Florida Law Review

Volume 2 | Issue 1 Article 5

January 1949

Sound Amplifiers: Nuisance or Free Speech?

Morrie Benson

Edward S. Resnick

prejudicial delay[63] on the part of the other co-tenants in offering to contribute to the expense of the tax title after having received notice of the purchase and of the exclusive claim of the purchasing co-tenant[64] is regarded as an abandonment of their right to share in the benefits of the tax title.[65] The decisions on this subject reflect a strong inclination on the part of the courts to place great emphasis on the equities of each case. In doing so, the courts of equity are exercising no more than their traditional prerogative to deal with each case as good conscience and morality require.

MILTON D. JONES

SOUND AMPLIFIERS: NUISANCE OR FREE SPEECH?

A problem facing every municipality in the nation is that of the regulation of loud-speaking devices.[1] Congested living conditions following upon the rapid growth of urban populations bring into increasing importance the problem of controlling the use of mechanical sound amplifiers to prevent aural aggression.

A conflict develops between the individual's constitutional right of free speech[2] and the interest of the community, coupled with the citi-

---

La. 957, 142 So. 138 (1932); Doiron v. Lock, M. & Co., 165 La. 57, 115 So. 366 (1927); Duson v. Roos, 123 La. 835, 49 So. 590 (1909); Gulf Refining Co. v. Hart, 130 La. 51, 57 So. 581 (1912); Egan v. Egan, 98 N. J. Eq. 487, 131 Atl. 129 (1925).

[63]Peabody v. Burri, 255 Ill. 592, 99 N. E. 690 (1912) (delay of 20 years but no prejudice shown); *cf.* Buchanan v. King's Heirs, 22 Gratt. 414 (Va. 1872).

[64]Inman v. Quirey, 128 Ark. 605, 194 S. W. 858 (1917); Stone v. Marshall, 52 Wash. 375, 100 Pac. 858 (1909).

[65]In Spencer v. Spencer, 36 So.2d 424 (Fla. 1948), this important phase of the case was not discussed even though there had been a 17-year lapse from the purchase of tax title to the time of suit. Undoubtedly the land had greatly increased in value, and it was alleged that plaintiff had spent considerable sums for improvements. However, it did not appear whether defendants had ever been informed of plaintiff's tax title or his exclusive claim under it. Unless these facts were present, the circumstances strongly suggest that the defendants were guilty of laches.

[1]NAT. INST. OF MUN. LAW OFFICERS, Rep. No. 123, p. 3 (1948).

[2]U. S. CONST. Amend. I; U. S. CONST. Amend. XIV, §1; Palko v. Connecticut, 302 U. S. 319 (1937); De Jonge v. Oregon, 299 U. S. 353 (1937).

zen's right to peace and quiet.[3] It is well settled that the constitutional freedoms are not absolute rights.[4] Although they are placed in a preferred position,[5] the rights are relative[6] and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order.[7] On the other hand, the state's power of regulation must not be used merely as a guise to abridge or deny the rights.[8] The difficulty arises in applying these general principles to a given factual situation and in determining on which side the scales are balanced. Indicative of the difficulty are the numerous decisions by a divided United States Supreme Court in recent cases involving the freedoms.[9] The trend is toward favoring the personal freedoms of speech, religion, and the press at the expense of the individual's rights to peace and quiet.[10] This conflict and the current trend are graphically illustrated in a recent case.

---

[3]Thornhill v. Alabama, 310 U. S. 88 (1940); Kovacs v. Cooper, 135 N. J. L. 584, 52 A.2d 806 (1947).

[4]*E.g.*, Prince v. Massachusetts, 321 U. S. 158 (1944); Chaplinsky v. New Hampshire, 315 U. S. 568 (1942); De Jonge v. Oregon, 299 U. S. 353 (1937); Gitlow v. People of New York, 268 U. S. 652 (1925).

[5]Marsh v. Alabama, 326 U. S. 501 (1946); Follett v. Town of McCormick, 321 U. S. 573 (1944); West Virginia State Board of Ed. v. Barnette, 319 U. S. 624 (1943); Martin v. City of Struthers, 319 U. S. 141 (1943); Bridges v. California, 314 U. S. 252 (1941); Schneider v. New Jersey, 308 U. S. 147 (1939); Woolf v. Fuller, 87 N. H. 64, 174 Atl. 193 (1934).

[6]Cases cited note 5 *supra*; Thomas v. Collins, 323 U. S. 516 (1945); Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722 (1942); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

[7]See note 4 *supra*.

[8]U. S. CONST. AMEND. XIV, §1; Murdock v. Pennsylvania, 319 U. S. 105 (1943); Jamison v. Texas, 318 U. S. 413 (1943); Schneider v. New Jersey, 308 U. S. 147 (1939); Hague v. CIO, 307 U. S. 496 (1939); People v. Banks, 168 Misc. 515, 6 N. Y. S.2d 41 (1938).

[9]Tucker v. Texas, 326 U. S. 517 (1946); Marsh v. Alabama, 326 U. S. 501 (1946); Follett v. Town of McCormick, 321 U. S. 573 (1944); Prince v. Massachusetts, 321 U. S. 158 (1944); West Virginia State Board of Ed. v. Barnette, 319 U. S. 624 (1943); Douglas v. City of Jeanette, 319 U. S. 157 (1943); Martin v. City of Struthers, 319 U. S. 141 (1943); Murdock v. Pennsylvania, 319 U. S. 105 (1943); Jamison v. Texas, 318 U. S. 413 (1943); Jones v. City of Opelika, 316 U. S. 584 (1942); Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722 (1942); *In re* Summers, 325 U. S. 561 (1941); Bridges v. California, 314 U. S. 252 (1941); Thornhill v. Alabama, 310 U. S. 88 (1940); Schneider v. New Jersey, 308 U. S. 147 (1939); Hague v. CIO, 307 U. S. 496 (1939); Palko v. Connecticut, 302 U. S. 319 (1937).

[10]Cases cited note 9 *supra*; Taylor v. Mississippi, 319 U. S. 583 (1943); Lar-

I. THE *Saia* CASE

In *Saia v. People of New York*,[11] a municipal ordinance[12] of the city of Lockport, New York, prohibited for most purposes the use of loud-speakers in the city streets and public places. An exception was made for dissemination of news items, matters of public concern, and athletic activities, provided a permit was first obtained from the chief of police. Pursuant to the ordinance, defendant Saia, a member of the religious sect commonly known as Jehovah's Witnesses, was given permission to operate a sound truck in a public park on four successive Sundays, and he, in fact, so operated the machine on those days. His fifth application was denied because of numerous complaints, but he nevertheless proceeded to operate his sound truck without a permit. He was convicted of violating the ordinance.[13] The United States Supreme Court reversed the conviction, four justices dissenting.

The Court held that Section 3 of the ordinance, requiring a permit before operation in the excepted case, was unconstitutional on its face, since it established a previous restraint on the right of free speech in violation of the First Amendment, protected by the Fourteenth Amendment against state action. Further objection to the constitutionality of the ordinance were these: no standards were established for limiting the official's discretionary power; the ordinance was an unlawful delegation of the legislative function; it was a possible instrument of oppression;

---

gent v. Texas, 318 U. S. 418 (1943); Chaplinsky v. New Hampshire, 315 U. S. 568 (1942); Lovell v. City of Griffin, 303 U. S. 444 (1938); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937); De Jonge v. Oregon, 299 U. S. 353 (1937).

[11]68 Sup. Ct. 1148 (1948).

[12]The Lockport ordinance, insofar as pertinent, reads as follows: "Section 2. Radio devices, etc.— It shall be unlawful for any person to maintain and operate in any building, or on any premises or on any automobile, motor truck or other motor vehicle, any radio device, mechanical device, or loud speaker or any device of any kind whereby the sound therefrom is cast directly upon the streets and public places and where such device is maintained for advertising purposes or for the purpose of attracting the attention of the passing public, or which is 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.

"Section 3.—Exception.—Public dissemination, through radio, loudspeakers, of items of news and matters of public concern and athletic activities shall not be deemed a violation of this section provided that the same be done under permission obtained from the Chief of Police."

[13]People v. Saia, 297 N. Y. 659, 76 N. E.2d 323 (1947).

and it contained all the vices of those in the *Cantwell, Hague,* and *Lovell*[14] cases.

On the basis of the *Saia* decision the present law in regard to the regulation of loud-speakers may be broadly stated to forbid any ordinance related to freedom of speech from vesting discretionary authority in a public official without setting forth clearly defined standards. Accordingly, municipalities are prohibited from reposing in a minor official absolute discretion in granting or denying a permit to use loud-speaking devices, since these mechanisms are connected, to some extent at least, with freedom of speech.

II. Power of Prohibition and Regulation

The Court in the *Saia* case failed to pass on the validity of Section 2 of the ordinance, which completely prohibited for most purposes the use of loud-speaking devices. It was on the basis of this section that Saia was convicted rather than on the basis of Section 3, which permitted exceptions. The Court looked to the entire ordinance, however, in order to see whether any part of it could be construed as unconstitutional.[15]

In the New Jersey case of *Kovacs v. Cooper*[16] an evenly divided state court sustained the defendant's conviction under an ordinance of the city of Trenton prohibiting completely the use of all sound trucks or loud-speaking devices. The defendant had set a sound amplifier on a truck and, while driving on a Trenton street, had played music and

[14]In Cantwell v. Connecticut, 310 U. S. 296 (1940), it was held that a conviction for breach of the peace violated religious liberty when the offense was merely that of attempting to induce individuals to listen to phonograph records attacking their religion, thereby provoking their indignation. In Hague v. CIO, 307 U. S. 496 (1939), the Court struck down an ordinance requiring a permit for the use of streets or parks for public assembly and enabling the director of safety to refuse a permit on his mere opinion that such refusal would prevent riots, disturbances, or disorderly assemblage. This case was not heard by the full Court. In Lovell v. City of Griffin, 303 U. S. 444 (1938), a city ordinance forbade, as a nuisance, the distribution of literature of any kind without the written permission of the city manager. A Jehovah's Witness disregarded the ordinance and was convicted. The Court held that the pamphlets distributed were in the nature of religious tracts and that, since there were no limitations on the city manager's authority, the ordinance violated the Fourteenth Amendment.

[15]This attitude in the "freedoms" cases is an exception to the usual canon that legislation should be upheld if possible. West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937).

[16]135 N. J. L. 584, 52 A.2d 806 (1947).

spoken through the amplifier. It was indicated that the purpose of the speech was to comment on an existing labor dispute in the community. This case is pending before the United States Supreme Court, and the decision may well settle the question, which is still open, as to whether a municipality may constitutionally prohibit the use of *all* loud-speaking devices.

Although this point was not decided in the *Saia* case, the majority opinion connotes that religion is in such a preferred position that a municipality cannot entirely prohibit the use of sound equipment in the propagation of religious ideas in public places.

In the *Saia* case the Court failed to distinguish between sound itself and the dissemination of ideas; the decisions agree that a municipality may in some respects restrict the broadcast of sound in public places, as, for example, music played on records from a music emporium[17] onto the street. This is analogous to the instant case, since the ordinance in the *Saia* case was designed to restrict sound itself rather than the dissemination of religious ideas. Although it is generally held that such dissemination may not be restricted or curtailed,[18] as Justice Frankfurter pointed out in his dissenting opinion, this does not mean that the public must be forced to listen.[19] Unbounded aural aggression in the name of freedom of speech is a pernicious doctrine. The right to speak is one thing; a right to force someone to listen is quite another. If the constitutional right of freedom of speech contemplates only the native power of the human voice, the right of free speech and the right to peace and quiet are evenly balanced. A person may spread his ideas by word of mouth: one who chooses to listen may come within earshot of the speaker; one who chooses not to listen may move out of range of the speaker's voice. In cases of freedom of the press, those who do not choose to read need not have their attention bludgeoned by undesired reading matter.[20]

---

[17]Stodder v. Rosen Talking Machine Co., 241 Mass. 245, 135 N. E. 251 (1922), *Judgment of contempt for violating the decree aff'd,* 247 Mass. 60, 141 N. E. 569 (1923); Giebough v. West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289 (1902); Peters v. Moses, 171 Misc. 441, 12 N. Y. S.2d 735 (1939).

[18]*E.g.,* Marsh v. Alabama, 326 U. S. 501 (1946); Taylor v. Mississippi, 319 U. S. 583 (1943); Jamison v. Texas, 318 U. S. 413 (1943); Martin v. City of Struthers, 319 U. S. 141 (1943).

[19]Saia v. People, 68 Sup. Ct. 1148, 1151 (1948).

[20]It is with this in mind that such ordinances as the one in Lowell v. City of Griffin, *supra* note 14, are held to be unconstitutional. Although Tucker v. Texas, 326 U. S. 517 (1946), and Marsh v. Alabama, 326 U. S. 501 (1946), held that Jehovah's Witnesses could not be prevented from distributing their pamphlets on private

Consequently there is no appreciable aggression by one right on the other. If, under certain circumstances, the public should wish to hear a specific program, a religious sermon, or a news item, it might be desirable to amplify the sound by a mechanical device in some specific locations; but the determination of the existence of such circumstances is of necessity a discretionary matter, difficult to provide for by definite standards in a statute or ordinance.

The Court failed to consider the distinction between the regulation of sound itself and control of mechanical sound equipment on public property. Mr. Justice Jackson stated in his dissenting opinion, "It is astonishing news to me if the Constitution prohibits a municipality from policing, controlling or forbidding erection of such equipment by a private party in a public park."[21] A city may regulate the use of its streets in setting up equipment in derogation of public safety.[22] While there may well be some factual distinction between protection of public safety in city streets and limitation of disagreeable noises in city parks, the Court could properly have sustained the conviction of Saia on the narrow issue of a municipality's power to prohibit or regulate the setting up of physical sound equipment on its public property.[23] The opposite decision accordingly indicates that freedom of propagandizing religion is in a category so favored that a municipality is helpless against the use of sound equipment, even on city-owned property. As against this extreme conclusion, the unguided discretion reposed in the chief of police may be regarded as the true basis for the decision.

---

property, the factual situations were peculiar in that the private property was a company-owned town in the *Marsh* case and federal property in the *Tucker* case. These holdings do not embrace private property in its generally accepted sense. Furthermore, even though distribution of the pamphlets could not be hindered, no one was forced to read them. Amplified sound, however, is not readily disregarded, even when one resents it.

[21]Saia v. People, 68 Sup. Ct. 1148, 1153 (1948).

[22]Jamison v. Texas, 318 U. S. 413 (1943); Cox v. New Hampshire, 312 U. S. 569 (1941); City Council v. Jackson, 20 Ga. App. 710, 93 S. E. 304 (1917).

[23]In Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113 (1895), *aff'd*, 167 U. S. 43 (1897), Chief Justice Holmes gave the following opinion: "It is, therefore, conclusively determined there was no right in the plaintiff in error to use the Common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe. The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the states to enact police regulations as to subjects within their control . . . . and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the Constitution and laws of the State." The United States Supreme Court has often distinguished but never overruled this case.

An interesting sidelight to the legalistic approach to these problems is that in cases involving the freedoms the dispute invariably concerns religious, labor, or political minority groups whose ideas are frequently repugnant to those of the vast majority of the public.[24] The courts are determining the extent to which the propagation of these ideas, by natural and artificial means, can be controlled under the Constitution.

Another point in rather sharp conflict among the justices in the *Saia* case is whether the constitutionality of a statute or ordinance is to be tested by the factual situation as it actualy exists in a given case,[25] or, as the Court decided here, by any conceivable circumstances that might arise thereunder. Coupled with this is the fact that the Supreme Court has repeatedly held that there is a presumption in favor of the constitutionality of a statute.[26] The greater number of past decisions hold that the constitutionality of a statute[27] should be decided on the basis of the instant factual situation.[28] The reasoning is fairly evident: one of the principles used in determining the constitutionality of a law is that almost any legal rule, if subjected to a reductio ad absurdum, can be construed so as to operate, under some imagined factual situations, in an unconstitutional manner.

Under the admitted factual situation in the *Saia* case, it is evident that the defendant's constitutional rights were not in fact impaired.[29] Saia had already spoken in the park on four successive Sundays. In view of the fact that during only three months of the year are the parks in the North suitable for use in their normal recreational aspect, and that there are more than 250 recognized religious denominations in the United

---

[24]See note 10 *supra.*

[25]Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Stuart Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911).

[26]Alabama State Fed. of Labor v. McAdory, 325 U. S. 450 (1945); Thornhill v. Alabama, 310 U. S. 88 (1940); Pacific States Box & Basket Co. v. White, 302 U.S. 319 (1937); Whitney v. California, 274 U.S. 358 (1926); Gitlow v. People, 268 U. S. 652 (1925); Stuart Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911).

[27]A municipal ordinance is a "statute" of the state, within the meaning of JUDICIAL CODE §237(a). King Mfg. Co. v. Augusta, 277 U .S. 100 (1928).

[28]*E.g.,* Nashville, C. & St. L. Ry. v. Walters, 294 U. S. 405 (1935); State Board of Tax Comm'rs v. Jackson, 283 U. S. 527 (1931); Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); Cady v. Detroit, 289 Mich. 499, 286 N. W. 805 (1939), *appeal dismissed,* 309 U. S. 620 (1940).

[29]The burden of proof as to showing injury is upon the party attacking the constitutionality of a statute. Helvering v. Davis, 301 U. S. 619 (1937); United States v. Butler, 297 U. S. 1 (1936).

States, Saia was allotted more than a fair proportion of the available time. No evidence was presented showing that any other denomination had ever been permitted or had requested to hold meetings in this area of the park, which was essentially for recreational purposes. The park was financed by the citizens of the community, not by any religious sect. Evidence was wholly lacking that the action of the chief of police was in fact arbitrary or capricious.

III. Latitude of Discretion Allowed

There is also the point, disregarded by the Court, that "such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation."[30] This is particularly true of statutes involving nuisances. On established principles of constitutional law, to hold unconstitutional a statute exercising the police power, the court should find that it bears no substantial relation to public welfare, health, protection, or privacy, or that it is patently excessive.[31] This principle rests on the concept that the decision as to whether a given course of conduct is a nuisance should rest with those who have to live with it. If there is any reasonable basis for the statute or ordinance, it should be sustained;[32] the court should not substitute its judgment for that of the elected representatives of the people.[33]

The *Saia* decision with regard to the requirement of clearly defined standards in ordinances is based on a principle illustrated in the leading case

---

[30]Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 389 (1926).

[31]Madden v. Commonwealth, 309 U. S. 83 (1940); Hall v. Putney, 291 Ill. App. 508, 10 N. E.2d 204 (1937); O'Connor v. Aluminum Ore Co., 224 Ill. App. 613. (1922); Russell Inv. Corp. v. Russell, 182 Miss. 385, 182 So. 102 (1938); Williams v. Cross, 16 Tenn. App. 454, 65 S. W.2d 198 (1932).

[32]West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937); Stephenson v. Binford, 287 U. S. 251 (1932); State Board of Tax Comm'rs v. Jackson, 283 U. S. 527 (1931); Gitlow v. People, 268 U. S. 652 (1925).

[33]Polish Nat. Alliance v. N. L. R. B., 322 U. S. 643 (1944). Whether a particular grant of authority to an officer or agency is wise or unwise raises questions which are of no concern to the Supreme Court. Bowles v. Willingham, 321 U. S. 503 (1944); Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, 313 U. S. 236 (1941); South Carolina State Hwy. Dept. v. Barnwell Bros., Inc., 303 U. S. 177 (1938); Stephenson v. Binford, 287 U. S. 251 (1932).

of *Seignious v. Rice.*[34] In cases involving zoning ordinances[35] or licensing of plumbers,[36] barbers,[37] doctors,[38] attorneys at law,[39] or locomotive engineers,[40] the standard can in practice be clearly defined by the legislature, so as to limit strictly the discretion vested in the enforcement officer. It would be an unauthorized delegation of the legislative function to delegate to a minor official the duty of determining whether or not a man is fit to practice medicine, law, or other occupations unless standards are prescribed on which he is to base his decision.[41]

In the field of nuisances, however, encompassing such problems as smoke,[42], dust,[43] vibrations,[44] gases,[45] odors,[46] and sound[47] the test of the existence of a nuisance is necessarily one of reasonableness in regard to the individual and community.[48] Since guiding regulations cannot be set down with the precision of a mathematical formula,[49]

---

[34]"The Legislature cannot grant to an administrative officer plenary power to discriminate between applicants, requiring some to prove their fitness and granting a license to others without such proof." Seignious v. Rice, 273 N. Y. 44, 6 N. E.2d 91, 93 (1936).

[35]Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).

[36]See note 34 *supra;* 11 AM JUR. 1053.

[37]State v. Briggs, 45 Ore. 366, 78 Pac. 361 (1904); see Note 98, A. L. R. 1090 (1935).

[38]41 AM. JUR. 138.

[39]*In re* Galusha, 184 Cal. 697, 195 Pac. 406 (1921); 5 AM. JUR. 277.

[40]Nashville, C. & St. L. Ry. v. Alabama, 128 U. S. 96 (1888); Smith v. Alabama, 124 U. S. 465 (1888).

[41]Lovell v. City of Griffin, 303 U. S. 444 (1938); A. L. A. Schecter Poultry Corp. v. United States, 295 U. S. 495 (1935); Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); see notes 35-40 *supra.*

[42]De Blois v. Bowers, 44 F.2d 621 (D. C. Mass. 1930); Kolb v. Knoxville, 111 Tenn. 311, 76 S. W. 823 (1903).

[43]Centoni v. Ingalls, 113 Cal. App. 192, 298 Pac. 47 (1931); Graham v. Ridge, 41 Ohio App. 288, 179 N. E. 693 (1931).

[44]McCullen v. Jennings, 141 Kan. 420, 41 P.2d 753 (1935).

[45]See note 42 *supra.*

[46]Shellabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005 (1905); Swanson v. Bradshaw, 187 S. W. 268 (1916).

[47]Warren Co. v. Dickson, 185 Ga. 481, 195 S. E. 568 (1938); McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 N. W. 786 (1908).

[48]GA. CODE §§72-101 (1933), Warren Co. v. Dickson, 185 Ga. 481, 195 S. E. 568 (1938); Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N. W. 109 (1932).

[49]In discussing the relationship between the guaranties of the Fourteenth Amendment and the police power of the states, Chief Justice Holmes has pointed out: "We

determining reasonableness entails the vesting of a greater latitude of discretion in minor officials. In certain sparsely populated locales sound may not be unreasonable, whereas in heavily populated areas the same sound is unreasonable and therefore a nuisance. Any rules must of necessity be flexible in order to meet varying situations. It has accordingly been held, in cases involving the determination of what constitutes a nuisance, that the granting of broad discretion to a minor official or administrative officer is not an unlawful delegation of the legislative function.[50]

Assuming that standards for regulating a nuisance caused by sound could be set down by an engineer with any degree of certainty by stating the number of decibels[51] allowable, it is difficult to apply this basis of measurement to sound amplification, and those enforcing the ordinance would probably be confused. Furthermore, the volume needed changes under different conditions and situations; a purely mechanical test does not serve in defining a nuisance.

---

must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it is often difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nomulus mutare* as against the lawmaking power." Noble State Bank v. Haskell, 219 U. S. 104, 110 (1911). See note 48 *supra.*

[50]Northwestern Laundry v. Des Moines, 239 U. S. 486 (1916) (ordinance upheld providing that the emission of dense smoke could be prohibited if the city commission determined it was a nuisance); Ryder v. Board of Health, 273 Mass. 177, 173 N. E. 580 (1930) (order of the Board of Health sustained, prohibiting plaintiff's piggery under the statute which empowered the Board to remove all nuisances and causes of sickness within the town); Albany v. Newhof, 230 App. Div. 687, 246 N. Y. Supp. 100 (1930) (ordinance upheld prohibiting slaughtering of cattle in buildings within certain prescribed territory without permission of the common council); Yee Bow v. Cleveland, 99 Ohio St. 269, 124 N. E. 132 (1919) (health commissioner properly allowed to decide on "adequate" ventilation and plumbing of laundries); Lerner v. City of Delavan, 203 Wis. 32, 233 N. W. 608 (1930) (ordinance valid forbidding the keeping of a junk yard without a permit from city council).

[51]WEBSTER, INTERNATIONAL DICTIONARY (Unabridged) (2d ed. 1949) defines "decibel" as follows: "One tenth of a bel. The decibel is the usual unit for measuring the loudness of sounds. It is equivalent to the loss in power in a mile of standard cable at 860 cycles."

IV. Conclusion

To meet the requirements of the Court in the *Saia* case, the ordinance would have to specify exact times and places when loud-speaking devices could be used. This, in effect, would bring forth the very danger which the Court is endeavoring to prevent, since it would be impossible for the Legislature to anticipate all the situations that would present themselves, were no deviations or exceptions permitted from the narrowly drawn regulation. Such legislation would continue to act as unnecessary suppression of freedom of speech and religion in some instances.

In assuming that loud-speaking devices come within freedom of speech as contemplated by the framers of the Constitution, the Court clearly contradicts itself in requiring a narrowly drawn ordinance. In litigation over what is a violation of freedom of speech, the Supreme Court itself has never been able to set standards for its own decisions on this matter, and in recent opinions is further away from a test embodying any reasonable certainty.[52]

In view of the fact that sound, as well as all nuisances, is a nebulous thing, some discretion must be granted to administrative officers in determining when a given situation becomes a nuisance. Although ordinances or statutes can, and therefore should, be more definite than the Lockport ordinance, it is impossible to attain the exactitude that the Court seemingly requires. Admittedly the answer does not lie in permitting wide discretionary power to be vested in one minor official, who may use it as an instrument of oppression; but neither does it lie in forbidding the citizens to protect themselves against disagreeable and unwanted noise and congestion.

An expeditious method of minimizing this possibility, while retaining the flexibility required in the regulation of nuisances, would be to prescribe a hearing on each application for a permit. A duly constituted board would then decide whether or not the applicant's action invades privacy to such a degree that the community's interests would materially outweigh the individual's right to use the loud-speaker. The American

---

[52]Tucker v. Texas, 326 U. S. 517 (1946); Marsh v. Alabama, 326 U. S. 501 (1946); Follet v. Town of McCormick, 321 U. S. 573 (1944); Prince v. Massachusetts, 321 U. S. 158 (1944); West Virginia State Board of Ed. v. Barnette, 319 U. S. 624 (1943); Douglas v. City of Jeanette, 319 U. S. 157 (1943); Martin v. City of Struthers, 319 U. S. 141 (1943); Murdock v. Pennsylvania, 319 U. S. 105 (1943); Jamison v. Texas 318 U. S. 413 (1943); Jones v. City of Opelika, 316 U. S. 584 (1942).