts’s freedom of expressive association overridden by state interests in the antidiscrimination law?

The Court described the Scouts as an organization engaged in “instill[ing] values in young people.” Referencing those values, the Boy Scouts claimed that homosexual conduct was “inconsistent with the

187 Id.
188 Id.
189 Id. at 647 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).
190 Id. at 648.
191 Id. (citing New York State Club Ass’n v. City of New York, 487 U.S. 1, 13 (1988)).
192 Id. (quoting Roberts, 468 U.S. at 623).
193 See Id. at 647-61.
194 Id. at 649.
195 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 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, 630 (1996) (Scalia, J., dissenting). Many others, however, will advance that homosexual
In answering their first inquiry, the Court determined that the BSA engaged in "expressive association" concerning homosexuality to reach First Amendment protection.\textsuperscript{201} Admitting that nowhere in the Scout Law or Oath was sexuality mentioned, the Court added that "morally straight" and "clean" are highly subjective.\textsuperscript{202} Despite the Court's admission of ambiguity, the Court relied upon statements in BSA's brief that stated: "[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."\textsuperscript{203} The analysis ends there. Because BSA's brief reflected their belief that homosexuality was neither "legitimate" nor "morally

conduct is very different from the experience or status of being gay or lesbian. Many courts have explicitly recognized no difference when adopting views from the Supreme Court's statement concerning Georgia's sodomy law in \textit{Bowers v. Hardwick}, 478 U.S. 186 (1986). However, the Supreme Court appeared to draw a distinct line in its opinion in \textit{Romer}. No resolution to this debate appears imminent.

\textsuperscript{196} \textit{Dale}, 530 U.S. at 650.

\textsuperscript{197} See \textit{id.} at 645. The preface "active" may shed some light on the expressive identity concept. Since the Boy Scouts 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's policy would not apply to the "closeted" homosexual. This is an interesting conceptual bifurcation of homosexuality, but perhaps it is a necessary one. 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.

\textsuperscript{198} \textit{Id.} at 650.

\textsuperscript{199} \textit{Id.} 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." \textit{Id.} at 649.

\textsuperscript{200} \textit{Id.} at 650. The Scout Law reads: "A Scout is: Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." \textit{Id.} at 649.

\textsuperscript{201} \textit{Id.} at 655.

\textsuperscript{202} \textit{Id.} at 650.

\textsuperscript{203} \textit{Id.} at 651.
straight,” the Court proceeded to find expressive association concerning sexual orientation. As the Dale dissent points out, the Court had never before found expressive association based purely on a statement in a brief to the Court. The Court then reviewed examples of statements that BSA had made concerning homosexuality, but commented that such review was merely “instructive” as to the sincerity of the BSA’s views.

The Court turned to the second, and most intriguing, question: Did James Dale’s presence as a scoutmaster affect the BSA’s message against “homosexual conduct?” From the beginning, the Court made clear it would give deference to the opinion of the BSA as to how Dale’s presence would affect them. The Court noted that Dale was “open” about his homosexuality, was a “gay Scout... leader[ ] in their community,” and “a gay rights activist.” The Court, again without analysis, stated, “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.”

In support of the Court’s belief regarding the message James Dale would force upon the BSA, the Court cited Hurley. The Court’s reliance on Hurley, however, is misplaced. In Hurley, the Court held that a Massachusetts antidiscrimination law impermissibly infringed upon the First Amendment rights of parade organizers. The decision rested upon a distinction the Court drew between the actual parade itself and the “message” embodied in the total parade. The Hurley Court reiterated the

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204 See id.
205 Id. at 685-86 (Stevens, J., dissenting).
206 Id. at 651.
207 Id. at 653.
208 Id. at 651 (citing Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124 (1981)).
209 Id. at 653 (citation omitted). It is unclear how Dale, at the time of his dismissal from the Boy Scouts, was a gay rights activist. Certainly, as the litigation continued, 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 the Boy Scouts’s message, it is irrelevant to the analysis that the majority of Justices viewed him as an “activist” at the time the opinion was authored. In fact, it is patently wrong.
210 Id. (emphasis added).
211 Id. at 653-54.
213 Id. at 572-73.
validity of the antidiscrimination law\textsuperscript{214} and did not question the ability of individual gay and lesbian citizens to participate in the parade.\textsuperscript{215} The parade organizers also denied any attempt to preclude homosexual individuals from participating in the parade.\textsuperscript{216} The dispute in \textit{Hurley} revolved around the participation of a homosexual \textit{group} that would have identified itself during the parade by carrying a sign indicating the name of the group. "[T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner."\textsuperscript{217}

The facts of \textit{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."\textsuperscript{218} Dale's presence in the Scouts more closely reflected that of the marchers in \textit{Hurley} which the Court did not address: openly gay individuals participating in the parade in various, "non-gay" groups.\textsuperscript{219} The parade organizers in Boston had no problem with those marchers, obviously because they perceived no "message" being communicated. The \textit{Hurley} opinion implies 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.\textsuperscript{220}

The Court's reliance on \textit{Hurley} in support of their view is flawed in another respect. The \textit{Hurley} decision turned upon the message desired by the parade organizers in Boston as protected by the First Amendment rather than on the message the Court believed would be inferred by the participation of an identified homosexual group.\textsuperscript{221} The problem was the conflicting

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\textsuperscript{214} \textit{Id.} at 571-72.  \\
\textsuperscript{215} \textit{Id.} at 572.  \\
\textsuperscript{216} \textit{Id.}  \\
\textsuperscript{217} \textit{Id.}  \\
\textsuperscript{218} Boy Scouts of Am. v. Dale, 530 U.S. 640, 689 (2000) (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.").  \\
\textsuperscript{219} See \textit{Hurley}, 515 U.S. at 572. The Massachusetts law was not challenged on the ground that it allowed openly gay individuals to participate in the parade. Rather, the challenge focused on the ability to exclude gay "groups" and not gay individuals. "Petitioners disclaim 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 . . . [T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner." \textit{Id.}  \\
\textsuperscript{220} See \textit{id.} at 571-72.  \\
\textsuperscript{221} \textit{Id.} at 574.
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messages, and, thus, the right to control one's message as guaranteed by the First Amendment trumped the right of the homosexual group requesting inclusion. In Dale, however, it is apparent that the reason for James Dale's dismissal from the Scouts was not about any perceived message. The Court considered Dale's point that the BSA did not expel heterosexual members who did not support the policy against homosexual conduct irrelevant. "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." The Court provides no justification for the difficult distinction it draws on this point, nor does it explain its reasoning. The omission, however, speaks volumes. In truth, the only difference between a heterosexual who opposes an exclusionary policy and a homosexual who opposes an exclusionary policy is sexual orientation. If the BSA's message is one of exclusion, both the heterosexual and homosexual equally interfere with the Scout's ability to express that message by propounding a contrary view. Yet, only the homosexual is excluded from the group. The Court's narrow analysis makes it quite clear that at issue is not message, but rather sexual orientation—a problem supposedly solved by the passage of New Jersey's antidiscrimination law.

Despite the Court's identification of the adverse impact upon the expressive association rights of the Boy Scouts (resulting from Dale's inclusion), the Court next queried whether a compelling state interest warranted such an intrusion. The Court recognized that states have compelling interests in ending gender discrimination, citing Roberts v. United States Jaycees and Board of Directors of Rotary International v. Rotary Club of Duarte. In Roberts v. United States Jaycees, the Jaycees challenged a Minnesota Human Rights Act which prohibited discrimination based upon race and sex, claiming their freedom of association protected their right to discriminate and associate with only those they wish. The Court, however, disagreed: "[i]nfringements on that right may be justified 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." The Court noted that "Minne-

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222 Dale, 530 U.S. at 653 (emphasis added).
223 Id. at 657.
226 Roberts, 468 U.S. at 615.
227 Id. at 623; accord Duarte, 481 U.S. at 546-47.
sota'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.\footnote{228}

The Court in Dale distinguished Roberts, contending that enforcement of the statute in question in those cases "would not materially interfere with the ideas that the organization sought to express."\footnote{229} The Court asked if New Jersey's law placed a "serious burden" on the associational expression of the BSA.\footnote{230} Without analysis, the Court announced, "[w]e have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct."\footnote{231} The Court's reference to "already conclud[ing]" must be its statement that admission of Dale would force the BSA to admit to the world that "homosexual conduct" is a "legitimate form of behavior."\footnote{232} However, as stated earlier, the Court relied on Hurley to reach this conclusion—arguably this reliance is misplaced.\footnote{233} The Court struck down the law as applied to the Boy Scouts after finding Dale's inclusion in BSA placed a significant burden on its expressive association.\footnote{234} With respect 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's rights to freedom of expressive association."\footnote{235}

C. Impact of Hurley and Dale

The Supreme Court in Hurley and Dale imports message after message onto homosexuals to the point that lesbians and gay men come to resemble walking billboards. In Hurley, participation by the homosexual marchers represented a demand for equality and a concession by the parade organizers that a homosexual "lifestyle" was "legitimate."\footnote{236} In Dale, allowing a gay scoutmaster was an immediate challenge to the validity of

\footnotesize{228} Roberts, 468 U.S. at 623.
\footnotesize{229} Dale, 530 U.S. at 657.
\footnotesize{230} Id. at 656.
\footnotesize{231} Id. at 659.
\footnotesize{232} Id. at 653.
\footnotesize{233} See discussion supra notes 211-22 and accompanying text.
\footnotesize{234} See Dale, 530 U.S. at 659.
\footnotesize{235} Id.
\footnotesize{236} See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 574 (1995).}
policies such as "moral straightness" and "cleanliness" as well as an implied assertion by James Dale that homosexuality was "straight" and "clean." Ironically, neither the Boston parade organizers nor the Boy Scouts had any meaningful expression concerning homosexuality prior to the inclusion of homosexuals in the group. Yet, upon inclusion of homosexuals, these groups suddenly found their "message" challenged. And, both times, homosexuals lost, despite the expressed will of their home state in the form of antidiscrimination statutes.

Under this analysis, any civil rights claim homosexuals are ever to make becomes automatically transformed (by the perceived messages) into "a proposal to limit speech in the service of orthodox expression." Hurley and Dale represent a not-so-new trend in constitutional jurisprudence—the inevitable clash between equality and expression. The collision occurs when two groups attempt to occupy the same social vehicle (i.e., a parade or Boy Scout troop) and one group claims the vehicle for expressive purposes and the other group claims the vehicle for identity or equality purposes. Do we favor expression or equality? At best, the Court's jurisprudence has been haphazard. What we do know is that when a group clamoring for equality does so on race or gender grounds, the Court consistently has stood with the equality group and against the expression group. This stance, however, shifts when homosexuals attempt to claim the same societal discursive space. In Dale and Hurley, the Court focused on the damage to the speakers' message with little ink spilled on the equality claims of homosexuals. Rather than evaluating the equality claims under state nondiscrimination laws, the Court proceeded to transform their claims of equality into claims of counter-expression against the very groups into which they sought entrance. Certainly members of the Jaycees felt it improper for women to hold membership, yet the Court found a more compelling societal need to include women in the Roberts decision. On the other hand, members of the Boston parade organizing group and the Boy Scouts felt it inappropriate to include homosexuals, and the Court obviously felt no great compelling societal need to include homosexuals regardless of the expressed will of individual states.

IV. THE "SPECIAL" RIGHTS ARGUMENT

One of the most pervasive policy attacks against laws prohibiting sexual orientation discrimination is to label such laws "special" rights. This

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237 Id. at 579.
238 See Hunter, supra note 184, at 1.
argument is often driven by the view that homosexuality is a chosen behavior rather than an innate individual characteristic, and, thus, individuals should not be allowed to "opt in" to a category of extra protection. Opponents of such laws point to a traditional reprobation of homosexuality and conclude that legal protections that "encourage" such behavior should not exist. Some point to an ever-expanding field of "protected" classes of people and wonder aloud who is not protected. Others blame a growing "victim" mentality in society. Some see a diminishing difference between antidiscrimination laws and affirmative action laws. Still others believe that legal protections for homosexuals mock traditional family values and will lead to the ultimate failure of the family.

Like the origins of homosexuality, however, the line between an "equal" right and a "special" right has yet to be determined. This may be a direct result of public rhetoric having blurred the distinction between "equal" and "special" rights. This is especially troubling when one considers that often the sloganeering and rhetoric surrounding "special" rights will have a more substantial impact on the public-at-large than any legal precedent or theological position. In reality, the issue of "special" rights drives the entire debate concerning gay rights in one form or another, and, thus, deserves attention.

The influence and persuasiveness of this concept has not escaped the courts, including the U.S. Supreme Court. However, what exactly a "special" right is as opposed to an "equal" right has even the courts bewildered. Most often, the difference boils down to differences in perspective and, occasionally, blatant stereotyping and prejudices.

The label of "special" rights will often obfuscate the real aim of a law for a court. As Professor Peter Rubin explains:

One of the reasons the claim of special rights is rhetorically powerful is because it tars antidiscrimination law with the brush of racial and gender preferences. Many Americans believe such preferences amount to discrimination against those who do not receive them, and that they are antithetical to the idea of equal treatment for all.

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240 See id. at 565-67.
242 Rubin, supra note 239, at 566 (emphasis added).
Today, laws prohibiting discrimination based on race, gender, and age largely escape rebuke as “special” rights, though in the past they were similarly attacked. During debate over the proposed Civil Rights Act of 1964, one Senator retorted: “Under a misleading banner labeled ‘equal opportunity,’ proponents . . . would have the Congress enact what in fact and substance is ‘the Special Privilege Act of 1963.’ For rights won at the expense of others’ rights are not rights at all, but special privileges.” The challenge has an eerie character when one considers how readily civil rights laws are contemporarily accepted. Thus, one must ask why issues concerning sexual orientation are experiencing a repeat of history. If all civil rights are “special,” what makes certain efforts valid, while others are invalid? Alternatively, are only antidiscrimination laws aimed at sexual orientation special?

An immediate difference separating sexual orientation from most other identified classes is the debate over “choice” in sexual orientation. Many maintain that a right stemming from a “chosen” behavior unfairly allows those who choose to be homosexual greater, undeserved, and unequal protection over those who do not so choose. Nevertheless, choice alone cannot explain this approach because religion is chosen conduct and has enjoyed historical, as well as constitutional, protection. Moreover, marital status, smoking status, and, to some degree, veteran status are all chosen conduct that have received protected status from various states. Thus, Americans must not be completely antithetical to the idea of protecting something which the individual chooses. There must be another distinction beyond “choice” which makes laws prohibiting sexual orientation discrimination “special” rights.

The impact of antidiscrimination laws can vary greatly, depending on an individual’s perspective. For the individual desiring to discriminate, the antidiscrimination law becomes a prohibition of activity that signals out a group that he or she is now required to treat differently. For the protected individual, the antidiscrimination law ensures not treatment like all others, but only protection from the efforts of those who would discriminate against them. Perhaps, in this way, antidiscrimination laws protecting

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244 Id. at 149 (quoting 110 CONG. REC. 4760 (1964) (statement of Sen. Hill)).
245 Is allowing African-Americans to sit at a lunch counter a “special” right? This question is specifically posed by Karen Engle. See Karen Engle, What’s So Special About Special Rights, 75 DENV. U. L. REV. 1265, 1274-75 (1998).
246 See Rubin, supra note 239, at 573.
gays and lesbians are "special," but this begs the question: Is the right to keep a job, live in a house, or patronize a restaurant free from discrimination anything inherently special? Under this analysis, religious and disability protections must be considered "special," as well as laws regarding gender, age, or race. From this perspective, the only thing "special" about antidiscrimination laws is their necessity to exist.

The proponents of Colorado’s Amendment 2 proclaimed that it did nothing more than deny homosexuals "special" rights. However, almost every antidiscrimination law will be couched in terms of sexual orientation, not homosexuality. Heterosexuality is also a sexual orientation, and, thus, if these type of laws give homosexuals any type of "special" right, they must, by their very language, grant heterosexuals that same "special" right. While no one worries about discrimination based upon heterosexuality, the semantic difference is ultimately important, though routinely ignored. Once both heterosexuals and homosexuals are protected from sexual orientation discrimination, the protection no longer is "special."

A strong case can be made that heterosexuals have been the recipients of "special" rights, using Colorado and Cincinnati as prime examples. Both Colorado’s Amendment 2 and Cincinnati’s Issue 32 imposed barriers to homosexuals seeking legal protection. Neither legislative effort, however, imposed similar burdens on heterosexuals. Under both laws, heterosexuals retained the right to petition for laws prohibiting heterosexual discrimination, while homosexuals were burdened with laws which prohibited any effort to seek legal or legislative redress. If a "special" right is the ability to do something that others cannot or to be granted unequal access or privilege, heterosexuals, not homosexuals, were the recipients of "special" rights in Colorado and Cincinnati. Homosexuals were granted no right or privilege that heterosexuals are denied.

The Romer Court stated that it found "nothing special in the protections Amendment 2 withholds," thus rebuffing the state’s claims that it was merely denying lesbians and gay special rights or privileges. However, James Barnett presents the other side of the coin:

Of course, this statement represents a value judgment not shared by all Americans. The counterargument is that homosexuals already have the same constitutional rights granted to them as any other American, and, if a homosexual is a senior citizen or racial minority, the same constitutional

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248 See supra note 82 and accompanying text.
249 See supra note 110 and accompanying text.
250 Romer, 517 U.S. at 631.
protections afforded all senior citizens and all racial minorities. Any law conferring upon homosexuals a favored status because of their sexual preference is one that grants a "special" right.251

Barnett is correct in the fact that the same constitutional protections apply to homosexuals as any other American, regardless of the fact that application of those rights may be uneven. However, in 1964, was the same not true of African-Americans? The answer is yes, and it quite succinctly points out the error in Barnett’s argument. Barnett’s point would be well-taken if such antidiscrimination laws granted gays and lesbians new rights shared by no one else. For example, laws granting homosexuals the right to steal without punishment would be a “special” right.252 That, however, is not the situation with laws prohibiting sexual orientation discrimination.253 By prohibiting sexual orientation discrimination and not homosexual discrimination, such laws avoid creating uneven rights. While few could deny that the impetus of such laws is the protection of a disfavored minority, the language utilized in such efforts effectively prevents the granting of a “special” right. Commentators such as Barnett frequently overlook this powerful legislative symmetry.

Far from labeling laws which protect homosexuals as “special,” some state courts have found the protection constitutionally mandated. In the landmark case Gay Law Students Ass’n v. Pacific Telephone & Telegraph Co.,254 the California Supreme Court held that admission of one’s homosexuality constituted a “political activity” as defined in California’s labor code.255 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

251 Barnett, supra note 96, at 655-56 (drawing upon Scalia’s dissent in Romer, 517 U.S. at 644).
252 Engle poses a similar problem. See Engle, supra note 245, at 1279.
253 Admittedly, Barnett’s point gains validity when discussing affirmative action laws. However, a great majority of laws prohibiting sexual orientation discrimination explicitly state that no quotas or preferential treatment is designed.
255 See id. at 610.
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 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.256

The court's opinion incorporated sexual orientation into the protections offered by California's Labor Code, which previously had prevented employers from interfering in the rights of employees to engage in political activity.257 Protections were subsequently extended to "closeted" homosexuals.258 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.259 Implicit from the fear of discovery that the court acknowledges is the recognition of the unique status that being open about homosexuality achieves, concomitant with its social, political, and economic consequences. While few courts have adopted this approach, the reasoning utilized by the court is compelling when one considers the true nature and, more importantly, the consequences of an individual's openness regarding her or his homosexuality. 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,"260 and that Rowland's comments involved her in the political debate regarding sexual orientation.261

Ultimately, there is no resolution to the special rights argument. What should be realized, however, are the numerous fallacies supporting many of the arguments advanced by those labeling antidiscrimination efforts as

256 Id. (citations omitted).
257 See CAL. LAB. CODE § 1102 (West 1989).
259 See Gay Law Students Ass'n, 595 P.2d at 610.
261 See id. at 1012.
“special.” Unfortunately, the rhetoric around “special” rights too often obfuscates the real issues. Those on both sides of the special rights argument should be ever-vigilant to ensure that biases and prejudices do not overshadow the substantive issues surrounding laws prohibiting sexual orientation discrimination.

CONCLUSION

The moral, ethical, social, and political tensions surrounding the issue of sexual orientation are reflected in a judicial schizophrenia that respects the ability to protect homosexuals from discrimination, yet dismisses such protections once challenged, with a rapidity nowhere found in analogous cases regarding issues of racial and gender discrimination. In Hurley and Dale, the Supreme Court adopted, perhaps unintentionally, the approach of the Boston parade organizers: if you are homosexual, you can be in the parade, but do not let anyone know who you are. It is laudable to protect the ability of state and local governments to pass laws prohibiting sexual orientation discrimination as the Romer Court did, but opinions such as Dale and Hurley undermine such efforts by relegating them to legislative nihilism. If a law does not work, why have the law? Would we ask racial minorities or women to hide the very characteristic we choose to protect?

Perhaps buttressing the development of the case law thus far has been the notion that we are dealing with “special” rights. Ultimately, such laws may receive little respect or due enforcement until the time when such efforts are considered “equal” rights. That process is surely only a function of time. In the meantime, however, the hope must be that the sheer humanity of things as elementary as a home or a job will stand in defense of laws prohibiting sexual orientation discrimination.

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