THE DIGITAL TRANSITION AND THE FIRST AMENDMENT: IS IT TIME TO REEVALUATE *RED LION*'S SCARCITY RATIONALE?

I. INTRODUCTION

In 2004, the FCC levied heavy fines on television and radio programs for violation of indecency regulations.[1] If challenged, these regulations are not subject to the same strict level of scrutiny as content-based regulations for other types of media. Regulations of broadcast media are subject to a lower First Amendment scrutiny than regulations of print, cable, or the Internet.[2] The Court applies a lower First Amendment standard because of the "spectrum scarcity rationale" (Scarcity Rationale), which refers to the scarcity of radio frequencies.[3]

Broadcast media utilize the electromagnetic spectrum to transmit broadcast signals that convey information.[4] A limited number of signals can occupy the spectrum. Two signals of the same frequency that occupy the same physical space at the same time will interfere with each other and cause a "cacophony of competing voices," rendering the spectrum of little use.[5]

Due to their scarcity, frequencies must be regulated to ensure the audience receives an uninhibited marketplace of ideas and a diversity of viewpoints, two First Amendment policies.[6] As a result, the Scarcity Rationale reasons that such gov-

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[1] *See* Richard E. Wiley, Rosemary C. Harold, *Contentious Times in a Shifting Landscape, in* 2 James C. Goodale, COMMUNICATIONS LAW 2004 109, 162-3 (Practicing Law Institute 2004). In 2004, the Federal Communications Commission issued fines for broadcasts of such heavily publicized events as the Superbowl, the Golden Globes, and the Howard Stern Show.

[2] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (holding that broadcast media are subject to lower level of scrutiny). After *Red Lion*, the Court affirmed that regulations in print media would still be subject to strict scrutiny. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974). Cable television and the Internet are also subject to strict scrutiny. Turner Broad. Sys. v. FCC, 512 U.S. 622, 639 (1994) (holding that the Scarcity Rationale does not apply to cable television and regulations are subject to strict scrutiny); Reno v. ACLU, 521 U.S. 844 (1997) (holding that the Scarcity Rationale does not apply to the Internet and regulations are subject to strict scrutiny).

[3] *See, e.g.*, National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943), *and Red Lion*, 395 U.S. at 391 (solidifying the doctrine).

[4] *See* T. BARTON CARTER, THE FIRST AMENDMENT AND THE FIFTH ESTATE 42 (2003).

[5] *Red Lion*, 395 U.S. at 376.

[6] *Id.* at 390.

ernment regulation is necessary for clear broadcasting and should be subject to a lower standard of scrutiny.

Red Lion Broadcasting Co. v. Federal Communications Commission ("*Red Lion*") established the Scarcity Rationale in 1969.[7] Since then, the Supreme Court has used the Scarcity Rationale to enforce a modified, less rigid standard for evaluating content-based regulations in broadcast media.[8] The Court has continued to uphold and justify broadcast regulations that would not be upheld in print or other kinds of speech.[9] However, the courts, the Federal Communications Commission, and various legal scholars remain critics of the Scarcity Rationale.

FCC v. League of Women Voters (*League of Women Voters*)[10] is the most recent discussion of the bases for broadcasting regulation.[11] The Court expressed doubt about the validity of the Scarcity Rationale as well as willingness to reexamine and overturn the Rationale if it receives a signal from Congress or the FCC that technological developments have advanced far enough that some revision of the system of broadcast regulation may be required.[12] The advent of digital technology and digital television ("DTV") and the planned transition from analog to all-digital television will give critics of the Scarcity Rationale the opportunity to have it reexamined and possibly overturned.

Soon all television will cease to be transmitted through the broadcast spectrum, utilizing digital technology instead.[13] In 1995, the FCC issued a Notice of Proposed Rulemaking on digital broadcasting, hoping to facilitate the transition from analog to digital television.[14] This plan was approved in the 1996 Telecommunications Act.[15] The FCC then adopted a DTV table of allotments and established policies and rules for digital television[16] and established a build-out schedule for

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[7] *Id.*

[8] *See,* e.g., Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973) (holding that broadcasters were not obligated to accept paid advertisements from responsible individuals and groups, relying on the First Amendment standard in *Red Lion*); *Red Lion*, 395 U.S. at 367.

[9] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (holding that requiring a newspaper to print replies to personal attacks is unconstitutional). *But see Red Lion,* 395 U.S. 386 (upholding the Fairness Doctrine, which requires broadcasters to, *inter alia*, give an individual involved in a public issue who has received a personal attack on air the opportunity to respond on air).

[10] FCC v. League of Women Voters, 468 U.S. 364 (1984).

[11] *See* CARTER, *supra* note 4 at 92.

[12] *League of Women Voters*, 468 U.S. at 376 n.11.

[13] Consumer & Governmental Affairs Bureau, *Digital Television: FCC Consumer Facts* (2005), *available at* http://www.fcc.gov/cgb/consumerfacts/digitaltv.html.

[14] *See* In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 10 F.C.C.R. 10540 (1995).

[15] 47 U.S.C. § 336 (2005).

[16] In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, MM Docket No. 87-268, 12 F.C.C.R. 12809 (1997).

digital television stations and a target date of 2006 for cessation of analog broadcast service.[17] Congress later approved an extension of that deadline to 2009.[18] This will give the Supreme Court an opportunity to reexamine the 36 year-old Scarcity Rationale doctrine.

This Note will examine the conditions identified in *League of Women Voters* that would lead to the Supreme Court's reconsideration of the heavily-criticized scarcity rationale: technological developments, signals from Congress, and signals from the FCC.[19] In addition to examining these conditions, this Note will examine recent Supreme Court trends to find that, ultimately, while the Scarcity Rationale is heavily criticized, the signals present are not strong enough for the Court to overturn the long-established doctrine.

II. THE CONDITIONS UNDER WHICH THE SCARCITY DOCTRINE WILL BE OVERTURNED.

The Scarcity Rationale is currently good law[20] and will not be overturned, or even reexamined, except under certain conditions. In footnote 11 of *League of Women Voters*, Justice Brennan acknowledges that the Scarcity Rationale has come under increasing criticism, but the Court was not prepared to reconsider the court's long-standing approach without first receiving a signal from Congress or the FCC that revision of the system was necessary because of technological developments.[21] This Note will examine whether recent technological developments, signals from Congress, or signals from the FCC are sufficient to trigger a reconsideration or nullification of the Scarcity Rationale.

A. Technological Developments

Recent technological advancements make the revision of the Scarcity Rationale necessary. All television will soon be broadcast using digital technology, which will simultaneously eliminate the use of the electromagnetic spectrum while mak-

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[17] The FCC's digital build-out rules required the stations affiliated with ABC, CBS, Fox and NBC in the top 10 television markets to begin transmitting a digital signal by May 1, 1999. By November 1, 1999, affiliates of these four broadcast networks in markets 11-30 were required to be on the air with a digital signal. All other commercial stations must be transmitting a digital signal by May 2002, and non-commercial stations must do so by May 2003. The National Cable & Telecommunications Association, *The Transition to Digital Television* (April 2002), at http://www.ncta.com/pdf_files/WhitePap4-2002.pdf (September 26, 2005).

[18] Digital Television Transition and Public Safety Act, Pub. L. No. 109-171, 120 Stat. 4 (2006).

[19] *See* FCC v. League of Women Voters, 468 U.S. 364, 376, n.11 (1984).

[20] *See American Family Ass'n v. FCC*, 365 F.3d 1156, 1169 (D.C. 2004) (applying the *Red Lion* standard in 2004).

[21] *League of Women Voters*, 468 U.S. at 376, n.11.

ing it easier to broadcast more channels.[22] Other technological developments further eliminate the scarcity aspect of the Rationale by creating more broadcast outlets for speech. Additionally, new technological developments in television give consumers more control over their viewing experience to further First Amendment interests, obviating the need for government involvement.

1. The Spectrum: The Change in Technology

The Scarcity Rationale, which allocates free speech rights based on broadcast technology's limitations, is a technology-based approach to the First Amendment. Traditionally, the government has needed to regulate broadcast technology to ensure that each signal is heard clearly because, since interference is likely to occur due to the nature of the electromagnetic spectrum.[23] Under the rationale that providing a diversity of viewpoints serves the public interest, the Scarcity Rationale was created to ensure that different viewpoints could be heard in spite of technological limitations.[24] By using a technology-based approach, a future change in technology could allow for a change in the First Amendment standard applied to broadcasters.

2. Scarcity: Broadcast Technology is No Longer Scarce Enough To Warrant Special First Amendment Treatment

Digital technology makes it possible to broadcast television signals using less of the electromagnetic spectrum, which in turn frees up much of the spectrum bandwidth.[25] More information is transmitted in less bandwidth by removing redundant information from a digital signal prior to transmission.[26] Although parts of the spectrum will continue to be used for digital transmission, the spectrum can no longer be characterized as "scarce" since digital compression will free up much of the spectrum, making more of the spectrum available.

i. Scarcity: New Technology Creates More Outlets for Expression in Broadcasting

New technology, using the spectrum more efficiently, has served to eliminate broadcasting's characterization as a uniquely scarce resource. Many new technological developments, including digital technology, have made it possible to create and maintain more broadcast channels than those at the time *Red Lion* was decided.

New broadcast media, such as Direct Broadcast Satellite services ("DBS"), low power FM, Instructional Fixed Television Service, Multipoint Distribution Serv-

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[22] See *Digital Television: FCC Consumer Facts, supra* note 13.

[23] *See* CARTER, *supra* note 4, at 42.

[24] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 391 (1969).

[25] *See Digital Television: FCC Consumer Facts, supra* note 13 ("Converting to DTV will also free up parts of the scarce and valuable broadcast airwaves.").

[26] *See* CARTER, *supra* note 4, at 55.

ice, and Multichannel Multipoint Distribution Service, utilize the spectrum for broadcasting on a large scale, contributing to the rapid growth of the number of television and radio stations in the United States since *Red Lion*.[27] Since *Red Lion*, broadcast technology has changed the way broadcast frequencies are used, allowing more voices to be heard under less government regulation.

Particular developments in television and radio have also made it possible to broadcast without the use of the spectrum, creating hundreds of channels and stations. Digital television allows broadcasters to transmit multiple programs simultaneously using a single television channel.[28] Many DTV broadcasters are currently "multicasting," defined as "broadcasting two or more channels of content."[29] Additionally, Digital Audio Radio Services ("DARS") "offer hundreds of radio channels in every market."[30] Because these new technologies help to reduce broadcast technology's status as uniquely scarce, and digital technological advances can further remove that status altogether, making governmental regulation no longer necessary.

ii. Scarcity: A Comparison

Broadcast media's characterization as "uniquely scarce" is further weakened by a comparison to the scarcity of print media. The D.C. Circuit Court noted that broadcast frequencies are much less scarce than they were while the Scarcity Rationale was being developed and, in fact, many markets have a far greater number of broadcasting stations than newspapers.[31] While the number of broadcast stations continues to rise, the number of print media outlets, such as newspapers, does not.[32] In fact, the number of daily newspapers in the United States has actually declined to the point where newspapers are, in fact, more scarce than broadcast media.[33] John W. Berresford argues that "if scarcity is the basis for the intrusive gov-

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[27] *See* John W. Berresford, *Traditional Broadcasting: An Idea Whose Time Has Passed* 12-13, FCC Media Bureau Staff Research Papers Affecting Media Policy and Regulation, *available at* http://www.fcc.gov/mb/mbpapers.html (last visited Apr. 26, 2005) (stating that "the number of full-power traditional television and radio stations has risen from 7,411 in the year *Red Lion* was decided to 15,273 at the end of 2004").

[28] *See* FCC Office of Engineering and Technology, *Digital Television Consumer Information: November 1998*, *available at* http://www.fcc.gov/Bureaus/Engineering_Technology/Factsheets/dtv9811.html (last visited Apr. 25, 2005).

[29] *See* Berresford, *supra* note 27, at 13.

[30] *Id.*

[31] Telecommunications Research & Action Ctr. v. FCC, 801 F.2d 501, 508-09 n.4 (quoting Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983), cert. denied, 464 U.S. 1008 (1983)). Berresford notes that the market in Kansas City, Missouri went from eighteen traditional radio stations and three traditional television stations in 1960 to forty and nine, respectively, in 2000. Missouri only has two general circulation newspapers today. *See* Berresford, *supra* note 27, at 13.

[32] Berresford, *supra* note 27, at 13.

[33] *See id.*, at 18.

ernment regulation . . . then newspaper outlets, not broadcast stations, deserve greater attention."[34] The decline in the number of newspaper outlets available today that are still subject to strict scrutiny under the First Amendment further weakens the argument that broadcasting is "uniquely scarce."[35] New technologies have rendered the resources that broadcast media utilize no less scarce than any other media, even print.

3. Technological Changes Now Work in Favor of First Amendment Interests

The court has taken two approaches when dealing with new technology: at first allowing intrusive regulations and later relying on technology's abilities to further First Amendment interests.[36] *Red Lion*, which established the Scarcity Rationale, was part of the first approach in which government regulations were thought to further First Amendment interests.[37] The court's later approaches, however, have depended on the advantages of new technology, instead of government regulations, to further First Amendment interests.[38] Digital technology should spark a reconsideration of the Scarcity Rationale because digital technology's capacities can help further First Amendment interests.

The Scarcity Rationale reflects the Court's earlier approach to new technology: that of allowing intrusive regulations in order to further the First Amendment rights of the public. *Red Lion*, for example, established the Scarcity Rationale based upon the characteristics of the new broadcast technology - the electromagnetic spectrum.[39] In *FCC v. Pacifica Foundation*[40] ("*Pacifica*"), the Court limited broadcasters' First Amendment protection in favor of government regulations based on two characteristics of broadcast media technology - its pervasive presence and its unique accessibility to children.[41] *Red Lion* and *Pacifica*, decided in 1969 and 1978 respectively, illustrate the first approach that the Court took towards new technology: allowing intrusive governmental regulations as a way of furthering the First Amendment interest of encouraging diverse viewpoints. The Court limited the First Amendment rights of broadcasters in favor of the First Amendment rights of the public. The Court responded to new technologies through intrusive regulation, reflecting fears that those technologies will limit First Amendment freedoms of the public.

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[34] *Id.*

[35] *Id.*

[36] *See generally*, Jennifer L. Polse, *III. Constitutional Law: A. First Amendment: 1. Indecent Speech: a) Cable Television: United States v. Playboy Entertainment Group, Inc.*, 16 BERKELEY TECH. L.J. 347 (2001).

[37] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969).

[38] *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2002) (holding that cable television's technological capabilities furthered First Amendment interests).

[39] *See Red Lion*, 395 U.S. at 386.

[40] 438 U.S. 726, 748 (1978).

The Court later began to take a different approach when confronted with new technology. It instead began to rely on technology's ability to expand the viewer's capacity to choose and "ultimately create a world in which diverse voices can speak freely without fear of being coerced into silence and conformity."[42] Instead of responding to the fear that technology will deprive some of their First Amendment rights, the Court began to rely on the benefits of new technology that allow the individual to assert his or her First Amendment rights by controlling programming accessibility.[43] This change was exemplified in *U.S. v. Playboy* ("*Playboy*"), where the court declined to apply a lower First Amendment standard to cable television because cable technology was capable of empowering individual subscribers' efforts to shape their viewing experiences in the marketplace of ideas.[44] The *Playboy* court acknowledged that cable technology's capabilities further First Amendment interests more than the public's interest in broadcast regulation, as spelled out in *Red Lion*.[45]

Similarly, digital technology is capable of extending First Amendment interests for broadcast television. Digital technology is capable of allowing more channels to be broadcast, which would eliminate the broadcast spectrum's scarcity element.[46] Additionally, digital technology would enable broadcasters to transmit multiple programs simultaneously using a single television channel, which allows more diverse viewpoints to be heard.[47] Furthermore, digital technology and digital television are capable of transmitting or delivering data,[48] which would enable a television, like a computer, to provide access to a full range of American magazines;[49] while airing regular television, broadcasters could transmit publications like newspapers, program schedules, and computer software, which would increase marketplace diversity.[50] Similarly, the technology behind Digital Video Recorders, which digitally record programming, gives the viewer the ability to customize their viewing experience and block unwanted programming.[51] Because new digital technology is able to further First Amendment freedoms without the use of government regulations, the Court should reconsider the need for the Scarcity Rationale.

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[42] *See* Polse, *supra* note 36, at 348.

[43] *See id.*

[44] *See Playboy*, 529 U.S. at 818.

[45] *See id.*

[46] *See* FCC Office of Engineering and Technology, *supra* note 28.

[47] *Id.*

[48] *Id.*

[49] *See* Cass R. Sunstein, *Television and the Public Interest*, 88 CALIF. L. REV. 499, 527 (1999).

[50] *See* FCC Office of Engineering and Technology, *supra* note 28.

[51] Mark S. Nadel, *How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing*, 19 BERKELEY TECH. L. J. 785, 830 (2004).

Digital video recorder (DVR) technologies "empower viewers to automatically eliminate commercials during playback or even when watching a live broadcast on a slightly-delayed (almost real time) basis." *Id.*

B. Signals from Congress

In the past two years, Congress has sent the signal that it would like the Scarcity Rationale to remain, despite technological advances. Congress has pushed towards more content-based regulations. Upholding of the Scarcity Rationale is necessary to move in this direction.

In 2004, Congress' actions regarding indecency are evidence that Congress believes that broadcasters must act as public trustees and are subject to public interest programming obligations. After Janet Jackson suffered from a wardrobe malfunction that exposed her nipple for 19/32 of a second, Congress quickly passed the Broadcast Indecency Enforcement Act of 2004, which increased the maximum fine for an indecency violation from $27,500 to $500,000.[52] Viacom paid $550,000 in fines for the fiasco.[53] This legislation clearly raises the fines to a punitive level based purely on programming content, reflecting the imposition of mandatory programming obligations onto broadcasters.

In March, Congress pressured the FCC to overrule an FCC Enforcement Bureau determination that the *Golden Globe* broadcast in which the artist Bono used the "F-word" (uttering "fucking brilliant" upon receiving an award) had not violated the indecency prohibition because the utterance was fleeting and non-sexual.[54] Congressional disapproval of the lenient FCC ruling is another signal indicating the desire for more government regulation, based on the Scarcity Rationale belief that broadcasters are acting in the public interest and are subject to programming obligations.

In addition to passing the Broadcast Decency Enforcement Act of 2004 in the House, in June 2004 the Senate passed the Defense Authorization Act of 2005, which included an amendment raising the maximum indecency fine to $3 million for a 24-hour period.[55] This Act had a controversial amendment that would prohibit the broadcast of "violent" television programming outside of "safe harbor hours" and does not distinguish between broadcast and non-broadcast media.[56] Although the Amendment did not survive conference committee, it is significant. The Amendment indicates Congress' desire to continue imposing content-based programming obligations, and apply them to non-broadcast technology.

Not only did Congressional action in the past year make a strong statement on its stand against indecency in favor of government regulation, but Congress' actions will also carry great weight in the Scarcity Rationale debate in courts. Con-

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[52] In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII, FCC LEXIS 5444 (2004).

[53] *Id.*

[54] Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975 (2004). The new ruling created a flat ban on the word, which has led to backlash. In November 2004, ABC affiliates were too afraid to show the movie "Saving Private Ryan" on Veteran's Day because the movie featured several utterances of the "f-word." *Id.*

[55] Defense Authorization Act of 2005, S. 2400, 108th Cong. (2004).

[56] *Id.*

gressional views on whether a revision of the broadcast regulation system is necessary have always been entitled to great weight in the judicial evaluation of First Amendment claims in the broadcasting context.[57] In *CBS, Inc. v. DNC*, the Court afforded great weight to Congress' beliefs that broadcasters may be subject to reasonable public interest programming obligations, due to the scarcity of broadcast frequencies and the traditional basis that broadcasters were public trustees.[58]

Congressional actions in the last year strongly indicate that Congress would like to increase content-based regulations that could only survive First Amendment scrutiny through the lower standard provided by the Scarcity Rationale. These congressional actions, which are given great weight in the reconsideration of the current broadcasting regulatory system, display a strong preference for upholding the Scarcity Rationale.

C. Signals from the FCC

FCC signals regarding the Scarcity Rationale, even if express, appear less significant and relevant than Congress' signals when being evaluated by the Court. FCC signals are also subject to congressional pressure.

1. FCC Signals Carry Little Relevance – The Example of *Syracuse*

History has shown that FCC signals regarding the Scarcity Rationale carry less relevance and weight than congressional signals. This has shown to be true even when the FCC expressly repudiated the Scarcity Rationale. The FCC instead succumbs to congressional signals of preference.

i. Express Repudiation by the FCC

The FCC has already sent a clear and strong signal for the reevaluation of the Scarcity Rationale. In 1987, in *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York* ("*Syracuse*"),[59] the FCC expressly repudiated the Scarcity Rationale and explicitly urged the Supreme Court to reconsider *Red Lion* and the Scarcity Rationale. The FCC abrogated large parts of the Fairness Doctrine[60] and declared that the concept of scarcity is irrelevant and that developments in technology resulted in a wide variety of broadcasts outlets.

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[57] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973). The legislative history of CTA of 1990 shows that broadcasters may be subject to reasonable public interest programming obligations due to scarcity.

[58] *Id.* at 131.

[59] *See* In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043 (1987), *cert. denied*, 493 U.S. 1019 (1990).

[60] The Fairness Doctrine, which has been repealed, required broadcasters to air issues "so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely" and that if broadcasters covered " 'controversial issues of public importance,' they [had to] take steps to assure that important contrasting views [were] also presented." *See* CARTER, *supra* note 4 at 230.

The FCC stated that allocational scarcity is simply excess demand for a license of available supply, which is true of all markets.[61] The FCC then urged the Supreme Court to reconsider *Red Lion*.[62]

ii. The FCC Backs Down to Congressional Pressure and Rejection by the Courts

Congress, however, decided to send an even stronger signal and fought against the FCC's ruling to reinstate the Fairness Doctrine by enacting the Children's Television Act.[63] By embracing the concept of scarcity as a justification for content regulation of broadcasting, the Children's Television Act made it clear that Congress wanted broadcasters to be subject to public interest obligations reviewed under the Scarcity Rationale.[64]

The FCC then expressly repudiated what it said in *Syracuse* and agreed that *Red Lion* set the appropriate standard of review in the Order Implementing the Children's Television Act.[65] Similarly, the FCC also responded to congressional pressure that year, by overturning FCC holdings for indecency in the *Golden Globe* matter.[66]

An examination of the history of FCC statements for and against the Scarcity Rationale, as well as Congress' and the Courts' reactions to it, demonstrate that congressional views are entitled to greater weight when evaluating whether to uphold the Scarcity Rationale.

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[61] *See In re Complaint of Syracuse Peace Counci*, 2 F.C.C.R. at 5054-55.

[62] The FCC explained:

> We further believe, as the Supreme Court indicated in FCC v. League of Women Voters of California, that the dramatic transformation in the telecommunications marketplace provides a basis for the Court to reconsider its application of diminished First Amendment protection to the electronic media. Despite the physical differences between the electronic and print media, their roles in our society are identical, and we believe that the same First Amendment principles should be equally applicable to both. This is the method set forth in our Constitution for maximizing the public interest; and furthering the public interest is likewise our mandate under the Communications Act. It is, therefore, to advance the public interest that we advocate these rights for broadcasters.

Id. at 5058.

[63] *See* 47 U.S.C. § 336(d) (2000) (previously Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 108).

[64] *See* Commissioner Susan Ness and Commissioner Gloria Tristani, *Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani Concerning the Political Editorial and Personal Attack Rules, available at* http://www.fcc.gov/Speeches/Ness/States/stsn819.pdf (last visited Apr. 25, 2005).

[65] *See id.*

[66] *See* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975 (2004).

Courts have not responded to FCC signals regarding the Scarcity Rationale, even when those signals are as clear as in *Syracuse*.[67] Courts have declined to acknowledge such signals as signs to reevaluate the Scarcity Doctrine. In *Syracuse Peace Council v. FCC*, for example, the Supreme Court declined to acknowledge the FCC's arguments in *Syracuse* and denied certiorari.[68]

Subsequently, the Supreme Court and the D.C. Circuit Court have also rejected *Syracuse*. Based on *Red Lion* and the Scarcity Rationale, the D.C. Circuit court, in *Time Warner Entertainment Co. v. FCC*,[69] upheld the constitutionality of public interest requirements imposed on direct broadcast satellite services that also used scarce spectrum frequencies. In *Reno v. ACLU*, the Supreme Court rejected *Syracuse* and relied upon the Scarcity Rationale for not subjecting broadcast regulations to strict scrutiny, like the internet.[70] After the FCC explicitly asked the Court to reconsider the Scarcity Rationale in *Syracuse*, the Court gave no signal that it was prepared to respond to the FCC's arguments.[71]

In the *Repeal or Modification of the Personal Attack and Political Editorial Rules*, Commissioners Ness and Tristani made it clear that those dicta in *Syracuse* regarding the appropriate level of First Amendment scrutiny had been rejected by Congress, the FCC, and the courts.[72] Commissioners Ness and Tristani noted that the FCC based its decision in *Syracuse* on the FCC's view of the standard, but that the District of Columbia Circuit did not affirm on that basis. The Commissioners stated that the Rationale will remain good law as long as there are substantially more individuals who want to broadcast than there are frequencies available to allocate - this holding was an explicit repeal of *Syracuse*.

By reversing the arguments made in *Syracuse*, the FCC has signaled a retreat from its former position and has even reaffirmed its support for the Scarcity Rationale by signing the order implementing the Children's Television Act.

Nevertheless, the FCC's support for or against the Scarcity Doctrine matters little, since *Syracuse* exemplified how the Supreme Court will continue to ignore any FCC requests to reevaluate the Scarcity Rationale as long as such modification is opposed by Congress.

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[67] Syracuse Peace Council v. FCC, 867 F.2d 654, 682 (D.C. Cir. 1989) (declining to reconsider the Scarcity Doctrine despite the FCC's arguments).

[68] 493 U.S. 1019 (1990).

[69] 211 F.3d. 1313 (D.C. Cir. 2000).

[70] *Reno v. ACLU*, 521 U.S. 844 (1997).

[71] *See id.*

[72] *See* Commissioner Susan Ness and Commissioner Gloria Tristani, *Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani Concerning the Political Editorial and personal Attack Rules, available at* http://www.fcc.gov/Speeches/Ness/States/stsn819.pdf (last visited Apr. 25, 2005).

D. Supreme Court Trends

1. The Current Court Declines to Hear First Amendment Cases

In the past two years the Supreme Court has granted certiorari to very few cases implicating the First Amendment. Even where the Court has accepted such cases, many of them were not decided on First Amendment grounds, and none of them involved broadcasting. Out of the forty cases on their docket for the 2004-5 term[73] only six involving Freedom of Expression were granted review,[74] thirty-three were denied review, and none of the six granted review involved broadcasting or any kind of public media.[75] The current Court's devaluation of the subject matter reflects a general decline in the populace's interest in First Amendment issues.[76]

2. Courts Have Been Reluctant to Nullify the Rationale

Although the Court said 1984 that it was willing to reexamine and dispense with the 1969 Scarcity Rationale under the conditions set forth in *League of Women Voters*,[77] the Court has failed to nullify the Rationale when presented with the opportunity to do so. A survey of the cases addressing the validity of the Scarcity Rationale since *Red Lion* reveals that lower courts are reluctant to question the authority of the Supreme Court. Because the Supreme Court finds that the conditions are not yet ripe for nullification, other courts are reluctant to question such a

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[73] On The Docket: Northwestern University US Supreme Court, *Court to Open Term with 40 Cases on the Docket*, NEWS (Sept. 8, 2004), *available at* http://docket.medill.northwestern.edu/ (last visited Apr. 25, 2005).

[74] First Amendment Center, *2004-2005 Supreme Court Term*, *available at* http://www.firstamendmentcenter.org/faclibrary/petitionsfiled.aspx?topic=20042005_supreme_court_term_topic&subheadingtypeid=35 (last visited Apr. 25, 2005).

[75] City of San Diego v. Roe, 543 U.S. 77 (2004) (ruling on the issue of a police officer's free speech). *See* Clingman v. Beaver, 544 U.S. 581 (2005) (ruling on whether Oklahoma's semi-closed primary law, which allows parties to invite independents to vote in primaries, violates the petitioner's First Amendment associational rights); Garcetti v. Ceballos, 2005 U.S. LEXIS 5379 (2005) (ruling on whether the First Amendment protects the speech of a deputy district attorney who wrote and circulated a memorandum suggesting that a deputy sheriff lied in a search warrant affidavit and in his subsequent testimony at court); Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n, 544 U.S. 550 (2005) (ruling on whether the U.S. Department of Agriculture's pork-check-off program violates the First Amendment); Tory v. Cochran, 544 U.S. 734 (2005) (ruling on whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment); Veneman v. Livestock Marketing Ass'n, 543 U.S. 977 (2004) (ruling on whether the 1985 Beef Promotion & Research Act is unconstitutional).

[76] The Future of the First Amendment, *Key Findings*, *available at* http://firstamendment.jideas.org/findings/findings.php (last visited Apr. 25, 2005) (showing that research reveals that high school students exhibit little knowledge or interest in the First Amendment).

[77] FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984).

longstanding doctrine. While acknowledging that the Scarcity Rationale has been openly and heavily criticized, it seems as though the Court is unwilling to confront that criticism and is comfortable upholding a doctrine whose validity is openly criticized rather than defy stare decisis.

i. Lower Courts are Reluctant to Question the Authority of the Supreme Court's Refusal to Nullify the Scarcity Rationale

Lower courts are reluctant to challenge the Supreme Court's precedents regarding the Scarcity Rationale. The Defendants in *American Family Ass'n v. FCC*,[78] *Fox Television Stations v. FCC*,[79] and *Prometheus Radio Project v. FCC*,[80] have all advanced the argument that the courts should discard the Scarcity Rationale as a relic of the past. Each and every court dismissed this argument, however, relying on the rationale that "it is a rule of law in our court system that it is not the province of this court to determine when [a] prior [decision] of the Supreme Court [has] outlived its usefulness."[81] Even if a court clearly disagrees with the Scarcity Rationale, it is not in a position to reject it. In *Fox TV Stations, Inc. v. FCC*, the D.C. Circuit stated that the Rationale "no longer made sense," but nevertheless refused to disregard the Supreme Court's decision.[82] In *Prometheus Radio Project v. FCC*, the Third Circuit held that, until the Supreme Court takes notice of the changing conditions to reexamine and overturn the Scarcity Rationale, lower courts are obligated to continue to apply the doctrine.[83]

ii. Evidence Presented Has Not Been Enough to Push for Reevaluation

Courts have refused to question the Scarcity Rationale's validity even when presented with empirical evidence against the Rationale.[84] Courts have also refused to disregard the precedent in response to requests from petitioners,[85] requests from the FCC,[86] and FCC findings that the media market has changed since 1964.[87] Thus, precisely what type of evidence is required to ripen the conditions for reevaluation remains unclear.

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[78] 365 F.3d 1156 (D.C. Cir. 2004).
[79] 280 F.3d 1027 (D.C. Cir. 2002).
[80] 373 F.3d 372 (3d Cir. 2004).
[81] *Fox Television Stations*, 280 F.3d at 1046 (citing Agostini v. Felton, 521 U.S. 203, 237 (1997)).
[82] *Id.* at 1046.
[83] *Prometheus Radio Project*, 373 F.3d at 401.
[84] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 638 (1994).
[85] *See Prometheus Radio Project*, 373 F.3d at 401.
[86] *See* In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York, 2 F.C.C.R. 5043, 5058 (1987).
[87] *See Prometheus Radio Project*, 373 F.3d at 401.

iii. The Court is Reluctant to Question a Longstanding Doctrine, Despite Mounting Criticism

An additional reason why courts are reluctant to reevaluate the Scarcity Rationale is because of its designation as a longstanding doctrine. In *Turner Broadcast Systems v. FCC* ("*Turner*") the Court held that, although the Scarcity Rationale has been criticized since its inception, the Court has declined to question its continuing validity and declines to do so in this case.[88] Thus, the Court declines to question the Scarcity Rationale's validity today simply because the Court has not questioned it in the past.

The Court has also cited the history of extensive government regulation as one of the justifications for the continuing validity of the Scarcity Rationale. In *Reno v. ACLU*, the Court declined to apply the Scarcity Rationale to the Internet, acknowledging that broadcast media has special justifications for regulation not applicable to other speakers.[89] Those justifications included the Scarcity Rationale as well as the history of extensive government regulation of the broadcast medium.[90]

Even the acknowledgement of criticism from the Court itself is not enough for the reevaluation of a longstanding doctrine. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas have openly criticized the Scarcity Rationale, calling it dubious from its infancy and criticizing it for causing confusion for both regulators and cable operators who were unsure of whether they were entitled to the substantial First Amendment protections of print media or subject to the more "onerous obligations shouldered by the broadcast media."[91] The Court has also grudgingly upheld the distinction in recent years[92] but has still declined to revisit the validity of the Scarcity Rationale for fear of upsetting a longstanding doctrine, despite the mounting criticism.

This criticism has also manifested itself in the refusal of the Court to apply the Scarcity Rationale to other technologies. In *United States v. American Library Association*,[93] the Court did not consider the Internet to be scarce in the same way that broadcasting technologies are and refused to apply the Scarcity Rationale to blocking the Internet access in public libraries. The Court stated that even though the Scarcity Rationale has been the subject of intense criticism, *Red Lion* is not in such poor shape that an intermediate court of appeals could properly announce its death.[94]

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[88] Turner Broadcast Systems v. FCC, 512 U.S. at 638.
[89] Reno v. ACLU, 521 U.S. at 868.
[90] *Id.*
[91] *See* Denver Area Educ. Telecoms. Consortium v. FCC, 518 U.S. 727, 813 (1996).
[92] *See Turner*, 512 U.S. at 637.
[93] 539 U.S. 194, 217 (2003).
[94] Time Warner Entertainment Co., L.P. v. FCC, 105 F.3d 723, 724 (D.C. Cir.,1997).

3. Courts Have Begun to Emphasize Other Rationales for a Lowered First Amendment Standard of Scrutiny

The courts, perhaps sensing the weakening reasoning and mounting criticism behind the Scarcity Rationale, have begun to emphasize other rationales for continuing to use a lowered First Amendment standard of scrutiny for broadcast media. Courts have cited broadcast media's intrusiveness and easy availability to children as other rationales for the continuing regulation of broadcast media.

i. Intrusiveness in the Home

In *Pacifica*, the Court emphasized that broadcast media should be subject to a lower standard of scrutiny because of its invasive nature.[95] The Court declared that the FCC limitation on times for indecent language is not subject to the same searching scrutiny with which it would have treated a similar content-based restriction of print media or other speakers because of the uniquely pervasive presence/intrusiveness and unique accessibility to children.[96] The Court held that the invasive nature of broadcast renders some restrictions, like limiting sales of print media, unworkable and that prevention of restriction by minors requires restricting expression at the source.[97]

ii. Availability to children

Pacifica also emphasized television's accessibility to children as a major reason why indecency regulations should not be subject to the same searching scrutiny for other media.[98] The *Playboy* Court also acknowledged that the protection of children is a legitimate governmental interest for broadcast regulations.[99] In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* the court argued for a less strict broadcast standard to be applied to cable television because of the lesser effects on children.[100]

These cases show that in the face of mounting criticism against the Scarcity Rationale, the Supreme Court has often emphasized other justifications for upholding a lower First Amendment standard for broadcasting. It is likely that the Court will simply phase out the Scarcity Rationale and begin naming these other justifications instead.

III. CONCLUSION

Technological advances in digital technology, combined with the FCC's plan to replace all analog broadcasting with digital broadcasting suggest that the time is

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[95] *See* FCC v. Pacifica Foundation, 438 U.S. 726, 749 (1978).
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 842 (2002).
[100] Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 748 (1996).

ripe to reconsider the Scarcity Rationale under the conditions set forth in *League of Women Voters*. We have seen, however, that the strong signals that Congress is currently sending about upholding the Rationale will carry more weight than even explicit signals or evidence from the FCC. We have also seen that, since *Syracuse*, the FCC has either remained complacent about criticism directed toward the Scarcity Rationale or has complied with Congress' wishes. The lack of strong signals pushing for reevaluation and nullification of this heavily-criticized doctrine combined with the Courts' reluctance to disturb longstanding precedent and instead the move to emphasize other rationales, indicate that the Scarcity Rationale is not likely to be disturbed, reevaluated, or nullified with the advent of the digital transition.

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