

# EXPLAINING CHANGE AND RETHINKING DIRTY WORDS: *FCC v. FOX TELEVISION STATIONS, INC.*

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## I. INTRODUCTION

Everybody curses these days, including President Bush.<sup>1</sup> Does that mean that it is no longer reasonable to consider television programs that include the “F-Word”<sup>2</sup> indecent? The Supreme Court faces that quandary in *FCC v. Fox Television Stations, Inc.*<sup>3</sup> The FCC has declared “fleeting and isolated” utterances of the words “fuck” and “shit” indecent,<sup>4</sup> and is fighting to keep its new fleeting-expletives policy in place after the Second Circuit Court of Appeals struck it down.<sup>5</sup> The Second Circuit rejected the FCC’s new policy on administrative law grounds: it held that the FCC had not provided a reasoned explanation for changing its fleeting-expletives policy.<sup>6</sup>

The Supreme Court must now decide whether the FCC could reasonably conclude that non-literal uses of the F-Word are offensive enough to be indecent. To make that decision, the Court will need to clarify confusion about the leeway agencies have under the

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1. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 459 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008) (noting that President Bush once commented that the United Nations needed to “get Syria to get Hezbollah to stop doing this shit”).

2. *In re Complaints Regarding Various Television Broads*. Between Feb. 2, 2002 and Mar. 8, 2005 (*Remand Order*), 21 F.C.C.R. 13,299, 13,303 (2006) (the term “F-Word” used to avoid repeating the word “fuck”); *see generally* THE NEW OXFORD AMERICAN DICTIONARY 683 (2001) (defining the word “fuck” and noting that, “[u]ntil relatively recently, it rarely appeared in print; even today, there are a number of euphemistic ways of referring to it in speech and writing, e.g. the F-word, f\*\*\*, or f—k”).

3. *FCC v. Fox Television Stations, Inc.*, No. 07-582 (U.S. argued Nov. 4, 2008).

4. *Remand Order*, 21 F.C.C.R. at 13,306–11.

5. *Fox v. FCC*, 489 F.3d at 462.

6. *Id.* at 458–62.

Administrative Procedure Act<sup>7</sup> (APA) to change long-standing policies. In its decision, the Second Circuit limited the FCC's ability to change long-standing policies by presuming that the FCC's old policy of tolerating fleeting expletives was correct unless the FCC presented "evidence" proving otherwise.<sup>8</sup> By demanding a special explanation for the policy change, the Second Circuit extended the scope of its judicial review beyond the bounds authorized by the APA, which only allows courts to strike down unreasonable agency explanations.<sup>9</sup> In reviewing the Second Circuit's decision, the Supreme Court will probably use a more limited scope of review and reject the Second Circuit's problematic presumption that it was unreasonable to classify non-literal uses of the F-Word as indecent.

## II. FACTS

The FCC announced in 2004 that it could, and would, sanction broadcasters for airing "fleeting and isolated" expletives.<sup>10</sup> The announcement marked an about-face by the FCC, which had spent the previous twenty-five years rejecting claims that fleeting expletives were indecent.<sup>11</sup>

The FCC announced its new fleeting-expletives policy in March 2004,<sup>12</sup> a month after Janet Jackson bared her right breast during Superbowl XXXVIII as a result of a "wardrobe malfunction."<sup>13</sup> Complaints about indecent programming had increased ninefold, and

7. Administrative Procedure Act, Pub. L. No. 46-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

8. See *Fox v. FCC*, 489 F.3d at 461 ("The FCC's decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation.").

9. See Administrative Procedure Act, 5 U.S.C.A. § 706(2) (West 2007) (requiring courts to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"); *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to provide "reasoned basis" for acting in order to pass the APA's arbitrary-and-capricious test).

10. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program (Golden Globes)*, 19 F.C.C.R. 4975, 4975-79 (2004).

11. See *Fox v. FCC*, 489 F.3d at 461 (noting broadcasters had relied on the FCC's previous "restrained approach" to indecency enforcement); *CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir. 2008) (summarizing the FCC's long history of explaining "that isolated or fleeting material did not fall within the scope of actionable indecency").

12. *Golden Globes*, 19 F.C.C.R. at 4975.

13. *CBS*, 535 F.3d at 171-72; Kalefah Sanneh, *During Halftime Show, a Display Tailored for Video Review*, N.Y. TIMES, Feb. 2, 2004, at D4.

the FCC was trying to hone its “enforcement blade.”<sup>14</sup> The FCC’s first target was NBC, which had broadcast an awards show in which U2 singer Bono had used the phrase “really fucking brilliant” during an award-acceptance speech.<sup>15</sup> Under the FCC’s old policy, such a fleeting expletive would not have been indecent because Bono had only said the F-Word once.<sup>16</sup> The FCC, however, claimed that it had to change its fleeting-expletives policy “to safeguard the well-being of the nation’s children from the most objectionable, most offensive language.”<sup>17</sup> Accordingly, it held that the F-Word, even when only said once, was vulgar and shocking enough to be indecent.<sup>18</sup>

A number of broadcasters felt the sting of the FCC’s new policy. In an omnibus review of shows between 2002 and 2005, the FCC declared indecent Fox’s live broadcast of the 2002 Billboard Music Awards, in which Cher said “fuck ‘em”;<sup>19</sup> it declared indecent Fox’s live broadcast of the 2003 Billboard Music Awards, in which reality show star Nicole Richie observed that “it’s not so fucking simple” to get “cow shit out of a Prada purse”;<sup>20</sup> and it declared indecent a 2004 broadcast of the CBS’s “The Early Show,” in which a contestant on the reality show “Survivor: Vanuatu” used the word “bullshitter” during an interview.<sup>21</sup> (The FCC later reversed its “Early Show” ruling because it worried that punishing news programs for indecency could create some First Amendment problems.<sup>22</sup>) Broadcasters complained that the FCC’s indecency rules had become unpredictable and inconsistent.<sup>23</sup> Even as the FCC banned fleeting expletives, it let CBS

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14. *The Broadcast Decency Enforcement Act of 2004: Hearings on H.R. 3717 Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce*, 108th Cong. 78–79 (2004) (statement of Michael K. Powell, Chairman, FCC); see also FCC, *Indecency Complaints and NALs: 1993–2006*, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (showing that indecency complaints skyrocketed from 166,683 in 2003 to 1.4 million in 2004).

15. *Golden Globes*, 19 F.C.C.R. at 4976 n.4.

16. *Id.* at 4980.

17. *Id.* at 4979.

18. *Id.*

19. *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005 (Remand Order)*, 21 F.C.C.R. 13,299, 13,322–23 (2006).

20. *Id.* at 13,303–06.

21. *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005*, 21 F.C.C.R. 2664, 2698–99 (2006).

22. *Remand Order*, 21 F.C.C.R. at 13,327–28.

23. See, e.g., Mike Musgrove, *Sinclair Puts 9/11 Show in Late Night Time Slots*, WASH. POST, Sept. 2, 2006, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/01/AR2006090101528.html> (noting that CBS affiliates refused to air an “important” 9/11 documentary in prime time because it contained expletives, which made it “a risk” given the “uncertainty and potential level of fines”).

air an unedited version of “Saving Private Ryan” because the curse words were “integral” to conveying the “horrors of war.”<sup>24</sup>

Fox Television Stations, Inc., and other broadcast networks challenged the FCC’s new fleeting-expletives policy.<sup>25</sup> In an appeal to the Second Circuit, Fox argued (1) that the FCC had arbitrarily and capriciously instituted the new policy in violation of section 706(2)(A) of the APA and (2) that the new policy unconstitutionally restricted speech protected by the First Amendment.<sup>26</sup>

### III. LEGAL BACKGROUND

When the FCC changes its broadcast indecency policy, it must clear both administrative law and constitutional law hurdles.<sup>27</sup> The reviewing court will resolve the administrative law claim first by examining the new policy to see if it passes the APA’s arbitrary-and-capricious test.<sup>28</sup> The arbitrary-and-capricious test is based on § 706(2)(A) of the APA, which requires reviewing courts to strike down agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” The ultimate touchstone during arbitrary-and-capricious review is “reasoned” explanation.<sup>29</sup> Once an agency provides a reasoned explanation, the reviewing court cannot strike down the agency’s policy as arbitrary and capricious.<sup>30</sup>

The line between a reasoned explanation and an inadequate explanation is ill-defined but important. Generally, a reasoned explanation outlines why an agency made a change and on what authority it is relying to make that change.<sup>31</sup> An explanation can fall

24. *In re Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan.”* 20 F.C.C.R. 4507, 4512–13 (2005).

25. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

26. *Id.*

27. *CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir. 2008); *Fox v. FCC*, 489 F.3d at 462; *Action for Children’s Television v. FCC (ACT)*, 852 F.2d 1332, 1337–38 (D.C. Cir. 1988).

28. *See, e.g., CBS*, 535 F.3d at 174 (beginning review of a new FCC policy by asking if it passes the APA’s arbitrary-and-capricious test).

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

30. *See id.* at 42–43 (acknowledging that courts cannot strike down agency rules that are “rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute”).

31. *See, e.g., id.* at 43 (requiring agencies “to examine the relevant data and articulate a satisfactory explanation” that makes a “rational connection between the facts found and the choice made” (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))).

short of the reasoned requirement for any number of reasons, including inconsistent logic, failure to consider material factors, or “implausible” reasoning.<sup>32</sup> Because a number of considerations determine whether an explanation is reasoned enough to pass administrative review, the APA places few concrete limits on the scope of judicial review.<sup>33</sup> But the limits that exist are steadfast. Courts, for instance, cannot demand more of agencies than Congress requires.<sup>34</sup> Congress sets the rules the agencies must follow, the courts can only “impose” them.<sup>35</sup> Judicial rulemaking is rarely allowed.

Differentiating between demands for explanation, on the one hand, and judicial rulemaking, on the other, becomes particularly difficult in cases involving changes to long-standing agency policies.<sup>36</sup> Courts presume that old policies endure because the old policies carry out the agencies’ Congressionally-authorized missions.<sup>37</sup> In essence, the old policies’ longevity makes them presumptively reasonable. Because of that presumption, both the D.C. Circuit Court of Appeals and the Second Circuit have concluded that agencies wanting to change policies must explain why change is warranted to survive administrative review.<sup>38</sup>

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32. *Id.* at 43.

33. *See* Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73, 77 (1st Cir. 1993) (“The arbitrary and 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.”); Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 233–34 (1996) (surveying 135 APA cases decided by the D.C. Circuit and concluding that it is hard “to quantify or even explicate” what makes an agency explanation inadequate); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1065–68 (1995) (surveying 118 cases and finding that the definition of “arbitrary and capricious” in § 706(2)(A) is indeterminate).

34. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (“Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them. This is not to say necessarily that there are no circumstances which would ever justify a court in overturning agency action because of a failure to employ procedures beyond those required by the statute. But such circumstances, if they exist, are extremely rare.”).

35. *Id.*

36. *Compare* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 461 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008) (demanding evidence that the FCC needed to change its fleeting-expletives policy is demanding a reasoned explanation), *with id.* at 473 (Leval, J., dissenting) (criticizing the majority’s decision to strike down the FCC’s new fleeting-expletives policy as “a difference of opinion between a court and an agency”).

37. *State Farm*, 463 U.S. at 41–42.

38. *See* N.Y. Council, Ass’n of Civilian Technicians v. Fed. Labor Relations Auth., 757 F.2d 502, 508 (2d Cir. 1985) (requiring agencies to provide “a reasoned explanation of why the new

After the FCC's new policy survives administrative review, it is subjected to constitutional review.<sup>39</sup> The FCC, however, has broad power to regulate speech on broadcast television,<sup>40</sup> and, as a result, it does not have to wrestle with the First Amendment<sup>41</sup> concerns that government indecency regulations normally create.<sup>42</sup> This is because broadcast networks receive less First Amendment protection due to their "uniquely pervasive" reach into the American home with programming that is "uniquely accessible to children, even those too young to read."<sup>43</sup>

The Supreme Court has never decided whether regulating fleeting expletives is constitutional.<sup>44</sup> The FCC has long believed that it could regulate fleeting expletives to some degree, and nothing in the law contradicts the FCC's interpretation.<sup>45</sup> Because the FCC has general authority to sanction broadcast indecency,<sup>46</sup> it arguably also has the specific authority to regulate fleeting expletives.

#### IV. HOLDING

In *Fox Television Stations, Inc. v. FCC*, a divided Second Circuit panel struck down the FCC's new fleeting-expletives policy. The court determined that the policy-change lacked a reasoned explanation and

rule effectuates the statute as well or as better than the old rule"); *Brae Corp. v. United States*, 740 F.2d 1023, 1038 (D.C. Cir. 1984) (requiring agencies to "explain why the original reasons for the rule or policy are no longer dispositive").

39. *See Action for Children's Television v. FCC (ACT)*, 852 F.2d 1332, 1338 (D.C. Cir. 1988) (examining the constitutional challenge to a new FCC policy after concluding that the new policy passed the arbitrary-and-capricious test).

40. *See Reno v. ACLU*, 521 U.S. 844, 867-70 (1997) (prohibiting the federal government from policing the internet for indecency in the same way the FCC patrols broadcast television); *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (explaining that the FCC can impose speech limits on broadcast media that it cannot impose on newspapers or other mediums).

41. U.S. CONST. amend. I.

42. *See, e.g., Pacifica*, 438 U.S. at 748 (noting that the government cannot usually license speakers or impose equal-time requirements).

43. *Id.* at 748-49.

44. *Id.* at 750; *id.* at 760-61 (Powell, J., concurring).

45. *See* 18 U.S.C.A. § 1464 (West 2000) (permitting punishment for broadcasting "any . . . indecent . . . language"); 47 U.S.C.A. § 326 (West 2001) (prohibiting the FCC from engaging in censorship); *Action for Children's Television v. FCC (ACT)*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (holding that the FCC could broaden its definition of broadcast indecency); *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8009-10 (2001) (listing examples of when fleeting expletives have been found indecent).

46. *See Pacifica*, 438 U.S. at 750 (approving a broadcast indecency regime "under which context is all-important").

that it therefore failed the APA's arbitrary-and-capricious test.<sup>47</sup> As a result, the court did not decide whether the new policy was unconstitutional.<sup>48</sup> In dicta, however, the majority indicated that it would declare the new policy unconstitutionally vague if the case came before it again.<sup>49</sup>

The majority rejected the FCC's new fleeting-expletives policy because it presumed the FCC's old policy was correct.<sup>50</sup> The majority read the APA as requiring more than merely a reasoned explanation for changing policy: it read the APA as requiring the FCC to show why a new policy was needed. To do that, the FCC needed to provide evidence that fleeting expletives were a problem requiring government oversight<sup>51</sup> in order to overcome the presumption that fleeting expletives, particularly non-literal uses of "fuck" and "shit," were not harmful.<sup>52</sup> The majority based this presumption on the FCC's twenty-five year record of rejecting claims that fleeting expletives were indecent.<sup>53</sup>

The majority searched for evidence justifying the FCC's new fleeting-expletives policy and came up empty-handed. The FCC changed its fleeting-expletives policy because the old policy clashed with its context-sensitive approach to indecency enforcement by making a single factor—the number of expletives—determinative.<sup>54</sup> But the FCC failed to provide adequate justification or evidence that such a change was necessary. It neither evaluated whether the words "fuck" and "shit" had become more offensive since 1978,<sup>55</sup> nor

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47. *Fox v. FCC*, 489 F.3d at 457–62.

48. *Id.* at 462.

49. *Id.* at 462–66.

50. *See id.* at 456–57 (allowing agencies to change long-standing policies, but only if they show that a "flip-flop" is warranted (quoting *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985))).

51. *Id.* at 461.

52. The majority concluded that it could not even consider the possibility that fleeting expletives were indecent because the FCC did not provide any evidence that fleeting expletives are offensive. *Id.* at 460 n.10 (citing *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 626 (1986) ("Agency deference has not come so far that we will uphold regulations whenever it is possible to 'conceive a basis' for administrative action.")). The majority stretches a bit when it contends that the FCC has provided no basis for its new fleeting-expletives policy. The FCC explained that it changed its policy because it concluded that non-literal uses of the F-Word are offensive enough to be indecent. *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005 (Remand Order)*, 21 F.C.C.R. 13,299, 13,303–08 (2006).

53. *Fox v. FCC*, 489 F.3d at 458–61.

54. *Remand Order*, 21 F.C.C.R. at 13,308.

55. *See Fox v. FCC*, 489 F.3d at 461 ("The FCC's decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is

explained that it acted in response to viewer complaints.<sup>56</sup> Instead, all the FCC did was claim that it was fulfilling its duty to protect viewers from the “first blow” of offensive language.<sup>57</sup> This prophylactic explanation was insufficient, the majority held, to justify a policy that did not completely protect viewers from televised expletives.<sup>58</sup>

In dissent, Judge Leval argued that the majority improperly stymied the FCC’s new fleeting-expletives policy by setting out too onerous a reasoned-explanation requirement.<sup>59</sup> Any reasoned explanation should have sufficed, according to the dissent, including one that was “sensible, although not necessarily compelling.”<sup>60</sup> Because the FCC reasonably concluded that the F-Word is always graphically explicit enough to be indecent, the FCC’s new fleeting-expletives policy should have survived administrative review.<sup>61</sup> The dissent found nothing in the APA’s arbitrary-and-capricious test barring the FCC from changing its fleeting-expletives policy and charged the majority with striking down the FCC’s new policy because of “a difference of opinion.”<sup>62</sup>

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serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech.”); Jess Bravin & Amy Schatz, *Don’t Read His Lips—You Might Be Offended*, WALL ST. J., Nov. 4, 2008, at A14, available at <http://online.wsj.com/article/SB122575539538895001.html> (“The FCC says . . . that it conducted no formal study beyond the opinion it published announcing the expletive rule. A spokesman says the commission can’t comment further while the case is pending.”).

56. The failure to make this argument will hurt the FCC because, unlike rational-basis review, courts “may not supply a reasoned basis for the agency’s action that the agency itself has not given,” *Motor Vehicle Mfrs. Ass’n v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). The FCC would have an easier time passing the arbitrary-and-capricious test if it had used viewer complaints to explain the policy change. See Transcript of Oral Argument at 36, FCC v. Fox Television Stations, Inc., No. 07-582 (Nov. 4, 2008) (question of Souter, J.) (indicating that the FCC’s new policy could have passed administrative review if it had said that it was changing the policy in response to public complaint).

57. *Fox v. FCC*, 489 F.3d at 457–58. The FCC relied on this argument because it was taken directly from the language of the Supreme Court’s *Pacifica* decision. See *Remand Order*, 21 F.C.C.R. at 13,309 (“[In *Pacifica*, the Supreme Court] rejected the argument that one could protect oneself by turning off the broadcast upon hearing indecent language: ‘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.’ We believe that granting an automatic exemption for ‘isolated or fleeting’ expletives unfairly forces viewers (including children) to take ‘the first blow.’” (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 748–49 (1978))).

58. *Fox v. FCC*, 489 F.3d at 458.

59. *Id.* at 469–72, 473 (Leval, J., dissenting).

60. *Id.* at 469.

61. *Id.*

62. *Id.* at 473.



## V. ANALYSIS

The Second Circuit struck down the FCC's fleeting-expletives policy because it refused to presume that non-literal uses of the F-Word were offensive enough to be indecent.<sup>63</sup> The majority had a reason to be leery of the FCC's new policy (for decades, the FCC refused to call fleeting expletives indecent<sup>64</sup>), but it did not have the power to reject a policy based on the reasonable notion that the F-Word is indecent. In administering the APA's arbitrary-and-capricious test, the majority had the authority only to determine whether the FCC's explanation fell within the bounds of reason.<sup>65</sup> By requiring the FCC to prove change was warranted, the majority shrank the bounds of reason and made it harder for the FCC to pass administrative review.

### A. *The APA*

Congress enacted the APA in 1946 to impose “procedural controls” on the newly-empowered federal agencies.<sup>66</sup> In the burgeoning administrative state, agencies like the FCC had sweeping new powers delegated to them by Congress, and some had begun to worry about “bureaucratic tyranny.”<sup>67</sup> Congress enacted the APA to ensure that agencies such as the FCC did the work it asked them to do and stayed within the parameters that it set.<sup>68</sup>

Congress pulled the judiciary into APA enforcement because lawmakers lack the resources to effectively monitor compliance with

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63. *See id.* at 461 (majority opinion) (demanding evidence that fleeting expletives are harmful enough to “warrant” regulation).

64. *Id.*

65. *See Am. Dental Ass'n v. Martin*, 984 F.2d 823, 831 (7th Cir. 1993) (upholding a rule within the bounds of reasonableness—even though it is not necessarily a good rule, even though it might go too far, and even though its costs may exceed its benefits—because the duty of “a reviewing court of generalist judges is merely to patrol the boundary of reasonableness”).

66. Wald, *supra* note 33, at 222.

67. *See* Wald, *supra* note 33, at 221–23 (recounting the history of the APA); *In re Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 7999 (2001) (citing 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D)) (“Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464. In doing so, the Commission may revoke a station license, impose a monetary forfeiture, or issue a warning for the broadcast of indecent material.”).

68. *See* 5 U.S.C.A. § 706 (West 2007) (making illegal agency actions that were procedurally improper or otherwise in violation of the agency's authorizing statute); Wald, *supra* note 33, at 223 (pointing out that, when lawmakers enacted the APA, they did not intend to give the judiciary the power to influence agency policy decisions).

the APA.<sup>69</sup> Though Congress gave the judiciary some power to watch over the agencies, it limited the scope of the judiciary's power to review agency actions, in part because the judiciary had thwarted early congressional efforts to empower federal agencies.<sup>70</sup> Under the APA, courts can stop agencies from stepping out of bounds or violating a rule of procedure, but they cannot prevent agencies from replacing a high-quality policy with a moderately-functional one.<sup>71</sup> As the referees of the administrative state, courts monitor agencies' compliance with the rules but lack the power to set the rules themselves.

### B. *The Reasoned Explanation*

In *Fox Television Stations, Inc. v. FCC*, the Second Circuit majority did more than referee the FCC: it reset the limits on the FCC's rule-making powers. The majority limited the FCC's ability to change its fleeting-expetives policy by presuming that fleeting expletives were not indecent.<sup>72</sup> With that single presumption, the FCC's ability to provide a reasoned explanation for the change shrank. The FCC could no longer get through administrative review by concluding that non-literal uses of the F-Word are offensive enough to be indecent. The FCC needed more. It needed evidence that fleeting expletives are harmful enough "to warrant government regulation."<sup>73</sup>

To demand evidence from the FCC, the majority read the APA as requiring special explanations from agencies trying to change long-standing policies.<sup>74</sup> This reading of the APA sprang in large part from

69. The APA subjects all final agency actions to review. *See* 5 U.S.C.A. § 701(a) (allowing judicial review except when the law precludes it or "agency action is committed to agency discretion by law"). Only the judiciary has the capability to review final agency actions on a case-by-case basis.

70. *See* Wald, *supra* note 33, at 222–23 (recounting the history of the APA and noting that New Dealers worried that "an escalated level of judicial review" would allow the judiciary to stymie regulation).

71. *See supra* note 65.

72. The majority actually comes close to holding that non-literal uses of the F-Word are not indecent. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 459–60 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). Classifying non-literal uses of the F-Word as indecent "defies any commonsense understanding of these words," according to the majority, because everybody knows that such uses do not describe coitus. *Id.* at 459. In a footnote, the majority urges readers not to think that it is agreeing with claims that the F-Word is not indecent. It does not "disagree" with the notion that non-literal uses of the F-Word are indecent, it just wants the FCC to provide "record evidence." *Id.* at 460 n. 10.

73. *Id.* at 461.

74. The majority highlighted what it wanted from the FCC: "a reasoned explanation of why the new rule effectuates the statute *as well as or better than the old rule.*" *Id.* at 457

a section of the Supreme Court's *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, decision.<sup>75</sup> There, the Court stated that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."<sup>76</sup> The *Fox v. FCC* majority was wrong to read *State Farm* as setting out a special-explanation requirement for policy change, and wrong to interpret the APA as permitting the judiciary to employ an arbitrary-and-capricious test skeptical of otherwise-reasonable change.

First, the majority incorrectly read *State Farm* as establishing a different and more particular arbitrary-and-capricious test for changes to long-standing policies. In *State Farm*, the Court did not consider creating a different arbitrary-and-capricious test. Instead, the Court answered a different question: Should deregulation be subject to something less demanding than the arbitrary-and-capricious test?<sup>77</sup> The Court's decision, which required deregulation to pass the arbitrary-and-capricious test, shows that the APA sets out a single, unwavering test for agency action.<sup>78</sup>

Second, the majority incorrectly interpreted the APA's arbitrary-and-capricious test as skeptical of otherwise-reasonable change. In actuality, the APA provides agencies with "ample latitude" for change by limiting courts to checking agency decisions to make sure they are within the "boundary of reasonableness."<sup>79</sup> In the twenty-five years since its *State Farm* decision, the Court has repeatedly held that administrative law provides agencies with broad powers to change their policies as they see fit.<sup>80</sup> Although these decisions do not

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(quoting *N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 757 F.2d 502, 508 (2d Cir. 1985)).

75. The majority cites the pertinent section of *State Farm* when demanding evidence that fleeting expletives are harmful. *Id.* at 461 (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 42 (1983)).

76. *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Mut. Ins. Co.*, 463 U.S. 29, 42 (1983).

77. *Id.* at 41–42.

78. *See id.* at 42 ("[T]he direction in which an agency chooses to move does not alter the standard of judicial review established by law.").

79. *Id.* at 42; *Am. Dental Ass'n v. Martin*, 984 F.2d 823, 831 (7th Cir. 1993).

80. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (recognizing agencies have broad power to change policies and indicating that agencies might be able to change policies for political reasons); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (allowing an agency to change its 100-year-old interpretation of a statute because Congress gave the agencies the discretion to do so); *Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (allowing agency to change policies because it believed the "prior policy failed to

expressly disavow skeptical applications of the arbitrary-and-capricious test, they strongly indicate that the Court will not adopt such a limiting approach.

### C. *The F-Word*

The dissent correctly asked if non-literal uses of the F-word could reasonably be considered indecent.<sup>81</sup> The answer to that question—and that answer alone—should have determined whether the FCC gave a reasoned explanation for its new fleeting-expletives policy.

The majority should have spent more time analyzing the F-Word and less time knocking down all of the FCC's other explanations.<sup>82</sup> The majority's refusal to presume that fleeting expletives are indecent was untenable, at least with respect to the F-Word.<sup>83</sup> The F-Word remains one of the most offensive words in the English language because it is always freighted with "implicit sexual meaning."<sup>84</sup> The

implement properly the statute"); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984) ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.").

81. The majority does not consider this question at all. *See Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 460 n. 10 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008) (claiming that the Second Circuit "need not consider" that issue because the FCC did not provide any evidence showing that non-literal expletives are offensive). The dissent considers this question decisive. *Id.* at 469–70 (Leval, J., dissenting).

82. The majority correctly rejected the FCC's other explanations for changing its fleeting-expletives policy. *See id.* at 458–61 (rejecting the FCC's other explanations as inadequate). The FCC's "first blow" explanation was unconvincing. *See id.* at 458 (pointing out that a policy that still allows expletives to be broadcast does not really protect viewers from the "first blow" of expletives). The FCC was engaging in hyperbole when it claimed that it needed to prevent fleeting expletives from overrunning the airwaves. *See id.* at 460–61 (calling the explanation "divorced from reality because the Commission itself recognizes that broadcasters have never barraged the airwaves with expletives").

83. Because none of the judges on the Second Circuit panel that heard *Fox v. FCC* believed that the word "shit" is offensive enough to be indecent, this analysis does not address that claim. *See id.* at 459–60 (concluding that there is no evidence that fleeting utterances of the word "shit" are offensive); *id.* at 474 n.18 (concluding that "shit" is not indecent because a reference to excrement is not as harmful to children as a reference to sex because young children's "main preoccupation" is excrement). The Second Circuit is probably correct: the word "shit" is, according to one survey, merely the 17th-most offensive word in the English language. ANDREA MILLWOOD-HARGRAVE, ADVER. STANDARDS AUTH., *DELETE EXPLETIVES?* 9 (2000), <http://www.asa.org.uk/asa/research/archive>.

84. Robert F. Blomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 SANTA CLARA L. REV. 65, 98 (1999); MILLWOOD-HARGRAVE, *supra* note 83, at 9; *see also* THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 2, at 683 ("Despite the wideness and proliferation of its use in many sections of society, the word fuck remains (and has been for centuries) one of the most taboo words in English."); Christopher M. Fairman,

majority had little, if any, evidence that the word had lost its taboo power as more people use it in non-sexual ways.<sup>85</sup> If anything, the spread of non-literal uses of the F-Word might actually be a testament to its offensive power. After all, Bono did not say “fucking brilliant”<sup>86</sup> because the F-Word was the most literal description of his feelings: he said it because the F-Word accurately conveyed the intensity of his feelings in a way that a less-offensive word (such as “darn”) could not.<sup>87</sup>

Without the presumption that fleeting expletives are harmless, the majority would have been forced to admit that the FCC acted reasonably by declaring non-literal uses of the F-Word indecent. Nobody, not even the broadcast networks, thinks that the F-Word should be used on broadcast television.<sup>88</sup> The reason: Many people still consider the word extremely offensive.<sup>89</sup> Thus, the F-Word remains taboo enough to be presumptively indecent.<sup>90</sup>

## VI. ARGUMENTS AND DISPOSITION

How reasonable is it to presume that the F-Word is indecent? If a majority of the Supreme Court believes that it cannot presume that the F-Word is offensive enough to be indecent, it will uphold the Second Circuit’s decision. If, however, a majority of the Court believes that the F-Word remains offensive enough to be indecent, the court will overturn the Second Circuit’s decision. Either way, the Court

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*Fuck*, 28 CARDOZO L. REV. 1711, 1712 n.3 (2007) (listing scholarship that reviews the offensiveness of the F-Word).

85. See Bravin & Schatz, *supra* note 55, at A14 (quoting a linguist as saying that expletives like “fuck” “have their own magic” and defy reasoned analysis); *but see id.* (noting that Michael Powell, the former FCC chairman, regrets classifying non-literal uses of the F-Word as indecent because “no reasonable person would believe” that such exclamations are “meant to titillate or be sexual in nature”).

86. The FCC declared fleeting expletives indecent after Bono uttered this phrase on live television. *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program (Golden Globes)*, 19 F.C.C.R. 4975, 4976–80 (2004).

87. Justice Scalia made this point during oral arguments. See Transcript of Oral Argument at 35–36, *supra* note 56 (“[You] [d]on’t use golly waddles in—instead of the F-Word.”).

88. See *In re Complaints Regarding Various Television Broad. Between Feb. 2, 2002 and Mar. 8, 2005 (Remand Order)*, 21 F.C.C.R. 13,299, 13,310 (2006) (surveying network policy on expletives and finding that networks generally do not permit shows to use the F-Word, even when those shows air during the “safe harbor” period when the FCC’s broadcast indecency rules do not apply).

89. See *id.* at 13,306 n. 48 (quoting from e-mail complaining about Nicole Richie’s use of the F-Word during the 2003 Billboard Music Awards).

90. See Bravin & Schatz, *supra* note 55, at A14 (quoting a linguist as saying, “These words are taboo, and we as a society have invested ourselves in treating these words as taboo.”).

does not appear inclined to use *FCC v. Fox Television Stations, Inc.*, to decide if the FCC’s broadcast indecency regime is still constitutional. Instead, the Court will probably send the constitutional questions back to the Second Circuit for further constitutional arguments.<sup>91</sup>

### A. Examining Dirty Words

In evaluating the presumption that the F-Word is indecent, the Court will examine the meaning of the F-Word. This examination will honor the “narrow” scope of judicial review<sup>92</sup> that the APA sets out.<sup>93</sup> The Court is tied to a narrow arbitrary-and-capricious test in part because expanding the reasoned-explanation requirement would require it to violate *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, and impose a new rule on agencies.<sup>94</sup>

If oral arguments were any indication, the justices will examine the place of expletives in modern society before making their decision: How do people use and understand the F-Word?<sup>95</sup> Do community standards still consider expletives offensive?<sup>96</sup> What are the costs of excising such expletives from television, especially because a regime that strictly punishes fleeting expletives could make live broadcasts infeasible?<sup>97</sup> After examining these questions, the

91. See *infra* Part VI.B (explaining the constitutional arguments at issue).

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

93. See Transcript of Oral Argument at 32, *supra* note 56 (comments of Roberts, C.J.) (“But the point—important point is whether or not they provided a reasonable explanation for their current position.”).

94. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (holding that Congress set the procedural requirements the judiciary can impose on agencies, the judiciary cannot come up with new ones).

95. See Transcript of Oral Argument at 12, *supra* note 56 (question of Stevens, J.) (“Isn’t it true that . . . [the F-Word] is a word that often is used with . . . no reference whatsoever to the . . . sexual connotation?”); compare Brief for the Petitioners at 34–35, *FCC v. Fox Television Stations, Inc.*, No. 07-582 (U.S. June 2, 2008) (arguing that the F-Word retains its sexual connotations, even when it is used in a non-literal way) with Brief for Respondent Fox Television Stations, Inc., at 41–42, *FCC v. Fox*, No. 07-582 (U.S. Aug. 1, 2008) (arguing that non-literal uses of the F-Word are not explicit, graphic, pandering, or titillating, and that people understand when the F-Word is being used in a non-literal way).

96. See Transcript of Oral Argument at 49, *supra* note 56 (question of Kennedy, J.) (asking if community standards have changed so that people are more tolerant of curse words).

97. See Transcript of Oral Argument at 18–20, *supra* note 56. (“I just have a practical question. I’m just curious about this. What are the networks supposed to do, or the television stations? They cover a lot of live events.”); see also Brief for Respondent Fox Television Stations, Inc. at 32, *supra* note 95 (pointing out that the record before the court is “replete with examples of how the new policy has jeopardized the viability of live broadcasting”).

Court could very well decide that it was reasonable to declare non-literal uses of the F-Word indecent.

Unlike the Second Circuit, there are a significant number of justices on the Supreme Court who will begin their analysis by presuming that reasonable people consider the F-Word offensive, regardless of how it is used.<sup>98</sup> These justices will not need proof that the F-Word is harmful to uphold the FCC's fleeting-expletives policy; instead, they will presume that the FCC's fleeting-expletives policy is reasonable until Fox proves otherwise. If a majority of the Court adopts this approach, the Court will almost certainly uphold the FCC's new fleeting-expletives policy. The Court has little evidence that people distinguish non-literal from literal uses of the F-Word,<sup>99</sup> and what little evidence it does have is outweighed by the cries of indecency coming from television viewers and Congress.<sup>100</sup>

Perhaps in an effort to get around this problem, Fox has tried unsuccessfully to convince the Court that the APA requires more explanation from the FCC than normal because the new fleeting-expletives policy regulates constitutionally-protected speech.<sup>101</sup> At oral argument, the justices voiced doubt about this constitutional-

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98. During oral arguments, Chief Justice Roberts and Justice Scalia articulated this view. Transcript of Oral Argument at 12–14, 34–36, *supra* note 56. Justice Souter also indicated support for this view by saying that the spike in indecency complaints would have been enough to justify the fleeting expletives crackdown. *Id.* at 36–37. Justice Alito and Justice Thomas might agree with these three justices, though it is not publicly known: neither justice spoke during oral arguments.

99. The Second Circuit cited explicit comments by President Bush (“get Syria to get Hezbollah to stop doing this shit”) and Vice President Cheney (“[f]uck yourself”) as evidence that the people with a “commonsense understanding” of the words can distinguish between literal and non-literal uses of the words. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 459–60 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008). In doing so, the Second Circuit might have actually proved how hard it is to distinguish between the literal and non-literal uses of the F-Word. As the FCC tactfully points out, “at least one of the expletives at issue”—Cheney’s—“was used in a literal sense.” Brief for the Petitioners at 34, *supra* note 95.

100. Beginning in 2003, the FCC recorded a marked increase in indecency complaints. *See Indecency Complaints and NALs: 1993–2006*, *supra* note 14 (showing that the FCC received 327,198 complaints in the first six months of 2006). Viewers who heard fleeting expletives complained to the FCC about the “vulgarity” and the “disgusting and very disturbing” language. *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005 (Remand Order)*, 21 F.C.C.R. 13,299, 13,306 n.48 (2006). Others complained that their children started asking questions such as “what f\*\*\*ing meant.” Brief for the Petitioners at 26, *supra* note 95. Congress responded by increasing the fines for broadcast indecency. Broadcast Decency Enforcement Act of 2005, 47 U.S.C.A. § 503(b) (West Supp. Oct. 2006). In a House Report on the bill, the fleeting expletives uttered by Bono and Nicole Richie were used as evidence of the need for legislation. H.R. Rep. No. 109-5, at 2 (2005).

101. Transcript of Oral Argument at 38, *supra* note 56; Brief for Respondent Fox Television Stations, Inc. at 21–23, *supra* note 95.

avoidance approach.<sup>102</sup> They appeared unwilling to create a separate arbitrary-and-capricious test for constitutionally-questionable agency decisions, and some justices indicated that creating such a test would violate *Vermont Yankee* by imposing a new rule on agencies.<sup>103</sup>

### B. *Stopping Short of the Constitution*

The constitutional concerns about the FCC's new policy do not disappear simply because the Court does not factor them in to its administrative review. They remain an "elephant . . . in the room."<sup>104</sup> In an era of YouTube and digital cable, *FCC v. Pacifica Foundation's* dated claim that broadcast television is "uniquely pervasive"<sup>105</sup> and "uniquely accessible to children"<sup>106</sup> rings hollow. Not even the Court thinks this is true anymore,<sup>107</sup> largely because it realizes that cable reaches nearly as many homes as broadcast television.<sup>108</sup>

Nothing in the doctrine of *stare decisis* requires the Court to cling to the *Pacifica* decision. *Pacifica's* analog world is gone. Cable and the internet now flood American homes with images and content that used to trickle in through the broadcast airwaves.<sup>109</sup> The drastic changes in media over the last thirty years provide the Court with more than enough "special justification"<sup>110</sup> to overrule the decision.<sup>111</sup>

Though the Court could use *FCC v. Fox* to begin overhauling its constitutional approach to broadcast indecency regulation, it will

102. Transcript of Oral Argument at 38–41, *supra* note 56.

103. *Id.*

104. Transcript of Oral Argument at 27, *supra* note 56 (comment by Ginsberg, J.).

105. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

106. *Id.* at 749.

107. *See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744–45 (1996) (recognizing that cable is as pervasive and accessible to children as broadcast television, "if not more so").

108. About 87 percent of all American households now have cable or satellite service. FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report*, at 3, Nov. 27, 2007, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-278454A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf) (estimating that 95.8 million of the 110.2 million American households with a television have cable or satellite service).

109. *Cf.* Transcript of Oral Argument at 17, *supra* note 56 (comment of Ginsberg, J.) ("That was before the Internet. *Pacifica* was in 1978.")

110. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

111. The Court can deviate more from prior precedent in constitutional cases, in part because the only other way to alter the Court's prior constitutional interpretation is to amend the Constitution itself. *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997). Even so, "any departure from the doctrine of *stare decisis* demands special justification." *Rumsey*, 467 U.S. at 212. The Court recognizes that it can overturn prior precedent when facts change enough to rob the old rule of its foundation. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).



probably not do so. The court limited the question presented in *FCC v. Fox* to administrative law,<sup>112</sup> and has not agreed to consider the broadcasters' constitutional challenge to the FCC's broadcast indecency regime.<sup>113</sup> Remand is likely in part because the delay will not hurt the broadcasters' claims,<sup>114</sup> and in part because the Solicitor General specifically requested remand so the FCC could get "another crack at those issues before the Second Circuit."<sup>115</sup> Because there are no special reasons for taking up the broadcasters' constitutional challenge immediately, the Court will probably send the case back to the Second Circuit for further arguments.<sup>116</sup>

Remand might be particularly appropriate in *FCC v. Fox* because a decision reconsidering *Pacifica* could have huge cultural ramifications. If the Court drops the constitutional distinction between broadcast and cable, the FCC's current broadcast indecency regime could be unconstitutional.<sup>117</sup> The FCC would lose its ability to tell broadcasters what they could air, and viewers would have to filter out offensive material themselves.<sup>118</sup> Such changes could cause a

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112. See Petition for a Writ of Certiorari, *FCC v. Fox Television Stations, Inc.*, No. 07-582, at I (U.S. Nov. 1, 2007), cert. granted 128 S. Ct. 1647 (2008) (setting out a question presented that asks "[w]hether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of 'any obscene, indecent, or profane language,' . . . when the expletives are not repeated"). The Second Circuit did not make any constitutional holdings, so the Court's review is presumably limited to examining the Second Circuit's administrative law holdings.

113. Brief for Respondent Fox Television Stations, Inc. at 42–48, *supra* note 95.

114. The Second Circuit predicted that the networks would continue to litigate "these precise issues" as long as the FCC pursued a restrictive policy on fleeting expletives. *Fox Television Stations, Inc. v. Fox*, 489 F.3d 444, 462 (2d Cir. 2007), cert. granted, 128 S. Ct. 1647 (2008).

115. Transcript of Oral Argument at 28, *supra* note 56.

116. The Court could read its rules as requiring it to remand the constitutional question because it was not set out in the questions presented. See SUP. CT. R. 14.1(a) ("Only questions set out in the petition, or fairly included therein, will be considered by the Court."). The Court could also read its prior rulings as requiring remand because the Second Circuit addressed the broadcasters' constitutional challenge in *dicta*. See *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) ("This Court, however, reviews judgments, not statements of opinion.").

117. Cf. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824–27 (2000) (holding rules limiting the times of pornographic cable broadcasts unconstitutional because they were not narrowly tailored); *Reno v. ACLU*, 521 U.S. 844, 866–74 (1997) (providing the internet with full First Amendment protections and striking down indecency regulations as unconstitutionally vague).

118. The Court has held that the FCC cannot regulate speech on cable television if less-restrictive technological alternatives such as content filters are available. *Playboy*, 529 U.S. at 815–16. Viewers can now use a number of content filters to regulate what airs in their homes. Perhaps the most important content filter is the V-Chip, which now comes installed in every television with a screen bigger than 13 inches. See *In re Technical Requirements to Enable*

national stir,<sup>119</sup> raise Congress' hackles,<sup>120</sup> and ultimately lead people to accuse the Court of coarsening the nation by opening the public airwaves to dirty words.

## VII. CONCLUSION

The Court's *FCC v. Fox Television Stations, Inc.*, decision will have "an air of futility"<sup>121</sup> if it upholds a FCC rule on administrative grounds that, upon further examination, could be unconstitutional. Even with a whiff of futility about it, the *FCC v. Fox* decision will be important. The APA's arbitrary-and-capricious test has been twisted to retard change,<sup>122</sup> and Court needs to correct that bastardization of the test. Congress gave the judiciary the power to watch over agencies because it wanted the courts to make sure that the agencies honored the limits on their power. When patrolling those boundaries, the judiciary should also honor the limits on its own power. The APA sets up a system where the courts are referees, not rule-makers. The Court's decision in *FCC v. Fox* should reinforce that fundamental principle.

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Blocking of Video Programming Based on Program Ratings, 13 F.C.C.R. 11,248, 11,256-57 (1998) (requiring all qualifying televisions made after January 1, 2000, to contain V-Chips). V-Chips and digital video recorders provide the FCC with a less-restrictive alternative to broadcast speech regulations.

119. A significant number of people still rely on the FCC to keep indecency programming off the air. *Cf. Indecency Complaints and NALs: 1993-2006*, *supra* note 14 (showing that the FCC received 327,198 complaints in the first six months of 2006). Because an entire "generation of American parents" relies on the FCC to help shield their children from indecency, overruling *Pacifica* could upset the country's "settled expectations." Reply Brief for the Petitioners at 21-22, *FCC v. Fox Television Stations, Inc.*, No. 07-582 (U.S. Sept. 3, 2008).

120. As recently as 2005, Congress supported more onerous broadcast indecency regulations. *See Broadcast Decency Enforcement Act of 2005*, Pub. L. No. 109-235, 120 Stat. 491 (codified at 47 U.S.C.A. § 503 (West Supp. Oct. 2006)) (increasing indecency fines).

121. Transcript of Oral Argument at 27, *supra* note 56 (comment by Ginsberg, J.).

122. The contents of the arbitrary-and-capricious test set out by § 706(2) of the APA are "indeterminate," and that allows outcome-oriented judges to manipulate the scope of review to achieve their preferred ends. Shapiro & Levy, *supra* note 33 at 1065-68, 1072.