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# Arbitrary and F<sup>^</sup>@#\$\*! Capricious: An Analysis of the Second Circuit's Rejection of the FCC's Fleeting Expletive Regulation in Fox Television Stations, Inc. v. FCC (2007)

Justin Winqvist

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**Keywords**

Federal Communications Commission (FCC), Second Circuit, First Amendment, Fox Television Stations,  
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EXPLETIVE REGULATION IN *FOX  
TELEVISION STATIONS, INC. v. FCC* (2007)

JUSTIN WINQUIST\*

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\* J.D. Candidate, *American University, Washington College of Law*, May 2009. I would like to thank Karen, Willie and Emily for their support and patience. I would also like to thank Professor Anthony Varona and Meggie Sramek for their invaluable assistance.

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#### INTRODUCTION

“Shit, piss, cunt, fuck, cocksucker, motherfucker and tits:” the seven dirty words that comedian George Carlin observed “you couldn’t say on the public, ah, airwaves, um, the ones you definitely wouldn’t say, ever.”<sup>1</sup> Mr. Carlin may have been mistaken because the Second Circuit recently gave broadcasters a victory in their battle against broadcast indecency regulation. This Note analyzes the validity of the Federal Communications Commission’s (“FCC” or “Commission”) indecency regulations—specifically of fleeting expletives—in light of the Second Circuit’s recent decision in *Fox Television Stations, Inc. v. FCC*.<sup>2</sup> In *Fox Television*, the court held that the FCC’s inclusion of fleeting expletives in the category of actionably indecent speech was an arbitrary and capricious departure from precedent.<sup>3</sup>

Although the Second Circuit ruled against the FCC, this Note argues that fleeting expletives are constitutionally sanctionable under current law and that the FCC was not acting arbitrarily in expanding fining to single broadcast occurrences of indecent words. This Note also addresses and distinguishes the broader criticisms of broadcast indecency regulation, concluding that, although the constitutional justifications for regulation are eroding, the fleeting expletive policy is not the proper basis for reevaluating the FCC’s regulatory function.

Part I of this Note surveys the legal limitations on the FCC’s authority to regulate indecent material. Part II describes the specific

1. *FCC v. Pacifica Found.*, 438 U.S. 726, 751 (1978) (quoting GEORGE CARLIN, *Filthy Words, on OCCUPATION: FOOLE!* (Eardrum Records 1973)).

2. 489 F.3d 444 (2d Cir. 2007).

3. *Id.* at 462.

broadcasts and Commission rulings leading up to the *Fox Television* case. Parts III and IV analyze the *Fox Television* court's disposition of the case under arbitrary and capricious review, both in light of the analogous 1988 case of *Action For Children's Television v. FCC*,<sup>4</sup> and generally applicable bases for judicial reversal of agency action. These Parts argue that the policy change was not arbitrary and capricious because it was adequately reasoned and consistent with the FCC's authority. Further, Parts III and IV suggest that the *Fox Television* court's criticisms were not directed at the reasoning behind the policy change, but at the broadcast indecency regulatory scheme generally.

Part V examines the *Fox Television* court's prediction, in dicta, that the FCC's indecency definition will be found unconstitutional. This Part concludes that the inclusion of fleeting expletives is constitutional under current law, falling squarely within the Supreme Court's approval of context-based broadcast speech restrictions. Finally, this Note concludes that the Court should not use the *Fox Television* case to revisit the broader justifications for regulation of broadcast but should instead wait for a case that raises more persuasive and timely arguments against the FCC's continued regulatory role.

## I. BACKGROUND

### A. *The FCC's Statutory Authority*

The FCC was established by the Communications Act of 1934<sup>5</sup> as a regulatory agency for commerce in radio and wire communications.<sup>6</sup> From its inception, the FCC has been explicitly prohibited from engaging in any censorship activity of the public airwaves.<sup>7</sup> At the same time, however, the FCC and broadcasters have been categorized as "public trustees"<sup>8</sup> charged with providing programming in the

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4. 852 F.2d 1332 (D.C. Cir. 1998).

5. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151–613 (2000)).

6. *See id.* (indicating that this measure would serve as a regulatory framework for the communications industry).

7. *See* 47 U.S.C. § 326 (2000) ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or . . . interfere with the right of free speech by means of radio communication.").

8. *See, e.g.,* Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2103, 2105–08 (1997) (arguing that the FCC's broadcast regulation schemes designed to enforce broadcaster's public interest obligations are constitutional but ineffective).

public interest.<sup>9</sup> One aspect of the public trustee model has been regulation of speech deemed inappropriate for the viewing public, most notably child viewers.<sup>10</sup> In carrying out this duty of policing speech, the FCC has relied on the public trustee doctrine,<sup>11</sup> federal criminal law prohibiting the broadcast of indecent, profane, or obscene material,<sup>12</sup> and authorization to enforce that federal law through forfeiture penalties issued to broadcast licensees.<sup>13</sup>

### B. First Amendment Conflict

The Supreme Court has held that speech that qualifies as obscene may permissibly be regulated in broadcast and other contexts.<sup>14</sup> Merely indecent speech (the category in which fleeting expletives

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The essential justification for the limited First Amendment protection of broadcast—and the FCC’s resulting power to regulate—was outlined in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). There, the Court held that the “scarcity of broadcast,” (i.e., the fact that “there are substantially more individuals who want to broadcast than there are frequencies to allocate”) justified government regulation. *Id.* at 388, 400–01.

9. See 47 U.S.C. § 303(g) (2000) (providing that the FCC shall “generally encourage the larger and more effective use of radio in the public interest”). Additional contentious examples of public interest obligations are the fairness doctrine and the obligation to provide children with quality educational programming while protecting them from inappropriate content. See Anthony E. Varona, *Out of Thin Air: Using First Amendment Public Forum Analysis to Redeem American Broadcasting Regulation*, 39 U. MICH. J.L. REFORM 149, 159–65 (2006) (discussing the fairness doctrine and suggesting that educational programming obligations are not sufficiently defined or enforced). The FCC abolished the fairness doctrine in 1987. See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989) (approving the FCC’s abolition of fairness doctrine as neither arbitrary nor capricious).

10. See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 39–40 (2004) (recounting the FCC’s “strikingly permissive enforcement attitude” in enforcing indecency and obscenity prior to the Commission decisions at issue in *Fox Television*).

11. See *Red Lion*, 395 U.S. at 383 (approving classification of broadcast frequencies as part of the “public trust”).

12. See 18 U.S.C. § 1464 (2000) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”).

13. See 47 U.S.C. § 503(b)(1)(D) (2000) (making violators of 18 U.S.C. § 1464 liable to the U.S. government in forfeiture penalties). This provision is how the FCC is technically authorized to administratively impose fines, revoke licenses, and issue warnings for violations of its indecency regulations. See Sharokh Sheik, Comment, *FCC Indecency Violations: Should the FCC Be Able to Fine Non-Broadcast Licensees for Indecency Violations?*, 35 SW. U. L. REV. 457, 462 (2006) (noting that, although § 1464 is a criminal statute, “it has never been applied literally” and has instead been enforced through civil fines).

14. See *Miller v. California*, 413 U.S. 15, 36 (1973) (reaffirming that the First Amendment does not protect obscene material). The definition of obscenity at issue in *Miller* was essentially material that “taken as a whole” appeals to the “prurient interest.” *Id.* at 37 n.1 (Douglas, J., dissenting). The quintessential example of obscenity, although only a “sub-group of all ‘obscene’ expression,” is pornography. *Id.* at 20 n.2 (majority opinion).

fall), however, is fully protected by the First Amendment outside of the broadcast context.<sup>15</sup> An inherent conflict therefore exists between the FCC's goal of regulating broadcasters as public trustees and the First Amendment<sup>16</sup> limitation on what speech the government may permissibly regulate.<sup>17</sup> Regulation of indecent speech is a problematic area<sup>18</sup> where the FCC treads a fine line between impermissible censorship and protecting the public interest.<sup>19</sup> Adding to the complexity is the pressure felt by the FCC from the broadcast industry it regulates, Congress, and the public.<sup>20</sup>

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15. See, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that display of the word "fuck" in a public space is protected by the First Amendment).

16. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

17. See, e.g., Krotoszynski, *supra* note 8, at 2123 (noting that the First Amendment is at odds with the FCC's duty to require broadcasters to fulfill their obligations as public trustees but concluding that regulation of broadcast speech is likely constitutional); see also Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L.J. 243, 249-71 (2006) (surveying attempts to regulate non-broadcast media such as cable and Internet and predicting that any future attempts "would be almost certain to fail a constitutional challenge").

18. Even the FCC has acknowledged that the First Amendment's protection of indecent speech requires the government to "both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest," which is the standard articulation of constitutional strict scrutiny. Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency (*2001 Enforcement Policies*), 16 F.C.C.R. 7999, 8000 (2001) (internal quotations omitted).

19. The problem actually concerns the potential self-censorship that results from the threat of fines rather than literal government censorship of speech, as the FCC does not actually prohibit indecent speech, but rather, levies fines after the fact. See, e.g., Noelle Coates, Note, *The Fear Factor: How FCC Fines are Chilling Free Speech*, 14 WM. & MARY BILL RTS. J. 775, 780-82 (2005) (highlighting the danger that broadcasters, through self-censorship, will become "the functional equivalent of a government censor"). See generally Sheik, *supra* note 13, at 463 (describing the FCC's indecency complaint enforcement process).

20. The public is overwhelmingly represented by a select few activist groups who file the majority of complaints. See Geoffrey Rosenblat, *Stern Penalties: How the Federal Communications Commission and Congress Look To Crack Down on Indecent Broadcasting*, 13 VILL. SPORTS & ENT. L.J. 167, 173-75 (2006) (noting that FCC enforcement procedures allow "watchdogs, activist groups and individuals" to target certain broadcasters). This calls into question how representative the complaint process is of public opinion. See Coates, *supra* note 19, at 789 (noting the influence of interest groups on the regulatory process); see also B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob From the Tube*, 13 UCLA ENT. L. REV. 187, 194 (2006) (labeling FCC enforcement methods an "applause test"). The FCC does not monitor indecency (or related) violations, but rather, relies on a complaint process whereby viewers' complaints may be investigated to determine if a violation occurred. *2001 Enforcement Policies*, 16 F.C.C.R. at 8015. At least one watchdog group makes what is effectively one-click reporting to the FCC possible through its website. See Parents Television Council, File an Official Indecency Complaint With the Federal Communications Commission (FCC) Now, <https://www.parentstv.org/PTC/fcc/fcccomplaint.asp> (last visited Nov. 12, 2007) (providing a simple form which submits a complaint directly to the FCC).

Nevertheless, the FCC continues to navigate this complex area, imposing fines on broadcasters who violate its rules.<sup>21</sup>

C. *The Pacifica Framework: The Court Permits Context-Based Restrictions on Indecent Broadcast Speech*

In the landmark case of *FCC v. Pacifica Foundation*,<sup>22</sup> the Supreme Court outlined the standard for indecency regulation that still serves as the framework today. In *Pacifica*, the Court was confronted with FCC regulation of a radio broadcast of comedian George Carlin's "Seven Filthy Words" monologue.<sup>23</sup> The speech at issue was Carlin's use of seven curse words that did not qualify as unprotected obscene speech.<sup>24</sup> The Court nevertheless held that the FCC may regulate indecent speech in broadcast, even when it is not obscene, because of the unique characteristics of the broadcast medium.<sup>25</sup> The two special features of broadcast identified by the Court were that broadcast was a "uniquely pervasive" medium, capable of invading the privacy of the home, and that broadcast was "uniquely accessible to children."<sup>26</sup> Finding that these concerns warranted broadcast receiving "the most limited First Amendment protection,"<sup>27</sup> the Court applied "less than strict scrutiny"<sup>28</sup> and held that the FCC could

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21. For a chart summarizing the FCC's indecency fining activity from 1970 through 2004, see Frank Ahrens, *FCC Indecency Fines, 1970-2004*, WASHINGTONPOST.COM, <http://www.washingtonpost.com/wp-srv/business/graphics/web-fcc970.html> (last visited Jan. 17, 2008).

22. 438 U.S. 726 (1978).

23. *Id.* at 729. For a full transcript of the monologue, see *id.* at 751-55.

24. *Id.* at 750.

25. *Id.*

26. *Id.* at 748-50.

27. *See Id.* at 748 (distinguishing the historically limited protection of broadcast speech from protected print speech and noting that "each medium of expression presents special First Amendment problems"); *cf.* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952) (holding that motion pictures are protected speech under the First Amendment but cautioning that the protection is not an "absolute freedom to exhibit every motion picture of every kind at all times and all places").

28. *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 852 (E.D. Pa. 1996) (discussing *Pacifica's* lowered scrutiny of speech restrictions in broadcast and concluding that strict scrutiny applies to Internet context regulations), *aff'd*, 521 U.S. 844 (1997). Strict scrutiny is typically applied to content-based regulations of speech and requires that laws "be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). The *Pacifica* Court did not explicitly adopt a standard of review for broadcast regulations nor did it conduct the typical balancing test between governmental interests and the means of achieving them. *Pacifica*, 438 U.S. at 748-50. Nevertheless, it is clear that the Court approved the governmental interest in protecting children and deemed regulation of broadcast speech an acceptable way to achieve that goal at least in the specific circumstances of that case. *See id.* at 749-50 (citing *Ginsburg v. New York*, 390 U.S. 629 (1968) for the proposition that the goal



constitutionally regulate indecent speech like the Carlin monologue under a context-based standard.<sup>29</sup> The Court explicitly cautioned, however, that they were not holding that an “occasional expletive . . . would justify any sanction” and that the context of the speech was “all-important.”<sup>30</sup>

*D. From Pacifica to 2003: The FCC Expands Indecency Regulation While Exempting Fleeting Expletives*

In the years following *Pacifica*, the FCC pursued a lax enforcement policy of indecent speech, limiting actionable indecency to the seven dirty words in the Carlin monologue.<sup>31</sup> In 1987, however, the Commission announced that indecency determinations would be made without regard to whether they contained one of the seven words at issue in *Pacifica* and instead would be evaluated under the generalized contextual test that remains in place today.<sup>32</sup> The contextual definition adopted was virtually identical to the test at the time of the *Pacifica* case: “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience.”<sup>33</sup> The Commission successfully defended this indecency definition against constitutional challenges in 1988,<sup>34</sup> with the approving court

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of enabling parents to control the content to which their children are exposed, when combined with the ease of access to such content, “amply justifi[es] special treatment of indecent broadcasting”).

29. See *Pacifica*, 438 U.S. at 750 (specifying that the content of a broadcast program will “affect the composition of the audience” and that the Commission’s approach to indecency determinations “requires consideration of a host of variables”).

30. See *id.* (emphasizing the narrowness of the holding and explicitly not deciding that an “occasional expletive” in the setting of a “two-way radio conversation . . . or a telecast of an Elizabethan comedy” would be actionable indecency). The Court also made clear that it had not decided whether regulation would be permissible late at night when audiences contain “so few children.” *Id.* at 750 n.28.

31. See generally Brian J. Roeder, Note, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”: Has the FCC Grown Too Big For its Britches?*, 74 *FORDHAM L. REV.* 871, 882–83 (2005) (describing relaxed FCC indecency regulation between *Pacifica* and 1987 when the FCC adopted their current contextual approach).

32. See *Infinity Broad. Corp. of Pa. (1987 Reconsideration Order)*, 3 *F.C.C.R.* 930, 930 (1987) (indicating that there previously had been an “[u]nstated, but widely assumed” presumption that only the language of the Carlin monologue, presented in a deliberately shocking manner, would be actionable and abandoning that presumption in favor of the “more difficult” contextual approach).

33. See *id.* (reiterating the indecency definition at issue in *Pacifica* and assuming that the Court had implicitly agreed with its constitutionality).

34. See *Action for Children’s Television v. FCC (Act I)*, 852 *F.2d* 1332, 1338–39 (D.C. Cir. 1988) (concluding that the FCC’s definition of indecency was not unconstitutionally vague and finding support in *Pacifica*’s holding which quoted parts

issuing a caveat that the FCC's enforcement decisions remain reasonable and not create an impermissible chilling effect on free speech.<sup>35</sup>

The Commission eventually settled on a policy where indecency could be sanctioned under the aforementioned test during a 6 a.m. to 10 p.m. "safe harbor" period during which children were presumptively in the audience.<sup>36</sup> Until the forfeitures at issue in *Fox Television*, however, the FCC considered "deliberate and repetitive use" of offensive words to be a prerequisite for finding them actionable when the words were mere expletives not describing sexual or excretory functions.<sup>37</sup>

Because of uncertainty among broadcasters regarding what speech was actionable, the FCC attempted to clarify its indecency standards in a 2001 Policy Statement.<sup>38</sup> The Policy Statement announced several factors to be considered in determining if speech was "patently offensive," which included:

- (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory

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of the indecency definition with "seeming approval"), *overruled in part by* Action for Children's Television v. FCC (*Act III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc).

35. *Id.* at 1340 n.14 (citing *Pacifica*, 438 U.S. at 761 (Powell, J., concurring)). Again in 1991, see Action for Children's Television v. FCC (*Act II*), 932 F.2d 1504, 1508 (D.C. Cir. 1991) (rejecting vagueness and overbreadth challenges to the indecency definition), and 1995, see *Act III*, 58 F.3d at 659 (noting that petitioners had "failed to provide any convincing reasons" to ignore precedent and declining to overrule prior decisions upholding the indecency definition), the indecency definition was attacked as unconstitutionally vague or overbroad, and both times the challenges were dismissed on grounds that the definition had been implicitly approved as constitutional by the *Pacifica* Court.

36. See *Act III*, 58 F.3d at 664-67, 670 (balancing the First Amendment rights of adults to see and hear indecent broadcast material with the government's "compelling interest" in protecting children from such content and requiring the FCC to confine its ban on indecent programming to between 6:00 a.m. and 10:00 p.m.).

37. See *Pacifica Foundation Inc.*, 2 F.C.C.R. 2698, 2699 (1987)

([W]e believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency. When a complaint goes beyond the use of expletives, however, repetition of specific words or phrases is not necessarily an element critical to a determination of indecency. Rather, speech involving the description or depiction of sexual or excretory functions must be examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium. The mere fact that specific words or phrases are not *repeated* does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.)

38. Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency (*2001 Enforcement Policies*), 16 F.C.C.R. 7999 (2001).

organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*<sup>39</sup>

The FCC also noted in reference to fleeting expletives that,

[r]epetition of and persistent focus on sexual or excretory material have been cited consistently as factors that exacerbate the potential offensiveness of broadcasts . . . [but] where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.<sup>40</sup>

That policy was soon to change.

## II. CHANGES IN THE AIR . . . WAVES

### A. *The Golden Globes Decision*

Beginning in 2003, several highly publicized incidents of expletives aired on broadcast television<sup>41</sup> prompting the FCC to change its long-standing policy that fleeting expletives did not warrant sanction.<sup>42</sup> During the 2003 live broadcast of the Golden Globe Awards, Bono, a singer in the popular band U2, upon winning an award for best original song, exclaimed in delight, “this is really, really fucking brilliant.”<sup>43</sup> After receiving “hundreds of complaints”<sup>44</sup> that the “F-word” was obscene and indecent, the FCC Enforcement Bureau initially ruled that the word, because of its fleeting use and context (i.e., as an intensifier, rather than a sexual description), was not

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39. *Id.* at 8003. The Commission also stressed in the statement that the “full context” of the speech is to be considered and that indecency determinations are made on a “highly fact-specific” basis. *Id.* at 8002.

40. *Id.* at 8009. It is critical to note that this statement was not phrased as an absolute requirement of repetition. *See id.* (“[E]ven relatively fleeting references may be found indecent where other factors contribute to a finding of patent offensiveness. Examples of such factors . . . include broadcasting references to sexual activities with children and airing material that, although fleeting, is graphic or explicit.”).

41. *See, e.g.,* Julie Hilden, *Bono, Nicole Richie, and the F-word: Broadcast Indecency Law*, CNN.COM, Dec. 23, 2003, <http://www.cnn.com/2003/LAW/12/23/findlaw.analysis.hilden.indecency/index.html?iref=newssearch> (remarking that the incidents “fueled a furor among Congress and concerned parents”).

42. *See* Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program (*Golden Globes Complaint*), 19 F.C.C.R. 4975, 4978–80 (2004) (“While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the ‘F-word’ such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.”).

43. *Id.* at 4976 n.4.

44. *Id.*

actionable indecency.<sup>45</sup> Under pressure from Congress,<sup>46</sup> however, the FCC reversed the Enforcement Bureau's decision<sup>47</sup> and decided that, "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."<sup>48</sup> The Commission then concluded that Bono's specific use of the "F-word," despite its lack of repetition, met its definition of patently offensive under contemporary community standards for the broadcast medium,<sup>49</sup> and put broadcasters on notice that they would be subject to forfeiture penalties in the future for even fleeting expletives such as the Bono incident.<sup>50</sup>

This decision changed the treatment of single expletives because, depending on the expletive, they were now presumed to be sexual or excretory references and thus within the first prong of the indecency definition.<sup>51</sup> After the distinction between expletives and sexual or excretory references was dismissed as "artificial," the "F-word" and "S-word" were placed into the category of language for which repetition had arguably never been required in order to make a determination of patent offensiveness, thereby allowing them to satisfy both prongs of the indecency analysis.<sup>52</sup>

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45. See Complaints Against Various Broadcast Licensees Regarding their Airing of the "Golden Globes Awards" Program (*Enforcement Bureau Golden Globes*), 18 F.C.C.R. 19859, 19861 (2003) (noting that the word "fuck" in the Bono context was fleeting and did not describe sexual or excretory activity or organs, but rather was used as an "adjective or expletive").

46. See H.R. Res. 500, 108th Cong. (2004) ("[T]he Federal Communications Commission should make every reasonable and lawful effort and use all of its available authority to protect children from the degrading influences of indecent and profane programming."); S. Res. 283, 108th Cong. (2003) (resolving that the FCC should reverse the finding of no indecency violation in the *Golden Globes* complaint and heighten enforcement of decency standards).

47. See *Golden Globes Complaint*, 19 F.C.C.R. at 4982 (explaining the holding and indicating that the decision is consistent with *Pacifica*).

48. *Id.* at 4978.

49. *Id.* at 4979.

50. *Id.* at 4982. The Commission also held that the word "fuck" was, in addition to being indecent, "profane" under 18 U.S.C. § 1464. *Id.* at 4981. In making this determination, the FCC departed from previous definitions of profane which referred only to blasphemous language, and instead adopted the standard that "vulgar, irreverent, or coarse language" now constituted profanity. *Id.* (quoting BLACK'S LAW DICTIONARY 1210 (6th ed. 1990)). The new profanity standard presents a different set of issues and is beyond the scope of this Note.

51. See *id.* at 4978 (acknowledging but dismissing broadcasters' argument that the "F-word" in the Bono context was an "intensifier" and did not have a sexual meaning); see also *In re. Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (1987) (distinguishing between the use of "expletives" and descriptions of sexual or excretory functions).

52. See Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13308 (2006), vacated by *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007)

B. *The Facts of Fox Television: The 2002 & 2003 Billboard Music Awards*

Following the *Golden Globes* decision, the FCC issued an *Omnibus Order* attempting to clarify and provide guidance to broadcasters through indecency determinations on various incidents.<sup>53</sup> Among the incidents addressed were the 2002 and 2003 Billboard Music Awards in which Cher and Nicole Richie, in respective years, each used a variant of the word “fuck” and Richie said “shit” in reference to cow excrement in her reality show, “The Simple Life.”<sup>54</sup> The Commission, relying on the new fleeting expletive policy announced in the *Golden Globes* decision, found each to be indecent but declined to issue forfeitures because the new policy had not been announced at the time of the broadcasts.<sup>55</sup>

Fox and CBS sought review of the *Omnibus Order* in the Court of Appeals for the Second Circuit and, after a remand to the FCC, who affirmed its rulings on both Billboard Music Awards incidents,<sup>56</sup> the case was reinstated in the Second Circuit.<sup>57</sup> The issue on appeal was

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(arguing that “Bureau-level decisions issued before *Golden Globe* had suggested that expletives had to be repeated to be indecent but descriptions or depictions of sexual or excretory functions did not need to be repeated to be indecent” (internal quotations omitted)). The FCC actually altered both parts of its indecency test. First, it allowed mere expletives to be considered sexual or excretory references, thus permitting “fuck” to satisfy the first prong. *See id.* at 13304 (“Given the core meaning of the ‘F-Word,’ any use of that word has a sexual connotation.”). Second, it dispensed with the requirement that material be repeated to be considered patently offensive. *Id.* at 13305–08. Although the distinctions between the first and second prong of the test tend to be blurred, the blurring has no consequence for the purposes of this Note because the FCC’s test, despite attempts at separating it into two distinct parts, remains a contextual determination of indecency.

53. *See* Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005 (*Omnibus Order*), 21 F.C.C.R. 2664, 2665 (2006), *modified by* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299 (2006) (addressing the “increasing public unease with the nature of broadcast material” and responding to broadcasters’ uncertainty about the indecency standard’s application by applying the indecency test to a “broad range of factual patterns” to “provide substantial guidance”).

54. *See id.* at 2692–95 (providing an overview of Nicole Richie’s use of expletives and the ensuing legal action).

55. *See id.* (noting that Fox did not take appropriate steps to prevent the utterance of expletives, but declining to impose any sanctions due to standing “precedent”); *see also* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 204 (1988) (deciding that agencies may not issue rules with retroactive effect unless their statutory rulemaking authority explicitly delegates such retroactive power).

56. *See Golden Globes Remand Order*, 21 F.C.C.R. at 13311–13, 13325 (looking to Nicole Richie’s reputation for such remarks as a factor in holding a broadcaster liable and further explaining that Cher’s use of an expletive during prime time television, coupled with the lack of advance notice from broadcasters to viewers, rendered the act offensive).

57. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007) (providing a synopsis of the discussion portion of the court’s opinion). CBS and NBC intervened in the case despite the fact that the FCC had reversed its indecency

the validity of the fleeting expletive policy with respect to only the two Billboard Music Awards incidents, but the court seized the opportunity to review the policy rather than the individual decisions—although not with the finality that broadcasters would have hoped.<sup>58</sup>

### III. PREVIOUS COURT TREATMENT OF THE FCC'S INDECENCY POLICY UNDER ARBITRARY AND CAPRICIOUS REVIEW.

#### A. *Brief Overview of Judicial Review Under the Administrative Procedure Act*

Pursuant to the Administrative Procedure Act, courts may set aside agency decisions that are “arbitrary, capricious, an abuse of discretion or not in accordance with law.”<sup>59</sup> According to the Supreme Court, the factors making an agency decision arbitrary and capricious include failing to consider crucial aspects of the problem, offering explanations at odds with the relevant evidence, or offering implausible solutions that cannot be explained by agency expertise or a difference of opinion.<sup>60</sup> In total, the standard can be summarized, albeit vaguely, as requiring the agency to put forth a “satisfactory explanation”<sup>61</sup> for the challenged action.

In guiding the level of review under this standard, the Court has said that reviewing courts should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”<sup>62</sup> Despite some disagreement and uncertainty,<sup>63</sup> it is also generally agreed that

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determinations against their shows *N.Y.P.D. Blue* (dismissed on procedural grounds) and *The Early Show* (reversed due to context being a “bona fide news interview”). *Id.* at 453–54.

58. *See id.* at 454 (“[T]he validity of the new ‘fleeting expletive’ policy announced in *Golden Globes* and applied in the Remand Order is a question properly before us on this petition for review.”). In holding the policy to be arbitrary and capricious rather than unconstitutional, the court left open the possibility of the FCC resuming the identical scheme after bolstering their reasoning on remand. *See Fox Television*, 489 F.3d at 462 (“[W]e doubt that the Networks will refrain from further litigation on these precise issues if, on remand, the Commission merely provides further explanation with no other changes to its policy.”).

59. 5 U.S.C. § 706(2)(A) (2000).

60. *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

61. *Id.*

62. *See id.* (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)).

63. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (describing arbitrary and capricious review as “searching and careful”). *See generally* Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221 (1996) (recounting the fluctuating

“[t]he scope of review under the ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its judgment for that of the agency.”<sup>64</sup>

The level of scrutiny under the arbitrary and capricious standard is controversial,<sup>65</sup> and it has been suggested that arbitrariness review is similar, if not identical, to the second prong of agency review under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.<sup>66</sup> In the absence of clear statutory language, *Chevron* requires the determination of whether an agency construction of their statutory mandate is reasonable.<sup>67</sup> *Chevron* has also come to stand for the proposition—known as *Chevron* deference—that courts should defer to reasonable or permissible agency constructions of unclear statutes.<sup>68</sup>

A detailed examination of the debate regarding the overlap between *Chevron* step two and arbitrary and capricious review is outside the scope of this discussion,<sup>69</sup> but this Note will proceed under the assumption that under either *Chevron* reasonableness<sup>70</sup> or

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levels of judicial review under the APA and highlighting key areas of academic debate on the subject).

64. *State Farm*, 463 U.S. at 43.

65. See generally Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1080 (1995) (discussing the scope of review under substantive review doctrines and concluding that Congress should create more specific guidelines to reduce “outcome-oriented behavior by judges”).

66. 467 U.S. 837 (1984).

67. See *Chevron*, 467 U.S. at 864–65; Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI-KENT L. REV. 1253, 1295–97 (1997) (arguing that *Chevron* step two and arbitrary and capricious review should be considered identical).

68. See generally A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85 (John F. Duffy & Michael Herz eds., ABA 2005) [hereinafter JUDICIAL REVIEW]. The *Fox Television* court did not explicitly apply *Chevron* deference to the FCC’s policy change, but nevertheless cited it for the proposition that “agencies are of course free to revise their rules and policies.” *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456 (2007). One potential explanation for the lack of specific *Chevron* deference is that the FCC’s indecency definition is technically an interpretation of the federal statute criminalizing indecent broadcast speech rather than an interpretation of an explicitly FCC-administered statute. See JUDICIAL REVIEW, *supra*, at 113 (explaining that *Chevron* applies only to statutory conferrals of authority where “Congress would expect the agency to speak with the force of law” in interpreting the statute). Although an argument could be made that *Chevron* should apply because the FCC is specifically authorized by 47 U.S.C. § 503(b)(1)(D) to enforce 18 U.S.C. § 1464 (criminalizing broadcast indecency) through forfeitures, this Note assumes that the level of deference should be similarly high under arbitrary and capricious review, which renders the issue superfluous.

69. For a detailed examination of this topic, see Levin, *supra* note 67.

70. See *Chevron*, 467 U.S. at 863–66. As noted above, the *Fox Television* court did not claim to apply *Chevron* deference, but cited it in reference to agency deference. See *Fox Television*, 489 F.3d at 456.

arbitrary and capricious review,<sup>71</sup> at least some deference should be afforded to agency interpretations.<sup>72</sup> The unclear standards for exactly what is necessary to find an agency's explanation of its choices to be arbitrary<sup>73</sup> have led to a steady stream of criticism. That criticism expresses the view that many judicial decisions are the product of mere disagreement with the agency's outcome rather than a truly impermissible flaw in the agency's decision-making process or authority.<sup>74</sup> The lack of deference given by the court to the FCC in *Fox Television* is an example of such an activist judicial attitude.<sup>75</sup>

B. *Comparison of Judicial Review in Fox Television with Action for Children's Television v. FCC*

The *Fox Television* court erred in holding the FCC's new policy on fleeting expletives to be arbitrary and capricious and overreached the appropriate standard of review, consequently substituting its judgment for that of the agency. Considering the variability with which arbitrary and capricious review has been applied,<sup>76</sup> however,

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71. See *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–45 (developing the guidelines for arbitrary and capricious review that currently guide courts).

72. But see Wald, *supra* note 63, at 244–45 (“The rule in our [D.C.] circuit, as elsewhere, is that *Chevron* deference gets trumped by the canon requiring avoidance of unnecessary constitutional determinations. Consequently, we do not ordinarily defer to an agency's interpretation of a statute if that interpretation raises a serious constitutional question that another interpretation might avoid.”). However, the author also argues that the “mere fact” that an agency makes policy determinations that carry constitutional implications should not counsel courts to abandon deference unless the agency's interpretation raises a “concrete and avoidable constitutional question.” *Id.* at 246. Such a rule of constitutional avoidance probably represents the best argument in support of the lack of deference displayed by the *Fox Television* court. However, as argued *infra* Part V, the fleeting expletives policy did not raise any new constitutional questions in and of itself. Therefore, the court could have deferred to the FCC on the fleeting expletive policy without addressing any avoidable constitutional questions.

73. See, e.g., *Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73, 77 (1st Cir. 1993) (“The ‘arbitrary or capricious’ concept, needless to say, is not easy to encapsulate in a single list of rubrics because it embraces a myriad of possible faults and depends heavily upon the circumstances of the case.”).

74. See generally Wald, *supra* note 63, at 234 (“The acknowledged impossibility of specifying the components of ‘adequate explanation’ inevitably leaves courts open to the charge that the results of our review are inconsistent and reflect the political or philosophical preferences of the judges on the panel rather than any objective standard.”).

75. See, e.g., Shapiro, *supra* note 65, at 1067 (arguing that the “relatively indeterminate” definition of arbitrary and capricious combined with the “manipulable categories to which different degrees of deference apply” creates an environment where judges are “freer to pursue an outcome orientation”).

76. See JUDICIAL REVIEW, *supra* note 68, at 177–81 (discussing the debate over the proper level of arbitrary and capricious review and noting that proponents of minimal review emphasize that courts should not substitute their judgment for the agency's, while advocates of stringent or “hard look” review argue that a higher



the decision was not blatantly erroneous.<sup>77</sup> Nevertheless, the court gave substantially less deference to the FCC's new policy determination than has been given in the past to FCC constructions of its indecency regulating duties.

The most clearly analogous arbitrary and capricious challenge to an FCC indecency construction was entertained in 1988 regarding a major shift in the FCC's standard for indecency determinations. In *Action for Children's Television v. FCC (Act I)*,<sup>78</sup> the FCC defended their 1987 decision to adopt the current contextual standard for indecency rather than using George Carlin's seven dirty words as their effective "yardstick for 'indecency,'"<sup>79</sup> as they had done from *Pacifica* until 1987.<sup>80</sup> This expansion was not insignificant.<sup>81</sup> Judge (now Justice) Ginsburg, writing for the D.C. Court of Appeals, accepted the FCC's explanation for the change in course and held that the expansion was not an arbitrary and capricious agency action.<sup>82</sup>

In *Act I*, the FCC's justification for moving beyond regulating only the seven Carlin words was that such an interpretation of indecency was "unduly narrow as a matter of law"<sup>83</sup> and inconsistent with its enforcement duties. The FCC determined that the Carlin standard essentially gave blanket permission to broadcasters to air offensive material as long as it was not one of seven prohibited words, repeated at length.<sup>84</sup> Without much discussion, the court found the FCC's explanation adequate to defeat a claim that the change in standard

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standard reduces the risk that agency decisions will be based on impermissible political considerations); *see also* text and notes *supra* Part III.A (surveying the debate over substantive review doctrines).

77. *See* Shapiro, *supra* note 65, at 1065–66 (labeling the arbitrary and capricious standard "open-ended" and pointing to examples of the Court's "conflicting messages concerning the appropriate level of deference").

78. 852 F.2d 1332 (D.C. Cir. 1988), *overruled in part by* Action for Children's Television v. FCC (*Act III*), 58 F.3d 654 (D.C. Cir. 1995) (en banc).

79. *See id.* at 1336, 1337–38 (recalling that, prior to the change, sanctionable material had to be "similar or identical" to the George Carlin monologue); *see also* Infinity Broad. Corp. of Pa. (*1987 Reconsideration Order*), 3 F.C.C.R. 930, 930 (1987) ("Unstated, but widely assumed . . . was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975.").

80. *See 1987 Reconsideration Order*, 3 F.C.C.R. at 930 (noting that the FCC took no indecency action against broadcasters from 1975 until 1987).

81. *See Act I*, 852 F.2d at 1338. The change in indecency policy at issue in *Act I* was a major leap from regulating only seven words to regulating indecency in general, which includes visual depictions as well as audio.

82. *See id.* at 1338.

83. *1987 Reconsideration Order*, 3 F.C.C.R. at 930.

84. *Id.* The FCC also acknowledged that a contextual standard would be the "more difficult approach," but would aid in curing the "anomalous [sic] result[]" that children could be exposed to indecent material "simply because [broadcasters] avoided certain words." *Id.*

was arbitrary and capricious.<sup>85</sup> The court noted that, short of a bright-line test that identified *only* seven repeated words as indecent, the FCC would need a more “expansive” definition and the parties had suggested no “tighter” formulation.<sup>86</sup>

Instead of reading the FCC’s authority as limited to the precise factual situation of *Pacifica*, the court implicitly agreed that the broad definition of indecency, rather than the specific circumstances of the Carlin monologue, was the proper scope of FCC’s authority after *Pacifica*.<sup>87</sup> The court also agreed, or at least did not find a fatal reasoning flaw, with the FCC’s view that the narrow standard could lead to “anomalous, even arbitrary, results.”<sup>88</sup> Significantly, the court concluded that the “difficulty, or ‘abiding discomfort’ . . . is not the absence of ‘reasoned analysis’ on the Commission’s part, but the ‘vagueness . . . inherent in the subject matter.’”<sup>89</sup> The court then moved on to a challenge of unconstitutional vagueness and, reasoning that the *Pacifica* court had implicitly approved the Commission’s indecency definition as constitutional, held itself precluded from finding otherwise.<sup>90</sup>

The Second Circuit, in deciding *Fox Television*, faced a similar arbitrary and capricious challenge to a change in policy as the one denied by the D.C. Circuit in *Act I* but came to the opposite conclusion.<sup>91</sup> In *Fox Television*, however, the court decided a narrower question because it dealt with the comparatively slight expansion of the broad, context-based standard already approved in *Act I*. The *Fox Television* court’s issue was not whether indecency determinations should be contextual, but rather, whether the Commission adequately explained why lack of repetition would no longer be deemed a dispositive factor in the contextual analysis.<sup>92</sup>

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85. See *Act I*, 852 F.2d at 1338 (finding the FCC’s explanation “adequate,” and commenting that the FCC “rationally determined that its former policy could yield anomalous, even arbitrary results”).

86. *Id.*

87. See *id.* (suggesting that the “thesis that *only* seven dirty words are properly designated indecent” is not a correct interpretation of *Pacifica*).

88. See *id.* (commenting that the petitioner-broadcasters had disavowed the argument that “*only* the seven words are properly designated indecent”).

89. *Id.* (quoting *Pacifica Found. v. FCC*, 556 F.2d 9, 35 (D.C. Cir. 1977) (Leventhal, J., dissenting), *rev’d*, 438 U.S. 726 (1978)).

90. *Id.* at 1339 (inviting correction from “Higher Authority” on the court’s reading of *Pacifica*).

91. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007). In the beginning of the *Fox Television* opinion, the court quotes *Act I* for the proposition that “the agency may not resort to adjudication as a means of insulating a generic standard from judicial review.” *Id.* (quoting *Act I*, 852 F.2d at 1337).

92. *Fox Television*, 489 F.3d at 454.

The court should have found, like the D.C. Circuit in *Act I*, that the change in policy was not arbitrary and capricious, thereby moving on to the constitutional challenges to the policy.<sup>93</sup> First, in *Act I*, the FCC offered only two generalized explanations for broadening enforcement beyond Carlin's seven filthy words.<sup>94</sup> The FCC argued that the old test was too narrow and that it allowed the broadcast of material that may harm children as long as it did not contain certain words.<sup>95</sup> In *Fox Television*, the FCC offered a similar, but more thoroughly reasoned, rationale to explain the new presumption that the "F" and "S" words were presumptively sexual or excretory references needing no repetition to be considered indecent.<sup>96</sup> The FCC found that "categorically requiring repeated use of expletives," much like categorically requiring certain words in *Act I*, was inconsistent with the context-based approach and that the single factor of repetition should not "always be decisive."<sup>97</sup>

The FCC also justified the change on the grounds that allowing fleeting expletives forced viewers to take the "first blow,"<sup>98</sup> and would permit broadcasters to "air expletives at all hours of the day so long as they did so one at a time."<sup>99</sup> The FCC's arguments in *Fox Television*, therefore, were almost mirror images of their arguments in *Act I*, focusing on the Commission's determination that the previous policy was anomalous and inconsistent within the contextual standard approved by the Court in *Pacifica*. Given that the policy change in *Act I* was considerably more expansive than the one at issue in *Fox Television*, the *Fox Television* court should have given more deference to the FCC and should have found its explanation adequate to defeat the arbitrary and capricious challenge.

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93. This Note argues *infra* Part V that the policy change was not unconstitutional under current law.

94. See *Act I*, 852 F.2d at 1338 (addressing the FCC's determination that it made no "legal or policy sense" to regulate only certain words).

95. *Id.*

96. See *Fox Television*, 489 F.3d at 459–60 (discussing the FCC's contention that it is "difficult (if not impossible)" to tell when a swear word is used as an expletive or a description of sexual or excretory function) (internal quotations and citation omitted). The FCC also explained that a categorical exemption for single utterances was inconsistent with the context-based approach and would "permit broadcasters to air expletives at all hours of the day so long as they did so one at a time." *Id.* at 460 (internal quotations and citation omitted).

97. Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13308 (2006), *vacated by* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007).

98. For an analysis for the "first blow" theory, see discussion *infra* Part IV.A.

99. *Golden Globes Remand Order*, 21 F.C.C.R. at 13309.

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#### IV. OTHER SPECIFIC PROBLEMS WITH THE *FOX TELEVISION* COURT'S BASES FOR FINDING THE POLICY CHANGE ARBITRARY AND CAPRICIOUS

As discussed above, the *Fox Television* court should have deferred to the FCC's decision because the FCC offered a reasoned explanation for the change in policy that was more extensive than the reasoning behind a much larger policy change in *Act I*.<sup>100</sup> Instead, without settling on a concrete basis for finding the FCC's decision arbitrary and capricious,<sup>101</sup> the *Fox Television* court found the fatal flaw to be a general failure to articulate a reasoned basis for the change.<sup>102</sup> The court found that: (1) the "first blow" theory did not justify the change in policy; (2) the new presumption was inconsistent with a context-based approach; (3) the prediction that broadcasters could air expletives all day as long as they were isolated was "divorced from reality;" and (4) there was no evidence to suggest that a single expletive was even harmful.<sup>103</sup> Issues with the court's first two arguments will be analyzed together and the following two in turn.

##### A. "First Blow" Theory and Context-Based Approach

The *Fox Television* court focused primarily on the Commission's proffered justification that protecting children from the "first blow"<sup>104</sup> of expletives was better accomplished by prohibiting single occurrences of such words.<sup>105</sup> The court concluded that the first blow rationale was inconsistent with the context-based exceptions because

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100. See discussion *supra* Part III.

101. The court articulated many of the common reasons for setting aside an agency decision including a lack of rational connection between the "facts found and the choice made," reliance on factors that Congress did not intend to be considered, failing to consider an important aspect of the problem and offering an explanation counter to the evidence. *Fox Television*, 489 F.3d at 454–55 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Ultimately the court's review simply concluded that the FCC failed "to provide a reasoned analysis." *Id.* at 462.

102. *Id.* at 458.

103. *Id.* at 459.

104. The "first blow" concept was first articulated in *Pacifica* as a component of the reasoning that broadcast media are pervasive and enter into the home as intruders, and thus, the normal duty to avert one's attention when confronted with unwelcome speech gives way to the need to protect children in the home from the "first blow" of offensive content. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

105. See *Fox Television*, 489 F.3d at 457–58 (discussing the FCC's "first blow" theory as the primary reason for the agency crackdown on fleeting expletives).

children could still be subjected to the first blow of indecent language in certain circumstances.<sup>106</sup>

The rationale behind the “first blow” theory advanced in *Pacifica* was that requiring the listener to turn off the radio after hearing an offensive word was like asking them to run away from an assault after the first blow, which was unacceptable in the home and therefore justified lowering First Amendment protection.<sup>107</sup> According to the Court’s analogy, running away from the first blow does not “avoid a harm that has already taken place.”<sup>108</sup> The Court also noted that a broadcasted expletive could “enlarge[] a child’s vocabulary in an instant,”<sup>109</sup> thus strongly suggesting that the first “fuck” or “shit” that slipped by before turning off the set was worth curbing First Amendment protection.<sup>110</sup> The theory was advanced as a way around the criticism that one could easily turn off the offending source, much like averting one’s eyes to objectionable content in a public space.<sup>111</sup> Thus, the “first blow” theory, by its nature, was designed to protect against the first offensive word,<sup>112</sup> which calls into question the *Fox Television* court’s especially critical view of the FCC’s inclusion of single expletives into the category of actionable speech.

The *Fox Television* court’s essential argument was that the “first blow” theory, as justification for finding single expletives indecent, was inconsistent with the FCC’s context-based standard which allows for certain artistic<sup>113</sup> and news exceptions<sup>114</sup> that may make otherwise

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106. *See id.* at 458–59 (citing, for example, the FCC’s previous exemptions for expletives in a “bona fide news interview” and arguing that children who may not realize why the words are “integral” would be subjected to the first blow) (internal quotations omitted).

107. *See Pacifica*, 438 U.S. at 748–50 (relating the first blow concept to nuisance theory in the sense that it was applied to prohibit otherwise acceptable speech in the “wrong place,” (i.e., intruding into the privacy of the home)).

108. *Id.* at 749.

109. *Id.*

110. *Id.* at 748–49.

111. *See id.* at 748–49 n.27 (distinguishing its case from *Cohen v. California*, 403 U.S. 15 (1971), on the grounds that “[o]utside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the listener to turn away”).

112. The Court did not, however, explicitly decide whether single utterances could be sanctioned. *See id.* at 750 (“We have not decided that an occasional expletive . . . would justify any sanction.”).

113. *See, e.g.*, Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of The ABC Television Network’s Presentation of The Film *Saving Private Ryan*, 20 F.C.C.R. 4507, 4513 (2005) (finding expletives during broadcast of war film not indecent because of integral nature of expletives to historical context and artistic depiction of reality).

114. *See, e.g.*, Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and March 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13327 (2006), *vacated by* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007)

indecent speech justifiable.<sup>115</sup> But in so arguing, the court contradicted itself by attacking the fleeting expletive policy as inconsistent with a context-based approach,<sup>116</sup> while simultaneously faulting the context-based exceptions as inconsistent with the primary rationale for regulating broadcast indecency—protecting children from the harm (i.e., the “first blow”) of indecent speech.<sup>117</sup>

In scrutinizing this perceived discrepancy between the Commission’s actual policy and the “first blow” theory, the court felt that indiscriminating children, unable to differentiate appropriate contexts from inappropriate ones, would be subject to the “first blow” of offensive language in some situations but not others.<sup>118</sup> As pointed out by the dissenting judge, however, this critique applies to the entire rationale for broadcast regulation as much as it applies to the change in fleeting expletive policy.<sup>119</sup> Moreover, the FCC’s new treatment of fleeting expletives did not guarantee that “any occurrence of an expletive is indecent or profane,” but rather, that fleeting expletives *could* be actionable.<sup>120</sup>

The court’s critique therefore focused on the inconsistency with which the indecency standard is applied generally, rather than the inclusion of fleeting expletives as actionable.<sup>121</sup> The court admitted as much, commenting that the first blow theory “bears no rational connection to the Commission’s actual policy regarding fleeting expletives.”<sup>122</sup> Under the court’s reasoning, it seems that the “first

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(reaffirming the need for a restrained approach to indecency determinations in “news and public affairs programming”).

115. See *Fox Television*, 489 F.3d at 458–59 (rebutting the dissent’s suggestion that the majority’s issue was with the inconsistency of the policy with the first blow theory, while simultaneously maintaining that the rationale was “disconnected from the actual policy implemented by the Commission”).

116. See *id.* at 458–59 (implying that a context-based approach to indecency determinations is proper).

117. See *id.* at 458 (faulting the FCC for “chang[ing] its perception that a fleeting expletive was not a harmful ‘first blow’ for nearly thirty years” after *Pacifica*).

118. *Id.* If the court’s argument that children do not understand the importance of context is carried to its logical conclusion, then any context-based standard would presumably be deemed inconsistent with the goal of protecting children from offensive language. *Id.* at 459. The balance between contextual exceptions and the need to protect children, however, is the basic balance struck by the Court in *Pacifica*. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

119. See *Fox Television*, 489 F.3d at 471 (Leval, J., dissenting) (“If there is merit in the majority’s argument that the Commission’s actions are arbitrary and capricious because of irrationality in its standards . . . that argument must be directed against the entire censorship structure.”).

120. *Id.* at 458 n.7 (majority opinion).

121. See *id.* at 458–59 (highlighting various inconsistent FCC indecency decisions); see also Bungard, *supra* note 20, at 206–18 (reviewing FCC indecency decisions and finding a “blurred distinction” between what the FCC has determined to be or not to be indecent, resulting in chilled speech).

122. *Fox Television*, 489 F.3d at 458.

blow” theory would bear “no rational connection”<sup>123</sup> to the context-based approach in *any* case because, by their nature, contextual determinations allow children to take the first blow in certain situations while protecting them in others.

Moreover, the FCC’s presumption that certain words are sexual or excretory references actually decreases uncertainty and inconsistency because it protects children from the first blow whenever it happens to be the only blow.<sup>124</sup> Considering that a particular program segment rarely includes only a single expletive—even the Nicole Richie incident included several<sup>125</sup>—the presumption also removes broadcasters’ uncertainty as to how many utterances within a particular time frame would be actionable by placing all objectionable language on a level playing field. The court thus faulted the FCC for failing to justify its entire indecency policy rather than simply the shift in policy, which is more a critique of the reasoning behind *Pacifica*’s holding than a critique of the FCC’s new presumption.

#### B. Predictions of a Rise in Future Use of Expletives

The *Fox Television* court also felt that the Commission had inaccurately predicted that expletive use would rise dramatically if single occurrences were not actionable.<sup>126</sup> This determination almost certainly falls within the FCC’s area of expertise, and thus, should be given particular deference by judges who lack the agency’s expertise.<sup>127</sup> Although the FCC did not cite to any hard data supporting their prediction,<sup>128</sup> the increasing prevalence of expletives

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123. *Id.*

124. *See id.* at 471 (Leval, J., dissenting) (arguing that the inclusion of fleeting expletives makes the new policy more, rather than less, consistent because the context-based analysis applies to all circumstances without a blanket exception for isolated occurrences).

125. *See* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13308 (2006), *vacated by Fox Television*, 489 F.3d 444 (majority opinion) (suggesting that Richie’s language would have been actionable even before the Golden Globes decision because it included more than one offensive word).

126. *See Fox Television*, 489 F.3d at 460 (labeling the FCC’s prediction as “divorced from reality” on the ground that broadcasters did not “barrage[] the airwaves with expletives” before they became actionable indecency).

127. *See, e.g., Cellnet Comm. Inc. v. FCC*, 149 F.3d 429, 441 (6th Cir. 1998) (“It is well-established that under the arbitrary and capricious standard of review, an agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise are entitled to particularly deferential review.”).

128. *See Golden Globes Remand Order*, 21 F.C.C.R. at 13309 (contending that allowing fleeting expletives would “as a matter of logic permit broadcasters to air expletives at all hours of the day so long as they did so one at a time”) (emphasis added).

on television is common enough knowledge that the prediction should have been viewed as a policy judgment that was within the Commission's discretion.<sup>129</sup> Moreover, scholars have increasingly highlighted the concern that broadcast competes with unregulated speech on cable and satellite, and that by increasing racy content, broadcast is better able to compete.<sup>130</sup> Given this trend, it is a reasonable assumption on the FCC's part that expletive use would increase overall if single expletives were permitted.<sup>131</sup>

### C. Evidence of Harm

The *Fox Television* court also improperly attacked the Commission on the ground that it did not provide any evidence to suggest that fleeting expletives were a "problem" (i.e., harmful to children) in the first place.<sup>132</sup> The court cited *United States v. Playboy Entertainment Group*<sup>133</sup> for the proposition that the agency must offer actual evidence of the harm sought to be addressed.<sup>134</sup> The difficulty with the court's reasoning, however, is that it drew an untenable comparison between *Playboy's* problem of signal bleed occasionally leading to pornographic images appearing without a subscription to adult cable channels and the problem of fleeting expletives on broadcast television.<sup>135</sup> This analysis fails to consider that the signal

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129. See *Fox Television*, 489 F.3d at 472 (Leval, J., dissenting) (arguing that "[a]s a matter of law, it makes no difference" whose prediction about future expletive use is correct and that the court is required to defer to the agency's judgment); see also Aurele Danoff, Comment, "Raised Eyebrows" Over Satellite Radio: Has Pacifica Met its Match?, 34 PEPP. L. REV. 743, 776-77 (2007) (noting that broadcast is becoming more laced with expletives and violence as broadcasters attempt to "up the ante" to compete with "edgier" cable programming).

130. See Coates, *supra* note 19, at 777-78 (describing the nation's "enduring affection for the tawdry, tacky, and scantily-clad"); see also Rosenblat, *supra* note 20, at 189 (describing Howard Stern's move from broadcast radio to satellite radio in order to be "beyond FCC control").

131. See Rooder, *supra* note 31, at 901-03 (arguing that consumers watch offensive broadcasts even though they would prefer to have content regulated, which suggests that the broadcast industry will continue to air offensive content under the assumption that it is responding to market demand).

132. See *Fox Television*, 489 F.3d at 461 (majority opinion) (suggesting that children today are exposed to expletives more often and from a wider variety of sources than in the past and requiring evidence that children in today's world are harmed by fleeting expletives). Again, this argument goes more towards the justification for regulating indecent speech at all, rather than the reasonableness of making single expletives actionable. See generally Coates, *supra* note 19, at 776-78 (discussing how the standards of decency have changed over time).

133. 529 U.S. 803 (1994).

134. *Fox Television*, 489 F.3d at 461.

135. On the issue of proving a problem, the court also cited *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1463 (D.C. Cir. 1985), which dealt with whether the FCC had adequately demonstrated that the government had a substantial interest in promoting local programming by requiring cable TV providers to carry certain local



bleed addressed in *Playboy* was a “phenomenon” that was not present on all televisions tuned to a specific channel at a specific time.<sup>136</sup> Unlike signal bleed, fleeting expletives, when broadcast, inevitably reach every television tuned to that particular station. A distinction must therefore be drawn between the description of harm as “isolated” in *Playboy* and in *Fox Television*. In *Fox Television*, the term describes expletives that are spoken only once but reach every television tuned to the program;<sup>137</sup> in *Playboy*, the term connotes the sporadic nature of the images or audio actually reaching the audience.<sup>138</sup> Thus, demanding proof that broadcast expletives are harmful is a matter of content evaluation, whereas demanding proof that signal bleed is harmful is a matter of the prevalence and frequency of admittedly harmful content.<sup>139</sup>

Moreover, demanding proof of the harm to children of a single expletive—or even the harm of multiple expletives—is inconsistent with the theory behind broadcast regulation in general, and with the “first blow” theory specifically.<sup>140</sup> The essential reason behind *Pacifica*’s approval of limited regulation was that children should not be exposed to offensive content in a pervasive and accessible medium such as broadcast.<sup>141</sup> Thus, implicit in this rationale is the Supreme Court’s acceptance of Congress’ initial determination that indecent content is harmful.<sup>142</sup> Additionally, it has been said that, “Congress

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broadcast channels. *Id.* Similarly, the court cited *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1997), where the FCC was challenged on a cable access issue in which “content regulations . . . [were] not at issue.” *Home Box Office*, 567 F.2d at 49. Neither of these decisions is analogous to the governmental interest in protecting children from objectionable content.

136. See *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 806 (noting that technological scrambling techniques were “imprecise” and that audio or visual portions of blocked programs “might be heard or seen”).

137. See *Fox Television*, 461 F.3d at 452 (characterizing the use of the word “fucking” as “fleeting and isolated”).

138. See *Playboy*, 529 U.S. at 820–21 (using the word “isolate” to connote reported incidents of children actually seeing or hearing scrambled adult programming).

139. See *id.* (upholding the lower court’s determination that infrequent instances of signal bleed are insufficient to find a harm). The prevalence of a technological anomaly is a more easily quantifiable measure of “harm” than the abstract notion of whether expletives are harmful to children.

140. See *supra* discussion in Part IV.A.

141. *FCC v. Pacifica Found.*, 438 U.S. 726, 748–50 (1978).

142. See 18 U.S.C. § 1464 (2000) (providing fines and imprisonment for utterance of indecent language in broadcast). Although the specific harm is not easy to define or quantify and is certainly not agreed upon, it is nevertheless an issue that Congress sought to control with legislation. Cf. Jim Puzanghera, *Washington May Take Up TV Violence*, L.A. TIMES, Jan. 22, 2007, at C1, available at <http://www.commercialalert.org/news/archive/2007/01/washington-may-take-up-tv-violence> (discussing potential legislation to curb television violence and noting that “[o]ne proposal would give regulators powers similar to those they have now to punish indecency and coarse language over the airwaves”).

does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of obscenity.”<sup>143</sup> Thus, the *Fox Television* court improperly faulted the FCC for not providing evidence to support the governmental concern on which the entire indecency regulatory scheme is based.<sup>144</sup>

*D. Other Arbitrary and Capricious Considerations Not Addressed by the Fox Television Court*

In addition to the fact that the D.C. Circuit had previously found a similar, but broader policy change adequately explained in *Act I*,<sup>145</sup> and despite the court’s overly searching examination of the FCC’s rationale and evidence,<sup>146</sup> the policy change was supported by substantial explanation and reasoned analysis advanced in multiple Commission opinions.<sup>147</sup> Moreover, although the *Fox Television* court disagreed with the FCC’s outcome, the policy change was endorsed by Congress and indirectly supported by recent legislation.<sup>148</sup>

*1. The FCC justified its change in policy in anticipating judicial review*

The *Fox Television* court’s lack of deference, on a broader level, was unsupported by the procedural status of the case and the resulting extensive explanation of the new policy. It is generally stated that agency explanations are inadequate if they rely on faulty, implausible,

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143. *Action for Children’s Television v. FCC (Act III)*, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc); see also *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (requiring no scientific demonstration of psychic injury to determine that government has a compelling interest in protecting children from indecent speech).

144. But see Suzanne B. Goldberg, *Morals Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1305 (2004) (examining morals-based legislation and proposing that the Court require fact-based rationales for government action). Because the underlying indecency legislation is in many respects morals legislation, there is a possibility, albeit highly unlikely, that under this type of rationale, the Court could strike it down as a factually unsupported government interest. *Id. cf.* Mark Cenite, *Federalizing or Eliminating Online Obscenity Law as an Alternative to Contemporary Community Standards*, 9 COMM. L. & POL’Y 25, 66–69 (2004) (suggesting that laws against obscenity may be vulnerable to attack on grounds that they are purely morals legislation). If this thesis has merit, its extension into indecency laws would be even stronger, as indecency, unlike obscenity, is constitutionally protected. See *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007) (noting “that all speech covered by the FCC’s indecency policy is fully protected by the First Amendment”).

145. *Supra* discussion in Part III.C.

146. *Supra* discussion in Part IV.

147. *Infra* discussion in Part IV.D.1.

148. *Infra* discussion in Part V.A–B.

or insufficient reasoning.<sup>149</sup> At the time the court heard the case, the FCC had already reconsidered both Billboard Music Awards issues on remand, reaffirming the fleeting expletive policy announced in the *Golden Globes* decision and, again, concluding that the material was actionably indecent.<sup>150</sup> Having notice that its policy would be immediately subject to judicial review, the FCC went to great lengths in their remand opinion to provide an explanation for its policy change.<sup>151</sup>

The situation is thus unlike one in which an agency either failed to provide an explanation or made no effort to adequately support its change in policy.<sup>152</sup> The court's opinion makes broad, conclusory statements to the effect that the FCC offered no support for its decision.<sup>153</sup> In truth, however, the FCC offered many reasonable explanations for the policy<sup>154</sup> and the court simply refused to accept them. At the very least, the FCC met the burden of showing that the new rule effectuates the indecency statute as well as the old rule.<sup>155</sup> It is curious, then, that the court also anticipated that the Commission would do nothing more on remand than develop a more adequate

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149. *E.g.*, *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); JUDICIAL REVIEW, *supra* note 68, at 184–85.

150. *See* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13305, 13325 (2006), *vacated by* *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

151. *Golden Globes Remand Order*, 21 F.C.C.R. at 13301–28. The FCC went so far as to justify their general authority to implement a regulatory scheme against constitutional attack. *Id.* at 13317–21. This treatment surely should be seen as a reasoned analysis, as their authority and policy is currently valid under *Pacifica*, and will remain so until a court finds that they have overstepped their First Amendment bounds. *See infra* discussion in Part V. Under the current law, however, no such lengthy explanation was even needed as an agency is free to modify policies at their discretion within the bounds of their authority which has not changed since *Pacifica*. *See* *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (“We have not decided that an occasional expletive . . . would justify a sanction . . . [because] [t]he Commission’s decision rested entirely on a nuisance rationale under which context is all-important.”).

152. *See* *Action for Children’s Television v. FCC (Act I)*, 852 F.2d 1332, 1341 (D.C. Cir. 1988) (criticizing the FCC for “ventur[ing] no explanation” why it considered children aged 12–17 the relevant group in need of protection from indecent content), *overruled in part by* *Action for Children’s Television v. FCC (Act III)*, 58 F.3d 654 (D.C. Cir. 1995) (en banc).

153. *See* *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 460 (2d Cir. 2007) (labeling the FCC’s prediction of a future increase in expletives without regulation “divorced from reality”).

154. *E.g.*, *Golden Globes Remand Order*, 21 F.C.C.R. at 13308 (explaining that “categorically requiring repeated use of expletives . . . is inconsistent with . . . the critical nature of context”).

155. *See* *Fox Television*, 489 F.3d at 457 (referencing the standard announced in *N.Y. Council, Ass’n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)).

explanation.<sup>156</sup> Considering that the Commission convincingly tied the policy change to essentially every available justification for broadcast indecency regulation, one is left to wonder what, if any, reasoned analysis it could have offered that would have been satisfactory to the court.

Finally, one of the major arguments against overly searching judicial review of agency decisions is that it forces agencies to devote greater resources to defending their policy changes in advance.<sup>157</sup> The effect of the *Fox Television* decision was to vacate and remand an already-remanded and extensively supported policy change for yet another round of rationalization.<sup>158</sup> Further, the decision left both the FCC and broadcasters unsure of exactly what policy the FCC would or could implement with regard to fleeting expletives.<sup>159</sup> This is particularly true because the FCC is still being urged by Congress to continue sanctioning fleeting expletives, while the Second Circuit is requiring additional, yet unspecified justifications for them to do so.<sup>160</sup>

2. *The FCC's policy was supported by Congress and consistent with current law*

The FCC, in modifying its policy, was acting pursuant to the express wishes of Congress, which issued resolutions urging the continuance of the heightened fleeting expletive policy.<sup>161</sup> However,

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156. See *id.* at 462 (predicting that on remand the FCC would provide a reasoned explanation for the change in policy, but suggesting that such an explanation would not pass "constitutional muster").

157. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1412 (1992) (discussing scholars' claims that judicial review causes agencies to go to considerable lengths to create rulemaking records that respond to all conceivable objections).

158. See *Fox Television*, 489 F.3d at 462 (remanding the issue to the FCC for reconsideration).

159. See generally RICHARD J. PIERCE JR., *ADMINISTRATIVE LAW AND PROCESS* 401-03 (4th ed. 2004) (criticizing the private and agency uncertainty that results from overly-searching judicial review of agency action with no clear guidance on what would cure the defect).

160. This arguably leaves broadcasters less certain of what they may permissibly air than before the decision was handed down, and thus solves very little. Compare Press Release, FCC, Commissioner Copps Disappointed in Court Decision on Indecency Complaints (June 4, 2002), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-273599A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-273599A1.pdf) (responding to *Fox Television* by suggesting that "any broadcaster who sees this decision as a green light to send more gratuitous sex and violence into our homes would be making a huge mistake"), with Stephen Labaton, *Court Rebuffs FCC on Fines for Indecency*, N.Y. TIMES, June 5, 2007, available at <http://www.nytimes.com/2007/06/05/business/media/05decency.html?hp> (noting industry speculation that the *Fox Television* court's decision could "gut the ability of the commission to regulate any speech on television or radio").

161. See H.R. Res. 500, 108th Cong. (2004) ("Expressing the sense of the House of Representatives that the Federal Communications Commission should vigorously

because the FCC did not cite congressional support as a specific justification for the change in policy, it could not be directly considered as part of the agency's reasoning behind the policy change.<sup>162</sup> Nevertheless, congressional support for the change is a strong argument that should at least have been supportive of the Commission's decision.<sup>163</sup>

Additionally, one of the factors relevant under arbitrary and capricious review is whether the agency has "relied on factors which Congress has not intended it to consider."<sup>164</sup> It should have counseled the court to some measure that both houses of Congress had issued resolutions urging the FCC to continue its policy of sanctioning indecent speech.<sup>165</sup> It can hardly be arbitrary and capricious agency action when an agency acts pursuant to the demands of Congress, even when those demands are not formally adopted as law.<sup>166</sup> Indeed, slightly over one month after the *Fox*

enforce indecency and profanity laws pursuant to the intent of Congress . . ."); S. Res. 283, 108th Cong. (2003) ("Affirming the need to protect children in the United States from indecent programming."). Although enacted after the FCC's decisions in the Billboard Music Awards incidents at issue in *Fox Television*, the Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006), raised the maximum fine for indecency violations from \$10,000 per violation with a maximum of \$75,000 to \$325,000 for each violation with a maximum of \$3,000,000 for any "single act or failure to act").

162. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) ("The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given." (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947))).

163. The major arguments against increased enforcement and regulation of broadcast focus on the means by which the government's interest in protecting children is effectuated—namely that parents, rather than the FCC should be responsible for the broadcast content to which their children are exposed. See, e.g., Terasa Chidester, *What the #& Is Happening on Television? Indecency In Broadcasting*, 13 COMMLAW CONSPLECTUS 135, 162 (2004) (summarizing arguments in favor of increased parental responsibility and decreased regulation). Given that the Supreme Court has not revisited *Pacifica*, however, increased FCC regulation has not yet been ruled out as the least restrictive, narrowly tailored means of achieving that goal. *Id.* at 163. Therefore, the FCC is currently entitled to assume the constitutionality of the urgings of Congress. See Erik Forde Ugland, *Cable Television, New Technologies and the First Amendment After Turner Broadcasting System, Inc. v. F.C.C.*, 60 MO. L. REV. 799, 817-18 n.123 (1995) ("Because Congress has already spelled out the interests that justify its supervision of the broadcasting industry, and because the Supreme Court has already upheld the constitutionality of that system, individual regulations are, in effect, presumptively constitutional.").

164. *State Farm*, 463 U.S. at 43.

165. E.g., H.R. Res. 500, 108th Cong. (2004); S. Res. 283, 108th Cong. (2003).

166. Congressional acquiescence to an agency interpretation can create a presumption in favor of the interpretation. See *Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 621 (1983) ("A contemporaneous and consistent construction of a statute by those charged with its enforcement combined with congressional acquiescence creates a presumption in favor of the administrative interpretation, to which we should give great weight." (citing *Costanzo v. Tillinghast*,

*Television* court issued its decision, a bill was introduced in Congress to explicitly overrule the court's decision.<sup>167</sup> This bill would amend the FCC's statutory authority to include a provision that a single word or image may constitute indecent programming.<sup>168</sup> Considering recent congressional willingness to dramatically increase the amount a broadcaster may be fined for indecency,<sup>169</sup> it is likely that the new bill will pass.<sup>170</sup> If the bill does become law, the only potential ground for attacking the FCC's enforcement of the fleeting expletive policy will be a constitutional one.<sup>171</sup>

Nevertheless, as the law currently stands, the FCC's indecency policy is constitutional, and the fleeting expletive policy did not change that fact.<sup>172</sup> Although the *Pacifica* Court did not directly approve sanctions for fleeting expletives, it also did not expressly foreclose the possibility.<sup>173</sup> Instead, the Court approved a contextual approach for determining when the "pig has entered the parlor,"<sup>174</sup> which is consistent with the FCC's approach to fleeting expletives.<sup>175</sup>

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287 U.S. 341, 345 (1932))). Here the argument is even stronger because Congress did not acquiesce to the FCC's interpretation, but rather, proactively supported it.

167. Protecting Children from Indecent Programming Act, S. 1780, 110th Cong. (2007).

168. *Id.* The text of the amendment would read: "In administering the regulations promulgated under subsection (a), the Commission shall maintain a policy that a single word or image may constitute indecent programming." *Id.*

169. See Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, 120 Stat. 491 (2006) (increasing maximum fines for indecency, obscenity and profanity violations).

170. *But see* Krotoszynski, *supra* note 8, at 2119 ("If the Commission regularly attempted to assess fines and forfeitures sufficient to deter undesirable conduct by licensees, the commercial broadcasting community's congressional allies would undoubtedly come to the industry's rescue.").

171. See Sophia Cope, *Bill Could Hasten Demise of FCC Indecency Regulation*, Center For Democracy & Technology, July 17, 2007, <http://blog.cdt.org/2007/07/17/bill-could-hasten-demise-of-fcc-indecency-regulation/> (discussing the implications of the Protecting Children from Indecent Programming Act and concluding that, if passed, it would necessitate a constitutional evaluation of regulation of fleeting expletives).

172. See *infra* discussion in Part V.

173. See *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978) (comparing Carlin monologue to a "two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy" and cautioning that the Court had not decided that "an occasional expletive in either setting would justify any sanction").

174. *Id.* (analogizing to the law of nuisance to the extent that the contextual approach can simply mean the "right thing in the wrong place" (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926))).

175. Despite a presumption that certain words are sexual or excretory references (which places them within the first prong of indecency analysis), the FCC's test is still contextual with respect to whether the words are patently offensive under contemporary community standards. See *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (Omnibus Order)*, 21 F.C.C.R. 2664, 2668 (2006) (describing indecency analysis as a balancing test and "contextual analysis"), *modified by* *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 13299 (2006). The effect of the policy change is merely that lack of repetition is no longer a dispositive factor in the

Making single utterances of expletives actionable is also consistent with the theories behind *Pacifica*. Most notably, fining fleeting expletives is consistent with the “first blow” theory advanced by the *Pacifica* Court,<sup>176</sup> and thus, unless *Pacifica* is revisited, the FCC’s contextual approach will remain constitutional.

*E. Summary of Arbitrary & Capricious Review*

The essential error of the *Fox Television* court was that it failed to give deference to the FCC’s interpretation of its mandate, and cloaked an attack on the FCC’s entire indecency regime in a non-deferential critique of the agency’s reasoning.<sup>177</sup> Although the court gave lip service to due deference,<sup>178</sup> the decision is more appropriately viewed as a court disagreeing with an agency determination on an arguable interpretation of the governing statute,<sup>179</sup> something both *Chevron*<sup>180</sup> and *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*<sup>181</sup> condemn. Although there was nothing actually impermissible about the way the *Fox Television* court decided the case, the court went to great lengths to find an inadequate explanation for the FCC’s change of policy, which approached the outer limits of judicial ability to discount deference to an agency’s policy determinations.<sup>182</sup> As demonstrated by this analysis, the court’s extension of its power of review was a result of finding problems not

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determination of patent offensiveness under contemporary community standards for the broadcast medium. *See id.* at 13309 (reiterating that “even relatively fleeting references may be found indecent” if the context makes them patently offensive” (quoting Industry Guidance on Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency (2001 Enforcement Policies), 16 F.C.C.R. 7999, 8009 (2001))).

176. *See supra* discussion in Part IV.A.

177. *See supra* discussion in Part IV.

178. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 456 (2007) (“An initial agency interpretation is not instantly carved in stone.” (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984))) (internal quotation omitted).

179. *See Fox Television*, 489 F.3d at 473 (Leval, J., dissenting) (“What we have is at most a difference of opinion between a court and an agency . . . in matters within the agency’s competence . . .”).

180. *See Chevron*, 467 U.S. at 865 (arguing that politically unaccountable federal judges have a duty to defer to the judgments of agencies in which Congress delegates responsibility for policy decisions).

181. *Motor Vehicle Manuf. Ass’n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (cautioning courts not to substitute their judgment for that of the agencies’ under arbitrary and capricious review).

182. *See supra* discussion in Part III.A (reviewing the debate over the proper level of deference in judicial review).

with the change in policy, but with the justifications for broadcast regulation generally.

#### V. THE *FOX TELEVISION* COURT'S CONSTITUTIONAL DICTA

After holding that the FCC's fleeting expletive policy was arbitrary and capricious, the *Fox Television* court predicted that the "fleeting expletive regime" would not withstand constitutional scrutiny because of concerns of vagueness, overbreadth and the erosion of justifications for broadcast's unique First Amendment treatment.<sup>183</sup> This prediction was inaccurate because, much like the court's arbitrariness analysis, it focused on problems applicable to indecency regulation generally and not to constitutional issues specific to the fleeting expletive policy.<sup>184</sup> Nevertheless, the court's prediction gave the first major show of support to many of the arguments made by broadcasters and commentators as to why the broadcast regulatory regime as a whole is unconstitutional,<sup>185</sup> but failed to convincingly argue that the change in policy was even a part of the reason for its unconstitutionality.<sup>186</sup> The court's essential arguments concerning vagueness, overbreadth, technological advances and spectrum scarcity will be discussed in turn.

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183. See *Fox Television*, 489 F.3d at 462–68. The court addressed the constitutional issues only after suggesting that the FCC would be capable of adequately justifying its new stance on remand and that it would therefore continue to implement the policy. See *id.* at 462. It is questionable that the FCC could provide an explanation sufficient for the *Fox Television* court considering the extremely high level of review and the already extensive justification proffered by the Commission. See discussion *supra* Parts III–IV.

184. See *Fox Television*, 489 F.3d at 463 (illustrating vagueness and over breadth with reference to FCC decisions). All of the FCC decisions cited by the court, however, involved the use of multiple expletives, and so, would have been actionable even before the *Golden Globes* change. See *id.* (discussing the airing of numerous expletives during the movie *Saving Private Ryan* as not indecent, while repeated expletives during a different broadcast were indecent); see also Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13307–08 (2006) (finding that Nicole Richie's use of two expletives during the 2003 Billboard Music Awards qualified as repeated and deliberate), *vacated by Fox Television*, 489 F.3d 444.

185. See Robert Corn-Revere, Ronald G. London & Amber Husbands, Second Circuit Rejects FCC's "Fleeting Expletives" Policy; Questions Indecency Regime (June 2007), [http://www.dwt.com/practc/communications/bulletins/06-07\\_Indecency.htm](http://www.dwt.com/practc/communications/bulletins/06-07_Indecency.htm) (suggesting that the *Fox Television* decision "called into serious question the ongoing constitutionality of the FCC's enforcement regime as presently formulated").

186. See *infra* discussion in Parts V.A and V.B (dissecting the court's constitutional analysis and its focus on vagueness of definition and developments in technology rather than policy change).



A. *Vagueness & Overbreadth*

The court's primary constitutional concern was that the indecency definition is unconstitutionally vague in that it "fails to provide the clarity required by the Constitution" and overly broad because it "creates an undue chilling effect on free speech and requires broadcasters to 'steer far wider of the unlawful zone'" by censoring legitimate, protected speech.<sup>187</sup> This argument has been made extensively by commentators<sup>188</sup> and has validity when applied to the context-based approach generally.<sup>189</sup> However, it is less applicable to fleeting expletives because specifically delineating certain words as actionable more closely approaches the "narrow specificity"<sup>190</sup> required in First Amendment regulation of speech.

Many critics of the indecency standard argue that it is a vague and overly broad regulation that leads to unnecessary self-censorship beyond the proscribed speech.<sup>191</sup> This argument is not novel, and was actually dismissed by the *Pacifica* Court when it noted that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language."<sup>192</sup> Moreover, given that the First Amendment seeks to protect the exchange of ideas by exposing them to public scrutiny,<sup>193</sup> it seems logical that the most legitimate use of expletives would be for the purpose of discussing and exposing their taboo place in society. This examination of expletives *as expletives* is exactly

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187. *Fox Television*, 489 F.3d at 463 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

188. See, e.g., Bungard, *supra* note 20, at 194 (labeling the indecency standard an "applause test" and contending that the current test can be salvaged if consistently applied); Coates, *supra* note 19, at 789–97 (arguing that the FCC's indecency test is vague and leads to broadcaster self-censorship); Nason Shefterl-Gomes, *Your Revolution: The Federal Communications Commission, Obscenity and the Chilling of Artistic Expression on Radio Airwaves*, 24 CARDOZO ARTS & ENT. L.J. 191, 212–14 (2006) (discussing broadcasters' broad preventative self-censorship in response to lack of guidance).

189. *But see* *Action for Children's Television v. FCC*, 59 F.3d 1249, 1262 (D.C. Cir. 1995) (suggesting that, although the FCC's policy may cause self-censorship, broadcasters have the remedy of getting a "trial on the merits" of specific forfeitures in federal court and have thus far been unable to show that "the agency is forcing off the air material that is not indecent"); Danoff, *supra* note 129, at 780 (predicting that the Court will continue to rely on *Pacifica's* emphasis on case-by-case determinations of indecency in order to overcome vagueness challenges).

190. *NAACP v. Button*, 371 U.S. 415, 433 (1963).

191. See, e.g., Rooder, *supra* note 31, at 898–902 (suggesting that the over-breadth of the indecency test coupled with increased fines leads to self-censorship).

192. *FCC v. Pacifica Found.*, 438 U.S. 726, 743 n.18 (1978) (responding to broadcaster's arguments that the FCC's indecency definition "may lead some broadcasters to censor themselves").

193. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 753 (2d ed. 1997).

what George Carlin attempted to do in his monologue<sup>194</sup> and exactly what the *Pacifica* court held may legitimately be censored.<sup>195</sup> Thus, the Court has implicitly decided that the use of expletives—even as political commentary on expletives—may not be worthy of extensive First Amendment protection.<sup>196</sup>

It also must be remembered that self-censorship is at the heart of the *Pacifica* doctrine,<sup>197</sup> and that the Court has thus far been willing to tolerate censorship that lies at “the periphery of First Amendment concern.”<sup>198</sup> The language at issue in the fleeting expletives cases is exactly the type of language to which the Court was referring<sup>199</sup> because, in the Court’s words, avoiding indecent language “will have its primary effect on the form, rather than the content, of serious communication.”<sup>200</sup> Therefore, although the indecency test may be problematic with respect to more complex determinations, when it comes to merely offensive language—a concept simple to grasp but difficult to define—a policy allowing fines for single expletives reduces constitutional problems with vagueness and overbreadth because broadcasters are on explicit notice that any use of certain words may be indecent.<sup>201</sup>

Once the assumption is made that certain words are presumptively indecent, broadcasters need only decide if the word is nevertheless justified as “demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.”<sup>202</sup> Although this is by no means a black and

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194. See *Pacifica*, 438 U.S. at 730 (noting that Carlin, as a social satirist, was seeking to use “words to satirize as harmless and essentially silly our attitudes towards those words”).

195. See *id.* at 750–51 (holding that the FCC’s power to regulate does not require a finding of obscenity).

196. See *id.* at 747 (reasoning that the social value of speech varies with the circumstances).

197. Because the FCC cannot prohibit indecent language before it airs—which would be a prior restraint—it relies exclusively on deterrence through the threat of fines to deliberately induce self-censorship. See *id.* at 736 (noting that the FCC may not subject “broadcast matter to scrutiny prior to its release”).

198. *Id.* at 743.

199. See *id.* at 746 (“Such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

200. *Pacifica*, 438 U.S. at 744 n.18.

201. See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program (Golden Globes Complaint)*, 19 F.C.C.R. 4975, 4978 (2004) (placing broadcasters on notice that any variation of the “F-Word” is inherently sexual thus meeting the first prong of the indecency definition as describing or depicting sexual or excretory activities).

202. *Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (Omnibus Order)*, 21 F.C.C.R. 2664, 2669 (2006) (discussing

white determination,<sup>203</sup> it is no more vague than contextually evaluating other forms of potential indecency to determine if they are patently offensive.<sup>204</sup> Moreover, the Commission's decisions provide a reasonably good sense of the situations in which the artistic or educational exceptions will apply.<sup>205</sup> Thus, the determination that fleeting expletives are actionable does nothing to exacerbate the inherent vagueness and overbreadth of the FCC's general context-based approach, and instead, places all potentially indecent speech on the same level.<sup>206</sup> In short, although vagueness and overbreadth

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exceptions to the presumption that the "S-word" and "F-word" are profane), *modified* by Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C.R. 13299 (2006). The same exceptions also militate against a finding of indecency because they suggest that the word is not patently offensive under contemporary standards for the broadcast medium. *See id.* (explaining why expletives in broadcast of *Saving Private Ryan* were not considered indecent or profane). Admittedly the argument could be made that, while the presumption reduces vagueness, over-breadth remains because broadcasters might not air words that would actually have been acceptable in the circumstances.

203. It seems probable that the more fleeting the expletive, the less likely that it will be integral to any artistic message because single expletives are more shocking than those repeated at length. *See Omnibus Order*, 21 F.C.C.R. at 2691 (finding Cher's use of the "F-word" in the Golden Globes to be "shocking and gratuitous" and implying that the word could have been blocked (i.e. bleeped) "without disproportionately disrupting the speaker's message").

204. The only additional chilling effect that could possibly result from this determination with regard to fleeting expletives would be that a broadcaster chooses not to air a specific word because of concern about whether the contextual exceptions would apply. As noted, any such errors would result in only the single, potentially offensive word being censored which almost certainly "lie[s] at the periphery of First Amendment concern." *Pacifica*, 438 U.S. at 730. *But see* Katherine A. Fallow, *The Big Chill, Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW. 1, 29 (2004) (predicting, in reference to the fleeting expletive policy, that "the uncertainty surrounding the FCC's standard will almost certainly deter broadcasters from airing programs containing any of the 'seven dirty words,' even if they form an integral part of important political, social, or artistic speech"). The weakness of this prediction lies in its assumption that broadcasters would choose not airing the entire program over bleeping a single word.

205. *Compare Omnibus Order*, 21 F.C.C.R. at 2687-90 (finding multiple variations of the word "shit" to be indecent in the broadcast of a fictional account of a 1971 skyjacker), *with* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13326-28 (2006) (finding that interviewee's use of "bullshitter" on the *Today Show* was not indecent because it occurred during a news interview), *vacated by* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007). *But see* Fallow, *supra* note 204, at 28-29 (examining FCC indecency decisions and noting problems in applying the FCC's contextual test and confusion over where the line should be drawn).

206. Although it is conceivable that situations could arise where broadcasters censor material that ultimately would have been appropriate in context, such speculation is not likely grounds for overturning a regulation. *See Hill v. Colorado*, 530 U.S. 703, 733 (2000) ("Speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended applications.'" (citing *United States v. Raines*, 362 U.S. 17, 23 (1960))).

are problems, they are not problems stemming from sanctioning fleeting expletives.

*B. Changes in Technology, Erosion of Uniqueness, and  
Less Restrictive Means*

The second major constitutional argument advanced by the *Fox Television* court was that, due to increasing prevalence of cable, satellite, Internet and other media, broadcast is no longer unique<sup>207</sup> and therefore its regulations deserve the same First Amendment scrutiny<sup>208</sup> as restrictions on non-broadcast media.<sup>209</sup> This argument is essentially a critique of the scarcity rationale that still underlies all broadcast regulation—the idea that broadcast may be regulated because there are more people who want to broadcast than there are available frequencies.<sup>210</sup> Although this is a potentially valid argument,<sup>211</sup> it is causally unrelated to fleeting expletives and is

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207. See, e.g., Chidester, *supra* note 163, at 166 (suggesting that “[t]he fact that so many Americans have access to cable” makes “maintenance of two different standards . . . outdated”); Rooder, *supra* note 31, at 895–97 (summarizing arguments that broadcast is no longer “readily distinguishable from other media on the grounds of pervasiveness”).

208. The *Fox Television* court did not explicitly call for strict scrutiny in broadcast speech restrictions, but, according to industry lawyers, intimated that “strict scrutiny may soon apply to broadcasting.” See Robert Corn-Revere, Ronald G. London & Amber Husbands, Second Circuit Rejects FCC’s “Fleeting Expletives” Policy; Questions Indecency Regime (June 2007), [http://www.dwt.com/practc/communications/bulletins/06-07\\_Indecency.htm](http://www.dwt.com/practc/communications/bulletins/06-07_Indecency.htm).

209. See *Fox Television*, 489 U.S. at 464–65 (commenting that, although the media landscape has changed, broadcast has historically had and continues to have less First Amendment protection); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994) (holding that the rationales for applying less rigorous scrutiny to broadcast do not apply to cable); cf. *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (applying strict scrutiny to Internet regulations).

210. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969) (allowing the government to regulate broadcast licenses in order to facilitate communication by preventing overcrowding of broadcast spectrum). Scholars and broadcasters have debated the validity of the scarcity rationale since its inception and current technological changes are fueling the debate. See, e.g., Josephine Soriano, Note, *The Digital Transition and The First Amendment: Is It Time To Reevaluate Red Lion’s Scarcity Rationale*, 15 B.U. PUB. INT. L.J. 341, 355–56 (2006) (surveying the scarcity rationale and suggesting that “the time is ripe” for it to be reconsidered); Varona, *supra* note 10, at 57–64 (discussing the continuing validity of the scarcity rationale for broadcast regulation).

211. See *Action for Children’s Television v. FCC*, 59 F.3d 1249, 1263 (D.C. Cir. 1995) (Edwards, C.J., concurring) (suggesting that indecency regulation law is in a “state of disarray” and questioning the distinction between broadcast and cable television given cable’s responsibility for a significant amount of indecency on television). But see Varona, *supra* note 9, at 167 (discussing the scarcity rationale and arguing that “new technologies have done nothing to lessen the persistent scarcity in broadcast frequencies available for license”).

equally applicable to the FCC's policy before single words became actionable.<sup>212</sup>

The court also argued that targeted blocking technology such as the V-Chip<sup>213</sup> is a less restrictive means, as compared to FCC regulation of protecting children.<sup>214</sup> The court thus suggested that the Commission's active regulatory role may no longer be narrowly tailored to achieve the government's goals of protecting children.<sup>215</sup> This argument has also been extensively studied by scholars and has significant merit.<sup>216</sup> The trouble with these arguments, however, is that they posit less restrictive means (e.g. the V-Chip) for achieving the government's objectives only after building on the erosion of uniqueness and scarcity to heighten the level of scrutiny.<sup>217</sup> Therefore, in order for the Court to accept the targeted blocking argument, it would have to first dispense with or dilute both the scarcity rationale and *Pacifica's* articulation of the uniqueness of broadcast so that FCC regulations could be analyzed under heightened scrutiny. When viewed in this light, the *Fox Television* court's argument goes too far for its purpose and could theoretically

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212. The arguments regarding uniqueness and scarcity go toward the FCC's ability to regulate broadcast rather than the specific regulations imposed under that authority. See Sophia Cope, Center For Democracy & Technology, Bill Could Hasten Demise of FCC Indecency Regulation (July 17, 2007), <http://blog.cdt.org/2007/07/17/bill-could-hasten-demise-of-fcc-indecency-regulation/> ("[T]he time is coming when the constitutional question will not be 'to what degree may the FCC regulate indecent speech?' but rather, 'can the FCC regulate indecent speech at all?'). The *Fox Television* court's technology and scarcity dicta lean toward the latter, while the issue of fleeting expletives is clearly the former.

213. See Federal Communications Commission, V-Chip: Viewing Television Responsibly, <http://www.fcc.gov/vchip/> (last visited Nov. 27, 2007) (explaining that the V-Chip, in combination with program ratings, "permit[s] parents to block programming with a certain rating from coming into their home"). The V-Chip became mandatory in all televisions over thirteen inches manufactured after Jan. 1, 2000. *Id.*

214. See *Fox Television*, 489 F.3d at 464 (comparing recent Supreme Court cases striking down cable and Internet speech regulations because less restrictive means (i.e., targeted blocking) were available to protect children).

215. See *id.* (contrasting scrutiny of restrictions inside and outside of the context of broadcast media).

216. See Rooder, *supra* note 31, at 874–81 (discussing First Amendment standards for indecency applied to non-broadcast media such as telephone, cable television and the internet and finding that less restrictive means made restrictions on speech outside of broadcast unconstitutional); Joshua B. Gordon, Note, *Pacifica Is Dead. Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1480–83 (2006) (detailing technological attacks on *Pacifica's* uniqueness rationales and concluding that cable and broadcast are indistinguishable in First Amendment terms and that V-chip technology is a less restrictive alternative to content regulation).

217. See generally Chidester, *supra* note 163, at 158–66 (discussing the merits of technological advances and increased regulation as ways to curb indecent material in broadcast).

strip the government of its long-standing justifications for regulating broadcast *in any capacity*.<sup>218</sup> This would be an immensely disproportionate step taken to protect occasional fleeting expletives under the First Amendment.

Furthermore, the technology as less restrictive means argument is currently *less* applicable to fleeting expletives than to other forms of indecency because the V-Chip technology relies on program ratings that may or may not take expletives into account.<sup>219</sup> Thus, while a V-Chip may be able to accurately screen for programs with excessive sexual content, its effectiveness is limited with respect to fleeting and often unpredictable expletives.<sup>220</sup> Although an argument could be made that targeted blocking is a less restrictive means of protecting children from, for example, violent content, technology has not progressed to the point where parents can selectively block indecent language.<sup>221</sup>

Therefore, the only currently effective place in the broadcast stream to intercept fleeting expletives is before they air and a relatively short delay in live broadcasts can essentially guarantee that

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218. Once the scarcity and uniqueness arguments are set aside, the only basis arguably left for regulating broadcast is pervasiveness, which, would be a difficult argument to make in the face of the increasing pervasiveness of cable, satellite and Internet. *See, e.g.,* Danoff, *supra* note 129, at 781 (distinguishing between the pervasiveness of the medium and the programming and claiming that pervasiveness of programming is a “powerful” argument for “extending *Pacifica* to cable and satellite radio”).

219. *See* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13319–20 (2006) (noting that the V-chip depends on program ratings which are often inaccurate and observing that most televisions do not have a V-chip and parents do not know how to use them), *vacated by Fox Television*, 489 F.3d at 444. *See generally* Adam Thierer, *Why Regulate Broadcast? Toward a Consistent First Amendment Standard For the Information Age*, 15 COMMLAW CONCEPTUS 431, 472–73 (2007) (explaining the V-chip and claiming that the low usage rates should not be used as an “excuse for government regulation of television programming”).

220. *See Golden Globes Remand Order*, 21 F.C.C.R. at 13319–20.

221. *But see* Thierer, *supra* note 219, at 473–82 (surveying technological, educational and lobbying alternatives to FCC broadcast regulation and concluding that regulation is no longer justified in light of these workable, but imperfect, alternatives); Gordon, *supra* note 216, at 1480–83 (positing that technology such as the V-chip and rating systems are a less restrictive alternative for protecting children from indecency at the household level rather than by government regulation). It is likely, however, that in the near future blocking technology will progress to the point where it does become a less restrictive means of protecting children from indecent speech. *See, e.g.,* TVGuardian, The Foul Language Filter Homepage, <http://tvguardian.com/gshell.php> (last visited Nov. 18, 2007) (exclaiming that “TVGuardian is a patented, award winning technology that automatically mutes offensive language”). This could conceivably give the Court all it needs to strike down or reduce the FCC’s regulatory role without actually abandoning the justifications for reduced scrutiny.

expletives do not slip by in inappropriate circumstances.<sup>222</sup> Given that there is still a general consensus that the goal of protecting children from indecent speech is valid,<sup>223</sup> placing the responsibility for content control in broadcasters still represents the least restrictive method of accomplishing this objective.<sup>224</sup> In sum, fining broadcasters for fleeting expletives does not contribute anything to the validity of the arguments that broadcast is no longer unique or scarce and fleeting expletives are currently not controllable by less restrictive means than FCC regulation.

#### CONCLUSION

Beginning in 1978 with *FCC v. Pacifica Foundation*, the FCC has been a gatekeeper of sorts for the content of broadcast media.<sup>225</sup> What began as the regulation of a “verbal shock treatment”<sup>226</sup> of expletives by a comedian has resulted in the FCC taking responsibility for policing speech on the airwaves within the bounds of the First Amendment.<sup>227</sup> There are many increasingly viable arguments, however, that *Pacifica’s* justifications for the permissibility of broadcast censorship are no longer valid. In that context, a pitched battle is brewing between the FCC and broadcasters who assert that regulation of broadcast is no longer justifiable.<sup>228</sup>

Meanwhile, the FCC, with apparent support from Congress, has decided to once again expand its enforcement capacity, ruling that

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222. See *Golden Globes Remand Order*, 21 F.C.C.R. at 13311–14 (recognizing that bleeping expletives is not foolproof, but contending that a five second delay should be sufficient to stop unwanted expletives without changing the live quality of broadcast). But see Corn-Revere, *supra* note 17, at 265 (claiming that the government’s interest in “substituting itself for informed and empowered parents . . . is not sufficiently compelling” because it incorrectly assumes that parents are not capable or interested enough to monitor what their children are watching (quoting *United States v. Playboy Entm’t Group*, 529 U.S. 803, 825 (2000))).

223. See *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials.”); Rooder, *supra* note 31, at 903 (arguing that the *Pacifica* Court’s “protection of children’ rationale is still compelling”). But see Danoff, *supra* note 129, at 776–78 (2007) (claiming that concern for children’s exposure to objectionable broadcast content may be “overly-inflated,” but noting that it is still a “legitimate government interest”).

224. But see Corn-Revere, *supra* note 17, at 265 (implying that targeted blocking technology is the least restrictive means of achieving the government’s interest in protecting children).

225. See *supra* discussion in Part I.

226. *FCC v. Pacifica Found.*, 438 U.S. 726, 756 (1978) (Powell, J., concurring).

227. See *supra* discussion in Part I.

228. See *supra* Part V and accompanying notes.

single or “fleeting” expletives are actionable indecency.<sup>229</sup> The affected broadcasters challenged the policy and the Second Circuit agreed with them, finding it to be arbitrary and capricious under the Administrative Procedure Act.<sup>230</sup>

Although the arbitrary and capricious standard is applied with a high degree of variability, the *Fox Television* court went too far and substituted its judgment for the FCC’s, and in doing so, attacked the entire justification behind broadcast regulation.<sup>231</sup> Further, by remanding the issue to the FCC, the court only caused increased uncertainty for both the FCC and broadcasters about the proper scope of the FCC’s power to regulate broadcast speech.<sup>232</sup>

The *Fox Television* court also predicted that the new policy was unconstitutional without finding that the fleeting expletive policy had in any way contributed to the unconstitutionality.<sup>233</sup> Moreover, the court’s constitutional predictions, if carried to their logical conclusions, could mean the demise of the rationale behind all broadcast regulation for the minimal gain of protecting the low First Amendment priority of fleeting expletives. Because the fleeting expletive policy is within the limits of the FCC’s authority under current law,<sup>234</sup> it cannot be struck down on constitutional grounds unless the Supreme Court chooses to reevaluate *Pacifica* and the FCC’s broader authority to implement context-based speech restrictions.<sup>235</sup>

Despite the many reasons why *Pacifica* may no longer be valid,<sup>236</sup> there are no compelling arguments as to why the airing of a single expletive should receive more First Amendment protection than the airing of several. The first blow rationale advanced in *Pacifica* is just as, if not more, applicable to fleeting expletives than to repeated ones.<sup>237</sup> Moreover, the battle over broadcast regulation should focus on more pressing and genuine concerns than whether a broadcaster may be fined because only a single expletive slipped by a bleeper who fell asleep at the wheel. Therefore, if *Fox Television* is appealed, the

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229. See Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Golden Globes Remand Order*), 21 F.C.C.R. 13299, 13308 (2006), vacated by *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007).

230. See *Fox Television*, 489 F.3d at 462.

231. See *supra* discussion in Parts III–IV.

232. See *supra* discussion in Part IV.

233. See *supra* discussion in Part V.

234. *But see* Chidester, *supra* note 163, at 167 (arguing that “targeting certain words as indecent” is an unconstitutional prior restraint on free speech).

235. See *supra* discussion in Parts IV–V.

236. See *supra* discussion in Part V.

237. See *supra* discussion in Part IV.A.



Supreme Court should reverse the Second Circuit, find the fleeting expletive policy constitutional, and wait for a more legitimate context in which to reform the general indecency regulatory scheme.<sup>238</sup>

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238. Such a challenge seems most likely if technology could effectively and selectively block unwanted content. Additionally, because the free and public nature of broadcast is one of the last remaining impediments to consistent regulatory treatment across media, the Internet, with its similarly high level of accessibility will probably represent the closest analogy once access to Internet connection reaches levels comparable to television access. An interesting challenge could arise in a situation where an identical television show is broadcast on television and simultaneously streamed live over the Internet. In theory, the Internet version could contain content presently deemed unacceptable for television, but with similar pervasiveness and accessibility by children.