



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

Sheryl Buske

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

Recommended Citation

Sheryl Buske, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 6 DePaul J. Art, Tech. & Intell. Prop. L. 125 (1995)

Available at: <https://via.library.depaul.edu/jatip/vol6/iss1/11>

This Case Notes and Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

CASE ANALYSES

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

I. INTRODUCTION

In the recent and controversial case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,¹ the United States Supreme Court unanimously held that a private parade organizer could not be compelled to accept a group whose message it disagreed with as a parade participant. Specifically, the Court held that to force the parade organizer, the South Boston Allied War Veterans Council (“Council”), to include a gay and lesbian group in the parade violated the organizer’s First Amendment right of free speech in that it compelled speech the Council did not choose to make. This note critiques the Court’s opinion and argues that because equality became the primary constitutional value as a result of the passage of the Reconstruction Amendments, the focus of the First Amendment was subsequently shifted from protection of the dominate culture to that of the subordinate culture. Thus, the Supreme Court’s protection of the Council’s First Amendment rights ignores the shift in the focus of the First Amendment which is now intended to protect subordinated groups such as the gay and lesbian association in this case.

II. LEGAL BACKGROUND: FIRST AMENDMENT LAW APPLIED TO PARADES

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”² “A parade is, by its nature, a pristine form of speech.”³ Thus, if “peaceful and orderly, [parades] fall well within the sphere of conduct protected by the First Amendment.”⁴ Indeed, as one commentator questioned, what could be “a more definitive and graphic way for someone to manifest himself to the world than to march down the street . . . displaying his allegiances for all to see[?]”⁵ From this premise, then, springs the notion that

1. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995).

2. U.S. CONST. amend. I.

3. *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 366 (S.D.N.Y. 1993).

4. *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969).

5. Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73

public streets “have immemorially been held in trust” for purposes of “communicating thoughts between citizens.”⁶

This tradition notwithstanding, citizens, in fact, do not have free reign to use the streets and parade whenever or however they please. Public streets, even when characterized as the “quintessential ‘public forum’”, are still subject to government regulation.⁷ The government may constitutionally impose reasonable time, place and manner regulations on the use of streets.⁸ For example, the Supreme Court has condoned licensing schemes that require would-be parade organizers to obtain parade permits.⁹ The government may not, however, discriminate in its decision to grant or withhold permits on the basis of the content of that expression.¹⁰ The government has no authority to withhold parade permits, consequently restricting free speech, because of the parade’s message, ideas, subject matter or content.¹¹ However, once a permit is granted, would-be organizers are entitled to proceed without interference.¹²

III. HURLEY V. IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON¹³

A. *The “Evacuation-St. Patrick’s Day Parade”*

Boston’s annual “Evacuation-St. Patrick’s Day Parade” (“the Parade”) is an event of long standing in the city. The Parade commemorates one of the first military victories of the Revolutionary War — the retreat of the royal troops and Loyalists from Boston Harbor in 1776.¹⁴ As the story goes, General George Washington called on the patron saint of Ireland and used “St. Patrick” as the codeword among his troops the day of the retreat.¹⁵ Thus, the Parade commemorates this historic event.

Over the past hundred years or so, March 17th, the date fixed for “Evacuation Day”, has been parlayed by Boston’s Irish community into a St. Patrick’s Day celebration as well.¹⁶ The principle event is the Parade which typically attracts

B.U. L. REV. 791, 797 (1993). Professor Yackle’s article provides a comprehensive discussion of First Amendment free speech doctrine within the context of “parade law.”

6. *Id.* at 797 (quoting *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 515 (1939)).

7. Yackle, *supra* note 5, at 797.

8. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976)(citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1971)). As one court noted, a citizen does not have the right to hold a meeting “in the middle of Times Square at the rush hour.” *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

9. *Cox*, 379 U.S. at 558.

10. *See Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Collins v. Chicago Park Dist.*, 460 F.2d 746 (7th Cir. 1972).

11. *Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976) (citing *Mosley*, 408 U.S. at 95).

12. Yackle, *supra* note 5, at 801-02.

13. 115 S. Ct. 2338 (1995).

14. *Id.* at 2341. For comprehensive discussion of the history of the Boston Parade as well as the events leading to the Irish-American Gay, Lesbian and Bisexual Group of Boston’s lawsuit against the Council, *see Yackle, supra* note 5, at 834-50.

15. *See Yackle, supra* note 5, at 834-50.

16. Chris Reidy, *The Greening of America: St. Patrick’s Day Has Become More US Than Irish*,

more than 20,000 marchers, legions of floats and marching bands as well as more than 1,000,000 spectators.¹⁷ The parade travels through Boston's South End, affectionately known as "Southie," and is considered by some to be a "cultural artifact" of the predominately blue collar neighborhood.¹⁸

The Parade was once formally sponsored by the City of Boston.¹⁹ Formal city sponsorship ended, however, in 1947, when the mayor authorized the Council to organize and conduct the Parade.²⁰ The Parade has continued as a much loved annual event, even in the absence of official city sponsorship.

B. Irish-American Gay, Lesbian and Bisexual Group of Boston and its Claim

In 1992, several lesbian women and gay men formed an organization known as the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB").²¹ Shortly after its formation, GLIB decided to participate in the 1992 Parade.²² The group's desire to participate in the Parade stemmed from their desire to "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade."²³ Barbara Kay, a representative for GLIB, requested and received registration information from the 1992 Parade's Grand

BOSTON GLOBE, 14, 1993, at A19. See also Yackle, *supra* note 4, at 835.

17. *Hurley*, 115 S. Ct. at 2341. The 1992 and 1993 Parades were comprised of a variety of marchers, floats and marching bands, including among others: U.S. Marine Corps Color Guard; Troy High School Marching Band; Army National Guard; U.S.S. Constitution Color Guard and Pikemen; U.S. Air Force Color Guard; U.S. Coast Guard Color Guard; Boston University, Marine and Navy ROTC; South Boston Against Drugs Float; Marshfield High School Marching Band; Hallamore Clydesdale Horses; Marion Manor Seniors Float; Leukemia Society Float; POW/MIA Float; South Boston Baptist Bible Trolley Float; Irish Malden Leprechaun Float; Irish Currah Rowing Club Float; Miss South Boston; Miss Ice-O-Rama; Miss Jr. Ice-O-Rama; Tin Can Sailors; Put America To Work Float; Boston Police Drum & Bagpipes; Lexington Minutemen and the South Boston Yacht Club Float. Brief for Petitioner at 38aa and 47aa, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S.Ct. 2338 (1995) (No. 94-749).

18. Yackle, *supra* note 5, at 835.

19. Brief for Respondent at 4, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995) (No. 94-749).

20. The South Boston Allied War Veterans Council is a "private, unincorporated, non-profit, charitable organization of elected and appointed representatives from American Legion, Disabled Veterans, and Veterans of Foreign Wars Posts in South Boston." Brief for Petitioner at 4, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995) (No. 94-749).

21. *Hurley*, 115 S. Ct. at 2341. See also Petitioner's Brief at 3-4, *Hurley* (No. 94-749).

22. *Hurley*, 115 S. Ct. at 2341. See also Petitioner's Brief at 3-4, *Hurley* (No. 94-749).

23. *Hurley*, 115 S. Ct. at 2341. The dispute surrounding the New York St. Patrick's Day Parade involved the sponsoring organization's, the Ancient Order of Hibernians (AOH), refusal to allow a gay organization, the Irish Lesbian and Gay Organization (IGLO), to participate in the 1991 parade. A compromise was reached in 1991, and IGLO marched in the parade. However, AOH refused to allow IGLO to march in the 1992 parade. It was partly in support of IGLO's exclusion from the 1992 parade that GLIB was formed. For a comprehensive discussion of the controversy surrounding the New York City parade, see Yackle, *supra* note 5, at 812-34.

Marshall, Thomas Lyons.²⁴ GLIB completed the form and applied to march in the Parade.²⁵ Prior to voting on GLIB's application, the Council requested a meeting with GLIB representatives.²⁶

GLIB and the Council differed as to what transpired at their initial meeting. Lyons maintained that GLIB was merely asked for assurance that it would not act in a confrontational manner and that GLIB refused.²⁷ GLIB, on the other hand, maintained that it was never asked for any assurances.²⁸ Within a few days, the Council voted to deny GLIB's application to march in the Parade, citing "public safety concerns" and doubts regarding GLIB's legitimacy.²⁹

At the mayor's urging, the two groups met again and agreed that if permitted to participate GLIB would limit its representation to twenty-five marchers carrying GLIB banners.³⁰ In addition, GLIB gave its assurance that it would conduct itself appropriately.³¹ Nevertheless, after reconsideration of GLIB's application, the Council voted unanimously³² to exclude GLIB from the Parade. The Council's decision was based solely on its doubts as to GLIB's legitimacy.³³

GLIB immediately filed suit against the Council and the City of Boston. GLIB first argued that because the Parade was itself a public forum, GLIB had a First Amendment right to participate and could not be excluded.³⁴ Furthermore, GLIB argued that their exclusion violated the state public accommodation law which prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."³⁵ Finally, GLIB ar-

24. Yackle, *supra* note 5, at 839.

25. Petitioner's Brief, *Hurley* (No.94-749).

26. Yackle, *supra* note 5, at 839-40.

27. Petitioner's Brief at 25-26, *Hurley* (No. 95-749) (quoting Grand Marshall Lyons as saying "[Barbara Kay] looked straight at me and she said, 'I cannot, but I will guarantee you that I would not do anything.'" See also Yackle, *supra* note 5, at 840.

28. Petitioner's Brief, *Hurley*, (No. 94-749); Respondent's Brief, *Hurley*, (No. 94-749).

29. *Hurley*, 115 S. Ct. at 2341. See also Yackle, *supra* note 5, at 840; Marc Malkin, *St. Pat's Parade Controversy Moves Its Way Into Boston*, BAY WINDOWS, Mar. 5-11, 1992, at 1, 16. Some commentators have suggested that the catalyst for the dispute over the gay and lesbian organization's participation in the Parade may have been caused by a demonstration of gay activists in the summer of 1990. During that summer, ACT-UP/Boston, a gay activist organization, protested the ordination of several priests at a church in the South End. Protestors were accused of shouting obscenities and throwing condoms at the priests and their families. According to some accounts, the Catholic community of Southie was profoundly offended and resolved to resist gays and lesbians from participating in the community. Yackle, *supra* note 5, at 838.

30. Yackle, *supra* note 5, at 841.

31. *Id.* Professor Yackle suggests that the compromise was controversial within the gay community where Kay was criticized for condoning the stereotype that homosexuals are violent and not dispelling unfounded fears that the citizens of South Boston would respond to GLIB marchers with violence. *Id.*

32. Petitioner's Brief at 15, *Hurley* (No. 94-749).

33. Yackle, *supra* note 5, at 843. See also Don Aucoin, *Veterans Bar Gay Group From St. Patrick Parade*, BOSTON GLOBE, Mar. 10, 1992, at 1.

34. Yackle, *supra* note 5, at 843.

35. *Hurley*, 115 S. Ct. at 2341 (citing MASS. GEN. LAWS ANN. ch. 272, § 98 (West 1990)).

gued that the Council's reasons for GLIB's exclusion were pretextual, and moreover, the Council's primary reason for excluding GLIB was due to the sexual orientation of GLIB's members.³⁶

In response, the Council maintained that the Parade was a private event rather than a public forum and did not constitute a public accommodation under the state statute.³⁷ Furthermore, the Council argued that the First Amendment granted them the right to control the message of the Parade by deciding who would be permitted to participate.³⁸ Judge Zobel, of the Massachusetts Superior Court, rejected the Council's position and issued a temporary restraining order prohibiting the Council from excluding GLIB from the Parade.³⁹ Under the court order, twenty-five members of GLIB marched in the 1992 Parade.⁴⁰ Although the marchers were met by both support and criticism from the crowd, most described GLIB's participation as "uneventful."⁴¹

In December 1992, the Council applied for the city permit to conduct the 1993 Parade.⁴² The Council's application was granted on the condition that it cooperate with the police department in developing a "safety plan."⁴³

The Council, however, denied GLIB's request for a 1993 Parade Registration Form, claiming that groups with sexual themes conflicted with the Parade's religious and social values.⁴⁴ Thereafter, GLIB amended its still-pending 1992 complaint alleging that the Council was merely adding to its list of pretextual reasons for excluding GLIB.⁴⁵ Additionally, GLIB argued that the City of Boston, as evidenced by its "conditional" permit, was actively participating in the planning of the Parade.⁴⁶ In response, the Council maintained its previous position and attempted to counter GLIB's state action argument on the grounds that it had declined financial subsidies from the City.⁴⁷ Pending trial, Judge Zobel granted a preliminary injunction compelling the Council to permit GLIB to

36. *Id.* at 2342.

37. *Id.*

38. *Id.*

39. *Id.* at 2341 (citing App. to Pet. for Cert. B3 and n. 4).

40. Yackle, *supra* note 5, at 845.

41. *Hurley*, 115 S. Ct. at 2341, (citing App. to Pet. for Cert. B3 and n. 4). See also Margery Eagan, *Law Must Work Equally For All, Unless You're in Massachusetts*, BOSTON HERALD, Jan. 2, 1994, at 6 (describing parade spectators as including young parents with children holding signs that read, "God Said Kill Faggots," teenagers who threw beer at GLIB marchers and screamed obscenities, other young parents shaking the hands of GLIB marchers and grandparents flashing the "thumbs-up" sign).

42. Petitioner's Brief at 4, *Hurley* (No. 94-749).

43. Yackle, *supra* note 5, at 846. The City of Boston was apparently concerned that it was "reasonable to expect" that GLIB marchers might encounter hostility from spectators or other marchers, and the situation warranted "safety plans." See also Laura Brown, *Gays Promise Court Suit In Battle Over Parade Ban*, BOSTON HERALD, Mar. 6, 1992, at 1. (attributing insistence on behalf of the Council that GLIB's inclusion in the Parade "posed a considerable safety risk, even with a police escort").

44. *Hurley*, 115 S.Ct. at 2341. See also Petitioner's Brief at 4, *Hurley* (No. 94-749).

45. Yackle, *supra* note 5, at 847.

46. *Id.*

47. *Id.* at 848.

march in the 1993 Parade.⁴⁸

C. GLIB's Victory in the Lower Courts

The trial court held that GLIB was “entitled to participate in the Parade on the same terms and conditions as other participants.”⁴⁹ In reaching its conclusion, the court first rejected the Council’s contention that the parade was “private,” holding instead that “the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event.”⁵⁰ Additionally, the court reasoned that because the Parade had travelled the same route along public streets for forty-seven years providing entertainment, amusement and recreation to participants and spectators alike, it fell within the statutory definition of a “public accommodation.”⁵¹ Finally, unable to “discern any specific expressive purpose which entitled the Parade to protection under the First Amendment,” the court rejected the Council’s argument that the First Amendment protected its right to control the message of the Parade.⁵² Instead, the court found the Council’s argument to be a pretext for its position that “GLIB would be excluded because of its values and its message, i.e., its members’ sexual orientation.”⁵³

48. Petitioner’s Brief at 5, *Hurley* (No. 94-749).

While GLIB’s case was working its way up to the United States Supreme Court, rather than admit GLIB, the Council canceled the 1994 Parade and led a short protest motorcade down the traditional route. See David Weber, *Court Ruling Dooms Southie Parade*, BOSTON HERALD, Mar. 13, 1994 (quoting John “Wacko” Hurley, Parade organizer and spokesperson, as declaring: “[w]e are not going to be dictated to by any radical group.”); Jules Crittenden, *Parade Leaders’ Irish Is Up Ruling For Gays Prompts Cancellation*, BOSTON HERALD, March 13, 1994 (quoting John “Wacko” Hurley as saying, “[t]hey’re not going to shove anything down our faces that is not our traditional values.”). In 1995, the Council succeeded in having the Parade structured in such a way that the United States district court approved it as a “protest.” The Council severely limited the number of participants and displayed black flags to symbolize what they claimed were their parade themes: family values and a protest against earlier court rulings that had allowed GLIB to march in the 1992 and 1993 Parades. See Puga, *supra* note 48, at 3.; As a result of the protest, the city of Cambridge, Massachusetts, held a St. Patrick’s Day Parade in which it welcomed GLIB and other gays and lesbians. See Pamela Ferdinand, *Irish Parade in Cambridge to Accent Unity*, BOSTON GLOBE, Jan. 21, 1995, at 15. (quoting local businessman as saying, “Cambridge has a very diverse population. You could never pull an exclusionary thing here.”). The 1995 “Parade/Protest” resulted in what one commentator referred to as a paradox: GLIB could be excluded in 1995 since the Council was protesting the fact that they were forbidden from excluding GLIB in 1992 and 1993. See Michael Grunwald, *Powerful Legal Tradition Decided Parade’s Fate*, BOSTON GLOBE, Jan. 19, 1995, at 21. *But see also*, Petitioner’s Brief, *Hurley* (No. 94-749) (commenting on the “irony” that the court perpetuated protest and divisiveness under the goal of being “inclusive”).

49. *Hurley*, 115 S. Ct. at 2342 (citing App. to Pet. for Cert. B27). The trial court dismissed the case against the City of Boston because there was no state action.

50. *Id.* (citing App. to Pet. for Cert. B6). In support of its conclusion, the Court noted that the Council had no written criteria or particular procedures for accepting applicants, the Council occasionally voted on new applications in batches, the Council had occasionally admitted groups who simply showed up at the Parade without having submitted applications, and the Council did not inquire into the views of any applicants. The Court noted that the only common theme among participants and the sponsors was their public involvement with the Parade.

51. *Id.* at 2341 (citing MASS. GEN. LAWS ANN. ch. 272, § 92A (West 1990)).

52. *Id.* at 2342.

53. *Id.* (citing App. to Pet. for Cert. at B4, n. 5, citing Tr. of Closing Arg. 43, 51-52 (Nov. 23,

Thus, the trial court concluded that the Council did not have a constitutionally protected First Amendment right and that the Parade was a public recreational event subject to the state public accommodation law.⁵⁴ Accordingly, the trial court concluded, and the Supreme Judicial Court of Massachusetts later affirmed,⁵⁵ that GLIB was entitled to march in the Parade.

D. The Supreme Court Decision

The United States Supreme Court framed the issue as “whether the requirement to admit a parade contingent expressing a message not of the private organizers’ own choosing violates the First Amendment.”⁵⁶ The United States Supreme Court unanimously answered in the affirmative and held that the state court’s application of the state public accommodation law requiring GLIB’s inclusion in the Parade violated the Council’s First Amendment rights.⁵⁷ The Court first determined that a parade is a form of expression, and thus, the Council’s message was entitled to constitutional protection. Second, the Court determined that the state public accommodation law was within the state’s power and did not violate the Constitution. Finally, the Court determined that to interpret of the state public accommodation law as requiring the veterans to include GLIB within the Parade violated the Council’s First Amendment rights.

In the first step of the Court’s analysis, it declared that because the word “parade” indicates that the marchers are making some sort of “collective point” to each other as well as spectators, parades are a form of expression and not just motion.⁵⁸ Thus, according to the Court, the protection that attaches to a parade includes not only its banners and songs, but also the message intended by its participants.⁵⁹

Examining the expressive value of GLIB’s participation in the Parade, the Court noted that GLIB was formed for the very purpose of marching in the Parade to celebrate its members’ identity as gay, lesbian or bisexual individuals of Irish descent.⁶⁰ Thus, GLIB’s participation was as “equally expressive” as

1993)).

54. *Id.*

55. *Irish-American Gay, Lesbian and Bisexual Group of Boston v. Boston*, 636 N.E.2d 1293, 1295-1298 (1994).

56. *Hurley*, 115 S. Ct. at 2343.

57. *Id.* at 2341. As an initial matter, the Court asserted its constitutional duty “to conduct an independent examination of the record as a whole, without deference to the trial court” because “the reaches of the First Amendment are ultimately defined by the facts it is held to embrace.” *Id.* at 2344.

58. *Id.* at 2345.

59. *Id.* The Court also noted other factors which do not affect the protected status of parades: the message need not be narrow or succinct to be entitled to constitutional protection; constitutional protection is not forfeited merely because the speaker combines “multifarious voices” or fails to edit them in such a way as to produce a single message; nor must the speakers’ communication be entirely original. *Id.*

60. *Hurley*, 115 S. Ct. at 2346.

other participants.⁶¹ Accordingly, the Court found it “understandable” that GLIB would seek to communicate its ideas in the existing Parade rather than organize its own.⁶²

The Court’s second step was to consider Massachusetts’ public accommodation law. After summarizing the history of the Massachusetts common law and its later codification, the Court concluded that the state legislature’s continued expansion of the common law has led to the prohibition of discrimination on the basis of “race, color, religious creed, national origin, sex, sexual orientation . . . , deafness, blindness or any physical or mental disability or ancestry” in “the admission of any person to, or treatment in any place of public accommodation, resort or amusement.”⁶³ The Court found the statute to be within the State’s power and inviolate of the First or Fourteenth Amendments.⁶⁴

Furthermore, the Court concluded that, on its face, the statute did not target speech or discriminate on the basis of content;⁶⁵ rather, the statute focused on prohibiting the act of discrimination against individuals in the provision of publicly available goods, privileges and services.⁶⁶

Finally, the Court considered the “peculiar way” in which the statute was enforced in this case.⁶⁷ The enforcement issue centered on the participation of individuals distinctly identified as gay, lesbian or bisexual, not simply as individuals marching in the parade.⁶⁸ According to the Court, because the message of each individual group affects the overall message of the organizers, requiring the Council to permit GLIB to march in the Parade essentially altered the expressive content of the Parade.⁶⁹ Thus, the Court concluded that the application of the statute in this case violated the “fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”⁷⁰

The Court distinguished *Turner Broadcasting v. FCC* which GLIB had relied on two grounds.⁷¹ First, the Court rejected GLIB’s contention that, like the cable operators in *Turner Broadcasting*, the Council was merely a “conduit” for speech of parade participants “rather than itself a speaker” and subsequently without First Amendment protection.⁷² The Court rejected GLIB’s analogy and

61. *Id.*

62. *Id.*

63. *Id.* (CITING MASS.GEN.LAWS ANN. ch. 272 § 98 (West 1990)).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 2347.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Hurley*, 115 S. Ct. at 2348 (citing *Turner Broadcasting v. FCC*, 114 S.Ct. 2445 (1994))(The Supreme Court held that, under intermediate scrutiny, the Cable Television Consumer Protection and Competition Act of 1992, requiring cable television operators to carry local broadcast stations, did not violate the cable operators’ First Amendment rights)).

72. *Id.*

reasoned that while only a small risk existed that cable viewers would assume that the broadcast stations carried on a cable system conveyed ideas or messages endorsed by the cable operator, GLIB's participation in the Parade would likely be perceived as resulting from the Council's determination that GLIB's message was worthy of presentation and even possibly supported by the Council.⁷³

The Court further distinguished *Turner Broadcasting*. The Court reasoned that in the cable operator scenario, there is an inherent possibility of monopolistic autonomy that could result in some speakers being "shut out."⁷⁴ In the Court's view, it is the existence of this possibility which gives credence to the "government's interest in limiting monopolistic autonomy in order to allow for the survival of all broadcasters who might otherwise be silenced and consequently destroyed."⁷⁵ The Court, however, found no comparable assertion in this case; there was no basis for a claim that some speakers would be destroyed in the absence of enforcement of the public accommodation law.⁷⁶ The Court did concede that the size and success of the Parade made it an "enviable vehicle" for GLIB, but that fact alone, without more, failed to support a claim that the Council had a monopoly over access to spectators.⁷⁷ Finally, the Court noted that since GLIB could presumably organize its own parade, GLIB had not shown that the Council had the capacity to "silence the voice of competing speakers."⁷⁸

In conclusion, the Court noted that "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own."⁷⁹ While disavowing any particular view as to the Council's message, the Court cautioned that mere disapproval of a private speaker's statement is insufficient for compelling the speaker to alter the message by including one that is more acceptable to others.⁸⁰

IV. ANALYSIS

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.⁸¹

73. *Id.*

74. *Id.* at 2349.

75. *Id.*

76. *Id.* at 2350.

77. *Id.* at 2349.

78. *Id.* (citing *Turner Broadcasting v. FCC*, 114 S.Ct. 2445, 2469 (1994)).

79. *Id.* at 2350.

80. *Id.* at 2351.

81. U.S. CONST. amend XIV, § 1.

In *Hurley*, the United States Supreme Court held that requiring the Council to include GLIB impermissibly altered the Council's message. Specifically, the Court declared that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'"⁸² Consequently, as several commentators have wondered, when a group seeks to participate in a parade in which it is unwelcome, one response appears to be to schedule separate parades at different times or locations to provide each group with a forum.⁸³ This is, in fact, exactly what the United States Supreme Court suggested in *Hurley* when it noted that GLIB presumably had a "fair shot" at obtaining its own parade permit. Unfortunately, the Court's response ignores the significance of this Parade to GLIB. As one of the largest St. Patrick's Day Parades in the country, participation offered GLIB the opportunity to join in a community event as equal citizens that could not be matched by an alternate parade on a different day. This note examines the Supreme Court's "separate but equal" suggestion in light of the argument for equality as the primary constitutional value and concludes that it is GLIB's First Amendment rights, rather than the Council's, that are entitled to protection.

A. *The Reconstruction Amendments: Making Equality the Primary Constitutional Value*

In *Hurley*, the United States Supreme Court held that requiring the Council to include GLIB in the Parade violated the Council's First Amendment right to choose the content of its message. The Court's response is insufficient because it fails to consider the reconceptualization of the First Amendment that occurred as a result of the passage of the Reconstruction Amendments which focused on notions of equality.⁸⁴ The Fourteenth Amendment altered the original Constitution and elevated equality to the most important constitutional value.⁸⁵ Thus, within this new paradigm of equality, free speech depends on individuals pos-

82. *Hurley*, 115 S. Ct. at 2347 (citing *Pacifica Gas & Electric Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986)).

83. Yackle, *supra* note 5, at 802. See also Jeff Jacoby, *Whose Parade? Whose Message?*, BOSTON GLOBE, May 2, 1995, at 15 (arguing that from the outset, GLIB chose to pursue a legal battle rather than exercise its other option — holding its own parade).

84. See generally Akhil Reed Amar, *The Case of the Missing Amendments: RAV v. City of St. Paul*, 106 HARV L. REV. 124 (1992) [hereinafter Amar, *Missing Amendments*] (arguing that free speech rights should be construed in light of the reconstruction); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131 (1991) (arguing for a unified reading of the constitution); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193 (1992) (arguing that the Fourteenth Amendment reflected a shift in focus to represent outsiders); Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337 (1987) (arguing that the Reconstruction Amendments significantly altered the original Constitution, resulting in a new constitution based on notions of equality); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case For Applying Employment Discrimination Laws To Religion*, 81 CORNELL L. REV. (forthcoming 1995) (arguing that as the primary constitutional value should be equality, employment discrimination laws should be applicable to religious employers).

85. Rutherford, *supra* note 84.

sessing an equal voice.⁸⁶

Following the Civil War and the end of slavery, the framers of the Fourteenth Amendment set out to critically alter the original Constitution.⁸⁷ With the passage of the Reconstruction Amendments, the very meaning of the Constitution was forever changed.⁸⁸ As Professor Jane Rutherford argued, “[a]mendments are more than mere additions to the Constitution. They are, by definition, changes, not addenda. Accordingly, newer amendments change the meaning of the prior document.”⁸⁹

Furthermore, Justice Thurgood Marshall argued in his provocative article that a new and different constitution was created by virtue of the Reconstruction Amendments:

While the Union survived the Civil War, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the [F]ourteenth [A]mendment, ensuring protection of the life, liberty and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws.⁹⁰

Thus, a new paradigm had been created which focused on the precedence of individual rights over states’ rights, and government action was to be judged by its impact on equality.⁹¹

B. “Insiders” and “Outsiders”

Such a radical change in the Constitution required a new interpretation of the original language. As Professor Amar argued:

[T]he original First Amendment reflected, first and foremost, a desire to protect relatively popular speech critical of unpopular government policies. The Fourteenth Amendment shifted this center of gravity toward protection of even un-

86. *Id.*

87. See *supra* note 84; For a comprehensive discussion of the nation’s history in the context of insider/outsider analysis, see Jane Rutherford, *supra* note 84. In short, Professor Rutherford argues that rejection of the status of outsiders and the desire for fuller participation lead the colonists to revolt and separate from England. *Id.* Yet, in order to attack the divine right of kings to rule, the colonists had to substantiate their own authority to rule as equal to the monarch’s. *Id.* Thus, asserting their independence from England, the colonists couched their claim in terms of equality and declared that “all Men are created equal.” *Id.*

However, following their success in the Revolutionary War, the founding fathers ceased to view themselves as “outsiders.” *Id.* Indeed, they were now influential and affluent “insiders.” *Id.* Thus, their original demand for equality was replaced by a governmental structure that was designed to protect private property and ward off factionalism and individual interests. *Id.*

Furthermore, while notions of equality were intricately tied to the founding, at the time, women and African-Americans were not only disenfranchised but also considered the property of others. *Id.* This was quite obviously in contradiction with the notions of equality that had supported the very idea of the social contract. *Id.* Consequently, egalitarian pressures rose in the form of the abolitionist and women’s movements. *Id.*

88. Rutherford, *supra* note 84.

89. *Id.*

90. Marshall, *supra* note 84, at 1340.

91. Rutherford, *supra* note 84.

popular, eccentric, “offensive” speech, and of speech critical not simply of government policies, but also of prevailing social norms.⁹²

Thus, the purpose of the First Amendment should be reinterpreted as providing protection for not only the dominate culture, the “insiders”, but also for subordinated groups, the “outsiders.”⁹³

Historically, the people on the outside have primarily been members of racial, religious and ethnic minorities.⁹⁴ As outsiders, these people were believed to be “unqualified for full membership in the community of equal citizens.”⁹⁵ Yet, it is only through equal participation that outsiders will ever cross the boundary from the subordinated group to the dominate culture. Only if subordinated groups are permitted equal access and participation in all aspects of the community will their opinions be affirmed as having value and will they be acknowledged as equal members of the community.

Deeply entrenched in a system that subordinates outsiders is the denial of their voice.⁹⁶ Silenced, outsiders are prevented from contributing to the social definition of other people as well as their own self-definition.⁹⁷ Consequently, outsiders are prevented from participating equally in the community. Hence, when a subordinated group refuses to be silenced and attempts to claim equal citizenship through expression, they threaten the established identities of the individual members of the dominant group.⁹⁸

C. The Court’s “Separate but Equal” Inspired Suggestion That GLIB Hold Its Own Parade Subordinates GLIB to “Outsider” Status, Thereby Denying Their Equality

In *Hurley*, a unanimous Court held that forcing the Council to accept GLIB as a Parade participant impermissibly altered the Council’s speech. In effect, the Court made the determination that it was the Council’s First Amendment rights that must prevail. In so doing, the Court relegated GLIB, as well as other gay, lesbian and bisexual individuals across the country, to outsider status. In this instance, the Court said that the rights of a small group of gay, lesbian and bi-

92. Amar, *Missing Amendments*, *supra* note 84 at 152-53.

93. *Id.* at 153-54. Professor Amar suggests that the paradigm speaker under original First Amendment intent would be someone like John Peter Zenger — a popular publisher intent on establishing sympathy for his anti-government message. On the other hand, the paradigm speaker under the First Amendment reconstructed in notions of equality would be someone like Harriet Beecher Stowe — a cultural outsider whose writings criticized the social order and dominant public opinion. *Id.*

94. Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 109 (1990).

95. *Id.*

96. Professor Karst cites the sit-ins of the civil rights movement as an example: just as the sit-in was a form of symbolic speech and conveyed the right of blacks to eat where they chose, thereby allowing them to join the dominant community, so today is the integration of public spaces. Karst, *supra* note 94, at 95-96.

97. *Id.* at 95.

98. *Id.* at 115.

sexual individuals to express themselves and participate in the Parade is not on the same footing as the rights of the Marine Color Guard, the Troy High School Marching Band, the Tin Can Soldiers or Miss Ice-o-Rama. Thus, the Court has silenced their voice and denied them the opportunity to participate in the community on an equal basis.

Furthermore, to suggest that GLIB acquire its own permit and hold its own parade marginalizes the value of GLIB's participation while overlooking the significance of the Parade. GLIB's motives for wanting to participate in one of the largest St. Patrick's Day celebrations in the country included the fact that its participants and spectators are comprised of individuals from all walks of the community. GLIB wished to be a part of a common celebration by the community at large. The Court acknowledged this when it stated that it was "understandable" that GLIB would prefer to participate in the Parade rather than seek its own permit. To suggest that GLIB would be just as well off with its own parade ignores the reality that the great cross-section of the community that participates as marchers and spectators would not have been available had GLIB staged a separate parade.⁹⁹

In this instance, the Court has made a value judgement that the Council's First Amendment rights prevail over those of GLIB. Yet, this is contrary to the notions of equality entrenched in the Fourteenth Amendment. The reconceptualization of the First Amendment shifted the focus from protecting the speech of insiders, to protecting the speech of outsiders. Here, it is clearly the members of GLIB who are the outsiders. This determination is important because it is concerned with balancing power; the exclusion of subordinated groups is more problematic than the exclusion of dominant groups because the subordinated groups are already at a power disadvantage.¹⁰⁰ Accordingly, it is GLIB's First Amendment rights that are entitled to the greatest protection.

V. CONCLUSION

The Court's failure to protect the First Amendment rights of a subordinated group, as mandated by the reconceptualization of the First Amendment through the Reconstruction Amendments, draws a line in the sand. In essence, by suggesting that GLIB conduct its own parade, the highest court in the land has said that gays and lesbians have a place, but that place is not as an equal participant within the community. But another court, the Superior Court of Massachusetts said, "[h]istory does not record that St. Patrick limited his ministry to heterosexuals or that General Washington's soldiers were all straight. Inclusiveness should be the hallmark of the Parade."¹⁰¹ "Perhaps it only goes to show that there's a

99. More importantly, the Court gave no guidance as to whether GLIB should be permitted to stage its parade over the traditional route on an alternate day or on the day designated for the Parade but over a different route. Had the Court had in mind the former, it is difficult to imagine a St. Patrick's Day Parade on a day other than the one designated by the city for "official" celebrations. *Hurley*, 115 S.Ct. at 2338.

100. Rutherford, *supra* note 84.

101. Petitioner's Brief, *Hurley*, at 26 (No. 94-749)(citing App. Pet. for Cert. at B28).

new line in the sand that says gay and lesbian participation in the community stops short of equal participation.”¹⁰²

Sheryl Buske

102. John Ellement, *Justices to Hear Arguments on 1st Amendment Issue in Parade Case*, BOSTON GLOBE, Feb. 22, 1995 (quoting John Ward, GLIB attorney, as suggesting that communities would tolerate the patronage of gay and lesbian in businesses, but would not tolerate their participation within the larger community).