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The Right to Reply: A Challenge to Freedom of the Press

Henry J. Van Wageningen

CASES NOTED

THE RIGHT TO REPLY: A CHALLENGE TO FREEDOM OF THE PRESS

Tornillo was a candidate for the Florida state legislature. After the *Miami Herald*[1] printed two editorials attacking his personal character, Tornillo demanded verbatim publication of his replies pursuant to section 104.38 of the Florida Statutes.[2] Upon refusal, Tornillo filed a complaint for declaratory and injunctive relief. Because of the imminence of the election, the Dade County Circuit Court granted an emergency hearing and held that section 104.38 violated the constitution of Florida[3] and the fourteenth amendment of the United States Constitution on the grounds that the statute restrains freedom of speech and press and that it is impermissibly vague and indefinite. On direct appeal,[4] the Supreme Court of Florida *held,* reversed and remanded: Section 104.38 of the Florida Statutes does not abridge the freedom of speech and press, and it lies within the limits prescribed by the constitutions of Florida and the United States.[5] *Tornillo v. Miami Herald Publishing Co.,* 287 So. 2d 78 (Fla. 1973), *appeal docketed,* 42 U.S.L.W. 3341 (U.S. Nov. 19, 1973).

1. The Miami Herald is Florida's largest newspaper with a circulation of over 400,000. It is owned by Knight News, Inc., a Florida corporation commanding one of the largest newspaper chains in the country. See 15 FLA. TREND MAGAZINE 34 (March 1973).

2. FLA. STAT. § 104.38 (1971) [hereinafter referred to as section 104.38].

Newspaper assailing candidate in an election; SPACE FOR REPLY.—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provision of this section shall be guilty of misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

3. Tornillo v. Miami Herald Publishing Co., 38 Fla. Supp. 80 (1972). The applicable constitutional provisions are:

FREEDOM OF SPEECH AND PRESS.—Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

FLA. CONST. art. I, § 4.

DUE PROCESS.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

FLA. CONST. art. I, § 9.

4. FLA. CONST. art. V, § 3(b)(1).

5. For its holding, the Supreme Court of Florida drew its authority from the following sections of the state and federal constitutions:

U.S. CONST. art. IV, § 4.

The United States shall guarantee to every State in this Union a Republican Form

The Florida Supreme Court upheld section 104.38 by favorably applying the principles and language contained in the decisions of the United States Supreme Court which deal with press freedom under the first amendment. It is the Supreme Court's position, then, which must be examined in analyzing *Tornillo*. The United States Supreme Court has traditionally refused to sanction state regulation of the first amendment freedom to express political views.[6] An independent press has been held indispensable to a well informed public in a system committed to peaceful social change.[7] With this in mind, the press was initially granted constitutional immunity from censorship despite a recognition that the privilege could be abused. Abuses were to be tolerated as unavoidable in order to achieve the higher goal of an unfettered "marketplace of ideas."[8] To insure the viability of that concept, the courts insulated the broad, yet vulnerable, immunity of the press from the power of government by requiring that legislatures may "regulate in the area only with narrow specificity."[9] To enforce this requirement the courts have viewed all statutes affecting the first amendment freedoms with a presumption of unconstitutionality, placing the burden on the government to prove otherwise.[10]

Only in specific areas is a newspaper's freedom to publish subject to government control. Commercial speech, for instance, does not enjoy the same protection under the first amendment as does socially or politically oriented commentary.[11] The press may also be regulated by laws

of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .

FLA. CONST. art. VI, § 1.

REGULATION OF ELECTIONS.—All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

Also see text of FLA. CONST. art. I, § 4, at note 3 *supra*.

6. Mills v. Alabama, 384 U.S. 214, 219-20 (1966); Schneider v. Massachusetts, 308 U.S. 147 (1939).

7. Mills v. Alabama, 384 U.S. 214, 219 (1966); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Near v. Minnesota, 283 U.S. 697 (1931). The first amendment was promulgated to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957).

8. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2111-13 (1973); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964).

9. NAACP v. Button, 371 U.S. 415, 433 (1963); *accord*, New York Times Co. v. United States, 403 U.S. 713 (1971) (5-4 decision in which the government unsuccessfully sought to enjoin two newspapers from publishing contents of classified studies on Viet Nam policy); Ashton v. Kentucky, 384 U.S. 195 (1966).

10. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam), *quoting* Bantam Books, Inc. v. Sullivan, 372 U.S. 50, 70 (1950); NAACP v. Button, 371 U.S. 415, 438 (1963); Palko v. Connecticut, 302 U.S. 319, 327 (1937); Thomas v. Collins, 323 U.S. 516, 530 (1935); Near v. Minnesota, 283 U.S. 697 (1931).

11. Pittsburg Press Co. v. Comm'n on Human Relations, 93 S. Ct. 2553 (1973) (up-

which affect its function as a business enterprise for profit.[12] In the area of political commentary, however, newspapers are vulnerable to censorship only if a clear and present danger to a compelling state interest makes regulation absolutely necessary.[13]

Outside these limited areas, contemporary Supreme Court decisions have enlarged the scope of press immunity to further insure "uninhibited, robust and wide-open" debate on public issues in spite of "vehement" and "caustic" attacks on public officials.[14] Thus, *New York Times Co. v. Sullivan*[15] precluded actions of libel against newspapers absent a showing that the defamatory falsehood was printed "with knowledge of its falsity or with reckless disregard of whether it was true or false."[16] Corollary decisions have since applied the *Sullivan* test to all public figures[17] and to individuals affected by issues of public or general concern.[18] Without such protection, the Supreme Court believed that newspapers would drift toward self-censorship to the ultimate detriment of the public.[19]

In comparison, broadcasters in radio and television must adhere to the Federal Communications Commission's fairness doctrine, which imposes on them a duty to present the viewing and listening public with fair and impartial coverage of public issues. Furthermore, the fairness

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holding a city ordinance which forbade publishing employment advertisements under headings designating preference by sex); Valentine v. Chrestensen, 316 U.S. 52 (1942). *See also* Approved Personnel, Inc. v. Tribune Co., 177 So. 2d 704 (Fla. 1st Dist. 1965) (holding that in absence of statutory regulation, a newspaper may publish or reject commercial advertising). *But see* New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964) (holding that if the advertisement itself deals with matters of the highest public interest and concern, it is protected by the first amendment).

12. Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (upholding application of the Fair Labor Standards Act to newspapers); Associated Press v. United States, 326 U.S. 1 (1945) (upholding application of the Sherman Antitrust Act to press enterprises); Associated Press v. NLRB, 301 U.S. 103 (1937) (upholding application of the National Labor Relations Act to the press); Chronicle & Gazette Publishing Co. v. Attorney General, 94 N.H. 148, 48 A.2d 478 (1946), *appeal dismissed*, 329 U.S. 690 (1947).

However, the Court has on several occasions invalidated laws which infringe on the special needs of a vigorous and independent press. Martin v. Struthers, 319 U.S. 141 (1943) (law prohibiting door to door distribution of leaflets); Lovell v. City of Griffin, 303 U.S. 444 (1938) (law requiring license for the distribution of printed matter); Grosjean v. American Press Co., 297 U.S. 233 (1936) (law taxing revenue of newspapers with circulation over 20,000).

13. Terminello v. Chicago, 337 U.S. 1 (1949) (restricting publications creating breach of the peace); Winters v. New York, 333 U.S. 507 (1948) (banning publications concerning "deeds of bloodshed and lust"); Musser v. Utah, 333 U.S. 95 (1948) (forbidding publications advocating polygamy); Gitlow v. New York, 268 U.S. 652 (1925) (forbidding socialist publications advocating overthrow of government); United States v. Hunter, 459 F.2d 205 (4th Cir. 1972) (banning advertisements for apartments indicating racial preference).

14. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

15. *Id.* [hereinafter referred to as *Sullivan*].

16. *Id.* at 254.

17. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

18. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Time, Inc. v. Hill, 385 U.S. 374 (1967).

19. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50 (1971); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 393 (1969); NAACP v. Button, 371 U.S. 415, 433 (1963).

doctrine specifically provides for an "equal time" access to the media if a broadcaster editorially attacks the personal character of a candidate for public office or if the broadcaster airs the political advertisements of his opponents.[20] Broadcasters are regulated by the government because of inherent technological limitations not found in the printed media. Because the airwaves constitute a finite and "scant resource" which is not available to all, broadcasters necessarily occupy the role of public trustees. These limitations, however, have been held inapplicable to newspapers.[21]

The growth of publishing empires and the increasing concentration of the mass media into fewer hands[22] has engendered claims that newspapers no longer reflect the "marketplace of ideas" concept envisioned by past Supreme Court decisions. Instead, the daily newspapers are charged with having become the conduits for the opinions of a homogeneous publishing elite.[23] As alternative channels for expression dry up, politicians find it increasingly difficult to defend themselves from attack. Therefore, it is argued, the principles of the fairness doctrine should be extended to newspapers in order to protect the politician from the adverse effects of monopolization. Extension of the fairness doctrine to newspapers, however, may not be necessary. Congress has attempted to decelerate the growing problem of press "monopolization" by supporting lower postal rates[24] to defray the operating costs of the smaller publications, and by granting to large newspapers limited anti-trust immunity to preserve the reportorial and editorial independence of financially distressed publications.[25]

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20. The right of access does not extend to statements arising from bona fide news coverage by the broadcaster. In such cases the broadcaster's duty is to follow the guidelines of impartiality, and he risks the revocation of his license if he breaches that duty. There is no initial right to access for the purposes of political advertisement, however. Communications Act of 1934, tit. III, § 301, 48 Stat. 1801, *as amended*, 47 U.S.C. § 301 *et. seq.*, § 315(a) (1971); 47 C.F.R. §§ 73.123, .300, .598, .679 (1972). For a summary of the development of the fairness doctrine, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969).

21. "Unlike broadcasting, the publication of a newspaper is not a government conferred privilege. . . . [T]he press and government have had a history of disassociation." Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 136 (9th Cir. 1971); *accord*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Mills v. Alabama, 384 U.S. 214 (1966).

22. The nineteen largest publishing chains own more than three hundred and thirty dailies. The chains now contol one half of the dailies, three quarters of the television stations and one third of the radio stations. Rucker, *Let's Protect Our Dying First Freedom*, in READINGS IN MASS COMMUNICATION 364 (1970). For further statistics on the historical development of media concentration, see *Hearings on S. 1312 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967).

23. *See generally* Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Bennet, *Media Concentration and the FCC: Focusing with a Section Seven Lens*, 66 NW. U.L. REV. 159 (1971); Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); Note, *Vindication of the Reputation of a Public Official*, 80 HARV. L. REV. 1730 (1967).

24. 39 C.F.R. § 132.1 (1972).

25. Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1971).

The Massachusetts legislature recently submitted a proposed statutory amendment for an advisory opinion by its supreme court. The amendment provided a political candidate with a right of access to a newspaper which printed any of his opponent's advertisements if they were detrimental to his campaign.[26] That court held the provision unconstitutional on three grounds: (1) that the fairness doctrine applied only to broadcasters;[27] (2) that the measure might "produce the chilling effect of discouraging newspapers . . . from accepting any political advertisements . . ." thereby restricting the distribution of information to the electorate;[28] and (3) that no state interest was served by imposing a "right of access" despite the "monopolistic" status of newspapers.[29]

In opposition to that theory, the instant case presents a bold reinterpretation of press immunity under the first amendment. By holding that the monopolistic press had jeopardized the unrestricted flow of information, and by maintaining that a well informed public is critical to the election process, the Supreme Court of Florida legitimized section 104.38 as necessary to the furtherance and protection of a compelling state interest. In reaching this conclusion, the court has, for the first time, consciously extended the guidelines of the fairness doctrine to newspapers, emphasizing that the statute does not exclude press comment, but instead assures an atmosphere of free debate as intended by the first amendment.[30]

Both *Sullivan* and *Tornillo* declare themselves in favor of robust and wide-open debate. But section 104.38, as upheld actually counterpoises the effect of *Sullivan*, restricting the independence of the press[31] by providing candidates with "access" when their personal characters have been assailed.[32] Section 104.38 also castigates the press for printing matters which, in fact, are not libelous, and any truthful and bona fide criticism, if unfavorable, presumably gives candidates a "right of access," or a cause of action if the newspaper declines to grant "equal space."[33] In that context, the statute virtually divorces the press from its

26. Opinion of the Justices, 298 N.E.2d 829 (Mass. 1973) (declaring proposed amendment to statute which would impose the basic principles of the fairness doctrine as to political advertising on newspapers).

27. *Id.* at 833.

28. *Id.* at 834.

29. [C]ompulsion to publish all responsive political advertisements . . . goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express . . . political ideas which otherwise would not be published.

Id. at 835.

30. 287 So. 2d 78. In the case of State v. News Journal Corp., (County Judge's Ct. for Volusia County, Florida, February 14, 1972), Judge Durden held section 104.38 unconstitutional as impermissibly vague and not applicable to the principles of the fairness doctrine. The Attorney General of Florida declined to support section 104.38 both at that trial and at a hearing before Judge Christie of the Dade County Circuit Court concerning the instant case. Tornillo v. Miami Herald Publishing Co., 38 Fla. Supp. 80 (1972).

31. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

32. See note 14 *supra*, and accompanying text. *See generally* articles cited note 25, *supra*.

33. Fla. Stat. § 104.38 (1971) provides that charges of misfeasance in office and attacks

constitutionally protected role as an independent critic of government.[34] The Supreme Court of Florida, however, emphasizes that *"no specified newspaper content is excluded"*[35] by section 104.38, implying that commanding a newspaper to publish against its will is not equivalent to government control of news content. This contention has been rejected by past cases, holding that "[t]here is no difference between compelling publication of material . . . and prohibiting a newspaper from printing news or other material."[36]

The Supreme Court of Florida predicts that vanishing competition within the media will ultimately result "in a form of private censorship."[37] It prefers the alternative of public control over newspapers under the principles of the fairness doctrine as enunciated in the Supreme Court decision of *Red Lion Broadcasting Co. v. FCC*.[38] That decision, however, was specifically limited to instances involving the peculiarities of the broadcasting media. The court in *Tornillo* attempted to hurdle this gap by taking judicial notice of the dependence of newspapers on the telegraph wires and the airwaves in *gathering* its news before publication.[39] Curiously enough, Justice Roberts, specially concurring in the court's per curiam decision, distinguishes *Columbia Broadcasting System, Inc. v. Democratic National Committee*[40] as inapplicable to the facts in *Tornillo* because the former is limited to broadcasters.[41] The fact that *Red Lion* applies but *Columbia Broadcasting* does not, is a contradiction that is left unexplained.

Tornillo also interprets section 104.38 as a legitimate vehicle for the maintenance of *"conditions conducive to free and fair elections."*[42] In Mills v. Alabama, the United States Supreme Court summarily dismissed a similar argument by stating: "We should point out at once that this question in no way involves the extent of a State's power to regulate

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on a candidate's public record are punishable as misdemeanors in the first degree if the newspaper refuses to grant equal space. See note 2 *supra*.

34. *See* Mills v. Alabama, 384 U.S. 214 (1966).

35. 287 So. 2d at 82.

36. Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (9th Cir. 1971). *Accord, e.g.*, Pittsburg Press Co. v. Comm'n on Human Relations, 93 S. Ct. 2553 (1973); Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); Avins v. Rutgers State Univ., 385 F.2d 151 (3d Cir. 1967); Approved Personnel, Inc. v. Tribune Co., 177 So. 2d 704 (Fla. 1st Dist. 1965). "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." Z. CHAFFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1946).

37. 287 So. 2d at 83.

38. Red Lions Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (upholding FCC's regulations within the scope of the fairness doctrine). See note 20 *supra* and accompanying text.

39. 287 So. 2d at 87.

40. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 93 S. Ct. 2080 (1973) (holding that the Democratic Party could not compel a television station to air its political advertisements unless the opposition had been granted the privilege). See note 20 *supra* and accompanying text.

41. 287 So. 2d at 87.

42. 287 So. 2d at 81.

conduct in and around the polls . . . ."[43] The "question" the Court was referring to was whether a State could restrain newspapers from commenting on the candidates on election day. If the Court was unwilling to accept this imposition on newspapers, it can hardly be expected to adopt the rationale expounded in *Tornillo* which extends the State of Florida's right to regulate newspapers to the entire election period.

The Supreme Court of Florida sought to combat the adverse effects of an overly concentrated ownership of the media, a problem engendered by the growth of newspapers as *business* enterprises. Unlike the political independence of newspapers which is protected by the first amendment, the business and economic aspects of a newspaper's operation are subject to anti-trust legislation.[44] Congress has already shown its ability to regulate a newspaper's finances through the Newspaper Preservation Act.[45] Thus, the better solution rests squarely on the legislatures to tackle the problem of concentration in the mass media at its roots. The courts should not sacrifice the political potency of newspapers by upholding a questionable statute, which seeks to solve an economic problem with a political solution, at the expense of the first amendment. Justice Douglas recently quoted Thomas I. Emerson, a leading first amendment scholar, who said,

> any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all 'newsworthy' events and print viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.[46]

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43. Mills v. Alabama, 384 U.S. 214, 218 (1966). The Alabama statute which prohibited newspapers from supporting candidates on election day was held unconstitutional as an "obvious and flagrant abridgement of freedom of the press" because it muzzled a newspaper when it can be most effective as an independent and outspoken critic of government. *Id.* at 219.

44. Associated Press v. United States, 326 U.S. 1 (1944).

> [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, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.

Id. at 20.

45. 15 U.S.C. §§ 1801-04 (1971) (granting large newspapers limited anti-trust immunity to allow smaller newspapers to merge production facilities *but not* editorial or reportorial staffs).

46. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 93 S. Ct. 2080, 2110 (1973). An alternative to the problem of press concentration in the form of "press councils" has steadily been growing in popularity around the country and the idea has been adopted in several states. The press council provides an independent forum in which complaints are aired, mediated and then ruled upon. Prior to the hearing, the aggrieved party waives his right to litigate the issue in the courts of law, and the newspaper, in turn, voluntarily agrees to abide by the decision of the Council. The Councils are composed of newspapermen and

Both the constitutional and policy reasons set forth above appear to warrant reversal by the United States Supreme Court.

HENRY J. VAN WAGENINGEN

SIX-MEMBER CIVIL JURY ON THE FEDERAL LEVEL

After a federal district court judge scheduled this civil diversity case to be tried before a six-member jury, as required by the local rules of the United States District Court of Montana,[1] petitioner filed a writ of mandamus to direct the judge to impanel a jury of twelve. The United States Court of Appeals for the Ninth Circuit denied the writ.[2] On certiorari to the United States Supreme Court, *held*, affirmed: The local federal court rule providing for six-member juries in civil suits does not violate either the seventh amendment[3] or rule 48 of the Federal Rules of Civil Procedure.[4] *Colgrove v. Battin*, 93 S. Ct. 2448 (1973).

There has been much debate as to the interpretation of the words of the seventh amendment providing that "[i]n suits at common law . . . the right of trial by jury shall be preserved . . . according to the rules of the common law." One view would incorporate into the American jury trial system all the common law rules regarding jury trials. The Supreme Court in *Capital Traction Co. v. Hof*[5] found that the jury trial referred to in the Constitution is the same as it existed in England at the time the Constitution was adopted. Thus, it has been held that a constitutional jury requires twelve men, even though the number is not specified in the Constitution, and that with less than twelve there is no jury at all.[6] Twelve-member juries have also been given great support in other federal court decisions.[7]

A second interpretation of the seventh amendment is that the jury trial should be preserved in its most fundamental form without including

prominent lay figures in the community. See A. BALK, A FREE AND RESPONSIVE PRESS (1973); BACK TALK: PRESS COUNCILS IN AMERICA (W. Rivers ed. 1972).

1. "A jury for the trial of civil cases shall consist of six persons . . . ." U.S. DIST. CT. FOR DIST. OF MONT. (CIV.) R. 13(d)(1).

2. Colgrove v. Battin, 456 F.2d 1379 (9th Cir. 1972).

3. "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

4. "The parties may stipulate that the jury shall consist of any number less than twelve . . . ." FED. R. CIV. P. 48.

5. 174 U.S. 1 (1899).

6. Patton v. United States, 281 U.S. 276 (1930). This case discussed the "trial by jury" clause of the sixth amendment.

7. *E.g.*, Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916); Thompson v. Utah, 170 U.S. 343 (1898); Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942).