

## Freedom of Speech and Regulation of Sound Amplification Devices - Kovacs v. Cooper

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## FREEDOM OF SPEECH AND REGULATION OF SOUND AMPLIFICATION DEVICES

### *Kovacs v. Cooper*<sup>1</sup>

An ordinance in the city of Trenton, New Jersey, made it unlawful "to play, use or operate for advertising purposes, or for any other purpose whatsoever, on or upon the public streets . . . any device known as a sound truck, loud speaker or sound amplifier . . . 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 . . .". Defendant was operating a sound truck, commenting on a labor dispute in progress at the time in Trenton, when a policeman, hearing the broadcasting, walked in the direction of the sound until he found the truck on a public street. The appellee, a police judge, convicted the defendant of violating the ordinance. On appeal from a judgment of the New Jersey Court of Errors and Appeals affirming,<sup>2</sup> in an equally divided court and without a majority opinion, the decision of the New Jersey Supreme Court which upheld the conviction,<sup>3</sup> the Supreme Court of the United States, with four justices dissenting, affirmed. The precise scope and effect of the decision in the Supreme Court and the rationale of the holding cannot be stated definitely.

Justice Reed announced the judgment of the court and handed down an opinion in which only Chief Justice Vinson and Justice Burton joined, and which was based primarily upon the assumption that the New Jersey Courts had interpreted the ordinance as barring from the streets, not all sound trucks, but only those which made loud and raucous noises. Rejecting the contention that the words "loud and raucous" set a standard so vague, obscure and indefinite as to fall within the doctrine of the *Winters* case<sup>4</sup> the conclusion was reached that to regulate noise in this manner is a valid exercise of the police power of a state; that the "preferred position of freedom of speech . . . does not require legislators to be insensible to claims by citizens to comfort and convenience", as when sound devices are objectionably amplified; that the right of free speech does not include the right to force unwilling people to listen, and sound devices amplified to such an extent have that

<sup>1</sup> 336 U. S. 77, 69 S. Ct. 448 (1949).

<sup>2</sup> The dissents are printed. 135 N. J. L. 584, 52 A. 2d 806 (1947).

<sup>3</sup> *Kovacs v. Cooper*, 135 N. J. L. 64, 50 A. 2d 451 (1946).

<sup>4</sup> *Winters v. New York*, 333 U. S. 507 (1948).

effect. *Martin v. City of Struthers*,<sup>5</sup> which upheld the right of a distributor to summon householders to the door to receive his pamphlets, was distinguished because there the home owner could protect himself by a "do not disturb" sign and the distributor could not force him to take a pamphlet or to listen even if he did come to the door. *Saia v. New York*<sup>6</sup> was also distinguished on the ground that the invalidation of the ordinance there was based primarily on the absence of sufficient standards limiting the exercise of discretion by an official empowered to grant permits for the use of sound trucks.<sup>7</sup>

Justices Frankfurter and Jackson, each of whom had dissented in the *Saia* case, filed separate opinions reaffirming the views which they had there expressed and concurring in the result in the instant case solely for the reasons stated in their prior dissents. Both apparently feel that "aural aggressions" are "implicit in the use of sound trucks" and that it does not matter whether the ordinance prohibits all sound trucks or only those "emitting loud and raucous noises". Justice Jackson specifically disagrees with Justice Reed as to the scope of the ordinance, regarding it as an outright prohibition of all sound trucks.

Justice Murphy dissented separately without opinion.

Justice Black in a dissenting opinion, in which Justices Douglas and Rutledge concurred, stated that the ordinance, both on its face and as interpreted by the New Jersey Courts, imposed an absolute prohibition on all use of sound trucks in the streets of Trenton<sup>8</sup>; that the defendant was charged only with operating a sound truck on the public streets, not with operating one emitting loud and raucous noises, and was convicted only of that charge upon evidence showing nothing more; that in consequence, under Justice Reed's opinion the defendant "will be punished for an offense with which he was not charged,<sup>9</sup> to prove which

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<sup>5</sup> 319 U. S. 141 (1942).

<sup>6</sup> 334 U. S. 558 (1948).

<sup>7</sup> See Note, *Freedom of Speech and Regulation of Sound Amplification Devices*, 9 Md. L. Rev. 285, 286 (1948).

<sup>8</sup> In interpreting the ordinance, the New Jersey Supreme Court, *Kovacs v. Cooper*, *supra*, N. 3, at page 66, 50 A. 2d p. 452, (the Court of Errors and Appeals affirmed without opinion) said it applies only to "(1) vehicles; (2) containing an instrument in the nature of a sound amplifier or any other instrument emitting loud and raucous noises". In another part of the opinion the same Court said, "it prohibits the use upon the public streets of any device known as a sound truck". *Kovacs v. Cooper*, *supra*, N. 3, p. 69, 50 A. 2d at pp. 453-4.

<sup>9</sup> The charge was that "he did on South Stockton Street . . . play, use and operate a device known as a sound truck". See Justice Black's dissent in the instant case.

no evidence was offered,<sup>10</sup> and of which he was not convicted", in itself a violation of due process of law.<sup>11</sup> To affirm a conviction under the ordinance as so interpreted would constitute a repudiation of the *Saia* case, since sound trucks were there placed on the same constitutional level as other media of communication, and, although subject to reasonable regulation as to time, place and volume, could not be completely banned from the city streets consistently with the holding in that case.

Justice Rutledge also dissenting, in a separate opinion, points out the inconsistencies of the case and the impossibility of foretelling its effect, stating that whether or not a state may completely bar sound trucks from public places is still left open for future determination.

The net result of the decision and of the divergent views presented is extraordinarily anomalous. It is specifically stated in Justice Rutledge's dissent that a majority of the court (consisting of Justices Jackson, Black, Douglas, Rutledge, and presumably either Justice Murphy or Justice Frankfurter or both) agree that the ordinance, both on its face and as interpreted by the New Jersey courts, prohibits all sound trucks and not merely those emitting loud and raucous noises. A different majority, made up of Justices Black, Douglas, Rutledge, Reed and Burton and Chief Justice Vinson,<sup>12</sup> also agree or seem to agree that outright prohibition of all sound trucks would be unconstitutional. Only Justices Frankfurter and Jackson, the first inferentially and the second positively, regard an outright prohibition as valid. Should not the result then logically have been that the ordinance involved was unconstitutional and the conviction improper? Yet the result is just the reverse, because of the combination of the minority of three who construe the ordinance as not imposing an absolute bar with the minority of two who believe an absolute bar is valid. Curiously, a judgment of reversal would have been equally anomalous, since it would have set aside a conviction which a majority of the court,

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<sup>10</sup> *Quaere*: Was the fact that the patrolman, after hearing the broadcasting, had to search for the truck in order to find it, evidence of the volume of the sound?

<sup>11</sup> *Cole v. Arkansas*, 333 U. S. 196 (1948). It should be noted that defendant was aware that "loud and raucous" had some implication in his case since he contended that these words were too vague and indefinite to be sufficient as a standard for criminal prosecution. See the Reed opinion in the instant case.

<sup>12</sup> "Absolute prohibition . . . of all sound amplification . . . is . . . probably unconstitutional . . .". See Justice Reed's opinion in the instant case.

though for different and inconsistent reasons, thought was constitutionally correct.<sup>13</sup>

As a guide to state and municipal authorities faced with the practical task of dealing with the sound truck problem, the decision is of little value and confuses rather than clarifies. There is unanimous agreement that some regulation as to time, place and volume would be valid, but a majority also agree that this is not the issue before the court. It is difficult to say whether the *Saia* case is still law or whether it is now repudiated; Justices Jackson, Black, Douglas and Rutledge state that it is in effect repudiated; Justices Reed and Burton, and Chief Justice Vinson believe that it is distinguishable and still authority; Justice Frankfurter agrees that it is distinguishable but insists that it should be repudiated; and Justice Murphy dissents silently. On the face of this analysis then, the *Saia* case may seem to be overruled; yet with two new members on the court who might well be inclined to agree with the reasoning of Justices Reed and Burton and Chief Justice Vinson, it is possible, perhaps even probable, that it is still authority for the reasons given by Justice Reed. In addition to this, in spite of the apparent agreement of at least six justices that absolute prohibition of all sound trucks would be unconstitutional, the result actually is inconsistent with that view, as stated above. Owing to the divided views of the majority which affirmed the conviction, the question of the validity of absolute prohibition is left unanswered.

Basically, we have here, as in the *Saia* case, a conflict between freedom of speech for those wishing to use sound trucks and freedom of thought for those wishing immunity therefrom.<sup>14</sup> Since both are among the basic rights accorded a preferred position by the Supreme Court in recent years, it is not surprising that confusion should result when two such rights conflict. In this connection, an interesting feature of the case is Justice Frankfurter's rebellion in his concurring opinion against the "preferred position" doctrine. To speak of "the preferred position of freedom of speech" is, he contends, to use a "mischievous" phrase, which "expresses a complicated process of constitutional adjudication by a deceptive formula" making for "mechanical jurisprudence." He traces chronologically the evolution of the doctrine and argues that there is no justification in the cases in which the phrase originated for any principle

<sup>13</sup> For a similarly curious anomalous result, cf. *Hoover and Allison Co. v. Evatt*, 325 U. S. 892 (1945).

<sup>14</sup> See the close of Justice Frankfurter's separate concurring opinion.

that legislation restricting the exercise of rights embraced in the First Amendment should be regarded as presumptively invalid. What is really behind the notion sought to be expressed by this phrase, he states, is merely that the courts should feel more free than in other cases to find legislation unconstitutional where "free inquiry" is involved, since it is this which assures us of an "open society as against a closed one"; while they should be less willing to oppose their opinions to those of legislatures in the economic area which is one of changing and debatable views. Furthermore, he reasons, all means of communication are not given the same constitutional rights as the unaided human voice, but raise new problems which were not contemplated by the draftsmen of the Constitution and which can be left to the legislative judgment for solution. In the instant case one of the problems raised is that by the use of sound trucks unwilling people can be forced to listen, thus making further inroads on the "steadily narrowing opportunities for serenity and reflection" which are necessary to freedom of thought; "and without freedom of thought there can be no free society".