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Freedom of Speech and Regulation of Sound Amplification Devices - Saia v. People of the State of New York

FREEDOM OF SPEECH AND REGULATION OF SOUND AMPLIFICATION DEVICES

Saia v. People of the State of New York[1]

A city ordinance prohibited the use of sound amplification devices "for advertising purposes or for attracting the attention of the passing public or . . . so placed and operated that the sounds coming therefrom can be heard to the annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises".

[1] 68 S. Ct. 1148 (1948).

It further provided that public dissemination through such devices of "news and matters of public concern and athletic activities" should be excepted, provided that permission was obtained from the Chief of Police. Defendant, a minister of the Jehovah Witnesses, had obtained a permit to use sound equipment mounted on his car to amplify lectures on religious topics given at a fixed place in a public park on designated Sundays. On the expiration of the permit, he applied for another one, but was refused on the ground of complaints having been made. He thereafter used his equipment without a permit to amplify religious speeches in the park, was tried and convicted of violating the ordinance. On appeal from a judgment of the New York Court of Appeals affirming the conviction,[2] the Supreme Court, with four justices dissenting, reversed, holding the ordinance void on its face as violating freedom of speech.

The brief majority opinion, by Justice Douglas, in which the Chief Justice and Justices Black, Murphy and Rutledge concurred, is based primarily on the absence of any standards limiting the exercise of discretion by the Chief of Police in granting or refusing permits; *Cantwell v. Connecticut*,[3] *Lovell v. Griffin*,[4] and *Hague v. C. I. O.*[5] are regarded as controlling. Loudspeakers are termed indispensable instruments of effective public speech and the sound truck an accepted method of political campaigning. The ordinance would cause a political candidate's ability to use such means of conveying his views to the public to depend on the uncontrolled discretion of the Chief of Police, and would be a dangerous weapon if allowed to get a hold on our public life. Abuses must be controlled by more narrowly drawn statutes; in the ordinance, as it stands, the power of censorship is inherent.

The dissenting opinion by Justice Frankfurter, in which Justices Reed and Burton concurred, argues that freedom of speech does not include a right to force unwilling people to listen, and that in such cases as the *Lovell* and *Hague* decisions, involving utterances by speech and pen, unwilling people were forced neither to listen nor to read. But modern sound amplifying devices afford easy opportunity for "aural aggression" and intrusion into privacy; control

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[2] People v. Saia, 297 N. Y. 659, 76 N. E. (2d) 323 (1947).
[3] 310 U. S. 296 (1940).
[4] 303 U. S. 444 (1938).
[5] 307 U. S. 496 (1939).

of such methods of communication of ideas is therefore justified. There was no showing here that such control had been arbitrarily or unfairly exercised. The case is governed by *Cox v. New Hampshire*[6] rather than by the authorities relied upon by the majority.

Justice Jackson filed a sharply worded separate dissenting opinion, saying that the decision endangered the right of free speech more than the ordinance, by "making it ridiculous and obnoxious", and that it was a "startling perversion" of the Constitution to say that it deprived the States and their subdivisions of the power to regulate or prohibit the "irresponsible introduction into public places" of such contrivances. "Can it be," he asks, "that society has no control of apparatus which, when put to unregulated proselyting, propaganda and commercial uses, can render life unbearable?" The case seemed to him in no way to involve freedom of speech, since the defendant's right freely to speak or to publicize his views without a prior permit was not taken from him by the ordinance, this dealing merely with one means of communication that could amount to a public nuisance if abused. To the extent that freedom of religion was involved, he stressed the curious inconsistency between this case and the three months old *McCollum* decision.[7]

The case brings out anew and in striking fashion the sharp division of opinion on the Court as to the scope of the right of freedom of speech and as to the extent to which it may be controlled by the States and their subdivisions. Though agreed that the freedoms protected by the First Amendment to the United States Constitution occupy a preferred position with reference to governmental control and regulation, and can be curtailed only where the "clear and present danger" test is met, the Court has with increasing frequency and acrimony disagreed in specific instances of attempted control. The conflicting views expressed here by Justices Douglas and Jackson parallel closely their positions in *Murdock v. Pennsylvania*,[8] where in language even more vigorous than that in his present dissent, Justice Jackson charged the Court with having added "new stories to the temples of constitutional law", and warned that "temples have a way of collapsing when one story too many is added", and, as here, viewed

[6] 312 U. S. 569 (1941).

[7] People of State of Illinois ex rel. McCollum v. Board of Education, 68 S. Ct. 461 (1948).

[8] 319 U. S. 136 (1943).

the result as discrediting and endangering rather than protecting freedom of speech and religion.

However, it may well be that the dissent here read more into the majority opinion than is actually there contained. The feature of the ordinance particularly stressed by the latter as vitiating it was the uncontrolled discretion vested in the Police Chief to grant or refuse permits. It is far from clear that a flat prohibition of the use of sound amplifying devices in public places would be regarded as void on its face; certainly the majority specifically countenance regulations of the hours or places in which such devices may be used and of the volume of sound to which they may be adjusted. This seems to be a long way from any holding that obstreperous individuals and minorities have a constitutional right to intrude upon the privacy of others, or to force their views upon those undesirous of hearing them.

The *Lovell* case[9] seems particularly apposite. Here an ordinance, prohibiting distribution of circulars or other printed matter without a permit from a city official, was termed by Chief Justice Hughes to be of a character such that it struck at the very foundation of freedom of speech and press by subjecting it to censorship and prior restraint upon publication. The distinction drawn in the dissent of Justice Frankfurter between normal expression by speech or pen and the use of sound amplifiers to disseminate one's views may be admitted; yet it seems to bear little relation to the problem here, which is one of possible censorship by arbitrary administrative action. If the ordinance, as the majority holds, enables an administrative official, at his pleasure and with no relation to anything except his own caprice, to grant a permit for the use of loudspeakers to one applicant and to refuse it to another, it contains precisely what the *Lovell* case condemned.

It should perhaps be noted that in cases not involving freedom of speech, press or religion, such permit requirements have not been viewed as conferring an arbitrary discretion in licensing officials, but one to be exercised fairly, in good faith, and with reference to the purposes of the licensing statute.[10] But such a construction (under which the statute would not be void on its face, though arbitrary exercise of the discretion conferred would be unconstitutional in specific cases) has been viewed as too readily facilitating the arbitrary suppression of free ex-

[9] Lovell v. Griffin, *supra*, n. 4.

[10] See, *e.g.*, People of the State of New York ex rel. Lieberman v. Van de Carr, 199 U. S. 552 (1905).

pression of views to be applicable in the case of rights so fundamental as those here involved.[11]

Justice Jackson seems somewhat to have raised up a straw man for the purpose of knocking it down. But if the majority opinion can be viewed as having the effect ascribed to it by him and as announcing a constitutional right to force views upon unwilling listeners through devices which the listeners cannot readily escape, his criticisms have force indeed. Unreasonable production of noise is enjoinable as a nuisance;[12] and, if it should interfere with the reasonable use and enjoyment of a public park by the public, would clearly constitute a public nuisance. There are few people unfortunate enough to live and work in a metropolitan area who have not been annoyed by the activities of sound trucks; the possibilities of the use of airplanes equipped with sound amplification devices are hideous to contemplate.

If the opinion of the majority is to be construed as meaning that the right of freedom of speech makes it unconstitutional either to regulate or prohibit such means of expression, then it would seem sound to say with Justice Jackson that the right has been made both ridiculous and obnoxious. It is not believed that the decision fairly construed holds any such implication.[13]

The inconsistency with the *McCollum* case,[14] mentioned by Justice Jackson, is troublesome and it is possibly significant that the majority decision ignores rather than distinguishes that case. It is difficult to see why he is not accurate in saying that there the Court held that the Constitution prohibits a State or its subdivisions from using tax-supported property to aid religious groups to spread

[11] Hague v. C. I. O., *supra*, n. 5. It should be noted, however, that in Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113 (1895), affirmed in 167 U. S. 43 (1897), Justice Holmes, the later originator of the "clear and present danger" test, in Schenck v. United States, 249 U. S. 47 (1919), found nothing violative of freedom of speech in an ordinance prohibiting speaking on any of the public grounds of a city without a permit from the Mayor, upon the exercise of whose discretion no limits were in terms imposed.

[12] Meadowbrook Swimming Club v. Albert, 173 Md. 641, 197 A. 146 (1938), noted in (1939) 3 Md. L. R. 240.

[13] *But see* Editorial (1948) 34 Am. Bar Assoc. J. 589, viewing as illusory the approval by the majority decision of statutes more "narrowly-drawn" than the ordinance involved in the instant case. It is further stated that within a few days after the decision, Left Wing groups in New York City, refusing to obtain permits, placed and operated sound trucks outside reading rooms of the New York Public Library and private clubs. It is asked: "what church, library, school, college, park, club, hospital or home will be immune?" Certainly, however, it should be possible within the confines of the present decision either to control or prohibit such activities.

[14] *Supra*, n. 7.

their faith and now holds that it compels them to allow such property to be used for exactly the same purpose. For even though the majority opinion be read as permitting properly drawn statutes regulating use of sound amplifying devices, it yet seems implicit in the opinion that the defendant had a constitutional right to use a public park for the expression of his religious views.[15] Perhaps the answer lies in the dubious validity of the *McCollum* decision.

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[15] And see Schneider v. U. S., 308 U. S. 147 (1939).