



1995

# Recent Developments: Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston: Use of Public Accommodations Law to Modify Expressive Speech Content Violates the First Amendment

Paul J. Wilson

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

## Recommended Citation

Wilson, Paul J. (1995) "Recent Developments: Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston: Use of Public Accommodations Law to Modify Expressive Speech Content Violates the First Amendment," *University of Baltimore Law Forum*: Vol. 26 : No. 1 , Article 7.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol26/iss1/7>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

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

***USE OF PUBLIC ACCOMMODATIONS LAW TO MODIFY EXPRESSIVE SPEECH CONTENT VIOLATES THE FIRST AMENDMENT.***

By unanimous decision, the Supreme Court of the United States, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995), held that a Massachusetts public accommodations law violated First Amendment speech protections when employed to alter the content of private citizens' expressive speech. In so holding, the Court declared the selection of participants by a private parade organization constituted protected expressive speech. Consequently, a state cannot compel the inclusion of marchers whose message the parade organization does not wish to present.

The petitioner, South Boston Allied War Veterans Council ("Council"), has sponsored the St. Patrick's Day parade in South Boston every year since 1947; no other group had applied for the permit in that time period. The City of Boston provided funds, use of its seal, and printing services to the Council. In 1992, the respondent, Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB"), was created with the intent of marching in the parade to express their pride as openly gay individuals of Irish descent. Although the Council denied their application for inclusion in the 1992 parade, GLIB participated without incident under a state court order.

Once again, the Council denied GLIB's admittance in the 1993 parade. GLIB re-

sponded by filing suit against the Council and its leader, John J. Hurley. GLIB alleged, *inter alia*, violations of the United States and Massachusetts Constitutions, as well as the state public accommodations law, which prohibited "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws Ann. ch. 272 § 98 (West 1990). The trial court determined that, due to the fact that the parade had traveled the same basic route for forty-seven years and provided entertainment to both marchers and spectators, the statutory definition of a public accommodation was satisfied. In rejecting the Council's claim that the parade was "private," the trial court held the "lack of genuine selectivity in choosing participants . . . demonstrates that the Parade is a public event." App. to Pet. for Cert. B24. Further, the trial court rejected the Council's assertion that GLIB's admission to the parade would violate the Council's First Amendment right of expressive association, holding that the required "focus on a specific message" was absent from the parade. *Id.* The trial court concluded that any infringement upon the Council's First Amendment rights was minimal and was necessary to promote the state's aim of eliminating discrimination.

The Supreme Judicial

Court of Massachusetts affirmed the trial court. The court held that it need not decide the Council's claim that the public accommodations law violated its freedom of speech as it agreed with the trial court's finding that the parade lacked an expressive purpose which would afford First Amendment protection. The court also rejected challenges that the public accommodations law could be interpreted as regulating speech and that the law was unconstitutionally vague. The Supreme Court of the United States granted certiorari to determine whether a private parade organization's First Amendment rights are violated when a public accommodations law is used to force the inclusion of a group of marchers whose viewpoint is not supported by the parade organization.

In beginning its analysis, the Court noted that GLIB presented neither a First Amendment claim nor an equal protection claim under the Fourteenth Amendment. *Hurley*, 115 S. Ct. at 2344. Therefore, according to the Court, GLIB's claim for inclusion in the parade rested solely upon the Massachusetts public accommodations law. *Id.* The Council's claim that their parade activity was a form of protected speech, however, imposed a constitutional duty upon the Court to review the trial record de novo. *Id.*

Next, the Court examined the expressive nature of parades and stated its use of the

word "parade" indicated a group of marchers making a collective point not only to fellow marchers, but to spectators along the parade path as well. *Id.* at 2345. The Court emphasized that protected expression goes beyond a parade's physical manifestations to its inherent symbolism. *Id.* While acknowledging that the Council's methods of choosing parade participants were rather lenient, the Court held the Council's failure to present a cohesive message, to edit a particular group's theme, or to originally create the messages presented, did not lead to forfeiture of constitutional protection. *Id.* The Court noted that the First Amendment protects broadcast and print media in their selection of speech, created by others, for dissemination. *Id.* at 2345-46. Thus, the Council's selection of parade participants was entitled to similar protection. *Id.* at 2346.

Subsequently, the Court narrowed its analysis to a detailed review of the Massachusetts public accommodations law. The Court ruled that the public accommodations law was within the state's power to adopt, as it did not target speech or its content, but instead prohibited discrimination against individuals attempting to buy or use publicly available goods and services. *Id.* at 2346-47. Instead, the Court took issue with the application of the law, noting that the Council disclaimed any intent to exclude individual homosexual or bi-

sexual members of groups approved to march, and no individual member of GLIB claimed to be excluded from any approved groups. *Id.* at 2347. Hence, the Court decided that the manner in which the state courts had enforced the law did not address the ultimate issue of whether GLIB, as an organization, could express a viewpoint not embraced by the parade organizers. *Id.*

The Court held that the state court's application of the statute effectively forced the Council to alter the expressive content of its parade, as every group participating in the parade affects the message conveyed by the parade organizers. *Id.* The Court determined the state court's approach resulted in the Council's speech itself becoming the public accommodation, thereby allowing any protected group to participate in shaping the Council's message. *Id.* This, the Court ruled, was a clear violation of the Council's First Amendment rights. *Id.* "Since all speech inherently involves choices of what to say and what to leave unsaid," the Court explained that, outside a commercial context, a state cannot compel a speaker to affirm a belief in concepts he opposes. *Id.* (quoting *Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986)) (plurality opinion) (emphasis in original). Consequently, the Court held that the Council could present any particular viewpoint it wished and exclude views to

---

which it did not subscribe; a choice lying outside the government's power to control. *Hurley*, 115 S. Ct. at 2348.

GLIB, relying on *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1995) (limiting the autonomy of a monopolistic cable franchise to allow survival of broadcasters who might otherwise be silenced), responded by arguing that admission to the parade would not threaten the Council's autonomy. *Hurley*, 115 S. Ct. at 2348. Specifically, GLIB likened the Council to a "conduit" for the speech of the parade participants, rather than a speaker of the participants' messages. *Id.* The Court, in refusing to accept this analogy, reasoned that GLIB's participation and its message could be perceived as enjoying the Council's support. *Id.* Thus, the Court held that when a view contrary to a speaker's own beliefs is forced upon the speaker, the speaker's autonomy has been compromised. *Id.*

Furthermore, there was "little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas . . . endorsed by the cable operator." *Id.* at 2348-49 (quoting *Turner Broadcasting*, 114 S. Ct. at

2465). In contrast to broadcast media, a parade does not consist of individual messages which can be selectively viewed. *Id.* at 2349. In addition, no method exists which allows parade organizers to disclaim opposing viewpoints. *Id.* GLIB's assertion that the Council would be able to silence GLIB's message was unfounded as GLIB had not attempted to obtain a parade permit on its own or demonstrated that the Council enjoyed a monopoly of access to parade spectators. *Id.*

While recognizing that access to a speaker's message could ultimately produce speech free of bias toward particular classes of people, the Court found the rationale for applying the public accommodations law to expressive speech erroneous. *Id.* at 2350. The Court noted that our free speech traditions protect a safe haven from government interference for those expressing their views. *Id.* Furthermore, the Court held that restricting speech to statements inoffensive to all people is the very antithesis of the First Amendment. *Id.* The Court concluded that though "the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better

reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id.*

With its decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Supreme Court of the United States held that the First Amendment prevents a state from compelling alterations in private expressive speech under the guise of eliminating discrimination. States, confronted with the task of eliminating prejudice, have resorted to anti-discrimination statutes in an effort to ensure the rights of protected classes of people are not trampled. The *Hurley* Court, however, concluded that use of an anti-discrimination statute to alter an individual's expressive speech to further the purpose of eradicating bias intolerably strikes at the very heart of the First Amendment. Under *Hurley*, groups with controversial messages cannot rely on anti-discrimination statutes in order to present their ideas in traditional forums. They must explore other available avenues of expression; otherwise, they may not be heard at all.

-Paul J. Wilson

---

---

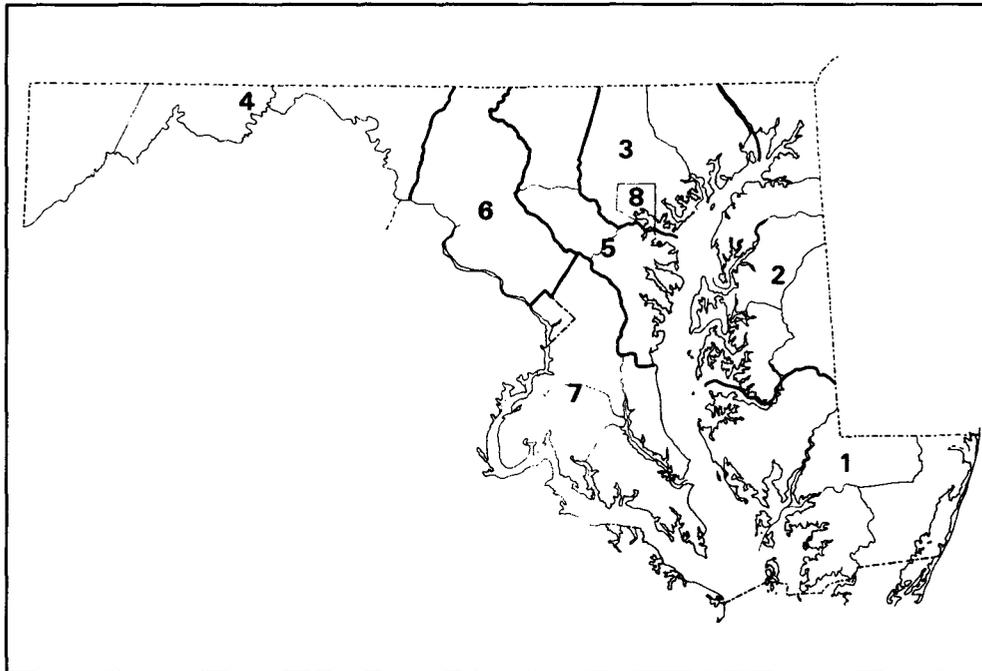
**The LAURENCE M. KATZ  
COMMERCIAL LAW COLLECTION**

A fund honoring Professor Katz has been created to support a permanent Commercial Law Collection in the University of Baltimore Law Library. Your contributions to assist in the establishment of this \$10,000 Endowment Fund are most welcome.

Make checks payable to: University of Baltimore Educational Foundation  
Please send to:

Laurence M. Katz Commercial Law Collection  
University of Baltimore Educational Foundation  
1304 St. Paul Street, Baltimore, Maryland 21202-2789

*Gifts to the Laurence M. Katz Commercial Law Collection are tax deductible  
as allowed by law.*



Map of Maryland's eight circuit court regions