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Constitutional Law -- Freedom of Speech -- Use of Loudspeakers

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—USE OF LOUDSPEAKERS

Defendant was convicted for operating a sound truck in violation of a municipal ordinance,[1] and appealed alleging that the ordinance violated the Fourteenth Amendment to the Federal Constitution. The New Jersey Supreme Court, by a split decision, upheld the validity of the ordinance.[2] This decision was affirmed by an evenly divided Court of Errors and Appeals.[3] From this decision the defendant appealed to the United States Supreme Court. *Held*, conviction affirmed. The ordinance did not violate the Fourteenth Amendment, as it was not in contravention of the rights of freedom of speech, freedom of assemblage, or freedom to communicate information to others. *Kovacs v. Cooper*, 69 Sup. Ct. 448 (1949) (four Justices dissenting), *rehearing denied*, 69 Sup. Ct. 638 (1949).

The problem of amplified speech devolves into the basic conflict between the constitutional right of the individual to free expression of opinion and ideas and the right of privacy of the general public, which is protected by the state police power.[4] Civil rights are not absolute, and can be reasonably restricted.[5] However, the recent trend has been to place them in a favored position to insure against a breach in our democratic tradition.[6]

The right of a state reasonably to regulate noise through its police power is undisputed;[7] but completely to abridge a constitutional right in the guise of regulation is repugnant to our theory of civil liberties.[8]

The instant case can best be evaluated by considering it together with

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1. Ordinance No. 430, City of Trenton, New Jersey:
"4. That it shall be unlawful for any person, firm or corporation, either as principal, agent or employee, to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets, alleys or thoroughfares in the City of Trenton, any device known as a sound truck, loud speaker or sound amplifier, or radio or phonograph with a loud speaker or sound amplifier, or any other instrument known as a calliope or any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon said streets or public places aforementioned."

2. Kovacs v. Cooper, 135 N. J. L. 64, 50 A.2d 451 (1946).

3. Kovacs v. Cooper, 135 N. J. L. 584, 52 A.2d 806 (1947).

4. *E.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939); Nebbia v. New York, 291 U.S. 502 (1933); Chicago, B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561 (1906).

5. *E.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, *supra*; Cantwell v. Connecticut, 310 U.S. 296 (1940); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).

6. *E.g.*, Marsh v. Alabama, 326 U.S. 501 (1946); Prince v. Massachusetts, *supra*; Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, *supra*; American Federation of Labor v. Swing, 312 U.S. 321 (1941); Cantwell v. Connecticut, *supra*.

7. Hamilton v. City of Montrose, 109 Colo. 228, 124 P.2d 757 (1942) (city ordinance regulating sound devices upheld); Maupin v. City of Louisville, 284 Ky. 195, 144 S. W.2d 237 (1940); Brachey v. Maupin, 277 Ky. 467, 126 S. W.2d 881 (1939).

8. Cantwell v. Connecticut, *supra*; Hague v. C. I. O., 307 U.S. 496 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

the recent case of *Saia v. People of New York*.[9] In the *Saia* case a city ordinance required any person desiring to use a loud speaker in a public place to obtain prior permission from the chief of police. As the ordinance failed to set an adequate standard for the exercise of judgment by the chief of police, the Supreme Court, in a five to four decision, held that it was a previous restraint on the right of free speech and, therefore, unconstitutional. The Court in that case recognized an extension of the right of free speech—the right to amplify one's voice.[10] If the right is a constitutional one, it cannot be legislated out of existence by the use of the police power of the states.[11] The instant case again opens this issue—is there a constitutional right to be heard through the use of a loudspeaker? The nicety of the question is apparent from the fact that there are three concurring opinions and two written dissenting opinions. However, there are only three basic views.

The first view [12] indicates that there is no constitutional right to mechanically amplified free speech, as the constitutional guarantees apply only to the natural voice. In an attempt to justify this attitude the rather outmoded argument is advanced that since the framers of the Constitution could not have known of modern mechanical devices, such guarantees should not apply to them. This reasoning was long ago repudiated as to interstate commerce,[13] and the federal taxing power.[14]

The second view extends the privilege of free speech to include amplified speech, subject only to narrow limitations. The Justices taking this view seem quite concerned with the practical effect of holding ordinances of this type to be constitutional. The primary objection is that to so hold is to deprive the individual of what could conceivably be the only effective or plausible means to reach an audience.[15]

The third view [16] attempts to take the middle road between the two extremes. The Justices advocating this view prevailed. Not wishing to repudiate the *Saia* case, they attempted to distinguish it on the basis of the difference in the wording of the two ordinances. Recognizing the constitutional right of free speech through amplification, the Court found that this right was not violated. Although the ordinance could well be construed as entirely prohibiting all sound trucks,[17] the Court chose to interpret the ordinance as

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9. 334 U.S. 558 (1948).
10. The development of this concept is traced in 3 MIAMI L. Q. 51 (1948).
11. See note 5 *supra*.
12. Kovacs v. Cooper, *supra* at 454.
13. *In re* Debs, 158 U.S. 564 (1895).
14. South Carolina v. United States, 199 U.S. 437 (1905) (see also Mr. Justice Rutledge, dissenting in the principal case).
15. Kovacs v. Cooper, *supra* at 459 (dissenting opinion).
16. Kovacs v. Cooper, *supra* at 449.
17. The ordinance was construed by the New Jersey Supreme Court prohibiting the use of sound trucks. See note 2 *supra*.

forbidding only *loud* and *raucous* sound trucks and that these words conveyed a sufficiently accurate concept of what was forbidden.

More than half of the Justices feel that the decision in the *Saia* case has been repudiated, despite the desire by the majority not to do so. The practical effect of this decision is to indicate that only a municipal ordinance expressly and unequivocally forbidding any amplification of speech whatsoever, would be held invalid; but any words creating an ambiguity would remove the ordinance from that category.

The more liberal thought evinced in the *Saia* case appears preferable. The decision is not consonant with the modern trend toward expansion of civil liberties. Fear of the possible abuse of a right is no excuse for its abrogation or unreasonable abridgment.

LABOR LAW—PICKETING—LEGALITY OF OBJECT—SELECTIVE HIRING OF NEGROES

Petitioners, as individuals and not as members of a labor union, requested the "Lucky Stores" to engage in selective hiring of Negro clerks based on the proportion of white and Negro customers who patronized the stores. The requested hiring was to be made, as clerical vacancies became available, through the Retail Clerks Union, with whom the stores had a union shop contract. Upon refusal of their demands, the petitioners peaceably picketed one of the stores with signs announcing, "Don't Patronize—Lucky Won't Hire Negro Clerks In Proportion To Negro Trade." The store secured an injunction against the pickets which the latter ignored. Adjudged guilty of contempt, petitioners brought a writ of certiorari to annul the conviction. *Held*, conviction affirmed. Such picketing is for the unlawful object of establishing an arbitrary and discriminatory hiring policy on a racial basis, thereby effecting the equivalent of both a closed shop and a closed union in favor of the Negro race. *Hughes v. Superior Court in and for Contra Costa County*, 198 P.2d 885 (Cal. 1948).

It is well established that peaceful picketing is guaranteed as an incident of free speech by the First and Fourteenth Amendments to the Federal Constitution,[1] though many authors and judges have assailed picketing as extending beyond mere free speech and as a weapon of coercion and intimidation.[2] Peaceful picketing is not permissive, however, if directed toward an unlawful

1. Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940); Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).

2. *See* McKay v. Retail Automobile Salesmens' Local Union, 16 Cal.2d 311, 106 P.2d 373, 395 (1940) (dissenting opinion); 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 136 (1940).