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CONSTITUTIONAL LAW-DUE PROCESS-FREEDOM OF SPEECH-LIMITATIONS ON USE OF SOUND AMPLIFICATION DEVICES

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CONSTITUTIONAL LAW—DUE PROCESS—FREEDOM OF SPEECH—LIMITATIONS ON USE OF SOUND AMPLIFICATION DEVICES—Appellant used sound equipment mounted on his truck to comment on a labor dispute. He was convicted in a police court of violating a city ordinance which prohibited the use on any public street of sound amplifying devices emitting loud and raucous noises. The intermediate court of appeal of New Jersey, in affirming the conviction, construed the ordinance to be an absolute prohibition.¹ The conviction was sustained on appeal to the highest court of New Jersey by an evenly divided court of twelve justices.² On appeal to the United States Supreme Court, *held*, affirmed. Justice Reed, joined by Chief Justice Vinson and Justice Burton, found that the ordinance was not a denial of due process of law in that it was sufficiently definite and did not constitute an abridgment of free speech. Justices Frankfurter and Jackson concurred specially. Four justices dissented. *Kovacs v. Cooper*, (U.S. 1949) 69 S. Ct. 448.

In *Saia v. New York*, five members of the Court agreed that the concept of free speech accorded constitutional protection to the use of sound amplification devices.³ The principal case indicates that Justices Reed and Burton have reversed their views expressed in the *Saia* case, where they joined with Justice Frankfurter in asserting that only a problem of municipal regulation of a nuisance was presented.⁴ In the *Saia* case the Court struck down a city ordinance which prohibited unlicensed use of loudspeakers as being a previous restraint on freedom of speech.⁵ Faced with a different type of ordinance in the principal case, Justice Reed interprets it as preventing the use of loudspeakers only if loud and raucous noises are emitted,⁶ and concludes that it is a proper exercise of the state's police power to

¹ *Kovacs v. Cooper*, 135 N.J.L. 64, 50 A. (2d) 451 (1946).

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

³ 334 U.S. 558, 68 S.Ct. 1148 (1948). Chief Justice Vinson, Justices Black, Douglas, Murphy and Rutledge. See 47 MICH. L. REV. 111 (1948); 58 YALE L. J. 335 (1949).

⁴ *Supra*, note 3. In the principal case Justices Frankfurter and Jackson reiterate their views expressed in the *Saia* case.

⁵ *Supra*, note 3; see also *Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666 (1938).

⁶ The Court holds that the words "loud and raucous" through daily use have acquired a sufficiently definite meaning to meet the constitutional requirements of due process of law. See *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948).

regulate freedom of speech to this degree.⁷ If this had been the interpretation given the ordinance by the state courts, the dissenters would probably have agreed that it was valid, for a state may restrict freedom of speech to prevent clear and present danger to the public peace.⁸ But in reading the ordinance as he did, Justice Reed appears to disregard the well settled rule that the Supreme Court must accept the state court's conclusion as to the scope of state statutes,⁹ for the record indicates that the New Jersey courts interpreted the ordinance to prohibit the use on the public streets of any loudspeaker.¹⁰ Other difficulties are present. Appellant was charged and convicted in the New Jersey courts of using a sound truck, not of making loud and raucous noises, as Justice Reed assumes. There was no evidence in the record that appellant's use of the speaker resulted in loud and raucous noises.¹¹ In dissenting, Justice Black argues that the majority of the Court, by affirming appellant's conviction, has convicted him of an offense for which he was not tried. Such a conviction has been held to be a denial of due process of law.¹² In addition, Justice Black contends that this holding reverses the *Saia* decision, since complete prohibition poses a much stronger case for invalidity than does an ordinance imposing prior censorship.¹³ If the *Saia* case has been repudiated, cities can prohibit at will one important means of disseminating information and ideas. But it seems that the Court did not intend this result. Thus, if the Court had before it a clearly worded ordinance absolutely prohibiting the use of loudspeakers, a majority of the Court would probably concur in holding it invalid.

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⁷ In *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762 (1941), a statute prohibiting a parade or procession on a public street without a special license was held valid as a reasonable regulation of freedom of speech and assembly.

⁸ *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900 (1940). The protection accorded freedom of speech has at times been referred to by the Court as "The preferred position of freedom of speech." Justice Frankfurter, in his concurring opinion, criticizes this phrase because it implies that any state law touching communication is presumed invalid, a view he believes to be dangerous and erroneous. Principal case at 455 et seq.

⁹ *Winters v. New York*, 333 U.S. 507, 68 S.Ct. 665 (1948).

¹⁰ *Supra*, note 1. There is no indication that the six justices who affirmed the conviction in the Court of Errors and Appeals of New Jersey entertained a different view. Of the six justices who there voted for a reversal of the conviction, only one agreed with Justice Reed's interpretation. *Supra*, note 2. In the United States Supreme Court the four dissenting justices, with Justice Jackson of the majority, accept the interpretation of the New Jersey courts. In effect, then, appellant's conviction is sustained by a majority of justices who do not agree what constituted his crime.

¹¹ Justice Reed suggests that the mere fact a police officer had to search to locate the sound truck was sufficient evidence of loudness and raucousness on which the New Jersey court could convict. Principal case at 452, n. 6. On this point Justice Black states that, "Possibly the words of the ordinance refer to any noise coming from an amplifier whatever its volume or tone." Principal case at 459.

¹² *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514 (1948).

¹³ Justice Jackson, in his separate concurring opinion, agrees with Justice Black that the principal case repudiates the *Saia* decision.