

# SENDING A MESSAGE TO THE OTHER BRANCHES: WHY THE SECOND AND THIRD CIRCUITS PROPERLY USED THE APA TO RULE ON FLEETING EXPLETIVES AND HOW THE NEW FCC CAN UNDO THE DAMAGE

## INTRODUCTION

The Administrative Procedure Act is a strongly marked, long sought, and widely heralded advance in democratic government. It embarks upon a new field of legislation of broad application in the ‘administrative’ area of government lying between the traditional legislative and fundamental judicial processes on the one hand and authorized executive functions on the other.<sup>1</sup>

The Federal Communications Commission’s (FCC) decision to change its longstanding precedent regarding “fleeting expletives” on broadcast media is a prime example of a regulatory agency pushing its constitutional boundaries.<sup>2</sup> The FCC, at the direction of commissioners appointed by President Bush and with the backing of Congress, pushed for stronger indecency standards on broadcast media.<sup>3</sup> The change came as the result of a number of high-profile incidents, including U2 singer Bono’s use of the F-word during an acceptance speech at the Golden Globe Awards in 2003<sup>4</sup> and the infamous “wardrobe malfunction” during the Super Bowl half-time show in 2004.<sup>5</sup> The FCC, at the behest of Congress and the Executive, issued a number of orders explaining that it was modifying its past practice regarding fleeting expletives and would begin to sanction broadcasters for even one utterance of certain expletives.<sup>6</sup>

Independent regulatory agencies, one of which is the FCC, oversee a wide range of functions within American society and constitute a large part

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1. LEGISLATIVE HISTORY OF THE ADMINISTRATIVE PROCEDURE ACT, S. DOC. NO. 79-248, at III (1946) [hereinafter LEGISLATIVE HISTORY].

2. See Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975 (2004) [hereinafter *Golden Globes*] (changing policy regarding fleeting expletives and holding that any use of “fuck” is indecent).

3. See Stephen Labaton, *Powell to Step Down at F.C.C. After Pushing for Deregulation*, N.Y. TIMES, Jan. 22, 2005, at A1 (“But under pressure from lawmakers and some conservative organizations, [Powell] wound up leading the agency through one of its most aggressive enforcement periods and expanded the indecency rules.”).

4. See Jim Rutenberg, *Few Viewers Object as Unbleeped Bleep Words Spread on Network TV*, N.Y. TIMES, Jan. 25, 2003, at B7 (discussing Bono’s utterance of “fucking brilliant” at the Golden Globes).

5. See Kelefa Sanneh, *Pop Review: During Halftime Show, a Display Tailored for Video Review*, N.Y. TIMES, Feb. 2, 2004, at D4 (discussing Janet Jackson and Justin Timberlake’s performance).

6. See *infra* Part II.

of what has been called the “fourth branch of government.”<sup>7</sup> These agencies, though not fully part of the Executive Branch, are led by individuals chosen by the President and are overseen by Congress. Both Congress and the President are therefore able to coax these agencies in certain directions through executive appointments and legislation.

The Bush Administration enjoyed a Republican majority in both the House and Senate for much of its time in office.<sup>8</sup> This happenstance resulted in independent regulatory agencies becoming the creature of the Bush Agenda and Republican policymaking prerogatives. Conservative economic, religious, and moral objectives have been proliferated through executive mandate with legislative backing.<sup>9</sup> As a result, independent regulatory agencies have started pushing their constitutional boundaries in areas they avoided for decades. In response, courts are using section 706 of

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7. Lisa Kinney Helvin, *Administrative Preemption in Areas of Traditional State Authority*, 2 CHARLESTON L. REV. 617, 618 (2008); see also Frona M. Powell, *The Supreme Court Rejects the New Nondelegation Doctrine: Implications for the Administrative State*, 71 MISS. L.J. 729, 729 (2002) (“Today, administrative agencies thrive at every level of American government and have become so pervasive that they are often called a ‘fourth branch’ of government.”) (citation omitted). Even the original drafters recognized this:

[The APA] touches every phase and form of human activity, and it deals with that which at the opening of my statement I described as the fourth dimension or fourth branch of our democracy. In other words, by the Constitution the executive, the legislative, and the judicial branches of our Government were set up; but now we have a fourth branch, the administrative form of our Government.

LEGISLATIVE HISTORY, *supra* note 1, at 311 (statement of Sen. McCarran).

8. Carl Hulse, *Bigger Republican Majority Plans to Push Bush Agenda*, N.Y. TIMES, Jan. 2, 2005, at 16. The Conservative majority used its numbers much to its advantage:

A more Republican and more conservative Congress convenes on Tuesday, with Republicans intending to use their greater strength in the House and Senate to help President Bush pursue a second-term agenda of major changes in bedrock programs like Social Security and income taxes. . . . Senate Republicans gained four seats in the November elections, enlarging their majority to 55 to 45 and putting them closer to the 60 votes needed to break filibusters. The seven new Republican members include a core of fiscal and social conservatives moving across the Rotunda from the House who are strongly against abortion and for tax cuts. . . . In the House, Republicans—bolstered by a contentious redistricting in Texas—gained three seats for a new majority of 232 to 202, with one independent who generally votes with the Democrats. Republicans have increased their numbers for two straight elections, a trend House Democrats will try to reverse in the 2006 midterm contests.

*Id.*

9. See CHARLES TIEFER, *VEERING RIGHT: HOW THE BUSH ADMINISTRATION SUBVERTS THE LAW FOR CONSERVATIVE CAUSES* 4 (2004). “President Bush proved ready and able to do a great deal for the Republican Party’s most conservative social and economic bases. . . . These include administrative, judicial, and foreign-affairs powers, as well as legal mechanisms within Congress that sidestep its normal processes.” *Id.*

the Administrative Procedure Act (APA) to find these agency decisions “arbitrary and capricious” in an effort to constrain their powers.

The major broadcast networks immediately challenged the FCC’s decision to change its policy regarding fleeting expletives, arguing, *inter alia*, that the new ruling violated the First Amendment because it chilled constitutionally protected speech.<sup>10</sup> The Second Circuit avoided the complicated First Amendment question by holding that the agency’s abrupt change in policy was arbitrary and capricious under the APA because the FCC did not provide a reasoned explanation for the major policy change.<sup>11</sup> Judge Pooler, writing for the Second Circuit, also stated in dicta that the new policy would likely not pass constitutional muster under the First Amendment.<sup>12</sup> Following suit, the Third Circuit held similarly when deciding whether fleeting images were subject to the new ruling by the FCC.<sup>13</sup>

The Supreme Court granted certiorari to the FCC on the Second Circuit’s decision and overruled Judge Pooler.<sup>14</sup> The Court “[found] the Commission’s orders neither arbitrary nor capricious.”<sup>15</sup> As discussed more fully below,<sup>16</sup> Justice Scalia’s plurality opinion reasoned that the FCC only had to show that its action was not arbitrary and capricious, and that no more searching standard was required when an agency reverses a prior course of action.<sup>17</sup> The Third Circuit case was vacated and remanded in a memorandum opinion after certiorari was granted.<sup>18</sup>

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10. See Brief for Intervenors NBC Universal, Inc. and NBC Telemundo License Co. at 6, *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. Nov. 27, 2006) (No. 06-1760) (“The uncertainty engendered by the Commission’s line-drawing indisputably and impermissibly chills broadcasters’ speech, particularly given the steep and sweeping penalties now available under the Broadcast Decency Enforcement Act of 2005 . . .”).

11. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454–62 (2d Cir. 2007), *overruled by* *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); see also *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (discussing why a reasoned explanation is necessary).

12. See *Fox*, 489 F.3d at 464 (stating that the Supreme Court would apply strict scrutiny, its highest standard of review, to indecency regulations).

13. *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated*, *FCC v. CBS Corp.*, 129 S. Ct. 2176 (May 4, 2009) (mem.).

14. *FCC v. Fox Television Stations, Inc.*, 128 S. Ct. 1647 (Mar. 17, 2008) (mem.) (granting certiorari); *Fox*, 129 S. Ct. 1800 (overruling the lower court).

15. *Fox*, 129 S. Ct. at 1819.

16. See *infra* Part VI.B.

17. See *Fox*, 129 S. Ct. at 1810. “The [APA] mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.” *Id.*

18. *FCC v. CBS Corp.*, 129 S. Ct. 2176 (May 4, 2009) (mem.). “Petition for writ of certiorari

This Note discusses the judiciary's use of section 706 of the APA to retaliate against the policies of the Bush Administration that pushed independent regulatory agencies' policy implementation too far. Specifically, this Note contends that the Second and Third Circuit decisions represent masterful use of the APA to avoid the complicated First Amendment question, whereas lower court decisions could further muddle an already murky, and very contentious, area of constitutional law. It shows that both Congress and the Bush Administration forced the FCC into this precarious situation. In order to leave the underlying constitutional mandate of the First Amendment and the longstanding case law of *FCC v. Pacifica* intact, the courts had no choice but to find the FCC's action arbitrary and capricious.<sup>19</sup> Finally, this Note discusses how the newly minted Obama Administration can reverse the course of action taken by the Bush Administration's FCC and avoid putting courts in the conundrum that the Bush FCC sanctioned. The course of action is simple: return to the constitutionally accepted principles followed until 2003. Even more importantly, the Supreme Court's reversal of the Second Circuit's decision gives the new set of FCC commissioners plenty of room to change course once again and ensure that the FCC's indecency policy, both generally and with regard to fleeting expletives, does not violate longstanding First Amendment principles.

Part I looks at the history of the FCC's treatment of fleeting expletives through its abrupt change in the past few years. Part II looks at how Congress and the Executive spawned the change in policy by pushing the Bush Administration's conservative policy agenda on the agency. Part III discusses the use of section 706 of the APA when evaluating the actions of independent regulatory agencies, especially in light of the Supreme Court's seminal ruling in *State Farm*. Part IV discusses the holdings of the Second and Third Circuit cases. Part V discusses why the courts' use of section 706 was an ingenious way to dispose of the case while both avoiding the complicated constitutional question and sending a message to the FCC that it was pushing an already bursting envelope with this change of policy. Part VI evaluates how the new FCC commissioners under the Obama Administration can avoid putting the courts in this position by having the FCC reverse its course regarding fleeting expletives. It further evaluates how the Supreme Court's decision in *FCC v. Fox Television Stations* allows

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granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *F.C.C. v. Fox Television Stations*, 129 S. Ct. 1800 (2009).” *Id.* (internal citations omitted).

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

the new commissioners to return to a constitutionally sound indecency policy concerning fleeting expletives.

I. FLEETING EXPLETIVES AND THE FCC: FROM  
GEORGE CARLIN TO BONO AND JANET JACKSON

A. *The Plurality of the Pacifica Decision*

One must start with the Supreme Court's decision in *Pacifica* when discussing naughty words. The facts of *Pacifica* are not complicated. A New York radio station, owned by Pacifica Foundation, broadcast George Carlin's "Filthy Words" monologue at two o'clock in the afternoon.<sup>20</sup> A man who was driving with his young son complained to the FCC a few weeks later.<sup>21</sup> Pacifica responded by "explain[ing] that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included 'sensitive language which might be regarded as offensive to some.'"<sup>22</sup> Pacifica Foundation further compared Carlin to great satirists like Mark Twain and Morton Sahl.<sup>23</sup>

The FCC granted the complaint, which emphasized that broadcast speech was different from other speech because: (1) children have easy access to radios when unsupervised; (2) radios are in the home where privacy interests are heightened; (3) unconsenting listeners may miss warnings about the content of the broadcast material; and (4) the government must license stations because there is a scarcity of spectrum space.<sup>24</sup> The FCC found that it had the power to regulate indecent speech under Title 18 U.S.C. § 1464 (1976 ed.), which stated that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both."<sup>25</sup> The Commission asserted that the "Filthy Words" monologue was "patently offensive" but not obscene and that regulation was guided by the law of nuisance where the law forms behavior instead of fully barring it.<sup>26</sup>

The FCC outlined the analysis for determining what was indecent:

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20. *Id.* at 729–30.

21. *Id.* at 730.

22. *Id.* (citations omitted).

23. *Id.*

24. *Id.* at 731 n.2.

25. *Id.* at 731 n.3 (quoting 18 U.S.C. § 1464 (1976)).

26. *Id.* at 731.

“[T]he concept of ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”<sup>27</sup>

Applying this standard, the Commission found the Carlin monologue to be indecent because it was broadcast in the early afternoon, when children were likely to be in the audience, and had certain language that referred to “sexual and excretory activities in a patently offensive manner . . . .”<sup>28</sup> The FCC clarified by explaining that it intended only to limit broadcasts to certain times when children were less likely to be listening.<sup>29</sup> The FCC further acknowledged that during some live broadcasts there would not be time for “journalistic editing,” and it would therefore be unjustified in sanctioning the broadcaster.<sup>30</sup> The United States Court of Appeals for the District of Columbia reversed the Commission’s order.<sup>31</sup>

At the Supreme Court, Justice Stevens initially found that the memorandum “was issued in a specific factual context,”<sup>32</sup> and the scope of review was limited solely to the “Commission’s determination that the Carlin monologue was indecent ‘as broadcast.’”<sup>33</sup> The Court concluded that denying the renewal of the license was not censorship or prior restraint and was well within the regulating power of the FCC.<sup>34</sup> Next, the Court discussed the definition of “indecent” under section 1464. The FCC determined that the monologue was patently offensive because it was broadcast when it was likely that children were in the audience.<sup>35</sup> *Pacifica* did not contest this but argued that the broadcast was not indecent in the absence of prurient appeal.<sup>36</sup> The Court found this unpersuasive because “obscene, indecent, or profane” are written in the alternative, and thus have different meanings.<sup>37</sup> Therefore, because prurient appeal is an element of the obscene, but not within the confines of the normal definition of

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27. *Id.* at 731–32 (alteration in original) (quoting Declaratory Order, 56 F.C.C.2d 94, at 98 (1975)).

28. *Id.* at 732 (citing 56 F.C.C.2d, at 99).

29. *Id.* at 733 (quoting Clarification Order, 59 F.C.C.2d 892 (1976)).

30. *Id.* at 733 n.7 (citing 59 F.C.C.2d, at 893 n.1).

31. *Id.* at 733.

32. *Id.* at 733.

33. *Id.* at 734.

34. *Id.* at 736.

35. *Id.* at 739.

36. *Id.*

37. *Id.* at 739–40.

indecent, the Commission properly decided that the language of the Carlin monologue was indecent, but not obscene.<sup>38</sup>

The three judge plurality found that the facial challenge failed because the scope of the issue was limited to whether the Commission had the authority to bar the instant Carlin monologue.<sup>39</sup> Justice Stevens relied on *Red Lion Broadcasting Company v. FCC*,<sup>40</sup> where the Court “rejected an argument that the Commission’s regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters’ freedom of speech[]” and decided that issues like this would be dealt with as they arose.<sup>41</sup> The Court went on to say that the memorandum may lead some broadcasters to censor their material but found that the Commission’s definition of indecency would only deter language “at the periphery of First Amendment concern.”<sup>42</sup>

The plurality then rejected *Pacifica*’s second argument that the First Amendment denies the Commission the power to restrict an indecent broadcast unless it is obscene under *Miller v. California*.<sup>43</sup> However, the plurality held that there is no such “absolute” rule required by the First Amendment and pointed to the “proposition that both the *content and the context* of speech are critical elements of First Amendment analysis . . . .”<sup>44</sup> Justice Stevens pointed to the fighting words doctrine, exemplified by *Chaplinsky v. New Hampshire*,<sup>45</sup> which takes into account the content *and the context* in which words are uttered.<sup>46</sup> Applying the facts, the plurality noted that “[a]lthough these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment,”<sup>47</sup> but that “[w]ords that are commonplace in one setting are shocking in another.”<sup>48</sup> Justice Stevens further expounded the importance of context by citing *Cohen v. California*, where a man entered a courthouse wearing a jacket with the words “Fuck the Draft” on the back, but created no uproar or disruption—the speech had definitive political overtones.<sup>49</sup> In

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38. *Id.* at 740.

39. *Id.* at 742.

40. *Id.*; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

41. *Pacifica*, 438 U.S. at 742–43; *Red Lion*, 395 U.S. at 396.

42. *Pacifica*, 438 U.S. at 743.

43. *Id.* at 744 n.19; *Miller v. California*, 413 U.S. 15 (1973).

44. *Pacifica*, 438 U.S. at 744 (emphasis added) (citing *Schenck v. United States*, 249 U.S. 47, 52 (1919)).

45. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

46. *Pacifica*, 438 U.S. at 745.

47. *Id.* at 746.

48. *Id.* at 747.

49. *Cohen v. California*, 403 U.S. 15, 16 (1971).

contrast, the broadcast of Carlin's monologue produced a direct complaint to the FCC<sup>50</sup> and was not political in nature.<sup>51</sup>

The Court then discussed why broadcast media receives less First Amendment protection (only intermediate scrutiny) than other forms of expression.<sup>52</sup> First, broadcast media is "uniquely pervasive" in the home "where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."<sup>53</sup> Along with this, Justice Stevens espoused what would become known as "the first blow" theory<sup>54</sup> by stating that prior warnings cannot protect an individual from exposure to unwanted content and "[t]o 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."<sup>55</sup> Second, "broadcasting is uniquely accessible to children, even those too young to read."<sup>56</sup> Further, the Court cited *Ginsberg v. New York* for the proposition that "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justified the regulation of otherwise protected expression."<sup>57</sup> Thus, indecent broadcasting receives less First Amendment protection than other forms of communication.

The Court concluded by emphasizing the narrowness of its holding and pointed out that the Commission's decision "rested entirely on a nuisance rationale under which context is all-important . . . ."<sup>58</sup> Further, the Court focused on the time of the broadcast (which would lead to "Safe-Harbor" legislation<sup>59</sup>) and closed by stating that it "simply hold[s] that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."<sup>60</sup>

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50. *Pacifica*, 438 U.S. at 730.

51. *Id.* at 746.

52. *Id.* at 748.

53. *Id.* (citing *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970)).

54. See, e.g., Genelle I. Belmas et al., *In the Dark: A Consumer Perspective on F.C.C. Broadcast Indecency Denials*, 60 FED. COMM. L.J. 67, 91-92 (2007) (discussing Judge Pooler's rejection in the Second Circuit of the extension of the "first blow" theory).

55. *Pacifica*, 438 U.S. at 748-49.

56. *Id.* at 749.

57. *Id.* (quoting *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968)).

58. *Id.* at 750.

59. 47 U.S.C. § 561 (2006). See, e.g., *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 806 (2000) ("Section 505 requires cable television operators who provide channels 'primarily dedicated to sexually-oriented programming' either to 'fully scramble or otherwise fully block' those channels or to limit their transmission to hours when children are unlikely to be viewing, . . . the time between 10 p.m. and 6 a.m.") (citation omitted).

60. *Pacifica*, 438 U.S. at 750-51 (referring to Justice Sutherland's famous line that "[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard" from *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).



*B. Pacifica: Concurrence and Dissent*

Justice Powell's concurrence emphasized that children lack the "full capacity for individual choice" and "[t]hus children may not be able to protect themselves from speech which . . . generally may be avoided by the unwilling through exercise of choice."<sup>61</sup> Moreover, Justice Powell relied heavily on the fundamental rights principle that parents have the right to raise their children as they see fit.<sup>62</sup> Most important to the discussion here, Justice Powell reminded the reader that the Commission's "judgment is entitled to respect," but went on to say "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the *isolated use of a potentially offensive word* in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here."<sup>63</sup> Justice Powell then stated that he did not join Justice Stevens's opinion that discusses the content and context based distinctions surrounding the language of the Carlin monologue,<sup>64</sup> but rather he found the "result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes."<sup>65</sup> More importantly, Justice Powell candidly reminded the Commission of its responsibility: "In addition, since the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights."<sup>66</sup>

Justice Brennan's scathing dissent took issue with the majority's view of the unique pervasiveness into the home and unique accessibility to children. As to the first, Justice Brennan took an anti-majoritarian standpoint and hinted that the "choice" was to bring the medium into the home in the first place.<sup>67</sup> He based his discussion of the second issue on the belief that "indecent" and "obscene" are not the same, and thus, when offensive material lacks prurient appeal, it retains full First Amendment protection.<sup>68</sup> Further, Justice Brennan alluded to a line of reasoning that suggests Carlin's monologue may have some "literary, artistic, political, or

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61. *Pacifica*, 438 U.S. at 757–58 (Powell, J., concurring).

62. *Id.* at 758 (citing *Ginsberg*, 390 U.S. at 639 (quotation omitted)).

63. *Id.* at 760–61 (emphasis added).

64. These are Parts IV-A and IV-B of Justice Stevens's opinion. *Id.* at 742–48.

65. *Id.* at 762.

66. *Id.* at 761–62 n.4 (citation omitted).

67. *See id.* at 765 (Brennan, J., dissenting) (discussing "an individual's decision to allow public radio communications into his home").

68. *Id.* at 767–68.

scientific value” and would therefore not be within the confines of obscenity under *Miller*.<sup>69</sup> As a final slashing of the majority opinion, Justice Brennan stated that “[t]he words that the Court and the Commission find so unpalatable may be the stuff of everyday conversations in some, if not many, of the innumerable subcultures that compose this Nation. Academic research indicates that this is indeed the case.”<sup>70</sup>

### C. *Pacifica’s Progeny and Deterioration*

The FCC took the *Pacifica* decision to heart:

With regard to “indecent” or “profane” utterances, the First Amendment and the “no censorship” provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464. . . . We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission’s opinion, as approved by the Court, relied in part on the repetitive occurrence of the “indecent” words in question. The opinion of the Court specifically stated that it was not ruling that “an occasional expletive . . . would justify any sanction . . . .”<sup>71</sup>

The Commission would reaffirm its commitment to this restrained policy five years later when it rejected a challenge to a broadcaster’s license.<sup>72</sup> There, the American Legal Foundation (ALF) challenged a station’s license renewal application because it broadcast the words “motherfucker,” “fuck,” and “shit” during morning shows on a few occasions.<sup>73</sup> The FCC found that the broadcast did not violate section 1464 because “ALF [did] not show[] that such use was more than ‘isolated use in the course of’ a three year license term” and the material had not reached the level of “verbal shock treatment” like that of the Carlin monologue.<sup>74</sup>

In 1987, the FCC found that three broadcasts violated the indecency provision of section 1464.<sup>75</sup> In an order affirming all three rulings, the FCC modified its policy from the narrow view that only those broadcasts that

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69. *Id.* at 767–68 n.2 (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

70. *Id.* at 776 (citations omitted).

71. Application of WGBH Educ. Found., 69 F.C.C.2d 1250, para. 10 (1978) (first alteration by author; internal footnotes and citations omitted).

72. *In re* Application of *Pacifica Found.*, 95 F.C.C.2d 750, para. 16 (1983).

73. *Id.*

74. *Id.* at para. 18.

75. *Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987); *The Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *Infinity Broad. Corp.*, 2 F.C.C.R. 2705 (1987).

reached the level of Carlin's monologue would be found indecent.<sup>76</sup> The Commission thus adopted a generic definition of indecent speech: "[I]ndecent speech is language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. [This] is actionable when broadcast at times of the day when there is a reasonable risk that children may be in the audience."<sup>77</sup> The FCC then reaffirmed the view that "[s]peech that is indecent must involve more than an isolated use of an offensive word."<sup>78</sup>

The various broadcasters appealed this order to the D.C. Circuit, arguing that the FCC's definition of indecency was unconstitutionally vague.<sup>79</sup> The D.C. Circuit rejected this argument because the definition was "virtually the same definition the Commission articulated in the order reviewed by the Supreme Court in the *Pacifica* case."<sup>80</sup> The court found that *Pacifica* thus implicitly rejected the vagueness challenge.<sup>81</sup> The court then noted that the FCC "has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."<sup>82</sup>

The FCC continued its restrained policy with regard to indecency and, in a 2001 guidance report to the broadcast industry (Industry Guidance), noted that regulation of indecent speech by the government was subject to strict scrutiny.<sup>83</sup> The Commission then explained that speech is indecent based on two determinations: "First, the material alleged to be indecent . . . must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary

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76. Infinity Broad. Corp., et al., 3 F.C.C.R. 930, para. 5 (1987) [hereinafter *Infinity Order*].

77. The Regents of the Univ. of Cal., 2 F.C.C.R. 2703, para. 3 (1987) (internal citations and quotations omitted).

78. *Id.* (internal footnote omitted by court); see also *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, para. 13 ("If a complaint focuses solely on the use of expletives, we 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.").

79. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1334 (D.C. Cir. 1988), *superseded in part by* *Action for Children's Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (en banc).

80. *Id.* at 1338.

81. *Id.* at 1339.

82. *Id.* at 1340 n.14 (citation omitted).

83. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, para. 3 (2001) [hereinafter *Industry Guidance*] ("[T]he government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest.").

community standards for the broadcast medium.”<sup>84</sup> When determining whether material is “patently offensive,” the FCC looks at:

(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 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>85</sup>

Also of note, the Commission distinguished between material that dwelled on offensive content that was indecent and material that was “fleeting and isolated,” deemed to be not indecent.<sup>86</sup>

However, the FCC’s restrained policy would soon come to end, sparked initially by U2 front man Bono during the 2003 Golden Globe Awards when he said “this is really, really fucking brilliant” in his acceptance speech.<sup>87</sup> Members of the Parent’s Television Council (PTC) filed complaints with the FCC, claiming that the material was indecent.<sup>88</sup> In the Golden Globes Order, the Commission stated that *any* use of the word “fuck” has an inherently sexual meaning<sup>89</sup> and therefore falls under the umbrella of indecency.<sup>90</sup> The FCC then “overruled all prior decisions in which fleeting use of an expletive was held not indecent.”<sup>91</sup>

The FCC issued another order, the Omnibus Order, regarding various broadcasts by Fox, ABC, and CBS, finding that certain programs—all involving isolated utterances of “fuck,” “shit,” “dick,” or variances thereof—were indecent under the new policy set forth in the Golden Globes Order.<sup>92</sup> Under the second part of the indecency test, the FCC found that the

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84. *Id.* at paras. 7–8 (internal citation omitted).

85. *Id.* at para. 10 (emphasis removed).

86. *Id.* at paras. 17–18.

87. *Golden Globes*, 19 F.C.C.R. 4975, para. 3 n.4.

88. See Matthew C. Holohan, Note, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341, 360–62 (2005) (discussing how the Parent’s Television Council unduly influences the FCC); Matthew S. Schneider, Note, *Silenced: The Search for a Legally Accountable Censor and Why Sanitization of the Broadcast Airwaves is Monopolization*, 29 CARDOZO L. REV. 891, 904 (2007) (“Much evidence exists to suggest anti-indecency groups have privately ‘captured’ the FCC’s regulatory authority to advance solely their own agenda.”) (citation omitted).

89. The Commission also held that the word “fuck” was profane, but that discussion is irrelevant to this paper. *Golden Globes*, 19 F.C.C.R. 4975, para. 13.

90. *Id.* at paras. 8–9.

91. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 451–52 (2d Cir. 2007), *overruled by FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); *Golden Globes*, 19 F.C.C.R. 4975, at para. 12.

92. Complaints Regarding Various Television Broadcasts Between February 2, 2002 and

programs were patently offensive because the material was “explicit and shocking and gratuitous.”<sup>93</sup> The FCC did not issue penalties because the material aired before the decision in the Golden Globes Order and thus the broadcasters were not on notice as to the change in policy.<sup>94</sup> Finally, the Commission issued a further order, the Remand Order, which upheld the main points of the Omnibus Order but reversed one decision regarding the use of “bullshitter” during the Early Show, stating that the use of the expletive during a “*bona fide* news interview” was not indecent.<sup>95</sup>

## II. BETWEEN A ROCK AND A HARD PLACE: THE EXECUTIVE AND CONGRESS PUSH FOR A HIGHER STANDARD OF DECENCY

Bono’s utterance of “fuck” at the Golden Globes in 2003 merely raised some eyebrows compared to the barrage of attention created by the appearance of Janet Jackson’s nipple at the Super Bowl. Scope was probably the main difference: approximately 140 million people watched the Super Bowl XXXVIII Halftime Show,<sup>96</sup> while only about 20.1 million heard Bono in 2003,<sup>97</sup> and west coast viewers watched an edited, taped version.<sup>98</sup> Interestingly, Representative Fred Upton of Michigan had already introduced “The Broadcast Decency Enforcement Act of 2004” on January 21, 2004,<sup>99</sup> but support grew exponentially in the weeks following the

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March 8, 2005, 21 F.C.C.R. 2664 (2006) [hereinafter *Omnibus Order*].

93. *Id.* at paras. 106, 120, 131; *see also id.* at para. 141 (“[T]he use of the ‘S-Word,’ particularly during a morning news interview, is *shocking and gratuitous*.”) (emphasis added).

94. *Id.* at paras. 111, 124, 136, 145.

95. Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 paras. 11, 67, 68, 72, 73 (Nov. 6, 2006) [hereinafter *Remand Order*].

96. *See* Jay Handelman, *Super Bowl Show a Flash in the Pan*, SARASOTA HERALD TRIB., Feb. 3, 2004, at E1. “Can you really believe she didn’t mean for people to see it? And if she wanted to shock, what bigger audience to reach than the estimated 140 million who tuned in to the Super Bowl.” *Id.* *See also* David Barron, *Houston’s Super Bowl Draws Record Viewership; More than 140 Million See at Least Some of CBS’ Coverage*, HOUS. CHRON., Feb. 3, 2004, at 5 (“More than 140 million people watched all or part of CBS’ coverage of Super Bowl XXXVIII from Reliant Stadium, making it the most-viewed program in television history.”).

97. *See* Michele Greppi, *Indecency on D.C.’s Radar; Fines, Laws, Hearings on Election-Year Agenda*, TELEVISION WEEK, Feb. 2, 2004, at 1 (“Brent Bozell, the president of the Parents Television Council that mobilized 217 of the 234 complaints received by the FCC after some 20.1 million people saw the Bono-Golden Globes incident . . .”).

98. *See* Rutenberg, *supra* note 4, at B7.

The president of NBC Entertainment, Jeff Zucker, said that the network “in no way condoned” the cursing of Bono and Mr. Farrell during the Golden Globes and that the language had been bleeped out for the taped West Coast showing of the program. Audiences may have been forgiving, he said, because it was a live program.

*Id.*

99. H.R. 3717, 108th Cong. (2nd Sess. 2004).

“wardrobe malfunction.”<sup>100</sup> However, Upton’s bill died in the Senate, though it would reappear the following year in the House of Representatives as H.R. 310, again proposed by Representative Upton.<sup>101</sup>

On February 16, 2005, H.R. 310 passed the House by a margin of 389 to 38, again with wide bipartisan support.<sup>102</sup> During the floor debate preceding the passage, a number of representatives voiced their opinion that the FCC’s then-current fines were inadequate.<sup>103</sup> Further, Mr. Upton introduced a “Statement of Administrative Policy” into the Congressional Record:

The Administration strongly supports House passage of H.R. 310. This will make broadcast television and radio more suitable for family viewing by giving the Federal Communications Commission (FCC) the authority to impose stiffer penalties on broadcasters that air obscene or indecent material over the public airwaves. In particular, the Administration applauds the inclusion in the bill of its proposal to require that the FCC consider whether inappropriate material has been aired during children's television programming in determining the fine to be imposed for violations of the law.<sup>104</sup>

This directly shows how the Republican Congress and the Bush Administration pushed the FCC to implement their policies, likely without much regard for the FCC’s continuing constitutional responsibilities.

Nearly concurrently, the Senate considered S. 193, which Senator Brownback of Kansas introduced on January 26, 2005.<sup>105</sup> This version of

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100. See 150 CONG. REC. H533–34 (2004) (statement of Rep. Osborne). “Also, the gentleman from Michigan (Mr. Upton) has introduced H.R. 3717, the Broadcast Decency Enforcement Act . . . I urge my colleagues, Mr. Speaker, to hold the broadcast media to a higher standard and to require the FCC to enforce commonly held standards of decency.” *Id.*; see also 150 CONG. REC. H1015–35 (2004) (noting more than 30 Representatives speaking on behalf of H.R. 3717 before it was passed by a margin of 391 to 22). Further, Representative Pitts stated:

Today the Committee on Energy and Commerce will mark up a bill [H.R. 3717] which allows the FCC to enforce tougher penalties on broadcasters for violations of the law. . . . Broadcast airwaves belong to the American people, not to the networks. It is time for Congress to defend and protect America’s parents and children and pass a tough bill to ensure decency on the airwaves.

150 CONG. REC. H756 (2004) (statement of Rep. Pitts).

101. H.R. 310, 109th Cong. (1st Sess. 2005). This and the original H.R. 3717 both provided for a maximum of \$500,000 for each violation. *Id.*

102. 151 CONG. REC. H664 (2005).

103. See 151 CONG. REC. H635–43, H652–61 (2005) (including upwards of ten Congressmen voicing their disdain for the current fines).

104. 151 CONG. REC. H656 (2005) (statement of Rep. Upton).

105. S. 193, 109th Cong. (1st Sess. 2005) (enacted).

the Broadcast Decency Enforcement Act called for a \$325,000 fine for each violation and a maximum \$3,000,000 fine per action or inaction, a slightly lower modification from the bill introduced in the House.<sup>106</sup> The Senate did not pass S. 193 until over a year later, but did so unanimously.<sup>107</sup> S. 193 passed in the House, with the urging of Mr. Upton and his supporters,<sup>108</sup> by a vote of 379 to 35.<sup>109</sup> Finally, the bill became the Broadcast Decency Enforcement Act of 2005 on June 15, 2006, when President George W. Bush signed it into law.<sup>110</sup> Of course, since the Administration had pushed hard for this bill, President Bush stated at the signing that as “the head of the executive branch, I take responsibility, as well, for putting people in place at the FCC who understand, one of their jobs, and an important job, is to protect American families.”<sup>111</sup>

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106. *Id.* § 2.

107. 152 CONG. REC. S4816 (2006).

108. 152 CONG. REC. H3388 (2006) (statement of Rep. Upton). Mr. Upton emphatically pushed the legislation in any form:

This legislation is virtually identical to H.R. 3717, as introduced by my good friend, Mr. Markey, Chairman Barton, Mr. Dingell, and myself in the last Congress on January 21, 2004, which I would note was about a week and a half before the infamous Janet Jackson/Justin Timberlake Superbowl half-time show. That legislation was the predecessor of H.R. 310, which the House passed in this Congress on February 16, 2005 by a vote of 389–38. While S. 193 omits a number of important provisions contained in H.R. 310, I believe that passage of this legislation will help us achieve our ultimate goal, which is to help ensure American families that broadcast television and radio programming will be free of indecency, obscenity, and profanity at times when their children are likely to be tuning in, whether that be in the living room watching TV or in the car listening to the radio.

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I believe that broadcasters do have a special place in our society, given that they are stewards of the public airwaves. And with that stewardship comes the responsibility, including adherence to our Nation’s indecency laws. Most broadcasters are responsible, and many recently have taken steps to redouble their commitment to keeping indecency off the public airwaves. But for those broadcasters who are less than responsible, the FCC needs to have the teeth to enforce the law, and this bill, S. 193, will give the FCC that [sic] teeth.

*Id.* at H3388–89 (citation omitted).

109. *Id.* at H3466.

110. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491 (2006).

111. Remarks on Signing the Broadcast Decency Enforcement Act of 2005, 42 WEEKLY COMP. PRES. DOC. 1145 (June 15, 2006). President Bush further stated:

Since 2000, the number of indecency complaints received by the FCC has increased from just hundreds per year to hundreds of thousands. In other words, people are saying, “We’re tired of it, and we expect the Government to do something about it.” And so we believe we have a vital role to play. We must ensure that decency standards for broadcasters are effectively enforced. That’s the duty of the FCC. That’s why we’ve got the Chairman standing right here, which

It is evident from the bill's long legislative history that both the Bush Administration and Congress successfully pushed for the increased penalties the FCC could impose. The Commission took the cue and changed its policy regarding fleeting expletives in 2004.<sup>112</sup> However, there is evidence that the FCC knew that its new position conflicted with the constitutional mandate of the First Amendment. For instance, Michael Powell, son of former Secretary of State Colin Powell, stepped down as chairman of the FCC in 2005 after attempting to deregulate the broadcast industry.<sup>113</sup> Powell felt pressure from both Congress and the Administration to expand indecency rules, which likely led to his resignation.<sup>114</sup> President Bush appointed Kevin J. Martin, the man who had "foiled Mr. Powell's attempts to deregulate broadcasters," to replace Powell as chairman.<sup>115</sup> Prior to appointment, Martin sat on the Commission and criticized Powell for not being tough enough on indecency.<sup>116</sup> By appointing Martin, the Bush

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he understands. . . . It's the duty of the FCC to impose penalties on broadcasters and stations that air obscene or indecent programming. It's one of their responsibilities. People expect us to adhere to our responsibilities. He's a part of the executive branch. And since I'm the head of the executive branch, I take responsibility, as well, for putting people in place at the FCC who understand, one of their jobs, and an important job, is to protect American families. The problem we have is that the maximum penalty that the FCC can impose under current law is just \$32,500 per violation. And for some broadcasters, this amount is meaningless. It's relatively painless for them when they violate decency standards. And so the Congress decided to join the administration and do something about it.

*Id.*

112. *Golden Globes*, 19 F.C.C.R. 4975 paras. 8–9, 12.

113. See Stephen Labaton, *Powell to Step Down at F.C.C. After Pushing for Deregulation*, N.Y. TIMES, Jan. 22, 2005, at A1. "He also sharply shifted emphasis on broadcasting regulations . . . [E]arly in his tenure as chairman, he was praised[,] . . . saying it was time to eliminate the double standard that allowed the government to subject broadcasters . . . to indecency and other speech regulations." *Id.*

114. *Id.*; see also Stephen Labaton, *A Deal Maker Named by Bush to Lead F.C.C.*, N.Y. TIMES, Mar. 17, 2005, at C1 (connecting Powell's resignation to pressure from Congress). Powell's change of course was likely not of his own choosing:

But under pressure from lawmakers and some conservative organizations, he wound up leading the agency through one of its most aggressive enforcement periods and expanded the indecency rules. His shift became apparent about a year ago, after the House and Senate adopted resolutions critical of an F.C.C. staff conclusion that Bono, the lead singer of U2, did not violate indecency rules by uttering an expletive after winning a Golden Globe Award on NBC; the commission later overruled its staff.

Labaton, *supra* note 113, at A1.

115. *Id.*

116. See Stephen Labaton, *2 Front-Runners Seen for Nomination to Lead F.C.C.*, N.Y. TIMES, Mar. 10, 2005, at C4 ("[Martin] has also been critical of the commission for not being more aggressive in enforcing indecency rules against broadcasters."). Additionally, it was noted that:

[W]ith Mr. Powell now widely expected to step down, they are hardly gloating about the prospect of his departure; the short list of candidates to succeed him



Administration sent a clear message to broadcasters that it would take a hard line on indecency. Powell's resignation may have signaled that he was not prepared to fully support the Bush Agenda when fundamental rights are involved, especially since he may have seen a conflict between the Commission's new policy and the Supreme Court's holding in *Pacifica*.

### III. THE ADMINISTRATIVE PROCEDURE ACT AND "ARBITRARY AND CAPRICIOUS"

#### A. Section 706 and the Legislative History of the APA

The APA<sup>117</sup> was passed in 1946 to "establish[] the fundamental relationship between regulatory agencies and those whom they regulate . . . ."<sup>118</sup> The legislation came in part because of the complex regulations issued during the New Deal.<sup>119</sup> In general, the APA is the middle ground between judicial review of agency decisions and agency autonomy.<sup>120</sup> The APA is designed "to promote rationality and to enhance public acceptance of agency decisionmaking."<sup>121</sup> For the purpose of this Note, the discussion of the Act is limited to section 706(2)(A), which states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law,

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includes another Republican member of the five-person commission, Kevin J. Martin, who - echoing those who say television is too tawdry - has repeatedly argued that the commission and Mr. Powell are not tough enough.

Stephen Labaton, *Indecency on the Air, Evolution atop the F.C.C.*, N.Y. TIMES, Dec. 23, 2004, at E1.

117. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (2008)). For a complete discussion of the legislative history of the APA see George B. Sheperd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U.L. REV. 1557 (1996).

118. Sheperd, *supra* note 117, at 1558.

119. See Christina Larsen, *Is the Glass Half Empty or Half Full? Challenging Incomplete Agency Action Under Section 706(1) of the Administrative Procedure Act*, 25 PUB. LAND & RESOURCES L. REV. 114, 118 (2004) ("Congress enacted the APA in 1946 in response to the myriad regulations of the New Deal.").

120. See Catherine Zaller, Note, *The Case for Strict Statutory Construction of Mandatory Deadlines Under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1547 n.12 (2001) (explaining how the APA resulted from New Deal politics). Zaller explains:

The APA was enacted as a compromise over the new regulations installed as part of the New Deal. Many politicians disagreed with the politics of the New Deal and wanted to ensure judicial review of agency decisions while others wanted agency autonomy. The APA acted as a compromise in which agencies were regulated while still maintaining considerable discretion in their decision-making capacity.

*Id.* (citation omitted).

121. Powell, *supra* note 7, at 763.

interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .<sup>122</sup>

The actual legislative history discussing section 706 is sparse, largely because it essentially codified existing common law.<sup>123</sup> However, there is some legislative history that speaks briefly on the subject<sup>124</sup> and the Attorney General's Manual on the APA from 1947,<sup>125</sup> which are both informative. Section 706(2)(A) was originally found at section 10(e)(B)(1) of the APA and will simply be referred to as section 10.<sup>126</sup> The Senate Judiciary Committee noted that the several categories in section 10, including the "arbitrary and capricious" language, were "constantly repeated by courts in the course of judicial decisions or opinions . . . ."<sup>127</sup> Thus, the Committee essentially reiterated that the language was formed from the common law, leaving it to the courts to determine the true "scope" of reviewability.<sup>128</sup> One commentator stated that "[i]n the final analysis, the scope of judicial review under the APA gives judges substantial discretion to determine whether the agency rule meets the decidedly vague requirements of the 'arbitrary and capricious' test."<sup>129</sup> As seen in the following section, the Supreme Court has interpreted the provision to require a "reasoned analysis" for a change made by informal rulemaking, i.e. not notice-and-comment rulemaking.<sup>130</sup>

The Attorney General's Manual provides definition as to what section 10 envisioned: "Section 10, it must be emphasized, deals largely with principles. It not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to

122. 5 U.S.C. § 706(2)(A) (2006).

123. See Larsen, *supra* note 119, at 118 ("In the end, the APA was cast as a mere 'restatement' of existing common law—a creature with something less than the force of a true statute.") (citation omitted). "[T]he APA's section on judicial review is a 'restatement of [the] existing judicial practice' of mandamus in the area of agency inaction and delay. Courts are not allowed to substitute their own discretion for agency discretion when forcing the agency to act on congressional mandates." Zaller, *supra* note 120, at 1550 (brackets in original) (footnotes omitted).

124. LEGISLATIVE HISTORY, *supra* note 1, at 8.

125. U.S. DEPARTMENT OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) (reprinted 1979) [hereinafter ATTORNEY GENERAL'S MANUAL].

126. LEGISLATIVE HISTORY, *supra* note 1, at 8.

127. *Id.* at 39.

128. *Id.*

129. Powell, *supra* note 7, at 765.

130. See *infra* Part III.B.

be governed by other statutes and by judicial rules.”<sup>131</sup> Again, the Manual essentially restates the notion that section 10 is intentionally vague so courts can determine the contours of the scope of review. Further, “[c]ourts having jurisdiction have always exercised the power in appropriate cases to set aside agency action which they found to be ‘(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .’”<sup>132</sup> The Manual then interprets some of the other enumerated clauses of section 10 but does not mention the arbitrary and capricious standard,<sup>133</sup> thus leaving it for the courts to determine.<sup>134</sup> The leading case is *State Farm*.<sup>135</sup>

### B. *State Farm: Reasoned Analysis Required*

Both the Second and Third Circuit Courts relied on *State Farm* in reaching their decisions.<sup>136</sup> This reliance on *State Farm* is not surprising because, “[s]ince *State Farm*, the Court has issued no major pronouncements about judicial review of allegedly arbitrary agency action, and the doctrine has remained essentially stable for over two decades.”<sup>137</sup> As the facts are particularly relevant and the holding is so important to the following discussion, a recitation of the case is necessary.

*State Farm* involved a rescission by the National Highway Traffic Safety Administration (NHTSA) of Motor Vehicle Safety Standard 208, which mandated that cars be equipped with “passive restraints” (seat belts) to protect passengers.<sup>138</sup> Much like the current debate over the FCC indecency standard, there was a political component to the issue as the Carter Administration had promulgated the original rule, and it was quickly

131. ATTORNEY GENERAL’S MANUAL, *supra* note 125, at 93.

132. *Id.* at 108.

133. *Id.* at 108–10 (describing other clauses, but failing to mention Section 10(e)(B)(1) again).

134. *See* Powell, *supra* note 7, at 765 (“The terms embody the tradition of flexible, common law methods of review, and review under this standard leaves an ‘open field for the judiciary to assume a substantial presence in defining the contours of administrative power.’”) (citation omitted).

135. *Motor Vehicles Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983).

136. *See* *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 455 (2d Cir. 2007), *overruled by* *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); *CBS Corp. v. FCC*, 535 F.3d 167, 174 (3d Cir. 2008) (both relying on *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)). It should be noted that in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 502 (2002), the Supreme Court distinguished between an agency’s original interpretation of a statute, which is evaluated under the two prong test laid out in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984), and an agency interpretation of a statute that has been modified, to which *State Farm* would be applicable.

137. Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 764 (2008) (footnote omitted).

138. *State Farm*, 463 U.S. at 34.

revoked by the Reagan Administration.<sup>139</sup> The Reagan NHTSA concluded that regulation would not promote seat belt use and therefore any potential benefits were too speculative, a finding directly contradicting the Carter NHTSA finding.<sup>140</sup> State Farm Mutual Automobile Insurance Company challenged the rescission, and the United States Court of Appeals for the District of Columbia Circuit found it to be arbitrary and capricious.<sup>141</sup>

The Supreme Court upheld the circuit court decision and articulated what would become the mainstay for evaluating claims under section 706(2)(A). 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>142</sup> Further, an “agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>143</sup> The Court then articulated “both procedural and substantive components of the hard look doctrine,”<sup>144</sup> essentially stating that courts should examine agency actions more closely than those of Congress (i.e., a legislative body)<sup>145</sup>:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>146</sup>

In addition, the Court articulated the longstanding mandate that the reviewing court should not attempt to supply a reasoned analysis for the agency.<sup>147</sup>

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139. *Id.* at 37–39.

140. *Id.* at 38–39.

141. *Id.* at 39 (citing *State Farm Mut. Auto. Ins. Co. v Dep’t of Transp.*, 680 F.2d 206 (1980)).

142. *Id.* at 42 (emphasis added).

143. *Id.* at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

144. *Miles & Sunstein*, *supra* note 137, at 763. The authors explain that under the hard look doctrine, “courts should require detailed justifications for agency action and also examine the reasonableness of the agency’s conclusions.” *Id.* at 772.

145. *See State Farm*, 463 U.S. at 43 n.9 (“We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”) (emphasis added).

146. *Id.* at 43.

147. *Id.* at 43–44 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)); *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” *Id.*

*State Farm* requires agencies that change policy to give a reasoned analysis for such change. The case is particularly interesting because of the political tensions that led to the Court's review—namely the Reagan Administration's attempt to undo the Carter Administration's regulations, which burdened manufacturers by requiring them to install seat belts.<sup>148</sup> Similarly, the FCC has become a creature created by the Bush Administration's policies, and the courts are left to sort out the decisions of the other branches. *State Farm* is not a bar to changing policies, but an agency must provide a reasoned analysis for a change and cannot simply impose the will of an administration without some basis for doing so.<sup>149</sup> Both the Second and Third Circuit decisions reflect this understanding.

#### IV. RESTRICTING AGENCY AUTHORITY: THE SECOND AND THIRD CIRCUITS FIGHT BACK

##### A. *The Second Circuit: Bono and His Progeny*

Bono's utterance of the F-word at the 2003 Golden Globes eventually came before the Second Circuit as *Fox v. FCC*.<sup>150</sup> Judge Pooler decided the case on administrative law grounds, holding that the FCC's change in policy with regard to "fleeting expletives" was arbitrary and capricious under the APA, and discussed the constitutional challenges in dicta. Under the authority of 5 U.S.C. § 706(2)(A), a reviewing court may set aside an

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148. See Miles & Sunstein, *supra* note 137, at 770 ("In brief, the agency concluded that, contrary to the analysis conducted under the Carter Administration, the regulation would not produce a significant increase in seat belt usage, and hence the benefits were too speculative to justify the imposition of the passive restraints rule on manufacturers.").

149. See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry Into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 538–39 (2005) (discussing the role of courts within the political spheres). Mashaw states,

As they move into this politically-charged environment, reviewing courts have, with notable exceptions of course, attempted to maintain the rule of law as judicially conceived while making space for the necessary role of politics in administration. The famous *State Farm* case makes clear . . . that new administrations can direct new policies, provided that they act within the terms of the relevant legislation. Additionally, as *State Farm* illustrates, it may be much easier to mediate the conflict between politics and law if "law" is proceduralized in terms that invite reconsideration, particularly where the court believes that the administration's position is unsupportable as explained.

*Id.* (footnote omitted).

150. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 451 (2d Cir. 2007), *overruled by FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009). Although the FCC found that Bono's utterance of a fleeting expletive did not "fall within the scope of . . . the indecency prohibition," the Second Circuit noted that Bono's performance influenced the FCC's subsequent policy change. See *id.*

agency decision if it finds it to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”<sup>151</sup> Further:

“The 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. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>152</sup>

The court held that the FCC did not provide a reasoned analysis for its departure from precedent in the Golden Globes Order, and found that the “first blow” theory articulated in *Pacifica* was an insufficient ground for changing its indecency policy.<sup>153</sup>

The majority rejected the FCC’s “reasoned explanation” because it was “disconnected from the actual policy implemented by the Commission,” not because it was inconsistent with the prior standard as the dissent suggested.<sup>154</sup> The Commission rested heavily on the fact that viewers, especially children, should not have to receive the “first blow” of an expletive.<sup>155</sup> However, the Commission failed to explain why, for instance, a *bona fide* news interview that used the same language as another broadcast in a different context would not be indecent.<sup>156</sup> Therefore, the court found that “the record simply does not support the position that the Commission’s new policy was based on its concern with the public’s mere exposure to this language on the airwaves.”<sup>157</sup> The court stressed that the FCC’s proffered rationale was disconnected from reality.<sup>158</sup>

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151. *Id.* at 454 (citation and internal quotes omitted).

152. *Id.* at 455 (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

153. *Id.* at 456–58.

154. *Id.* at 459 n.8 (citation omitted).

155. *Id.* at 457–58.

156. *Id.* at 458.

157. *Id.* at 459.

158. *See id.* “This defies any commonsense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any ‘sexual or excretory’ meaning. Bono’s exclamation . . . is a prime example of a non-literal use of the ‘F-Word’ that has no sexual connotation.” *Id.* Of interest was the court’s reference to utterances of expletives by President Bush, who noted “to British Prime Minister Tony Blair that the United Nations needed to ‘get Syria to get Hezbollah to stop doing this shit’ and Vice President Cheney’s widely-reported ‘Fuck yourself’ comment to Senator Patrick Leahy on the floor of the U.S. Senate[.]” *Id.* at 459–60 (citation omitted). *See also* Helen Dewar & Dana Milbank, *Cheney Dismisses Critic With Obscenity: Clash with Leahy About Halliburton*, WASH. POST, June 25, 2004, at A4. “A chance meeting with [Senator Leahy] (Vt.) . . . became an argument about Cheney’s ties to Halliburton Co., . . . and President Bush’s judicial

The court noted that the record did not show any evidence that the FCC made a reasoned analysis when it changed its fleeting expletives policy.<sup>159</sup> The court acknowledged that the agency is free to change its policies,<sup>160</sup> but stated that “the Remand Order provides no reasoned analysis of the purported ‘problem’ it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable.”<sup>161</sup> The court also quickly dismissed the FCC’s contention that a *per se* rule allowing fleeting expletives would lead broadcasters to air them at will because it “is equally divorced from reality because the Commission itself recognizes that broadcasters have never barraged the airwaves with expletives.”<sup>162</sup> Therefore, without a reasoned explanation of the abrupt change, the court held that the change was arbitrary and capricious under the APA and remanded to the lower court.<sup>163</sup>

Judge Pooler noted that courts should avoid constitutional questions unless absolutely necessary and thus provided an analysis of the constitutional challenges to the FCC’s indecency regime in dicta.<sup>164</sup> Initially, Judge Pooler recited the fact that “*all* speech covered by the F.C.C.’s indecency policy is fully protected by the First Amendment,” citing *Sable Communications of California, Inc. v. FCC*<sup>165</sup> and the FCC’s own Industry Guidance.<sup>166</sup> The court agreed with the Network’s contention that the FCC’s indecency test is unconstitutionally vague because, for example, the FCC found that multiple expletives in the broadcast of “Saving Private Ryan” were not gratuitous,<sup>167</sup> a single utterance of “fucking” at the Golden Globes was “shocking and gratuitous.”<sup>168</sup> Thus, the

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nominees. The exchange ended when Cheney offered some crass advice. ‘Fuck yourself,’ said the man who is a heartbeat from the presidency.” *Id.* See also Tom Feran, *Open-Mike World Calls for Closed Lips*, CLEVELAND PLAIN DEALER, July 21, 2006, at E1 (“‘See,’ [President Bush] added, ‘the irony is that what they need to do is get Syria to get Hezbollah to stop doing this s--.’”).

159. See *Fox*, 489 F.3d at 460 n.10 (“We reject this reason not because we disagree with it, but because it is both unsupported by any record evidence as well as contradicted by evidence submitted by the Networks.”).

160. *Fox*, 489 F.3d at 461.

161. *Id.*

162. *Id.* at 460.

163. *Id.* at 461–62, 467.

164. *Id.* at 462 (citing *Lyng v. N.W. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445 (1988)).

165. *Id.* at 462 (citing *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that material that is indecent but not obscene retains protection under the First Amendment)).

166. *Id.* 462–63 (citing *Industry Guidance*, 16 F.C.C.R. 7999, para. 3).

167. 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, para. 14 (2005) [hereinafter *Saving Private Ryan*].

168. *Golden Globes*, 19 F.C.C.R. 4975 para. 9. See also Rutenberg, *supra* note 4 (discussing multiple obscene utterances on prime-time television).

court “can understand why the Networks argue that the FCC’s ‘patently offensive as measured by contemporary community standards’ indecency test coupled with its ‘artistic necessity’ exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech.”<sup>169</sup>

Judge Pooler then discussed the tension in First Amendment law regarding the appropriate level of scrutiny in communications cases.<sup>170</sup> He pointed out that cases involving broadcast communications receive intermediate scrutiny because of their unique pervasiveness and accessibility to children (*Pacifica*),<sup>171</sup> but outside of this context “the Supreme Court has *consistently* applied strict scrutiny to indecency regulations” (*United States v. Playboy Entertainment Group, Inc.*,<sup>172</sup> *Reno v. ACLU*,<sup>173</sup> and *Sable*<sup>174</sup>).<sup>175</sup> However, Judge Pooler then analyzed the Network’s argument that technological advances have “eviscerated” the concerns raised in *Pacifica* that broadcast media is so “unique” and determined that “at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.”<sup>176</sup> The court reasoned that *Playboy* can be used as a basis for the proposition that technological advances, namely those giving choice to the consumer,<sup>177</sup> are a less restrictive alternative to banning obscene speech as the FCC did by making “fuck” and “shit” presumptively profane.<sup>178</sup> Lastly, Judge Pooler stated:

The proliferation of satellite and cable television channels—not to mention internet-based video outlets—has begun to erode the “uniqueness” of broadcast media, while at the same time, blocking technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television.<sup>179</sup>

Judge Leval dissented because he believed the FCC’s analysis provided

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169. *Fox*, 489 F.3d at 463.

170. *Id.* at 464.

171. *Id.* at 464–65.

172. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 807 (2000) (holding that strict scrutiny applied to cable operators, thus striking down section 505 of the Telecommunications Act of 1996).

173. *Reno v. ACLU*, 521 U.S. 844, 878, 882 (1997) (holding that strict scrutiny applied in the cyberspace context, thus striking down two sections of Communications Decency Act of 1996).

174. *Sable Commc’ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (holding that strict scrutiny applied in the dial-a-porn context).

175. *Fox*, 489 F.3d at 464 (emphasis added).

176. *Id.* at 465.

177. *Id.* at 466 (providing the v-chip and the parental ratings system as examples).

178. *Fox*, 489 F.3d at 465–66.

179. *Id.* at 466.



a reasonable basis for its policy change.<sup>180</sup> He explained that for “this relatively modest change of standard, the Commission gave a sensible, although not necessarily compelling, reason. . . . [T]he Commission’s central explanation for the change was essentially its perception that the ‘F-Word’ is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation.”<sup>181</sup> Essentially, Judge Leval believed that there was a “difference of opinion” between the court and the agency, and preferred to give substantial deference, under the *Chevron* test,<sup>182</sup> to the FCC.<sup>183</sup>

*B. The Third Circuit: Janet’s Moment in the Limelight*

In *CBS Corp. v. FCC*, the court considered the FCC’s reprimand<sup>184</sup> of CBS for airing a “fleeting image” of Janet Jackson’s breast during the live broadcast of the Super Bowl XXXVIII Halftime show.<sup>185</sup> Though the FCC issued the Golden Globes Order a month after the airing of the Halftime Show, the FCC argued that it could impose fines on CBS because it interpreted the Golden Globes Order “as addressing only the broadcast of fleeting expletives, not other fleeting material such as brief images of nudity.”<sup>186</sup> However, the court found that prior to the Golden Globes Order the FCC had not distinguished between “fleeting images” and other “fleeting material” but had simply dealt with “fleeting expletives”:

The Commission’s conclusion on the nature and scope of its indecency regime—including its fleeting material policy—is at odds with the history of its actions in regulating indecent broadcasts. In the nearly three decades between the Supreme Court’s ruling in *Pacifica* and CBS’s broadcast of the Halftime Show, the FCC had never varied its approach to indecency regulation based on the format of broadcasted content. Instead, the FCC consistently applied identical standards and engaged in

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180. *Id.* at 467 (Leval, J., dissenting).

181. *Id.* at 469.

182. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984) (announcing the famous two part test governing a court’s review of an agency’s construction of a statute administered by that agency).

183. *Fox*, 489 F.3d at 469, 473 (Leval, J., dissenting).

184. *In re Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show*, 21 F.C.C.R. 2760 (2006) [hereinafter *Forfeiture Order*].

185. *CBS Corp. v. FCC*, 535 F.3d 167, 171 (3d Cir. 2008).

186. *Id.* at 181.

identical analyses when reviewing complaints of potential indecency whether the complaints were based on words or images.<sup>187</sup>

Therefore, the court determined that the “fleeting image” was to be treated like the rest of the “fleeting expletives” affected by the Golden Globes Order.<sup>188</sup>

Once the court determined that the policy for “fleeting images” was the same as that for “fleeting expletives,” it relied, as the Second Circuit had, on *State Farm* for the standard of review.<sup>189</sup> The FCC was thus required to show that it gave a reasoned analysis for its departure from prior policy.<sup>190</sup> Otherwise, it would have acted arbitrarily and capriciously in violation of the APA.<sup>191</sup> The court found that the FCC did not give any reasoned explanation for its departure because it merely relied on the premise that “fleeting images” were not governed by the Golden Globes Order.<sup>192</sup> Thus, the Third Circuit held that the FCC had acted arbitrarily and capriciously in violation of 5 U.S.C § 706(2)(A), just as the Second Circuit had in *Fox*.<sup>193</sup>

#### V. THE RIGHT PATH: WHY THE SECOND AND THIRD CIRCUITS CHOSE THE HIGHER GROUND

The Bush Administration was formed through political appointments and lobbying, just as any other modern presidential administration. Some believe the Bush Administration expanded the powers of the executive office to unconstitutional levels, but that is beyond the scope of this Note.

187. *Id.* at 184.

188. *See id.* at 188. “As detailed, the Commission’s entire regulatory scheme treated broadcasted images and words interchangeably for purposes of determining indecency. Therefore, it follows that the Commission’s exception for fleeting material under that regulatory scheme likewise treated images and words alike.” *Id.* Further, “[the Agency’s] restrained enforcement policy for fleeting material extended only to fleeting words and not to fleeting images.” *Id.*

189. *Id.* at 182.

190. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“Accordingly, 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.”).

191. *Id.*

192. *CBS*, 535 F.3d at 188 (“Because the Commission fails to acknowledge that it has changed its policy on fleeting material, it is unable to comply with the requirement under *State Farm* that an agency supply a reasoned explanation for its departure from prior policy.”).

193. The court also held that the FCC had incorrectly determined that Janet Jackson and Justin Timberlake were vicariously liable under the doctrine of *respondeat superior*, but that analysis is not within the scope of this Note. *See id.* at 189–210 (holding that, though “[t]he FCC’s arbitrary and capricious change of policy on the broadcast of fleeting indecent material [was] a sufficient ground to decide this case,” the FCC also failed to show that Jackson or Timberlake were liable under any tort or contract theory).

In terms of what the branches can do regarding the FCC, the Bush Administration and Congress did not go further than constitutional bounds permit: President Bush could appoint whomever he chose to head the Commission and Congress may raise forfeiture penalties as it sees fit. However, the Administration placed the FCC in an interesting constitutional conundrum. The FCC, headed at the time by Mr. Martin,<sup>194</sup> pushed for higher standards of decency on the airwaves, but Congress and the Administration may have pushed too far without realizing the implications their decisions would have on the constitutional mandate of the First Amendment.

The Supreme Court held in *Pacifica* that fleeting expletives were likely protected under the First Amendment while material that dwelled on vulgarities and sexual content would rise to the level of indecency under 18 U.S.C. § 1464.<sup>195</sup> The FCC followed this mandate for several years, but switched course in 2004,<sup>196</sup> leading to the present litigation. By using section 706(2)(A) of the APA to strike down the FCC's new policy,<sup>197</sup> the circuit courts properly realized that the Bush Administration and Congress attempted to use the FCC as a conduit to further entrench and reinforce policies, even though those policies may violate the First Amendment. Both circuit courts were confronted with a difficult task. On one hand, they could have looked at the policy change itself and decided the cases under section 706 of the APA. On the other hand, they could have decided the cases on First Amendment grounds, which some commentators argue should have been done.<sup>198</sup> Both courts selected the more appropriate option.

It is a canon of statutory construction that courts should construe a statute narrowly and only reach a constitutional question where absolutely

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194. President Obama nominated Julius Genachowski as the new chairman of the FCC in January, 2009. Stephen Labaton, *Julius Genachowski to Be Nominee for F.C.C. Chairman*, N.Y. TIMES, Jan. 14, 2009, at B2. Chairman Genachowski was confirmed by the Senate on June 25, 2009. *Senate Confirms New Chairman to Lead F.C.C.*, N.Y. TIMES, June 26, 2009, at B4; see *infra* Part VI.A.

195. *FCC v. Pacifica Found.*, 438 U.S. 726, 760–61 (1978) (Powell, J., concurring).

196. *Golden Globes*, 19 F.C.C.R. 4975, paras. 8–9, 12.

197. For the remainder of this Note, “fleeting expletives” will include both fleeting language and images to incorporate the holdings of both the Second (language) and Third (images) Circuits.

198. See generally Justin Winquist, Note, *Arbitrary and F@#\$%! Capricious: An Analysis of the Second Circuit's Rejection of The F.C.C.'S Fleeting Expletive Regulation in Fox Television Stations, Inc. v. F.C.C.*, 57 AM. U. L. REV. 723, 760 (2007) (discussing the implications if the Second Circuit or the Supreme Court had decided on First Amendment grounds); Holohan, *supra* note 88, at 341 (arguing that the court could decide the First Amendment question instead of discussing it in dicta and concluding that “indecent broadcasting should be fully protected by the First Amendment”); Noelle Coates, Note, *The Fear Factor: How F.C.C. Fines Are Chilling Free Speech*, 14 WM. & MARY BILL RTS. J. 775, 789–91 (2005) (discussing the subjectivity of the current indecency test and arguing that the area of law needs clarification and more objectivity).

necessary.<sup>199</sup> Although neither circuit focused on statutory construction, this canon provides a basis for the courts' decisions. The Supreme Court states that "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court."<sup>200</sup> The circuits were thus confronted with either a hard look analysis of the policy change under *State Farm* or a very complicated First Amendment analysis that would surely show where the FCC erred. However, such an analysis would fail to implicate the actors behind the FCC's change of heart on fleeting expletives.

As an initial matter, the courts realized, and the Second Circuit explained in detail, that the First Amendment question was not simple and would "raise a multitude of constitutional problems."<sup>201</sup> The Third Circuit specifically stated that "[i]n cases raising First Amendment issues, we have an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression."<sup>202</sup> Interestingly, the Second Circuit discussed in dicta the probable failure of the new policy to pass constitutional muster,<sup>203</sup> essentially tempting the Supreme Court to revisit the First Amendment issue on appeal. Both courts recognized that a foray into the First Amendment issues was not the province of the circuits for two reasons: (1) the Supreme Court had already visited the constitutional issue in *Pacifica* and (2) they could reach the same conclusion using a much more solid ground in *State Farm*, which allowed them to subtly discuss more than just the facial inadequacies of the agency's unreasoned decision.

Rather than enter the morass of First Amendment issues, the circuit courts evaluated the policy change under *State Farm* and found that the FCC did not give a reasoned analysis for its drastic change regarding fleeting expletives. In doing so, the courts sent a strong message to the FCC that it was outside of its authoritative purview. Both courts went through the history of the FCC's policy regarding fleeting expletives and were therefore well informed on the issues concerning the coercive forces of the Bush Administration and Congress. Both circuits realized that "[a]gency

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199. See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960–61 (1997) (providing cases where the Court construed a statute narrowly to avoid a constitutional question).

200. Clark v. Martinez, 543 U.S. 371, 380–81 (2005).

201. *Id.*

202. CBS Corp. v. FCC, 535 F.3d 167, 174 (3d Cir. 2008) (citations omitted).

203. Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 463–67 (2d Cir. 2007), *overruled by* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009).

rulemaking, particularly during political transitions, provides a critical perspective both on what can be changed easily and quickly by rotating political masters—including appointees within the agency, other political actors in the Executive Branch, and members of Congress . . . .”<sup>204</sup> As one commentator explained:

One of the crucial differences between agency and judicial interpretation is its political context. Agencies are immersed in political controversies—struggles not just between or among interest groups vying for attention and preference, but institutional competitions between the executive and the legislative branches. As our table of canons for institutionally-responsible statutory interpretation suggested, agencies, as distinguished from courts, are often responsible for following presidential direction. They must also pay constant attention to the contemporary political milieu in the Congress and look across time in order to strategically gauge their continuing capacity to garner public support, both to ease the difficulties of enforcement and to avoid disruptive charges of illegitimacy.

As they move into this politically-charged environment, reviewing courts have . . . attempted to maintain the rule of law as judicially conceived while making space for the necessary role of politics in administration.<sup>205</sup>

The circuit courts took into account the policy shift in the FCC, but both realized that the change made by the Bush Administration had gone too far.<sup>206</sup> Circuit courts are not usually embroiled in political controversies to a substantial degree, but independent agencies like the FCC are to an overwhelming extent. The FCC’s new policy was a reflection of the policies pronounced by the Bush Administration and the Republican Congress of the time. The courts recognized this policy shift and their holdings implicitly rejected the meddling of Congress and the Administration. Both courts assaulted the Bush Doctrine on indecency, which was built through congressional action and political appointment. To do so, the courts relied on established precedent that enabled them to chastise the Administration without unnecessarily hindering the broader First Amendment principles. By finding that the Commission had not

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204. Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 892 (2008).

205. Mashaw, *supra* note 149, at 538.

206. One commentator stated that “the decision . . . was a sharp rebuke for the F.C.C. and for the Bush administration.” Stephen Labaton, *Decency Ruling Thwarts F.C.C. On Vulgarities*, N.Y. TIMES, June 5, 2007, at A1 (emphasis added).

changed its policy with a viable underlying rationale, the courts subtly rejected the Bush Administration's widening control over independent agencies while leaving intact any First Amendment question that loomed in the background.

As one commentator explained, "The standard legal justification for the reasoned decisionmaking requirement is that it promotes rationality, deliberation, and *accountability*. . . . [I]t induces agencies to be transparent about their rationales, facilitating not only judicial review but public and political oversight as well."<sup>207</sup> Here, the courts not only held the agency accountable: they chastised a President whose appointments placed unreasonable demands on the FCC and a Congress that, through its prodding by raising penalties, placed unreasonable expectations on the FCC. However, the courts recognized "*State Farm* establishe[d] that political influence alone is not a sufficient rationalization for agency action."<sup>208</sup> Thus, there was an opportunity to use *State Farm* to properly decide the cases while sending an implicit message to the other branches of government that they should not be mandating prerogatives that an independent agency is far better situated to make with a reasoned decision.

## VI. WHAT THE OBAMA ADMINISTRATION CAN DO TO AVOID THIS PROBLEM AND HOW THE SUPREME COURT'S OVERRULING OF THE SECOND AND THIRD CIRCUITS HELPS THE NEW FCC

### A. *The New FCC and the Prospect of a New Direction*

#### 1. President Obama and Julius Genachowski

While the Second and Third Circuits properly disposed of these cases, neither should have confronted them in the first instance. The Administration unacceptably put the courts in an untenable position by throwing its weight around in the realm of independent agencies. Through its own agency appointments, the Obama Administration has an opportunity to relieve the courts of this burden.

On January 14, 2009 the Obama Administration unofficially announced that Julius Genachowski would be the successor to Republican Kevin

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207. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1778–79 (2007) (emphasis added) (footnotes omitted).

208. Kevin M. Stack, *The President's Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263, 308 n.192 (2006) (citation omitted).

Martin.<sup>209</sup> Genachowski has been a longtime friend of President Obama, a relationship beginning with their service on the Harvard Law Review.<sup>210</sup> President Obama first tapped Genachowski to assist his “highly successful online strategy” during the 2008 campaign.<sup>211</sup> Genachowski later helped shape “telecommunications and technology policies” during the campaign.<sup>212</sup>

Genachowski has openly endorsed net neutrality on the Internet<sup>213</sup> and “media ownership rules that promote[] a diversity of voices on the airwaves.”<sup>214</sup> Genachowski clerked for former Supreme Court Justices William J. Brennan, Jr. and David H. Souter,<sup>215</sup> Justices with notably liberal tendencies when it comes to the First Amendment and regulation of speech.<sup>216</sup> President Obama’s choice has already been praised: “The head of the country’s largest broadcasting trade group [David Rehr, president and CEO of the National Association of Broadcasters] is cautiously optimistic the Obama Administration will ease some of the pressure and uncertainty that have hovered over TV and radio in recent years concerning appropriate content.”<sup>217</sup> Rehr speculated that Genachowski is more concerned with the digital transition and emerging technology than looking over broadcasters’ shoulders to police content.<sup>218</sup> However, “Rehr stresses [Genachowski] isn’t advocating an anything-goes policy. He just thinks the marketplace and broadcasters usually can sort out appropriate content themselves.”<sup>219</sup>

The new Administration appears to be much more concerned with technology and access to newer communications than the former Administration, and will likely take a harder look at the dominance of

209. Stephen Labaton, *Julius Genachowski to Be Nominee for F.C.C. Chairman*, N.Y. TIMES, Jan. 14, 2009, at B2; Jim Puzanghera, *Obama to Name Julius Genachowski as F.C.C. Chief*, L.A. TIMES, Jan. 13, 2009, at 4.

210. Labaton, *supra* note 209, at B2.

211. *Id.*

212. *Id.*

213. See Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 146 (2003). “A communications network like the Internet can be seen as a platform for a competition among application developers. Email, the web, and streaming applications are in a battle for the attention and interest of end-users. It is therefore important that the platform be neutral to ensure . . . competition . . .” *Id.*

214. Labaton, *supra* note 209, at B2.

215. *Id.*

216. Justice Brennan wrote a dissent in the *Pacifica* decision that emphasized the difference between indecency and obscenity, with the former retaining full First Amendment protection. *FCC v. Pacifica Found.*, 438 U.S. 726, 767–68 (1978) (Brennan, J., dissenting). Justice Souter joined the majority in both the *Reno* and *Playboy* decisions, which held against findings of indecency. See *supra* notes 172–73 and accompanying text.

217. David Hinckley, *Broadcaster’s Don’t See Federal Case Over Content*, N.Y. DAILY NEWS, Feb. 25, 2009, at 71.

218. *Id.*

219. *Id.*

certain stakeholders like Verizon and AT&T in the technology industry.<sup>220</sup> However, President Obama's choice to head the FCC shows that he is aware of the fear with which many broadcasters are operating due to the heightened fines that may be levied if the FCC finds indecency under the more lax standard now in use. Genachowski clerked for two Supreme Court Justices who likely influenced his views about indecency and First Amendment freedoms. There is speculation that a Genachowski FCC will return to the standards enunciated by the FCC prior to 2003:

Broadcasters are keenly interested in whether Mr. Genachowski will take a more moderate approach to enforcement of indecency standards. Thousands of complaints backed up at the FCC over the past few years after the agency's tougher enforcement policies—and multimillion dollar fines—were challenged in court by broadcasters.

Mr. Obama's plan advocated using technology to help "protect our children while preserving the First Amendment." *Hollywood and broadcasters interpreted those statements as code that an Obama FCC would revert to its pre-Bush-administration days of restrained enforcement and smaller fines.*<sup>221</sup>

President Obama, a constitutional scholar,<sup>222</sup> likely recognized that the indecency fight raging in the courts was a creature of the Bush Administration's molding of indecency policy with little regard for First Amendment freedoms.

By nominating an individual well versed in both constitutional law and emerging technology issues, President Obama can leave the FCC to its own devices without having to pressure the agency like the Bush Administration did. Genachowski will primarily be concerned with issues like net neutrality and the digital transition, but he will still have ample opportunity to reverse the indecency regime promulgated by Martin's FCC.<sup>223</sup> Furthermore, Genachowski can solve the constitutional dilemma by simply reverting to

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220. Kim Dixon, *Obama's F.C.C. Choice Praised, Seen Easily Confirmed*, REUTERS, Jan. 13, 2009, available at <http://uk.reuters.com/article/rbssTechMediaTelecomNews/idUKN1329907120090113?sp=true>.

221. Amy Schatz & Shira Ovide, *Obama's Pick for F.C.C. Signals Change*, WALL ST. J., Jan. 14, 2009, at B6 (emphasis added).

222. See Adam Cohen, *Democratic Pressure on Obama to Restore the Rule of Law*, N.Y. TIMES, Nov. 14, 2008, at A32 ("Now that Mr. Obama—a onetime constitutional law professor . . . —has won the election, there is both reason for optimism and increased pressure on the president-elect to keep his promises.").

223. Labaton, *supra* note 209, at B2.



pre-2003 indecency standards, a measure that can be accomplished in an industry guidance memorandum issued by the Commission.<sup>224</sup> Also, by focusing on more pressing issues involving technology and overall industry regulation, Genachowski can easily slide any indecency decisions through, likely only to be noticed by the Parent's Television Council—the organization that primarily floods the FCC with indecency complaints, skewing the pool of complaints received by the agency.<sup>225</sup>

Though this seems similar to Bush Administration tactics, it is much different. In this case, President Obama chose Genachowski not only because of his close ideological ties, but also due to his expansive knowledge in the emerging technology and broadcast regulation fields.<sup>226</sup> Further, any action by Genachowski regarding fleeting expletives and indecency will simply be a return to the indecency standards already endorsed by the Supreme Court in *Pacifica* and followed for many years. The mentality is therefore focused on returning to constitutionally accepted standards rather than changing an industry to reflect the ideological and political sentiments of one party.

## 2. Chairman Genachowski and the New Commission

Genachowski, a Democrat, was officially and unanimously confirmed by the Senate as the new Chairman of the FCC on June 25, 2009.<sup>227</sup> The

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224. See *infra* Part VI.B.2.

225. See Holohan, *supra* note 88 and accompanying text. Another commentator elaborates:

Socially conservative groups, most notably the Parents Television Council, have taken full advantage of the option of submitting indecency complaints by email or webform. Its official website includes multiple form letters complaining to the FCC about allegedly indecent broadcasts; these letters need only the addition of the complainant's name, address, and email address before they can be electronically submitted to the FCC. The PTC even invites website visitors to view clips of the allegedly indecent material, likely with the hope the visitors will be offended and file a complaint with the FCC. This electronic approach is effective. Mediaweek reported that the PTC was responsible for 99.8% of all broadcast indecency complaints received in 2003.

Kurt Hunt, Note, *The FCC Complaint Process and "Increasing Public Unease": Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. & TECH. L. REV. 223, 233 (2007) (citations omitted). See also Coates, *supra* note 198, at 799 ("In December 2004, the FCC released documents . . . which revealed that 99 percent of the indecency complaints received that year—with the exception of the complaints caused by the sight of Ms. Jackson's breast—were filed by one single activist group, The Parents Television Council (PTC).").

226. See Labaton, *supra* note 209, at B2. "[Genachowski] was chief counsel to Reed Hundt, an F.C.C. chairman during the Clinton administration. He then worked . . . as a senior executive at the IAC/Interactive Corporation . . . . He also founded an investment and advisory firm for digital media companies and co-founded the country's first commercial 'green' bank." *Id.*

227. 155 CONG. REC. S7114 (June 25, 2009); *Senate Confirms New Chairman to Lead F.C.C.*, N.Y. TIMES, June 26, 2009, at B4.

Senate unanimously confirmed the re-appointment of Republican Robert M. McDowell to the FCC on the same day.<sup>228</sup> During the five months between Chairman Genachowski's nomination and confirmation, Democrat Michael J. Copps served as acting Chairman and will continue to serve until the expiration of his term on June 30, 2010.<sup>229</sup> The final two seats of the Commission were filled on July 24, 2009 when the Senate unanimously confirmed Migon L. Clyburn, a Democrat, and Meredith Attwell Baker, a Republican.<sup>230</sup>

According to statutory mandate, President Obama can only nominate and the Senate can only confirm three Democrats to sit on the Commission at one time.<sup>231</sup> President Obama has filled the FCC with competent individuals, all of whom have extensive experience dealing with the FCC and the telecommunications industry.<sup>232</sup> However competent the new Commission may be, many challenges await Chairman Genachowski and his associates.

During the opening remarks at Chairman Genachowski's nomination hearing, Senator John D. Rockefeller, IV aptly demonstrated that the road ahead of the new FCC would not be easy: "[L]et me be very clear about the challenge before you. Fix this agency, or we will fix it for you. Prove to us that the FCC is not battered beyond repair."<sup>233</sup> Senator Rockefeller specifically referenced "affordable and robust broadband," "entrepreneurship," and "educational resources" in his opening remarks.<sup>234</sup> Moreover, Senator Rockefeller specifically asked Chairman Genachowski to "[s]how us that parents can have confidence to view programming in their homes without their children being exposed to violent and indecent content."<sup>235</sup>

There is no question that the indecency standard is still sitting on the tongues of many congressmen. Genachowski's Commission faces many challenges on both the technology side of its docket and the enforcement

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228. *Senate Confirms New Chairman to Lead F.C.C.*, *supra* note 227.

229. *Id.*

230. 155 CONG. REC. S8102 (July 24, 2009); John Eggerton, *Senate OKs pair for FCC*, DAILY VARIETY, July 27, 2009, at 5.

231. See 47 U.S.C. § 154(b)(5) (2009) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.").

232. See, e.g., Fawn Johnson, *Obama Taps Former Bush Admin Official for FCC Slot*, WALL ST. J., June 25, 2009, <http://online.wsj.com/article/BT-CO-20090625-713965.html>.

233. *Nomination Hearings Before the S. Comm. on Commerce, Science & Transportation*, 111th Cong. D702-03 (2009) (statement of Sen. John D. Rockefeller, IV, Chairman, S. Comm. on Commerce, Science & Transportation), available at [http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing\\_ID=bca080f3-15a0-4d05-8abd-77f5327a2cb7](http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=bca080f3-15a0-4d05-8abd-77f5327a2cb7) (then click "Majority Statements").

234. *Id.*

235. *Id.*

and regulatory side—namely the switch from analog to digital and expanding broadband.<sup>236</sup> However, the question of indecency has not necessarily taken a back seat, though it may now be a sideshow to another matter—the possible reformation of the Children’s Television Act.

Senator Rockefeller may introduce legislation to bring the Children’s Television Act into the Digital Age, as indicated by his opening of hearings on the subject on July 22, 2009.<sup>237</sup> While stating that the intent of the hearings was not to specifically discuss indecency, Senator Rockefeller noted, “[I]t will come as no surprise to anyone in this room that I continue to have grave concerns about violence and indecency in the media. I continue to believe that programming with gratuitous sex and excessive violence harms our children and demeans our culture.”<sup>238</sup> It is quite clear that indecency is one of Senator Rockefeller’s concerns, and it is likely that this may cause Chairman Genachowski and the full Commission to take a new look at the indecency regime left by the former FCC.

Chairman Genachowski spoke at the hearing on July 22, appearing to avoid the indecency question as much as possible and focusing instead on the Act’s original purpose of “promoting educational and informational programming for children and placing limits on commercial advertising to which children are exposed while watching TV.”<sup>239</sup> However, Chairman Genachowski hinted at his views on indecency:

Government has a vital role to play in helping parents and protecting children, while honoring and abiding by the First Amendment. The private sector has real responsibilities in this area – and, potentially, opportunities. I’m hopeful that the evolving media landscape will produce innovation and new business models to increase the amount of educational programming and content available to all children, and enhance the ability of parents to pick and choose.<sup>240</sup>

It is very insightful that Chairman Genachowski specifically mentioned

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236. See, e.g., John Eggerton, *Genachowski’s Media Mission*, MULTICHANNEL NEWS, August 3, 2009, at 2 ([Julius Genachowski]: “I have tried in my public remarks to staff and in meetings to outline the strategic priorities: promoting universal broadband—essential; promoting job creation, economic growth, innovation and investment—essential; protecting and empowering consumers, public safety, promoting a vibrant media landscape and revitalizing and retooling the FCC.”).

237. *Rethinking Children’s Television: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 111th Cong. (2009) (statement of Sen. John D. Rockefeller, IV, Chairman, S. Comm. on Commerce, Science & Transportation).

238. *Id.*

239. *Id.* (statement of Julius Genachowski, Chairman, FCC).

240. *Id.*

the First Amendment in his first public appearance on Capital Hill as the head of the FCC.<sup>241</sup> Again, President Obama was highly cognizant that Chairman Genachowski is versed in constitutional law and First Amendment issues. Chairman Genachowski's awareness of the issues currently surrounding indecency and the protection of free speech is evidence that he understands that the policies adopted by the previous Commission likely violated the First Amendment.

Possibly more telling is Chairman Genachowski's statement on the importance of protecting children: "[Children] are our most cherished, valuable resource. Video content for our nation's children should treat them as such and not as 'Little Consumers.' Guarding against inappropriate marketing to children is as vital today as it was twenty years ago when Congress limited commercial advertising to kids through the Act."<sup>242</sup> Noticeably absent from this statement is any mention of the effects of "indecent" programming under the current FCC policy on expletives. It is likely that Chairman Genachowski is carefully watching his words in anticipation of the seemingly inevitable battle over the constitutionality of the current FCC policy on indecency. However, as discussed in the next section, the Supreme Court has left open the door for the current FCC to bring the broadcast indecency policy back within the bounds of the First Amendment.

### *B. The Supreme Court's Ruling and How the New FCC Can Use It*

#### 1. The Supreme Court's Version of "Arbitrary and Capricious"

On April 28, 2009, the Supreme Court overturned the Second Circuit's ruling that the FCC acted in an arbitrary and capricious manner when it reversed its decades-old policy regarding isolated and fleeting indecent content.<sup>243</sup> Justice Scalia delivered the plurality opinion,<sup>244</sup> holding that the FCC had, in fact, given enough of a reasoned decision when changing the fleeting expletives policy to avoid being deemed "arbitrary and capricious" under the APA.<sup>245</sup>

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241. *Id.*

242. *Id.*

243. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009).

244. I say "plurality opinion" because that is what it "actually" is since only four members joined the full opinion. However, the only part that Justice Kennedy refrained from joining in Justice Scalia's opinion was the part where Justice Scalia, in typical fashion, bashed and corrected the opinions of the four dissenting Justices. *Id.* at 1815–19, 1822.

245. *See id.* at 1819 ("The Commission could reasonably conclude that the pervasiveness of foul

Justice Scalia first walked through 18 U.S.C. § 1464 and the *Pacifica* decision, and then explained the Commission's treatment of fleeting expletives through the change in policy after Bono's utterance of "fuck" at the Golden Globes in 2001.<sup>246</sup> He then discussed the Golden Globes Order and the Remand Order, highlighting language offered by the previous FCC:

Both broadcasts, it noted, involved entirely gratuitous uses of "one of the most vulgar, graphic, and explicit words for sexual activity in the English language." It found Ms. Richie's use of the "F-Word" and her "explicit description of the handling of excrement" to be "vulgar and shocking," as well as to constitute "pandering," after Ms. Hilton had playfully warned her to "watch the bad language." And it found Cher's statement patently offensive in part because she metaphorically suggested a sexual act as a means of expressing hostility to her critics.<sup>247</sup>

Justice Scalia's focus on this language set the tone of the opinion and set the stage for finding that the FCC could reasonably conclude that this type of language should be regulated on broadcast television.

Justice Scalia found that the Second Circuit improperly used circuit precedent that "requir[ed] a more substantial explanation for agency action that changes prior policy" and held:

We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review. The Act mentions no such heightened standard. And our opinion in *State Farm* neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance.<sup>248</sup>

He further stated the APA makes no distinction between agency action in the first instance and later action by the agency reversing a policy.<sup>249</sup> The Court also acknowledged that an agency must recognize that it is changing policy, and stated that the FCC had done so.<sup>250</sup> However, an agency "need

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language, and the coarsening of public entertainment in other media such as cable, justify more stringent regulation of broadcast programs so as to give conscientious parents a relatively safe haven for their children.").

246. *Id.* at 1806–08.

247. *Id.* at 1809 (internal citations omitted).

248. *Id.* at 1810.

249. *Id.* at 1811.

250. *Id.* at 1811–12.

not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and the agency *believes* it to be better."<sup>251</sup> Justice Scalia also stated that the agency's change of course adequately shows it believes that the change of policy is better.<sup>252</sup>

By this point in the opinion, it was clear that Justice Scalia and the four Justices who joined him believed that the arbitrary and capricious standard of the APA was indeed a low threshold for an independent agency to overcome. In doing so, the Court distinctly emphasized that this low threshold was only for the APA standard and had no relation to any standards required by the First Amendment. Justice Scalia rejected the assertion by the broadcasters that the arbitrary and capricious standard was somehow linked to the constitutional question of whether the policy violated the First Amendment.<sup>253</sup>

Further, Justice Scalia wrote:

In the same section authorizing courts to set aside "arbitrary [or] capricious" agency action, the Administrative Procedure Act separately provides for setting aside agency action that is "unlawful," 5 U.S.C. § 706(2)(A), which of course includes unconstitutional action. We think that is the only context in which constitutionality bears upon judicial review of authorized agency action. If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's "arbitrary [or] capricious" standard; its lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge.<sup>254</sup>

This again shows the Court's awareness that it is deciding *purely* on administrative law grounds and *not* on any related constitutional question. The Court thus explicitly leaves open the door to a constitutional challenge of the FCC's current indecency policy regarding fleeting expletives.

Justice Scalia specifically acknowledged that the current FCC policy "may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution."<sup>255</sup> He continued, "Whether that is so, and, if so, whether it is unconstitutional, will be determined soon

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251. *Id.* at 1811.

252. *Id.*

253. *Id.* at 1811–12.

254. *Id.* at 1812.

255. *Id.* at 1819.

enough, perhaps in this very case.”<sup>256</sup> However, he then tempered his remarks by stating, “Meanwhile, any chilled references to excretory and sexual material ‘surely lie at the periphery of First Amendment concern.’”<sup>257</sup>

Justice Scalia, writing this time for the plurality of four (Scalia, Roberts, Alito, and Thomas), dedicated nearly five pages of the opinion to dispelling the dissent’s opinions.<sup>258</sup> In particular, Justice Scalia took issue with Justice Stevens and Justice Breyer’s contention that the Commission incorrectly addressed the constitutional issues surrounding fleeting expletives.<sup>259</sup> The plurality reasoned that the FCC gave credence as to why its policy did not violate the First Amendment, at least facially, by reading *Pacifica* to “[draw] no constitutional line; to the contrary, it expressly declined to express any view on the constitutionality of prohibiting isolated indecency.”<sup>260</sup>

Interestingly, Justice Scalia also addressed Justice Breyer’s argument “[t]hat law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences.”<sup>261</sup> Justice Scalia retorted that “[t]he independent agencies are sheltered not from politics but from the President, and it has often been observed that their freedom from presidential oversight (and protection) has simply been replaced by increased subservience to congressional direction.”<sup>262</sup> However, as discussed above, it is very apparent that the FCC is not insulated from the political objectives of the Executive.<sup>263</sup>

Justice Thomas’s concurrence focused directly on the constitutional question, “not[ing] the questionable viability of the two precedents that support the FCC’s assertion of constitutional authority to regulate the programming at issue in this case.”<sup>264</sup> He wrote:

This deep intrusion into the First Amendment rights of broadcasters, which the Court has justified based only on the nature of the medium, is problematic on two levels. First, instead of looking to first principles to evaluate the constitutional

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256. *Id.*

257. *Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978) (plurality opinion of Stevens, J.)).

258. *Id.* at 1815–19.

259. *Id.* at 1817–19.

260. *Id.* at 1817.

261. *Id.* at 1829 (Breyer, J., dissenting).

262. *Id.* at 1815 (Scalia, J., plurality opinion).

263. *See supra* Part II.

264. *FCC*, 129 S. Ct. at 1819–20.

question, the Court relied on a set of transitory facts, *e.g.*, the “scarcity of radio frequencies,” to determine the applicable First Amendment standard. But the original meaning of the Constitution cannot turn on modern necessity: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”

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Second, even if this Court's disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, dramatic technological advances have eviscerated the factual assumptions underlying those decisions.<sup>265</sup>

Justice Thomas invited re-evaluation of both *Pacifica* and *Red Lion* and suggested that he does not believe the current policy is constitutional.<sup>266</sup>

## 2. Where the Opinion Leaves Off and What the FCC Can Do

All three fleeting expletives cases (the Second Circuit, Third Circuit, and the Supreme Court) avoided the constitutional question. This is not surprising considering the intricacies and pitfalls of indecency, profanity, and expletives in the First Amendment arena. And of course there is the axiom of judicial interpretation that ambiguous language in a statute should be construed to avoid a constitutional abnormality.<sup>267</sup>

However, it can be gleaned from the Second Circuit and the Supreme Court opinions that the current FCC policy regarding fleeting expletives on broadcast television is likely at odds with the First Amendment. Judge Pooler readily acknowledged that the FCC's current policy may not “pass constitutional muster.”<sup>268</sup> Justice Thomas criticized the continuing validity

265. *Id.* at 1820–21 (Thomas, J., concurring) (citation omitted).

266. *See id.* at 1819–22 (Thomas, J., concurring). The concurrence by Justice Kennedy and the dissents generally discuss the relation of the arbitrary and capricious standard to the constitutional question, reiterating many arguments made by the Second Circuit, or simply arguing over the amount of reasoning necessary to fail the “arbitrary and capricious” threshold question. *See id.* at 1822–41 (opinions of Kennedy, Stevens, Ginsburg, and Breyer, JJ.).

267. *See, e.g., FCC*, 129 S. Ct. at 1811 (citing *Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.”); *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) (“A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”).

268. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 462 (2d Cir. 2007), *overruled by FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).



of both *Pacifica* and *Red Lion*.<sup>269</sup> The dissenting Justices, even while arguing that the case should be remanded in accordance with the canon of constitutional avoidance, repeatedly referred to the FCC policy as “constitutionally suspect.”<sup>270</sup> Even Justice Scalia invited the constitutional question.<sup>271</sup>

There are two foreseeable courses of action to be taken. First, the broadcasters must now directly challenge the constitutionality of the FCC’s policy, likely arguing that it unconstitutionally chills protected speech. After all, speech that is indecent retains constitutional protection.<sup>272</sup> The broadcasters have a strong argument that the current policy unduly restricts and chills constitutionally protected language because many will not air certain shows outside the safe harbor period from 10 p.m. to 6 a.m., even those that obviously contain artistic value, such as *Saving Private Ryan*.<sup>273</sup>

Moreover, as Justice Thomas points out, many of the concerns evident at the time of the *Pacifica* decision are no longer relevant.<sup>274</sup> For example, spectrum scarcity is no longer an issue because the switch from analog to digital alleviates this concern.<sup>275</sup> Additionally, the technological advances available today support less interference from the FCC rather than more, as Justice Scalia contends.<sup>276</sup>

Parents today have both more and less control over the content that enters their home. No longer is broadcast media “uniquely pervasive” as it was in the time of *Pacifica*. Children today are bombarded by images via broadcast television, cable television, satellite television and radio, iPods,

269. *FCC*, 129 S. Ct. at 1819–21 (Thomas, J., concurring).

270. *See id.* at 1840 (Breyer, J., concurring) (“The Court has often applied [the doctrine of constitutional avoidance] where an agency’s regulation relies on a plausible but constitutionally suspect interpretation of a statute. The values the doctrine serves apply whether the agency’s decision does, or does not, rest upon a *constitutionally suspect* interpretation of a statute.”) (emphasis added) (citation omitted).

271. *Id.* at 1819 (Scalia, J., plurality opinion).

272. *See Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989) (noting that speech “which is indecent but not obscene is protected by the First Amendment”); *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (“Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment.”).

273. *See* Lisa de Moraes, ‘*Saving Private Ryan*’: *A New Casualty of the Indecency War*, WASH. POST, Nov. 11, 2004, at C1 (“ABC suits scrambled yesterday to try to contain the mutiny among stations that refuse to air tonight’s broadcast of the unedited ‘Saving Private Ryan,’ citing indecency concerns.”).

274. *FCC*, 129 S. Ct. at 1821–22 (Thomas, J., concurring).

275. *Id.* at 1821 (“And the trend should continue with broadcast television’s imminent switch from analog to digital transmission, which will allow the FCC to stack broadcast channels right beside one another along the spectrum, and ultimately utilize significantly less than the 400 MHz of spectrum the analog system absorbs today.”) (punctuation and citation omitted).

276. *See id.* at 1813 (Scalia, J., plurality opinion) (“The fact that technological advances have made it easier for broadcasters to bleep out offending words further supports the Commission’s stepped-up enforcement policy.”).

the Internet, and even cell phones. Technology has introduced a plethora of modes to receive and send information. The FCC currently regulates these mediums differently,<sup>277</sup> which has led to considerable confusion about what standard applies to the various available mediums. Currently, broadcast media is the only medium that receives a lesser standard of First Amendment scrutiny.<sup>278</sup> At least one commentator has argued that “[b]ecause technological developments have blurred the distinction between broadcast and non-broadcast electronic media, differing treatment of these forms of communication is no longer legally defensible.”<sup>279</sup> Justice Thomas agrees.<sup>280</sup>

Parents, not the FCC, are in a better position to regulate the kind of programming that enters their home as well as the medium through which it comes in. Parents can monitor what shows children watch on television now more than ever by restricting certain programming from even entering the home using their remote control. Applying the heightened standard of scrutiny that the Court applies to other mediums, parental choice would be the least restrictive available alternative.<sup>281</sup> Further,

Allowing viewers to make their own decisions about what they do or do not watch achieves the same effect as the fines, for the content that is broadcast is determined ultimately by the viewers and the commercial advertisers that seek their attention. When the viewers become bored, horrified, or repulsed, they turn the channel. When enough do so, the broadcaster gets the hint and alters the content in an effort to keep both the viewers and the advertisers. Accordingly, it is the marketplace, not the government, that controls the content and the individual, not the government, who chooses what to watch.<sup>282</sup>

These are strong arguments that will almost inevitably be asserted by some broadcaster in the near future, especially since the question remains

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277. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in part and dissenting in part) (“The text of the First Amendment makes no distinctions among print, broadcast, and cable media, but we have done so.”).

278. The Supreme Court refused to apply this lesser standard of scrutiny in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 127–28 (1989) (telephone dial-in services), *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994) (cable television programming), and *Reno v. ACLU*, 521 U.S. 844, 867–68 (1997) (the Internet).

279. Holohan, *supra* note 88, at 366.

280. See *FCC*, 129 S. Ct. at 1821–22 (Thomas, J., concurring) (commenting that “factual assumptions” underlying different treatments have changed).

281. See cases cited *supra* note 278.

282. Coates, *supra* note 198, at 804.

ripe as the FCC has not changed the course of its indecency policy. Further, the FCC's belief that its policy is enforceable is backed by Supreme Court precedent. However, a more interesting, and possibly controversial step could quickly resolve the issue and immediately make the question moot.

The second course of action is much simpler, though it would likely lead to a flurry of activity from the Parent's Television Council.<sup>283</sup> In this scenario, the new FCC takes the initiative and, through another series of orders, moves the indecency policy back to its constitutionally sound pre-2001 stance. I say this with some hesitancy in light of Justice Thomas's most recent concurrence in which he questions the validity of the *Pacifica* decision. However, this policy at least retains the original policy of the FCC that isolated, fleeting expletives are not actionable unless they reach some higher threshold of indecency. This comports with the spirit of *Pacifica* in that indecent language retains whatever First Amendment protection it must receive, and the Commission is still free to take action when the circumstances and context warrant action against a violator.

Moreover, Justice Scalia's plurality opinion invites this type of policy change by the FCC. Now that the FCC is fully aware that it need not comport with any "heightened" standard when reversing course, it can change the rule as long as it "believes" the change is better and "that there are good reasons for it."<sup>284</sup> If nothing else, a "good" reason would be to not unduly chill protected speech because the Commission believes the old rule better reflected the constitutional bounds outlined in *Pacifica*. Further, there are good arguments that the old policy was unduly influenced by one politically powerful group, the Parent's Television Council, which "gamed" the system by flooding the FCC with form letters, regardless of whether parents truly found the programming offensive or even watched the show!<sup>285</sup> The FCC could insulate itself further by following normal notice-and-comment rulemaking procedures under 5 U.S.C § 553 (2009).<sup>286</sup>

The Commission should also point out that there is currently no study actually showing that indecency or profanity "harms" children in any appreciable manner.<sup>287</sup> Justice Scalia argues that "[o]ne cannot demand a

283. See, e.g., Hunt, *supra* note 225, at 233 ("Mediaweek reported that the PTC was responsible for 99.8% of all broadcast indecency complaints received in 2003.")

284. *FCC*, 129 S. Ct. at 1811.

285. See *supra* note 225 and accompanying text.

286. See also *FCC*, 129 S. Ct. at 1837 (Breyer, J., concurring) ("Had the FCC used traditional administrative notice-and-comment procedures, the two failures I have just discussed would clearly require a court to vacate the resulting agency decision.") (citation omitted).

287. The Supreme Court held in *Turner Broadcasting System v. FCC* that:

When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the

multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.”<sup>288</sup> He then states, “It is one thing to set aside agency action under the Administrative Procedure Act because of failure to adduce empirical data that can readily be obtained. It is something else to insist upon obtaining the unobtainable.”<sup>289</sup> His argument also cuts the other way. There is no empirical data showing that indecency does not harm children.<sup>290</sup> Even if, as Justice Scalia asserts, “Congress has made the determination that indecent material is harmful to children,”<sup>291</sup> there is no reason that the FCC cannot revert to a prior standard equally unsupported by empirical evidence. The door is open for the new FCC commissioners to use Justice Scalia’s plurality opinion to its fullest extent and change back to the standard that, presumably, comports with constitutional standards set forth in *Pacifica*. In doing so, the Commission can undo the previous Administration’s endeavor into unconstitutional policymaking at the behest of Congress and the Executive.

To top it off, the FCC could return to this policy and still “show its teeth” by taking more consistent action against violators and reforming the way complaints are filed by consumers. Simple changes could avoid much more complicated (and expensive) litigation in the courts and resolve the issue in terms of the consumer empowerment that Chairman Genachowski seems to be pushing.<sup>292</sup>

#### CONCLUSION

The Second and Third Circuits properly concluded that the FCC strayed into uncharted waters when it changed its policy regarding fleeting expletives. Both courts sent a clear message that the Commission’s rulemaking violated the standards agencies must comply with when

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existence of the disease sought to be cured.” It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (citation omitted); *see also* Holohan, *supra* note 88, at 364 (“Recent decisions, however, have emphasized the significance of showing actual harm to children in justifying restrictions on expression.”).

288. *FCC*, 129 S. Ct. at 1813.

289. *Id.* (internal citation omitted).

290. *Id.*

291. *Id.*

292. *Rethinking the Children’s Television Act for a Digital Media Age Before the S. Comm. on Commerce, Science & Transportation*, 111th Cong. (statement of Julius Genachowski, Chairman, FCC). “Third, the importance of empowering parents. Parents should have access to a full range of information and tools in exercising their essential responsibilities.” *Id.*

changing longstanding policy. Specifically, the FCC failed to give a reasoned analysis that did not reek of congressional and executive influence. There is much evidence that the FCC, especially during the tenure of Commissioner Powell, was pushed to implement a standard of decency that directly conflicted with constitutional mandates regarding freedom of speech. Even in the face of the Supreme Court's decision, both circuits properly interpreted the cases using administrative law grounds and avoided constitutional questions that are better reserved for a higher court.

The courts' use of section 706(2)(A) was particularly compelling because it showed the Commission that acting in an arbitrary and capricious manner would not be tolerated. Both courts used the longstanding *State Farm* case, embodying the hard look doctrine that courts must take when looking at informal agency policymaking actions. This revealed that the FCC's proffered rationale for the change in policy was not connected in any meaningful manner to the drastic measure of changing a principle rooted in the *Pacifica* case three decades earlier. In doing so, both courts correctly reserved any decision on First Amendment grounds for the Supreme Court, where such a decision would be more meaningful and sweeping.

The Bush Administration placed the courts in an unacceptable position by forcing the FCC into an untenable constitutional conundrum. Luckily, the Second and Third Circuits decided the fleeting expletives cases without pushing the First Amendment issue. The new FCC can return to its pre-Bush Era policy regarding fleeting expletives in order to relieve the pressure on the courts, and can even do so using recent Supreme Court precedent to reverse course without being subjected to a more searching standard. President Obama's choice of Julius Genachowski strongly indicates that the new Administration will look to reverse course regarding fleeting expletives and indecency, and return to the constitutionally acceptable standards proffered in the *Pacifica* decision. In doing so, the Obama Administration will not be pushing its own agenda but simply returning to past precedent—a precedent that controlled the broadcast industry for many years with little controversy.

—Albert W. Vanderlaan<sup>\*†</sup>

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\* J.D. candidate 2010, Vermont Law School; B.A., *magna cum laude*, 2007, Union College.

† I would like to thank Professor Cheryl Hanna for her advice and guidance throughout the research and writing process. I would also like to thank my mother for her love and support throughout my education. Finally, this Note is dedicated to the memory of my loving father, William Albert Vanderlaan.

