KEYNOTE ADDRESS: THREE CHEERS FOR *RED LION*

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Thank you. It is a distinct pleasure to be back in D.C. at a great school to talk about a great Supreme Court decision. I apologize for my comments' amounting to merely a case comment—my general view is that media policy should be examined from the perspective of democratic and economic theory. The occasion of this conference, however, calls for some more specific remarks about *Red Lion*.[1]

My title "Three Cheers for *Red Lion*," however, requires comment. The last time I was in D.C., I was at a conference honoring Jerome Barron,[2] possibly the greatest scholar in this area over the last fifty years. There, I criticized the Fairness Doctrine, for which *Red Lion* is most known, as a disaster for progressive media law—as an ideologically biased, centrist, ineffectual, censorious policy.[3] That critique leaves the question: Why the title of this talk, "Three Cheers for *Red Lion*"?[4]

My claim is that Justice White's opinion in *Red Lion* merits great respect for making three absolutely essential points (hence three cheers) that are regularly ignored by legal commentators and often even by the Court. Namely, *Red Lion* merits praise, first, for announcing the correct central constitutional principle for media policy; second, for being fundamentally a media and not merely a broadcast case; and, third, for properly understanding and explaining the economic basis of regulation.

Preliminarily, however, a point that *Red Lion* has in common with most

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1. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

2. *Access to the Media—1967 to 2007 and Beyond: A Symposium Honoring Jerome A. Barron's Path-Breaking Article, Introductory Remarks by the Honorable Stephen G. Breyer*, 76 GEO. WASH. L. REV. 819 (2008).

3. *See* C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS 195–97 (2007) (detailing a version of these criticisms).

4. *See generally* C. Edwin Baker, Turner Broadcasting*: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (elaborating more fully and contextualizing the themes discussed in this talk).

great First Amendment cases merits notice. *Red Lion* did not apply strict scrutiny. In fact, it did not apply any announced level of scrutiny to evaluate the government action at issue. But contrary to common modern misreadings, the same is true of the great cases in the First Amendment canon: for example, *West Virginia Board of Education v. Barnette*,[5] *Brandenburg v. Ohio*,[6] *New York Times Co. v. Sullivan*,[7] as well as other landmark cases such as *Miami Herald Publishing Co. v. Tornillo*,[8] *Roth v. United States*,[9] *Hustler Magazine, Inc. v. Falwell*,[10] and more.[11] In these cases, the Court did not—as required by scrutiny review—evaluate the importance of the state interest supporting the regulation and then check whether the regulation was necessary for (or even related to) achieving that interest. Such an analysis would in many of the cases—surely in *Brandenburg* and *New York Times Co. v. Sullivan*—have led to upholding the law and diminishing the First Amendment. Rather, the Court's reasoning aimed to determine whether the rationale of the First Amendment covered the speech at issue. Depending *only* on its answer to this question, the Court did or did not affirm or reject the First Amendment claim.[12] This is precisely the style of reasoning that the Court properly employed in *Red Lion.*

Now to the three cheers. The first is for correctly identifying the properly central constitutional principle for media law. The Court said, "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[13]

Let us pause over this first cheer. Justice White here highlights the value at the heart of the constitutionally proper difference between the Press and the Speech Clauses of the First Amendment. As for speech, an individual's freedom of expression should be, as Brennan says, virtually "inviolate."[14]

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5. 319 U.S. 624 (1943).
6. 395 U.S. 444 (1969).
7. 376 U.S. 254 (1964).
8. 418 U.S. 241 (1974).
9. 354 U.S. 476 (1957).
10. 485 U.S. 46 (1988).
11. *See generally* C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979 (1997) (developing this point further).
12. When Justice Brennan eventually changed his view about whether obscenity could be limited under the First Amendment, he also changed from subscribing to the marketplace of ideas rationale that he invoked in *Roth* to a liberty and autonomy view in *Paris Adult*. *Compare Roth*, 354 U.S. at 484–85 (protecting "all ideas," even "hateful" ideas "to assure unfettered interchange of ideas," presumably as a "step to truth") (citation omitted), *with* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 85–86 n.9 (1973) (Brennan, J., dissenting) (recognizing an autonomy or liberty basis to receive obscenity).
13. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).
14. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585 (1980) (Brennan, J., concurring). The often-quoted language about "the need to preserve inviolate the constitutional rights" originated in *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). This

The idea of an inviolate freedom cannot apply to a corporate or institutional entity, which provides the most common form of the "press." Should corporate law take one or another form by creating one or another type of entity? When in conflict, is it the editor, journalist, or owner whose speech choice should prevail—should be inviolate? In the context of *Tornillo*, the Court suggested it may be the editor's—but more fundamentally, that conclusion and many others about the organization, structure, and authority of these institutions can only be determined by positive law, not by a simple invocation of inviolate liberty.[15] More importantly, the constitutional role of the press is different from the Speech Clause's proper recognition that the legitimacy of a constitutional democracy depends on not abridging individual liberty. Rather, like any institution, the press should be valued only instrumentally for its possible service to human interests. It became the one business to receive constitutional protection because of the ways that press freedom serves the public generally and democracy in particular. Thus, in *Red Lion*, Justice White appropriately says, "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC."[16]

Now for the second cheer. Though controversial, I believe a careful examination shows that *Red Lion* is fundamentally a general media law case—*a press case*, not a broadcast case. My evidence here is variable and may be weaker, but I believe it is clear. Prominently, Justice White relied most heavily for the Court's holding in *Red Lion* on a principle from a case (cited three times) involving newspapers, namely *Associated Press v. United States*.[17] In *Red Lion*, the FCC limited the speech power of one private actor, the broadcaster, in favor of other voices. Doing this is exactly what *Associated Press* says can serve the First Amendment and should be upheld when done. Thus, according to Justice White, "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."[18] And for this proposition, he cites identical reasoning in *Associated Press*. Justice White then again cites and now paraphrases *Associated Press*, saying, "It is the purpose of the First Amendment to preserve an

language is often used to distinguish between overt limitations on speech (or the right to assembly) and laws that in some way burden or make less effective these rights.

15. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment.").

16. *Red Lion*, 395 U.S. at 390.

17. 326 U.S. 1 (1945).

18. *Red Lion*, 395 U.S. at 387.

uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[19] Finally, he later directly quotes *Associated Press*: "'Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'"[20]

The point is that these two cases, the first from the print arena and the second from the broadcast arena, present the same problem: the power of corporate media to restrict other voices. And the Court reached the same result: it upheld the government policy response that favored other voices, the weaker voice, and that limited corporate media control. Most important for the current discussion, the second case—the broadcast case—relied on already-established analysis from a print media case for both its First Amendment reasoning and its holding. That is, *Red Lion* is, at its core, a media law—not broadcast law—case.

Again, let us pause over this second cheer. I believe these aspects show that *Red Lion* represents not a secondary press law tradition properly limited to broadcasting but is central to the proper meaning of the Press Clause. What the case did so importantly was to recognize the government's power to engage in structural regulation of the media. The Court recognized the government's authority to allocate expressive opportunities to better serve the government's (reasonable) vision of a free and open democratic communications order.

I *challenge you* to identify any Supreme Court precedent that limits this power to engage in structural regulation of the media. Often cited is *Miami Herald Publishing Co. v. Tornillo*—but that assertion can no longer be sustained. The Court there offered two theories of what was wrong with the right-to-reply law: that it interfered with editorial autonomy or amounted to a penalty on—or deterrence of—the paper's speech criticizing a candidate. The first objective is to protect editorial autonomy, the second to protect against content-based censorship. In *Turner Broadcasting System, Inc. v. FCC*,[21] the must-carry rules interfered with the editorial discretion of the cable operators and, therefore, would be clearly invalid if *Tornillo*'s first rationale applied. You might reasonably reject this application if you deny that cable operators merit the journalistic title of editors. But the Court took a different route—namely, it accepted cable as part of the press, but it read *Tornillo* as not protecting editorial control but only as involving the problem of being a content-based penalty on speech

19. *Id.* at 390 (citations omitted).
20. *Id.* at 392 (quoting *Associated Press*, 326 U.S. at 20).
21. 512 U.S. 622 (1994).

criticizing candidates.[22] Thus, the Court explained,

> [t]he right-of-reply statute at issue in *Tornillo* . . . imposed an impermissible content-based burden on newspaper speech. Because the right of access at issue in *Tornillo* was triggered only when a newspaper elected to print matter critical of political candidates, it "exact[ed] a penalty on the basis of . . . content.[23]

The Court went on to say that "*Tornillo* . . . do[es] not control this case for the following reasons. First, unlike the access rules struck down in those cases, the must-carry rules are content-neutral in application. They are not activated by any particular message spoken by cable operators and thus exact no content-based penalty."[24] Thus, as limited under current law, especially by *Turner*, *Tornillo* involves impermissible censorship—punishing content—not permissible structural regulation to favor a wider distribution of speech opportunities.

The only tension between the results in *Tornillo* and *Red Lion* is whether the impermissible penalty or deterrence should be identified abstractly or empirically. Justice White in *Red Lion* agreed that, if facts show the deterrence that the Court predicted in *Tornillo*, the Fairness Doctrine could be reconsidered and might be impermissible. On this empirical issue, other democratic countries in Europe have apparently found that right-of-reply requirements do not significantly impede press performance. In my view, given the business need of papers to continue to provide news and their capacity to benefit from controversy in contrast to broadcasters, which, as largely entertainment media, desire to avoid outsider interference with scheduling flows, the obvious prediction is the reverse of the Court's: deterrence would more likely be a problem in broadcasting than print. But I put aside this empirical question that has little implication for structural regulation as opposed to whether right-to-reply laws deter critical

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22. The Court actually gave multiple grounds for its distinction, including an ill-advised (because it is subject to technological reevaluation) argument based on the cable system's bottleneck control over access to television programming. *See id.* at 656.

23. *Id*. at 653 (citation omitted). The Court made the point repeatedly within the opinion, maybe out of fear that the point would not be clear. For example, about *Tornillo*, the Court said,

> We explained that, in practical effect, Florida's right-of-reply statute would deter newspapers from speaking in unfavorable terms about political candidates: "Faced with the penalties . . . editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced."

Id. (quoting Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 257 (1974). The Court also relied on its paraphrase of *Associated Press* to justify structural regulation: "The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." *Turner*, 512 U.S. at 657 (citing *Associated Press*, 326 U.S. at 20 (1945)).

24. *Turner*, 512 U.S. at 655 (citation omitted).

commentary.

Still, this second cheer for *Red Lion* is dampened slightly by what I consider Justice White's one unfortunate misstep. He paraphrased *Joseph Burstyn, Inc. v. Wilson*,[25] a 1952 case involving motion pictures, to say: "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them."[26] The problem is that White did not continue with the next sentence from *Burstyn*: "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary."[27] If he had added this point, he would have made clear that, though the government in its regulatory activities can distinguish different media,[28] the principles—for example, the principles involved in *Red Lion*—apply to all media.[29]

The third cheer for White's opinion is that he developed an economically sophisticated justification for regulation that, at bottom, applies to all media, rather than the economically dumb point about scarcity that his critics often attribute to him. When asked the basis of *Red Lion*, the invariable reply is "scarcity"—and, given this reply, the opinion is then ridiculed, especially by economists. Most goods are scarce, these economists assert, if offered for free. There are not enough BMWs to supply demand if both the car (and now the gasoline needed to drive one) were given away free. I might even want several. Markets eliminate this scarcity, however, by creating an approximate balance between supply and demand at the market clearing price.

An unexamined scarcity is not, however, the story that *Red Lion* told. Admittedly, the decision does contain considerable language suggesting this possible characterization—and even the Court has subsequently run with it. But in fact the key word in the analysis was "chaos" and the story White told to justify regulation was a version of the more sophisticated image of the tragedy of the commons[30]—an argument that applies equally

25. 343 U.S. 495, 503 (1952).

26. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

27. *Burstyn*, 343 U.S. at 503.

28. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439, 453 (1991) (holding that different taxes can apply even to different entities in the same media category "unless the tax is directed at, or presents the danger of suppressing, particular ideas").

29. Clearly, this point applies to the need to use different techniques in different media to protect against exposure of children despite the constancy of the *Butler v. Michigan* principle that regulation on behalf of protecting children can never justify significant limits on adults' access to protected speech. *Compare* Butler v. Michigan, 352 U.S. 380, 383 (1957) (rejecting legislation that would effectively "reduce the adult population of Michigan to reading only what is fit for children"), *with* FCC v. Pacifica Found., 438 U.S. 726, 750 n.28 (1978) (declaring that the FCC did not violate the *Butler* principle by barring Carlin's indecent language during daytime radio shows).

30. *See* Garrett Hardin, The Tragedy of the Commons, 62 SCIENCE 1243 (1968) (discussing how the destruction of shared resources can occur when individuals act in their

to grazing land in the traditional account, or to the spectrum relied on by broadcasters, or even to the office space and printing presses and wood pulp relied on by print media. Thus, when White started his historical account, he wrote, "Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos."[31] He observed that it was because of this "chaos" that the National Radio Conferences recommended adoption of a federal law to deal with the broadcast spectrum.[32]

What precisely is the chaos problem? White explained it in terms that are now familiar to us as a description of the tragedy of the commons. He observed, "[O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had . . . ."[33] And he continued, "It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934 . . . ."[34]

Of course, this is the same problem of grazing cattle in any tragedy-of-the-commons dilemma. A solution requires government action:[35] "[W]ithout government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."[36]

So what is the proper response to a tragedy of the commons? An ideologically driven or simply unsophisticated economist is likely to say "private property." *Wrong!* What is needed is government intervention. The intervention can take various forms of which private property is only one. Public ownership combined with public administration, queuing with time limits for each user, various sorts of rules of the road, and licensing to private users just begin a list of alternative devices that are sometimes used to handle the problem of the commons. Thus, unlike my imagined economist, Justice White noted various alternatives including giving a small time slot on a spectrum to anyone who wanted it. But some choice among alternatives must be made. As White clearly recognized, there ought to be policymaking discretion in making the choice.

Let us pause for a final time. Discretion is required in response to a

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own self-interest).

31. *Red Lion*, 395 U.S. at 375.

32. *Id.* at 388.

33. *Id.*

34. *Id.* (citation omitted).

35. Under some circumstances, voluntary acceptance of custom can substitute for law to handle the problem. Justice White noted that this had been tried but had not worked in respect to broadcasting—rather the result had been "chaos." *Id.*

36. *Red Lion*, 395 U.S. at 376.

tragedy of the commons, but how should that discretion be exercised? In the end, it can only properly be made on the basis of values that government should try to serve. Here again, Justice White was at the top of his game. Rather than referring simply to something like efficiency that might be invoked today, White saw something more was at stake—the role of press in serving the interests of listeners and viewers, whose rights are paramount. White accepted the obvious propriety of the government's relying on this standard in formulating its response.

Thus, we should take note of the following: First, the tragedy of the commons applies more generally to justify government intervention whether it takes the form of licenses, private property, contract, or corporate law. That is, the government always intervenes structurally in the media context and all media depend on these interventions. Second, *Red Lion* shows not only that intervention is proper, even inevitable in many circumstances if resources are to be usable, but *Red Lion* also gives the values—serving the audiences' democratic informational and discourse needs—that should guide these interventions in the media realm. Third, the best intervention can hardly be determined abstractly and will inevitably be controversial. Thus, Justice White was wise enough to recognize that the government should have a choice as to the solution—any reasonable policy choice in allocating the means for effective communication among private parties should be acceptable if guided by appropriate values.