1-1-2002

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Speaking Out of Thin Air: A Comment on
Hurley v. Irish-American Gay, Lesbian
and Bisexual Group of Boston

by
RANDALL P. BEZANSON
AND MICHELE CHOE

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The appropriation and use of others’ speech is ubiquitous. People engage in the practice daily when the statements of others appear in segments of conversation. Appropriation and use likewise occur every day when newspapers publish – and purchase – a story from the Associated Press newswire. Television viewers who watch a television show through the use of cable technology benefit from this sort of secondary use; the same is true for a corporation’s advertisement that is produced by and purchased from an advertising agency.

Despite the prevalence of these speech acts – which we call “speech selection judgments” – traditional First Amendment jurisprudence is often at a loss when it confronts them. Speech selection judgments often rise to the level of protected First Amendment speech, but it is not always clear why. The opposite is also true. What is it about these “secondary” speech acts that might qualify them for First Amendment protection? Is the decision to communicate the speech of another person itself speech for purposes of the First Amendment? What criteria should qualify these speech acts as privileged speech under the First Amendment?

Little in the way of First Amendment theory or doctrine is available to clarify the constitutional boundaries surrounding speech selection judgments. The law of libel recognizes the existence of speech selection judgments and offers some assistance. It calls publication of a statement previously published by another

2. Speech selection judgments involve the appropriation or selection of speech originally created elsewhere (by another) and the secondary deployment of that material in another context by a person or entity different than the original creator. The practice is essentially citational – not in the narrow sense of enclosing words within quotation marks – but in the broader sense that one repeats the words, speech, message, or meaning of another and yet claims governance and, often, ownership over the repetitive use.


4. A host of speech selection judgments are excepted from First Amendment protection. For instance, the individual donor’s decision to support certain parties or candidates or charitable causes and not others is not generally considered a protected act of expression. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976). The copyright violator’s transformative republication of a protected work is not always, or even usually, protected by the First Amendment. See, e.g., Estate of Martin Luther King, Jr. v. CBS, 194 F.3d 1211 (1999); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987). Neither does the First Amendment protect the libeler’s decision to publish a knowing falsehood by artful editing of another’s statement. See, e.g., Masson v. New Yorker Magazine, 501 U.S. 496 (1991).
“republication,” and affords the republisher some, albeit limited, protection for the act. But this only covers a narrow array of speakers and speech since republication only applies to already published speech. Republished speech that adds no new meaning whatever sometimes receives substantial First Amendment protection, but the republisher is often disqualified as a First Amendment speaker. The First Amendment tends to provide more secure protection for republications that add meaning to the originally published message, and thus reflect the independent communicative will of the republisher, but this result is largely unexplained in the judicial decisions. Is there something intrinsic in the addition of new meaning or independent will that confers upon speech selections the status of “speech” or “speaker”?

Just as the status of speech selection is often mysterious, so also is the identity of a, or the, speaker. Parties who erect First Amendment claims for citational, secondary speech acts typically do so upon fact patterns that involve more than one speaker and more than one artifact of speech. The fact patterns often pit various speakers and artifacts of speech against one another. As such,


6. In other words, the doctrine of republication under libel law would not cover the cable operator’s selection of material for transmission to its viewers, nor would it cover a corporation’s selection and use of an advertising agency’s advertisement.

7. See, e.g., Buckley, supra n. 4 (discussing political campaign contributions). However, it is not clear whether the freedom in such cases is the republisher’s or the original author’s, or perhaps both. Is the campaign contribution, arguably an instance of speech selection by the contributor, the speech of the candidate (or campaign committee) alone, or is the contribution perhaps too passive an act to qualify for First Amendment protection? Consider also the Hurley case, supra n. 1, at 572-75 (discussing a parade organizer’s right to exclude parade participants’ messages). Is the pro-gay message of a group marching in a parade the message of the parade organizer, or the group, or both? See also Denver Area Telecomm. Consort., Inc. v. FCC, 518 U.S. 727 (1996) (discussing the competing speech and speaker claims among a cable operator, a channel operator (municipal commission), and program producers and originators).

8. Even here there may be exceptions. The copyright violator’s transformative republication of a protected work is not always, or even usually, protected by the First Amendment. See, e.g., Estate of Martin Luther King, supra n. 4. The libeler’s decision to publish a knowing falsehood by artful editing of another’s statement is not protected speech. See, e.g., Sullivan, supra n. 3; Masson, supra. The market newsletter’s decision to select, as its own news, a story written and paid for by a company about itself, is not protected by the First Amendment. See, e.g., SEC v. Wall Street Publ’g Inst., Inc., 851 F.2d 365 (D.C.Cir. 1988). The individual donor’s decision to support certain parties or candidates or charitable causes and not others is not generally considered a protected act of expression. See, e.g., Buckley, supra n. 4. Is this because these selection judgments, while speech for First Amendment purposes, have insufficient value, or lack specific communicative intention, or are too harmful, to warrant full protection?
precedent from speech selection cases often tramples upon one or more parties who are literally speaking. This outcome threatens to unravel many of the cherished protections traditionally extended to the speaking individual, and threatens to use arbitrary audience interpretations of messages as the rubric for stabilizing and determining the meaning inherent in messages. In short, speech selection judgments must be examined more carefully and systematically. Otherwise, precedent from speech selection cases threatens to unravel the First Amendment’s core.

We argue that a largely unappreciated and unevaluated complex of factors are at work in the law’s treatment of speech selection judgments as First Amendment speech. It is to the additional criteria and their basis in theory and practice that this article is directed. Our purpose is to explore the phenomenon of speech selection and the attributes of speaking and communication that may account for its status as speech under the First Amendment. Our goals are exploratory and evocative, not prescriptive. We focus on a single case, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,\(^9\) in an effort to expose the complicated elements lying beneath the surface of the Court’s opinion. We turn, first, to the multiple and conflicting forms of speech and speakers that exist in Hurley. We then consider four different theories of speech and/or communication, measuring the Court’s First Amendment reasoning against them. Our goal is to reveal the deep ambiguities about the nature of speech selection judgments and to critique the free speech principles implicit in the Court’s decision.

I. The Multiple Speakers and Forms of Speech in Hurley

The South Boston Allied War Veterans Council is a private association of representatives of veterans groups authorized since 1947 by the City of Boston to organize and conduct the annual St. Patrick’s Day-Evacuation Day Parade.\(^10\) In 1993 the Council denied the application of the Irish-American Gay, Lesbian and Bisexual Group (GLIB) to participate in the parade.\(^11\) GLIB wished to “march

\(^10\) The Council itself applies for and receives a permit from the city every year to organize and conduct the parade. Through 1992, however, the city allowed the Council to use the city’s official seal and directly funded the parade. Id. at 560-61.
\(^11\) Two things should be noted about this denial. First, the Council denied GLIB’s permit to participate in the parade the previous year, but was ultimately forced to allow GLIB’s participation due to a court order. Id. at 561. Second, GLIB was not the only candidate denied in 1993. The Council also denied the Ku Klux Klan and ROAR (an anti-
in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express solidarity with like individuals who sought to march in New York’s St. Patrick’s Day Parade.” GLIB challenged the Council’s refusal to permit it to march. It based its claim on the Massachusetts public accommodation law, which prohibited discrimination based on sexual orientation “in any place of public accommodation, resort or amusement.” The state trial court and appellate court concluded that the Council’s decision to exclude GLIB violated the public accommodations law and ruled that the Council must admit GLIB to the parade on the same terms as any other applicant. The Supreme Court unanimously reversed, holding that the exclusion of GLIB by the Council constituted an exercise of the Council’s First Amendment right of free speech. The Council, the Court held, was a speaker in its own right entitled “to shape its expression by speaking on one subject while remaining silent on another,” free from state interference.

The Council’s decision was an instance of speech selection, the choice of others’ speech by a party itself claiming that it did not want to select the chosen expression of others. The Council, in the Court’s view, was an organizer, indeed an assembler and composer, of a collective mode of expression in the form of a thematic parade. What was it about the particular form or type of selection judgment made by the Council that qualified it as the Council’s speech? What precisely was the “speech” protected by the First Amendment? The speakers and speech in Hurley take a number of potential forms. We explore four possibilities.

A. The Participants as Speakers

The speaker(s) in Hurley could be the participants in the parade – not the audience but the marchers, individually conveying messages or, instead, conveying an overarching message through the meaning of their collective participation. Ostensibly, the individual paraders

bussing group). Id. at 562.
12. Id. at 561.
15. Id. at 559.
16. Id. at 574.
17. Id.
18. Id.
actually spoke, sang, chanted, carried signs, danced, or engaged in
that which qualifies normally as obviously expressive behavior.
However, the Court refused to credit the participants as speakers,
effectively disenfranchising them. The Court may have done so on
the ground that the participants were not, definitionally, qualified
speakers under the First amendment, or that while they, too, were
speakers, the Council’s speech claim subordinated or preempted their
speech claims, at least in relation to the meaning conveyed by their
collective participation.

B. The Parade Organizer as Speaker

If the Council receives credit as the speaker, it can arguably
claim responsibility for two separate kinds of speech, each involving a
distinct status as speaker. The first kind of speech is the message
implicit in and conveyed through the Council’s selection judgments,
i.e., the exclusion of GLIB, the Ku Klux Klan, and the anti-bussing
groups. The parade organizer, the Council, functions as a speaker
when acting in its capacity as a composer or conductor – an assembler
– of speech. The second kind of speech is the message that resides in
the parade itself. In that scenario, the Council speaks through the
parade, which makes some kind of collective point. We turn to the
first alternative in this section, and discuss the second alternative
below.19

In litigation, the Council claimed the first speaker status. It
argued that, by selecting out GLIB, the parade expressed “traditional
religious and social values”;20 GLIB was “excluded because of its
[inconsistent] values and its message, i.e., its members’ sexual
orientation.”21 The Court went to great lengths to show that speech
(a message) did inhere in the Council’s organization of the parade
itself. “Every participating unit,” the Court said, “affects the message
conveyed by the . . . organizers.”22 Thus, forcing GLIB’s message
(express or constructed by bystanders) to be included “essentially
requir[ed] [the Council members] to alter the expressive content of
their parade.”23 The Council “clearly decided to exclude a message it
did not like from the communication it chose to make” and that is
enough to invoke its right as a private speaker to shape its expression

19. See infra Part I.D.
21. Id.
22. Id. at 572.
23. Id. at 572-73.
by speaking on one subject while remaining silent on another.”

The Court’s language reflects two alternative views of the Council as speaker. The first is that the Council was expressing its own predetermined message. GLIB would have altered it by marching in the parade. The second view is that the Council had no preexisting message. Instead, GLIB’s marching would have created meaning out of the Council’s previously nonexpressive act of assembling the parade. The Council was therefore entitled under the First Amendment to eliminate GLIB from the parade in order to eliminate GLIB’s message, because that message would have been attributed to the Council.

These are two very different views of the Council’s actions and its speech in *Hurley*. Surprisingly, the Court was studiously ambiguous about which of the two alternatives is applicable. For the Court, the case “boils down to the choice of a speaker not to propound a particular point of view.” “[A] private speaker,” the Court said, “does not forfeit constitutional protection simply by combining multifarious voices.” Nor must the speaker (assembler) “edit their themes (participants’) to isolate an exact message as the exclusive subject matter of the speech.” According to the Court, the First Amendment does not require a speaker to generate, as an original matter, each item featured in the communication. . . . For example, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers’ opinion pages, which, of course, fall squarely within the core of First Amendment security.

Yet the Court fails to explain why this is and should be so. Neither does it announce any limits – growing out of, for example, speaker intention or purpose - on when speech selection amounts to speech of the selector. For example, editing, which the court specifically mentions, is a form of transformation through adoption of others’ speech as the selector’s own. In comparison, a city manager clearly can effect speech through the regulatory assignment of space

24. *Id.* at 574 (emphasis added).
25. We addressed this view above. See *infra* Part I.B. (discussing the parade organizer as speaker).
26. See *infra* section 1.D.
28. *Id.* at 569.
29. *Id.* at 570.
30. *Id.*
and time in a city park, or even a parade, but the manager would not be considered a speaker or First Amendment claimant.\textsuperscript{31} How are we to know the difference? The Court says virtually nothing about the Council’s selection or other transformative actions in \textit{Hurley}, except to say that there need be no adoption, or even sponsorship or endorsement, of the views of specific marchers selected or excluded from the parade in order for the Council’s action to be that of a First Amendment speaker.\textsuperscript{32} Yet in treating the Council as a speaker “in its own right” whose interests prevail over all other speech interests, the opinion necessarily implies that something expressively full-bodied results from—indeed is created by—the Council’s selection decisions.

C. The Parade Itself as Speaker and/or Speech

This conception of speech involves a message, either specific or thematic, conveyed by the parade event, with the parade serving, in a sense, as both speaker and speech. It is distinct from an intentional or personal message, irrespective of whether the message’s ultimate meaning derives from the marchers acting collectively or by the Council. This form of speech is also distinct from a specific text containing a clearly identifiable meaning (e.g., a political speech).

In assessing the expressive significance of a parade, the Court distinguished a parade from a “march from here to there.”\textsuperscript{33} The Court conceded that “[s]ome people might call such a procession a parade, but it would not be much of one.”\textsuperscript{34} As an initial matter, then, the Court argued that the words “march” or “processional” were not precise synonyms for a parade. “Real” parades, the Court said, “are public dramas of social relations”\textsuperscript{35} in which “performers define who can be a social actor and what subjects and ideas are available for communication and consideration.”\textsuperscript{36} In contrast with a mere march, a parade means “marchers who are making some sort of collective point, not just to each other but to bystanders along the way.”\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{31} See, e.g., \textit{Thomas v. Chicago Park District}, 534 U.S. 316 (2002); \textit{Lovell v. Griffin}, 303 U.S. 444 (1938).
\item \textsuperscript{32} 515 U.S. at 569-70.
\item \textsuperscript{33} \textit{Id.} at 568.
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} \textit{Id.} (quoting S. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia 6 (Philadelphia: Temple Univ. Press 1986)).
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\end{itemize}
The Court emphasized “the inherent expressiveness of marching to make a point [which] explains . . . cases involving protest marches.” Is the Court, by this rather indirect reference, saying that “making a point” is not a function of intention, specific or general, in relation to a message, but is rather a function of the inherent expressiveness of the medium of marching to those who witness it, who by their perception and interpretation give it “a point?” If so, on what basis can the Council be viewed as a speaker in its own right? The meaning and role of intention or purpose is ambiguous in the Court’s statement. Marching to make a point implies intention, on the part of the marchers and also, it seems, on the part of the organizers. But the Court never requires the Council to express a specific point or coherent message, only “some sort of . . . point” with arguably symbolic significance. “Symbolism,” the Court says, “is a primitive but effective way of communicating ideas,” and “a narrow, succinctly articulable message is not a condition of constitutional protection.”

The parade itself, then, is the speaker, but a peculiar one: it is a vessel to be filled with expressive meaning supplied extrinsically to the event by the audiences who give it meaning(s). Perhaps the most confusing thing about this conclusion is the way in which it seemingly contradicts the Court’s implicit conclusion – that both the message conveyed by the parade itself and the GLIB marching contingent qualify as speech.

38. Id. at 568.
39. See Boy Scouts of America, supra n. 3 (employing a similar logic); see also, R. Bezanson, Artifactual Speech, 3 U. Penn. J. of Const. Law 819 (2001) (discussing the Dale case).
41. Id. at 569 (quoting W. Va. Bd of Educ. v. Barnette, 319 U.S. 624, 632 (1943)).
42. Id.
43. In the context of discussing the peculiarity of the application of Massachusetts’ public accommodation law, the Court concedes that expression inheres in both the individual paraders and the parade collectively:

“In the case before us . . . the Massachusetts law has been applied in a peculiar way . . . . The disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners [Council] to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state court’s application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.”
D. Compelled Speech Through Attribution of Audience Construction

Alternatively, the parade bystanders, or audience, could be constructors of meaning attributable to the Council. This conception of speech yields two different perspectives on the Council’s “speech.” First, it could support the theory that the Council was forced to speak by virtue of the Massachusetts public accommodation law’s requirement that the Council organize and conduct a parade containing a message the Council did not wish to convey (i.e., GLIB’s values). This is a negative speech claim, and as such, the Council can only identify that which it prefers not to speak. Second, this conception of speech could mean that the Council “spoke” a circumstantial, thematic parade message only to the extent that it was received and constructed as such in the minds of bystanders along the way. The meaning of this message develops within the audience’s collective mind (and despite the Council’s best intentions to the contrary).

If the speech claim in *Hurley* is based on the theory that the state statute forced the Council to speak GLIB’s message – a requirement that the council say something it did not intend to say – the claim is necessarily grounded in an intention or purpose-based speech analysis. This theory would rest not on the message of the organizer, but on the fact that the state law forced GLIB’s message on the parade (which, incidentally, suggests that GLIB is a speaker).

Conversely, if the speech claim in *Hurley* is based on the idea that the Council speaks the parade’s circumstantial, thematic message as received and constructed in the audience’s mind, then purpose and intention are not implicated. The logic of this claim necessarily assumes that GLIB’s participation in the parade emits signifying force. This signifying force will result in an identifiable pro-gay and lesbian message that those witnessing the parade will perceive a particular pro-gay and lesbian message upon witnessing GLIB’s participation. The result is that such message will in fact be perceived by audience members as the Council’s intentional or purposeful endorsement of GLIB’s values. In short, the parade’s message is constructed by the audience and then attributed to the Council as speaker.

Under this view, the Council’s status as a speaker is not offensive, but defensive. The Council is not creating an identifiable and purposeful message, but instead claims the right not to be forced

*Id.* at 572-73 (emphasis added).
to speak a message that will (allegedly) inevitably be attributed to it by others – a message not known at the time of the Council’s selection act. In short, the Council’s message seems inescapably bound to the audience and the circumstances of the parade, from which themes of patriotism, pride, and/or an endorsement of GLIB would presumably emerge. This confers great power upon the audience as a central and necessary factor in determining the message at issue.

In determining whether the Council alleged a valid speech claim, the Court asks whether “the Council, like a cable operator, is merely a ‘conduit’ for the speech of participants in the parade ‘rather than itself a speaker.’” 44 The Court answers its own question in the negative: “[T]his metaphor is not apt here, because GLIB’s participation would likely be perceived as having resulted from the Council’s customary determination . . . [that GLIB’s message, like others in the parade], was worthy of presentation and quite possibly of support as well.” 45

The Court adjudicates the question of whether the Council qualifies as a “conduit” by looking to audience perception. The Court speculates – without any evidence – about likely audience perception and uses that construct to determine whether the Council is a conduit or not. Thus, the attachment of a message to the Council would be a product of the bystanders’ interpretation alone, as would be the message deemed to be carried by the participant. This is a purely interpretive and constructed message, resting in no significant way on purpose or intention of the “speaker,” the composer, organizer, or whatever we might call the Council. 46 Moreover, the Court’s explanation rests upon premises that are ultimately inconsistent with its earlier insistence on the Council’s expressive intentions. 47

On what basis does the Court rest its conclusion that attribution of GLIB’s message to the Council will occur with the parade? With cable television, the Court says, “there appears little risk the cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.” 48

44. Id. at 575.
45. Id.
46. In Wooley v. Maynard, 430 U.S. 705 (1977), the Court used similar reasoning in the absence of any evidence that other drivers would interpret Maynard’s license plate as expressing his own view.
47. See supra Part I.B. (discussing the Council’s claimed speaker status).
“In contrast,” the Court says,

parades and demonstrations... are not understood to be so neutrally presented or selectively viewed... Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow “any identity of viewpoint” between themselves and the selected participants.

The absence of disavowal, however, does not necessarily imply avowal or endorsement. An audience’s construction of meaning is an obstreperous and circumstantial basis upon which to support such a facile assumption. Apparently sensing this, the Court undercuts its own conclusion: “Without deciding on the precise significance of the likelihood of misattribution,” the Court insists that, “the parade’s overall message is distilled from individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.”

In the Court’s view, attribution seems to be largely, if not solely, a function of either the accepted practice and understanding on the part of the audience or Justice Souter’s beliefs about the audience’s interpretation. The “common experience” attribution and interpretation is a method used analytically by the Court also to draw something of a line between cable programs and parade segments. This line is notably not drawn on the basis of substantive principle or expressive policy, but instead only on the (potentially idiosyncratic) interpretation of various relevant audiences or sets of bystanders. In the absence of any empirical evidence, this is a fragile, and even reckless, foundation upon which to rest an exceedingly expansive conception of constructed speech.

Ultimately, an approach that uses the concept of “audience perception” and attribution to determine and stabilize the meaning of an expressively ambiguous message is in high conflict with the Court’s continuous and adamant attention to the “message” derived from Council’s authorship of that message in the course of its selection decisions. The Council may have disapproved of GLIB’s message. It may have rejected it out of pure distaste for the ideas and values GLIB represented. But the Council’s claim is not a constitutional right to act on one’s own prejudices. It is instead a right of free

49. Id.
50. Id. at 577 (emphasis added).
speech. Such a claim requires that the Council speak, not just act. Distaste, alone, is not speech.

II. The Multiple Theories of Speech and Communication in Hurley

To understand Hurley as an instance of First Amendment speech, one must not only identify precisely what the Council’s speech acts consisted of, but also how the Council’s speech acts fit into an underlying idea of expression. To do this, we situate the Hurley case within different speech and communication theories and compare them to the Court’s reasoning. The four views discussed here are not an exhaustive inventory of the forms communication may take, but they represent a fair spectrum of competing ideas. The views are reflected in the work of J. L. Austin, E. D. Hirsch, John Peters, and James Carey.

A. J.L. Austin’s Speech Act Theory

1. Explanation of Austin’s Theory

J.L. Austin’s overarching speech act theory introduced a category of language called the “performative.” These statements do not simply describe or report facts. Rather performative statements are acts, in and of themselves. When results or consequences are brought about by saying something, then the speaker can be said to use language in the performative sense. The performative statement is qualitatively distinct from a statement that simply reports facts. The latter type of statement, once heard, may change someone’s course of action later in time. But when the former is issued and understood, then certain effects are immediately obtained. For example, if one articulates a descriptive statement of fact, such as “it is forty degrees outside,” the receiver of that statement may rely on that information and, thus, choose to put on a coat. But that consequence is not a necessary response or effect of the utterance. The doing of the act is not achieved by the speech. Statements with a greater degree of illocutionary force, and hence,

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52. Id. at 6-7 (explaining that the name “performative” “is derived . . . from ‘perform’, . . . it indicates that the issuing of the utterance is the performing of an action – it is not normally thought of as just saying something”) (emphasis added).
53. Austin refers to verifiable statements of fact – statements that do nothing in themselves, or that have no necessary force – as “constative” statements. Id. at 1-3.
performative quality, include statements such as, “I promise to pay you five dollars in exchange for your hat.” Assuming this statement is uttered in the appropriate context, it constitutes a promise and, perhaps, even a legally actionable contract. Performative statements are performative because a relationship or structure has congealed between the statement, uttered with the requisite intention and in the appropriate speech situation (i.e., context), such that effect necessarily attends the speech.

Though Austin concedes that there is no such thing as a “pure” performative – there are only uses of language with more or less illocutionary force according to the speech situations in which the expression is uttered – his notion of the performative documents something important about the nature of language: that sometimes speech and act are so tangled as to be inextricably intertwined. First Amendment jurisprudence likewise noted this oddity about speech and conduct, and the fact that utterances issued in particular contexts can have powerful, material effects. For example, the law of incitement reveals a belief in the (sometimes) inextricable quality of speech and conduct. Under the old rule of *Shenck v. United States*, the Court assumed that some words, uttered in particular circumstances, were so dangerous as to create a material danger

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54. Some background discussion of Austin’s speech act theory is in order here. When Austin began the Harvard lecture series documented in the book, *How To Do Things With Words*, he crafted a dichotomy between a performative and constative statement, suggesting that no overlap existed between the two senses of speech. *Id.* at 1-11. By the end of the lecture series, Austin rejects this dichotomy in favor of a more generalized speech act theory that tracks the various degrees of illocutionary force effected by all sorts of statements:

We said long ago that we needed a list of “explicit performative verbs”; but in the light of the more general theory we now see that what we need is a list of *illocutionary forces* of an utterance. The old distinction, however, between *primary* and *explicit* will survive the sea-change from the performative/constative distinction to the theory of speech-acts quite successfully. For we have since seen reason to suppose that . . . [we can sort] out those verbs which make explicit . . . the illocutionary force of an utterance. . . . What will *not* survive the transition . . . is the notion of the purity of performatives: this was essentially based upon a belief in the dichotomy of performatives and constatives, which we see has to be abandoned in favour of more general *families* of related and overlapping speech acts . . . .


55. 249 U.S. 47 (1919).
usually a tendency to cause unrest and violence). Under the modern *Brandenburg v. Ohio* standard, courts judge incitement by asking whether a speaker’s advocacy would direct or incite imminent lawlessness. The immediacy requirement only allows for a very small temporal separation, if any, between that which constitutes speech and that which constitutes conduct. This reflects the view that some expression achieves a conduct-like status because the expression has force, that is, inevitable and real consequences.

The same speech/conduct entanglement subtends the doctrine of fighting words. Under *Chaplinsky v. New Hampshire*, the Court allowed the state to regulate words likely to cause an average addressee to fight. The Court defined “words likely to cause . . . fight” as words that (1) are likely to incite an immediate fight (again, the temporal requirement between word and resulting action is extremely tight), or (2) words that themselves “inflict injury.” In short, these are words that effect a force equivalent to a physical blow, and that capability turns on the belief that such words possess a uniquely powerful force when uttered in a particular context.

Finally, it is important to note that, unlike the incitement and fighting words doctrines, where a speech act is regulated because its effects are both forceful and harmful, often the Supreme Court protects an instance of conduct precisely because its communicative aspect is so forceful. For instance, in flag desecration cases the Court has consistently held that the nation’s flag holds significant symbolic content. Burning that particular object necessarily conveys a political message that the flag burner disapproves of the state’s message of unity and patriotism. As such, flag burning may thus qualify as speech under the First Amendment. The illustration inverts Austin’s theory somewhat: the flag burner engages in an act that cannot but “speak,” or signify, where as speech act theory posits that a speech cannot but “act,” or effect illocutionary force. But the speech and act are inextricable under both views and so causation runs both ways.

2. *Austin’s Theory Applied to Hurley: Alternative Resolutions of the Case*

Austin’s understanding of the performative shifts the quality of the communicative phenomena that took place in *Hurley*, and thus

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57. 315 U.S. 568 (1942).
58. *Id.* at 571-72, 573.
bears on possibilities for resolving the case. The Supreme Court could have used Austin’s theory to conclude that the (GLIB) marchers were entitled to no constitutional protection. According to Austin, the explicitly performative statement encompasses a speech act wherein speech effects a high degree of force. It is at least arguable that, as the individual paraders marched along in procession, their individual units generated no real illocutionary force. That is to say, the pride, entertainment value, or any other values communicated by the parade were not generated by, or intrinsic to, a single marching entity. To the extent that the individual parade units engaged in communication with no illocutionary force, their speech acts approach the roughly synonymous legal realm of non-expressive “conduct,” which raises no First Amendment issues. First Amendment protection would only extend to conduct with substantial illocutionary force, that is, situations where conduct remains inseparable from signification. Thus, under Austin’s theory, the Court was right to conclude that the Veteran’s Council had the right to combine multifarious voices and/or edit their themes according to its private dictates and without regard to the speech interests of GLIB. It was also correct to conclude that “every participating unit affects the message conveyed by the private organizers,” and that parades “make some sort of collective point.”

In the alternative, the Court could have conceded that the individual parade units evinced some small degree of illocutionary force. Imagine if GLIB had marched down the street by itself. Considered in isolation, not within the context of the large procession that is Boston’s parade, the significance of one small marching unit cannot possibly match that of the entire parade taken collectively. GLIB might look extremely silly – indeed, out of order and arbitrary – should it decide to parade randomly down the street, accompanied by no other parade units. Nor does GLIB’s expression, as an individual unit, have an impact or force of meaning that matches the magnitude of signification inherent in, for example, flag burning committed on the steps of a capitol building. In short, GLIB would speak, but in a whisper.

Under either premise, GLIB’s interest in marching may legally be subjected to or trumped by the First Amendment interest of the Council. The Council’s composition of the parade, which included its particular speech selection judgments, can qualify as a speech act with

60. Hurley, 515 U.S. at 572.
61. Id. at 568 (emphasis added).
great, indeed primary, illocutionary force. Because the Council’s announcement of GLIB’s disqualification performs the very act that it states and immediately effects the exclusion of GLIB, the Council’s judgment carries great weight, backed by the force of the juridical state.\textsuperscript{62} The Council’s speech act can therefore be privileged above GLIB’s alleged speech interest.

3. The Court’s Reasoning

The Supreme Court viewed the parade as a form of robust expression, not conduct. It characterized parades in general as “public drama[s] of social relations” that make a “\textit{collective point}.”\textsuperscript{63} It held that parades constitute “a form of expression, \textit{not just motion}.”\textsuperscript{64} Characterized this way, the parade itself constitutes speech. The parade itself thus becomes the focus of the Court’s analysis, rather than the Council’s speech selection judgment (which Austin’s theory would have directed the Court to examine).

After deciding that a parade makes a general collective point—rather than a bundle of specific, identifiable messages\textsuperscript{65}—the Court also found an “inherent expressiveness [in] marching” that is symbolic.\textsuperscript{66} Yet, by participating in \textit{the Council’s} parade, the Court argued that GLIB necessarily “seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.”\textsuperscript{67} Inferentially, the Court did not view GLIB’s participation as an act of speaking \textit{through} the parade, even though the Court concedes that GLIB was, in fact, “communicating its ideas.”\textsuperscript{68} On this basis, the Court decided that the Council was necessarily “the” speaker, rather than GLIB or any of the other parade contingents.

But the conclusion that the Council is the speaker, by default, does not follow. If the Court is right that marching is not mere

\begin{itemize}
\item[\textsuperscript{62}]. That is, the Council is the sole holder of the parade permit granted by the city of Boston. It has sole discretion over the selection of parade participants. The Council’s decision is final. \textit{Id. at} 560-61.
\item[\textsuperscript{63}]. \textit{Id.} at 568 (emphasis added).
\item[\textsuperscript{64}]. \textit{Id.} (emphasis added).
\item[\textsuperscript{65}]. This presents an interesting contrast to (or inconsistency with) the Court’s decision in \textit{Austin v. Michigan State Chamber of Commerce}, 494 U.S. 652 (1990), where the Chamber of Commerce’s endorsement of a candidate could be seen to make a collective point, but the “point” made did not count as speech of the members, because all of the members of the Chamber did not endorse it. Similarly, how can a parade make a collective point, and thus count as speech, if, as seems inevitable, all of the marchers participating in it do not endorse the point?
\item[\textsuperscript{66}]. \textit{Hurley}, 515 U.S. at 569.
\item[\textsuperscript{67}]. \textit{Id.} at 570.
\item[\textsuperscript{68}]. \textit{Id.}.
\end{itemize}
motion – that it is inherently expressive\(^{69}\) – then each individual \textit{marcher} (including the excluded GLIB members) deserves First Amendment protection, for the messages of each and all of them are distinct but are still expressive communication. They are part of the collective point made by the parade. In this sense the “point” is not prescribed in advance, with the marchers all subscribing to it, but instead arises from the parade itself as a collective practice that has gained cultural and political significance as a form of communication across various historical moments.

While this insight about parades may be right, the Court’s initial premise would seem to concede the argument that the Council’s selection judgments do not uniquely cause a collective point to be made. Indeed, even absent a permit-granting process – for example, if the parade were run by the city and everyone could participate – a collective, multifarious message could still be extrapolated from the combination of the multiple paraders’ voices. If act and speech are not inextricably intertwined in the Council’s (de)selection act, then the Council’s speech selection judgment has little communicative force; its process of denying permits looks more like pure conduct than speech, and should not receive First Amendment protection.

If the Court did in fact believe that act and speech were inextricably intertwined in the Council’s (de)selection act, no evidence of this fact exists in the opinion. Nothing mentioned by the Court would provide support for the conclusion that the Council’s speech act (i.e., the selection process) qualifies as an explicitly performative statement to trump the historically sedimented meaning that inheres in most forms of marching as a kind of expressive conduct. If a parade’s message is social, dramatic, and thematic, arising from an entrenched historical appreciation for the cultural significance of marching, it seems unlikely that the Council’s intended message – be it vague or specific – could consist of anything more than its own mental construct, bearing no real significance to the parade. This is particularly true given the fact that GLIB participated in the parade the previous year.\(^{70}\) Furthermore, it makes little sense that the Council should get credit as the preeminent speaker just because it takes individual paraders’ messages and allegedly transforms them, by virtue of granting or denying a permit, into some later constructed collective point.

Ultimately, the Court’s decision resonates with Austin’s notion

\(^{69}\) \textit{Id.} at 568.

\(^{70}\) \textit{Id.} at 561.
of the performative at times, but the Court fails consistently to deploy this conception of speech. The Court's decision positioned the Council as the preeminent message organizer not by virtue of the illocutionary force inherent in speech selection judgments, but rather, by default. The Court impliedly held that the marchers' specific messages were constitutive of the Council's message, and thus subordinate to it. The Council thus received ownership over all the marchers' speech.

B. E.D. Hirsch's Theory of Authorial Intent

1. Explanation of Hirsch's Theory

    E.D. Hirsch established authorial intent as the prevailing normative guideline for evaluating the interpretation of (literary) texts.\textsuperscript{71} He defined authorial intent as the author or speaker's intended message\textsuperscript{72} – an orientation which assumes an identifiable message and a singularly or arguably “best” interpretation of a text. Hirsch chose this rubric because one must be able to stabilize meaning and then judge it according to systematically reliable principles.\textsuperscript{73} Through doing this, one enables the possibility of assessment. Using the notion of intent as one's measuring stick, Hirsch predicted that authorial intent would typically bring readers, interpreters, or other assessors to the most correct understanding of a text, if not to a perfect understanding.\textsuperscript{74} Put differently, Hirsch's theory grounded the possibility of determinate meaning in a human's preexisting determinate will to share a message. While the scope or specificity of the intended message remains unclear, for Hirsch, no principle better stabilizes meaning than intent.\textsuperscript{75}

    In a very similar fashion, First Amendment law also relies on the notion of intent for the purposes of making legal determinations of authorship and meaning. Traditional free speech jurisprudence assumes that meaning can be stabilized and determinate, that speakers either intend or do not intend certain meanings, and that the constitutionality of a given message should be assessed using that intent. For instance, in \textit{Cohen v. California},\textsuperscript{76} the Court entertained a

\textsuperscript{71} Eric Donald Hirsch, Jr., \textit{Validity in Interpretation}, 5-6 (1967).
\textsuperscript{72} Id. at 17.
\textsuperscript{73} Id. at 207.
\textsuperscript{74} Id. at 17.
\textsuperscript{75} As such, Hirsch's theory of authorial intent is framed as a “defense of the author.” Id. at 1.
\textsuperscript{76} 403 U.S. 15 (1971).
lengthy inquiry into Cohen’s intention or reason for wearing a jacket bearing the words “Fuck the Draft.” Under the first prong of the *Spence v. Washington* test, the Court asked whether a speaker intended to convey a particular message. In her concurring opinion in *Lynch v. Donnelly*, Justice O’Connor penned the “endorsement” test and asked, *inter alia*, whether the speaker (the government in that case) intended to convey a message of endorsement or disapproval of religion.

These cases discussing the legal doctrine of intent illustrate the fact that an intention-based theory presumes a single, identifiable speaker, an assumption not readily applicable to a case such as *Hurley*, which involves potentially multiple and competing speakers. But intent might serve as a means of identifying the primary speaker; that is, the party whose expressive act can be given stable meaning and priority.

2. *Hirsch’s Theory Applied to Hurley – Alternative Resolutions of the Case*

Under Hirsch’s theory, the threshold question in *Hurley* must be whether any of the contending parties/speakers intended to speak an identifiable message. There are two primary ways of conceptualizing this question. The first would be to view the Council as the only entity with the intent to speak an identifiable message. But there is no reason to adopt such a limited view, especially given the difficulty in attaching a specific intent and message to the Council’s selection acts. Additionally this is difficult given the fact that other parties, including GLIB, clearly asserted an intent to express a message.

Thus, a second approach would be to view the Council, GLIB, and other parade participants as individuals or entities who can claim an intent to speak an identifiable message. This alternative view involves dueling intents that require their resolution. GLIB arguably intended to celebrate its members’ identity as openly gay, lesbian, bisexual descendents of Irish immigrants and to include its members as part of the larger group whose diverse history, traditions, and

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79. See supra Part I (discussing the multiple speakers and forms of speech in *Hurley*).
80. Actually, for Hirsch, there are always two burning questions. First, what did the speaker/author intend to say or accomplish? Second, did the speaker/author effective in achieving that objective? Id. at 12. The second question suggests that Hirsch’s theory might disqualify a speaker from First Amendment protection if it failed to accomplish its stated purpose. Of course, Hirsch does not speak to the First Amendment specifically, so we cannot be sure.
beliefs were being re-presented by the participants in the parade.\textsuperscript{81} GLIB distributed a fact sheet explaining its members’ intention to celebrate this exact message.\textsuperscript{82} In contrast, the Council publicized no express or identifiable message — certainly no message that GLIB wittingly consented to as a condition of its participation.

Characterized this way, and assessed under Hirsch’s rubric of authorial intent, it appears that only GLIB intended to communicate a message, and therefore, technically, GLIB is the only entity eligible for speakership under this characterization. GLIB publicized its intent to articulate a meaningful and identifiable message; GLIB marchers would (presumably) physically speak or display messages while marching. The Council itself did neither.

The Council did, of course, organize the parade and select the participants. But an intent to do these things would not satisfy Hirsch’s conception of intent nor qualify the Council as a speaker whose claim could subordinate that of GLIB. To trump GLIB’s interests, the Council must, at the very least, intend to express some message or express its own disagreement with one (like GLIB’s). The fact that a parade is inherently expressive cannot, without more, bootstrap the Council into the category of “speaker” under Hirsch’s theory. Without more by way of intent and message, the parade is an event, not speech, and the Council is an actor, not a speaker.\textsuperscript{83}

3. The Court’s Reasoning

Ultimately, the Hurley Court conferred speakership upon the Council because (a) the Council was a private organizer; (b) a speaker is not required to generate, as an original matter, each item featured in the communication (i.e., republishers may be entitled to First Amendment protection when they only select speech originally produced by others); (c) the selection of contingents to make a parade is an act of authorship intended to create a collective message; and (d) GLIB’s application for participation in this particular parade disqualifies it as a speaker. That is, GLIB intended to “communicate its ideas as part of the existing parade, rather than [stage] one of its

\textsuperscript{81} 515 U.S. at 570.

\textsuperscript{82} Id.

\textsuperscript{83} Cable operators and newspapers, which the Court discussed, could still conceivably be “speakers” entitled to First Amendment protection under this theory, since the cable operators and papers have an intent to select, edit, and circulate certain messages or texts as their own expression. See Randall Bezanson, The Developing Law of Editorial Judgment, 78 Nebr. L. Rev. 754 (1999).
GLIB was therefore treated as constructively disclaiming any intent to speak its own message by virtue of applying as a participant in the Council’s parade. This left no competing speech claimant for the Council and thus meant that the Council’s relatively ambiguous speech intention prevailed by default.

While the Court offers justifications to explain why it privileges the Council as the speaker, it does not do this by relying on the traditional doctrine of speaker intent. Instead, the Court begins from the premise that parades and marching constitute speech and implicitly addresses the question of intent:

To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech. Nor . . . does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. [Similar to a cable operator or newspaper editor,] the selection of contingents to make a parade is entitled to First Amendment protection.

In answering GLIB’s argument that speakers only receive First Amendment protection when their messages contain identifiable messages, the Court elides the question of intent and simply reasserts that speech selection judgments have been protected under First Amendment precedent. However, it does not explain why this is so. The only warrant the Court provides for its decision to grant the Council speaker status is the Court’s analogy among cable operators, newspapers, and parade organizers. But later in the opinion, the Court spends a great deal of time explaining that the Council, in fact, is much different than a cable operator:

Respondents contend . . . that the admission of GLIB to the parade would not threaten the core principle of speaker autonomy because

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84. *Hurley*, 515 U.S. at 570 (emphasis added).
85. *Id.* at 570-71.
86. *Id.* at 570.
87. See the Court’s statement at a later point in the opinion that “[a] newspaper, similarly, ‘is more than a passive receptacle or conduit for the news, comment and advertising,’ and we have held that ‘the choice of material . . . and the decisions made as to limitations on size and content . . . and treatment of public issues . . . constitute the exercise of editorial control and judgment.’” *Id.* at 575. While the analogy is more drawn out here, the Court still fails to explain why the characteristics of the paradigmatic newspaper editor apply equally to that of a parade organizer.
the Council, like a cable operator, is merely “a conduit” for the speech of participants in the parade “rather than itself a speaker.” But this metaphor is not apt here, because GLIB’s participation would likely be perceived as having resulted from the Council’s customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well.\(^{88}\)

It is difficult to pin down any warrant, much less an explicit one, as to why the Council’s speech selection judgments are protected. While the Court elides the question of the Council’s intent, the Court explicitly discusses GLIB’s intent and construes those statements against GLIB’s interests. First, the Court concedes that GLIB’s participation in the parade was “equally expressive” to the Council:

GLIB was formed for the very purpose of marching in [the parade] . . . in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade . . . . The organization distributed a fact sheet describing the members’ intentions, and the record otherwise corroborates the expressive nature of GLIB’s participation.\(^{89}\)

Yet somehow, GLIB’s statements function as evidence of an intent to contribute to a collective point at the expense of GLIB’s intended, individualized point – almost like a waiver of First Amendment speaker status. The Council is thus allowed to prevail as the speaker by default.

Finally, the Court argues that Hurley is about autonomy, more than anything else. Again skirting around the question of why the Council deserves speaker status, the Court likens the Council to a composer:

Petitioners’ claim to the benefit of this principle of autonomy to control one’s own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from the potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day. . . . The Council clearly decided to invoke its right as a private speaker to shape its expression by

\(^{88}\) Id. at 575.  
\(^{89}\) Id. at 570.
speaking on one subject while remaining silent on another. . . . [I]t boils down to the choice of a speaker not to propound a particular point of view.  

While it may be clear enough that the Council is a private entity, the metaphorical alignment between a composer and the Council fails to articulate a coherent reason as to why the Council’s speech selection judgment cancels out other potential speakers and forms of speech. At best, the composer metaphor imports an uncritical assumption into the Hurley equation: that the Council necessarily must have had an intent to speak because a composer always has an intent to compose music.

In short, the Court equates the Council’s selection judgments with an intent to speak that liberates the requirement of a specific, intended message or even an express agreement or endorsement by the Council and so implies that intention inherently resides in parades (not speakers). It then uses the traditional element of intent to disqualify GLIB as a speaker. The opinion offers no doctrinal reason grounded in intent that explains why, for the purposes of the First Amendment, the Council deserves credit as a speaker.

C. John Peters’ Theory of Communication as Dissemination

1. Explanation of Peters’ Theory

John Peters discusses a model of communication that views communicative activity through the metaphor of a one-way broadcast to which there exists a general access. This communication-as-dissemination model is indifferent to its receivers, which is not to say that receivers are of no relevance. It means that all receivers are

90. Id. at 574.
92. Id. at 51. Some mention of Peters’ larger objective is in order here. Peters’ ultimate project is one of “staging a debate between the greatest proponent of dialogue, Socrates, and the most enduring voice for dissemination, Jesus.” Id. at 34-35. The effect of this contrast is to forestall many of the contemporary controversies around and over “communication,” most of which, Peters argues, characterize good communication as dialog. Peters’ historical sketch documents how dialog earns the status of “cure all” for a variety of modern longings (including physical distance, emotional distance, cultural and other differences, etc.). Id. at 1-31. Peters seeks to trouble this “cure all” conception of communication and the hyper-emphasis on dialog. He moves “beyond the often uncritical
equally desirable, and the model relinquishes any investment in (or control over) the meanings that highly diverse audiences may assign to the message. 93 The theory never maintains that audiences uniformly receive messages. Whereas Austin’s model locates the creation of meaning within the text itself (as interpreted within a certain context) and Hirsch calibrates the evaluation of meaning with the construct of authorial intent, the Peters model locates meaning-making primarily within audiences themselves. 94 The conditions of possibility in which the relevant audience(s) circulate determine the degrees of intelligibility and, thus the significance or insignificance of a message. In fact, the model does not presume that any given message will, in fact, get taken up by those on whom it falls. 95 Ultimately, the dissemination model values the sheer expenditure of the seeds of communication because that activity distributes, or plants, the roots for engagement in democratic practices. 96

celebration of dialogue to inquire more closely into what kinds of communicative forms are most apt for a democratic polity and ethical life.” Id. at 35. Peters’ uses the “parables attributed to ‘Jesus’ by the synoptic Gospels” not because he wants to focus on historical Jesus “but rather the afterlife of these figures in specific texts written by their canonical disciples.” Id. at 35. In particular, Peters highlights the parable of the sower, which features, “a rhetoric of sowing and harvesting . . . this rhetoric often celebrates dissemination as desirable and just. The parable of the sower—the archparable of dissemination—presents a mode of distribution that is as democratically indifferent to who may receive the precious seeds.” Peters, supra n. 91, at 51.

93. Id. at 51-52.

The parable of the sower . . . enacts its point in the form of its saying, performing its own modus operandi. The diverse audience members, like the varieties of soils, who hear the parable as told by the seashore are left to make of it what they will. It is a parable about the diversity of audience interpretations in settings that lack direct interaction. . . . [T]he sower celebrates broadcasting as an equitable mode of communication that leaves the harvest of meaning to the will and capacity of the recipient. . . . [¶] The meaning of the parable is quite literally the audience’s problem.

94. Id. at 52 (stating that, in the parable of the sower, “the audience bears the interpretive burden” and that “[i]t becomes the hearer’s responsibility to close the loop without the aid of the speaker”).

95. Id.

96. Id. at 53-62. Peters contends that the dissemination model balances out the hyper-emphasis on dialog because it forms the basis for more democratic and ethical life. In explaining the democratizing effect of dissemination, Peters states:

Plato’s version of Socrates privileges a private and esoteric mode of communication [i.e., dialectic or dialog]. In the intimate setting of dialectic the receiver is carefully selected by the speaker in advance and carefully brought to understand. . . . [O]nly an elite few were admitted . . . Jesus, in contrast, performs a radically public, exoteric mode of dispersing meanings – even though the
The Supreme Court has acknowledged the importance of disseminating information broadly and seems to comprehend the notion of broadcasting as sheer expenditure. This is particularly evident in its decisions relating to commercial speech and to indecency bans on communications media. For example, in *FCC v. Pacifica Foundation,* the Court noted the sheer pervasiveness of radio broadcasts. Additionally, the Court clearly rejects total indecency bans in the medium of radio broadcasting, by suggesting that it values dissemination and realizing that the radio operates as a more pure technology of dissemination rather than as a platform for reciprocal communicative exchange, such as the telephone. Likewise, under today’s commercial speech doctrine, purely commercial speech receives First Amendment protection because the public wants and needs a free flow of truthful information. The rationale in these cases is simply that the information ought be made available, not as an exercise of the advertiser’s freedom, but in order that its audiences have the opportunity to make what they will of it.


Whether the medium is newspaper advertisements, radio broadcasts, or price tags, the Court and Peters agree that dissemination of information is a crucial prerequisite to fertile democracy. If we apply Peters’ theory to *Hurley,* however, it becomes evident that the value of dissemination itself was not determinative of the Court’s decision.

Under the communication-as-dissemination model, the parade arguably constitutes a technology of dissemination because listeners or receivers enjoy a general access to the unidirectional message(s) aired. Viewers of the parade need only stand on the sidelines, or

hearers often fail to catch the hint – in which the audience sorts out the significance for itself . . . The synoptic Gospels repeatedly undercut reciprocal and hermetic relations in favor of relations that are asymmetrical and public.

*Id.*, *supra* n. 91, at 53.


101. Of course, Peters’ conception of what constitutes “democracy” is much more radical than that entertained by the U.S. Supreme Court. *See supra* n. 96 at 53-62.
perhaps watch the parade on television. Parades are a medium whose historically politicized form and typically public appearance tend to advertise the views expressed. The disseminator’s purpose or intention is not the message’s source of meaning; neither of these need to be pinned down for speech or a speaker to qualify as a technology of dissemination. That being said, however, two potential speakers exist in Hurley: the individual marchers or entities participating in the parade, and the composer of the parade (i.e., the Council).

If the parade itself qualifies as First Amendment speech under Peters’ theory, it seems likely that the individual marchers or entities participating in the parade ought be protected as speakers, if only on the consequentialist ground that one cannot have a parade without paraders. In that sense, the human body functions as a technology of dissemination, and ought be protected vigorously even though it presents the case of an “organic” technology. An intended message is not needed to qualify the marchers as a technology of dissemination, since perhaps only the foreknowledge that their acts will be perceived as communicating some kind of message will be sufficient.

The Council’s speech selection behavior might also qualify as First Amendment speaking, at least to the extent that the behavior is intended to function as a technology of dissemination of the other marchers’ speech. Under the dissemination model, speech selection decisions in general might rise to the level of protected speech – even though selection necessarily involves the exclusion of some speech – since those decisions are a necessary precondition given spatial constraints or the constraints of a competitive marketplace. This presents yet another consequentialist rationale that fits neatly with Peters’ dissemination model.

However, if the Council’s attempts to exclude parties such as GLIB can be viewed as exclusionary or akin to soft censorship, then its behavior qualifies as something less than sheer dissemination and perhaps qualifies as antidemocratic for Peters. More basically, if the Council’s exclusion is alleged to result from the Council’s intent to disavow a specific message, then the Council’s action may no longer qualify as dissemination under Peters’ view. The Council as censor – a shaper of its specific message at the cost of other’s messages – may have no privileged place in a world that regards dissemination so highly.

If both the Council’s speech selection judgments and the parade marchers arguably fall within the umbrella of the First Amendment, a theoretical orientation, such as Peters’ model, that values
technologies of dissemination as building blocks of a more democratic culture might ask whether one of the two parties with potential speech interests is most analogous to a pure technology of dissemination or which communicative practice seems most integral to radically public, democratic participation. The paraders’ speech claims arguably fall closer to a pure technology of dissemination, primarily because Peters’ theory privileges the receiver and the distinctness of human beings in the intractable process of meaning creation.\(^{102}\) Peters’ theoretical apparatus favors exoteric, not elitist, modes of communication.\(^{103}\)

3. *The Court’s Reasoning*

The Supreme Court argued in *Hurley* that parades, unlike cable lines, operate as more than “conduits” for the dissemination of information, which suggests that the Court views the parade as more than a mere technology of dissemination.\(^{104}\) Rather than derive the First Amendment privilege of a parade purely from its capacity to function as a technology of dissemination, the Court articulated two different grounds for protecting the parade as expression. First, unlike a cable transmission, which involves no substantive message contributed by the cable operator’s channel carriage decisions, a parade constitutes speech because it makes a “point,” or communicates a new message tailored by the Council’s selection choices.\(^{105}\) Second, the Court emphasized that the parade deserved protection (unlike cable operators dealt with in *Turner Broadcasting*

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102. Peters, *supra* n. 91, at 269-71

103. See *supra* n. 96, at 53-62.


105. *Id.* (likening the Council’s decision to editorial license).
v. FCC because it did not threaten the very survival of certain speakers' messages. GLIB, after all, could hold its own parade.

The Court's attempt to distinguish the Council from cable operators and newspapers makes little sense considering its reliance on an analogy among the three earlier in the opinion, where it reasoned that the Council exercised editorial judgment similar to that of a cable operator or a newspaper editor. In order to argue that the parade constitutes speech, the Court has to say that the Council is totally different from the cable operator or newspaper editor. Yet, in order to argue that the Council's speech selection judgment constitutes protected speech, the Court has to say that the Council is highly similar to the cable operator or newspaper editor. As such, the Court refuses to characterize the parade as a technology of dissemination, yet likens the parade to those figures (newspaper editors or cable operators) who receive First Amendment protection due, in large part, to their position as critical disseminators of communication.

D. James Carey's Theory of Communication as Culture

1. Explanation of Carey's Theory

The key feature of James Carey's communication theory is its cultural perspective. Carey contends that, historically, Americans conceived of communication “in the idea of transmission: communication is a process whereby messages are transmitted and distributed in space for the control of distance and people.” But in Carey's view, to reduce communication to a mode of transmission is to unduly and artificially narrow the realm of activity that can be said to have communicative significance, and to deceive oneself into believing that humans only communicate for the purpose of sharing information or getting things done. That is to say, the transmission

107. Hurley, 515 U.S. at 577-78. In Hurley, the Court found that no speakers would be prevented from speaking if the Court struck down the application of the public accommodation statute, because the Council did not have the power to silence GLIB the way cable operators could silence their competing speakers in the cable provider marketplace. Ultimately, while the “size and success of [the Council’s] parade makes it an enviable vehicle for the dissemination of GLIB’s views . . . that fact . . . would fall short of supporting a claim that [the Council] enj oy[s] an abiding monopoly of access to spectators.” Id.
108. Id. at 570.
model treats communication like an instrument – a tool for getting things done – when in fact communicative activity holds much greater utility and value than the pundits will admit.

Carey introduces his larger theoretical project against this historical backdrop, and claims instead that “media of communication are not merely instruments of will and purpose but definite forms of life: organisms, so to say, that reproduce in miniature the contradictions in our thought, action, and social relations,” including those contradictions housed within the symbol of the First Amendment itself. In defining communication as “culture,” Carey widens the very definition of what qualifies as communication beyond notions of intent or purpose. Instead, he contends that “communication is a symbolic process whereby reality is produced, maintained, repaired, and transformed.”

Thus, Carey’s model, unlike Hirsch’s model, accepts the premise that meaning is socially constructed. Though humans trade in the currency of words,

words are not the names for things but, . . . things are the signs of words. Reality is not given, not humanly existent, independent of language and toward which language stands as a pale refraction. Rather, reality is brought into existence, is produced, by communication—by, in short, the construction, apprehension, and utilization of symbolic forms. Reality, while not a mere function of symbolic forms, is produced by terministic systems – or by humans who produce such systems – that focus its existence in specific terms.

In other words, humans can identify semi-stabilized meaning – shared meaning – through ritualized communication practices, but stabilized meanings and their structures of reference gain force through human, ritualistic repetition, and they act back on us with the

110. Id. at 9.
111. Id. at 6. Carey ties the relevance of his retheorized sense of communication to the First Amendment:

But the point is this: from the outset a key discourse of American life has entertained different and contradictory notions of the practice of communication – one that derives from modern advances in the printing press and transportation and one that is situated within the ancient theory and practice of the voice. The contradiction is symbolized, though hardly resolved, by the uneasy juxtaposition of assembly, speech, and press in the First Amendment.

Id.

112. Id. at 23.
113. Id. at 25.
power of “truth” in a manner that is always culturally and historically informed.114

Carey’s shift from a transmission model to a cultural one entails several implications. First, because humans live in a symbolically mediated and constructed reality, communication is valuable for different reasons than might be assumed under, say, Peters’ dissemination model. Communication becomes “the primary phenomena of experience,” and warrants more (and different) attention than it received historically. It includes not only “relations of property, production, and trade – an economic order,”115 but more importantly, “the sharing of aesthetic experience, religious ideas, personal values and sentiments, and intellectual notions – a ritual order.”116

Second, Carey’s shift means that thought is predominantly public and social. It occurs primarily on blackboards, in dances, and in recited poems. The capacity of private thought is a derived and secondary talent, one that appears biographically later in the person and historically later in the species. Thought is public because it depends on a publicly available stock of symbols.117

Thus, Carey’s shift challenges the notion, and the very possibility, of a “private” speaker.

Third, because thought is a priori derived from a publicly shared stock of symbols, “problems of communication are linked to problems of community.”118 Because our habits of communication entail a participatory process necessarily derived from the republic, communicative practices are both sources of and resources for

114. *Id.* at 31: “[T]here is no such thing as communication to be revealed in nature through some objective method free from the corruption of culture.”
115. *Id.* at 34.
116. *Id.* Carey explains:

[A] ritual view conceives communication as a process through which a shared culture is created, modified, and transformed. The archetypal case of communication is ritual and mythology . . . art and literature . . . A ritual view of communication is directed not toward the extension of messages in space but the maintenance of society in time . . .; not the act of imparting information or influence but the creation, representation, and celebration of shared even if illusory beliefs.

*Id.*

117. *Id.* at 28.
118. *Id.* at 33.
maintaining and changing the democratic order.

In short, a cultural, ritualistic theory of communication values expressive activity for the kind of comment it makes about the relationships between culture and society, or between expressive forms.\textsuperscript{119} It values the ways in which “experience is worked into understanding and then disseminated and celebrated.”\textsuperscript{120}

The Supreme Court understands the premise that communicative practices are central to the existence of a democratic polity, in part because linguistic connectivity is a basic element of the tissue of civility and a precursor to democratic enfranchisement.\textsuperscript{121} Precisely because of this realization, the Court in \textit{NAACP v. Button}\textsuperscript{122} held that membership in the NAACP (plus its affiliates and staff) constituted a “mode[] of expression and association” protected by the First Amendment.\textsuperscript{123} Participation in the organization articulated an effective political statement (especially given the historical context of 1963) and constituted a legitimate form of political expression.\textsuperscript{124}

Awareness of linkages between communicative practices and democratic culture may also lend credence to the notion of “low value” speech articulated most recently by Justice Stevens.\textsuperscript{125} In \textit{Young v. American Mini Theatres}\textsuperscript{126} and \textit{Renton v. Playtime Theatres},\textsuperscript{127} sexually explicit, non-obscene speech was thought to have less social value than political speech because sexually explicit non-obscene speech failed to occupy a “core” position in relationship to democracy. Cases from \textit{Valentine v. Chrestensen}\textsuperscript{128} to \textit{Central Hudson Gas v. Public Service Commission}\textsuperscript{129} also demonstrate a belief, at least by a majority of the Court, that commercial speech is less valuable to a democratic ideal than, for example, traditionally conceived political speech.

\begin{itemize}
\item 119. \textit{See id. at 43.}
\item 120. \textit{Id. at 44.}
\item 122. 371 U.S. 415 (1963).
\item 123. \textit{Id. at 448.} Justice Harlan dissented, arguing that the activities of the NAACP are more akin to conduct than speech, and should not be protected.
\item 124. An illustration of this is \textit{Boy Scouts of America v. Dale}, 530 U.S. 640 (2000); Bezanson, \textit{Artifactual Speech, supra } 39.
\item 126. 427 U.S. 50 (1976).
\item 127. 475 U.S. 41 (1986).
\item 128. 316 U.S. 52 (1942).
\item 129. 447 U.S. 557 (1980).
\end{itemize}
2. Carey’s Theory Applied to Hurley – Alternative Resolutions of the Case

Carey’s theory opens up two distinct understandings in Hurley. The first is that, if the paraders as a whole effect a collective expression that captures, in miniature, the Council’s idyllic ritual order, then the parade ought to function as a political comment on the Council’s beliefs about the status of social relations. The Council, as “conductor,” is an entity that holds certain ideas; the parade is the dramatic embodiment of the idealized ritual order that the Council imagines. Ostensibly, the Council’s ideal world would exclude GLIB, or the Ku Klux Klan, as outside the boundaries of a virtuous civic life. Irrespective of the fact that many people today would find this message reprehensible, the Council possesses the permit for the entire parade, which is one historically common procedure for entering into, and participating in, the (re)construction of social structures. Since, for Carey, symbolic enactment is something in which all humans engage, his model of communication might dictate that civic participation in the form of parading or marching is inherently ritualistic, symbolic, and therefore inherently human. For these reasons, it ought not be encroached upon by the government. Hence, forcing a privately organized parade to grant a permit to objectionable messages would usurp a basic right. This is, of course, what the Court ultimately decided.

While this view explains why the parade itself ought be protected as First Amendment speech, it provides little ground for characterizing the parade as the Council’s speech. Because the origin of communication takes on a radically “public” character in Carey’s theory (and Carey does not explain whether one can ever “own” words), it is difficult for the Council to find much basis for asserting preeminent speaker status. The Council may hold a permit to conduct the parade, but that does not provide us with a First Amendment based rationale as to why the Council should be granted dominion over other communicators. Carey’s broad definition of communication would likely encompass the Council’s speech selection judgments as inherently expressive, but it would undoubtedly extend the same to the parade itself and to the individual marching units. Furthermore, Carey’s cultural theory of communication does not indicate whether the First Amendment ought distinguish between an affirmative message and those that are mere negations (i.e., assertions of the right not to speak), so it does not explicitly help us prioritize the speakers.

But another possible view exists. If one had to use Carey’s model as the basis for preferencing either the Council or GLIB’s
speech rights, the chips would arguably fall in favor of GLIB. First, a
cultural theory of communication would concede that people create
multiple realities, not just one reality. It relinquishes any need to
resolve contradictions resulting from multiple worldviews, and would
point to the First Amendment as the iconic symbol of the social
contradictions that riddle American culture. The richness, for
Carey, lies precisely in the dramatically different ways in which
groups of people pattern their existences. Needs and motives
encountered in various cultural groups are not “anything more than
one cultural version among many and not some final court against
which to judge the veridicalness of other modes of experience.” On
that register, the Council’s dictatorial behavior toward GLIB, in
contradistinction to its typically nonexistent selection procedure,
looks akin to “low value” speech, if anything. This would be a
radically different view of the role of speakers and speech than that
now entertained by the Court.

Carey’s theory would arguably preference GLIB for a second
reason: to the extent that the Council’s conception of itself as “the”
speaker is grounded in a transmission model – that is, it sought to
control the transmission of traditional religious and social values and
people’s ability to express sexual themes – Carey’s theory might
reject the Council’s post hoc rationalization as less important than the
individual marchers’ ability to engage in expression. Communication
is the name Carey extends to experiencing, disseminating, and
celebrating phenomena, not the name for the practice “of controlling
space and people.”

Third, under Carey’s view, meaning is socially constructed and
constitutive of reality. This premise has a couple of implications, each
of which favors GLIB. First, in order to make an educated guess
about the likelihood of misattribution, the Court would have to
consider the socio-political context in which the audiences viewed the
parade, and would have to engage in a cultural analysis to determine
whether GLIB’s participation in the annual parade would arguably
hold symbolic significance for the relevant community. This would

130. See Carey, supra n. 109, at 6.
131. Id. at 67.
132. The lower courts found that the “Council had no written criteria and employed
    no particular procedures for admission, voted on new applications in batches, had
    occasionally admitted groups who simply showed up at the parade without having
    submitted an application, and did not generally inquire into the specific messages or views
    of each applicant.” 515 U.S. at 562.
133. Id. at 562.
134. Carey, supra n. 109, at 17.
necessarily entail a study of popular reactions to, or anxieties expressed after, GLIB’s participation in the parade the previous year. The Court might need to consider cultural artifacts – such as newspaper stories, transcripts from town hall debates, or other cultural clues – and perform a rhetorical, cultural analysis to decipher whether GLIB’s participation really had the anticipated effects that the Council claimed it would (i.e., misattribution and dampening of the Council’s proffered traditional values). Given the current anti-homosexual majoritarian political sentiment in the U.S., it is at least likely that GLIB’s message would be viewed as illegitimate in the eyes of most bystanders. Then again, given the variety of audience reactions to any single message – particularly cultural dramas unaccompanied by explicit, preexisting statements of intent or purpose – such an analysis strikes one as an unlikely project that the Council can reliably prove. It is extraordinarily difficult to predict audience reaction in advance.

In short, Carey’s culture-oriented theory provides no basis for the Council to claim that GLIB’s participation will necessarily be attributed to the Council (as an endorsement): the Court (or, more likely, the Council) would have to articulate that argument by predicting how audiences might react to the symbolic spectacle; the de-selection itself would need to be characterized as a kind of political speech or association – a manifestation of the Council’s answer to existing problems in the wider community. But, what neither the government nor the Council can regulate under a cultural theory of communication, such as Carey’s, is audience response. Since the Council would not be able to prove misattribution, one of the pillars upon which it relies to claim speaker status would arguably be eroded.

Even if the Council proved some margin of misattribution, that would not be a reason to conclude that GLIB’s message overpowered the other, more traditional parade units, or a justification for holding that the Council, acting as a speaker, deserved preeminent speaker status. Carey’s radically “public” theory of communication suggests that communication is always public because it relies on a publicly shared stock of symbols. Private thought is a derived and secondary capability. This distinction inserts something of a gap between public performances, like parades, and the private thoughts that follow (e.g., a bystander’s impressions of GLIB’s participation), and it suggests that the relationships between the two are decidedly not governed by the Council’s intentions, but rather by the ritual order(s) prevalent in the observers’ minds. If Carey is right, then the state courts were
astutely correct when they declared the Council’s speech itself to be a “public” site, subject to the Massachusetts public accommodation law prohibiting discrimination against homosexuals.\(^{135}\) Of course, this is a radical departure from the traditional view of speakers under First Amendment jurisprudence, and it unravels many of our fundamental assumptions about the feasibility of owning speech.\(^{136}\)

3. *The Court’s Reasoning*

In *Hurley*, the Court implicitly recognized the ritualistic power of parading. It recounted in detail the historic nature and significance of the Saint Patrick’s Day parade in Boston. It characterized parades as public dramas of inherent symbolic and communicative worth. As an initial premise, then, the Court agreed with Carey’s notion that ritualistic human practices become imbued, over time, with great cultural significance that reveals social actors’ relationship to the broader American culture.

Ultimately, however, the Court dismissed the possibility that the Council’s decision to exclude GLIB could be reversed by the state.\(^{137}\) The basis for the Court’s decision was that the Council enjoyed no monopoly of access to spectators, as a cable operator does, and that GLIB can hold its own parade. Given the fact that no speakers would “be destroyed in the absence of” the Massachusetts public accommodation statue, the Court would not endorse an attempt to compel speech upon the Council.\(^{138}\)

\(^{135}\)*Hurley*, 515 U.S. at 572-73. After noting that the statute was well within the state’s power, the Court reasoned:

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state court’s application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.

\(^{136}\) A trademark, for example, could represent a situation where one “owns” speech.

\(^{137}\)*Hurley*, 515 U.S. at 566.

\(^{138}\) *Id.* at 578 (stating that GLIB’s arguments amount to “what the general rule of
Moreover, the Court ultimately held that the Council’s parade could not be declared “public.” Doing so would have shocking results, according to the Court:

Under this approach, any contingent of protected individuals with a message would have the right to participate in petitioners’ speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State’s power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of [its] own message.¹³⁹

Thus the Court departs from Carey’s theory, and instead justifies its decision by naming the Council the preeminent speaker. But its previous resonance with Carey’s cultural approach seems to undercut the notion that the Council earned preeminent speaker status.

III. Speaking Out of Thin Air

The First Amendment was born in the 1960s within a political imagery that presumed the existence of an individual human speaker, standing on a street corner soap box (i.e., in a public forum), speaking his or her mind to those who choose to listen.¹⁴⁰ The First Amendment has long been tethered to protecting that traditional conception of speech.

Today, perhaps five percent of the speech that courts adjudicate involves such traditional speech situations. Problems of technology, new media, corporate entities, the comparatively recent right not to speak, anonymous speech, and government speech complicate the picture radically. Speech selection judgments present one of the recent outgrowths of these shifts in communicative phenomena, and they present unique problems of multiple, competing speakers and multiple, competing artifacts of speech. The current Court has little, if any, precedent to call upon for adjudicating these new problems, for making order out of competing speech claims. The Court’s underlying theories of communication or speech are too potentially varied, not well understood, and never carried out fully.

_Hurley_ is a case in point. The Court’s theory of communication

¹³⁹ _Id._ at 573.
¹⁴⁰ Owen Fiss, _Free Speech and Social Structure_, 71 Iowa L. Rev. 1405 (1986). _See supra_ n. 111 (noting Carey’s argument that the practice of communication was historically situated within the ancient theory of the voice).
is ambiguous. The decision in *Hurley* does not fit nicely into any single view of communication. Indeed, the Court at various points seems to rely on all the versions of communication we have discussed. It agrees with Austin that certain kinds of speech, including parades and marching, have undeniable communicative force and are therefore inherently expressive speech acts. The Court also seems to argue, as Hirsch would, that intent or purpose is relevant to discerning GLIB’s message (although the Court ignores intent for the purposes of granting First Amendment speaker status to the Council). The opinion relies heavily on audience and audience construction of a message, as Peters’ dissemination model would, to determine the value of the disseminated expression at issue. Finally, the opinion also resonates with Carey’s idea that communication is cultural and ritualistic. But all four theories cannot coexist – at least not coherently.

More importantly, some versions of the Court’s communication theories are radically at odds with the traditional assumptions of the First Amendment: that speaking is an intentional act; that messages are a function of a speaker, message, and intent; and that speech is a liberty of the speaker, not the audience. *Hurley*’s result resonates only momentarily with the assumptions about intention and stable meaning that underlie Hirsch’s conceptions; the same can be said for the notion of illocutionary force articulated by Austin. In fact, *Hurley* is perhaps most easily squared with Peters’ view of communication as

141. *Hurley*, 515 U.S. at 568-69 (stating that “parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marchers”).

142. *Id.* at 570 (stating that GLIB’s participation in the parade was “expressive”) and 569-70 (rejecting the state courts’ conclusion that the Council evinced no specific expressive purpose and arguing, instead, that “a narrow, succinctly articulable message is not a condition of constitutional protection”; neither must a speaker “generate, as an original matter, each item featured in the communication”).

143. *Id.* at 568 (stating that “a parade’s dependence on watchers is so extreme that nowadays . . . ‘if a parade or demonstration receives no media coverage, it may as well not have happened’”), and at 575 (arguing that the Council is more than a mere conduit – a mere technology of dissemination – “because GLIB’s participation would likely be perceived as having resulted from the Council’s customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well”); see also *id.* at 576 (arguing that “when dissemination of a view contrary to one’s own is forced upon a speaker intimately connected [by way of audience perception] with the communication advanced, the speaker’s right to autonomy over the message is compromised”).

144. *Id.* at 569 (“Real ‘parades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration.”).
dissemination and with Carey’s view of communication as culture. The Court’s language is clearly most sympathetic with Carey’s cultural and constructed conception of communication.

While Hurley in this sense may be an attractive communication theory to some, it may serve poorly as a basis for law. Carey or Peters may be quite right about how communicative phenomena work, and quite content with the idea that meaning is a social phenomenon. But their models may be deeply flawed as a basis for First Amendment speech. For instance, the Hurley Court unanimously insisted that the Council could not possibly function as a mere conduit, which would make its acts mere conduct. Rather, the parade was an inherently expressive social drama with ritualistic, symbolic meaning. But the Court’s conclusion rested on an audience-based argument. This is a non-sequitur. More importantly, the Court’s reasoning subordinated the speech interests of the people arguably speaking and performing (the paraders) to those of the Council. Its reasoning, like Carey’s, thus threatens to cast off, for First Amendment purposes, much of the protection the law has traditionally granted to individual speakers. The Court effectively loses meaning “out of thin air,” tethering messages to arbitrary claims about audience perception rather than to the conventional elements of text and speaker intention.

The implications of viewing free speech as disseminated cultural metaphors and images are vast. Such a view would privilege as free speech the inadvertent as well as – indeed perhaps more than – the advertent. It would formally disconnect speakers from speech. It would also countenance an active role by government in judging and managing speech in light of its social and democratic value and benefits. Carey’s theory of communication as culture would convert a broad range of acts now deemed conduct into speech, and vice versa.

We leave the full critique of the Court’s approach to speech selection judgments to another time and article, but the prevalence and complexities of speech selection judgments can no longer be ignored. The complicated and new forms of speech growing out of modern conditions cannot be allowed to impart a collective amnesia about the hallmark speech situation that first animated the right of free speech. Though the realities of contemporary speech selection judgments complicate the idyllic picture of a single orator delivering a political speech, the rights of the intentional, speaking individual can

145. See infra nn. 44-47 (discussing the Court’s reliance on the construct of audience perception).
and should be afforded the greatest degree of privilege under the First Amendment.