AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 8: The New Deal/Great Society Era – Democratic Rights/Free Speech

**Kovacs v. Cooper, 336 U.S. 77** (1949)

*The City of Trenton, New Jersey, had an ordinance prohibited anyone from using a sound truck or sound amplifier to create “loud and raucous noises” on city streets. Charles Kovacs was a labor union activist and played music and spoke over a loudspeaker from a truck near the municipal building in an effort to call attention to a printers’ strike. Kovacs was convicted of violating the city ordinance, and that conviction was affirmed by a divided state supreme court. The U.S. Supreme Court affirmed the conviction in a 5-4 decision, but there was substantial disagreement among the justices on what was at stake in the case. The plurality opinion emphasized that the ordinance barred “loud and raucous noises,” but two members of the majority were willing to affirm a total ban on sound trucks in the city. The justices disagreed with whether this result was consistent with their recent decision in* Saia v. New York *(1948), in which a divided Court struck down a city ordinance requiring a permit before using sound amplification equipment in public spaces.*

JUSTICE REED delivered the opinion of the Court.

. . . .

The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words "loud and raucous." While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden. . . .

. . . .

The scope of the protection afforded by the Fourteenth Amendment, for the right of a citizen to play music and express his views on matters which he considers to be of interest to himself and others on a public street through sound amplification devices mounted on vehicles, must be considered. Freedom of speech, freedom of assembly, and freedom to communicate information and opinion to others are all comprehended on this appeal in the claimed right of free speech. They will be so treated in this opinion.

The use of sound trucks and other peripatetic or stationary broadcasting devices for advertising, for religious exercises, and for discussion of issues or controversies has brought forth numerous municipal ordinances. The avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets, since some citizens find the noise objectionable and to some degree an interference with the business or social activities in which they are engaged or the quiet that they would like to enjoy. A satisfactory adjustment of the conflicting interests is difficult, as those who desire to broadcast can hardly acquiesce in a requirement to modulate their sounds to a pitch that would not rise above other street noises, nor would they deem a restriction to sparsely used localities or to hours after work and before sleep -- say 6 to 9 p.m. -- sufficient for the exercise of their claimed privilege. Municipalities are seeking actively a solution. Unrestrained use throughout a municipality of all sound amplifying devices would be intolerable. Absolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities.

. . . . When ordinances undertake censorship of speech or religious practices before permitting their exercise, the Constitution forbids their enforcement. *Saia v. New York* (1948). . . .

This ordinance is not of that character. . . . It is an exercise of the authority granted to the city by New Jersey "to prevent disturbing noises," nuisances well within the municipality's power to control. The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the wellbeing and tranquility of a community. A state or city may prohibit acts or things reasonably thought to bring evil or harm to its people.

. . . .

Of course, even the fundamental rights of the Bill of Rights are not absolute. The Saia case recognized that in this field by stating "The hours and place of public discussion can be controlled." It was said decades ago in an opinion of this Court delivered by Justice Holmes, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." *Schenck v. United States* (1919). Hecklers may be expelled from assemblies, and religious worship may not be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order.

While this Court, in enforcing the broad protection the Constitution gives to the dissemination of ideas, has invalidated an ordinance forbidding a distributor of pamphlets or handbills from summoning householders to their doors to receive the distributor's writings, this was on the ground that the home owner could protect himself from such intrusion by an appropriate sign "that he is unwilling to be disturbed." The Court never intimated that the visitor could insert a foot in the door and insist on a hearing. *Martin v. Struthers* (1943). . . . The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street, he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality.

City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control. We think it is a permissible exercise of legislative discretion to bar sound trucks with broadcasts of public interest, amplified to a loud and raucous volume, from the public ways of municipalities. On the business streets of cities like Trenton, with its more than 125,000 people, such distractions would be dangerous to traffic at all hours useful for the dissemination of information, and in the residential thoroughfares, the quiet and tranquility so desirable for city dwellers would likewise be at the mercy of advocates of particular religious, social or political persuasions. We cannot believe that rights of free speech compel a municipality to allow such mechanical voice amplification on any of its streets.

The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners, and to do so, there must be opportunity to win their attention. This is the phase of freedom of speech that is involved here. We do not think the Trenton ordinance abridges that freedom. It is an extravagant extension of due process to say that, because of it, a city cannot forbid talking on the streets through a loudspeaker in a loud and raucous tone. Surely such an ordinance does not violate our people's "concept of ordered liberty" so as to require federal intervention to protect a citizen from the action of his own local government. *Palko v. Connecticut* (1937). Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets. The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience. To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself. That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open. Section 4 of the ordinance bars sound trucks from broadcasting in a loud and raucous manner on the streets. There is no restriction upon the communication of ideas or discussion of issues by the human voice, by newspapers, by pamphlets, by dodgers. We think that the need for reasonable protection in the homes or business houses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinance.

*Affirmed*.

JUSTICE FRANKFURTER, concurring.

Wise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society. Insofar as the Constitution commits the duty of making this accommodation to this Court, it demands vigilant judicial self-restraint. A single decision by a closely divided court, unsupported by the confirmation of time, cannot check the living process of striking a wise balance between liberty and order as new cases come here for adjudication. To dispose of this case on the assumption that the *Saia* case, decided only the other day, was rightly decided, would be for me to start with an unreality. . . . I conclude that there is nothing in the Constitution of the United States to bar New Jersey from authorizing the City of Trenton to deal in the manner chosen by the City with the aural aggressions implicit in the use of sound trucks.

The opinions in this case prompt me to make some additional observations. My brother Reed speaks of 'The preferred position of freedom of speech,' though, to be sure, he finds that the Trenton ordinance does not disregard it. This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity. It is not the first time in the history of constitutional adjudication that such a doctrinaire attitude has disregarded the admonition most to be observed in exercising the Court's reviewing power over legislation, “that it is a constitution we are expounding.” . . .

. . . .

Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas. It is argued that the Constitution protects freedom of speech: Freedom of speech means the right to communicate, whatever the physical means for so doing; sound trucks are one form of communication; ergo that form is entitled to the same protection as any other means of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-called 'mass communications' raise issues that were not implied in the means of communication known or contemplated by Franklin and Jefferson and Madison. . . .

Only a disregard of vital differences between natural speech, even of the loudest spellbinders, and the noise of sound trucks would give sound trucks the constitutional rights accorded to the unaided human voice. Nor is it for this Court to devise the terms on which sound trucks should be allowed to operate, if at all. These are matters for the legislative judgment controlled by public opinion. So long as a legislature does not prescribe what ideas may be noisily expressed and what may not be, nor discriminate among those who would make inroads upon the public peace, it is not for us to supervise the limits the legislature may impose in safeguarding the steadily narrowing opportunities for serenity and reflection. Without such opportunities freedom of thought becomes a mocking phrase, and without freedom of thought there can be no free society.

JUSTICE JACKSON, concurring.

I join the judgment sustaining the Trenton ordinance because I believe that operation of mechanical sound-amplifying devices conflicts with quiet enjoyment of home and park and with safe and legitimate use of street and market place, and that it is constitutionally subject to regulation or prohibition by the state or municipal authority. No violation of the Due Process Clause of the Fourteenth Amendment by reason of infringement of free speech arises unless such regulation or prohibition undertakes to censor the contents of the broadcasting. Freedom of speech for Kovacs does not, in my view, include freedom to use sound amplifiers to drown out the natural speech of others.

I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of 'communication of ideas.' The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.

But I agree with Justice Black that this decision is a repudiation of that in *Saia*. . . .

JUSTICE MURPHY dissents.

JUSTICE BLACK, with whom JUSTICE DOUGLAS and JUSTICE RUTLEDGE join, dissenting.

. . . . [T]he New Jersey Supreme Court affirmed the conviction on the ground that the appellant was shown guilty of the only offense of which he was charged—speaking through an amplifier on a public street. If as some members of this Court now assume, he was actually convicted for operating a machine that emitted “loud and raucous noises,” then he was convicted on a charge for which he was never tried. . . .

. . . .

The New Jersey ordinance is on its face, and as construed and applied in this case by that state's courts, an absolute and unqualified prohibition of amplifying devices on any of Trenton's streets at any time, at any place, for any purpose, and without regard to how noisy they may be.

In *Saia v. New York* (1948) we had before us an ordinance of the City of Lockport, New York, which forbade the use of sound amplification devices except with permission of the chief of police. The ordinance was applied to keep a minister from using an amplifier while preaching in a public park. We held that the ordinance, aimed at the use of an amplifying device, invaded the area of free speech guaranteed the people by the First and Fourteenth Amendments. The ordinance, so we decided, amounted to censorship in its baldest form. And our conclusion rested on the fact that the chief of police was given arbitrary power to prevent the use of speech amplifying devices at all times and places in the city, without regard to the volume of the sound. We pointed out the indispensable function performed by loud speakers in modern public speaking. We then placed use of loud speakers in public streets and parks on the same constitutional level as freedom to speak on streets without such devices, freedom to speak over radio, and freedom to distribute literature.

In this case the Court denies speech amplifiers the constitutional shelter recognized by our decisions and holding in the *Saia* case. This is true because the Trenton, New Jersey, ordinance here sustained goes beyond a mere prior censorship of all loud speakers with authority in the censor to prohibit some of them. This Trenton ordinance wholly bars the use of all loud speakers mounted upon any vehicle in any of the city's public streets.

In my view this repudiation of the prior *Saia* opinion makes a dangerous and unjustifiable breach in the constitutional barriers designed to insure freedom of expression. Ideas and beliefs are today chiefly disseminated to the masses of people through the press, radio, moving pictures, and public address systems. To some extent at least there is competition of ideas between and within these groups. The basic premise of the First Amendment is that all present instruments of communication, as well as others that inventive genius may bring into being, shall be free from governmental censorship or prohibition. Laws which hamper the free use of some instruments of communication thereby favor competing channels. Thus unless constitutionally prohibited, laws like this Trenton ordinance can give an overpowering influence to views of owners of legally favored instruments of communication. This favoritism, it seems to me, is the inevitable result of today's decision. For the result of today's opinion in upholding this statutory prohibition of amplifiers would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked.

There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Yet everybody knows the vast reaches of these powerful channels of communication which from the very nature of our economic system must be under the control and guidance of comparatively few people. On the other hand, public speaking is done by many men of divergent minds with no centralized control over the ideas they entertain so as to limit the causes they espouse. It is no reflection on the value of preserving freedom for dissemination of the ideas of publishers of newspapers, magazines, and other literature, to believe that transmission of ideas through public speaking is also essential to the sound thinking of a fully informed citizenry.

It is of particular importance in a government where people elect their officials that the fullest opportunity be afforded candidates to express and voters to hear their views. It is of equal importance that criticism of governmental action not be limited to criticisms by press, radio, and moving pictures. In no other way except public speaking can the desirable objective of widespread public discussion be assured. For the press, the radio, and the moving picture owners have their favorites, and it assumes the impossible to suppose that these agencies will at all times be equally fair as between the candidates and officials they favor and those whom they vigorously oppose. And it is an obvious fact that public speaking today without sound amplifiers is a wholly inadequate way to reach the people on a large scale. Consequently, to tip the scales against transmission of ideas through public speaking as the Court does today, is to deprive the people of a large part of the basic advantages of the receipt of ideas that the First Amendment was designed to protect.

. . . .

I am aware that the 'blare' of this new method of carrying ideas is susceptible of abuse and may under certain circumstances constitute an intolerable nuisance. But ordinances can be drawn which adequately protect a community from unreasonable use of public speaking devices without absolutely denying to the community's citizens all information that may be disseminated or received through this new avenue for trade in ideas. . . . A city ordinance that reasonably restricts the volume of sound, or the hours during which an amplifier may be used, does not, in my mind, infringe the constitutionally protected area of free speech. It is because this ordinance does none of these things, but is instead an absolute prohibition of all uses of an amplifier on any of the streets of Trenton at any time that I must dissent.

JUSTICE RUTLEDGE, dissenting.

. . . .

In my view an ordinance drawn so ambiguously and inconsistently as to reflect the differing views of its meaning taken by the two groups who compose the majority sustaining it, would violate Fourteenth Amendment due process even if no question of free speech were involved. . . . For myself, I have no doubt of state power to regulate their abuse in reasonable accommodation, by narrowly drawn statutes, to other interests concerned in use of the streets and in freedom from public nuisance. But that the First Amendment limited its protections of speech to the natural range of the human voice as it existed in 1790 would be, for me, like saying that the commerce power remains limited to navigation by sail and travel by the use of horses and oxen in accordance with the principal modes of carrying on commerce in 1789. The Constitution was not drawn with any such limited vision of time, space and mechanics. It is one thing to hold that the states may regulate the use of sound trucks by appropriately limited measures. It is entirely another to say their use can be forbidden altogether.

. . . .