Parading Ourselves: Freedom of Speech at the Feast of St. Patrick

Larry Yackle

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship

Part of the Human Rights Law Commons, Judges Commons, Law and Gender Commons, Law and Society Commons, and the Sexuality and the Law Commons
PARADING OURSELVES: FREEDOM OF SPEECH AT THE FEAST OF ST. PATRICK

LARRY W. YACKLE*

Three things are true. First, American society is now absorbed in yet another great civil rights movement, this one on behalf of gay, lesbian, and ambisexual citizens, which will lead ineluctably to the elimination of legal burdens on the basis of sexual orientation. Change will come slowly, with much backing and filling, and at an awful price measured in human pain. Intolerance for the homosexualities that exist among us, and the homosexual

* Professor of Law, Boston University. I would like to thank Mary L. Bonauto, Maura R. Cahill, Chester Darling, John Mahan, James Mansfield, Julie Netherland, Gretchen Van Ness, and Karen Wilinski for helping me piece together the background materials I explore in this piece. I received helpful comments on the manuscript from Kathryn Abrams, C. Edwin Baker, Christian Kimball, Susan Koniak, Pnina Lahav, Tracey Maclin, David Seipp, Avi Soifer, and the participants in the Boston University Law School faculty workshop. Rob Kwon, Kenneth Westhassel, and especially Brendan Crowe rendered excellent research assistance.

behavior in which many of us engage, will persist in quarters where the law cannot reach. Yet private homophobia, deprived of legal sanction, will ultimately be discredited and forced to the margin. Second, the fundamental


Perhaps the most persuasive evidence of the profound movement under way is the very ubiquity of episodes in which sexual orientation plays an important role—episodes that find their way into the public press virtually every day. E.g., Gay-Rights Groups Rally for Legislation, N.Y. TIMES, Apr. 30, 1990, at B5 (describing a demonstration promoting “bias crime” legislation); Jane Gross, A Milestone in the Fight for Gay Rights: A Quiet Suburban Life, N.Y. TIMES, June 30, 1991, at D16 (describing the migration of gays and lesbians to the suburbs); Douglas Martin, Strictly Business: Christopher Street Rebounds as Thriving Gay Mecca, N.Y. TIMES, June 21, 1993, at B3 (noting the economic strength of merchants catering to the gay and lesbian community); John J. O’Connor, Gay Images: TV’s Mixed Signals, N.Y. TIMES, May 19, 1991, at B1 (reporting objections from gays and lesbians to the depiction of homosexuality on television). The movement is not rigorously progressive, of course. For every step forward, it seems there is often a step backward. While many religious groups show increasing tolerance, others stubbornly persist in historical intolerance. Cf. Colum Lynch, Conservative Religious Alliance Targets NYC School Election, BOSTON GLOBE, May 2, 1993, at 21 (reporting that “conservative” Christians hoped to unseat gay and lesbian school officials in the next election). Compare Robert O’Harrow, Jr., Gays Welcomed at D.C. Church, WASH. POST, June 7, 1993, at B4 (reporting that a Unitarian congregation in the District of Columbia had decided to acknowledge homosexual relationships in church bulletins) with Ari L. Goldman, Conservative Branch Rejects Proposal to Allow Gay Rabbis, N.Y. TIMES, Mar. 29, 1992, at A34 (reporting that the Conservative movement among American Jews had rejected a proposal to permit homosexuals to serve as rabbis) and Peter Steinfels, Church Keeps Ban on Gay Ministers, N.Y. TIMES, June 9, 1993, at A15 (reporting the Presbyterians’ decision to retain a ban on appointing “sexually active” gay ministers). Most employers still do not extend benefits to gay partners, but the trend is in a more promising direction. E.g., Jordana Hart, Benefits at Harvard to Cover Gay Partners, BOSTON GLOBE, May 21, 1993, at 17; Jonathan P. Hicks, A Legal Threshold is Crossed by Gay Couples in New York, N.Y. TIMES, Mar. 2, 1993, at A1. In a time of such swift change, it is perhaps not surprising that reports of violence against gays and lesbians are all too common. See GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 3 (1991); Anti-Gay Crimes Are Reported on Rise in 5 Cities, N.Y. TIMES, Mar. 20, 1992, A12. But see Raymond Hernandez, Healing Wounds and Seeking Understanding: Police and Gay Residents of the 115th Precinct Work Together to Find Common Ground, N.Y. TIMES, Apr. 19, 1993, at B1.

Individuals may indulge in “wilful ignorance,” but we will have done with “legally enforced invisibility.” RICHARD D. MOHR, GAYS/justice: A STUDY OF ETHICS, SOCIETY, AND LAW 27 (1988). For illustrations of the backing and filling we will see, one need only look to England. See, e.g., COUNCIL ON RELIGION AND THE HOMOSEXUAL ET AL., THE CHALLENGE AND PROGRESS OF HOMOSEXUAL LAW REFORM (1968) (citing the British decision to abandon criminal penalties for homosexual relations between consenting adults); STEPHEN JEFFERY-POULTER, Peers, Queers & Commons: The Struggle for Gay Law Reform from 1950 to the Present 234-35 (1991) (citing more recent reversals but pointing out that setbacks may have galvanized the movement).
principles of political order we have drawn from, or ascribed to, the Constitution must be deployed once again to manage our differences, promoting respectful exchange. We require of our basic law that which is basic: a structure for mapping our future—together. Third, the constitutional principles and rules we have developed to date will disappoint us at every turn. We will find no fixed and firm doctrinal markers along the perilous path before us. Paradoxically, it is far easier to predict where we will come out in the end than it is to specify and appreciate how we will get there. The mess we are in is a real and human mess; it will not be disciplined by abstractions alone.

I mean in this Article both to demonstrate that this third proposition is so, and to insist that, on reflection, things could scarcely be otherwise. The imperfections in our constitutional law are no cause for despair. We can muddle through as we always do, relying on formal legal categories as guides to clear thinking, but eschewing any attempt simply to label problems away. On the one hand, we must pursue the essence of conventional methodology. We must draw distinctions, identify relationships, capture events within definitional boundaries, and work out the implications. On the other hand, we must immerse ourselves in the vagaries of experience, distrusting the very neat and tidy boxes that conventional analysis seems to demand. The trick is to strike the proper balance between analysis and description.

I focus on a graphic confrontation between the civil rights movement now gathering momentum and the old order now retreating, however grudgingly, from the field: the battle royal over whether gay and lesbian groups are entitled to participate in annual St. Patrick’s Day parades in New York and Boston. The parades plainly reflect the larger social and political developments currently under way and must be seen in that overarching context along with other, related flashpoints—gays and lesbians in the military, same-sex marriages, dependent benefits for gay partners, and dozens of others. Yet the parades also offer an especially rich source of materials by which to demonstrate both the need for and the flaws in our constitutional framework for orchestrating the national debate in which we are engaged.

Loose analogies between seismic cultural developments can be misleading. I dare say, though, that the current situation shares common ground with

---

the struggle against de jure racial segregation a generation ago.\(^4\) A lot of constitutional law was required to manage the sit-ins, pickets, demonstrations, and parades by which African Americans demanded full recognition and participation in American life. Constitutional principles and rules were needed, and for that reason they were forged to guide us through those troubled times.\(^5\) Back then, and however belatedly, we made some crucial choices. We decided in a number of cases, one of them called Brown,\(^6\) that everyone, black or white, was free to associate with his or her chosen comrades in the public streets and other common areas, and to preach brotherhood, hatred, or anything in-between—at least as long as things remained peaceful. By contrast, we decided in another Brown case\(^7\) that segregationists were not free to choose their associates as they pleased and thus to deny access to the public schools on the basis of race. Today, we enjoy the benefits of those decisions, but their wise use demands practical, insightful judgment. Human rights problems don’t really change all so much. They don’t get any easier, either.\(^8\)

At the most superficial level, the St. Patrick’s Day parades present a classic conflict—pitting those who are included (and want to exclude others) against those who are excluded (but want very much to be included). The occasion cries out for doctrinal categories that allocate entitlements between the competitors and declare winners and losers. Do the parades constitute the exercise of the organizers’ speech, religious, and associational rights to rally round a pure sectarian message, uncorrupted by the participation of gays and lesbians who represent contrary ideas? Or are they places of public accommodation, from which citizens may not be excluded on the basis of sexual orientation? Are governmental officials simply disinterested arbiters between warring camps? Or are they responsible for the invidious discrimination over which they preside? At a deeper level, however, the parades bristle with intricate theoretical problems that resist easy resolution. Liberty claims grounded in the First Amendment are not set over against equality


\(^5\) See generally HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965) (discussing the impact of the civil rights movement on First Amendment jurisprudence).


\(^8\) See Kenneth L. Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. ILL. L. REV. 95, 117-22 (sketching the linkage between the gay liberation movement and the evolution of First Amendment doctrine); cf. Deborah L. Rhode, Association and Assimilation, 81 NW. U. L. REV. 106 (1987) (recalling Herbert Wechsler’s argument that in its rush to outlaw racially segregated schools the Supreme Court ignored the associational rights of white students).
claims resting on the Fourteenth; both kinds of claims are sprinkled over the arguments open to the parties. The crucial matter at issue, self-identification, demands attention—but gets almost none from the pigeonholes available for selection. Government's role is not delineated and confined, but diffuse and problematic. We cannot deal with the parades simply by invoking one Brown precedent or the other.

I will begin with a summary of extant positive law, drawing primarily on the Supreme Court's constitutional decisions in point, but ranging as well over civil rights statutes that may be brought to bear. Within that discussion, I will identify both places where participants in the parade cases may try to gain a handhold, and ways in which their grip may slip. Next, in the body of the Article, I will explore the factual backdrop that calls all these legal arguments into play in the first instance: the character and history of the New York and Boston parades; the individuals, organizations, and communities involved; the nature and basis of the desires, fears, and anxieties that come to light; the role and significance of pertinent religious dogma; and the development of the current controversy. In the final section, I will offer suggestions for bringing constitutional doctrine to bear on the richly textured complexities implicated in the parades. Even if I am right in thinking that the human problems we face will not submit easily and comfortably to conceptual analysis (and I am pretty sure I am right about that), I appreciate that at some point we will have to do something with the parades. They are not the first of their kind, nor will they be the last. If we do our job well, we will fortify the foundation we will need as we grapple with the profound social and political upheaval at hand. Squabbles over who gets to march up Fifth Avenue, or down Telegraph Street, may seem trifling or merely ill-mannered. Yet they offer an opportunity to brace our law (and ourselves) for the greater work that lies ahead.  

9 See, e.g., Gay Veterans Ass'n v. American Legion, 621 F. Supp. 1510 (S.D.N.Y. 1985) (involving an attempt by a gay and lesbian veterans organization to gain access to an annual parade conducted by the American Legion); Jacques Steinberg, Gay Dispute Fails to Dim Israel Parade, N.Y. TIMES, May 10, 1993, at B1 (reporting that the organizers of the Salute to Israel parade had refused to permit a largely gay and lesbian congregation to participate under its own flag). Most major cities now have annual Gay Pride parades. See, e.g., Catholic War Veterans of the United States, Inc. v. City of New York, 576 F. Supp. 71 (S.D.N.Y. 1983) (involving an attempt by a veterans group to enjoin the Gay Pride parade); see also Lisa Atkinson, Gays, Lesbians Parade Their Pride by the Tens of Thousands in Boston, BOSTON GLOBE, June 13, 1993, at 44 (describing the similar parade in Boston); Clifford J. Levy, Thousands March in a Celebration of Gay Pride, N.Y. TIMES, June 28, 1993, at B4 (describing the most recent Gay Pride parade in New York); Jeffrey Schmalz, March for Gay Rights: Gay Marchers Throng Mall in Appeal for Rights, N.Y. TIMES, Apr. 26, 1993, at A1 (reporting an extraordinarily large rally on the Mall in Washington, D.C.).

10 A rich body of excellent work has recently been done at the level of "grand theory" touching free speech. E.g., C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); LEE C. BOLLINGER, THE TOLERANT SOCIETY (1986); FREDERICK
I will urge city officials in New York and Boston to take responsibility for planning and conducting these two great municipal street parties and, in so doing, to ensure both that all members of the community may attend and that anyone who wishes by attending to express a message is free to do so. Concomitantly, city authorities should weed discriminatory features out of their existing schemes for dispensing permits for privately sponsored parades. Such permits should be freely distributed to competing groups, whose messages should be considered only to promote expression. Officials should try to accommodate a group's special interest in a particular street or date, but should not be obliged routinely to turn major arteries over to private processions. When the precise character of a message warrants it, city officials should exempt a parade from the local anti-discrimination ordinance. If a group seeks such a dispensation, it should be invited to explain how its compliance with anti-discrimination law would dilute its message, and city officials should make that explanation known to the public. As a general matter, then, city officials should take parade cases as they come—attempting to be genuinely neutral with respect to permit applicants, but recognizing that the proper result in a case often requires an investigation of the facts and hard judgment. Suffice it to say, I think the Constitution should be read to endorse this practical approach.

I. PARADE LAW IN THE BOOKS

The constitutional law governing parades begins with the First Amendment, which prohibits government from enacting laws prohibiting the "free exercise" of religion, or "abridging the freedom of speech" or the "right of the people peaceably to assemble." Stated as absolutes, these injunctions have always been understood and treated as predispositions that accommodate a Theory of Free Speech, 34 UCLA L. REV. 1837 (1987). In this Article, I am guided by that literature, but I focus my attention at a lower level of generality—namely workaday constitutional doctrine that delivers acceptable results in trying circumstances.

11 U.S. CONST. amend. I. Inasmuch as the parade organizers in New York and Boston insist that they wish to exclude gay and lesbian participants on religious grounds, there is a rather clear Free Exercise Clause element in the parade cases I am about to explore. E.g., Complaint at 8-9, New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358 (S.D.N.Y. 1993) (93 Civ. 0281) (alleging violations of both the organizers' freedom of speech and association and their "free exercise" rights). In addition, there are occasional contentions that city authorities violate the Establishment Clause if they permit parade organizers to employ a traditional parade to advance a sectarian message. E.g., Otway v. City of New York, 818 F. Supp. 659 (S.D.N.Y. 1993) (summarily rejecting such a claim); accord Widmar v. Vincent, 454 U.S. 263, 271 (1981). As these cases have evolved, however, claims grounded in freedom of speech and association have tended to enjoy central attention, making any independent concern for free exercise largely redundant. Cf. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2146 (1993) (relying entirely on free speech grounds to hold that
date countervailing values and interests. The precise limits the First Amendment places on governmental regulation are not self-evident; they require reasoned elaboration. Like it or not, they require balancing.

A. Basics

A parade "falls well within the sphere of conduct protected by the First Amendment."12 Indeed, one can scarcely imagine a more definitive and graphic way for a citizen to manifest himself to the world than to march down the street, arm-in-arm with friends and neighbors, displaying his allegiances for all to see. To abandon the anonymity of the crowd and take a place in the lists is to affirm as few other actions can the ideas and people one calls her own. To parade is to proclaim who, what, and of what you are—to identify yourself with a community of thought and comradeship in the most elemental sense. This does not mean (necessarily) that a city or town must allow citizens to use all its public streets for parades at their every whim. Yet it is widely understood that if there is any publicly controlled real estate that must routinely be open for expressive activity, it is an ordinary street.13 And, anyway, neither New York nor Boston has been inclined (recently)14 to ban street parades en masse. In these two towns, as elsewhere in America, public streets "have immemorially been held in trust" for purposes of "communicating thoughts between citizens."15 In common parlance, a street is a quintessential "public forum," in which expression usually can be regulated only in a way that is indifferent both to the subject matter speakers wish to take up, and to the viewpoints they wish to expound.16 In any given

an organization could not be refused access to public facilities because its viewpoint with respect to an otherwise approved topic was religious in nature).

13 In Cox v. Louisiana, the Court found it unnecessary to consider the validity of the "uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings." 379 U.S. 536, 555 (1965) (footnote omitted). In Greer v. Spock, however, the Court recognized in dictum "the long-established constitutional rule that there cannot be a blanket exclusion of First Amendment activity from a municipality's open streets, sidewalks, and parks." 424 U.S. 828, 835 (1976); cf. David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675, 717-18 (1992) (contending that to the extent government must open public forums like streets for speech, it is commanded by the First Amendment to subsidize private expression).
14 But see Massachusetts v. Davis, 39 N.E. 113, 113 (Mass. 1895) (Holmes, J.) (declaring that a legislature may "forbid public speaking in a highway or public park").
instance, the task is, first, to determine whether and how freedom of expression is burdened by the governmental regulation under attack, and, second, to decide whether the governmental interests asserted in support of the regulation are nonetheless sufficient to justify it.\textsuperscript{17}

Streets constitute a scarce resource, and from that premise alone it follows that their utilization must be allocated among competing users—ordinary people who merely want a fast track to the office, the factory, or the supermarket, as well as other parade organizers and would-be participants. For this administrative task, the Supreme Court has approved a licensing scheme, notwithstanding the traditional presumption against "previous restraints" on expression.\textsuperscript{18} Potential marchers can be asked to give fair notice of their plans, so that the authorities can mitigate the disruption of ordinary traffic, avoid conflicts with other uses, and generally provide good policing.\textsuperscript{19} Suffice it to say for now that both New York and Boston maintain licensing systems for street processions, under which parades can usually be held only on the authority of a permit.\textsuperscript{20} Those schemes have special features touching the particular parades we are investigating, but we will get into that later.


\textsuperscript{17} \textit{E.g.}, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (holding that New York City had a compelling interest in controlling noise levels).


\textsuperscript{19} Cox v. New Hampshire, 312 U.S. 569 (1941). Put graphically, there is no unconditional constitutional right to hold a street meeting "in the middle of Times Square at the rush hour." Cox v. Louisiana, 379 U.S. 536, 554 (1965).

\textsuperscript{20} N.Y.C. ADMIN. CODE § 10-110 (1990):

\begin{itemize}
  \item \textbf{Permits.} A procession, parade or race shall be permitted upon any street or in any public place only after a written permit therefor has been obtained from the police commissioner. Application for such permit shall be made in writing, upon a suitable form prescribed and furnished by the department, not less than thirty-six hours previous to the forming or marching of such procession, parade or race. The commissioner shall, after due investigation of such application, grant such permit subject to the following restrictions:
    \begin{itemize}
      \item It shall be unlawful for the police commissioner to grant a permit where the
An administrative plan for coordinating parades cannot confer unbridled

commissioner has good reason to believe that the proposed procession, parade or race will be disorderly in character or tend to disturb the public peace;

2. It shall be unlawful for the police commissioner to grant a permit for the use of any street or any public place, or material portion thereof, which is ordinarily subject to great congestion or traffic and is chiefly of a business or mercantile character, except, upon loyalty day, or upon those holidays or Sundays when places of business along the route proposed are closed, or on other days between the hours of six-thirty post meridian and nine ante meridian;

3. Each such permit shall designate specifically the route through which the procession, parade or race shall move, and it may also specify the width of the roadway to be used, and may include such rules and regulations as the police commissioner may deem necessary;

4. Special permits for occasions of extraordinary public interest, not annual or customary, or not so intended to be, may be granted by the commissioner for any street or public place, and for any day or hour, with the written approval of the mayor;

5. The chief officer of any procession, parade or race, for which a permit may be granted by the police commissioner, shall be responsible for the strict observance of all rules and regulations included in said permit.


Section 1. Parades, Processions and Formations

No person shall take part in any parade, procession or other organized formation of persons or vehicles, other than a funeral procession or a picket line, in or upon any street, way, highway, road, or parkway under the control of the City unless the Commissioner of Transportation has granted a permit for such parade, procession, or formation. The Commissioner of Transportation shall issue such permit in all cases except where the time, place, and manner are not in conformity with the Rules set forth below, or where the permit would conflict as to time or place with a permit previously issued. No fee shall be charged for any such permit.

1. The written request for the permit shall be filed with the Commissioner of Transportation at least seventy-two hours prior to the occurrence and should include the following:

(a) The date and starting time.

(b) The name, address, and telephone number of the applicant and name of the organization involved.

(c) The formation or assembly area and time therefor.

(d) The route of the parade or motorcade and what portions of the streets traversed may be occupied by such parade or motorcade.

(e) The approximate number of people and vehicles in the parade or motorcade.

2. No permit shall be issued authorizing a parade, procession, or formation under the following conditions:

(a) When the sole purpose is advertising any product, goods, wares, merchandise, event, or is designed to be held for private profit.

(b) When the time, route, and size will disrupt the use of any street or any public place, or material portion thereof, which is ordinarily subject to great congestion of traffic and is chiefly of a business or mercantile character, except upon those holidays or Sundays when places of business along the route proposed are closed.

(c) When it is of a size or nature that requires the diversion of so great a number of police officers of the City to properly police the line of movement and the areas contiguous thereto, that allowing the parade or motorcade would deny reasonable police protection to the City.
discretion on local officials to grant or withhold permits as they see fit.\textsuperscript{21} That, of course, would invite discrimination on the basis of the content of applicants’ expression or, worse, the viewpoint they wish to put forward. However repugnant a message may be, it still is entitled to an opportunity to be heard.\textsuperscript{22} By the same token, neither public officials nor judges can subject would-be speakers’ views to an objective test for truth.\textsuperscript{23} If investigations of that sort were permissible, they would threaten freedom through intimidation. As a general rule, private opinions or religious beliefs are entitled to protection whether or not they are “acceptable, logical, consistent or comprehensible to others.”\textsuperscript{24} At the same time, however, citizens can scarcely throw up a false free speech objection to any regulation they don’t like. When the sincerity of opinions or religious commitments is seriously in doubt, public authorities can look further—albeit with appropriate sensitivity to the obvious dangers of the enterprise.\textsuperscript{25}

Generally, then, city authorities are constitutionally limited to “reasonable” regulations of the “time, place and manner” of the parades for which licenses are sought.\textsuperscript{26} I hasten to say, though, that the principle of neutrality that is so crucial in this context does not translate into a simple, mechanical rule barring city officials from considering what would-be speakers have to say. Sometimes the authorities must take account of content and viewpoint in order to distribute parade time and space in a (sensibly) neutral way—when, for example, a would-be speaker’s message is linked to a particular

Special permits for occasions of extraordinary public interest, not annual or customary, or not so intended to be, may be granted by the Commissioner of Transportation for any street or public place, and for any day or hour, with the approval of a majority of the Boston Transportation Commission. The Commissioner of Transportation shall have the authority to modify the route, time, and place of a parade to facilitate crowd control in the interest of relieving congestion and promoting public safety, provided that the applicant’s right of free speech is not denied thereby.

\textsuperscript{21} Lovell v. City of Griffin, 303 U.S. 444 (1938) (involving a permit requirement for leafleting); Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1972) (illustrating the routine application of this principle to public assemblies).

\textsuperscript{22} E.g., Smith v. Collin, 447 F. Supp. 676 (N.D. Ill.), aff’d, 578 F.2d 1197 (7th Cir.), \textit{cert. denied}, 439 U.S. 916 (1978) (the famous case involving an apparently disingenuous attempt by the National Socialist Party of America to obtain a permit to march through Skokie, Illinois); see Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992) (invalidating a permit scheme under which local officials were given discretion to adjust parade fees according to the level of policing they thought was needed—a matter not unrelated to their attitude toward the expression in each instance).


\textsuperscript{25} Ballard, 322 U.S. at 83-84; see Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc., 477 U.S. 619, 628 (1986).

time or place, when the intensity of one speaker's need to march is demonstrably greater than that of another, or when a speaker's access to a unique audience depends on using a particular street at a particular time.\(^{27}\) In order to sort out complexities like this, the courts must engage in close, fact-specific analysis of the circumstances in which disputes arise.\(^{28}\)

All this should be specifically spelled out in the relevant local ordinance—or, at the very least, should be clear from authoritative state court decisions in point.\(^{29}\) The Supreme Court condemns vague or overbroad statutes regulating expression for a range of self-evident reasons: they offer inadequate notice regarding what is required of applicants; they fail to constrain the officials they are supposed to guide; and they "chill" the expression of citizens who may censor themselves rather than risk prosecution under an ordinance that appears on its face to forbid what they have in mind.\(^{30}\) In this, of course, the Court squeezes local regulators from the other direction. If the authorities adopt blanket prohibitions on speech to avoid being charged with invalid discrimination, they may find their handiwork vulnerable for overbreadth.\(^{31}\) Legal doctrine that makes inconsistent demands would be obnoxious in ordinary circumstances. Yet where expression is concerned, sharply circumscribed limits on policy making are perfectly proper. Government is supposed to have a hard time regulating freedom of speech.

These foundational propositions granted, both sides in the parade cases may fairly insist that the law is on their side. Parade organizers may assert that while they may be required to obtain a permit, city officials are constitutionally charged to oblige them. Any limits imposed must be justified by reasonable, that is, neutral, interests in public convenience and safety. Once problems of that kind are laid to rest, organizers are entitled to pursue their


\(^{28}\) *E.g.*, Christian Knights of the Ku Klux Klan Invisible Empire v. District of Columbia, 919 F.2d 148, 150-51 (D.C. Cir. 1990) (setting aside a preliminary injunction and remanding for a more thorough exploration of the effect that shortening a parade route would have on the effectiveness of the event). On claims to use a particular route in order to convey a special message or to reach a potential audience, see Sixteenth of Sept. Planning Comm. v. City of Denver, 474 F. Supp. 1333, 1340 (D. Colo. 1979); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667, 674-75 (N.D. Ill. 1976); *cf.* Catholic War Veterans of the United States, Inc. v. City of New York, 576 F. Supp. 71, 75 (S.D.N.Y. 1983) (summarily dismissing an attempt to enjoin the Gay Pride parade from passing by St. Patrick's Cathedral—ostensibly on the ground that the marchers would violate the free speech and free exercise rights of parishioners).

\(^{29}\) See Cox, 312 U.S. at 574-77.


plans without interference. Even if the views they use the parade to advance are offensive to the authorities or others, the organizers' freedom to speak is entitled to respect. By the same token, gay and lesbian groups may fairly claim that they, too, are entitled to the same treatment. They, too, effectively seek permission to parade their message, and the authorities are constitutionally barred from favoring their adversaries. As a first pass at the resulting conflict, one might reasonably suggest that separate parades be scheduled at different times or over different routes. That course may be helpful in some instances. Yet we will see that simply multiplying the number of parades does not offer a complete and satisfying answer. We cannot resolve the conflicts within St. Patrick's Day parades by ceding that day to some claimants and relegating other claimants to a different celebration at another time and place.

B. Refinements

Increasingly beyond this point, parade law must partake of decisions in other contexts in which the Court has articulated free speech doctrine that seems, in principle, to be equally applicable here. To begin, the Court has often made it clear that when citizens take their turn in a public forum, government has no business telling them what to say. The central value protected by the First Amendment is "freedom of belief," the individual's right to think as she pleases. Moreover, that entitlement takes on special power when the thought in question touches politics or religion, the latter being a matter of independent First Amendment concern.

No official, "high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion." The freedom to think begets, in turn, the freedom to speak—to manifest one's personal commitments to others willing to listen and thus to serve the public interest in the exchange of information and opinion regarding "all matters of public concern." The freedom to speak one's mind includes, in turn, the freedom to hold one's tongue. For the


33 For example, the courts have had some success in settling squabbles over demonstrations in front of St. Patrick's Cathedral during the Gay Pride parade in New York by ordering that Dignity (a gay and lesbian organization) and the Defense of St. Patrick's Cathedral Committee (an opposing group) must share the sidewalk—by alternating groups of 25 representatives each at 30-minute intervals, with a police barricade between those who are demonstrating and those who are waiting to demonstrate. Olivieri v. Ward, 801 F.2d 602, 607 (2d Cir.), cert. denied, 480 U.S. 917 (1986).


freedom "not to speak publicly" serves "the same ultimate end as freedom of speech in its affirmative aspect."

The freedom to speak or not to speak includes, as well, the freedom to decline to mouth the messages of others. When government mandates "speech that a speaker would not otherwise" utter, it "necessarily alters . . . content." The First Amendment thus protects citizens from being punished for failing to endorse an ideological cause for which they have no sympathy, and, accordingly, refusing to enhance "the relative voice" of "opponents." Said another way, it protects citizens from being made the unwilling instruments by which government dispenses its own estimate of right thinking, or, indeed, anything else thought to be of interest and value. If the authorities really think people should hear something, the direct approach is available. In some instances at least, they can seek information regarding speakers' messages through official channels and then can publish the material itself.

Finally, the freedom to speak, not to speak, and to speak only what one will spills over into a wider body of freedoms, commonly denominated rights of association. The Supreme Court purports to recognize two kinds of associational rights. One, the right of "expressive association," sounds plainly in freedom of speech and therefore is manifestly pertinent here. The

---

40 E.g., Pacific Gas, 475 U.S. at 15 (invalidating a rule requiring an objecting utility company to include outsiders' newsletters in billing envelopes); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977) (holding that a union may not tax objecting members for funds to advance causes unrelated to the union's duties as their collective-bargaining representative); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256-57 (1974) (setting aside a statute requiring newspapers to allow political candidates space in which to reply to editorial criticism).
42 E.g., Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that citizens cannot be forced to display the state motto—popular among many but repugnant to some).
43 Riley, 487 U.S. at 795-801 (regarding the disclosure of the percentage of receipts actually spent by fundraisers on the causes for which they solicited contributions).
44 Id. at 800 (noting that North Carolina authorities might have protected consumers from fraud by publishing the "detailed financial disclosure forms" that professional fundraisers were required to file); accord Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 637-38 (1980). But see NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-63 (1958) (holding that NAACP members could not be required to disclose their affiliation to state investigators).
other, the right of "intimate association,"\textsuperscript{47} derives from a less particularized corpus of human liberty, tied to personal affection, camaraderie, and ethnic connection, and thus is less obviously relevant. On closer scrutiny, this second brand of associational freedom breaks down further into at least two sub-categories: freedom respecting relationships that are genuinely "intimate" in the personal, typically sexual or familial sense, and freedom respecting relationships that are more attenuated and better understood as "cultural" in nature.\textsuperscript{48} Ultimately, all three kinds of associational freedom are implicated in the parade cases. Yet clear analysis demands that they be distinguished and approached seriatim.

The right of expressive association rests on the First Amendment itself, which protects both the individual's freedom to speak alone and his freedom to associate with others for the purpose of magnifying his voice. This kind of associational right is preeminently volitional and purposeful. The individual's deliberate choice of what to say is inextricable from her choice of the company in which to say it—in order to get it said in the most effective way. Think here of political parties\textsuperscript{49} and other voluntary groups formed to promote a fairly specific normative agenda.\textsuperscript{50} There is both a positive (inclusive) side to this and a negative (exclusive) side. The freedom to associate for the advancement of one's views "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."\textsuperscript{51}

Herein, of course, parade law appears to take a turn in favor of original organizers. In combination, the individual's freedom to decline to endorse a cause with which she disagrees and her freedom to exclude from her associates those who would undermine a group message yield a proposition of ostensible significance. The Constitution recognizes and protects an entitlement on the part of parade organizers to band together for the purpose of speech—and, importantly, to police the purity of the collective message that results by barring those who dissent from the party line. I hasten to say, however, that the mere existence of this constitutional protection does not resolve anything. As we will see in a moment, gay and lesbian groups, too, are served by the recognition of a fairly sweeping right of expressive association. For even as intolerant parade organizers capitalize on this right to resist accepting homosexuals formally into their community, gays and lesbi-

\textsuperscript{47} Id. at 76-80; see Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624 (1980).


\textsuperscript{50} E.g., NAACP v. Button, 371 U.S. 415, 430 (1963) (civil rights organizations); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (same).

ans depend on their own, similar right of expressive association to rally together in the pursuit of that very community acceptance.\footnote{Karst, Belonging, supra note 48, at 92-93 (making this point generally about subordinated minority groups).} Moreover, interests and values that compete with the freedom of expressive association must still be identified and weighed.

The freedom of intimate association rests more generally on the liberty safeguarded by the Due Process Clauses and extends to relationships of a different order.\footnote{Roberts v. United States Jaycees, 468 U.S. 609, 617-20 (1984).} Think here of close ties to spouses, children, family in general—and about personal decisions touching sex and procreation.\footnote{E.g., Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978) (marriage and family); Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) (family); Carey v. Population Servs. Int'l, 431 U.S. 678, 684-86 (1977) (procreation). When, in Roberts, 468 U.S. at 619, Justice Brennan cited these and other cases behind the point in the text, he neglected the abortion case, Roe v. Wade, 410 U.S. 113 (1973). I suspect that omission was deliberate—not because Roe was inapposite, but because an explicit citation might have intimidated general approval and thus jeopardized Justice Brennan's unanimous judgment. See discussion infra notes 323-27 and accompanying text.} Intimate associations are sometimes volitional and sometimes not. People choose their friends, but not their relatives; they choose their sexual partners, but not their sexual orientation.\footnote{Id. at 620.} Intimate associations are sometimes volitional and sometimes not. People choose their friends, but not their relatives; they choose their sexual partners, but not their sexual orientation.\footnote{Id. at 619.} Individuals draw "much of their emotional enrichment"\footnote{Id. at 617.} from their close relationships around the kitchen table, before the family hearth, and upstairs in bed. The right of intimate association, suffice it to say, plays an important, if oblique, role in the parade cases we are investigating.

The right of cultural association shares with the right of intimate association some, but not all, its emphasis on human connection. Think here of more diverse human groups, which by dint of their "size, purpose, policies, selectivity, [and] congeniality"\footnote{Id. at 619.} offer a "private" shield against governmental overreaching and thus foster pluralism within mass society. Think, indeed, of ethnic and religious associations by which "shared ideals and beliefs" are cultivated and transmitted between generations.\footnote{Id. at 617-18.} In some instances, the freedom of cultural association covers involuntary relationships into which an individual is thrust by accident of birth and out of which even the most existential among us rarely escapes. It is one thing to abandon a father's commitment to FDR and quite another to stop being Jewish. In other instances, this third kind of associational freedom is, like the others, very much a matter of individual choice.\footnote{Id. at 619.} Protestants don't have to be Masons. In practice, it is often hard to say whether the cultural associations one has were received or selected.\footnote{Aviam Soifer, On Being Overly Discrete and Insular: Involuntary Groups and the}
Both the freedom of intimate association and the freedom of cultural association include, as a necessary corollary, some principle of inclusion and exclusion. For every human grouping must have its defining contours. Yet the reasons that some would-be members are included in, and others are excluded from, these liaisons are different. Intimate associations insulate a small sphere of personal endearment, passion, and physical fulfillment. Cultural associations screen out threats to broad-based ethnic and similar relationships that balance the great power of the state. Indeed, the life-blood of expressive groups (the identification and promotion of a clear ideological message) can, and often does, pose a threat to intimate and cultural associations. The latter groups celebrate other bases of human connection and actively discourage any focus on ideological differences about which participants may well disagree.

All three forms of associational freedom are vitally linked to self-identification. The freedom to think and to say what you think is part and parcel of being human; the right of expressive association merely adds the communal touch to an otherwise individualistic idea. The freedom to love is equally basic, the freedom of intimate association merely the doctrinal recognition of that truth. Finally, even in modern liberal society, for all its cold isolation, individuals still identify themselves, at least in part, by their cultural links with others. Individuals locate themselves in the universe not only by reference to those they vote with or sleep with, but also those they drink with, go to church with, live and die with. By the people they care for—and the people who care back. Here again, however, even as the different faces of associational freedom share a common theme in self-identification, they can be in tension one with another. We will see in the parade cases that expressive association, which contemplates a discernible collective message and gathers strength as that message is sharpened, competes with cultural association, which flourishes best when potentially divisive ideological issues are ignored.

*Ango-American Judicial Tradition*, 48 Wash. & Lee L. Rev. 381, 383 (1991) (observing the problematic nature of legal categories that purport to define basic social units such as families, tribes, and racial, ethnic, religious, or national groups).

61 Not just any club, irrespective of its size and character, can select its members as it chooses. See New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988). The rights-oriented freedom of association asserted by any particular group must be given its constitutional due as against more communitarian claims of equal access—but only in light of the "objective characteristics of the particular relationships at issue." Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 547-48 n.6 (1987) (quoting Roberts, 468 U.S. at 620); see Douglas O. Linder, *Freedom of Association After Roberts* v. United States Jaycees, 82 Mich. L. Rev. 1878, 1881, 1903 (1984) (identifying the liberal/communitarian tension in the background). In all three of the Supreme Court's principal cases in point, *Duarte, Roberts,* and *New York State Club Ass'n*, state anti-discrimination laws were applied to the gender-conscious membership policies of clubs with a substantially commercial raison d'être.

62 See discussion *infra* note 347 and accompanying text.
PARADING OURSELVES

In any case, to understand all that is at stake in the parade cases, we must explore the sense in which the organizers' efforts to exclude gays and lesbians, and equally gays and lesbians' attempts to participate, respond to deeper yearnings for self-definition through association. The right of expressive association is very much in the middle of this, but we will see that the rights of intimate and cultural association may be even more influential. Associations that are only distantly linked with the expression of any particular message may, in the end, reach all the way to the fundamental divisions from which the controversy over the parades arises in the first instance.

C. Complications

What we have said so far is hardly the end of parade law. To complete the whole, we must consider two further points that cloud the picture considerably.

1. The State Action Conundrum

The affirmative speech and associational rights we have discussed depend on a crucial premise, namely that only private citizens bear responsibility for what is said by way of a street parade and who is included or excluded. That premise is often perfectly sound. Certainly if local authorities restrict themselves to administering a neutral permit scheme for the very purpose of ensuring that private speakers have a chance to press their views without governmental interference, it would be circular to hold the state accountable for the message that private licensees express or the way in which they define the association through which they express it. If government is constitutionally obliged to play the role of disinterested referee, then it can scarcely be faulted for doing so. Herein, of course, orthodox constitutional doctrine indulges a crude version of the public/private distinction, much maligned in academic circles. Put concretely, the Constitution speaks only to the state,

63 The notion that government officials approve the speech of those who are permitted to express themselves would presumably (and invalidly) imply that the authorities can and should allow only speech with which they genuinely are in sympathy. See Toward a Gayer Bicentennial Comm. v. Rhode Island Bicentennial Found., 417 F. Supp. 642, 645 (D.R.I. 1976) (refusing to accept as a basis for denying a gay organization the use of a public facility the argument that the authorities thought that they would be approving the organization's point of view). The Court has noted that while government cannot subvert the Fourteenth Amendment simply by delegating authority for public facilities to private groups that discriminate on the basis of race, the wholesale refusal of state authorities to permit such organizations to use public facilities because of their views would infringe their freedom of association. Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974).

64 See, e.g., Symposium, The Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982). For a nuanced recent treatment of the many forms the distinction, and arguments about it, may take, see Ruth Gavison, Feminism and the Public/Private Distinction, 45 STAN. L. REV. 1 (1992).
not to private citizens and their organizations. And while the administration of a permit system clearly is "state action," the use to which licensees put their permits is not.

If, by contrast, local authorities depart from the role of neutral moderator and involve themselves in the enterprise, entirely different implications flow. Once public officials act in league with private citizens, the Constitution does address what is going on in the street, imposing the same standards for a joint venture between government and private actors as for governmental behavior alone. It follows, for example, that racial discrimination would be permissible only in the most extraordinary circumstances. Discrimination on the basis of sexual orientation may not receive an equal measure of judicial concern, but so long as we are now talking about a classification according to status, rather than differential treatment according to behavior, the blanket exclusion of gay and lesbian participants would be exceedingly difficult to defend. Moreover, if the basis of exclusion is not sexual orientation

---


66 See National Socialist White People’s Party v. Ringers, 473 F.2d 1010, 1016 (4th Cir. 1973) (explaining that “[n]o case suggests that in maintaining a street . . . a state espouses the views which may be there expressed”). Of course, here, too, variations on the facts can have doctrinal significance. Cf. O’Hair v. Andrus, 613 F.2d 931, 935 (D.C. Cir. 1979) (holding that District of Columbia authorities did not endorse the Pope’s religious message in violation of the Establishment Clause merely by providing police and fire protection during a mass on the Mall). Compare Gay Veterans Ass’n v. American Legion, 621 F. Supp. 1510, 1517 (S.D.N.Y. 1985) (holding that a parade licensed by the City of New York but conducted by the American Legion without public funds was “private” and thus not subject to the Fourteenth Amendment) with North Shore Right to Life v. Manhasset Am. Legion, 452 F. Supp. 834, 837 (E.D.N.Y. 1978) (reaching a different result where the relationship between city authorities and parade organizers was arguably closer). But see Gilfillan v. City of Phila., 637 F.2d 924, 928 (3d Cir. 1980) (holding that public expenditures for a special platform from which the Pope administered mass did violate the Establishment Clause).

67 In Gilmore, the Court noted that “invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action.” 417 U.S. at 575.


itself, but the views that gays and lesbians hold regarding their homosexualities, it would seem that, in this different state of affairs, the First Amendment would no longer protect private parade organizers' efforts to bar homosexuals because of their dissenting views, but, instead, would prohibit public and private organizers acting jointly from excluding gays and lesbians on that very basis. Here, of course, we return to ground we covered earlier. Even when they join forces with private actors, public officials are charged to be impartial with respect to the content of would-be speakers' messages and the viewpoints they wish to advance.

By this account, everything turns, again, on the doctrinal box in which a parade is placed: if it is legitimately an exercise of private constitutional rights within a neutral framework, we get one result; if it is a governmentally sponsored event, we get another. The line the Court uses to delineate these two categories establishes no bright and sharp test to be applied mechanically. We know only to look for "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." In the parade cases, it is not always easy to know such a nexus when you see one. True, the Court has not been inclined in recent years to hold local authorities responsible for many of the calamities that occur about them—even when they know what needs to be done but fail to take action within their authority and thus

ance Office, 895 F.2d 563, 571 (9th Cir. 1990) (declining to invoke "strict scrutiny" with respect to a sexual orientation classification touching security clearances) with High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 376 (9th Cir. 1990) (Canby & Norris, J.J., dissenting from denial of rehearing) (insisting that "strict scrutiny" was appropriate). See Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285 (1985); Developments in the Law: Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1557-59 (1989); see also Richard Delgado, Fact, Norm, and Standards of Review—The Case of Homosexuality, 10 U. DAYTON L. REV. 575 (1985) (probing more subtle doctrinal issues). Since I am now merely sketching largely noncontroversial legal doctrine, it is unnecessary to examine critically the status/behavior dichotomy implicit in cases like Bowers. Suffice it to say, though, that such a distinction will not withstand scrutiny. At the very least, the Court is inconsistent on the point. RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 189 (1988) (noting that religious practices as well as beliefs receive constitutional protection). One has to think, too, that the authority of the decision in Bowers has been weakened by Justice Powell's public admission that his (decisive) concurring vote was "probably" a "mistake." Anand Agnesshwar, Ex-Justice Says He May Have Been Wrong, NAT'L L.J., Nov. 5, 1990, at 3.

70 See also Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (recognizing the cases in which classifications bearing on free speech have received special judicial attention); cf. MOHR, supra note 69, at 39-41, 188-89 (making the point that if homosexual orientation is a matter of choice it would seem to be protected after the fashion of free speech). But see discussion infra note 362 and accompanying text.

71 See discussion supra notes 16-17 and accompanying text.

72 See discussion supra notes 21-22 and accompanying text.

permit, if they do not commit, harmful behavior. Yet some decisions attach significance even to official participation in the “scheduling” of events on public property.

2. The Police Power

Finally, the conceded constitutional protection to which parade organizers and participants are entitled is not absolute, but must be balanced against the reasons that government may have for restricting constitutional freedom. We have already mentioned government’s legitimate interests in traffic management and public order, which explain and justify subjecting parades to previous restraints. Further regulation may be warranted to serve other, equally legitimate objectives. Specifically, the Supreme Court has regularly held that government has a compelling interest in combating invidious discrimination and thus may legislate a state of affairs it has no constitutional obligation to sponsor. In this, of course, the Court acknowledges a field of operation for discretionary, majoritarian, legislative police power. Both New York and Boston have ordinances that expressly prohibit discrimination on the basis of “sexual orientation” in “places of public accommodation.” And the courts and agencies responsible for enforcing those laws have found them applicable to the St. Patrick’s Day parades.

---

74 E.g., Deshaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189, 196-97, 201 (1989).
   It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation, resort or amusement, because of the race, creed, color, national origin, age, gender, disability, marital status, sexual orientation, alienage, or citizenship status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.
78 MASS. GEN. L. ch. 272, § 98 (1992):
   Whoever makes any distinction, discrimination or restriction on account of race, color, religious creed, national origin, sex, sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object, deafness, blindness or any physical or mental disability or ancestry relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement, as defined in section ninety-two A, or whoever aids or incites such distinction, discrimination or restriction shall be punished . . . .
79 Ancient Order of Hibernians in Am., Inc., Complaint No. MPA-0362, slip op. at 3 (City of N.Y. Comm’n on Human Rights Oct. 27, 1992) [hereinafter HRC Decision];
Here again, we have boxes to fill, labels to attach. Here again, the effort we spend in that direction brings us closer to a confident result—but fails actually to get us there. Just as it will not do simply to characterize the parades as private affairs administered by disinterested governmental traffic cops, and to insist on that basis alone that organizers may exclude gays and lesbians, it will not do, in the alternative, simply to characterize them as public events, wherein even private actors may be asked to comply with local anti-discrimination laws. To appraise fully the constitutional implications of parading ourselves, we have to get deeper into the experiential backdrop of the parades. We are ready to do that now.

II. Parades in the Streets

Let us be clear at the outset that we are not here discussing just any of the thousands of street processions held both regularly and irregularly in the United States each year. Nor are we investigating any of the two hundred or so parades scheduled annually on March 17 in various towns around the country. Those parades may be flavored by Irish attachments and senti-

Irish-American Gay, Lesbian & Bisexual Group v. City of Boston, Civil No. 92-1518, slip op. at 3 (Mass. Super. Ct. Feb. 19, 1993). The state courts are authoritative regarding the reach of these state statutes. Keller v. State Bar, 496 U.S. 1, 11 (1990). It is open to argue that a parade is such an obvious exercise of free speech that it should not be held to be a place of public accommodation. E.g., Reply Memorandum of Law Submitted on Behalf of the New York Civil Liberties Union at 8-12, Ancient Order of Hibernians (No. MPA-0362) [hereinafter NYCLU Memorandum, HRC] (making this argument with respect to the New York parade). Yet the power of such an argument depends on the particular circumstances of the case at hand. It is also open to argue that a parade is not a "place" within the meaning of these ordinances. Cf. Welsh v. Boy Scouts of Am., 742 F. Supp. 1413, 1421 (N.D. Ill. 1990) (declining to apply Title II of the 1964 Civil Rights Act to the Boy Scouts because that organization was not a "place" for Title II purposes). It is not unusual, however, for local agencies and courts to read anti-discrimination statutes more generously in aid of their remedial objectives. E.g., National Org. for Women v. Little League Baseball, Inc., 318 A.2d 33, 37 (N.J. Super. Ct. App. Div. 1974); see Curran v. Mount Diablo Council of Boy Scouts, 195 Cal. Rptr. 325, 334 (Ct. App. 1984) (reviewing the history of less accommodating judicial decisions regarding a similar statute in California—and the legislative response).

See Keller, 496 U.S. at 11 (making clear that an authoritative state court decision regarding the nature of an organization for state law purposes does not control any federal constitutional implications). The analytical point, of course, is that state and federal issues arise seriatim. It must first be decided whether a parade is a public accommodation under state law. Only if it is does one need to reach the further question whether such state anti-discrimination law can be applied in a particular instance, consistent with the federal Constitution. But see Ward v. South Boston Allied War Veterans Council, Docket No. 92-BPA-0014, slip op. at 2 (Mass. Comm'n Against Discrimination May 29, 1992) (Investigating Commissioner's Order) (on file with the Boston University Law Review) (erroneously suggesting that a decision that a parade fits the state statutory definition of a place of public accommodation precludes further First Amendment issues).

Affidavit of Bartholomew Murphy, Vice President of the New York County Board
ments and may be named for Ireland's patron saint, St. Patrick. Yet they are not "the" St. Patrick's Day Parade up Fifth Avenue in Manhattan or "the" Evacuation Day Parade in South Boston. The New York and Boston events are singular in the profound significance they bear for all New Yorkers and Bostonians, for all Irish Americans and, indeed, for the country as a whole. Let's take a moment to review their history.

A. The New York Parade

1. History

By conventional account, the parade in New York finds its origins in several small celebrations in the eighteenth century, undertaken by Irish immigrants to commemorate the feast day of St. Patrick, the cleric said to have introduced Christianity to Ireland. In 1766, for example, a fife and drum team from a local military unit circulated among the homes of prominent Irish families, awakening everyone at dawn. Over the succeeding century, parading up Fifth Avenue on March 17 evolved into an annual event. Two developments in the middle of the nineteenth century bore telling, definitional significance—the appearance of a regular sponsor for the event and the emergence of the parade as an Irish-Catholic counterpoint to the nativism of the annual Independence Day parade in the city. A third development in recent years, the emergence of the parade as a situs for working through modern political disputes, forms the crucial backdrop for the current controversy we are exploring.

The parade began to take on genuine staying power in 1853, when it found a reliable annual sponsor in the New York County branch of the Ancient Order of Hibernians (AOH), a privately organized, not-for-profit organization with roots in medieval Ireland, whose members must be Roman Catholic men of Irish descent.85 There were occasional gaps. The parade was
canceled in 1880 in order that scarce funds might better go to famine relief efforts in Ireland. And it was split apart on two occasions, 1858 and 1885, because of bickering between rival Hibernian groups. In 1885, one contingent marched uptown from Cooper Union, while the other proceeded downtown and across the bridge to join a third parade in Brooklyn. In 1916, the police commissioner awarded the parade permit to a minority faction of pro-British Hibernians. After winning the resulting court battle, that group managed only a small procession on Fifth Avenue, boycotted by most other Irish societies. The New York County group that had previously served as sponsor refused an invitation to march on an alternative street that year. Responsibility for the parade was soon restored to the county AOH, and that organization has organized and conducted it ever since. For as long as anyone can remember, the police department has reserved “the” permit for “the” parade up Fifth Avenue on March 17 for this “traditional” sponsor, refusing to consider awarding “the” permit to any other applicant—a practice, by the way, that Judge Constance Baker Motley approved in 1985.86

86 Gay Veterans Ass’n v. American Legion, 621 F. Supp. 1510, 1516 (S.D.N.Y. 1985) (noting a similar practice with respect to the Veterans Day parade, the Labor Day parade, and the Gay Pride Day parade). Gerald J. Kerins, the Assistant Chief of Police at the time, testified in the Gay Veterans case as follows:

Q: Chief Kerins, on what basis do you approve or disapprove an application for a parade permit?
A: Well, there are certain parades that are held annually, some of them going hundreds of years, and we routinely approve those parades without any question or any reservation.

There are a variety of other parades, some of them new, some of them on an individual basis, that are just one-time affairs and that we review the route, the time of day, the area that they are looking to march, and based on our findings, we either approve or disapprove of them . . .

Q: Can you tell us what a traditional parade is?
A: The traditional parades that we have are, you know, there are about 20 that go down Fifth Avenue and involve mostly ethnic groups; the Italians, the Irish, the Spanish. They march at the same—either on the same date every year or on the same Sunday or Saturday of the week . . . .

Q: Are these parades also in the same location each year?
A: Yes, they follow [sic] the same parade route.

Q: And does the police department give these traditional parades a priority when the applications come in?
A: Yes, we do.
Q: The police department doesn’t go on a first come-first served basis, does it?
A: No, no, we don’t.
Q: Why does the police department give a priority to these traditional annual parades?
A: Well, I think that every parade group—I don’t know of any that over the course of years has not had some dissident elements in it; the Irish with the No Raid Committee, and the signs, anti-Britain, the JDL in the Salute to Israel parade, the Puerto Ricans have a socialist group that used to march in their parade that upsets the parade committee. Any one of these groups, to embarrass the regular annual parade, could file a petition ahead of time and if we were to follow a first come-first served, it could exclude parades like St. Patrick’s, which has been going for over 200
Under the current ordinance, indeed, it appears that traditional sponsors for annual Fifth Avenue parades need not even apply for permits.\footnote{87} The Hibernians purport to do so only to ensure efficient cooperation with the police.\footnote{88}

Under the auspices of the county AOH, the parade on March 17 matured in the last half of the nineteenth century in parallel with the Independence Day parade on July 4. Early on, anti-Irish and anti-Catholic forces in the city resisted Irish participation in the July 4th parade. In 1853, the Convention of Irish Societies bowed to the threat of violence and declined to send representatives. When Hibernians attempted to take their place, they ended up in a brawl with "Know Nothings." Thereafter, the March 17 parade, with all its attention to people and ideas distinctly Irish, came to be understood as an Irish rejoinder to the July 4th parade, the symbol of an overarching, national society from which many Irish immigrants felt excluded.\footnote{89}

On the one hand, the March 17 parade has always had a certain edge to it—a sense of resentment and alienation born of rejection by the larger community. The martial character of the March 17 celebration reflects this contentious history. To this day, the St. Patrick's Day parade in New York is escorted by military units—most prominently the "Fighting 69th," a regiment of the state militia that historically included many Irish recruits.\footnote{90} The self-evident religious overtones are, in some sense, to the same effect. The parade is preceded each year by a special mass, conducted at St. Patrick's Cathedral by the Cardinal of the Archdiocese of New York. Representatives of the Fighting 69th routinely attend the mass, as do other principal participants. By common account, the parade reaches its zenith when it passes the Cathedral and the Cardinal's traditional reviewing stand, where the Cardinal himself extends the grand marshal an official greeting.\footnote{91} Many units in the parade carry banners bearing the traditional seal of an Irish county on years, and some of the other parades, so it has been the policy of the police department to continue to give the parade permits to the organizations that traditionally hold them.

\begin{itemize}
  \item \textit{b. Exemptions.} This section shall not apply. . . .
  \item \textit{3.} To processions or parades which have marched annually upon the streets for more than ten years, previous to July seventh, nineteen hundred fourteen.
\end{itemize}


\footnote{88} The current ordinance expressly exempts longstanding parades (and thus their traditional sponsors) from any permit requirement:

\begin{itemize}
  \item b. Exemptions. This section shall not apply. . . .
  \item 3. To processions or parades which have marched annually upon the streets for more than ten years, previous to July seventh, nineteen hundred fourteen.
\end{itemize}


\footnote{88} Affidavit of Timothy V. Hartnett at 8, Ancient Order of Hibernians v. Dinkins (Civ. 0281) (on file with the Boston University Law Review) [hereinafter Hartnett Affidavit] (insisting that "[t]he police department reserves the route for the sponsor and does not issue a permit to anyone else"); \textit{see also} discussion \textit{infra} note 170 and accompanying text.

\footnote{89} HRC Recommended Order, \textit{supra} note 85, at 4 (locating the "roots" of the parade in efforts to eliminate "discrimination against Irish New Yorkers").

\footnote{90} Ridge, \textit{supra} note 84, at 69.

\footnote{91} Murphy Affidavit, \textit{supra} note 81, at 9; HRC Recommended Order, \textit{supra} note 85, at 5.
one side and representations of St. Patrick on the other. These traditional features attest to a definite sense of difference—the pride that flowers in a people spurned.

On the other hand, and perhaps paradoxically, the parade also projects the image of Irish inclusion. According to the organizers, the parade celebrates not only Catholic ideology and Irish heritage, but also the proposition that “all Americans, native and immigrant alike, enjoy the freedom of the City on the streets of New York and, by implication, throughout our land.” The Hibernians thus enthusiastically invite participants and spectators from all quarters to a massive, civic event that aspires to pluralistic unity. Even the military escorts and the tributes to the Cardinal fit this additional model. The presence of units like the Fighting 69th makes the point that Irish-Americans, too, are ready to fight for their country. The orchestrated deference to the Cardinal invites religious tolerance.

The parade has also reflected, and been affected by, domestic political alignments and disputes. At the outset, anti-Irish sentiments among Republicans kept politicians away. Yet when the number of immigrants in the

---

92 HRC Recommended Order, supra note 85, at 5.
93 Id.
94 Ridge, supra note 84, at 70.
96 See George E. Reed, From the Ward to the White House 52-54 (1991) (contrasting the industrialists then in control of the Republican Party with urban working-class Irish immigrants).
city swelled in the late nineteenth century, Irish New Yorkers built their own power base in the Democratic Party. Then, the parade began to attract vote-seeking office holders and candidates. Occasionally, city mayors served as grand marshals. When there were two parades in 1885, Mayor W.R. Grace, himself an Irishman, attended both. In 1966, the liberal Republican mayor, John Lindsay, walked the entire route. Through the 1980s, political figures from all three New York parties regarded an appearance at the parade as de rigueur, both to participate actively in one of the city's premier events and also to signal a bond with, and concern for, Irish-Americans and their interests. For many years, and again in 1993, the city permitted organizers to paint an "emerald" green line on Fifth Avenue to mark the parade route—yet another salute to the Irish roots of the celebration. Politicians sometimes spelled their surnames with an extra "O" on parade day, and generally promoted the message of Irish inclusion implied in the common refrain that "[o]n St. Patrick's Day, every New Yorker is Irish."

In this way, the New York parade has grown both in stature and in size. Participants in 1936 reportedly numbered 40,000. More recently, the figure has consistently been many times that. Individuals march only in units approved by the county AOH parade committee. Each unit may display its own identifying banner, but other flags or signs are barred—particularly placards promoting political candidates, social causes, or commercial products. Anti-abortion groups have been excluded, notwithstanding that many Hibernians undoubtedly share their views, as have political candidates attempting to march alone—among them Jimmy Carter and Robert Kennedy. The Irish flag is everywhere, and one traditional banner reads: "England Get Out of Ireland." In recent years, the parade has included labor unions, numerous police, military, and school bands, and units representing immigrant groups from other countries. The official line of march

97 See 1 U.S. CENSUS OFFICE, NINTH CENSUS 1870, at 386-91 tbl. 8 (1872) (reporting that Irish-born residents accounted for 21.4% of the city's population in 1870).
99 Ridge, supra note 84, at 78.
100 Parading Bigotry, N.Y. TIMES, Jan. 25, 1992, at A22 (noting that the modern parade "involves every politician in town").
101 Sam Roberts, One More Time, with Turmoil, N.Y. TIMES, Mar. 17, 1993, at B1 (reporting that the city refused permission to paint the Irish green line when other ethnic groups began demanding that they paint their national colors on the avenue during their parades—but that the green line was back in 1993).
103 See Cantwell, supra note 98 (noting that the parade became larger after Irish immigration swelled in the mid-nineteenth century).
104 Hibernian Memorandum, State Court, supra note 95, at 24-26.
105 Id. at 26 n.17.
106 Respondent Commission's Memorandum of Law in Opposition to the Petition and in Support of its Cross-Petition to Enforce Its Order at 6, Beirne v. New York City
is a virtual honor role of ethnic Irish organizations and musical groups from the region. 107 The crowd of onlookers has reached two million along the parade route and millions more via television. 108 Sponsors promote the New York event as the "largest civilian annual parade in the world." 109

Notwithstanding its success, the parade has recently come upon troubled times. On the whole, it seems clear that the parade is a net economic benefit to the city. According to one source, it generates $15 to $20 million in business each year. 110 Most of those profits go, however, to enterprises with a distinct Irish flavor—from Irish pubs to companies that manufacture Irish paraphernalia. 111 By contrast, merchants along Fifth Avenue protest that the parade diverts their usual customers and thus actually reduces sales. 112 Residents of the area complain that they have only limited access to their own homes, and the police report that as the parade has become larger it has placed ever heavier demands on the department to manage congested traffic and ensure public safety. 113 For their part, city authorities have encouraged the AOH to reduce the length of the parade so that it can be completed before dark—when police protection becomes more difficult. 114

As one might expect, patience with the parade has worn thin as the political power wielded by the Irish community in the city has worn out. Having achieved some economic success, most Irish New Yorkers removed to the suburbs—where many began to vote the Republican ticket. Barely ten percent of the city's voters now identify themselves as Irish-Americans, and, in hard political terms, few of those genuinely matter to current city office holders. Mayor David Dinkins, who has consistently supported gays and lesbians who wish to march, received only eighteen percent of the white Catholic vote in his 1989 victory over Rudolph W. Giuliani, who has generally sided with the Hibernians. 115 In the main, the Hibernians who have


109 Joint Statement, supra note 85, at 3.

110 Perez-Pena, Uncertainty, supra note 108, at A31 (reporting an estimate by Debra Pucci of the European-American Affairs Bureau in the Mayor's office). My attempt to obtain a more exact figure was unsuccessful. Telephone Conversation with Christina Ampil, New York City Economic Policy and Marketing Group, June 11, 1993 (reporting no information available on annual events like the parade).


114 See Hartnett Affidavit, supra note 88, at 12 (describing the New York Police Department's parade policy).

115 Richard Perez-Pena, Another Irish Parade Sequel: Despite Ruling for Hibernians.
traditionally conducted the parade are of that older generation, now located outside Manhattan. The Irish who now live in town tend to be younger and politically more progressive. They read different newspapers, subscribe to different visions of the good life, and, in many instances, recognize in themselves a different sexual orientation. By some estimates, ten to fifteen percent of the city’s electorate is gay. As one knowledgeable observer has put it, “[t]here are probably almost as many gay Irish as there are straight Irish in this town.” In these demographic shifts lie the seeds of division within the Irish community itself—a matter not unrelated to the current controversy over gay and lesbian participation in the parade.

Issues reflecting generational differences have appeared in the parade before. For many years, women were not permitted to march. After that barrier was broken, attention focused on the conspicuous absence of any...
female names on the parade's long list of grand marshals. Formally, at least, the charge of gender discrimination was met by the selection of Dorothy Hayden Cudahy in 1989.120 The quarrel over gay and lesbian marchers, however, dwarfs all previous internal disputes. Upon its resolution rests the parade's very future. Politicians now avoid the parade, lest their presence be regarded as an endorsement of bigotry.121 Attendance rates are off, profits are down,122 and there is a real possibility that the parade will not survive the storm. The Times has flatly encouraged New Yorkers to stay home.123

2. The Current Controversy

The quarrel over gay and lesbian participation in the New York St. Patrick's Day parade may have begun in the winter of 1989, when an estimated 5,000 demonstrators, organized by two advocacy organizations, AIDS Coalition to Unleash Power (ACT-UP) and “Queer Nation,” disrupted Cardinal O'Connor's conduct of a mass at St. Patrick's Cathedral.124 The protestors reportedly chanted slogans, chained themselves to pews, threw condoms in the air, and spat out morsels of consecrated wafer.125 Then and there, by some accounts, the Catholic hierarchy in the city equated all homosexual activists with ACT-UP, and all activist tactics with desecration.126 Later, when the dispute over gay and lesbian participation in the St. Patrick's Day parade arose, there were reports that the Cardinal might endorse a compromise resolution—if, in exchange, would-be homosexual marchers publicly denounced the demonstration at the Cathedral.127 By other accounts, how-

121 Perez-Pena, Sequel, supra note 115, at B3.
122 Id.; Perez-Pena, Uncertainty, supra note 108, at A31.
123 Right Parade Ruling, Wrong Message, N.Y. TIMES, Mar. 2, 1993, at A20 (arguing that if the Hibernians do not relent, New Yorkers should ignore their “bigoted message” and their “march”).
126 See Patrick Farrelly, Why They Turned Their Backs on the Parade, IRISH VOICE, Mar. 30, 1991, at 8 (quoting one traditionalist complaining that gay and lesbian marchers were the same people who “invaded the cathedral and made a mockery of the Mass”); Bruce Weber, A Time of Trouble for Hibernians, N.Y. TIMES, Feb. 19, 1992, at B2 (reporting the views expressed by Hibernians). The following year, as many as 3000 parishioners and supporters from the region crowded into the cathedral, preventing demonstrators from entering the main chamber. Jim Dwyer, More Acting Up in the Cathedral, NEWSDAY, Dec. 10, 1990, at 2.
127 See Jim Dwyer, ACT-UP Sin, ILGO Penance, NEWSDAY, Jan. 18, 1993, at 2 [here-
ever, the Cardinal steadfastly refused to consider any such accommodation because he remained furious at what he regarded as disrespect for the Church, reflected in the Cathedral episode.\textsuperscript{128} By still other reports, the leaders of the gay group seeking access to the parade found it objectionable that they should be held responsible for actions taken by others, who happened also to be homosexual.\textsuperscript{129} There is a sense, then, in which both gays and lesbians seeking to march in the parade and its traditional Catholic organizers and sponsors view themselves as put upon. Would-be homosexual participants think they were being unfairly excluded out of bigotry ("gay-bashing"), while Catholics think the point of the demand by gays and lesbians to take part amounts to religious intolerance ("Catholic-bashing").\textsuperscript{130} And this notwithstanding that many of the gays and lesbians who wish to march themselves profess to be Catholic.\textsuperscript{131}

No one doubts that gays and lesbians participated in the parade from its inception, marching with any of the many affiliated organizations.\textsuperscript{132} In the


\textsuperscript{129} Dwyer, \textit{Sin}, \textit{supra} note 127, at 2.


\textsuperscript{132} \textit{See} Hibernian Memorandum, State Court, \textit{supra} note 95, at 2 n.3 (explaining that
fall of 1990, however, just months after the Cathedral demonstration, a
group of about one hundred homosexual men and women of Irish descent, the
Irish Lesbian and Gay Organization (ILGO), applied to the AOH
parade committee for permission to join the procession as a formal unit,
flyng the ILGO banner. ILGO had previously participated in the Gay
Pride Day parade in New York, and that positive experience led its members
to think that marching in the St. Patrick's Day parade would be equally
rewarding. The parade committee chair, Francis P. Beirne, denied
ILGO's application and later gave two reasons for his action. In the main,
he simply considered ILGO ineligible to participate in the parade as a unit,
because the homosexual "lifestyle" the group promoted conflicted with the
 teachings of the Catholic Church, the promotion of which he understood to
be a principal purpose of the parade. Additionally, however, he said he
regarded ILGO's application as premature. In response to the city's request
that the parade be kept to a manageable size, the committee had developed a
waiting list of organizations seeking to participate. At the very most,
accordingly, Beirne insisted he could only put ILGO on that list, so that in
due course it might work its way to the top and be evaluated on the merits.
Beirne said nothing to ILGO about the conflict he saw with Catholic doc-
trine and, instead, promised to add ILGO to the waiting list like any other
new organization seeking a chance to march. In fact, however, he hoped
that by postponing consideration of ILGO's application, he might effectively
avoid dealing with it at all. For by the time ILGO's name reached the top of
the list, the idea of an ILGO contingent in the parade might have "blown
over."

Convinced that the waiting list was a ruse, ILGO sought help from Mayor
Dinkins, who proposed a compromise: on this occasion at least, the parade
might be lengthened to accommodate small marching units from each of the

---

133 HRC Recommended Order, supra note 85, at 3-4.
134 Id.
135 Hartnett Affidavit, supra note 88, at 11.
136 Id. at 11-12; see also Irish Lesbian & Gay Org. v. New York State Bd. of Ancient
of the parade controversy).
137 Hartnett Affidavit, supra note 88, at 11. When Beirne received ILGO's applica-
tion, he did not treat it as he did other requests, but, instead, consulted the committee's
attorney. While he did file the application in the usual fashion on advice of counsel, he
later testified that he had no intention of including ILGO in the parade no matter where
its name might be on the waiting list. When the president of the state AOH board, Al
O'Hagen, saw Beirne's misleading letter to ILGO, he admonished Beirne that "there
[was] no substitute for honesty" and that Beirne's failure to say forthrightly that ILGO
had "no place" in the parade because of its agenda had put the organizers in "a compro-
mising position." HRC Recommended Order, supra note 85, at 20-21.
forty organizations on the waiting list, including ILGO. If necessary, the Mayor offered to provide city funds and volunteers to assist the Hibernians in managing a larger event.\(^\text{138}\) The AOH declined to agree to that arrangement and later offered three reasons: such a concession established for ILGO alone might insult other groups for whom the Mayor had made no similar effort in the past; the acceptance of public funds would draw the parade's "private status" into question; and ILGO's participation "under its own banner" would "compromise the religious values and message of the Parade."\(^\text{139}\) After further negotiations, however, the parties reached a settlement: ILGO members would be permitted to march as the anonymous guests of a sympathetic AOH unit—that is, without their own identifying standard.\(^\text{140}\)

The point of this arrangement was rather plain. The AOH hoped to defuse any confrontation with ILGO and to appease Mayor Dinkins, but at the same time to avoid any formal recognition of the gay and lesbian organization. That objective was wildly unrealistic. The Mayor not only announced the compromise at a press conference, but also declared that he would abandon his usual place at the head of the parade and march, instead, with ILGO. He himself would substitute for the banner the settlement prevented ILGO from displaying.\(^\text{141}\) Dinkins did join the ILGO marchers for part of the parade on March 17, 1991 and, in so doing, drew public attention to the nature of the unmarked contingent around him. In addition, ILGO members identified themselves by wearing T-shirts bearing the names of ACT-UP and Queer Nation. Along the way, onlookers rained invective on the Mayor and the gay and lesbian participants he had chosen to support.\(^\text{142}\) When the group reached the Cardinal's reviewing stand, the Cardinal gave Dinkins an "icy" reception.\(^\text{143}\) By some, albeit disputed, reports, some mem-


\(^{\text{139}}\) Hartnett Affidavit, supra note 88, at 13.

\(^{\text{140}}\) The accommodating AOH unit was Division 7 of the New York County Hibernians, perhaps the only AOH affiliate that expressed sympathy with ILGO's cause. Within a few months after the parade, the county organization expelled Division 7. Formally, the ground was the division's failure to cooperate in a matter of procedure. Yet many observers took the action to be punishment for the division's support of ILGO. Dennis Hevesi, Irish Order Expels Hosts of Gay Group, N.Y. TIMES, Sept. 21, 1991, at 23; see also Dennis Hevesi, Hibernians Bar Gay Irish from Parade, N.Y. TIMES, Dec. 27, 1991, at B1 (quoting a leader of Division 7 to the effect that his group was getting a "spanking"). The state AOH organization soon overturned the expulsion and restored Division 7 to good standing. Dennis Hevesi, New York City Irish Group Loses Parade Permit, N.Y. TIMES, Jan. 10, 1992, at B1.

\(^{\text{141}}\) Jerry Gray, Mayor's Place in Parade to Be with Gay Group, N.Y. TIMES, Mar. 16, 1991, at A27.


bers of the platform party turned their backs in an apparent show of disgust, while some ILGO members shouted expletives, sang provocative chants, and made offensive gestures. The scene, in sum, was hostile, confrontational, and disrespectful—and thus destined to fortify both ILGO's resolve to march as a unit the following year and the Hibernians' resistance.

Late in 1991, ILGO wrote to the parade committee on two occasions to request a status report on its application to participate as a unit in the 1992 parade. When the committee failed to respond to either letter, city officials attempted to negotiate another compromise. Informal discussions at City Hall soon faltered, however, and the Mayor took a different tack. Since the county AOH was intransigent, he attempted to bypass that group and deal, instead, with the state AOH organization, which appeared to be more pliable. Despite the county organization's longstanding role in conducting the parade, the Mayor awarded the permit for the 1992 parade to the state AOH board. That strategy proved futile, however. After litigation in the state courts over the relative positions and authorities of the two AOH groups, both the state and the national AOH organizations adopted the county group's attitude toward ILGO. Irrespective of which AOH organization held the permit, ILGO would not be welcome.

The Hibernians now gave two justifications for their position. First, they purported to rest on a sense of civic responsibility to ensure that "New York City's" annual parade not be used to insult spectators. In light of the "outrageous behavior" the Hibemians ascribed to ILGO and "non-Irish support groups" (evidently, ACT-UP and Queer Nation) in 1991, ILGO would not be invited back. Second, the Hibernians voiced their commitment to what

---

144 Farrelly, supra note 126, at 8; Bryan Rohan, Gay Power and Parade Politics, IRISH VOICE, Mar. 23, 1991, at 22.
145 Hartnett Affidavit, supra note 88, at 14-15. But see Dwyer, Bigotry, supra note 131 (reporting that video tapes of the parade revealed no misbehavior by ILGO marchers).
146 See generally James Barron, Beer Shower and Boos for Dinkins at Irish Parade, N.Y. TIMES, Mar. 17, 1991, at A1, A34. For the Hibernians' reaction, see Hartnett Affidavit, supra note 88, at 14-15. For the Mayor's response, see David N. Dinkins, Keep Marching for Equality, N.Y. TIMES, Mar. 21, 1991, at A23 (explaining and justifying his actions to the public); Robert D. McFadden, Dinkins Joins Gay Marchers in an Encore, N.Y. TIMES, Mar. 18, 1991, at B1 (quoting the Mayor insisting that he had done "the right thing").
147 Letter from David N. Dinkins, Mayor of the City of New York, to Timothy V. Hartnett, President, New York County Ancient Order of Hibernians at 2 (Jan. 16, 1992) (on file with the Boston University Law Review).
148 See Hartnett Affidavit, supra note 88, at 28; Bruce Weber, Hibernians in Accord on Parade, N.Y. TIMES, Feb. 26, 1992, at B3 (reporting that the state organization had decided to permit the existing county parade committee to proceed).
they said was one of the parade’s “main founding purposes,” namely “to uphold, defend and protect the Roman Catholic Church, its priests and bishops, its teachings and tenets.”

A contemporaneous statement from the parade committee underscored that, with respect to this second ground, the Hibernians were not acting out of any sense of responsibility to the city, but were, instead, asserting their proprietary interest in the parade as an instrument for advancing their own sectarian views: “[N]o group that has a position contrary to the teachings of our Catholic faith has a place in our Parade.”

Two days later, the New York City Human Rights Commission (HRC) issued a complaint charging the Hibernians with violating the city’s ordinance prohibiting discrimination on the basis of sexual orientation in places of public accommodation. In hopes of disposing of the matter in time for the parade in March, the HRC expedited its ordinary procedures. An administrative law judge, Rosemarie Maldonado, held a hearing and thereafter made numerous findings favorable to ILGO—among them a determination that ILGO’s formal place on the waiting list was a pretext and that the Hibernians never meant to consider ILGO for participation in the parade. Nevertheless, Judge Maldonado recommended that the complaint be dismissed in deference to the Hibernians’ First Amendment rights. The HRC itself did not review her recommendation immediately. Two members

[N]o organization or organizations are allowed to use New York City’s 231st Annual St. Patrick’s Day Parade on March 17, 1992 as a vehicle to publicly insult any person or group watching or reviewing the parade. The outrageous behavior and conduct of the Irish Lesbian and Gay Organization (ILGO), and its several well known, non-Irish support groups, on Fifth Avenue and particularly in front of St. Patrick’s Cathedral and at the Parade Reviewing Stand, during the 1991 parade, mandated that ILGO not be permitted to participate in the 1992 Parade.

Id. (emphasis added).

HRC Recommended Order, supra note 85, at 33. The HRC enforcement bureau did not suggest that the Hibernians’ own membership policy was subject to the anti-discrimination ordinance. Since the AOH was a “benevolent” order within the meaning of New York law, it was exempt from that ordinance and thus was free to exclude women and non-Catholics. Id. at 16 n.7. Instead, the bureau claimed that the AOH had violated the anti-discrimination law in that it had engaged in discrimination on the basis of sexual orientation in the conduct of the parade—which the HRC viewed as a “public accommodation.” Id. at 17.

Id. (explaining that the argument that ILGO was placed on the waiting list “like everyone else” was “clever” but “not supported by the evidence”). This is not to say that there was no list at all. There was, and the Hibernians made it available. Brian Rohan, Countdown, IRISH VOICE, Mar. 17, 1992, at 20 (reporting the “Official Parade Waiting List”).

HRC Recommended Order, supra note 85, at 33. As the Hibernians put it:

The point is that if . . . placing ILGO on the waiting list was pretextual and was tantamount to denying ILGO affiliation, one must still look at the reasons why ILGO was rejected. . . . There is no question that the Parade Chairman took the
recused themselves because of their relationship with, and support for, ILGO's cause, and a schedule was established in contemplation of a final decision in the fall. When it became clear that there would be no conclusive HRC ruling before March 17, ILGO went to federal district court, seeking a preliminary injunction forcing the AOH to accept ILGO into the line of march as an identified unit. When the case came on before Judge Pierre N. Leval, the contending arguments were precisely what we might have expected. ILGO conceded that if the parade were truly a "privately sponsored event" fostering Catholic doctrine, the organizers would be entitled to exclude a homosexual group espousing a conflicting point of view. Yet ILGO insisted that the parade was not "private" in that crucial sense at all—that it was, instead, so "intertwined" with officialdom that the Hibernians had "come to act on behalf of the City," that AOH action was therefore "state action" within the meaning of the Fourteenth Amendment; and that, accordingly, ILGO members must be permitted to participate in the exercise of their rights to freedom of speech and association and against irrational discrimination. The Hibernians, for their part, conceded that if the parade were genuinely a public event, sponsored by the city, it would follow that ILGO could not be excluded out of deference to the Church. By contrast, however, the AOH insisted that the parade was entirely private; that the organizers therefore had no duty to respect ILGO's desire to express its message; and that, indeed, they were constitutionally entitled to use the parade to express their own views—however distasteful those views might be to Mayor Dinkins or anyone else.

Faced with the issues framed in these classic terms, and pressed to reach a resolution within the space of a few days, Judge Leval took evasive action. On the day before the parade, he issued an order in which he explicitly declined to decide whether the free speech right at stake in the case "belong[ed]" to ILGO or the Hibernians. Before he could reach that easy way out... because he perceived ILGO to have an agenda and to be not in accord with church teaching.

Hibernian Memorandum, State Court, supra note 95, at 8-9.

155 See discussion infra notes 167-68 and accompanying text.


157 Irish Lesbian & Gay Org., 788 F. Supp. at 176-77; see Donna Greene, Westchester Q&A: John P. Hale, N.Y. TIMES, Feb. 7, 1993, § 13 (Westchester Weekly), at 3 (quoting a Hibernian leader declaring that ILGO's message was that "homosexuality is legitimate behavior" while Catholic teaching has it that "homosexual behavior is morally wrong").

“provocative” issue, he insisted he must deal with the waiting list problem. ILGO had asserted, but not proven, that the list was a sham. If it was genuine, and there were other organizations ahead of ILGO in line, then the court could not very well give ILGO precedence over those groups—ordering the Hibernians to accept ILGO into the parade while leaving the others to wait longer than they otherwise would. Even if ILGO could demonstrate that Beirne had been disingenuous; if, as Judge Maldonado had found, ILGO was not “meaningfully” listed with other applicants; and if the Hibernians could not lawfully refuse even to consider ILGO’s application—still, the court could at most redress only that wrong. As Judge Leval saw the evidence, the parade was “full,” and if an opening appeared it would presumably be filled by organizations near the top of the waiting list.\(^\text{159}\) Even if he concluded, then, that ILGO must be given a “meaningful” place on that list, it would be some time before the ultimate question whether the Hibernians must allow gays and lesbians to march in the parade would arise.\(^\text{160}\)

Judge Leval’s disposition of ILGO’s request for a preliminary injunction only temporarily eluded the problem in which we are interested. The crucial question may be expressed either way: whether the Hibernians can validly refuse even to consider ILGO’s application to march (and thus can decline to put ILGO on a genuine waiting list), or whether the AOH can simply exclude ILGO from the parade.\(^\text{161}\) Judge Leval’s attempt to dodge it was shallow at best. For he did not pause to ask how it was that “the” St. Patrick’s Day Parade was “full” and who might be responsible for making it so. Those questions, in turn, go to the very definition of the New York parade and who is responsible for specifying that—matters to which we will return.\(^\text{162}\) Moreover, Judge Leval did not explain how it was that the groups previously approved for participation could retain their positions in the parade if it were assumed, for purposes of decision, that the AOH had picked them on a discriminatory basis. If state authorities are shown to have excluded African-American children from a public school, it hardly is open to the principal to respond that blacks can nonetheless continue to be turned away because the school is “full” of white kids who gained admission because they were not black.

In the near term, differences unresolved in court were played out in the streets on March 17, 1992. An hour or so before the AOH parade began on 44th Street, ILGO held its own independent parade over a different segment of the traditional route, from 59th Street to 66th Street. Mayor Dinkins was ill, but made it known that if he had been able to march, he would have

\(^{159}\) Id. at 177.

\(^{160}\) Id. at 177-78.

\(^{161}\) Cf. HRC Recommended Order, supra note 85, at 22-23 (recognizing that an allegedly invalid discriminatory act occurred when Beirne placed ILGO’s name on the waiting list with the “intent” that the gay organization would “never move[] off the list and onto the line of march”).

\(^{162}\) Irish Lesbian & Gay Org., 788 F. Supp. at 177.
joined the ILGO procession and boycotted the AOH parade—a position Cardinal O'Connor pointedly said he would not forget. Many political leaders marched with ILGO; others, like Governor Mario Cuomo, stayed away altogether. Anticipating a disturbance, the police department deployed thousands of officers along the parade route and at ports of entry into the city. The ILGO marchers reportedly chanted as they walked: "We're here! We're queer! We're Irish!" There were insults and complaints from onlookers, but few violent incidents, and, in the main, the event was less contentious than the previous year. The crowd in 1992 was sharply diminished, however—down to an estimated 385,000. In October 1992, the HRC rejected Judge Maldonado's view that the Hibernians were constitutionally entitled to exclude ILGO in order to preserve the purity of their private religious message. By contrast, the HRC held that the parade was a "secular event" in celebration of a wide range of religious and cultural values and that the Hibernians' freedom to associate with others to advance those values did not entitle them to bar ILGO solely on sectarian grounds. The Hibernians promptly sought review of the HRC's action in state court, where the HRC cross-claimed for enforcement of its order.

With the outcome of the litigation with ILGO in doubt, the Hibernians were of two minds. On the one hand, their resistance to ILGO's participation was so strong that many preferred to scuttle the parade entirely rather than bow to the city's wishes. Perhaps in pique, the state president told the press that the AOH would not sponsor the parade in 1993. On the other hand, given that the legal battle was scarcely over, the county AOH hoped to reclaim its role as the traditional sponsor and thus to be in a position to conduct the parade if the state courts overturned the HRC decision. Antici-

164 See In Solidarity: Who Marched, Who Refused, N.Y. TIMES, Mar. 18, 1992, at B3 (reporting what prominent politicians were doing during the parade).
165 Bruce Weber, Irish March, with Protests but No Clash, N.Y. TIMES, Mar. 18, 1992, at B1, B3.
166 Id. at B3.
167 HRC Decision, supra note 79, at 15-16.
168 The HRC found that [the Hibernians] have defined the Parade quite broadly and, by their own admission, have allowed a number of diverse groups to participate in their celebration of Irish heritage without regard to those groups' members' race, color, sex or creed. Respondents' associational right is thus the right to associate with persons who support the broad celebratory goals of the Parade rather than, as Respondents argue, the right to associate merely with those who adhere to any one element of Irish heritage, such as Catholicism.
169 Dennis Hevesi, Groups Fear No March on March 17, N.Y. TIMES, Oct. 30, 1992, at B3 (quoting Kevin Coggins to the effect that "the St. Patrick's Day parade in New York City will not be sponsored by the Ancient Order of Hibernians" and Al O'Hagen to the effect that "for the first time in over 200 years" there would be no parade in the city).
pating that Mayor Dinkins might try again to grant the permit to a group willing to include ILGO, the county Hibernians served notice that, in their view, they had a prior claim—by virtue of longstanding police department policy and the explicit provision in the city ordinance.  

A few weeks later, the police department asked the Hibernians for more specific information about their plans, said to be needed in order to weigh the AOH application against “several” competing requests for the permit. The information sought went generally to managerial and logistical details—for example, the number and kinds of units that would participate, the number and identity of the marshals that would be used, the timing and orchestration of the initial formation, the names of the “feeder” streets that would be used, and similar plans for the “conduct of the parade.” Preserving their objection to the consideration of competing applications, the Hibernians supplied the information requested.  

Shortly after the turn of the year, Police Commissioner Raymond W. Kelly announced that the permit for the 1993 parade would be awarded to the St. Patrick’s Day Parade Committee, an organization that had existed only a few weeks. Kelly recognized that the county Hibernians had long been the sponsors, but in light of the HRC decision that they had unlawfully excluded ILGO in 1992, together with the city’s “policy of inclusion,” he said that he and Mayor Dinkins had concluded that the permit should go to a group with more “broad-based representation.” The new committee
PARADING OURSELVES

was led by Brooklyn District Attorney Charles Hynes, a prominent member of the Irish-American community who had previously urged the AOH to accept ILGO into the parade, and included Brian O'Dwyer, whose father had once been both President of the City Council and a grand marshal of the parade. The group's spokesperson, Michael Keogh, explained that the Hynes Committee would "save" the St. Patrick's Day parade in New York in its familiar form, continuing "a tradition of more than 200 years," in order to celebrate "the achievements of the Irish race in America" and "build peace, unity, justice and democracy here and in Northeast Ire-

from Jeremy Travis, Deputy Commissioner, Legal Matters, New York City Police Dep't, to George Clough, President, Ancient Order of Hibernians in America, Inc. (Dec. 23, 1992) (on file with the Boston University Law Review) (requesting information about the by-law); Letter from George J. Clough, Jr., President, Ancient Order of Hibernians in America, Inc., to Jeremy Travis, Deputy Commissioner, Legal Matters, New York City Police Dep't (Dec. 28, 1992) (on file with the Boston University Law Review) (acknowledging the by-law). Citing the new by-law, city authorities in New York took the position that they need not consider the New York County AOH application. Letter from Jeremy Travis, Deputy Commissioner, Legal Matters, New York City Police Dep't, to Timothy V. Hartnett, President, New York County Board, Ancient Order of Hibernians in America, Inc. (Dec. 30, 1992) (on file with the Boston University Law Review). As might have been expected, the county Hibernians objected that any difficulties they might have with the national organization were entirely an internal affair and therefore could not be the basis of city action. Letter from Thomas W. Gleason, Attorney at Law, to Jeremy Travis, Deputy Commissioner for Legal Matters (Dec. 30, 1992) (on file with the Boston University Law Review) (stating the county Hibernians' position); see Maurice Carroll, Two Groups Fight for Right to Run Parade, NEWSDAY, Nov. 19, 1992, at 4 (reporting that the county Hibernians were attempting to resolve any differences they might have with the national organization). In due course, the county AOH formed the separate corporation demanded under the by-law. Letter from Kevin Coggins, President, New York State Board, Ancient Order of Hibernians in America, Inc., to Jeremy Travis, Deputy Commissioner for Legal Matters, New York City Legal Dep't (Jan. 6, 1993) (on file with the Boston University Law Review). That action eliminated any argument that the county Hibernians lacked authority within the larger, national Hibernian organization. On the other hand, it arguably weakened their contention that, as the traditional sponsors of the parade, they were entitled to the parade permit as against competing applicants. See Letter from Timothy V. Hartnett, President New York County Board, Ancient Order of Hibernians in America, Inc., to Jeremy Travis, Deputy Commissioner, New York City Police Dep't (Jan. 7, 1993) (on file with the Boston University Law Review) (notifying the city of the new corporate entity and insisting that it must be considered the successor in interest to "the rights of the New York Hibernians"). Since the city acknowledged no such right in the county AOH, the formal difference between that organization and the separate corporation established to satisfy the national organization's by-law never actually proved significant.

174 See Maurice Carroll, $750K—That's a Swell Party, NEWSDAY, Nov. 20, 1992, at 20 (reporting that the new committee had been formed at a meeting in O'Dwyer's office at which ILGO representatives were present); Two Rival Irish Groups Vie for Parade Permit, N.Y. TIMES, Nov. 20, 1992, at B5 (reporting that the initial meeting was attended by representatives of 60 Irish-American organizations in the city).
To that end, he said that the 1993 parade would begin "in exactly the same manner as in 1992" and would proceed up Fifth Avenue over the usual route.\footnote{Keogh invited potential participants to contact him and ran advertisements in the \textit{Irish Echo} meant to dispel suspicions within the Irish community.\footnote{For a time, then, it seemed that the city had finally won its long battle with the Hibernians by diverting the crucial parade permit elsewhere. On that basis, the state courts concluded that their review of the HRC order requiring the Hibernians to accept ILGO was \textit{moot}.\footnote{The award of the permit to the Hynes Committee was poorly received in the Irish community. The county AOH attacked it in a new lawsuit in federal district court, where the matter was assigned to Judge Kevin T. Duffy. Cardinal O'Connor, for his part, not only denounced the move, but also suggested that Catholic organizations might "shun" the parade if the Hibernians were elbowed aside.\footnote{The idea of a boycott gained currency quickly. For it appeared to many that the committee was merely the Mayor's instrument for wresting the parade away from the county AOH in order that ILGO might be allowed to march. The information the police department had sought from the Hibernians in November now appeared to be in aid of teaching the newcomers how to conduct the parade—thus reaping the benefits of the Hibernians' experience.}}}}

Keough invited potential participants to contact him and ran advertisements in the \textit{Irish Echo} meant to dispel suspicions within the Irish community.\footnote{Keough invited potential participants to contact him and ran advertisements in the \textit{Irish Echo} meant to dispel suspicions within the Irish community.\footnote{For a time, then, it seemed that the city had finally won its long battle with the Hibernians by diverting the crucial parade permit elsewhere. On that basis, the state courts concluded that their review of the HRC order requiring the Hibernians to accept ILGO was \textit{moot}.\footnote{The award of the permit to the Hynes Committee was poorly received in the Irish community. The county AOH attacked it in a new lawsuit in federal district court, where the matter was assigned to Judge Kevin T. Duffy. Cardinal O'Connor, for his part, not only denounced the move, but also suggested that Catholic organizations might "shun" the parade if the Hibernians were elbowed aside.\footnote{The idea of a boycott gained currency quickly. For it appeared to many that the committee was merely the Mayor's instrument for wresting the parade away from the county AOH in order that ILGO might be allowed to march. The information the police department had sought from the Hibernians in November now appeared to be in aid of teaching the newcomers how to conduct the parade—thus reaping the benefits of the Hibernians' experience.}}}}

The award of the permit to the Hynes Committee was poorly received in the Irish community. The county AOH attacked it in a new lawsuit in federal district court, where the matter was assigned to Judge Kevin T. Duffy. Cardinal O'Connor, for his part, not only denounced the move, but also suggested that Catholic organizations might "shun" the parade if the Hibernians were elbowed aside.\footnote{The idea of a boycott gained currency quickly. For it appeared to many that the committee was merely the Mayor's instrument for wresting the parade away from the county AOH in order that ILGO might be allowed to march. The information the police department had sought from the Hibernians in November now appeared to be in aid of teaching the newcomers how to conduct the parade—thus reaping the benefits of the Hibernians' experience.}

By some accounts, the state judge who issued the mootness order, Acting State Supreme Court Justice Alice Schlesinger, first attempted to mediate between the Cardinal and ILGO in hopes of achieving a compromise that would permit ILGO to march in exchange for ILGO's public denunciation of the behavior exhibited by ACT-UP at the 1989 demonstration at the Cathedral. Hartnett Affidavit, supra note 88, at 30; Dwyer, \textit{Sin}, supra note 127, at 2; see discussion supra notes 126-27 and accompanying text.\footnote{By some accounts, the state judge who issued the mootness order, Acting State Supreme Court Justice Alice Schlesinger, first attempted to mediate between the Cardinal and ILGO in hopes of achieving a compromise that would permit ILGO to march in exchange for ILGO's public denunciation of the behavior exhibited by ACT-UP at the 1989 demonstration at the Cathedral. Hartnett Affidavit, supra note 88, at 30; Dwyer, \textit{Sin}, supra note 127, at 2; see discussion supra notes 126-27 and accompanying text.}

The Vice President of the New York County Board of the AOH, Bartholomew Murphy, testified that\footnote{The Vice President of the New York County Board of the AOH, Bartholomew Murphy, testified that}

\footnote{The Vice President of the New York County Board of the AOH, Bartholomew Murphy, testified that}
Once the Hynes Committee was charged with "taking over"\textsuperscript{181} the Hibernians' event, its resolve began to weaken. Hynes himself visited Cardinal O'Connor to explain that his group meant only to find a compromise that would settle the issue of ILGO's participation so that the parade could go on.\textsuperscript{182} The Cardinal reportedly refused to endorse that effort, however, and, indeed, told Hynes that he held Mayor Dinkins "solely to blame" for the difficulties surrounding the parade.\textsuperscript{183} Thereafter, the Hynes Committee capitulated. If, after all, the county AOH did wish to conduct the parade, if the Cardinal and so many people in the community preferred that traditional sponsor, and if, accordingly, the committee's involvement threatened to disrupt the very event it hoped to preserve, then many of those who had lent their names to its effort thought it best to withdraw.\textsuperscript{184} In early February, the committee returned the permit to Commissioner Kelly. Mayor Dinkins commended Hynes, Keogh, and their associates for performing a "significant civil service" in the "face of undue criticism," then solicited new applications from other potential sponsors of a parade he still hoped would be "a successful and inclusive event."\textsuperscript{185}

After the Hynes Committee withdrew, only the county AOH accepted the Mayor's invitation to seek the permit. The city refused to agree, unless the Hibernians were willing to allow ILGO to march. The AOH stood firm, and the longstanding dispute over ILGO's participation was ripe for Judge Duffy's decision on the merits. Now, of course, ILGO no longer contended that the Hibernians acted on behalf of the state, such that the Fourteenth Amendment of its own force applied to their decision to exclude gays and come because of the spectacle and message we have created over the years with our time, money and effort. In a real sense we have created the audience. To give a group with whose [sic] message we are at odds the benefit of our efforts would be akin to theft. We are unwilling to contribute our resources to ILGO's or the City's message.

Murphy Affidavit, \textit{supra} note 81, at 11. \textit{But see} Dwyer, \textit{Sin}, \textit{supra} note 127, at 2 (reporting that many of those involved in the Hynes group were Hibernians who had helped organize the parade in the past).

\textsuperscript{181} Murphy Affidavit, \textit{supra} note 81, at 7.

\textsuperscript{182} Carroll, \textit{Parade Mess}, \textit{supra} note 128, at 3.

\textsuperscript{183} \textit{Id}.

\textsuperscript{184} In the interest of determining whether the county AOH \textit{did} mean to conduct the parade, the Hynes Committee questioned the national Hibernian organization about the new by-law and the internal complications it had apparently generated. Letter from Lawrence C. Downes, Attorney at Law, to George Clough, President, Ancient Order of Hibernians in America (Jan. 21, 1993) (on file with the \textit{Boston University Law Review}); \textit{see also} discussion \textit{supra} note 173.

lesbians. Since the HRC had concluded that the discrimination the AOH freely acknowledged violated local law, the question was whether the Constitution permitted the city to force the Hibernians to accept ILGO into the parade, on pain of losing the permit if they declined. Judge Duffy's own statement of the problem plainly identified the doctrinal box into which he thought the case should go. The issue, he said, was whether the city could "compel" the AOH, "a private and long-standing sponsor of New York's St. Patrick's Day Parade," to "alter" its message by "requiring it to include, in the Parade and under their [sic] own banner, the Irish Lesbian and Gay Organization"—a group whose "tenets" were "allegedly inconsistent with the message of the Parade's sponsors." In an extraordinarily shrill opinion, Duffy accused the HRC of behaving like Orwellian "thought police" in "dramatically" rejecting the Hibernians' own characterization of the parade and "substituting" a different meaning more to the commission's liking. In this, Judge Duffy declared, the HRC had attempted to tell citizens "what they must think and how they must express themselves." Accordingly, he concluded that the Hibernians were entitled to conduct the parade free of any requirement, imposed by the city, to include "any contingent" that the AOH itself would not "approve[]."

With respect to his stark articulation of the issue in the case, Judge Duffy had the support and encouragement of the New York affiliate of the American Civil Liberties Union (NYCLU), which condemned any attempt by the city to condition the Hibernians' permit on a commitment to include gays and lesbians. With respect to his remedial decree, however, Duffy

---

186 New York County Bd. of Ancient Order of Hibernians v. Dinkins, 814 F. Supp. 358, 365 (S.D.N.Y. 1993); Murphy Affidavit, supra note 81, at 1-2; see also discussion supra note 156 and accompanying text.


189 Id. at 369.

190 Id.

191 Id. at 370.

192 NYCLU Memorandum, Federal Court, supra note 32, at 8-9 (relying on Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281 (D. Md. 1988) (holding that city authorities could not condition a parade permit awarded to the Klan on its willingness to permit a group of NAACP members to participate)); accord NYCLU Memorandum, HRC, supra note 79, at 10 (arguing that the HRC sought "to compel the Hibernians to accept and promote ILGO's message"); see also Memorandum of Law Amicus Curiae on Behalf of the St. Patrick's Society of Brooklyn et al. at 1, Ancient Order of Hibernians v. Dinkins (93 Civ. 0281) (reporting that other Irish-American groups in the city were "profoundly disturbed by the City's overt attempts to impose its own political and ideological agenda on the message sought to be conveyed by a fellow Irish-American organization"). But see Brief Amicus Curiae on Behalf of the Center for Constitutional Rights, Ancient Order of Hibernians v. Dinkins (93 Civ. 0281) (supporting the HRC decision); cf. Andrew Maykuth, Irish Danders up over Gay Rights in St. Pat's Parade, CALGARY HERALD, Mar. 15, 1992, at D12 (quoting an NYCLU leader compar-
squarely rejected the NYCLU's suggestion that, having found that the Hibernians could exclude ILGO from their parade, the court should equally conclude that ILGO was free to conduct its own event and, accordingly, that city authorities should allow the two groups to conduct separate parades on Fifth Avenue at different times of the day. Rather, Duffy accepted the Hibernians' argument that they were entitled to their role as traditional sponsors and therefore could command the Fifth Avenue route over which "the" St. Patrick's Day parade in New York had always moved. Therein lay paradox. For the Hibernians' claim to Fifth Avenue as a situs of special import and value played directly into the city's argument that Fifth Avenue was, indeed, such a "unique and scarce resource" that its use for speech purposes could be regulated by means that would be objectionable anywhere else.
Since March 17 was only two weeks away, Mayor Dinkins declined to appeal Judge Duffy's order and thus acceded to AOH control of the parade for another year. Resisting calls to reconsider its position, the AOH again refused to allow ILGO to participate. The result was, again, predictable. A group of activists staged a demonstration a few blocks from the Cathedral and, by the end of the day, many had been arrested. There matters have stood in New York ever since. Judge Duffy expressly limited his order to the 1993 parade, so arrangements for the parade in 1994 will almost certainly raise again the host of questions that his opinion purported (simplistically) to resolve.

B. The Boston Parade

1. History

Like the parade in New York, the Boston parade is an annual event of long standing, covering a traditional route through some of the oldest streets in the city. The Boston celebration occurs on a public holiday ostensibly commemorating one of the first military victories of the Revolutionary War—the British fleet's retreat from Boston Harbor in 1776. According to tradition, Washington massed his artillery on Dorchester Heights overlooking the harbor and thus convinced General Howe to weigh anchor without firing a shot. The only connection between the British "evacuation" and the patron saint of Ireland was Washington's use of "St. Patrick" as the

---

197 Francis X. Clines, Irish March up the Avenue, Gay Protesters at Bay, N.Y. TIMES, Mar. 18, 1993, at A1, B1.
199 The official proclamation, issued at least since 1976, is as follows:

Now, therefore, I, Governor of the Commonwealth of Massachusetts, in accordance with Chapter 80 of the Acts of 1938, do hereby proclaim March 17 as Evacuation Day and urge the citizens of the Commonwealth to give appropriate recognition to the observance of . . . a memorable day in Bay State History.


200 John Barker, The British in Boston, Being the Diary of Lieutenant John Barker of the King's Own Regiment from November 15, 1774 to May 31, 1776 71 (Humphrey Milford ed., 1924). See generally Celebration of the Centennial Anniversary of the Evacuation of Boston by the British Army, March 17, 1776 (George E. Ellis ed., 1876).
password for his troops on the crucial day.\textsuperscript{201} Since the middle of the nineteenth century, however, the city’s Irish community has capitalized on the March 17 date fixed for “Evacuation Day” to shape the procession honoring General Washington into a St. Patrick’s Day celebration as well.\textsuperscript{202} Organizers typically refer to the event as the “Evacuation-St. Patrick’s Day Parade,” and the press routinely reports it in that way.\textsuperscript{203}

In Boston, as in New York, the Irish were not always welcomed by earlier immigrants. They established themselves in the Dorchester area that is now South Boston and developed political power only gradually. In this century, of course, ethnic Irish in Boston came to dominate local politics, electing many of their own to public office—including former Mayor Raymond C. Flynn, who handled the question of gay and lesbian participation in the parade in recent years. The annual parade in Boston, then, has many of the same paradoxical implications as does the parade in New York. It both marks the separate heritage and culture of the Irish people and claims their acceptance into the pluralistic mainstream of city society generally. Given its decidedly American origins, however, the Boston parade has not typically focused on the Northern Ireland dispute that has so dominated the parade in New York. Nor has it developed serious religious significance. There is no Cathedral, no special mass; unlike Cardinal O’Connor, Cardinal Bernard Law has issued no public statements concerning the parade.\textsuperscript{204}

In Boston, it is the vicinity in which the parade is conducted that is important—far more important than any political or religious overtones. The New York parade moves through comparatively well-heeled commercial and residential sections of Manhattan, where, it used to be said, the wealthy looked out their fashionable windows and watched their servants pass by.\textsuperscript{205} By contrast, the Boston parade is situated entirely in old “Southie” and, in a real sense, is a cultural artifact of that economically depressed, but fiercely independent, neighborhood.\textsuperscript{206} It was in South Boston twenty years ago that resistance to racial desegregation was often vehement and sometimes violent.\textsuperscript{207} And it is in South Boston today that resistance to openly gay and

\begin{itemize}
\item \textsuperscript{201} Van Ness Affidavit, \textit{supra} note 199, at 4.
\item \textsuperscript{202} Chris Reidy, \textit{The Greening of America: St. Patrick’s Day Has Become More US Than Irish}, \textit{BOSTON GLOBE}, Mar. 14, 1993, at A19 (quoting Professor Thomas Brown of the University of Massachusetts at Boston: “Over the years, the Irish took advantage of Evacuation Day.”).
\item \textsuperscript{203} \textit{E.g.}, Letter from Thomas J. Lyons, Chief Marshal, and Gene Vaillancourt, Parade Adjutant, to Barbara [sic] Kay, Leader, Irish-American Gay, Lesbian, and Bisexual Group of Boston (Nov. 18, 1991) (on file with the \textit{Boston University Law Review}) [hereinafter Lyons Letter].
\item \textsuperscript{204} Telephone Interview with Lois Kelly, Archdiocese of Boston, Office of Communications (July 6, 1993).
\item \textsuperscript{205} \textit{See} Carroll, \textit{Rein}, \textit{supra} note 115, at 20.
\item \textsuperscript{206} \textit{See J. ANTHONY LUKAS, COMMON GROUND} 81, 227 (1986) (describing the other significant annual parade in Boston—conducted in Charlestown on Bunker Hill Day).
\item \textsuperscript{207} \textit{Id.} at 241.
\end{itemize}
lesbian citizens seems unfortunately to flourish. This is scarcely to say that bigotry is more common or more pronounced in Southie than in other communities; indeed, many accounts suggest that South Boston little deserves its unsavory reputation. If that is the case, however, it only exacerbates feelings already scraped raw by past experiences. So it is that in yet another twist on the exclusion/inclusion paradox that follows both of the parades we are exploring, some residents of South Boston regard the attempt by a gay and lesbian group to join “the” Evacuation Day parade through the streets in front of their homes as one more assault on the integrity of their community—one more effort to condemn Southie, to embarrass Southie, and thus to excoriate its inhabitants as backward, ignorant, and xenophobic. The dispute over gay and lesbian participation in the Boston parade is thus attached to strong claims to local autonomy and self-identification.

Moreover, as with the Irish community in New York, generational splits within South Boston’s social and political life are also reflected in the battle over the town’s traditional parade. By some accounts, the neighborhood is racked by an “internecine struggle” for the authority to “speak[] for Southie.” Younger, politically moderate residents accept change rather well, while “old-guard community activists” defend “Southie’s time-honored tradition of fierce, unquestioning loyalty to the status quo.” In this vein, one holdover from the desegregation fight, the South Boston Information Center, recently issued a public warning to all “agents of social change” in Southie: “This organization will actively expose and oppose any attempt to trivialize South Boston’s heritage or culture or tamper with our traditions.” Again, as we have seen in New York, local newspapers in Boston reflect these same social divisions, with the Boston Globe counseling the

---

208 E.g., Marching Through South Boston, BOSTON GLOBE, Jan. 4, 1993, at 10 (anticipating that a gay and lesbian contingent in the parade “would be welcomed by many along the parade route”); Letter to the Editor from Kevin Devlin, BOSTON HERALD, May 16, 1993, at 32 (recognizing that “intolerance” is “alive” in South Boston just as anywhere else but insisting that the “majority” of the people in Southie are concerned only about violence). According to David Scondras, a gay former city councilor:

I honestly think that most people who live in South Boston don’t care if a few gay people march in the parade so long as they’re not trashing the Irish traditions or people who live in South Boston. I know this because I’ve marched in the parade and I’ve been treated with respect. People are there to have a good time.


209 See Kevin Cullen, A Community of Contradictions, BOSTON GLOBE, Feb. 22, 1993, at 13 (contending that the parade dispute illustrates the way in which “a good many people in South Boston” hold “outsiders responsible for their problems” as though busing, drugs, and traffic snarls were “foisted by strangers upon the Town”).

210 Id. at 16.

211 Id.

212 Id.
admission of gay and lesbian participants and the *Boston Herald* siding with the resistance.\(^{213}\)

Within this complex picture, Mayor Flynn, a life-long resident of Southie who had initially come to public attention as a leader of the anti-busing movement,\(^{214}\) cut an ambiguous figure. On the one hand, he was regarded by liberals as a progressive urban leader who had matured in office and now typically championed minority interests, including the interests of gay and lesbian Bostonians. On the other, he owed much of his personal and political support to Old Town traditionalists—for whom gay and lesbian participation in the Evacuation Day parade posed another in a series of threats.\(^{215}\)

To make matters worse, Flynn found himself flanked by competitors attacking his positions from both directions at once. While the conservative Republican Governor, William Weld, actively sought support in the gay community,\(^{216}\) equally conservative Democrats like City Councilor James Kelly, also from South Boston, vehemently resisted gay and lesbian interests.\(^{217}\) In hard political terms, then, Flynn was caught in the middle—and may well have suffered serious political damage when he ultimately chose to support gay participation in the parade.\(^{218}\)

Over the years, the celebration in Boston has blossomed into another massive spectacle, attracting 20,000 marchers, dozens of vehicles and floats, and as many as 700,000 spectators. Politicians are always on hand, as are units of city fire fighters and police officers. As in New York, there are numerous bands and other musical groups. Since schools, city and state facilities, and many businesses are closed for the official holiday, public school children often march—typically with school organizations and bands. Unlike New York, however, participants promoting commercial products and political causes are common. In 1992, Raytheon Corporation dragged a Patriot Missile along the route—followed by clowns dressed as “Teenage Mutant Ninja Turtles;” a contingent of the Boston Stockbrokers Association; Miss “Ice-O-


\(^{214}\) LUKAS, supra note 206, at 248.


\(^{217}\) See Don Aucoin, *City Councilor Facing Civil Rights Complaint*, *Boston Globe*, Mar. 24, 1992, at 27 (reporting a civil rights complaint filed by a gay activist charging Kelly with threatening him during a taped interview on gay and lesbian activities in the city).

\(^{218}\) Flynn later decided not to seek reelection in Boston.
Rama;" a POW/MIA float; a team of Clydesdale horses; floats sponsored by Pepsi-Cola, Hub Video, Shubert's Smoke Shop, and the Mt. Washington Cooperative Bank; a Little League baseball team; and the "McGruff Crime Dog."  

From the earliest times, a service club in the city has had at least some responsibility for organizing and conducting the annual parade. First it was the City Point Improvement Association, then the South Boston Citizens' Association, and, for the last forty-seven years, it has been the South Boston Allied War Veterans Council. That organization routinely obtains a permit to hold the parade—much like the permit issued to the Hibernians in New York. In Boston, however, the city typically provides financial support for the parade ($8000 in 1992). Moreover, as we will see in a moment, city authorities in Boston figure significantly in the planning and conduct of the parade—a difference between the Boston case and the case in New York that, in many minds, draws a telling distinction. Recall that the NYCLU has sided with the Hibernians. The Civil Liberties Union of Massachusetts (CLUM), by contrast, has taken the part of gays and lesbians—giving as its reason that the Boston parade is a truly public affair and thus subject to the Fourteenth Amendment prohibition on irrational discrimination.

2. The Current Controversy

In Boston, as in New York, the catalyst for the current dispute over gay and lesbian participation may have been a contentious demonstration by gay activists. In the summer of 1990, ACT-UP/Boston disrupted the ordination of several young priests at the Holy Cross Cathedral in the South End. The protestors staged a mock gay wedding, shouted vulgarities, and threw condoms at priests and their families. By some accounts, that incident deeply disturbed Southie's Catholic community and stiffened local resolve to resist other efforts by gays and lesbians to gain "acceptance from the wider world." The attempt by a different organization, employing markedly

\[\text{[Vol. 73:791}\]
more conciliatory strategies, to participate in the Evacuation Day parade may well have fallen victim to hard feelings developed long before in a clash that simply refused to be forgotten.

Early in 1992, several lesbian women and one gay man, Patrick Ward, formed a new local organization, the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB), which promptly decided to participate in the Evacuation Day parade that year.\textsuperscript{225} According to uncontradicted testimony, one of the GLIB leaders, Barbra Kay, approached John Meunier, a member of Mayor Flynn’s staff responsible for relations with the gay and lesbian community. Meunier responded favorably, but he cautioned Kay that Thomas Lyons, an employee in the city’s Veterans’ Services Department who served as grand marshal for the 1992 parade, had some “concerns”—namely that GLIB’s participation would turn out to be another demonstration by Queer Nation.\textsuperscript{226} Lyons was willing to talk to GLIB, however, and for that purpose Meunier passed along Lyons’ office number. Kay phoned Lyons during business hours, and he promised to send the necessary registration forms.\textsuperscript{227} On February 3, about a month and a half before the parade, Kay received a letter from Lyons on letterhead stationery, which displayed the city’s seal and name at the top, identified three honorary marshals for the parade (Mayor Flynn, U.S. Rep. Joseph Moakley, and William M. Bulger, President of the Massachusetts State Senate), and listed Lyons and others as parade officers. While the letterhead showed one apparent officer as Commander of the Veterans Council, it nowhere identified that organization as the parade sponsor. The letter “cordially invited” Kay and her group to march.\textsuperscript{228}

Initially, then, there appeared to be no objection to GLIB’s participation in the Boston parade. Kay promptly mailed in the registration form she had received from Lyons, accompanied by her check in the amount of the registration fee; Lyons, for his part, promised to send her further information about the parade route.\textsuperscript{229} Yet within a few days things began to fall apart. In the third week of February, Kay met with a battery of city and parade

---

Letter to the Editor from Tim Daley, \textit{Boston Globe}, Jan. 11, 1993, at 14 (complaining that the \textit{Globe} had erroneously ascribed responsibility for “stuffing condoms into church poor boxes” to all gays and lesbians and particularly to those who wished only to march in the Evacuation Day parade).


\textsuperscript{226} Kay Affidavit, supra note 225, at 2.

\textsuperscript{227} Id. at 3.

\textsuperscript{228} Lyons Letter, supra note 203. The letter was evidently a form prepared in the fall of 1991, which accounts for its date.

\textsuperscript{229} Kay Affidavit, supra note 225, at 4.
officials, including Meunier and Lyons, as well as Robert Jackson, the police department's liaison with the gay community, and John O'Sullivan, Mayor Flynn's liaison with South Boston.\textsuperscript{230} According to Kay, O'Sullivan anticipated that "people in Southie" would think that "other people" were "encroaching on their territory" in an attempt to force change that was "difficult" to accept—like "busing and housing desegregation."\textsuperscript{231}

Reports are divided regarding what happened next. Lyons recalls asking Kay for assurances that GLIB would act in a "non-confrontational" manner and that Kay said she could make no "guarantee."\textsuperscript{232} Kay does not recall being asked for a "guarantee,"\textsuperscript{233} but does recall saying that GLIB meant to conduct itself in a "responsible" and "respectful" manner and that it would be "foolish" to think that a small group of gay and lesbian marchers would "behave or dress provocatively."\textsuperscript{234} Lyons understood Kay to mean that her group would "make no effort to control the activities and conduct of its members along the parade route."\textsuperscript{235} In any case, Lyons said that the Veterans Council would have to vote on GLIB's involvement. At a hastily called meeting a few days later, the Veterans decided to exclude GLIB. At that point, two grounds were given: concerns about "public safety" and doubts respecting the "legitimacy of this Irish-American gay group."\textsuperscript{236}

By common account, many of the Veterans who voted against GLIB's participation regarded that group as, in fact, Queer Nation or ACT-UP, sailing under false colors. Kay herself made no secret of her association with Queer Nation, and, in some minds, it followed that in pressing GLIB's cause she and her colleagues were misrepresenting who they were and what they intended to do. While they insisted they wished only to express pride in their identity as gay and lesbian Irish-Americans, many Veterans feared that, in fact, they meant to stage a "publicity stunt."\textsuperscript{237} James Kelly, for example, insisted that GLIB's "purpose" was, first, "to create a problem,"

\textsuperscript{230} Id. at 4-5.
\textsuperscript{231} Id.
\textsuperscript{233} Kay Affidavit, supra note 225, at 5.
\textsuperscript{234} Id.
\textsuperscript{235} Veterans Answer, MCAD, supra note 232, at 5.
\textsuperscript{236} Marc S. Malkin, St. Pat's Parade Controversy Moves Its Way into Boston, BAY WINDOWS, Mar. 5-11, 1992, at 1, 16 (quoting Lyons after the vote). Lyons later returned Kay's registration form to her, with a handwritten note: "Dear Ms. Kay, Your application has been declined for safety reasons and insufficient information regarding social club." Parade Registration Form, Evacuation Day Parade Mar. 15, 1992, Irish, American, Gay, Lesbian, and Bisexual Group of Boston (copy on file with the Boston University Law Review).
\textsuperscript{237} Don Aucoin, Gays May Sue Organizers over St. Patrick's Parade Ban, BOSTON GLOBE, Mar. 5, 1992, at 1 [hereinafter Aucoin, Gays May Sue].
and then "to create media attention." In this, the Veterans attempted to disclaim the charge that GLIB was being excluded on the basis of the sexual orientation of its members and their message, implicit or explicit. Rather, according to the Veterans, GLIB would not be permitted to participate for the ostensibly neutral reason that its appearance in the parade would amount to purposeful provocation—the creation of a potentially violent episode for its own sake. One parade organizer, John "Wacko" Hurley put it simply: "I don't believe it is a sincere movement." Whatever anyone actually thought, the Veterans' vote drew a line in the dust. Gay activists now thought the Veterans were bigots, "and calling someone from Southie a bigot [could] stick." Many Veterans, in turn, thought that "gay activists who pelted priests and their families with condoms at the Cathedral [were] also bigots."

Prominent political figures in Massachusetts generally condemned the Veterans' action. Governor Weld said that it would be "wrong" and "discriminatory" to bar GLIB from the parade and urged the Mayor to intercede; the Boston Globe said that in the spirit of "diversity," participants and spectators should "welcome the gay contingent into the march." Mayor Flynn rejected Weld's characterization of the Veterans' action as discriminatory, but he nonetheless called Kay and the Veterans' representatives together and encouraged them to negotiate a settlement that would avoid the kind of strife Southie had seen before. Flynn pressed for a quick resolution both to ensure that the parade, now only days away, would not be disrupted, and also to blunt media attention. At his insistence, the parties held a press conference at which they announced that Kay had signed an agreement promising that if GLIB were allowed to participate, it would be represented by a group of only twenty-five marchers, who would conduct themselves properly and would fly only the GLIB banner—not insignia connoting ACT-UP or Queer Nation. The police gave assurances that order could be maintained on that basis, and it seemed that when the Veterans

---

238 Id. at 29 (quoting Kelly).
239 Id.
241 Id.
242 Id.
243 Aucoin, Gays May Sue, supra note 237, at 1.
244 A Parade of Troubles, BOSTON GLOBE, Mar. 6, 1992, 10.
245 Don Aucoin, Gays Offer to Limit Their Parade Role, BOSTON GLOBE, Mar. 6, 1992, at 1 [hereinafter Aucoin, Gays Offer].
246 Kay Affidavit, supra note 225, at 7-8.
247 Agreement, Mar. 6, 1992 (copy on file with the Boston University Law Review). A final item in the agreement specified that neither side would institute legal proceedings with respect to the Veterans' initial decision to exclude GLIB from the parade. See Aucoin, Gays Offer, supra note 245, at 1.
revisited the question of GLIB participation, concerns for public safety could not justify another negative result.\textsuperscript{248}

The agreement was controversial within some quarters of the gay community, where Kay was criticized for surrendering both to unfounded fears that homosexuals were inclined to be violent,\textsuperscript{249} and to equally unfounded concerns that the “good people of Southie” would respond with violence to the mere presence of a GLIB contingent in the parade.\textsuperscript{250} On the whole, however, the undertaking was thought to be justified in order to lay the public safety issue to rest on this occasion, so that in future years gay and lesbian participation in the parade might become unexceptional.\textsuperscript{251} In the interest of compromise, GLIB itself promised to postpone legal action until the Veterans had an opportunity to revise their earlier decision in light of the new agreement—albeit one GLIB member, Patrick Ward, immediately filed a complaint with the Massachusetts Commission Against Discrimination (MCAD).\textsuperscript{252} For two days, Mayor Flynn straddled the divide between GLIB and the Veterans, declaring that GLIB should be allowed to march so long as its representatives followed “the rules,” but also defending the Southie Veterans against the charge of bigotry.\textsuperscript{253} Ever the effective politician, he joked that if he could not resolve the parade issue, he might be safer in Northern Ireland (where he would be on the day of the parade) than in his own hometown.\textsuperscript{254} At week’s end, however, the Mayor took GLIB’s part and urged the Veterans to relent.\textsuperscript{255}

When the Veterans met to reconsider GLIB’s application, a crowd of South Boston residents surrounded the hall, holding signs to express their opposition: “Stand up for South Boston,” and “Vote No—Protect Our

\textsuperscript{248} Don Aucoin, \textit{Southie Veterans to Vote Tonight on Gay Marchers}, \textit{Boston Globe}, Mar. 9, 1992, at 1 [hereinafter Aucoin, \textit{Vote Tonight}] (quoting a parade adjutant, Gene Vaillancourt, confirming that “[t]he public safety issue is settled”); see Kay Affidavit, \textit{supra} note 225, at 8 (quoting a telephone call from the police department expressing confidence that order could be maintained).

\textsuperscript{249} Aucoin, \textit{Vote Tonight, supra} note 248, at 1 (quoting Barbra Kay).

\textsuperscript{250} Boyce, \textit{supra} note 208, at 4.


\textsuperscript{253} Aucoin, \textit{Gays May Sue, supra} note 237, at 1 (describing Flynn’s conflicting loyalties).

\textsuperscript{254} Aucoin, \textit{Two Realms, supra} note 215, at 77.

\textsuperscript{255} Aucoin, \textit{Vote Tonight, supra} note 248, at 1. Flynn generally drew praise in the gay community, both for his ultimate position and for previous attempts to negotiate a settlement. \textit{E.g.}, \textit{What a Shame}, \textit{Bay Windows}, Mar. 12, 1992. By most accounts, the outcome of the upcoming vote was much in doubt. \textit{See, e.g.}, Aucoin, \textit{Vote Tonight, supra} note 248, at 1 (reporting that “no one” professed to be “certain”).
James Kelly delivered an impassioned speech in which he again linked GLIB with Queer Nation and charged its members with being "provocateurs" and "agitators"—"haters" who had no "right to jump in someone else's parade." When the Veterans again voted to exclude GLIB, the crowd outside sang "God Bless America." Setting aside any further concern regarding public safety, Lyons now told the press that GLIB would be excluded because Kay still had not supplied adequate information about her group and because a majority of the Veterans were unsure that GLIB was "a bona fide Irish-American organization entitled to march." Critics quickly pointed out that the Veterans had never before proposed that a group must be Irish-American to participate. Nevertheless, "Wacko" Hurley insisted that, if necessary, the Veterans' position could be defended in court.

Hurley was soon proven wrong. With the assistance of CLUM and the Gay and Lesbian Advocates and Defenders (GLAD), GLIB immediately filed suit in the local state superior court, naming Mayor Flynn and the City of Boston, as well as the Veterans Council, as defendants. The theory was straightforward: the Evacuation Day parade was itself a public forum, from which GLIB could not be excluded. The Veterans resisted that argument on three grounds. First, they repeated the charge that Kay and others were using GLIB as a cover for Queer Nation, an "anti-religious and anti-Catholic" group that had employed offensive tactics in the past and would likely do so again if permitted to march in the parade—a charge that Kay flatly denied. Second, they revived the claim that Kay had refused to guarantee

---

257 Id.
258 Id.
259 Id.
260 See Hurley Answers, supra note 221, at 11 (stating that "[t]here is no requirement that a group be a bona fide Irish or Irish-American Group" and that "[i]t is the belief of the [Veterans] that all people are 'Irish' on St. Patrick's Day").
264 Aucoin, Queer Nation, supra note 223, at 1 (quoting Veterans' counsel declaring that GLIB was a "Trojan horse that this Queer Nation group wants to roll down the streets of South Boston" and reporting Kay's denial of those charges). In an effort to prove that GLIB was, in fact, Queer Nation, the Veterans introduced evidence that the national "Queer Nation Hotline" had recently answered with a recorded message suggesting that callers interested in the Boston parade should phone another number, which answered with a recorded message from GLIB. Id.; see also Affidavits of Mary L. Bonauto, Irish-American Gay, Lesbian & Bisexual Group (Civil No. 92-1518-A) (copies
the good behavior of GLIB marchers\textsuperscript{265}—the very concern that the agreement had been meant to address. Third, the Veterans declared that the “principle” [sic] reason for excluding GLIB was that the inclusion of gay and lesbian marchers was “not consistent” with the Veterans’ own views, “embodied in their parades”—views they described as “traditional” values, reflected in appearances by “little league champions” and “topical media figures such as the Ninja Turtles.”\textsuperscript{266} In this last, of course, the Veterans asserted their own First Amendment right to use the parade to advance a private agenda, and, within that argument, effectively claimed that they need specify no particular message other than what was implicit in ad hoc decisions to include some groups and exclude others.\textsuperscript{267} Judge Hiller Zobel

\textsuperscript{265} Hurley Answers, supra note 221, at 7.

\textsuperscript{266} Id.:

The Respondent’s membership denied GLIB permission to march in the parade because the group had misrepresented itself in its initial application and contacts with the Respondents. Barbra Kay “assured” the Respondents that GLIB was not Queer Nation. . . . It was stated in the Boston Herald, on January 20, 1992, that while Cardinal John O’Connor [sic] was the keynote speaker at a Massachusetts Citizens for Life Service, at the Sheraton Boston, members of Queer Nation and/or ACT-UP protested outside. In particular, Barbra Kay is quoted as calling Cardinal O’Connor [sic] a “misogynist and a homophobe. We don’t want him in our city.” Most revealing is that, on January 20, 1992, Barbra Kay identified herself as a member of Queer Nation. Was Barbra Kay a member of Queer Nation, ACT-UP or GLIB, or were these organizations simply synonymous with one another . . . . The principle [sic] representative of the group, Barbra Kay, indicated that she could guarantee only her own demeanor and provided no assurances regarding the demeanor of the other members of GLIB/Queer Nation/ACT-UP who would be marching with her . . . .

However, the principle [sic] reason for rejecting GLIB/Queer Nation/ACT-UP was that including them in the parade was not consistent with the views of the Respondents, which are embodied in their parades.

\textsuperscript{267} Id. at 2:

The “standards for participation” and/or “criteria” employed by the Respondents in determining which groups or individuals are solicited to march in the South Boston Evacuation Day/St. Patrick Day Parades, are those that have traditionally applied and deemed to reflect the last forty-seven years of experience by the South Boston Allied War Veterans Council. Generally, the standards could be characterized as the desired expression of the Veterans reflected in their parade.

For instance, the current little league champions and various Holy Name societies which, within the South Boston community during a given year, are solicited to participate. The emphasis is on encouraging marching bands to participate in the parade.

Basic standards are those of a “traditional” parade. Organizers seek such participants as marching bands and topical media figures such as the Ninja Turtles.

\textsuperscript{267} Id. (“In summary, the principle [sic] standard in the parade is that each group, and collectively the total parade, reflects the views of the South Boston Allied War Veterans, since it is an event staged by Respondents to reflect and illustrate its [sic] values.”).
would have none of this. Speaking from the bench, he rejected the Veterans’ argument that they had a constitutional right to keep GLIB out of the parade and held, by contrast, that GLIB had a constitutional right to be in it. Accordingly, he ordered the Veterans to accept GLIB’s representatives, provided they followed the agreement that Kay had previously signed on their behalf.268 Neither the city nor the Veterans appealed.269

Under state court order, then, twenty-five GLIB members marched under their own banner in the 1992 Evacuation Day parade in Boston. Reaction was mixed. Both GLIB and the Veterans, as well as Mayor Flynn, issued pleas for calm. A few organizations and school bands stayed away, citing fears of violence; two radio stations declined to cover the event in order to protest the Veterans’ behavior.270 Many spectators along the route yelled obscenities, insults, and threats, and a group of young men taunted the GLIB marchers all the way, “sometimes urged on by older spectators yelling ‘get them.’”271 Others braved rebukes from their neighbors and openly cheered the GLIB group as it passed by. The marchers were escorted by two

---


269 Don Aucoin, Judge Lets Gays March in Parade, BOSTON GLOBE, Mar. 12, 1993, at 1 (reporting the Veterans’ decision not to appeal and reviewing the events of recent days).


271 Don Aucoin & Andy Dabilis, Jeers, Threats Greet Gays in South Boston Parade, BOSTON GLOBE, Mar. 16, 1992, at 10 [hereinafter Aucoin & Dabilis, Jeers] (reporting that one group of spectators chanted “We hate you” and that one onlooker yelled “You bunch of fags”); see also Ed Boyce, St. Patrick’s Day Parade Hailed a Success, IN NEWS, Mar. 17/23, 1992, at 1 (reporting that the GLIB marchers “never lost their smiles” even as they were pelted with both “cheers” and “jeers”—and occasional beer cans and firecrackers); Marc S. Malkin, A Day of Hatred and Hope, BAY WINDOWS, Mar. 19/25, 1992, at 1 (reporting that a “white-haired grandmother holding her grandchild” screamed “Kill the faggots”); Dawn Schmitz, Boston’s Irish Get a Taste of Pride, GAY COMMUNITY NEWS, Mar. 22/Apr. 4, 1992, at 1 (reporting similar episodes).
trucks bristling with Boston police officers in riot gear, accompanied by scores of foot patrols imported from New York. Still more officers appeared on motorcycles and horses. There was little actual violence, albeit the police made several arrests for assault. On his return from Northern Ireland, Mayor Flynn criticized those who had shouted "hateful comments," but in the main declared himself satisfied that "the overwhelming majority of parade watchers and marchers brought great credit to themselves and their community."\footnote{Michael Rezendes, \textit{Flynn Decries Heckling of Gays}, \textit{Boston Globe}, Mar. 18, 1992, at 17; Aucoin & Dabilis, \textit{Jeers}, supra note 271, at 10. South Boston residents interviewed after the parade criticized the press for making it appear that the event was marked with invective and violence when, in their view, it had been nothing of the kind. Chris Reidy, \textit{South Boston Residents Call Media's Coverage Distorted}, \textit{Boston Globe}, Mar. 17, 1992, at 4; cf. Ed Boyce, \textit{Bisexual Activist Says He Was Forced out of Job over St. Patrick's Day Participation}, \textit{In News}, June 9, 1992, at 4 (reporting an allegation that one of the GLIB marchers had lost his job over the episode).}

GLIB leaders vowed to return the following year, but the Veterans threatened to sever their ties to the city and thereby attempt to make the Boston case fit the analysis adopted by Judge Duffy for the case in New York.\footnote{Don Aucoin, \textit{In Aftermath of Parade, Groups Plan for Future}, \textit{Boston Globe}, Mar. 17, 1992, at 1; Luz Delgado, \textit{Group Vows to Return Next Year with Others}, \textit{Boston Globe}, Mar. 16, 1992, at 14.}

Judge Zobel did not purport finally to resolve the issues in GLIB's lawsuit, but only to impose a short-term solution, with the expectation of getting to the bottom of things before the next parade in 1993.\footnote{Accordingly, Judge Zobel held in abeyance a motion to dismiss the action, filed in April by Mayor Flynn and the Hibernians. Oddly, however, Judge Zobel revisited that motion in December 1992, and at that point declared the issues moot. See Plaintiffs' Memorandum in Support of its Motion for a Preliminary Injunction and in Opposition to Defendants' Motion to Dismiss at 6, Irish-American Gay, Lesbian & Bisexual Group v. City of Boston, Civil No. 92-1518-A (Mass. Super. Ct. filed Feb. 12, 1993) (on file with the \textit{Boston University Law Review}) [hereinafter GLIB Memorandum].}

In the wake of the March 1992 parade, however, matters lay in repose until December, when the Veterans filed their usual request for a permit to conduct another parade the following spring.\footnote{Letter from John J. "Wacko" Hurley, Parade Adjutant, to Transportation Dep't (Dec. 3, 1992) (copy on file with the \textit{Boston University Law Review}) (declaring the Veterans' intention to hold "a parade to observe the annual St. Patrick's Day/Evacuation Day festivities" and requesting a permit to use the traditional route through Southie).} City authorities agreed, but on one condition: the Veterans could conduct the parade only if they cooperated with the police in developing a "public safety plan" for responding to any difficulties that GLIB marchers might have in 1993—a contingency the city said it was "reasonable to expect."\footnote{Parade Permit, Dec. 23, 1992, Appendix A (copy on file with the \textit{Boston University Law Review}).} Just how reasonable soon became clear. A few hours later, MCAD issued a formal finding of probable cause to pursue Patrick Ward's complaint that the Veterans' exclusion of gays and lesbians would
violate state anti-discrimination law.\textsuperscript{277} City authorities thus plainly sent a strong signal that they expected the Veterans to allow GLIB to march and that there would be consequences if they refused.\textsuperscript{278} Nevertheless, the Veterans did refuse to admit GLIB, now saying that they had taken yet another vote and decided to exclude all groups with “sexual themes” and, in that way, to underscore the point that the parade was meant to express their own “religious and social values.”\textsuperscript{279} A few weeks later, a Ku Klux Klan group from Connecticut was also reportedly turned away.\textsuperscript{280}

GLIB responded on two levels—first by filing its own complaint with MCAD and, then, by removing the new GLIB complaint to Judge Zobel’s court for immediate judicial attention.\textsuperscript{281} Once again, GLIB contended that the Veterans were violating both state law and the First Amendment—and setting up still more pretextual explanations for their actions. GLIB insisted that the Veterans had no genuine standards and procedures for deciding which groups could participate in the parade and had excluded GLIB ad hoc, that the Veterans had failed to articulate any “specific ideas and values” that would be diluted by GLIB’s mere presence, and that, in truth, the exclusion of GLIB marchers violated their First Amendment right of access to a public forum.\textsuperscript{282}

Recognizing that this last argument depended on the establishment of state action, GLIB contended that city officials were planning the parade with the Veterans just as they always had in the past and that the “conditional” permit the Veterans had received made it clearer than ever that the city played a critical role.\textsuperscript{283} Finally, according to GLIB, even if city author-


\textsuperscript{278} See Ed Boyce, \textit{Boston St. Patrick’s Day Parade Permit Mandates Admittance of Gay Marchers}, \textit{In News}, Jan. 11, 1993, at 6 (reporting that GLIB understood the “conditional permit” to require the Veterans to include gay and lesbian participants and that John Meunier appeared to be promoting that understanding); Michael Rezendes, \textit{City Hall Red Light Halts St. Pat Parade}, \textit{Boston Globe}, Dec. 17, 1992, at 64 (reporting that city authorities were “seeking assurances” from the Veterans that GLIB would be allowed to march).

\textsuperscript{279} Letter from Chester Darling, Attorney for the Veterans, to Mary L. Bonauto, Attorney for GLAD and GLIB (Jan. 14, 1993) (copy on file with the \textit{Boston University Law Review}).


\textsuperscript{281} Letter from Michael T. Duffy, Investigating Commissioner, to Cathleen Finn (Feb. 1, 1993) (copy on file with the \textit{Boston University Law Review}) (approving the removal).

\textsuperscript{282} GLIB Memorandum, \textit{supra} note 274, at 9.

\textsuperscript{283} \textit{Id.} at 22-23.
ities themselves attempted to disclaim responsibility for the parade, they should be charged with trying to delegate public responsibility to a private group for the illegitimate purpose of avoiding Fourteenth Amendment restraints—such that state action still should be found. In response, the Veterans pressed the arguments they had advanced previously, adding only that, this year, they had declined any cash subsidy from the city in hopes of undercutting GLIB's state action argument. CLUM, for its part, softened its support for GLIB this time around—amid internal disagreement regarding the side a civil liberties group should take in the parade case, now that monetary subsidies were terminated.

Again, Judge Zobel was unimpressed—unimpressed by the Veterans' argument that the parade was a private, religious observance rather than a "secular, civic event," and equally unimpressed with the contention that the Veterans meant the parade to convey a message that would be affected by GLIB's participation. When, indeed, he asked counsel to specify the precise "views" the parade embodied, he received only what he called a "litany" of "traditional values," including "the Red Sox and apple pie." Accordingly, Judge Zobel made final the judgment that previously had been only tentative: GLIB must be permitted to field a small group of parade participants who would march under the same guidelines that had been followed in 1992. Heavy snowfalls forced the postponement of the parade in 1993—allowing time for the Veterans to appeal Judge Zobel's order in state court and even to seek injunctive relief from the federal courts in Boston. Those efforts were fruitless, however, and, in the end, GLIB's little band of marchers once again joined the procession in Southie.

---

284 Id. at 22 n.3 (citing Evans v. Newton, 382 U.S. 296 (1966) (declining to allow a city to turn a public park over to segregationists and on that basis to justify the continuation of race discrimination)).


286 Doris S. Wong, Backers of '92 Gay Paraders Step Aside, BOSTON GLOBE, Mar. 16, 1993, at 22; see Harvey Silverglate, Vexed Vets: Why Anti-Gay Parade Officials May Have the Law on Their Side, BOSTON PHOENIX, Mar. 12, 1993, § 1, at 23-24 (attempting to explain to a civil liberties audience that the Veterans might now have the better of the argument). Despite these reservations, CLUM lawyers remained formally involved.


288 Id.

289 Id. at 5-6.

290 See Joe Heaney, Gay March Foes Credit "White Shamrocks" for Parade Delay, BOSTON HERALD, Mar. 15, 1993, at 21 (reporting delays caused by bad weather). The Veterans appealed first to Appeals Court Justice Roderick Ireland, sitting alone, who declined to upset Judge Zobel's judgment. Irish-American Gay, Lesbian & Bisexual
The 1993 parade went much like the 1992 event, although the bad weather may have combined with fears of violence to reduce the number of spectators to about 200,000. Again there was a large police escort; again there were firecrackers, smoke bombs, and other missiles. The GLIB marchers were alternatively jeered and cheered; some placards spewed vitriol ("Hell's Lined with Homosexuals"), some preached tolerance ("Stop the Hate"). John Meunier walked with GLIB over the full route—the better to demonstrate the city's support. Most GLIB marchers reported that their experience was less distressing and more fulfilling. Every year, predicted one participant, the people of Southie would see gays and lesbians as "a bit more human," perhaps even "a bit more Irish."

The scene in South Boston thus contrasted somewhat with events in New York, where Judge Duffy's order prevented ILGO from marching and left gay and lesbian protestors to be arrested in the course of their counterdemonstration.

The battle continues in Boston. Occasionally, there are signs of moderation. Rep. Joe Moakley, who represents Southie in Congress and served as an honorary marshal for the Boston parade in 1992, said just before the 1993 parade that he had changed his mind and now thought it would be best if gays and lesbians were allowed to march—so long as they "act and dress like anybody else."

The Veterans, by contrast, remain as strident as ever: "We don't want their sexual preferences pushed in people's faces;" GLIB is a "crazy, outrageous group. . . . [I]f they [sic] don't like the [parade's] tradi-

---

294 Malkin, supra, note 291, at 4.
295 Ed Boyce, Subdued by Comparison, IN NEWSWEEKLY, Apr. 5, 1993, at 5.
296 Malkin, supra note 291, at 1.
297 See Tom Mashberg, Gays and the Parade: Boston, NYC, BOSTON GLOBE, Mar. 18, 1993, at 3 (drawing the comparison); supra note 197 and accompanying text.
Gay and lesbian opinion is typically more moderate, but can sometimes be equally harsh: If "a small contingent of gays and lesbians marching in the parade has become such a landmark event," the Veterans have only "their zealous bigotry to blame." Thus in Boston, as in New York, the struggle over the St. Patrick's Day parade has clearly not been settled by the actions taken to date and will inevitably come alive again.

III. THE MESSAGE IN THE PARADES

Bracing for the future, we do well to consider what the history of these two parades can teach us. On examination, it is experience, not abstract doctrine, that best informs our understanding of the character and power of the Hibernians' and Veterans' claims that they are constitutionally entitled to take the position they do with respect to ILGO and GLIB. Ordinarily, the validity of citizens' opinions, and certainly the sincerity of their religious convictions, are matters left to the individuals involved—free of governmental second-guessing, even by the courts. Building on this base, it may fairly be proposed that city authorities in New York and Boston act at their peril when, and if, they discount the Hibernians' and Veterans' contention that the parades they conduct embody the message that homosexual behavior is immoral. The implication, then, is that we must ignore whatever evidence there may be to suggest that the parades are better understood to be large public events (and there is a great deal of evidence in that direction) and accept, instead, the organizers' characterizations. This, indeed, is precisely the argument advanced in the cases in support of an easy victory for the Hibernians and Veterans. For once it is posited that the parades must be treated as the expression of private homophobic opinion, which, however improbable or distasteful, cannot be questioned, it seems to follow, virtually as a logical imperative, that those who insist they hold such views must prevail.

300 Gay Pride on Green Turf, IN NEWSWEEKLY, Mar. 15, 1993, at 10.
302 E.g., Hibernian Memorandum, State Court, supra note 95, at 47: For First Amendment purposes, however, it is the view of the person being silenced or compelled to speak that must be controlling. How others view the Parade is irrelevant. It is the sponsor's message that is at issue, and only the sponsor can say what that message is. For the state to tell a private citizen what that person is saying is as odious as the state telling him what he should say. See also Brief Amici Curiae on Behalf of the Rabbinical Alliance of America et al. at 9-10, Beirne v. New York City Comm'n on Human Rights, Index No. 92-29840 (N.Y. Sup. Ct. filed Dec. 12, 1992) (insisting that "the sponsors of the parade, not government, define the purpose of the Parade" and that "[i]t is the AOH and not the City which decides whether the positions on homosexuality espoused by ILGO are in conflict with the teachings of the Roman Catholic Church" (citations omitted)).
303 NYCLU Memorandum, HRC, supra note 79, at 13-14:
PARADING OURSELVES

By this account, it seems inadequate to respond that such pristine free speech, religious, and associational freedoms must defer to access claims on the part of gay and lesbian groups. If the parades are truly private affairs organized by private associations, then it seems to follow that the Constitution of its own force cannot require those private organizers to conform to standards fixed for public authorities. And if the Hibernians and Veterans are truly expressing sincerely held personal views, it seems to follow that the forced inclusion of ILGO and GLIB would compromise their message. The argument on this point may sound like double-talk on first hearing, but there is some substance to the claim that the exclusion of gay and lesbian groups, as opposed to individual homosexuals marching with other units, is not discrimination on the basis of sexual orientation at all, but rather is discrimination on the basis of the point of view that ILGO and GLIB represent. Those organizations do have a message of their own, namely the message that forms their raison d'être—the message that makes intelligible both the exercise of associational freedom they reflect and the First Amendment claim they assert in seeking access to the public streets in the first place. To be sure, conventional legal doctrine treats discrimination on the basis of expression roughly like discrimination on the basis of race.

Yet in this particular First Amendment context, where speech claims are set over against each other, it seems perfectly reasonable, even essential, that those who command the public forum be permitted to bar those with conflicting views.

I want to suggest, however, that things do not necessarily fall out this way. For one thing, it just isn't true that bald assertions of opinion or even religious faith are absolutely invulnerable to investigation. Constitutional rights are not to be abused as pretexts for avoiding the effects of public policy. For another, one does not have to contest the sincerity of anyone's personal views regarding homosexuals or homosexual behavior, nor even a group's shared opinion on that score, in order to question whether these two massive events are genuinely the expressive activities the organizers profess them to be. Let's first explore the case for a sincere religious objection to

---

304 As the Hibernians have pointed out, ILGO pressed its own First Amendment claim on Judge Leval. That had to mean that ILGO wished to "express something," and that something must be "gay and lesbian orientation." So when ILGO was barred it was "not due to the sexual preference of its members" but instead the group's desire to "make a statement." Hibernian Memorandum, State Court, supra note 95, at 28-29.


306 See supra note 25 and accompanying text.
homosexuality and then consider the claim that the St. Patrick's Day parades constitute manifestations of such objections.

A. Catholics and Homosexuals

There is nothing necessarily Catholic about St. Patrick or the day traditionally marked for recalling his contribution to the spread of Christianity.\textsuperscript{307} Certainly, there is nothing to say that Catholics are obliged to conduct a sectarian parade on that day. There is, however, undeniable merit in the claim that the Catholic Church considers homosexual activity to be mortal sin.\textsuperscript{308} This does not mean, of course, that any Catholic who commits a homosexual act is thereby condemned to oblivion. Human beings do lots of sinful things. As long as Catholics struggle against their sins and genuinely try to live according to Church teachings, they may be forgiven.\textsuperscript{309}

By tradition, priests counseling parishioners who profess gay or lesbian sexual relations are to explain that their behavior is contrary to the revealed will of God and to advise one of two options: either "conversion" to exclusively heterosexual relations or "total abstinence from all sexual expression."\textsuperscript{310} If a Catholic follows one course or the other, the priest may administer absolution. If, however, he persists in homosexual activity in the face of counseling, absolution may be denied.\textsuperscript{311} Put bluntly, then, no believing Catholic can "condone, endorse, approve or be neutral about" homosexual behavior.\textsuperscript{312}

This orthodoxy invites criticism. Initially, it is plainly hurtful to great numbers of people and on that ground alone would seem to require extremely persuasive justifications to be satisfying.\textsuperscript{313} The justifications that

\textsuperscript{307} Letter to the Editor from Leland J. White, Professor of Religion and Culture, St. John's University, N.Y. TIMES, Jan. 29, 1993, at A26 (explaining that St. Patrick lived centuries before the Reformation and that the Hibernian Society in Charleston alternates between Catholic and Protestant leaders).

\textsuperscript{308} See Congregation for the Doctrine of the Faith, Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (Oct. 1, 1986) (copy on file with the Boston University Law Review). An addendum to the 1986 letter reported that the Pope had personally approved it and ordered its release. Testimony in the New York parade case was to the same effect. Accordingly, the Hibernians were on solid ground in their claim that within Catholic doctrine homosexual activity is always immoral. Hibernian Memorandum, State Court, supra note 95, at 37 n.26.

\textsuperscript{309} Cf. Lisa S. Cahill, Moral Methodology: A Case Study, in A CHALLENGE TO LOVE: GAY AND LESBIAN CATHOLICS IN THE CHURCH 78-79 (Robert Nugent ed., 1983) [hereinafter CHALLENGE] (explaining that a gay or lesbian individual may be understood to wrestle with his or her sexual inclinations much as any Christian grapples with any other form of sin).


\textsuperscript{311} Id. at 8.


\textsuperscript{313} Orthodox Catholic teaching regarding homosexuality has divided the faith like
are forthcoming, however, lack solid support in rational science and depend, instead, upon authoritative interpretations of scripture and Catholic tradition. Those interpretations, in turn, are open to question, both without and within the Church, precisely because they seem to ignore modern learning that renders already ambiguous primary materials all the more difficult to decipher. Finally, the disingenuous ways that believers, the Hibernians included, finally explain their reliance on Church doctrine suggests that that reliance is more convenient than real. I do not mean to offer in this small space a thoroughgoing critique of Catholic teaching on homosexuality. Nor do I mean to launch a superficial, ad hominem attack on the religious beliefs that many Catholics sincerely hold. Nor, certainly, do I mean to challenge the very foundation of religious liberty—the idea that men are free to believe what they cannot prove and have no duty to offer explanations that satisfy others. In an effort to get to the bottom of the parade cases, however, I am obliged to ask whether the fragility of Church doctrine as the basis for the Hibernians' rejection of ILGO suggests that there are other reasons, independent of religion, in the mix.

To begin, there is a sizeable range of opinion concerning Church doctrine. Many religious leaders, like Cardinal O'Connor, defend the status quo—often stridently. Other theologians and scholars elaborate the doctrine in a way that tends to blunt its condemnatory force—distinguishing, for example, between homosexual behavior (which the Church condemns) and homosexual orientation (which Catholics can tolerate). Still others are openly critical, albeit in varying degrees. Moderates like Charles Curran suggest that while "[h]omosexuality can never become an ideal," and while "attempts should be made to overcome this condition if possible," there may be circumstances in which "one may reluctantly accept homosexual unions as the only way in which some people can find a satisfying degree of humanity in their lives." More aggressive critics like John J. McNeill argue that

---

nothing else save abortion. Consider John Politano in Boston, whose son turned out to be gay—and then died of AIDS:

When I first found out Johnny was gay, I called up my priest and asked him for help . . . The first thing he said was, “It’s a mortal sin.” I hung up on him. My son was a good boy, a nice boy, everybody loved Johnny. I consider myself a good Catholic, but I think the church is out of order with gays and it has its head in the sand about AIDS.


314 See supra notes 127-28, 163, 179, 182-83 and accompanying text.

315 See RICHARD P. McBRiEN, 2 CATHOLICISM 1027-33 (1980) (recognizing the “official” church position as one of three general approaches found in the theological literature); THE VATICAN AND HOMOSEXUALITY: REACTIONS TO THE LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS (Jeannine Gramick & Pat Furey eds., 1988) (presenting a range of intramural criticisms).

316 CHARLES CURRAN, CATHOLIC MORAL THEOLOGY IN DIALOGUE 217 (1972).
"the homosexual condition" is consistent with the will of God and that "morally good homosexual relationships" are entirely possible.\textsuperscript{317}

If the official Church position were consistent with empirical evidence or scientific theory, it would presumably weather critiques more easily than it does. But science, suffice it to say, is fast forming ranks with dissenters. Initially, there are intractable problems of definition. We are not entirely sure that there are only two biological gender assignments (male and female), rather than perhaps five (males, females, "true" hermaphrodites, male pseudohermaphrodites, and female pseudohermaphrodites), or, indeed, whether human gender is not better understood as a continuum along which individuals are located at vaguely differentiated intervals.\textsuperscript{318} If we lay aside that uncertainty, focus on the conventional categories (male and female), and assume that "heterosexuals" represent the norm, we cannot be sure what counts as doing "homosexual" things or, certainly, "being" homosexual.\textsuperscript{319} It is only practical to recognize that we must use common terms like "homosexual" and "homosexuality" in order to conduct a discourse at all. I certainly accept that practical point in this Article.\textsuperscript{320} Still, same-sex exper-

\textsuperscript{317} McNeill, supra note 310, at 193-96. In a celebrated confrontation with church officials over the publication of his book, McNeill was expelled from the Society of Jesus. Edward Tiran, Homosexuals and the Churches, N.Y. TIMES, Oct. 11, 1987, at 84.

\textsuperscript{318} Anne Fausto-Sterling, The Five Sexes, THE SCIENCES, Mar./Apr., 1993, at 120; accord Judd Marmor, Notes on Some Psychodynamic Aspects of Homosexuality, in NATIONAL INSTITUTE OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPERS 55 (1972) [hereinafter TASK FORCE REPORT].

\textsuperscript{319} See, e.g., TASK FORCE REPORT, supra note 318, at 2: Homosexuality is not a unitary phenomenon, but rather represents a variety of phenomena which take in a wide spectrum of overt behaviors and psychological experiences. Homosexual individuals can be found in all walks of life, at all socioeconomic levels, among all cultural groups within American society, and in rural as well as urban areas. Contrary to the frequently held notion that all homosexuals are alike, they are in fact very heterogeneous.

\textit{See also} Richard R. Troiden, Gay and Lesbian Identity: A Sociological Analysis 15 (1988) (describing "a heterosexuality-homosexuality continuum" ranging from "a minimal to a predominant or exclusive sexual interest" in members of the same sex); Evelyn Hooker, Homosexuality, in TASK FORCE REPORT, supra note 318, at 11 (explaining that "[h]omosexuality . . . includes an extraordinary diversity of dyadic relations and of individual mental states and action patterns").

\textsuperscript{320} With apologies to more precise observers. E.g., John Boswell, Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century 41-59 (1980) (elaborating subtle distinctions that I am overlooking); Christine Downing, Myths and Mysteries of Same-Sex Love 3-12 (1989) (explaining the pitfalls of lumping gay men and lesbians in a single "homosexual" category). I also lay aside concerns that all of us have when we write about matters of vital concern to others—for which we can never feel fully appreciative. Cf. Martha Minow, The Supreme Court, 1986 Term—Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987) (exploring the role of perspective in legal analysis). Compare Mohr, supra note 2, at 15 (expressing a gay male's hesitancy to write about lesbians) with Downing, supra, at xvii-xix (expressing doubts that lesbians
iences are so diverse and nuanced that any attempt to derive genuine rigor from such terms is futile. 321 If we lay aside that problem, too, and insist on placing individuals in "homosexual" categories, we risk misleading (and personally offensive) stereotypes that only fuel misunderstanding. Whatever anyone may think about the morality of homosexual relationships, no one seriously believes that an individual's full being is determined and expressed by and through his or her sexual behavior or orientation. 322

Definitional difficulties are exacerbated, in turn, by problems of derivation. We very simply do not know what biological, experiential, or volitional factors may contribute to the development of homosexual behavior or orientation. 323 Scientific studies are few in number, often methodologically questionable, and always inconclusive. 324 We do know, however, that individuals do not simply choose their sexual orientation as a matter of taste. Sexual identity is immutable, and almost certainly genetically influenced. 325 If


322 See Marc Fajer, Can Two Real Men Eat Quiche Together? Storytelling and Gay Rights, 46 U. Miami L. Rev. 511, 546-47 (1992) (refuting any suggestion that anyone's identity is "reducible to sexual acts" or that "sex is all there is to being gay"). I do not mean in this to deny the role that one's sexual orientation quite obviously plays in the various arenas of life. Nor, certainly, do I doubt that one's politics can be, and often are, charged by sexual orientation—and reasonably so.


325 Chandler Burr, Homosexuality and Biology, The Atlantic Monthly, Mar. 1993, at 47 [hereinafter Burr, Homosexuality] (sketching the experiments conducted in recent years and the evidence they have produced). Genetic markers have a lot to do with homosexual orientation. Simon LeVay, The Sexual Brain 105-30 (1993). But, again, the genetic roots that now seem apparent scarcely conclude the social questions with which we are faced. See Chandler Burr, Genes vs. Hormones, N.Y. Times, Aug. 2, 1993, at A15 (insisting that most scientists concluded a long time ago that sexual orientation is not "chosen"—but have continued to do studies as part of the larger project to understand human sexuality more fully); Ruth Hubbard, False Genetic Markers, N.Y.
chromosomes, hormones, and prenatal development are not the exclusive
determinants, then post-birth experiences of which one is unconscious are
the most likely candidates next in line. Some theorists suppose that
"[h]omosexual interest" may on occasion be a "transient stage," and, indeed,
that in some instances it may "emerge late in life." In the main, however, it
is now widely understood that "the dominant pattern is set early."

Of course, if homosexuality is in the genes, then it is ever so difficult to
ascribe moral significance to any individual's gay or lesbian
inclinations. The notion that same-sex liaisons are pathological and thus to be "cured,"
becomes unworkable—itself open to criticism as immoral. Anyone who
defends a blanket condemnation of gay and lesbian relationships must resist
organic explanations and insist, against all the evidence, that homosexuality
is a product of will. That argument, of course, ultimately turns back on

TIMES, Aug. 2, 1993, at A15 (pointing out that the biological determinants of homosexual
orientation are only part of the general story of human sexual relations in any and all forms).

326 See BARNETT, supra note 68, at 223 (explaining that to the extent homosexuality is
rooted in post-birth experience "the majority of homosexuals never consciously realize or
admit to themselves what is happening to them until the die is already cast"); Burr, Homosexuality, supra note 325, at 64-65 (reporting conversations with investigators
of recent scholarship).

327 WOODS, supra note 1, at 61. Moreover, if we set aside questions regarding the
determinants of homosexuality in the first instance and focus on human development in society, the implications of homosexual orientation lend themselves to a sociological anal-
ysis running as follows:

People are not born with perceptions of themselves as homosexual, ambisexual
. . . , or heterosexual. Before they can identify themselves in terms of a social condition or category, they must learn that a social category . . . exists . . . ; discover that
other people occupy the social category . . . ; and perceive that their own socially
constructed needs and interests are more similar to those of persons who occupy that
social category than they are different. In addition, they must begin to identify with
those included in the social category; decide that they qualify for membership . . . ;
elect to label themselves in terms of the social category . . . ; and incorporate and
absorb these situationally linked identities into their self-concepts over time.

TROIDEN, supra note 319, at 1-2.

328 MOHR, supra note 2, at 188-89; accord McNEILL, supra note 310, at 41. Of

329 E.g., Lynn R. Buzzard, How Gray is Gay?, in SYMPOSIUM, supra note 321, at 47,
53 (referring to mysteriously uncited "evidence" that homosexuals "can change if they
really want to")

330 agree McNEILL, supra note 310, at 41. Of
itself. There may be something intuitively attractive in the notion that same-sex liaisons are “unnatural” in the sense that they cannot produce offspring. Yet there is no self-evident basis for insisting that sex can have only one function or, indeed, that it has to be functional at all. It just isn’t true that the only “natural” use of human genitals is reproduction; if that were true, then a host of common behaviors, among them masturbation and postmenopausal sex, would equally offend the natural order. In an atmosphere of uncertainty, mainstream professionals typically discourage social policies that impose burdens on individuals because of their homosexual behavior or status.

Coming at the problem in an entirely different way, Michel Foucault proposed that the idea of homosexuality is, in fact, a socially constructed phenomenon, assembled as one of a number of instruments for the exercise of coercive power in human society. This is not the place to attempt a serious evaluation of the constructionist case. It is enough for our purposes merely to note that the condemnation of homosexuality and homosexual behavior has undeniable social functions. By defining that which is deviant, the dominant forces in society define as well that which is oppositional to deviance, namely the norm, and appropriate that norm as a circular justification for dominance. In this fundamental sense, it may be that the homophobe’s attitudes do not merely reflect anxiety about his or her own latent homosexual tendencies, or even fears that the very existence of homosexuals presents

331 Of course, if, and to the extent that, homosexual orientation is a matter of “choice,” one’s “decision” is scarcely like selecting a restaurant for dinner. Given the penalties, formal and informal, for being gay, no one would take the matter lightly. See Mohr, supra note 1, at 39-40.
332 This understanding is typically ascribed to Thomas Aquinas. See, e.g., Edward A. Malloy, Point/Counterpoint, in Challenge, supra note 309, at 109.
333 Mohr, supra note 1, at 36, 113 (“[I]t is not merely as a need that sexual pleasure is central to human life; in intensity and in kind it is unique among human pleasures; it has no passable substitute from other realms of life. For ordinary persons—not mystics or adolescent poets—orgasmic sex is the only access they have to ecstasy.”).
334 Task Force Report, supra note 318, at 5-6. The American Psychiatric Association does not include homosexuality in its list of mental disorders. American Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 281 (1980); cf. Robert Pear, Doctors Add Homosexuals to Group’s Anti-Bias Rules, N.Y. Times, June 16, 1993, at A23 (reporting that the American Medical Association has amended its by-laws to make it clear that it will not discriminate among members on the basis of sexual orientation). What I have said about our law of free speech can equally be said of our law touching homosexuality. There is no “grand theory” that can discipline the majority’s desire to regulate sexual orientation or activity. Rather, we must “work with a more rich and complex view of human nature that takes into account the human need to belong, to be different, to contribute, to remain faithful to some sense of oneself, to change, [and] to pursue noble goals.” Katharine T. Bartlett, Rumpelstiltskin, 25 U. Conn. L. Rev. 473, 489-90 (1993).
335 Michel Foucault, The History of Sexuality 35-48 (1980). For an analysis of Foucault’s theory, see Dollimore, supra note 4, at 222-27.
a challenge to his or her masculine or feminine nature. Instead, or in addition, homophobia rejects same-sex liaisons because, for example, they undermine the rigid male/female dichotomy that makes it possible to conceive, and certainly to perpetuate, the idea of male superiority.  

Vexing questions regarding definition and source, in turn, befuddle attempts to glean the biblical import of homosexual relations. Most authorities acknowledge that both the Old and New Testaments consistently condemn homosexual acts. Nevertheless, scholars like Derrick Bailey protest that since we now know that human sexualities defy simple categories, it is impossible to pin down the precise meaning that ancient texts meant to convey when they addressed same-sex relations as then understood. According to Bailey, those texts cannot sensibly be allowed to make moral issues out of things that, in light of modern evidence, may be much more complex. In this, too, the acknowledged attention in biblical sources to same-sex acts, as opposed to more generalized orientation or status, is all the more problematic. A distinction does seem clearly to have been drawn, but the nature of that distinction, and certainly its purpose, loses something in translation. For example, since the authors of ancient scripture did not appreciate homosexuality as a morally neutral "psychological condition," they may well have been referring to what modern writers would call "perversion"—

336 See MCNEILL, supra note 310, at 95-96 (referring as well to Aquinas' commitment to the inferior status of women); cf. David Gelman, Homoeroticism in the Ranks, NEWSWEEK, July 26, 1993, at 28 (speculating on the implications of a variety of sexually erotic rituals in which military personnel are known to engage).

337 William Muehl, Some Words of Caution, in SYMPOSIUM, supra note 321, at 79. Of course, there are not many scriptural references at all respecting male homosexuality—and almost none respecting lesbianism.

338 DERRICK S. BAILEY, HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION 3-4 (1955); accord MCNEILL, supra note 310, at 38-39. Bailey, for example, disputes the conventional understanding that God destroyed Sodom because its citizens surrounded Lot's house and demanded that angels sent to investigate the city's wicked reputation be brought out so that the citizens might "know" them. Where orthodox interpretation takes "know" in the key passage to mean "engage in coitus," Bailey argues that that is not a necessary inference and that "know" may be understood in its ordinary, modern sense. BAILEY, supra, at 2-4; see MCNEILL, supra note 310, at 49 (contending that the "sin of Sodom . . . was primarily one of inhospitality").

339 TASK FORCE REPORT, supra note 318, at 2, 6-7:

Homosexuality presents a major problem for our society largely because of the amount of injustice and suffering entailed in it not only for the homosexual but also for those concerned about him. . . .

We believe that most professionals working in this area—on the basis of their collective research and clinical experience and the present overall knowledge of the subject—are strongly convinced that the extreme opprobrium that our society has attached to homosexual behavior, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency.
or "the indulgence in homosexual activity on the part of those who were by nature heterosexually inclined." 340

Finally, critics fault the traditional Catholic attitude toward homosexual behavior for its glaring inconsistency. Even if the scriptural references to same-sex acts are read for all they are worth, they still are only selections from the whole. Orthodox Catholic teaching does not fully explain why these particular passages should be taken so literally, and should be accorded such profound significance in Church doctrine, while other passages receive dramatically less attention and respect. If the Church were to be equally literal with respect to the rest of the Bible, Catholics "would have to go on a kosher diet, support capital punishment, and advocate the reinstitution of slavery." 341 Critics contend, accordingly, that the real explanation for intolerance lies neither in scripture nor in tradition, but rather in the ordinary, modern fears and anxieties that each of us has about human sexuality. 342

B. Catholic Teaching and the Parades

Against this background, it remains to ask, forthrightly and candidly, whether the parades we are investigating genuinely do constitute the expression of honestly held, constitutionally protected opinions regarding homosexuality in general or, at least, homosexual behavior. Once again, if we have to take the Hibernians' and Veterans' word for it, they do. If, however, we pause to look behind what those groups say to the courts and the press, we find evidence pointing in the other direction.

Initially, there is every reason to think that many, if not most, participants and spectators are largely ignorant of, or indifferent to, such a narrow sectarian view. At least they were before the current controversies captured the headlines. If, then, we acknowledge what the Hibernians and Veterans insist they want the parades to be, but also take account of what the parades appear to be (to others), we may fairly conclude that they are not "private, Catholic" events at all, but public street parties—to which ordinary citizens believe they hold open invitations. After all, it is conceded that individuals and groups need have no Catholic affiliation to participate and that many units have no purpose to express any discernible message, least of all a fine point of orthodox Catholic dogma. The Hibernians may and do respond

---

340 McNeill, supra note 310, at 41-42.
341 David L. Bartlett, A Biblical Perspective on Homosexuality, in Symposium, supra note 321, at 33; accord Boswell, supra note 320, at 7; Mohr, supra note 1, at 33.
342 E.g., Mohr, supra note 1, at 34 (dismissing religious scruples as "a disguise for some animus for which" those who voice them "have no reasons"). Duplicitous arguments that conceal actual motivations are the stuff of homophobia, as well as other forms of prejudice and bias. E.g., Clifford Krauss, Senators Attack Housing Nominee, N.Y. Times, May 21, 1993, at A12 (reporting that some senators purported to oppose a lesbian nominee for public office on the ground that she lacked the "temperament" to do a proper job).
that there is a difference between being “non-Catholic and being anti-Catholic,”\(^{343}\) and that surely is true. Yet the implication that anyone “[w]ho is not against me is with me,”\(^{344}\) may prove too much—namely that the message in the parades in gross is not neatly tied to any uniform ideology, but rather harbors a richly diverse collage of interests. At least, it seems fair to say that the speech value of the Hibernians’ message is diminished as its content is diluted into “anybody’s-view-but-theirs.”\(^{345}\)

Next, the parades themselves, viewed in light of their history and modern form, suggest the theme of inclusion, not exclusion. They have become, and plainly were meant by their organizers to become, massive celebrations of commonality—the acceptance of Irish immigrants and the societal cohesion drawn from the merger of Irish sentimentality and American patriotism. If we simply look at the parades and ask reasonably what they are, it is hard, indeed, to answer that they underscore that many of the very people who march along or wave from the sidewalk, i.e., gays and lesbians, are not legitimate members of the community that has gathered for an inspiring day in the springtime. There are just too many noisy bands in the line of march for that.

Finally, there is the tendency among organizers to rest their actions initially on other grounds and then to repair to religious explanations only when pretexts are uncovered. We have seen this time and again as the Hibernians have initially offered value-neutral administrative or other explanations for excluding ILGO, only to be pushed back to religious grounds later.\(^{346}\) In a crude paradox, the religious argument they eschew in the first instance, perhaps because they regard it as insubstantial, embarrassing, or deceitful, turns out to be the best, if not the only, argument they have for defending their position. Bluntly speaking, the Hibernians in Manhattan, no less than the Nazis in Skokie, draw increasing strength in their First Amendment claims as the thesis they wish to pursue loses its appeal to others. In this process, Catholic teaching necessarily suffers from the company it is asked to keep.

I hasten to say that the stages by which the Hibernians have approached their ultimate position provide only ambiguous evidence of what has actually taken place. On the one hand, it is possible to reconcile their incremental reliance on Catholic doctrine with genuine religious explanations for the rejection of ILGO participation in the parade. Expressive associations can be dynamic, evolving things—the essentials of which become clearer as the group comes into contact (and conflict) with other belief systems. Accord-

\(^{343}\) Hibernian Memorandum, State Court, \textit{supra} note 95, at 36.

\(^{344}\) \textit{Mark, 10:40, quoted in} Hibernian Memorandum, State Court, \textit{supra} note 95, at 53.

\(^{345}\) \textit{Cf. Ward MCAD Decision, supra} note 219, at 20, 31-32 (concluding that the diversity of the groups participating in the parade diluted “any message or values sought to be conveyed by its sponsors” and that there was no “coherent message or value” in the parade that could have been affected by GLIB’s appearance).

\(^{346}\) \textit{See supra} notes 135-37 and accompanying text.
ingly, by this account, the Hibernians may not have been forced back to the ground they now occupy, but rather may have been drawn forward to it. As they have reacted to ILGO's challenge, they may have come to understand and appreciate what really does count for them—the ideas that, after all, hold them together. If, this is to say, the gays and lesbians in ILGO are seeking their own self-identification as legitimate members of the Irish-American community (and seeking access to the St. Patrick's Day parade to further that purpose), then perhaps the Hibernians are also groping their way toward their own identity (honestly and with no apology to those who would have moved in another direction). Indeed, by this account, the troubling thought that arises from the Hibernians' ideological evolution is not that it may be insincere, but rather that it elevates the expressive side of their organization at the expense of its cultural aspects. As we noted earlier, the sharper a group's expressive message becomes, the harder it may be to keep the group together on the basis of personal or cultural ties. The emergence of the Hynes Committee in New York is a case in point.\footnote{See discussion supra note 173-85 and accompanying text.} Alternatively, of course, the shifts we observe in the Hibernians' position can be taken as evidence of duplicity. At some point, the painful question has to be asked: Is Catholic teaching genuinely the explanation for what the Hibernians are about or, instead, yet another rationalization for policies that actually are rooted in homophobia detached from religious commitment?\footnote{I have focused in the text on the New York case, but a similar pattern is obviously apparent in Boston. Ward, MCAD Decision, supra note 219, at 26 (concluding that the reasons "articulated" by the Veterans for initially excluding GLIB were "not the real reasons").}

I would not suggest that the situation can accurately be described only in one of these two ways or, indeed, that there is any fully satisfying single explanation to be found. I do think, however, that on the basis of the experience we have, two propositions are in order. First, to the extent the Hibernians' reliance on religious doctrine is pretextual, that reliance should be disregarded in any constitutional analysis that pretends itself to be realistic. Second, to the extent sincere religious faith actually drives the Hibernians' behavior, they should be encouraged to make the particulars of those religious commitments clear to all—withstanding that in so doing they may imperil their ability to coalesce around nonideological, cultural themes. Everywhere we look in these materials, balances have to be struck. Trade-offs have to be made. If, in this instance, the Hibernians make adherence to, or at least acquiesce in, orthodox Catholic teaching part of the price of admission to the parade, they must expect that they themselves will pay a price—if, and to the extent that, the demand for ideological discipline on this issue within their own ranks risks divisions the group might otherwise prefer to avoid. At this juncture, indeed, we begin to perceive a signal lesson from the parade controversies. If our law is to sponsor an environment in which citizens can respond as they will to the gay and lesbian civil rights
movement, then bright and clear expression in all forms must predominate
over cultural attachments that might benefit from rather less attention to
doctrinal purity. Potential participants in the parade and spectators alike
have a compelling interest in knowing the nature of the celebration they (or
most of them) are invited to join, so that they can respond as they see
fit.\footnote{See infra note 364 and accompanying text.}

IV. PARADE LAW IN ACTION

A. Reflections

Having explored our actual experience with the St. Patrick's Day parades
in New York and Boston, and having noted the way in which the courts
have reacted thus far, we now should step back from it all and attempt a
fresh assessment. As a first cut, we might at least consider the possibility
that the parades can get along well enough without the Constitution. After
all, they have been around for a long time, and, as we have seen, they have
weathered many storms already. When disputes have spawned litigation in
the past, nothing particularly good or memorable has come of it. Politics
(and local economics) may, accordingly, be able to go it alone, without any
constitutional meddling. As the gay and lesbian civil rights movement pro-
ceeds apace, gathering ever more support from younger and more progres-
sive residents of Manhattan and Southie, the parades will either change or
die. Simple as that. Appealing as it may be to do nothing, however, that
course is no longer available. For one thing, we already have lawsuits, and
lots of them, that demand constitutional answers. For another, as I sug-
gested some pages back, the right constitutional answers can structure not
only the way we meet the immediate problems the parades themselves pres-
et, but also the larger social adjustments that hover in the background—of
which the fight over gay and lesbian participation in the parades is merely a
symptom.

As a second cut, we should set aside any false confidence that the Consti-
tution, properly understood, can knife through the parade cases with sharp
doctrinal clarity, making the answers we seek obvious for all to see. With
due respect, Judge Duffy's decision in the New York case contemplates that
kind of foolish simplicity. The very reach and rigor of his rhetoric, not to
mention the ferocity in which he deploys it, testifies not to the strength of his
analysis, but to its fundamental weakness. When you find yourself arguing a
point that vehemently, it may be time to ask whether you are not trying to
make decibels substitute for substance. No, it will not do either to keep the
Constitution out of the parades altogether or to insist that, when it is
applied, it neatly resolves the issues the parades present—simply handing
victory to those who claim an absolute entitlement to do what they wish to
the exclusion of all other people, interests, and values. Human experience is
not so tractable as that.

As a third cut, we should recognize that while the principle of neutrality is
the best tool we have, that idea is a lot more difficult to manage than may initially appear. The key is to approach the parades at the proper level of generality and, in so doing, to be clear about what counts as neutral at that level. Here, too, our actual experience with these two great events should inform our thinking—helping us to choose the analytic level at which the parades should be approached. Recall that within conventional doctrine, the public streets constitute a traditional public forum, the use of which (for speech) may be regulated, in the main, only in a way that is neutral with respect to content and viewpoint. At one level of generality, then, we might take the public forum in question in these St. Patrick's Day cases to be any and all of the streets in New York and Boston—and treat the Hibernians and Veterans as no different from any other ostensibly private parade organizers. This, of course, is the classic model that Judge Duffy seems to invoke. All manner of applicants for parade permits show up at police headquarters, seeking permission to use this street or that, on this or that date. City officials simply act as disinterested referees, orchestrating the dispersal of permits in a way that minimizes the disruption of competing uses. Usually, no great difficulties arise. There are enough streets and dates to go around, conflicts emerge only rarely, and, when they do, city officials can resolve them on some equally neutral basis, typically first come, first served. If this were a sensible way to approach the St. Patrick's Day parades, then Judge Duffy's solution would seem to follow: Once one group has secured a permit, that group is entitled to advance its own message via its own parade, and government has no business interjecting different participants with conflicting ideas and voices.

Yet nothing about the parades with which we actually must contend suggests that this is the way to understand what is going on. These cases defy the classic model. The Hibernians in New York and the Veterans in Boston are not like (most) other private groups that periodically seek permits for ad hoc parades through ordinary streets. They seek, nay demand, permanent warrant to conduct massive, annual processions over traditional routes—which turn out to be major thoroughfares through the heart of each city. They attach vital significance to the time and place they march and refuse to step aside or even to moderate their demands in order to accommodate competing groups like ILGO, GLIB, or, indeed, any other group that might seek a permit to use the same routes on March 17. In short, the Hibernians and Veterans refuse to wait patiently in line for the same chance to parade as any other group, but rather claim a special purchase. If, then, we define the public forum with respect to the parade cases at this level of generality, it would seem to follow that city authorities can be neutral only if they reject the claim that Judge Duffy insists they must sustain.

See supra notes 16-17 and accompanying text.

See supra parts II.A.1, II.B.1.

The Hibernians themselves concede that the city might well change its policy, but insist that the question at the moment is whether the Mayor can do so "on an ad hoc
We probably reach the same result if we drop down to a different level, now taking the public forum in question to be the particular streets used by these two mammoth parades (rather than all the streets in the two cities). This approach makes some sense. Neither New York nor Boston can afford to open vital central corridors routinely to anyone who wishes to use them for private speech, and nothing in the Constitution requires any such thing. Yet if neutrality means in the context of administering Fifth Avenue alone what it means in the context of administering all the city's streets, it would seem that focusing on this single thoroughfare makes no difference. The practice of reserving a permit for the Hibernians as the "traditional" sponsors of "the" St. Patrick's Day parade would appear to be illegitimate favoritism. The evidence in Boston is virtually as conclusive on this point. For if Boston authorities have been blindly distributing permits to use a particular route over South Boston streets on a neutral basis, it is going to be hard to explain how the Veterans have lucked out for forty-seven consecutive years.

Here again, however, there are complications in life that must inform the law that can sensibly be brought to bear. Now that we are treating Fifth Avenue and the South Boston route as themselves peculiar public forums, we must recognize that the task of administering them is peculiarly difficult. The competition for these choice routes is intense—for the very reasons city authorities may give for setting them apart from other streets in the first place. Many applicants may be just as happy to conduct their parades in obscure neighborhoods. But many others will wish to command the premier routes, which promise greater access to a large audience. If neutrality still means turning a blind eye to content and viewpoint, then it would seem to follow that Fifth Avenue itself, when it is made available for parades at all, must be turned over to anybody who genuinely is lucky enough to draw a permit on some random system. That result would be silly—and thus scarcely something we should lightly assume is constitutionally required.

As we said previously, there are times when it is valid, indeed, essential to recognize the link between a would-be speakers' message and a particular public forum—in order to be neutral (as opposed to arbitrary) in the administration of that forum. Given the significance that Catholics attach to St. Patrick's Cathedral and the Cardinal's reviewing stand, it only makes sense that an application from a Catholic group should be entitled to consideration basis, secretly, after the fact, and with the purpose of punishing a parade sponsor for taking a political position contrary to the City's." Hartnett Affidavit, supra note 88, at 10. I would not reject that distinction out of hand, for there may be instances in which a sudden shift in public policy can raise constitutional doubts. If, however, a policy is constitutionally unsound in the first instance, it is hard to argue that city authorities act invalidly when they discard it.

353 See supra note 19.
354 See supra note 220 and accompanying text.
355 See Kerins Testimony, supra note 86.
over a competing request from a group that wants to use Fifth Avenue to tell everyone the circus is in town. I dare say I could write the brief defending that kind of accommodation as content-neutral in any meaningful sense of the term.

I hasten to say, however, that this kind of neutrality has not actually been at work in New York. ILGO, too, attaches significance to the Cathedral and, come to that, the Cardinal. It is only that ILGO wishes not to declare relentless faith in orthodox Church teaching, but rather to contest it. The Hibernians' claim that they are entitled to prevail over ILGO is therefore, again, a claim not for equal (neutral) treatment (with due attention to their special needs), but for special dispensation. The argument that their particular position regarding the Cathedral, the Cardinal, and Church doctrine should prevail amounts to a claim to enjoy viewpoint discrimination. Of course, the argument we are now exploring (and rejecting) on the part of Hibernians and Fifth Avenue is even weaker with respect to South Boston—where the Veterans' attachment to their traditional route lacks serious religious foundation.356

It is no answer that the Hibernians and the Veterans have had their way in this for a long time and that the discrimination they seek to perpetuate is between themselves (as "traditional" sponsors) and ILGO, GLIB, or others (as newcomers). It hardly makes First Amendment sense to privilege a point of view by adverse possession; chronic favoritism for a single message is all the more objectionable inasmuch as it insulates the status quo from dissent. Indeed, the New York ordinance is more troubling still in that it prefers some groups on a seemingly neutral basis (exempting those that have conducted parades for more than ten years), when everybody knows precisely who is affected.357 The vices of vagueness and overbreadth are everywhere apparent. Moreover, there is an obvious tension between an argument on the part of the Hibernians and Veterans that their "traditional" parades may safely be preferred to the events that others would stage and their insistence that their parades are not the general public events they have always appeared to be, but, instead, are narrowly focused celebrations of sectarian attitudes not shared by many participants and spectators. By characterizing their parades in this latter way, of course, the Hibernians and Veterans are attempting to fit themselves into the classic framework we ascribed to Judge Duffy. Yet any success they may have in making themselves over into isolated applicants who wish to advance a specific agenda undermines any claim that they are the masters of "traditional" parades that can be distinguished on the ostensibly neutral basis of age and broad cultural import.

Nor is it an answer that as the traditional sponsors of these two great occasions, the Hibernians and Veterans are the purveyors of Irish culture in the New World. Here, again, to the extent such a claim rests on past practice alone, it has no substantive base. There is, however, a deeper point to be

356 See supra notes 266-67 and accompanying text.
357 See supra note 87 and accompanying text.
made of the salute to everything Irish that is so much in evidence in the two
parades—a point that damns the Hibernians' and the Veterans' position like
no other. If we posit, as we fairly can, that the St. Patrick's Day parades in
New York and Boston are celebrations of the Irish people and culture, it
follows that the inclusion of some participants and the exclusion of others
says something extremely important and powerful about who it is who can
claim title to that Irish heritage. To the extent the Hibernians and Veterans
insist on barring ILGO and GLIB, they assert for themselves the authority
to circumscribe the Irish community to which gays and lesbians, too, main-
tain they belong.

Herein, of course, the right of expressive association on which both tradi-
tional sponsors and newly arrived gay and lesbian groups depend gives way
to the right of cultural association—which, in turn, offers the really telling
insight into the affair at hand. For the Hibernians and Veterans do not sim-
ply argue that ILGO and GLIB have no place among their own clubbish
members (an arguable point, at least), nor even within the Catholic Church
(also a debatable matter). They declare that gays and lesbians have no place
in the wider Irish-American community. Such an assertion of cultural
hegemony cannot be taken seriously; nothing in the Constitution obliges
public officials to indulge it. To do so would be to take sides in multi-layered
conflicts under way between different generations of Irish immigrants in
Manhattan and South Boston—conflicts that run deep into individual and
group self-identification. On examination, it is hard to escape the conclusion
that the Hibernians and Veterans are trying to appropriate the parades as
vehicles for drawing their own definitional lines around a tradition they have
no intrinsic warrant to rule.

Finally, we may drop down to yet another level of generality and consider
the public forum at issue in these cases to be these two parades themselves—
annual street processions over specified routes, celebrating St. Patrick's Day
in fact, if not always (in Boston) in form. This is more or less the approach
taken by Judge Zobel.\textsuperscript{358} There is an immediate objection here, of course, in
that the parades may not be public at all. Recall the evidence. The extensive
involvement by officials in Boston makes the case for state action there
rather convincingly.\textsuperscript{359} The facts are different in New York, but it is far
from clear that they are different enough. Pursuant both to the controlling
city ordinance and to longstanding practice, New York has for years
reserved "the" permit for "the" St. Patrick's Day parade for the county
AOH. And it was the police department that insisted that the New York
parade should end by dark, thus laying the predicate for Judge Leval's con-
clusion that the parade was "full" and could not easily be enlarged to
accommodate ILGO.\textsuperscript{360}

On the other side, however, it can scarcely be denied that the mayors in

\textsuperscript{358} See supra note 287 and accompanying text.
\textsuperscript{359} See supra notes 221-22 and accompanying text.
\textsuperscript{360} See supra note 159 and accompanying text.
PARADING OURSELVES

both cities have used their good offices in a genuine effort to bring ILGO and GLIB into the fold. In an article meant to exalt the facts of experience over abstract legal doctrine, I hesitate to say that David Dinkins and Ray Flynn themselves committed the very discriminatory actions they worked so hard to avert. I certainly would conclude that Dinkins and Flynn were responsible for what happened in the practical sense that they failed to do all they might have to change the result. Yet current state action doctrine would presumably find that argument insufficient—perhaps revealing the fundamental inadequacy of that doctrine when called upon in actual cases. Here again, the parades resist the definitions and categories that conventional doctrine offers. All that can fairly be said is that Mayor Flynn and Mayor Dinkins, and other public officials as well, have figured in the mix of actions at various points, responding as they would to the demands of both principle and expedience. On examination, what we have in the parade cases is not simply state action or no; it is urban politics as usual, albeit practiced in this instance by politicians with a well developed understanding of the direction in which the tide is moving—and should move.

The conventional binary choice between what is or is not state action fails to appreciate fully the gradations and nuances that a serious, realistic appraisal demands. We have seen already that the conclusion that the parades are not themselves public functions, but rather are the exercise of private right, does not necessarily mean that the Hibernians and Veterans must win. Equally, we should not blithely treat the Hibernians and Veterans as, in effect, the state and try by that means to wish our problems away. Those groups remain stubbornly private, and as private organizations they have their own constitutional claims to advance. If we accept that, as I think we must, then we must listen to their arguments. Neither group insists on barring individual gay and lesbian marchers; both object only to the expression tied up in ILGO and GLIB participation as identified groups. It is true that in ordinary Fourteenth Amendment analysis, classifications according to the content or viewpoint of speech are said to be unreasonable and, indeed, are regarded with the kind of suspicion usually reserved for racial segregation. In these cases, however, in which the Hibernians and Veterans press their own speech and association claims, the conflicting message that ILGO and GLIB wish to offer is arguably what makes a rule excluding them perfectly rational.

If we lay aside the idea that the parades themselves constitute a public forum (from which would-be participants cannot be excluded), we come to the different claim that they are not so private that they cannot be forced to admit gays and lesbians under local anti-discrimination laws. Here, too, conventional doctrine only presents us with more problems of characterization. It is rank foolishness to think that labeling a parade a place of "public accommodation" deprives the organizers of any constitutional objection to

361 See supra notes 283-86 and accompanying text.
362 See supra note 70 and accompanying text.
admitting gay and lesbian groups. It is also foolish to believe that calling these unruly street celebrations "parades" somehow renders them invulner-able to the state police power. Rigorous thought demands a close, fact-spe-
cific exploration of actual events. Just as we might disagree on the question whether there is sufficient state action to invoke the Constitution of its own force where these parades are concerned, we can equally disagree on this issue—namely, whether the imposition of an anti-discrimination rule would impermissibly infringe upon private organizers' speech and associational freedoms. For my part, the chances of seriously diluting anyone's message are greater in New York than in Boston, but, if the truth be told, I doubt that those chances are great in either city. The point, in any event, is that extant constitutional doctrine does not generate a clear answer, but only beckons a difficult exercise in balancing—in every case and in every year.

B. Prescriptions

At this point, I probably owe the authorities in New York and Boston some specific advice. What, then, would I have us do with the parades? To begin, we should worry rather more about the problems that can be observed in the streets and rather less about related problems that can only be imagined. It is enormously helpful to draw upon conventional legal doctrine to guide our thinking and, in so doing, to reason by analogy to (and from) less complex hypotheticals that focus attention on key issues. Yet we have seen these two giant events refuse to be wedged into neat analytical categories. It is dangerous business, then, to approach the cases we have by conjuring up easier disputes and insisting that if we can agree on the way those more tractable cases should be resolved, we can (and must) dispose of the matters at hand in the same manner. Such an approach assumes that if we once get our doctrinal ducks in order, clear constitutional rules and principles can sort all parade cases into a coherent, aesthetically pleasing grid—a place for every parade and every parade in its place. It won't work. The NAACP may try to horn in on a small, ad hoc Klan demonstration, but it is a mistake to think that there is some pristine legal principle that can and must resolve both that case and the far different disputes we are exploring. Life and law are more complicated than that; we can't always hammer unruly experience into formal models, and we shouldn't lose heart if we try and fail.\(^3\)

Next, we should be open to the expressive activities in which citizens wish to engage and thus should attempt to settle disputes when they arise in a way that promotes the free exchange of ideas. We will get nowhere if conflicting ideas and aspirations are silenced and our collective response to, and participa-
pation in, the gay and lesbian civil rights movement is thereby skewed. Thus we should be loath to credit the Hibernians' and Veterans' attempt to com-

\(^3\) See Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont, 700 F. Supp. 281 (D. Md. 1988); discussion supra note 192; cf. Baker, supra note 10, at 135 (counseling that we avoid the "rhetorical power of the worst case scenario").
mandeer large community gatherings in order to eliminate free discussion of matters they find unsettling. From the evidence, it appears that the Hibernians and Veterans do not so much want to advance their own attitudes regarding homosexual behavior. They want, instead, to frustrate the views that ILGO and GLIB represent—by discouraging any speech on the subject and thus to make it appear, at least, that the matter is beyond debate within the Irish-American community. They hope to make their own views the norm by submerging those views in ostensibly seamless community celebrations. That will not do. We need more speech about human sexuality, not less, and the First Amendment should be understood and applied in these cases in a way that fosters that result.

In this spirit, the authorities in New York and Boston should not shrink from their responsibility for the parades out of concern that official involvement somehow threatens the traditional organizers' private rights. By contrast, they should assume primary responsibility for planning and conducting these large civic celebrations of Irish heritage and, in so doing, should ensure that all members of the community can participate, irrespective of the disagreements that divide them. It may prove helpful and efficient to enlist groups like the Hibernians and Veterans, or for that matter ILGO and GLIB, to participate as joint venturers. But the involvement of private organizers working in league with public administrators should have no bearing on the inclusive nature of the events they help to orchestrate. Once the parades are freed from the classic model that so blinded Judge Duffy, and perhaps Mayor Dinkins and Mayor Flynn as well, they can be carried on as the civic spectacles they have always been and appeared to be.

At the same time, the authorities should comb existing procedures for allocating parade permits to groups that do fit the classic model—cleansing existing law of the favoritism that has crept into the statute books and common practice over the years. Everyone should be put on an equal footing in the competition for scarce public space. This does not mean that the authorities should ignore entirely the message that an applicant wishes to advance and blindly pass out licenses on some random basis. By contrast, as we noted previously, genuine neutrality may often demand that an applicant's desire for a particular street or date be accommodated—all other things being equal. When, then, the patch of Fifth Avenue in front of St. Patrick's Cathedral is made available, groups like the AOH and ILGO alike should receive due consideration for permits to use that street for their own, private speech purposes. The Hibernians' exclusive occupation of that choice forum cannot, however, be allowed to continue.

When a group seeks permission to march, it should be asked to specify whether it means to comply with the ostensibly applicable anti-discrimination ordinance. If not, the group should be invited to explain why—that is, to explain how its message would be affected if that law were brought to bear. After all, if a group is constitutionally entitled to discriminate on a basis that is ordinarily proscribed by state law, and the police will therefore be expected to enforce that constitutional entitlement with the necessary
force, then it is only just and practical that the authorities get the situation straight from the outset. Most groups will respond with alacrity and thus take full advantage of this additional method for articulating and clarifying their agenda—the better to attract participants and spectators who wish to press the same viewpoint. Some groups, however, will decline. I would not suggest that city officials should demand a satisfying response, on pain of withholding a permit from a group that resists. Nor, certainly, should the authorities launch intimidating investigations of the bona fides of a group’s message and desire to preserve its purity at the price of discrimination that would otherwise be barred. The First Amendment needs and deserves a fair amount of breathing space, and if a group declines to articulate its message in this way, or answers in obfuscating terms, we must accept that result. When, however, a parade permit is granted with an exemption from the anti-discrimination ordinance, the public is entitled to know it and, where the group itself provides an explanation, to know what that explanation is. Accordingly, when the authorities have a group’s own explanation, they should publish it to the community—in the terms used by the parade organizers themselves.64

With due notice of the exclusionary message that a parade purports to advance, potential participants and spectators will be in a position to make intelligent choices about whether to attend. Contending points of view will thus be defined and sharpened; the issue or issues will be tightly joined; and healthy debate can ensue. I understand and appreciate that in the process cultural associations may suffer. Where organizations typically may hope to play down internal doctrinal disputes and play up other ties that bind, the scheme I have in mind invites greater attention to potential disagreements that can threaten cohesion. Nevertheless, in a society that means to be free, it seems to me that the greater value lies in the delineation of issues for public appraisal.

I tend to think that most citizens will give wide berth to parades for the purpose of condemning homosexuality or homosexual behavior. Tolerance in these matters is the wave of the future. I even hope that parade organizers

364 See supra note 44 and accompanying text. For example:

An organization entitled has been granted a permit to conduct a street parade over the following route, on . By the organizers’ account, the message they wish to convey by way of the parade is that the Catholic Church considers homosexual behavior to be mortal sin. Because the organizers’ have made a reasonable case that the participation by organizations that promote homosexual behavior would be inconsistent with that message, they will be allowed to exclude such groups from the parade, notwithstanding the provisions of , which usually prohibits discrimination on the basis of sexual orientation in places of public accommodation.

The City of New York/Boston respects the constitutional right of the members of to express their views in this way.

Cf. Baker, supra note 10, at 149-50 (advocating a “voluntary” permit system that would encourage would-be speakers to notify the authorities of their intentions but would not require them to seek and obtain formal permission before using the streets for speech).
who are not genuinely moved by religious commitments will take the withdrawal of others' support as an occasion for reflection on the basis and strength of their own convictions—even if, again, the result is some loss of cohesion within primarily cultural associations. Yet even if I am wrong in the near term, I am content to let the chips fall where they may. For just as it makes no First Amendment sense to silence the gay and lesbian civil rights movement, it equally makes no sense to suppress the resistance to it. By contrast, our societal ability to thrash out our differences depends on the free and open clash of contending forces.

**CONCLUSION**

My ramble through the intricacies of the parade cases in New York and Boston may appear to confuse, rather than clarify, the legal issues those cases present. Then again, my thesis has been that abstract legal questions must defer to unruly reality and that it can't work the other way around. There will always be many and varied instances in which city officials, and ultimately the courts, will have to fashion particularistic remedies groomed to the circumstances of idiosyncratic cases.\(^3^6\) Often, it will be far from easy to accommodate conflicting private agenda—when, for example, groups with genuine reason to prefer particular streets and dates compete for a license that allows them to exclude their adversaries. That, too, is part of my argument. Hard cases are inevitable—the product of our defective analytical categories and our healthy, if disorderly, political system. The examination of the St. Patrick's Day parades we have just been through demonstrates, I think, that there is trouble aplenty ahead. We are dealing with human problems, and we are only human ourselves.

\(^{365}\) *E.g.*, Olivieri v. Ward, 801 F.2d 602 (2d Cir.), *cert. denied*, 480 U.S. 917 (1986); see discussion *supra* note 33.