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Constitutional Law - Due Process Clause - The Due Process Clause of the Fifth Amendment Requires Fair Notice of What Violates Federal Indecency Standards

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CASENOTES

CONSTITUTIONAL LAW—DUE PROCESS CLAUSE—THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT REQUIRES FAIR NOTICE OF WHAT VIOLATES FEDERAL AGENCY'S INDECENCY STANDARDS. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 132 S. CT. 2307 (2012).

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In *Federal Communications Commission v. Fox Television Stations, Inc.*,[1] the United States Supreme Court addressed the fair notice requirements of the Fifth Amendment's Due Process Clause[2] in relation to the Federal Communications Commission's (the Commission) broadcasting standards.[3] The broadcasting standards at issue were the result of a 2004 modification of the Commission's indecency policy.[4] This modification banned fleeting expletives and momentary nudity on television, both of which were not previously found to be actionably indecent by the Commission.[5] Fox Television Stations, Inc. (Fox) and ABC Television Network (ABC) challenged the modification to the indecency policy after the Commission found Fox and ABC to be in violation of the Commission's indecency standards.[6]

After receiving complaints about the content of the three broadcasts at issue, the Commission ruled that the broadcasts were actionably indecent.[7] The first two broadcasts aired by Fox contained fleeting expletives.[8] The first broadcast at issue was the 2002 Billboard Music Awards,[9] where the singer Cher was accepting an award and said, "I've also had my critics for the last 40 years saying

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[1] (*Fox II*), 132 S. Ct. 2307 (2012).

[2] "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

[3] *Fox II*, 132 S. Ct. at 2317.

[4] *Id.* at 2314-17.

[5] *Id.*

[6] *Id.* at 2315-17.

[7] *Id.* at 2314-17

[8] *Id.* at 2314.

[9] *2002 Billboard Music Awards* (Fox television broadcast Dec. 9, 2002).

that I was on my way out every year. Right. So f * * * 'em."[10] The second Fox broadcast at issue was the 2003 Billboard Music Awards,[11] where the reality television star Nicole Richie remarked, "Have you ever tried to get cow s* * * out of a Prada purse? It's not so f* * *ing simple."[12] The third broadcast considered indecent concerned an episode of "NYPD Blue,"[13] which aired on ABC.[14] During the episode, a woman's nude buttocks was shown for seven seconds and the side of her breast was shown for a brief moment.[15]

The Fox broadcasts at issue aired in 2002 and 2003,[16] and the ABC broadcast occurred in 2003.[17] After they aired, the Commission received indecency complaints about all three broadcasts,[18] however, at the time there was nothing in the Commission's regulatory framework to conclude the broadcasts were in violation of its indecency standards.[19] In 2004, after the broadcasts aired, the Commission issued an order (*Golden Globes Order*),[20] which changed the way the Commission enforced its policy against indecent television broadcasting.[21]

The *Golden Globes Order* was issued in response to the 2003 Golden Globe Awards broadcast, where singer Bono stated: "This is really, really, f * * * * ing brilliant. Really, really great."[22] Despite the brevity and fleeting use of the word in the broadcast, the Commission held the use of the F-word to be actionably indecent.[23] Before this modification, the Commission distinguished between

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[10] *Fox II*, 132 S. Ct. at 2314 (citing Fox Television Stations Inc. v. Fed. Commc'ns Comm'n, 613 F.3d 317, 323 (2nd Cir. 2010)).

[11] *2003 Billboard Music Awards* (Fox television broadcast Dec. 10, 2003).

[12] *Fox II*, 132 S. Ct. at 2314 (citing Fox Television Stations Inc. v. Fed. Commc'ns Comm'n, 613 F.3d at 323).

[13] *NYPD Blue* (ABC television broadcast Feb. 25, 2003).

[14] *Fox II*, 132 S. Ct. at 2314.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See generally id.* at 2312-17 (discussing the Commission's regulatory framework).

[20] *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globes Awards" Program (*Golden Globes Order*), 19 FCC Rcd. 4975 (2004).

[21] *See id.* at 4975-76, 4978-80; *Fox II*, 132 S. Ct. at 2314-15 ("Turning to the isolated nature of the expletive, the Commission reversed prior rulings that had found fleeting expletives not indecent.").

[22] *Fox II*, 132 S. Ct. at 2314 (quoting *Golden Globes Order*, 19 FCC Rcd. at 4976).

[23] *Id.* (citing *Golden Globes Order*, 19 FCC Rcd. at 4975-76). The Commission explained that the F-word was actionably indecent because it was "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language, [and] any use of that word or a variation in any context, inherently has a sexual connotation." *Id.* (quoting *Golden Globes Order*, 19 FCC Rcd. at 4975-76, 4978-79).

the "repetitive occurrence of the 'indecent words' . . . and an 'isolated' or 'occasional' expletive, that would not necessarily be actionable."[24] However with the *Golden Globes Order*, the Commission disregarded its previous stance by finding that isolated or fleeting use of expletives in a television broadcast could be considered actionably indecent.[25]

Armed with the *Golden Globes Order*, which was not in existence at the time the broadcasts at issue occurred, the Commission issued rulings on the Fox and ABC broadcasts in 2006[26] and 2008[27] respectively.[28] Applying the *Golden Globes Order* to the broadcasts, the Commission determined that Fox and ABC were in violation of its new indecency standards as the Fox broadcasts contained fleeting use of the F-word and the ABC broadcast portrayed fleeting nudity.[29]

After the Commission's 2006 ruling on the Fox broadcasts, various parties petitioned for a review of the Commission's order.[30] The Commission requested a voluntary remand, which the United States Court of Appeals for the Second Circuit granted, "so that [the Commission] could respond to the parties' objections."[31] In its remand order, the Commission found that both Fox broadcasts fell within the regulatory scope of patently offensive material, allowing a finding of indecency.[32] The Commission, however, decided it

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[24] *Id.* at 2313 (quoting *In re* Application of WGBH Educ. Found., 69 FCC 2d. 1250, 1254 (1978)).

[25] *Id.* at 2313-15 (quoting *Golden Globes Order*, 19 FCC Rcd. at 4980) ("[T]he mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.").

[26] *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005, 21 FCC Rcd. 2664, 2665, 2692 (2006).

[27] *In re* Complaints Against Various Television Licensees Concerning Their February 24, 2003 Broadcast of the Program "NYPD Blue," (*NYPD Blue Order*) 23 FCC Rcd. 3147, 3168 (2008).

[28] *See Fox II*, 132 S. Ct. at 2315.

[29] *Id.* at 2314-17. Although the *Golden Globes Order* focused on an incident involving indecent language, the Commission expanded it to "fleeting expletives and fleeting nudity," covering both the Fox and ABC broadcasts. *Id.* at 2315.

[30] *Id.*

[31] *Id.*

[32] *Id.* In reaching this conclusion, the Commission explained that the finding was based off of its definition of patently offensive contained in its 2001 policy statement. However, the Commission relied on its *Golden Globes Order* to further explain that "requiring repeated use of expletives in order to find material indecent [was] inconsistent with [its] general approach to indecency enforcement." *Fox II*, 132 S. Ct. at 2315 (quoting *In re* Complaints Regarding Various Television Broadcasts Between February 2, 2002, and March 8, 2005 (*Remand Order*), 21 FCC Rcd. 13299, 13308 (2006)).

would not impose a penalty for the broadcast since "it was not apparent that Fox could be penalized for Cher's comment at the time it was broadcast."[33]

Fox appealed, and the Second Circuit found the remand order arbitrary and capricious, stating that, "the FCC has made a 180-degree turn regarding its treatment of 'fleeting expletives' without providing a reasoned explanation justifying the about-face."[34] The Supreme Court granted certiorari and found the Commission's new indecency policy and its enforcement "neither arbitrary nor capricious."[35] The Court then remanded the case to allow "the [c]ourt of [a]ppeals to address respondents' First Amendment challenges."[36] On remand, the Second Circuit invalidated the poli-

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[33] *Id.* (quoting *Remand Order*, 21 FCC Rcd. at 13324).

[34] *Id.* (quoting Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n, 489 F.3d 444, 455 (2nd Cir. 2007)).

[35] *Id.* at 2315-16 (citing Fed. Commc'ns Comm'n v. Fox Television Stations, Inc. (*Fox I*), 556 U.S. 502, 517, 530 (2009). After the Second Circuit prohibited the enforcement policy under the Administrative Procedure Act (APA), the Commission appealed. *Fox I*, 556 U.S. at 516. Under the Administrative Procedure Act, the court has the ability to set aside agency action that is arbitrary or capricious:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:
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> . . .
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

5 U.S.C. § 706(2)(A) (2012); *see Fox II*, 132 S. Ct. at 2315. The Supreme Court found that under this Act, an agency was not required to prove its changes are better than previous policy or detail its justifications. *Fox II*, 132 S. Ct. at 2316 (citing *Fox I*, 556 U.S. at 515). Moreover, the Court agreed with the Commission in its new approach to examine "the patent offensiveness of even isolated uses of sexual and excretory words [as such] fits with the context-based approach [approved] . . . in *Pacifica*." *Id.* at 2316 (citing *Fox I*, 556 U.S. at 517).

[36] *Fox II*, 132 S. Ct. at 2316. In *Fox II*, the Court discussed the Second Circuit's decision further:

> The Court of Appeals found the vagueness inherent in the policy had forced broadcasters to 'choose between not airing . . . controversial programs [or] risking massive fines or possibly even loss of their licenses.' And the court found there was 'ample evidence in the record' that this harsh choice had led to a chill of protected speech.

Id. (quoting Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n, 613 F.3d 317, 334 (2nd Cir. 2010)) (citations omitted).

cy on constitutional grounds due to the policy's vagueness and the Commission's lack of consistency in its ruling.[37] The court of appeals stated that the Commission's standards "failed to give broadcasters sufficient notice of what would be considered indecent."[38] Subsequently, the Commission appealed and sought certiorari from the United States Supreme Court.[39]

Turning to the ABC case, in 2008 a forfeiture order was issued against ABC after the Commission determined the nudity in "NYPD Blue" broadcast to be actionably indecent.[40] A $27,500 forfeiture was imposed "on each of the [fourty-five] ABC-affiliated stations that aired the indecent episode."[41] The Second Circuit, however, struck down the Commission's forfeiture order based on the court's prior holding in the case, which invalidated the indecency policy in its entirety.[42] The Commission appealed, and the Supreme Court granted certiorari to review the Fox and ABC judgments collectively.[43]

At the time of the broadcasts at issue, the Commission's regulatory framework was mainly derived from *Federal Communications Commission v. Pacifica Foundation*[44] and a 2001 Commission Policy Statement (2001 Policy Statement).[45] The Supreme Court's holding in *Pacifica*—that George Carlin's "Filthy Words" monologue was indecent—was rather narrow because the Court did not venture into whether "an occasional expletive . . . would justify any sanction."[46] Following its interpretation of *Pacifica*, the Commission

[37] *Id.* (citing Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n, 613 F.3d at 327).

[38] *Id.*

[39] *Id.* at 2317.

[40] *Id.* Specifically, the Commission noted that nudity displayed during the broadcast was "patently offensive as measured by contemporary community standards," as it was "associated with sexual arousal and . . . excretory activities" and was "presented in a manner that clearly panders to and titillates the audience." *Fox II*, 132 S. Ct. at 2316-17 (quoting *NYPD Blue Order*, 23 FCC Rcd. 3147, 3150, 3153 (2008)).

[41] *Id.* at 2317.

[42] *Id.*

[43] *Id.*

[44] 438 U.S. 726 (1978). In *Pacifica*, the Court upheld the Commission's decision "that George Carlin's 'Filthy Words' monologue was indecent." *Fox II*, 132 S. Ct. at 2312. The monologue contained "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience." *Pacifica*, 438 U.S. at 732.

[45] *In re* Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency (*2001 Policy Statement*), 16 FCC Rcd. 7999 (2001).

[46] *Pacifica*, 438 U.S. at 750. George Carlin's monologue was an expletive-filled comedy bit that was "vulgar, offensive, and shocking," leaving no doubt that it

issued the 2001 Policy Statement in an attempt to give insight into its interpretation of and enforcement against indecent television broadcasts.[47] In the 2001 Policy Statement, the Commission indicated that a significant factor in determining what is patently offensive was "whether the material dwells on or repeats at length" the offending description or depiction.[48] Despite the Commission's regulatory framework at the time of the Fox and ABC broadcasts, the Commission applied its 2004 *Golden Globes Order* to find the broadcasts actionably indecent.[49] Subsequently, the Supreme Court was faced with the question of whether Fox and ABC had fair notice of what the Commission considered actionably indecent at the time the broadcasts aired.[50]

Justice Kennedy, delivering the opinion of the Court, held that the broadcasts were not actionable under the Commission's indecency standards in place at the time the broadcasts were aired and subsequently vacated the judgments of the Second Circuit and remanded the cases for further proceedings.[51] In reaching this conclusion, Justice Kennedy explained that, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or re-

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contained more than just an occasional expletive. *Id.* at 747 (internal quotation marks omitted). Later however, the Commission extended its application of *Pacifica* and held it would look past the seven specific words in Carlin's monologue and would examine "the full context of allegedly indecent broadcasts rather than limiting its regulation to a 'comprehensive index . . . of indecent words or pictorial descriptions.'" *Fox II*, 132 S. Ct. at 2313 (quoting *In re* Infinity Broadcasting Corp., 3 FCC Rcd. 930, 932 (1987)) (ellipsis in original). The Court in *Fox* noted however, the Commission continued to distinguish between repeated and deliberate indecent content and that of isolated indecent material. *Id.*

[47] *Fox II*, 132 S. Ct. at 2313. Specifically, the 2001 Policy Statement "intended 'to provide guidance to the broadcast industry regarding [its] caselaw interpreting 18 U.S.C. § 1464 and [its] enforcement policies with respect to broadcast indecency.'" *Id.* (alteration to original in quoted text) (quoting *2001 Policy Statement*, 16 FCC Rcd. 7999). Title 18 U.S.C. § 1464 bans the broadcast of "any obscene, indecent, or profane language." *Id.* at 2312.

[48] *Id.* Moreover, the statement provided that depictions of "sexual or excretory organs or activities" could be considered patently offensive and indecent based on the explicitness of the depiction, the length or repetition of the depiction, and the use of pandering or shock value. *Id.* (citing *2001 Policy Statement*, 16 FCC Rcd. at 8002-03). In line with the Commission's once held views on fleeting and isolated material, the 2001 Policy Statement also made clear that certain material that was "fleeting and isolated" was not actionably indecent. *Id.* at 2314 (citing *2001 Policy Statement*, 16 FCC Rcd. at 8008-09).

[49] *Fox II*, 132 S. Ct. at 2314-15.

[50] *Id.* at 2317-19.

[51] *Id.* at 2320.

quired."[52] This principle is guaranteed under the Due Process Clause, and as a result, when laws are "impermissibly vague" they will be invalidated.[53] A law will be impermissibly vague when a reasonably intelligent person is without fair notice of what actions the law prohibits or what facts must be proven under the regulation.[54] Following that principle, the Court found that the Commission's standards were too vague as applied to these specific broadcasts because at the time of the broadcasts, the networks were not put on notice of what content was forbidden.[55]

The regulatory framework existing at the time of the broadcasts did not put the networks on notice that fleeting expletives or a brief moment of nudity could be actionably indecent.[56] At the time of the broadcasts in 2002 and 2003, Fox and ABC were functioning within the regulatory framework derived from *Pacifica*, the 2001 Policy Statement, and other Commission rulings issued prior to the broadcasts.[57] These regulations made it clear that the Commission's focus in an indecency determination at the time of the broadcast was whether the indecent material was "dwell[ed] on or repeat[ed] at length,"[58] and an indecency violation based on fleeting expletives or nudity was not a known consequence.[59] The Commission subsequently amended this framework through its *Golden Globes Order* in 2004.[60] However, the Networks simply could not be expected to broadcast material within the new indecency standards when those standards were not in existence at the time of the broadcasts.[61] This lead the Court to conclude that the Commission, by applying its *Golden Globes Order* retroactively to prior broadcasts, violated the Networks' Fifth Amendment rights under the Due Process Clause.[62] Therefore, because the policies were too vague and infringed on due process, the broadcasts could not be actionable as indecent.[63] In reaching this decision, the Supreme

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[52] *Id.* at 2317 (citing Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).
[53] *Id.*
[54] *Id.*
[55] *Fox II*, 132 S. Ct. at 2317-20.
[56] *Id.* at 2318.
[57] *See id.* at 2313.
[58] *Id.* at 2317-18.
[59] *See id.* at 2313-14; 2318.
[60] *Id.; see also Golden Globes Order*, 19 FCC Rcd. 4975, 4975-76; 4978-80 (2004).
[61] *Fox II*, 132 S. Ct. at 2320.
[62] *Id.*
[63] *Id.* at 2317.

Court relied on its own consistent application of this principle in interpreting due process issues.[64]

In finding the enforcement framework void for vagueness, the Court looked to its prior ruling in *Connally v. General Construction Co.*,[65] which held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[66]

In *Connally*, the United States Supreme Court addressed the issue of fair notice in the context of an Oklahoma labor statute.[67] The Commissioner of Labor of Oklahoma (the Commissioner) had found General Construction Company (General) in violation of a labor statute that prohibited employers from paying laborers wages below the current rate of wages in the locality.[68] General was under contract with the state of Oklahoma to construct certain bridges within the state.[69] General paid certain laborers $3.20 per day, "whereas, [the Commissioner] asserted, the current rate in the locality where the work was being done was $3.60" per day.[70] In his complaint, the Commissioner relied on an investigation that found the daily wages paid to laborers in the vicinity generally between $3.00 and $4.00.[71] The Commissioner set forth a bill declaring

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[64] *See, e.g.*, United States v. Williams, 553 U.S. 285, 306 (2008) (holding that child pornography statute was not impermissibly vague); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (holding that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes"); Connally v. Gen. Constr. Co., 269 U.S. 385, 393 (1926) (holding that an Oklahoma statute's phrase "current rate of wages" was too vague to penalize a general contractor).

[65] Connally, 269 U.S. at 391.

[66] *Id.* (citing Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914); Collins v. Kentucky, 234 U.S. 634, 638 (1914)).

[67] *Id.* at 388, 390.

[68] *Id.* at 388-90. The Court interpreted the former Oklahoma Code Section 7255, which provided:

> That not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the state, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the state, . . . shall be deemed to be employed by or on behalf of the state.

Id. at 388 (alteration to original in quoted text) (quoting former OKLA. COMP. STAT., § 7255 (1921)).

[69] *Id.* at 389.

[70] *Connally*, 269 U.S. at 389.

[71] *Id.*

General to be in violation of the labor statute.[72] General applied for an interlocutory injunction to prevent the enforcement of the statute, which was granted by a three-judge court.[73] The Commissioner appealed to the Supreme Court, and the Supreme Court granted certiorari to address the lack of certainty in the Oklahoma statute.[74] General claimed that the statute, if enforced, would "deprive [General], its officers, agents and representatives, of their liberty and property without due process of law."[75]

The Court noted that "generally . . . the decisions . . . upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them."[76] The Court held that "the words 'current rate of wages' [did] not denote a specific or definite sum," and that the statute [was] even more uncertain due to the use of the word "locality."[77] The Court stated that "[w]ages have varied since [General] entered into its contracts . . . and it is impossible to determine . . . whether the sums paid by [General] or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality."[78]

The Court explained that a criminal statute must be certain and cannot "rest upon an uncertain foundation."[79] Moreover, "[t]he crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."[80] The Court reasoned that the statute at issue, with two uncertain terms present, was not a valid criminal statute.[81]

Connally stands for the proposition that due process requires fair notice.[82] *Connally* held that a contractor cannot be held criminally liable for its actions if the statute the contractor allegedly violated is so uncertain that it fails to provide fair notice as to what conduct is prohibited.[83] The same principle is seen in *Fox* where

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[72] *Id.*
[73] *Id.* at 391.
[74] *Id.*
[75] *Id.* at 390.
[76] *Connally*, 290 U.S. at 391 (citing Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925); Omaechevarria v. Idaho, 246 U. S. 343, 348 (1918)).
[77] *Id.* at 393-94.
[78] *Id.* at 390.
[79] *Id.* at 393.
[80] *Id.*
[81] *Id.* at 393.
[82] *See Connally*, 290 U.S. at 391.
[83] *Id.*

the Court addressed the requirement of fair notice in the context of a federal agency's retroactive enforcement of its indecency standards.[84] Based on the lack of notice, the Court found the Commission could not apply its 2004 policy modifications to broadcasts that transpired in 2002 and 2003.[85]

Similar to the issue in *Fox,* the Court addressed the retroactive application of standards arising from a subsequent judicial decision in *Marks v. United States.*[86] In *Marks,* the "[p]etitioners were charged with . . . transporting obscene materials . . . in violation of 18 U.S.C. § 1465."[87] The petitioners' actions, which led to the charges, took place over a span of time ending February 27, 1973.[88] The petitioners were convicted in the district court,[89] which applied the standards set forth in *Miller v. California*[90] to instruct the jury.[91] *Miller* was decided on June 21, 1973, which was between the time the petitioners were arrested and the time their case went to trial.[92] Petitioners argued that they were entitled to jury instructions under the standard developed in *Memoirs v. Massachusetts,*[93] but the district court overruled their objections.[94] The petitioners then appealed to the United States Court of Appeals for the Sixth Circuit, where a divided court affirmed the district court's convictions.[95]

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[84] *Fox II,* 132 S. Ct. 2307, 2311, 2314-15, 2317-20 (2012).
[85] *Id.* at 2315-20.
[86] 430 U.S. 188 (1977).
[87] *Marks,* 430 U.S. at 189. Section 1465 states, in pertinent part:

> Whoever knowingly produces with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1465 (2012).
[88] *Marks,* 430 U.S. at 189. "Petitioners were charged with several counts of transporting obscene films in interstate commerce." *See id.* at 190.
[89] *Id.* at 191.
[90] 413 U.S. 15 (1973).
[91] *Marks,* 430 U.S. at 191.
[92] *Id.* at 190.
[93] 383 U.S. 413 (1966) (plurality opinion).
[94] *Marks,* 430 U.S. at 190-91.
[95] *Id.* at 191.

Memoirs provided a more defendant-friendly interpretation of the federal obscenity laws than the interpretation set forth in *Miller*.[96] Under the *Memoirs* interpretation, "expressive material is constitutionally protected unless it is 'utterly without redeeming social value.'"[97] Under *Miller*, the test required the court to look at "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,"[98] which is a more onerous test than that set forth in *Memoirs*.[99] The reason for the petitioners' objection to the application of the *Miller* standard, however, was that *Miller* was not decided until after petitioners were indicted under 18 U.S.C. § 1465.[100] Subsequently, the Supreme Court addressed the lower courts' application of the *Miller* standard to conduct that took place before *Miller* was decided.[101]

The Court concluded that the petitioners should only be held criminally liable for conduct that was punishable under the previous *Memoirs* standard.[102] The Court stated that "since the petitioners were indicted for conduct occurring prior to our decision in *Miller*, they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are 'utterly without redeeming social value.'"[103] Accordingly, the decision of the district court, previously affirmed by the court of appeals, was reversed.[104] The Court stated that "[t]o apply *Miller* retroactively, and thereby punish conduct innocent under *Memoirs*, violates the Due Process Clause of the Fifth Amendment much as retroactive application of a new statute to penalize conduct innocent when performed would violate the Constitution's ban on ex post facto laws."[105]

The Court also looked to the principle of the Ex Post Facto Clause,[106] which is based on "the notion that persons have a right to fair warning of" the conduct that gives "rise to criminal penal-

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[96] *Id.* at 190.

[97] *Id.* at 191 (quoting *Memoirs*, 383 U.S. at 418) (plurality opinion)).

[98] Miller v. California, 413 U.S. 15, 24 (1973).

[99] *Compare Miller*, 413 U.S. at 24, *with Memoirs*, 383 U.S. at 418. *Memoirs* was not only more favorable to the petitioners' defense but also—according to the petitioners—should have been the controlling case on which their charges were adjudicated. *See Marks*, 430 U.S. at 190-91.

[100] *Marks*, 430 U.S. at 189-91.

[101] *Id.* at 188-90.

[102] *Id.* at 196.

[103] *Id.* (quoting *Memoirs*, 383 U.S. at 418).

[104] *Id.* at 191, 197.

[105] *Id.* at 191 (citing U.S. CONST. art. 1, § 9, cl. 3).

[106] "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. 1, § 9, cl. 3.

ties."[107] The petitioners in *Marks* did not have fair notice of the conduct that gave rise to the charges brought against them.[108] The retroactive application of *Miller* did not stand up to the Supreme Court's reasoned application of the Due Process and Ex Post Facto Clauses of the Constitution.[109] In *Fox*, the Supreme Court relied on reasoning similar to that in *Marks*, to find that the Commission could not retroactively apply the *Golden Globes Order* to the Networks' broadcasts.[110]

In 2008, the Court again addressed the issue of fair notice in *United States v. Williams*.[111] In *Williams*, the defendant was charged with violating 18 U.S.C. § 2252A(a)(3)(B),[112] which criminalizes "the pandering or solicitation of child pornography."[113] The defendant posted a message in a chat room that contained a link to seven pictures of children engaged in sexually explicit conduct.[114] After obtaining a search warrant for the defendant's home, the Secret Service found at least twenty-two pictures of "real children engaged in sexually explicit conduct."[115] The defendant was

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[107] *Marks*, 430 U.S. 191 (citing United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).
[108] *Id.* at 196.
[109] *Id.*
[110] *See Fox II*, 132 S. Ct. 2307, 2318 (2012).
[111] 553 U.S. 285 (2008).
[112] The statute holds:

> (a) Any person who—
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> (3) knowingly—
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> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—
>
> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct . . . shall be punished as provided in subsection (b).

18 U.S.C. § 2252A(a)(3)(B) (2012); *Williams*, 533 U.S. at 289-90 (quoting 18 U.S.C. § 2252A(a)(3)(B)).
[113] *Williams*, 553 U.S. at 288 (citing 18 U.S.C. § 2252A(a)(3)(B)).
[114] *Id.* at 291.
[115] *Id.* at 291-92.

charged with two counts of violating the child pornography statute.[116]

The United States District Court for the Southern District of Florida convicted the defendant on both counts, imposing concurrent sixty-month prison terms and a $100 statutory assessment for each count.[117] On appeal, the United States Court of Appeals for the Eleventh Circuit reversed one of the convictions, "holding that the [pandering] statute was both overbroad and impermissibly vague."[118] The Supreme Court granted certiorari and reversed the court of appeals, concluding that the statute did not violate the First or Fifth Amendments.[119] Justice Scalia delivering the opinion of the Court, reasoned that the pandering statute is neither overbroad nor impermissibly vague.[120] Congress's careful crafting of the pandering statute survived the constitutional challenges brought forward by the defendant.[121]

In addition to resolving whether the statute was overbroad under the First Amendment,[122] the Court addressed whether the statute was impermissibly vague, thereby violating the Due Process Clause of the Fifth Amendment.[123] In its analysis, the Court addressed the void for vagueness doctrine, which the Court described as "an outgrowth" of the Due Process Clause.[124] Citing *Hill v. Colorado*,[125] the Court acknowledged that "[a] conviction fails to comport with due process if the statute under which it is obtained fails

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[116] *Id.* at 292. "[Defendant] was charged with one count of pandering child pornography under §2252A(a)(3)(B) and one count of possessing child pornography under §2252A(a)(5)(B)." *Id.*

[117] *Id.*

[118] *Williams*, 553 U.S. at 292 (quoting United States v. Williams, 444 F.3d 1286, 1308-09 (11th Cir. 2006)).

[119] *Id.* at 292-307.

[120] *See id.* at 287-88, 306-07.

[121] *Id.* at 307.

[122] "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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The Court stated, "We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment." *Williams*, 553 U.S. at 288 (citing Roth v. United States, 354 U.S. 476, 484-85 (1957)). The Court further stated, "Moreover, we have held that the government may criminalize the possession of child pornography, even though it may not criminalize the mere possession of obscene material involving adults. *Id.* (comparing Osborne v. Ohio, 495 U.S. 103, 110 (1990), with Stanley v. Georgia, 394 U.S. 557, 568, 589 (1969)).

[123] *Williams*, 553 U.S. at 288.

[124] *Id.* at 304.

[125] 530 U.S. 703, 732 (2000).

to provide a person of ordinary intelligence fair notice of what is prohibited."[126] However, the Court noted that crystal clear instructions are not required and that "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."[127]

With this background analysis, the Court then addressed the exact wording of the statute to determine if, in fact, it was impermissibly vague.[128] Section 2252A(a)(3)(B) prohibits one from knowingly distributing material "in a manner that reflects the belief, or that is intended to cause another to believe" that the material is child pornography.[129] The court of appeals ruled that this phrase was "so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed."[130] However, the Supreme Court disagreed, stating that there is no indeterminacy in what the statute prohibits.[131] The Court stated that "[t]he statute requires that the defendant hold, and make a statement that reflects, the belief that the material is child pornography; or that he communicate in a manner intended to cause another so to believe."[132] This reasoning led the Court to determine that the statute was not impermissibly vague.[133]

While the Court in *Williams* determined that the pandering provision of Section 2252A did not violate the Due Process Clause, the Court did not contradict the constitutional requirement of fair notice.[134] The Court's line of reasoning is similar to that set forth in *Connally* and *Marks*, as well as *Fox*.[135] In *Fox*, the Court continued this consistent line of thinking in the context of an agency regulation—requiring regulatory language to be certain enough as to not be too vague and prohibiting retroactive enforcement in violation of the fair notice requirement of due process.[136]

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[126] *Williams*, 553 U.S. at 304.
[127] *Id.* at 306.
[128] *Id.* at 304-07.
[129] *Id.* at 289-90.
[130] *Id.* at 304-05.
[131] *Id.* at 306.
[132] *Williams*, 553 U.S. at 306.
[133] *Id.*
[134] *Id.* at 304, 306-07.
[135] The Due Process Clause requires fair notice. *See generally Fox II*, 132 S. Ct. 2307, 2320 (2012); Marks v. United States, 430 U.S. 188 (1977); Connally v. Gen. Constr. Co., 269 U.S. 385 (1926).
[136] *Fox II*, 132 S. Ct. at 2320.

In *Connally*, the Court's main due process issue was the vagueness of the applicable Oklahoma labor statute.[137] The Court reasoned that the disparity of meanings as to the phrase "current rate of wages" prohibited the enforcement of the statute.[138] The contractor, General, could not identify an exact wage to pay its laborers based on the statute. Therefore, the Court prevented the Commissioner of Labor of Oklahoma from enforcing the penalties of the statute.[139] The Court's reasoning is consistent with the doctrine of fair notice, which "goes to the very heart of the principle of the rule of law—that individuals should be treated in accordance with articulated legal standards."[140]

In *Marks*, the Court addressed the retroactive application of jury instructions stemming from an interpretation of a criminal statute that were set forth after the underlying conduct occurred in *Marks*.[141] The Court ruled that this form of enforcement violated the Due Process Clause of the Fifth Amendment.[142] An individual cannot be expected to abide by standards that are not incorporated into the law at the time of his or her actions. Applying this principle to *Fox*, the Court added to the framework and established that federal agencies cannot "promulgate retroactive rules" unless Congress expressly grants statutory authority.[143] Thus in *Fox*, as there was no express grant by Congress, the Commission could not apply the 2004 *Golden Globes Order* to broadcasts that took place in 2002 and 2003.

In *Williams*, although the Court reversed the decision to vacate the defendant's conviction, the Court was consistent with its prior rulings on fair notice.[144] The Court found that the child pornography statute was not so vague that it failed to provide fair notice to "a person of ordinary intelligence."[145] Thus, the Court held that even though it may be difficult to determine the clear meaning of a sta-

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[137] *Connally*, 269 U.S. at 390.
[138] *Id.* at 393.
[139] *Id.* at 396.
[140] Albert C. Lin, *Refining Fair Notice Doctrine: What Notice is Required of Civil Regulations?*, 55 BAYLOR L. REV. 991, 996 (2003) (citing Jason Nichols, Note, *Sorry! What the Regulation Really Means is . . .": Administrative Agencies' Ability to Alter an Existing Regulatory Landscape Through Reinterpretation of Rules*, 80 TEX. L. REV. 951, 964-68 (2002)).
[141] Marks v. United States, 430 U.S. 188, 189-90 (1977).
[142] *Id.* at 191.
[143] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (finding a rule that retroactively changed Medicare cost limits for services already performed and reimbursed unconstitutional).
[144] United States v. Williams, 553 U.S. 285, 304-07 (2008).
[145] *Id.* at 304, 306.

tute, these conditions alone do not make the statute void for vagueness.[146] *Williams* was the last time the Court seriously waded into the due process waters before the Court granted certiorari to decide *Fox*.

In *Fox*, the Supreme Court had another chance to interpret the Due Process Clause of the Fifth Amendment.[147] With this opportunity, the Court incorporated various principles underlying the Due Process Clause to determine that the Commission did not provide fair notice to Fox and ABC.[148] The framework in place at the time of the Networks' broadcasts did not include the indecency standards set forth in the *Golden Globes Order*.[149] As a result, the networks were unaware, at the time of the broadcasts, that the content would be actionably indecent at a future time.[150] Therefore, the Court held that the Commission could not retroactively enforce the standards to broadcasts aired prior to the promulgation of those standards.[151] In its opinion, the Court provided even more clarity to the requirements of due process, providing governmental agencies with guidance concerning the future enforcement of their regulatory standards.

While the Court came to a conclusion on the due process question, it left several questions unanswered in the *Fox* opinion.[152] The Court declined to address the "First Amendment implications of the Commission's indecency policy."[153] In addition, the Court left "the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements."[154] Therefore, while the interpretation of the Due Process Clause appears to continue down the path set forth in previous decisions of the Court, the First Amendment and indecency policy questions are left to be determined another day.[155] The decision not to address these questions follows Court precedent of "declining to decide cases not before it."[156]

The fair notice doctrine remains a vital protection offered to citizens of this country through the Due Process Clause of the Fifth

[146] *Id.* at 306.
[147] *Fox II*, 132 S. Ct. 2307 (2012).
[148] *Id.* at 2320. Specifically, the Court incorporated the void for vagueness doctrine and the prohibition against retroactive law making. *Id.*
[149] *Id.* at 2315.
[150] *Id.* at 2320.
[151] *Id.* at 2317-2320.
[152] *See Fox II*, 132 S. Ct. at 2320.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.* (citing Sweatt v. Painter, 339 U.S. 629, 631 (1950)).

Amendment of the Constitution. In *Fox*, the Court applied this doctrine to the enforcement of a governmental agency's indecency standards.[157] The decision follows a line of cases that prohibit standards from being impermissibly vague or applied retroactively.[158] Our judicial system certainly will be confronted with cases in the future that require further interpretation of the Due Process Clause. *Fox* will be another guidepost for the system to follow, providing persons and entities more clarity as to what the doctrine of fair notice requires.[159]

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[157] *Id.*

[158] *See supra* note 64.

[159] *See generally Fox II*, 132 S. Ct. at 2307.