1969


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of state convey political ideas. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. . . . Here it is the state that employs a flag as a symbol of adherence to government as presently organized.25

These excerpts from Justice Jackson's opinion in Barnette underscore the point that the flag or the preservation of it is not so sacrosanct an interest as to justify denying a constitutionally protected liberty.

There is no mysticism in the American concept of the State or of the nature and origin of its authority. . . . Authority here is to be controlled by public opinion, not public opinion by authority. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.29

Hence, if one differs with the prevailing authority and tries to form a following to create an opinion against that authority, he may speak without fear.30 If one wishes to effectively express rejection of the entire system, what better way to do it than to reject its symbol—the flag. As Justice Douglas in his dissent in Adderly v. Florida31 noted, mere talk, petitions through regular "channels" and other "usual" means of voicing dissent are so futile that other tactics are needed. Justice Black, in his dissent in Beauharnais,32 strongly urged that political protest, because of its valuable content, never be wholly excluded. The peaceful burning of a flag certainly voices an effective political protest.

If the State seeks to elicit patriotism by compulsory adherence to a symbol and to punish those who refuse, it will find that,

Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.33

Nestor L. Olesnyckyj


26 Id. at 641-42.
29 343 U.S. 250 (1952).
vania radio station, WGCB, a broadcast by Reverend Billy James Hargis as part of the "Christian Crusade" series. Hargis in discussing a book by Fred J. Cook, *Goldwater--Extremist on the Right*, made what was rather clearly a personal attack on Cook. Neither radio station WGCB nor its parent company, Red Lion, notified Cook of the attack; nor did they offer him a tape or transcript of the broadcast or time to reply to Hargis' accusations. Cook learned of the attack and requested free time to reply, which was refused by Red Lion, although a copy of the station's rate schedules was sent to him. Cook then appealed to the Federal Communications Commission [hereinafter FCC] which ruled that Hargis' broadcast had been a personal attack on Cook, that Red Lion had failed to meet its obligations under FCC's Fairness Doctrine, and ordered Red Lion to make free time available for Cook to reply to Hargis' charges. Red Lion appealed the FCC's decision to the Court of Appeals for the District of Columbia which upheld the FCC's position as constitutional and otherwise proper. Red Lion then appealed this ruling to the Supreme Court. *Held:* Affirmed. The personal attack principle of the FCC's Fairness Doctrine and the procedures to be followed thereunder are not violative of the first amendment and in fact enhance rather than abridge the freedoms of speech and press. *Red Lion Broadcasting Company v. Federal Communications Commission*, 395 U.S. 367 (1969).

*Red Lion* is the first case to squarely challenge the constitutionality of the FCC's personal attack rule and the Fairness Doctrine of which

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1 The Federal Communications Commission [hereinafter cited as FCC] defines a personal attack as an "attack . . . upon the honesty, character, integrity or like personal qualities of an identified person or group." 47 C.F.R. § 73.123 (1969). See note 29 infra.

2 The FCC regulation on procedures to be followed by licensees under the personal attack rule is cited at note 29 infra.

3 The Fairness Doctrine has been divided into four subheadings: (1) equal time for political candidates, (2) the personal attack rule, (3) fair presentation of opposing sides of issues of public importance, and (4) balanced programming (Continued on next page)
it is a part. What is currently known as the Fairness Doctrine had its inception in the Radio Act of 1927, requiring broadcasters to operate in the public interest. This principle, albeit somewhat ambiguously expressed, was carried through into the Communications Act of 1934, which is, as amended, the currently controlling legislation in this field providing the statutory authority for the FCC regulations. This authority given the FCC by Congress to assure that broadcasters operate in the public interest "... is a broad one, a power 'not niggardly but expansive.'" In addition the Court found a more specific statutory recognition of the Fairness Doctrine in Congress' 1959 amendment to section 315 of the Communications Act of 1934:

This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard.

While the specific principle of the Fairness Doctrine with which the Court was here concerned, i.e. the personal attack rule, had not been specifically enunciated at the time of Congress' action in 1959,

(Footnote continued from preceding page)

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The intent of Congress in enacting this legislation, as evidenced a statement by Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, was clearly to maintain radio as a medium of free speech for the general public. White stated:

We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea . . . that anyone who will may transmit and the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual . . . If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served. 67 ConG. Rec. 5479 (1926).


In amending section 315 of the Act, which accorded equal time to political candidates, to except certain appearances on news programs, Congress stated that this amendment made no exception "from the obligation imposed upon [broadcasters] under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U.S.C. § 315(a).


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the basis of the rule had been noted by the FCC in 1949, and had been elaborated upon in several rulings after that date, prior to 1959. Although Congress did indicate support for an obligation of broadcasters to fairly present both sides of controversial public issues, whether or not specific approval of the general Fairness Doctrine rulings and the embryonic personal attack rule was intended is not really of major significance. It is important, however, that Congress did affirmatively indicate agreement with the basic objective of the Fairness Doctrine. Regardless of Congressional intent in amending section 315, the Court made an interesting analogy in comparing the FCC's personal attack rule to the statutory provisions specifically enacted by Congress in section 315. In light of the fact that when a broadcaster grants time to a political candidate, Congress demands that equal time be afforded his opponents, the Court said, "It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station."

The administrative history of the Fairness Doctrine had its beginning shortly after the adoption of the Radio Act of 1927 in a series of administrative and judicial rulings interpreting the principle of operation in the public interest. In interpreting this phrase "public interest," both the FRC and later the FCC emphasized that: (1) "public interest" means exactly what it says on its face, i.e. that broadcasters are to serve the public and not the private interests of any individuals

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9 See note 21 infra.
10 See note 28 infra.
11 See note 7 supra.
12 The Court found the language of two of the sponsors of the bill to amend section 315 of the Act persuasive in support of the Fairness Doctrine: In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that the provisions remain in the bill [i.e. the section of the amendment quoted at note 7, supra], to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott ... added that: 'It is intended to encompass all legitimate areas of public importance which are controversial, not just politics.' 105 Cong. Rec. 17831. 395 U.S. at 384.
13 395 U.S. at 385.
14 The administrative agency set up by the Radio Act of 1927 was the Federal Radio Commission [hereinafter cited as FRC]. After the enactment of the Communications Act of 1934, this agency became the Federal Communications Commission.
15 See, e.g., Trinity Methodist Church, South v. FRC, 62 F.2d 850 (D.C. Cir. 1932), cert. denied, 288 U.S. 599 (1933); KFKB Broadcasting Co., 10 F.C.C. 515 (1945); Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938); Chicago Federation of Labor, 3 F.R.C. Ann. Rep. 36 (1929), aff'd, Chicago Fed'n of Labor v. FRC, 41 F.2d 422 (D.C. Cir. 1930).
or groups;\(^\text{16}\) (2) the licensee has assumed an obligation, as a form of
civic trustee in regard to broadcast frequencies, to fairly present
competing views on issues of public importance.\(^\text{17}\) While a number of
these early cases involved rather flagrant operations in furtherance
of purely individual or group interests, they did form the core ideals
around which the Fairness Doctrine has developed.

In the 1941 \textit{Mayflower Broadcasting Corporation} case,\(^\text{18}\) the Com-
mission's decision was generally interpreted as a ban on any type of
broadcast editorializing. This prompted the Commission in 1949 to
promulgate a document, the \textit{Editorializing Report},\(^\text{19}\) which is the
statement that sets forth most fully basic FCC policy in regard to the
Fairness Doctrine. Forming the foundation of the Fairness Doctrine,
along with the \textit{Editorializing Report} is the \textit{Fairness Primer}\(^\text{20}\) a 1964
FCC report which more specifically explained FCC policy in this
area through a digest of illustrative rulings.

The \textit{Editorializing Report} is the basic administrative act in
respect to the Fairness Doctrine. While it deals with the general
policy of the Fairness Doctrine, it implicitly recognized in 1949 what
was later to be codified as the personal attack rule.\(^\text{21}\) The \textit{Editorial-
izing Report} placed a two-fold obligation on the broadcast licensee:
(1) that he devote a reasonable proportion of his broadcast time
to the discussion of controversial issues of public importance, and

\(^{16}\) See, e.g., Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929),
rev'd on other grounds, Great Lakes Broadcasting Co. v. FRC, 37 F.2d 993 (D.C.
Cir. 1930), cert. dismissed, 281 U.S. 706 (1930), noted in 2 P & F Radio Reg.
2d 1921 (1964). The FRC added that,

Insofar as a program consists of discussions of public questions, public
interest requires ample play for the free and fair competition of opposing
views, and the Commission believes that the principle applies . . . to
to all discussions of issues of importance to the public. 2 P & F Radio Reg. 2d
1921 (1964).

\(^{17}\) Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941). The FCC succinctly
stated its position on this basis for the Fairness Doctrine:

Freedom of speech on the radio must be broad enough to provide full and
equal opportunity for the presentation to the public of all sides of public
issues. Indeed, as one licensed to operate in the public domain the
licensee has assumed the obligation of presenting all sides of important
public questions fairly, objectively and without bias. The public interest,
not the private, is paramount. \textit{Id}. at 340.

\(^{18}\) \textit{Id}.

\(^{19}\) \textit{Report of the Commission in the Matter of Editorializing by Broadcast
Licensees}, 13 F.C.C. 1246 (1949) [hereinafter cited as \textit{Editorializing Report}].

\(^{20}\) \textit{Applicability of the Fairness Doctrine in the Handling of Controversial
1901 (1964) [hereinafter cited as \textit{Fairness Primer}].

\(^{21}\) " . . . [E]lementary considerations of fairness may dictate that time be
allocated to a person or group which has been specifically attacked over the
station, where otherwise no such obligation would exist." \textit{Editorializing Report},
13 F.C.C. 1246, 1252.
in doing so he be fair.\textsuperscript{22} The broadcaster was characterized as a public trustee and emphasis was placed on his duty to operate with the public interest foremost.\textsuperscript{23}

The Editorializing Report, however, went further than merely requiring the licensee to respond to requests to present opposing views. It was pointed out that the public interest is best served when the people are able "... to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them."\textsuperscript{24} The Commission was thus placing the broadcasters in an active rather than a passive role in fairly presenting controversial issues. The Commission added:

... [I]t is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of opposing viewpoints.\textsuperscript{25}

The Editorializing Report observed that this obligation placed on broadcasters did, to some extent, limit their freedom to use their station solely in the manner they chose, but justified this in that it was done to "... make possible the maintenance of radio as a medium of freedom of speech for the general public."\textsuperscript{26} The Commission noted that only where a licensee's discretion was so limited by the obligation to provide a reasonable opportunity for the presentation of balanced views on issues of sufficient importance to merit air time could radio be so maintained as a medium of free speech for all the people.\textsuperscript{27}

The Fairness Primer, issued in 1964, was essentially a bringing together of the FCC's position on the Fairness Doctrine, including the personal attack rule, through a restatement of pertinent FCC rulings subsequent to 1949.\textsuperscript{28}

\textsuperscript{22} 2 P & F Radio Reg. 2d 1923 (1964).
\textsuperscript{23} "... [T]his licensee responsibility is to be exercised in the interests of, and as a trustee for the public at large which retains ultimate control over the channels of radio and television communications." Editorializing Report, 13 F.C.C. 1246, 1247 (1948).
\textsuperscript{24} Id. at 1251.
\textsuperscript{25} Id.
\textsuperscript{26} Id. at 1250.
\textsuperscript{27} Id.
\textsuperscript{28} While the Fairness Primer dealt with the broad range of FCC policy under ( Continued on next page)
The principles which were established in the Editorializing Report and the Fairness Primer in regard to the personal attack rule have recently been codified into a specific and explicit set of rules for broadcast licensees to follow.29

(Footnote continued from preceding page)

the Fairness Doctrine, the section devoted to the personal attack rule noted a number of decisions in which the rule had been developed. In Billings Broadcasting Co., 62 F.C.C. 736 (1962), the Commission had stated:

Where ... a station's editorials contain a personal attack upon an individual by name, the fairness doctrine requires that a copy of the specific editorial or editorials shall be communicated to the person attacked either prior to or at the time of the broadcast of such editorials so that a reasonable opportunity is afforded that person to reply. This duty on the part of the station is greater where ... interest in the editorials was consciously built up by a station over a period of days and the time within which the person attacked would have an opportunity to reply was known to be limited. 23 P & F Radio Reg. 951 (1962).

In the case of Douglas A. Anello, 63 F.C.C. 850 (1963), the Commission added that obligations under the personal attack rule applied to anything broadcast by a licensee:

The personal attack principle is applied whether a station is personally involved or not. The licensee is fully responsible for all matter which is broadcast over his station. ... Where a personal attack is made and no script or tape is available, good sense and fairness dictate that the licensee send as accurate a summary as possible of the substance of the attack to the person or group involved. 2 P & F Radio Reg. 2d 1917 (1963).


29 The codification is as follows:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

Note: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315 (a) of the Act, 47 U.S.C. § 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance. 29 Fed. Reg. 10415. The categories listed in (iii) are the same (Continued on next page)
The major question which was before the Court in *Red Lion* was the licensee's contention that the first amendment protects "... their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency." They argued that no man could be prohibited from saying what he thought or from refusing in his statements to give equal weight to opposing views.

Although it was observed that the broadcasting medium was not unaffected by the first amendment, the Court noted that differences in character of media could justify the application of different first amendment standards, and added, "The right of free speech of a broadcaster... does not embrace a right to snuff out the free speech of others."

The Court also found the limited number of broadcast frequencies to be a persuasive factor in applying somewhat different first amendment standards to broadcasters as compared to the press. The broadcast licensee was characterized by the Court, as by the FCC, as a trustee for the public rather than as one having an exclusive monopoly, as the appellant's arguments implicitly asserted. The Court stated that no constitutional right extended to a licensee to hold a broadcast license or to monopolize a frequency to the exclusion of the remainder of the public.

(Footnote continued from preceding page)

as those specified in Section 315(a) of the Act. 47 C.F.R. §§ 73.123, 73.300, 73.595, 73.679 (1969) all identical.

In a memorandum opinion written at the time of the codification of the previously "unwritten" personal attack rules cited above, the FCC commented on criticism of the regulations:

Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities. Further we do not perceive any discouragement to controversial issue programming, except for a licensee who wished to present only one side of such programming—namely, the personal attack and not the response by the individual attacked. 8 F.C.C. 2d 721, 725 (1967).

30 395 U.S. at 386.
31 Id.
35 "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." 395 U.S. at 386.
36 395 U.S. at 389.
37 Id.
There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to . . . present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.38

In addition the Court was unable to find any merit in appellant's contention that the personal attack rule and the Fairness Doctrine would have what might be termed a "chilling effect" on their freedom of expression by forcing a form of self-censorship on broadcasters because of their fear of being required to make free reply time available to speakers whose views might be unpalatable to the licensees.39 While on the surface this may appear to be a reasonable argument, it would at the same time seem incongruous for broadcast licensees to invoke first amendment protections in order to allow themselves to tread along the precipice of libel and distortion without any obligation to fairly present an opposing view. The bias of this contention is evident, and its real meaning was seen in an earlier statement by the FCC: " . . . [W]e do not perceive any discouragement to controversial issue programming [by the codification of the personal attack rule] except for a licensee who wished to present only one side of such programming."40

The specific issue before the Court in Red Lion was the constitutionality of the personal attack principle of the Fairness Doctrine. However, the Court concerned itself with the overall policy of the Fairness Doctrine. While the Court limited its holdings to the regulations and the ruling in issue here, it is important that it dealt with the broader view of the Fairness Doctrine, since there is a great deal less argument as to the propriety of the personal attack rule than as to the other standards of the Fairness Doctrine. Basic disagreement lies more with other FCC regulations and rulings under the Fairness Doctrine than with the personal attack rule, especially when the policy is extended in its scope as it was in the recent FCC ruling regarding anti-smoking commercials.41 The equities seem clearer in a case of personal attack, as in Red Lion, where the character of a person or group is assailed, than under other Fairness Doctrine requirements that place an obligation on broadcasters to affirmatively take steps to present opposing views on issues of public importance. The Court, while specifically dealing only with the

38 Id.
39 Id. at 392-93.
40 S. F.C.C. 2d 721, 725 (1967); see note 29 supra.
41 WCBS-TV, 9 P & F RADIO REG. 2d 1423, aff'd on reconsideration, 11 P & F RADIO REG. 2d 1901 (1967).
personal attack rule, indicated support of the basic policy of the Fairness Doctrine. The Court found that policy not only constitutionally supportable, but absolutely essential to the maintenance of a broadcasting medium as an instrument of freedom of expression, untainted by personal or group biases. Combining this factor with the scarcity of broadcast frequencies and the necessary government control of these frequencies, a different interpretation of first amendment rights in regard to broadcasting was justified by the Court, as related to other media. The Court pointed out, however, that these varied first amendment standards as to broadcasters do not affect the basic substantive rights guaranteed by the first amendment.\footnote{The specific application of the fairness doctrine in \textit{Red Lion} \ldots enhance[s] rather than abridge[s] the freedoms of speech and press protected by the First Amendment.' 395 U.S. at 375.}

The Court had stated in an early opinion that, "\ldots [the first] amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, \ldots"\footnote{\textit{Associated Press v. United States}, 326 U.S. 1, 20 (1945).} This is the overriding significance of \textit{Red Lion}—its emphasis on the necessity that the broadcasting industry in the United States provide a free and fair forum for opposing views on all public issues, regardless of how distasteful they may be to the broadcasters or to the majority of American citizens.

In a time when the influence of the electronic communications media has become such a pervasive force in modern American society, when it is not uncommon for a quarter or more of this country's population or of the population of any geographic area to see and/or hear one opinion or one view on a public issue at the same instant, we can hardly require less than what has been prescribed by the FCC through the Fairness Doctrine. As the FCC observed in the Editorializing Report, it is the right of the public to be informed which is the fundamental concern—not the right of the government, or a broadcaster, or an individual to put on the air his own particular views. This right of the public to be informed is "\ldots the foundation stone of the American system of broadcasting."\footnote{\textit{Editorializing Report}, 13 F.C.C. 1246, 1256 (1949).}

The question immediately raised is: What about the other communications media, \textit{i.e} the press? This is where the \textit{Red Lion} decision is disappointing—in its reliance on the "limited access" and "uniqueness" arguments\footnote{See note 35 supra.} which are used to justify the application of different first amendment standards to broadcasters. By basing its decision so much on this ground, the Court neglected an opportunity
for an essential reassessment of the first amendment in relation to all communication media—both printed and electronic—an interpretation based not on technical features and uniqueness concepts of media, but on the consideration that all media are, in a sense, trustees. They are trustees of the realm of public debate, and an affirmative obligation to provide and encourage free expression of opposing views on all issues of public importance should extend to all communications media—not only to radio and television.\textsuperscript{46} Noted constitutional scholars have commented on this view of the first amendment:

The true meaning of freedom of speech seems to be this. One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern.\textsuperscript{47}

Professor Barron, one of the leading exponents of the idea of freedom of access to the press has stated:

The late Professor Meiklejohn, who has articulated a view of the first amendment which assumes its justification to be political self-government, has widely pointed out that 'what is essential is not that everyone shall speak, but that everything worth saying shall be said'—that the point of ultimate interest is not the words of the speakers but the minds of the hearers.\textsuperscript{48}

While the Court would have had to go far beyond the issue it was asked to decide in this case in order to make any such reinterpretation of the first amendment, it would appear that the Court could have done more justice to the public's relation to the communication media if it had more firmly founded its opinion on the similarities rather than the differences in the media—or at least not so pointedly emphasized those differences. The question is not whether differences exist, but whether these differences justify varied views of the first amendment.

The Red Lion decision is important because of its strong support of the FCC's Fairness Doctrine. It would have been a more important decision if it had decisively opened the door for a reassessment of the function of the first amendment in relation to the communication media in contemporary society. As Professor Barron has observed:

\textsuperscript{46} For an extended discussion of this topic see Comment, \textit{The Red Lion Case: An Opportunity for First Amendment Reappraisal}, 29 U. Pitt. L. Rev. 691 (1968).
\textsuperscript{47} Z. Chafee, \textit{Free Speech in the United States} 31 (1941).
The changing nature of the communications process has made it imperative that the law show concern for the public interest in effective utilization of media for the expression of diverse points of view. Confrontation of ideas, a topic of eloquent affection in contemporary decisions, demands some recognition of a right to be heard as a constitutional principle.49

C. Grey Pash, Jr.

CIVIL PROCEDURE — FEDERAL RULE 23 — AGGREGATION OF CLAIMS. — Plaintiff brought a class action in Missouri federal court alleging jurisdiction based on diversity of citizenship.1 Since plaintiff's individual claim was less than $10,000, defendant moved dismissal for failure to show jurisdiction, contending that aggregation of individual claims to reach the jurisdictional amount was improper in actions under Rule 23.2 The Eighth Circuit Court of Appeals affirmed the district court in holding aggregation improper.3 Soon thereafter, the Tenth Circuit reached the opposite result under similar circumstances and allowed aggregation of claims to invoke diversity jurisdiction.4 Because of the conflict between the position of the Fifth5 and Eighth Circuits on one hand and the Tenth Circuit on the other, the Supreme Court granted certiorari.6 Held: Aggregation was improper. Under Federal Rule 23, separate and distinct claims may not be added together to satisfy the amount in controversy requirement of 28 U.S.C. § 1332. Snyder v. Harris, 394 U.S. 332 (1969).

49 Id. at 1678.

1 The substance of her complaint was that certain directors of the Missouri Fidelity Union Trust Life Insurance Company had sold their respective shares at inflated prices, that the money exceeding the fair market value represented payment to those men to obtain control of the company, and that the excess should be distributed among the stockholders.

2 28 U.S.C. § 1332 (1964) requires, inter alia, a showing that "... the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs. ..." The plaintiff contended that she and 4,000 other stockholders were entitled to aggregate their individual claims to reach an amount in controversy of about $1,200,000.

3 Snyder v. Harris, 309 F.2d 204 (8th Cir. 1967), cert. granted, 393 U.S. 911 (1968). This decision was congruous with a similar ruling by the Fifth Circuit Court of Appeals in Alvarez v. Pan American Life Ins. Co., 375 F.2d 992 (5th Cir. 1967), cert. denied, 389 U.S. 827 (1967).

4 Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968), cert. granted, 393 U.S. 911 (1968). This case is the companion to the one which is the subject of this comment. In a class action, the plaintiff alleged illegal collection of a city franchise tax from him and 18,000 other customers living outside the city limits. Although the alleged total overcharge was unknown, the court permitted Coburn to aggregate his $7.81 claim with those of the other class members, which aggregate was alleged to total more than $10,000.

5 See note 3 supra.

6 Snyder was affirmed; Coburn was reversed. See note 4 supra.