AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employees, and Schools

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Anderson v. City of Wellington, 40 Kan. 173 (1888)

Anderson and other members of the Salvation Army organized a parade down Washington Avenue in Wellington, Kansas, in order to protest a local ordinance banning parades on town streets unless the participants obtained permission from the mayor. They were immediately arrested, tried, and convicted. A state intermediate court rejected their claim that the Wellington ordinance was unconstitutional. Anderson appealed that decision to the Supreme Court of Kansas.

The Supreme Court of Kansas unanimously declared the ordinance void. Chief Justice Simpson declared that the Wellington anti-parade law violated "the rights of the people." What rights was he referring to? Did the opinion rely on federal constitutional rights, state constitutional rights, or some other source of rights? Was this an individual rights case or a structure of government case in which a local government lacked the power to pass the regulation in question? Compare Anderson *to contemporary public forum cases. What are the major similarities and differences? What explains those similarities and differences?*

Opinion by CHIEF JUSTICE SIMPSON:

. . .

. . . The object of this ordinance, and the danger apprehended and to be avoided by its enactment and enforcement as expressed by its terms is, to prevent the calling together of a large or unusual crowd of people on any of the streets, avenues or alleys of the city of Wellington. Then the question is this: Is a street parade with music or singing legally objectionable in itself, or does it threaten the public peace or the good order of the community? There are other questions made in the briefs of counsel for appellant, but we shall consider only the general legal characteristics of the ordinance; for if it is not legal, the other questions go with it; and if it is, they are probably not important enough to justify reversal in this particular case. This ordinance prevents any number of the people of the state attached to one of the several political parties from marching together, with their party banners and inspiring music, up and down the principal streets, without the written consent of some municipal officer. The Masonic and Odd Fellows' organizations must first obtain consent before their charitable steps desecrate the sacred streets. Even the Sunday-school children cannot assemble at some central point in the city and keep step to the music of the band as they march to the grove, without permission first had and obtained. The Grand Army of the Republic must be preceded in its march by the written consent of his honor the mayor, or march without drums or fife, shouts or songs. It prevents a public address upon any subject being made on the streets. It prevents an unusual congregation of people on the streets under any circumstances without permission. The ordinance is framed on the theory that an unusual crowd or congregation of people upon one of the public streets of a city is either of itself a disturbance of the public peace, or that it threatens the good order of the community. A crowd of people is one of the most ordinary incidents of every-day life in any city of considerable size in this country. A fire, a runaway, an unusual sight, collects a crowd as if by magic; and it is not a fair estimate of the character and habits of the American people to assume that the public peace is threatened when numbers of them congregate. We do not believe that the legislative grant of power to the city council . . . can be so construed as to authorize the city council to

take from the people of a city and the surrounding country a privilege exercised by them in every locality throughout the land, to form their processions and parade the streets with banners, music, songs, and shouts. It is an abridgment of the rights of the people. It represses associated effort and action. It discourages united effort to attract public attention, and challenge public examination and criticism of the associated purposes. It discourages unity of feeling and expression on great public questions, economic, religious, and political. It practically destroys these great public demonstrations that are the most natural product of common aims and kindred purposes. The power to pass such an ordinance should be clear and controlling before it can be upheld, and take away from the people the privilege that they have exercised ever since the organization of the government. Public parades of this character are not unlawful in their intent, purpose and result; they are not *mala in se*. If they are to be *mala prohibita*, it ought to be by some general law, and not by local regulation. . . .

We conclude that the city charter grants only such power to the common council of the city of Wellington as will enable the city to preserve the public peace and maintain good order, subject to the limitations and conditions required by the rights of the people themselves as secured by the general principles of the law, as exemplified by their universal action since the organization of the government and the common occurrences in every city in the Union on every public or festive occasion. The right of the people in this state by organization to cooperate in a common effort, and by a public demonstration or parade to influence public opinion and impress their strength upon the public mind, and to march upon the public streets of the cities of the state with the usual accompaniments of bands, banners, transparencies, glee clubs, and all the accessories of public meetings, is too firmly established and has been too often exercised to be now questioned, or to be made the basis of an ordinance forbidding the same, predicated on the false assumption that they are dangerous to the peace of the public or inimical to the good order of the city. Of course such parades are subject to the operation of the laws upon the subject of riots, mobs, unlawful assemblies, and nuisances, whenever they become so; and city ordinances and statutes of the state already afford ample protection to the public, and ready processes to prohibit, repress and arrest offenders whenever the original purposes of such parades are perverted and they become criminal in character and action. . . .

. . . It might be proper on account of the peculiar condition of affairs in a city, that street parades should be confined to certain streets, or should be conducted within certain hours of the day, or should be forbidden in the night-time, or that the police department should have some previous notice, or that there should be other reasonable regulations respecting them, justified by such a condition that it would be apparent that regulation, and not prohibition, was the object of the ordinance; because the power cannot be extended to prohibition, for the very essence of regulation is the existence of something to be regulated.

It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons combined for legal and meritorious purposes to parade the streets with music. The use of musical instruments on such occasions is not specially objectionable; songs and shouts, cheers and the waving of banners, have always been considered as demonstration of approval, and not as tending to create disturbances or provoke breaches of the peace. All these are the usual accompaniments of public demonstrations in every civilized country, and there is nothing in their use on all ordinary occasions of this character to *justify* absolute prohibition. It is not justified by the common experience, and our attention has not been called to any local disturbance that would seem to create a necessity for such an unusual attempt at regulation.

All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the public streets, expressly and intelligently; such conditions operating on all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation, and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he does not agree on controverted questions from calling public attention to the principles of their party or the objects of their organization in one of the most effectual methods known to associated effort.

For all these reasons, and because of all these results and consequences, we doubt the power of the city council of Wellington to pass the ordinance in question; and because it is not free from fair and reasonable doubt, resolve the question against the city and pronounce the ordinance illegal and void.

It is recommended that the judgment of the court below be reversed, and the case remanded for further proceedings in accordance with this opinion.