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FCC V. FOX TELEVISION STATIONS, INC.: TOWARDS AN EVEN MORE DEFERENTIAL JUDICIARY?

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FCC v. Fox Television Stations, Inc.: Towards an Even More Deferential Judiciary?
By Alan W. Moe¹

Abstract

Censorship has always been a polemical area of constitutional law. The controversy is further amplified when administrative agencies deal with sensitive areas of constitutional liberties. In FCC v. Fox Television Stations, Inc., 129 S.Ct. 1800, 1807 (2009), the U.S. Supreme Court dealt with an important issue of constitutional law and its intersection with the standard of judicial review for administrative agencies’ actions. In this case, the Court upheld the Federal Communications Commission’s about-face on its relatively conservative approach to the censorship of broadcasts for reasons of indecency in 2004. The FCC applied against Fox Television Stations its new policy of censorship that allowed single, “foul” words, or fleeting expletives, to be sanctioned. The FCC ignored important issues of constitutional law, the impact that near-blanket censorship would have on broadcasters—particularly small, local ones—and entertained narrow-minded assumptions about language and American society. Yet, the Court found that this new censorship policy was not arbitrary and capricious under the Administrative Procedure Act. Moreover, in the opinion, Justice A. Scalia wrote of a new standard of review that seems to give even greater deference to the administrative state.

How did the U.S. Supreme Court reach the conclusion that the FCC did not act arbitrarily and capriciously? Under Justice A. Scalia’s reformulated arbitrary and capricious standard of review, has the U.S. Supreme Court become more deferential to agency action?

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Introduction

“It seems really as though Old Hegel, in the guise of the World Spirit, were directing history from the grave and, with the greatest consciousness, causing everything to be re-enacted twice over, once as grand tragedy and the second time as farce . . . .”²

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The Federal Communications Commission (FCC) for the past 30 years has adhered to a relatively reserved approach in regulating indecent language on the airwaves.\(^3\) Obscene language could be censored in any context as it lied outside the protections of the First Amendment.\(^4\) However, following the U.S. Supreme Court’s fact-confined decision in 1978 *FCC v. Pacifica*—bearing on whether the FCC could also censor merely indecent language—the FCC limited its censorship of indecent language to a list of seven words.\(^5\) Later, the FCC adopted a contextual and bifurcated indecency policy where, particularly, a single utterance of an offensive word without a direct prurient appeal was generally not actionable.\(^6\) This ‘fleeting expletive’ rule seems to have been derived from two important concerns.\(^7\) This first concern was that censoring single utterances of foul words was particularly difficult given technological and cost burdens, particularly in regards to live coverage and local broadcasters. The second concern was the fundamental clash between the U.S. Constitution and subjective censorship of speech.\(^8\)

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\(^4\) The seminal case on this proposition in *Miller v. California*, but the Federal Communications Act does give the FCC statutory authority to regulate “obscene” broadcasts. See id. at 761, n.14 (citing Miller v. California, 413 U.S. 15, 36 (1973)) (noting that ‘obscene’ material lies outside of any First Amendment free-speech protections). The decision in *Miller v. California* also set up a 3 prong test for obscenity:

(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

*Miller*, 413 U.S. at 24. The Federal Communications Act provides in pertinent part that: ‘Whoever utter any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.’ 18 U.S.C. §1464 (2006).


\(^6\) See FCC v. Fox, 129 S.Ct. 1807 (noting that for non-expletive use of foul language there must be “deliberative and repetitve use”).

\(^7\) See id. at 1827–1828 (Stevens, J., dissenting) (noting that the FCC recognized the policy split between expletives and obscene language out of concern for the first amendment right of free speech).

\(^8\) Id.
Under the Bush Administration, however, the FCC abruptly changed policy and held all indecent language actionable.\(^9\) In 2006, the FCC had taken action against Fox Television Stations for airing, live, two awards ceremonies: one in which the word “Fuck” appeared once, and the other in which “shit” and “fuck” appeared each once.\(^10\) This was an about-face, as for the previous 30 years the FCC did not generally find single use of a non-literal expletive in a broadcast actionably indecent.\(^11\) However, during the last term of the U.S. Supreme Court in 2009, a majority of justices upheld this new policy in *FCC v. Fox*, and reversed the Court of Appeals’ finding that the policy change on indecency was arbitrary and capricious under the APA for its failure to examine the relevant facts and formulate a rational connection between its incomplete fact set and the new policy.\(^12\) Essentially, the court permitted the FCC to civilly, and possibly criminally, sanction a even a small, local broadcaster for airing a single expletive, even if a random expletive during live coverage that has no direct appeal or reference to sex or excrement.\(^13\) In its decision, the U.S. Supreme Court ignored important constitutional issues, mischaracterized the jurisprudence on the Administrative Procedure Act’s (APA) control of federal agencies, and relied on small-minded, provincial assumptions to whisk away important factual concerns over censorship’s impact on the media and free speech.\(^14\)

\(^9\) *Id.* at 1808–1809.
\(^10\) *FCC v. Fox*, 129 S.Ct. at 1808–1809. It should be noted that in the first broadcast, “fuck” undoubtedly was used in a nonliteral sense (i.e. a fleeting expletive). In the second broadcast, the word “fuck” also appeared in a nonliteral sense, but the word “shit” appeared in a literal sense. *Id.*
\(^11\) *See id.* at 1807–1808 (detailing the evolution of the FCC’s indecency policy).
\(^12\) *Id.* at 1806–1819; *see also* Administrative Procedure Act, 5 U.S.C. §706(2)(A) (2006) (giving statutory authority to federal courts to review federal agency actions, findings and conclusions and set these aforementioned aside if “[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); *see also* Fox Television Stations, Inc. v. FCC, 489 F.3d 444 (2d Cir. 2007) (3-1 decision) (Court of Appeals decision vacating the FCC findings and holding that the FCC’s change in policy was arbitrary and capricious).
\(^13\) *Id.* at 1836–1838 (Breyer, J., dissenting) (noting that local broadcasters still cannot afford censoring technology, and thus the new FCC will greatly impact their coverage of important, local events).
\(^14\) *See id.* at 1829–1841 (Breyer, J., dissenting) (noting appropriate standard under the APA for reviewing an agency’s actions for arbitrariness and capriciousness; noting the failure of the FCC to consider all relevant factors, particularly free speech concerns and the effect on local broadcasters of the new rule; noting the absurdity in assuming that any foul word that began with a sexual origin today has an overriding sexual connotation, especially in light of the given context).
Justice Scalia, writing for the majority, asserted that the standard of review under the APA for an allegedly arbitrary and capricious action is “narrow” and that the agency merely had to “examine the relevant data and articulate a satisfactory explanation for its action.”  

Scalia noted that an agency, changing its policy, is not subject to a higher standard of review than when initially taking policy action; there must merely be “good reasons [emphasis added]” for its new policy.  

Under this standard of review, in FCC v. Fox the majority justices easily found that the FCC fulfilled its statutory obligations under the APA: the FCC acknowledged the policy change; the FCC rationally based this change on the offensiveness of even singly uttered expletives; the FCC furthermore rationally based the policy change on the allegedly inherent sexual and/or excremental nature of even non-literal expletives; the FCC noted that bleeping technology costs less today than previously; and, finally, the FCC noted that allowing single use of expletives creates a “safe harbour” for broadcasting indecent words.

The U.S. Supreme Court in FCC v. Fox not only authorized a vast expansion of the FCC’s powers of censorship, but it also inappropriately narrowed the arbitrary and capricious standard of review in the APA, as articulated in Motor Vehicle Manufacturers Association of the U.S., Inc. v. State Farm Mutual Automobile Insurance Company and Citizens to Preserve Overton Park v. Volpe.  

This article contends that the majority erred when it found that the FCC had not acted arbitrarily and capriciously, principally by mischaracterizing the standard of review for federal agency action under the APA and State Farm, disregarding important constitutional issues of free speech present since the creation of the FCC in 1934, and using

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15 FCC v. Fox, 129 S.Ct. at 1810.
16 Id. at 1809–1812.
17 Id. at 1812–1813; see also APA, 5 U.S.C. §706(2)(A) (statutory obligation for agencies to not act arbitrarily and capriciously.
18 463 U.S. 29 (1983) (hereinafter referred to as “State Farm”); see also 401 U.S. 402 (hereinafter referred to as “Overton Park”).
narrow-minded assumptions about language and class that are inappropriate for the diverse
country that is the U.S. 19

Prior Law

Indecency

The FCC’s *ex post facto* censoring of the airwaves for purportedly socially
unacceptable language is found in a mix of federal legislation and court decisions.20 The
Federal Communications Act of 1934 established the Federal Communications Commission
(FCC), and conferred on it the power to issue broadcast licenses and apply certain conditions
to these licenses.21 One of the “public obligations” in accepting a license as a broadcaster is
the prohibition of airing obscene, indecent, or profane language.22 The Federal
Communications Act, in particular, prohibits “utter[ing] any obscene, indecent, or profane
language by means of radio communication.”23 The FCC may issue a warning, revoke a
license, refuse to renew a license or fine a broadcaster for “indecent language,” civilly fine the
broadcaster, or imprison the violator for up to 2 years.24 Under the Public

19 FCC v. Fox, 129 S.Ct. at 1833 (Breyer, J., dissenting). Justice Breyer noted that in *FCC v. Pacifica*, Justice
Powell’s concurrence made clear that the narrowness of the *Pacifica* holding was due to the delicacy of
authorizing censorship, while treading against a constitutional line of free speech. Moreover,

[T]he FCC subsequently [after *Pacifica* in 1978] made clear that it thought that Justice Powell’s
concurrence set forth a constitutional line that its indecency policy should embody. In 1978, the
Commission wrote that the First Amendment “severely limit[s]” the Commission’s role in regulating
indecency. It added that the Court, in *Pacifica*, had “relied…on the repetitive occurrence of the
‘indecent’ words in question.” And it said that, in setting policy, it “intend[ed] strictly to observe the
narrowness of the *Pacifica* holding.”

20 In the Matter of Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and
Indecency Guidance”).

24 FCC Indecency Guidance, 16 F.C.C.R. at 7999 (citing 47 U.S.C. §§312(a)(6) & 503(b)(1)(D) (2006)); *see also*
Telecommunications Act of 1992, Congress has directed that the ban on indecent language apply from 6 a.m. to 10 p.m.\(^\text{25}\)

The U.S. Supreme Court has refined the FCC’s censorship powers under the Federal Communications Act in light of free speech concerns.\(^\text{26}\) In *Miller v. California*, the U.S. Supreme Court held that “obscene” language falls outside First Amendment free speech protections, and thus the FCC can generally prohibit the broadcast of such speech at any time.\(^\text{27}\) However, indecent speech—foul words without a direct appeal to sex or excrement—benefits from First Amendment protections, and the FCC must identify a compelling government interest for the censoring of such language; and the FCC must choose the least restrictive means.\(^\text{28}\) Nevertheless, despite the pretty phrases, the U.S. Supreme Court has been very deferential to the FCC’s censoring of the airwaves, as evidenced by the *FCC v. Fox* decision.\(^\text{29}\)

Until *FCC v. Fox*, *FCC v. Pacifica* provided the “judicial foundation” for the FCC’s indecency policy.\(^\text{30}\) In *FCC v. Pacifica*, the U.S. Supreme Court upheld the constitutionality of censoring broadcasts on the grounds of indecency.\(^\text{31}\) This case involved a challenge to the FCC’s censorship of the afternoon radio broadcast of George Carlin’s infamous and rather funny “Filthy Words” monologue that critiqued middle-class squeamishness over ‘foul’

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\(^{26}\) FCC Indecency Guidance, 16 F.C.C.R. at 7999.

\(^{27}\) Id. (citing Miller v. California, 413 U.S. 15, 24 (1973)). *Miller v. California* set up a three part test for what the designation “obscene” may cover:

1. an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest;
2. the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and
3. the material, taken as a whole, must lack serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. at 24.

\(^{28}\) Id. (citing Sable v. FCC, 492 U.S. 115, 126 (1989)).

\(^{29}\) Id. at 8000; *see also generally* FCC v. Fox, 129 S.Ct. at 1805–1824.

\(^{30}\) FCC Indecency Guidance, 16 F.C.C.R. at 8000; *see also* FCC v. Fox, 129 S.Ct. at 1805–1824.

\(^{31}\) Id.
language by highlighting the ‘seven words’ one cannot say on the air.\textsuperscript{32} The court held that the FCC could regulate language that was merely indecent, and not obscene; and such regulation was within the intent of the Federal Communications Act and did not per se violate First Amendment free speech rights.\textsuperscript{33} Having endorsed censorship for indecency, the court expounded on what might constitute indecency: “[p]atently offensive sexual and excretory language.”\textsuperscript{34} However, although the Supreme Court agreed that the broadcast in question was indecent under the Federal Communications Act, it ‘boxed in’ its holding in \textit{FCC v. Pacifica} by expressly narrowing the holding to the specific facts of the case, and refusing to create rules to be applied to hypothetically indecent speech.\textsuperscript{35} Importantly, the majority held that, “although [indecent] words ordinarily lack literary, political, or scientific value, they are not entirely outside the protections of the First Amendment. Some uses of even the most offensive words are unquestionably protected…Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.”\textsuperscript{36}

The FCC—noting the context-based and fact-specific approach of the U.S. Supreme Court in \textit{FCC v. Pacifica}—first adopted a policy in 1978 stipulating that for foul language to be actionably indecent under the Federal Communications Act, it must involve the seven words identified in \textit{FCC v. Pacifica} and the words must be used repetitively and deliberately.\textsuperscript{37} The FCC eventually expanded, somewhat, the language that was actionably indecent, creating a bifurcated enforcement policy: offensive words that literally evoke sex or excrement (i.e. “obsence”) and non-literal “foul” words that do not directly evoke sex or

\textsuperscript{32} 438 U.S. 726 (1978).
\textsuperscript{33} Id. at 726–750.
\textsuperscript{34} Id. at 747.
\textsuperscript{35} Id. at 750; see also 18 U.S.C. §1464.
\textsuperscript{36} Id. at 748.
\textsuperscript{37} FCC v. Fox, 129 S.Ct. at 1807; see also 18 U.S.C. §1464.
excrement (i.e. expletives). Mere single use of offensive language that evoked sex or excrement could be actionably indecent, but the FCC had to look at the “context” to determine if it was indeed patently offensive, or against prevailing standards of morality. However, for expletives to be actionably indecent, these non-literal “foul” words had to be used in a repetitive and deliberate manner, and even then the FCC would emphasize the context of the use, such as explicitness, dwelling on sexual or excretory reference, and whether the material was presented for its shock value.

**Standard of Review**

The APA provides that federal agency actions can be set aside if such actions are “arbitrary and capricious.” The seminal case on the standard of review under the APA for arbitrariness and capriciousness is *State Farm.* In *State Farm,* the U.S. Supreme Court held that:

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” . . . 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 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 produce

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38 Id.
40 FCC v. Fox, 129 S.Ct. at 1807; see also FCC Indecency Guidance, 16 F.C.C.R. at 8003, ¶4.
of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies.\textsuperscript{43}

Importantly, in \textit{State Farm}, the court applied this standard to a case involving a federal agency that had \textit{changed} a previous policy it had implemented.\textsuperscript{44}

In \textit{FCC v. Fox}, a case also involving a federal agency that \textit{changed} policy, Justice Scalia, writing for the majority, rewrites the standard of review, stating that federal agency action under §706(2)(A) review for arbitrariness and capriciousness will be upheld if:

\begin{quote}
[T]he new policy is permissible under the statute . . . \textit{there are good reasons for [the new policy], and that the agency believes it to be better} [emphasis added], which the conscious change of course adequately indicates.\textsuperscript{45}
\end{quote}

Justice Scalia additionally maintains that when a federal agency changes policy, the standard of review is the same as that of an agency that initially adopts (or fails to adopt) policy.\textsuperscript{46} There is no heightened standard of review for agencies changing policy.\textsuperscript{47}

\textbf{Background}

In 2004, the FCC changed its indecency policy in the \textit{Golden Globes} order and stated that from then onwards, the FCC could civilly, and possibly criminally sanction, a broadcaster who airs even a single indecent word, with or without a direct appeal to sex or excrement.\textsuperscript{48}

Applying this new policy, in 2006 the FCC issued a final adjudicatory order against Fox

\begin{footnotesize}
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\item \textsuperscript{43} \textit{Id.} at 43. \textit{Overton Park} originally used much of the same language as \textit{State Farm}. \textit{Overton Park}, 401 U.S. at 823–824. Like \textit{FCC v. Fox}, \textit{Overton Park} involved an informal adjudication, whereas \textit{State Farm} involved informal rulemaking; nevertheless, \textit{State Farm} is a later case and provides more language, therefore, \textit{State Farm} will primarily be treated in this article. \textit{State Farm}, 463 U.S. at 43.
\item \textsuperscript{44} \textit{Id.} at 35–38.
\item \textsuperscript{45} \textit{FCC v. Fox}, 129 S.Ct. at 1811.
\item \textsuperscript{46} \textit{Id.} at 1810.
\item \textsuperscript{47} \textit{Id.} at 1810.
\item \textsuperscript{48} See \textit{id.} at 1807 (citing In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, 4976, n. 4, 2004 WL 540339 (2004) (hereinafter referred to as the “Golden Globes Order”); \textit{see also} 18 U.S.C. §1464 (2006) (providing that whoever utter indecent language can be fined or imprisoned for up to 2 years).
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Television Stations, Inc. (Fox) for purportedly broadcasting indecent content in 2002 and 2003. This final adjudicatory order became the object of the present controversy.

Fox broadcasts the Billboard Music Awards.  In 2002, during its live broadcast between the hours of 8 p.m. and 10 p.m., the singer and entertainer Cher won such an award. In her acceptance speech, Cher exclaimed, “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f[uck] ‘em.” In 2003, during Fox’s broadcast of the Billboard Music Awards, again between the hours of 8 p.m. and 10 p.m., Nicole Richie and Paris Hilton were presenting an award together. Ms. Hilton reminded Ms. Richie to watch the bad language, at which point Ms. Richie proceeded to ask the audience, “Why do they call it ‘The Simple Life?’ [the show on which both Ms. Richie and Ms. Hilton appeared] Have you ever tried to get cow s[hit] out of a Prada purse? It’s not so f[uck]ing simple.”

The FCC immediately began receiving many complaints for the alleged indecent language in 2002 and 2003. On March 15, 2006, the FCC released Notices of Apparent Liability for the above mentioned Fox broadcasts. The FCC found both broadcasts to be indecent, under both the new standard that sanctions fleeting expletives, and the old

49 See In the Matters of Complaints Regarding Various Television Broadcasting Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 13299, 13301 (Nov. 6, 2006) (hereinafter “Original Order Against Fox”); see also FCC Industry Guidance, 16 F.C.C.R. at 8015–8025 (setting forth the enforcement process, including right to hearing for a broadcaster accused of airing indecent material); see also FCC v. Pacifica Foundation, 438 U.S. at 734 (holding that the FCC’s memoranda opinions sanctioning violations of indecency policy are adjudications within the meaning of 5 U.S.C. §554(e) despite statements of opinion & policy within these opinions as they do not specifically engage in rulemaking).

50 See FCC v. Fox, 129 S.Ct. at 1808–1809 (detailing the FCC’s action against Fox Television Stations for the alleged infractions).

51 FCC v. Fox, 129 S.Ct. at 1808.

52 Id.

53 Id.

54 Id.

55 Id.

56 Id.

57 In the Matters of Complaints Regarding Various Television Broadcasting Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664, 2664 (2006) (hereinafter referred to as “Final Adjudicatory Order”). Note that this order contained complaints against many broadcasters, therefore, there were many parties to the order, not just Fox. Id.
The FCC asserted that the Cher-2002 broadcast was actionable under the old standard; the FCC essentially imputed obscenity to Cher’s speech by stating that the word “fuck” is always used in a literal sense because the power to insult comes from the sexual meaning, and the old standard provided for sanctioning of the single use of foul language literally related to sex or excrement. The FCC also asserted that under the old standard the Hilton-Ritchie dialogue in 2003 was indecent because “shit” was used literally and even if “fucking” was not used literally, there was more than one foul word in the same broadcast (the fleeting expletive rule). The FCC’s order then asserted that the broadcasts were offensive under the new standard, and even asserted that the new standard was not new as the fleeting expletive rule only occurred in “dicta” in previous FCC decisions.

However, because Fox aired the content before the Golden Globes Order, the FCC declined to seek any forfeiture from Fox. Nevertheless, several parties petitioned the Court of Appeals, challenging the constitutionality and statutory basis of the first FCC order, and requested a remand so that the parties could air their objections—an opportunity the FCC did not afford them before issuing the first order. The Court of Appeals remanded the affair to the FCC. On November 6, 2006, in its final adjudicatory order, the FCC again found that both of the broadcasts were indecent, but again withheld sanction because Fox did not have

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58 See FCC v. Fox, 129 S.Ct. at 1809–1810 (detailing the FCC’s reasoning).
59 See id.
60 See id.
61 Id. at 1809.
62 Id.; see also Golden Globes Order, 19 F.C.C.R. at 4975. The Golden Globes Order established for the first time that the FCC intended to abandon its fleeting expletives policy. See generally id. However, because Fox’s broadcasts occurred in 2002 and 2003, the FCC declined to seek any forfeiture (fines, license, etc.) from Fox (presumably because this would raise a constitutional due process issue). See In the Matters of Complaints Regarding Various Television Broadcasting Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. at 13301.
63 Id. at 13301–13302; see also FCC Industry Guidance, 16 F.C.C.R. at 8015–8025 (setting forth the enforcement process, particularly that the FCC acts on complaints by individuals, and that once the FCC has investigated and determined a possible indecent broadcast, before a fine or forfeiture is issued through a Notice of Apparent Liability, the accused will have the right to a hearing before the FCC).
64 In the Matters of Complaints Regarding Various Television Broadcasting Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. at 13302, n.2.
notice of the *Golden Globes Order* and the reversal of the fleeting expletive policy found in that order.\textsuperscript{65}

Fox promptly appealed the final adjudicatory order, and asserted that the FCC’s actions were arbitrary and capricious under the APA because the change in fleeting expletive policy “[r]epresent[ed] a dramatic change in agency policy without adequate explanation.”\textsuperscript{66} The Court of Appeals found that FCC’s actions were indeed arbitrary and capricious under the APA as the agency failed to provide a “[r]easoned analysis justifying its departure from the agency’s established practice [of sanctioning one-time use of obscene language, but not single-use of expletives without a direct appeal to sex or excrement].”\textsuperscript{67} The majority reasoned that the agency may be free to change its policy, but it must provide a reasoned basis for the change, just as an agency must provide a reasoned basis for initial agency action.\textsuperscript{68}

First, the Court of Appeals criticized the FCC for failing to explain why it had not banned fleeting expletives in the preceding 30 years because of the alleged danger to children.\textsuperscript{69} Of note, the agency cited protection of children for the reversal of the fleeting expletive rule under the *Golden Globes Order*, but had used the same reason, protection of children combined with freedom of speech concerns, to justify its previous 30 year precedent on why single utterances of non-literal foul words should go un-punished.\textsuperscript{70} If the FCC was so concerned with the harm of foul language to children (the first blow theory), then it should have categorically banned all indecent language, and not made an exception for fleeting

\textsuperscript{65} FCC v. Fox, 129 S.Ct. at 1808.

\textsuperscript{66} Fox v. FCC, 489 F.3d at 454; see also FCC v. Fox, 129 S.Ct. at 1810; see also APA, 5 U.S.C. §706(2)(A) (federal courts can vacate federal agency action that is arbitrary and capricious). It should be noted that when a court reviews an agency’s actions for being arbitrary or capricious under the APA (5 U.S.C. §706(2)(A)), the court generally will only look at the justifications provided by the agency for its action at the time of the action and not post hoc rationalizations at bar. Fox v. FCC, 489 F.3d at 457 (citing State Farm, 463 U.S. at 50).

\textsuperscript{67} Fox v. FCC, 489 F.3d at 462.

\textsuperscript{68} See id. at 461 (citing State Farm, 463 U.S. at 42) (noting that the FCC must explain why it changed policy, yet remains free to change policy).

\textsuperscript{69} Id. at 458.

\textsuperscript{70} Id.
expletives for 30 years.\(^\text{71}\) Second, the majority found insufficient the FCC’s assertion that there is fundamentally no difference between literal and non-literal use of ‘foul’ language—that is, the non-literal use of a swear word, as in “Oh shit!” is apparently the same as the literal use of a swear word, as in “Fuck me!”\(^\text{72}\) As the majority notes, it is not a difference of opinion on whether expletives are equivalent to words with a direct prurient appeal; the evidence is overwhelming on the dichotomy.\(^\text{73}\) Finally, the court rebuked the FCC for reasoning that the fleeting expletive rule would lead to an increase of foul language, noting that in its final order against Fox, the FCC admitted that there has not been an increase use of single expletives on the airwaves because of the fleeting expletive policy.\(^\text{74}\) Essentially, for the majority there was a fundamental disconnect between the proffered rationale and the actual policy implemented by the FCC.\(^\text{75}\) The FCC, undoubtedly under significant political pressure, appealed the decision to the U.S. Supreme Court.

The dissenting judge in Fox v. FCC would have upheld the FCC’s policy change as not being arbitrary and capricious under the APA.\(^\text{76}\) The dissent adopted a significantly more deferential standard of review under 5 U.S.C. §706(2)(A), emphasizing that the court will defer to agency actions resulting in policy changes as long as there is “sensible,” and not necessarily “compelling,” reason for the change.\(^\text{77}\) In regards to the justification the agency gave for the change in policy, the dissent found there was no disconnect between the agency’s

\(^{71}\) See id.


\(^{73}\) Id., n.10.

\(^{74}\) Id. at 460 (citing In the Matters of Complaints Regarding Various Television Broadcasting Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. at 13310, ¶29).

\(^{75}\) Id. at 459, n.8.

\(^{76}\) Id. at 467 (Leval, J., dissenting); see also APA, 5 U.S.C. §706(2)(A).

\(^{77}\) Id. at 469–470 (Leval, J., dissenting).
underlying rationale and the facts at hand. The minority whole-heartedly accepted the agency’s assertion that the word “fuck” can only be used in a literal sense because it is so offensive. The minority also seemed to believe that censoring any expletive is legitimate on the agency’s part because the agency used a context based approach and provided for some exceptions, such as for interviews or news broadcasts. The minority also refused to acknowledge that the agency’s reasoning for the policy change, that the fleeting expletives rule provides for a “safe harbor,” is invalid as there has been no consequential increase in their use; instead, the minority asserted that the court should defer to the agency.

The FCC appealed to the U.S. Supreme Court, which reversed the Court of Appeals’ decision in FCC v. Fox, but upon a slightly different basis from that of the dissent in Fox v. FCC. Justice Scalia, writing for the majority (except as to his 4 page mischaracterization of the dissenters’ arguments in Part III-E), hangs his rhetorical hat on rewording the standard of review in State Farm, advocating great deference to federal agency actions by the courts, at least in the case of censorship. Justice Scalia asserts that a federal court should uphold allegedly arbitrary and capricious agency action under the APA as long as the agency consciously makes a change in policy, gives good reasons for the change, and believes the policy to be better than the old, revised one. The majority found the justification that the
FCC gave for its new indecency policy to be sufficient.\textsuperscript{85} The majority concludes that all expletives can be censored as they all involve reference to sex and excrement, even if the speaker does not intend so.\textsuperscript{86} Moreover, the majority accepts the justification that the old fleeting expletive policy provided a “safe harbor” for foul language.\textsuperscript{87} Additionally, the majority accepts the FCC’s rationale that technological advances have made the new rule less burdensome to broadcasters, and dismisses any concerns for the burden on local broadcasters covering local events by asserting that surely small-town folk do not swear, unlike those in the city.\textsuperscript{88} Finally, the majority accepts the FCC’s assertion that the fleeting expletive rule imperilled the well-being of children, subjecting them to a “first blow.”\textsuperscript{89} The majority finds little reason to address any constitutional issues present in previous censorship cases, and instead dismisses any constitutional issue underlying the FCC’s policy as not being necessary to the outcome of the case.\textsuperscript{90}

Justice Thomas surprisingly writes an interesting concurrence where he agrees with the outcome of the case under the APA, but rejects the basis for censoring broadcasters’ materials.\textsuperscript{91} Particularly, Thomas points out that the basis for originally allowing the censorship of broadcasters was that broadcast frequencies were limited and that broadcasting was pervasive.\textsuperscript{92} Thomas asserts that the facts have changed, there is not such a limited availability of frequencies \textit{and} broadcasting is not so pervasive today given technological advances.\textsuperscript{93}

\textsuperscript{85}\textit{Id.} at 1812.
\textsuperscript{86}\textit{Id.}
\textsuperscript{87}\textit{Id.} at 1813.
\textsuperscript{88} See \textit{id} (for the assertion that technological advances have made censoring less burdensome); \textit{see also id.} at 1818 (for the assertion that small-town folk do not swear like big city folk).
\textsuperscript{89} \textit{Id.} at 1812.
\textsuperscript{90} \textit{Id.} at 1811. The majority invokes the well-known canon of construction known as the “Ashwander Principle.”
\textsuperscript{91} See \textit{id.} at 1819–1822 (Thomas, J., concurring).
\textsuperscript{92} \textit{Id.} at 1821–1822 (Thomas, J., concurring).
\textsuperscript{93} \textit{Id.}
Justice Kennedy writes a concurrence in which he agrees with the outcome, but instead agrees with the dissent on the proper standard of review for federal agencies’ actions under 5 U.S.C. §706(2)(A). Kennedy agrees with the minority that when an agency changes its policy, it must explain why it changed the policy, and account for the underlying facts and previous rationale. Essentially, he rejects Scalia’s mischaracterization of the minority as requiring a dual standard of review where initial action is subject to a lower standard of review than subsequent changes in policy. Kennedy points out that an agency may be required to explain why it changed policy as this comports with the general standard under the APA (5 U.S.C. §706(2)(A)) that an agency must formulate policy that marries rationale for the policy with the underlying observed facts. However, in the end, Kennedy agrees with the majority as he contends that the FCC when originally formulating its fleeting expletive policy did not rely on factual findings, and therefore, the level of scrutiny by the court must be lower.

Justice Stevens writes a dissent, agreeing with the minority opinion as written by Justice Breyer, but points out that there are two large flaws in the majority’s reasoning. First, Stevens remarks that in no circumstance is a federal agency allowed to discard former policy without justifying this policy, as the majority’s deferential opinion seems to imply. Secondly, Stevens objects to the majority’s implication that FCC v. Pacifica gave a blanket authorization to the FCC to censor “indecent” language. He points out that the majority in FCC v. Pacifica decided that, given the facts at hand, the FCC had the power to censor

94 Id. at 1822–1824 (Kennedy, J., concurring).
95 Id. at 1822 (Kennedy, J., concurring).
96 See id. at 1817 (for the assertion by Scalia that the minority wants “heightened scrutiny” for agencies when they change policy course).
97 Id. at 1823–1824 (Kennedy, J., concurring) (citing Overton Park, 401 U.S. at 416; citing also State Farm, 463 U.S. at 19; citing also the APA, 5 U.S.C. §706(2)(A) (2006)).
98 See id. at 1824 (Kennedy, J., concurring) (contending that the present case does not involve the same situation where the agency relied on factual findings as in State Farm).
99 Id. at 1824 (Stevens, J., dissenting).
100 Id. at 1825–1826 (Stevens, J., dissenting).
101 Id. at 1826–1828 (Stevens, J., dissenting).
indecent materials containing foul words repeating *ad nauseam*; however, the majority did not address the issue of whether the FCC could censor one, sole foul word.\(^{102}\)

Justice Ginsburg writes a dissent, agreeing with the minority opinion as written by Justice Breyer, but asserts independently that despite Justice Scalia’s invocation of the Ashwander principle in the majority opinion to obfuscate the inevitable clash between the U.S. Constitution and censorship, the court and the FCC cannot escape the “long shadow” of the First Amendment.\(^{103}\) Like Justice Stevens, Justice Ginsburg asserts that *FCC v. Pacifica* was a decision that turned largely on the facts present: a radio broadcast containing dozens of expletives.\(^{104}\) Justice Ginsburg also attacks the FCC’s rationale that single expletives, foul words that do not directly refer to sex or excrement, can be censored as obscene language directly referring to sex or excrement because these single expletives may at one point in the past have had a sexual or excretory meaning.\(^{105}\)

Justice Breyer writes the cogent opinion for the minority.\(^{106}\) First, Breyer takes issue with Scalia’s mischaracterization of the minority opinion as requiring a dual review standard under the APA for initial agency action versus changes in policy.\(^{107}\) He points out that under the APA’s arbitrary and capricious standard of review, a federal agency must engage in a “process” whereby it makes policy after having considered the relevant factors and any readily quantifiable facts.\(^{108}\) An agency must rationalize the adoption of a policy after having analyzed the relevant facts, and a failure to do so would constitute arbitrary agency action under the APA.\(^{109}\) This standard implies that when an agency does change policy, it must explain whether the relevant facts or factors have changed, or have not changed, and why it

\(^{102}\) Id. at 1826–1827 (Stevens, J., dissenting) (citing *FCC v. Pacifica*, 438 U.S. at 740).

\(^{103}\) Id. at 1828 (Ginsburg, J., dissenting).

\(^{104}\) Id. at 1829 (Ginsburg, J., dissenting).

\(^{105}\) Id. at 1828–1829 (Ginsburg, J., dissenting).

\(^{106}\) Id. at 1829–1841 (Breyer, J., dissenting).

\(^{107}\) Id. at 1829–1832 (Breyer, J., dissenting).

\(^{108}\) Id. at 1830 (Breyer, J., dissenting).

\(^{109}\) Id.
adopted the new policy given the new situation.\textsuperscript{110} Contrary to what the majority asserts, this standard does not mean that there are different standards for initial policy action and changing policy, merely that when an agency does change policy, it has to account for the relevant factors, and one of these relevant factors is why the policy change is necessary.\textsuperscript{111} Breyer quotes the standard laid out in \textit{State Farm} for arbitrary and capricious actions under the APA: “[w]hether the agency had ‘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 produce of agency expertise.’”\textsuperscript{112} Secondly, given the aforementioned standard, Breyer concludes that the FCC’s change of policy, given its justification, is arbitrary and capricious under the APA because the FCC failed to address and reason through the known factors or facts underlying the FCC’s conservative 30-year indecency policy, and necessarily failed to rationally connect the facts to its policy conclusions.\textsuperscript{113} Particularly, the FCC for 30 years adhered to a relatively conservative fleeting expletive rule for fear of treading to close to the constitutional line, yet under the Bush administration when changing policy, the FCC did not even address this important factor.\textsuperscript{114} Moreover, the FCC failed to address the burden on local broadcasters in its new policy, merely saying that the technology is cheaper today.\textsuperscript{115} The minority objects to the FCC’s assertion that its new ‘context’ based approach, punishing even one foul word broadcasted, is sufficient assurance to local broadcasters.\textsuperscript{116} Additionally, the minority rejects the FCC’s conclusion that single expletives are functionally equivalent to obscene language.\textsuperscript{117} The minority disagrees with the FCC’s assertion that the concern for children justifies the new

\begin{enumerate}
\item Id.
\item Id. at 1831 (Breyer, J., dissenting).
\item Id. at 1832 (Breyer, J., dissenting) (citing \textit{State Farm}, 463 U.S. at 43).
\item Id. at 1833–1835 (Breyer, J., dissenting).
\item Id. at 1834 (Breyer, J., dissenting).
\item Id. at 1835–1836 (Breyer, J., dissenting).
\item Id. at 1837 (Breyer, J., dissenting).
\item Id. at 1838 (Breyer, J., dissenting).
\end{enumerate}
policy: this was the justification under the 30-year policy, and the FCC fails to explain how this has changed to justify a new policy. Furthermore, the FCC cites “safe harbor” concerns in the fleeting expletive policy, but fails to show how this policy has increased foul language on the airwaves, or that broadcasters are taking advantage of such a rule. Overall, the minority would hold that the FCC’s failure to explain and reason through the facts and factors subjects the new any-expletive-actionable-policy to vacatur and to remand to the agency under the APA.

Discussion

The majority in FCC v. Fox mischaracterized the standard of review in State Farm, interpreting the APA’s arbitrary and capricious standard too narrowly, and subsequently was too deferential to the FCC. It was actually the minority in FCC v. Fox, and to a certain extent the majority in Fox v. FCC, that asserted the appropriate standard and came to the necessary conclusion that the FCC’s policy change was indeed arbitrary and capricious under the APA.

To uphold the FCC’s new policy finding indecency in even the fleeting, accidental broadcast of an indecent expletive—that is to find the FCC’s actions not arbitrary and capricious—Justice Antonin Scalia and the majority warped the standard of review contained in State Farm. The majority cited portions of State Farm, that the standard of review is “narrow” and that an agency must “examine the relevant data and articulate a satisfactory

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118 Id. at 1839 (Breyer, J., dissenting).
119 Id.
120 Id. at 1841 (Breyer, J., dissenting) ; see also APA, 5 U.S.C. §706(2)(A) (containing possibility of agency action vacatur and remand for arbitrariness and capriciousness).
121 See FCC v. Fox, 129 S.Ct. at 1829–1841 (Breyer, J., dissenting); see also Fox v. FCC, 489 F.3d at 446–467; see also 5 U.S.C. §706(2)(A).
122 See generally FCC v. Fox, 129 S.Ct. at 1805–1825 (majority asserting standard of review and that FCC’s actions were not arbitrary and capricious).
explanation for its action.”\textsuperscript{123} However, it forgot a large chunk of information, of very citable material, that comes right after the language it cited in \textit{State Farm}.\textsuperscript{124} Particularly,

\textbf{“[n]ormally, 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 of the produce of agency expertise.”}\textsuperscript{125}

The reviewing court should not attempt itself to make up for such deficiencies.”\textsuperscript{126} In all fairness, the majority in \textit{State Farm} then immediately quotes \textit{Bowman Transp. Inc. v. Arkansas-Best Freight System}, “We will, however, uphold a decision of less than ideal clarity if the agency’s path may be reasonably discerned”\textsuperscript{127} However, this is not sufficient to dilute the searching standard of review laid out before in \textit{State Farm}, and it does little to help the FCC’s case in \textit{FCC v. Fox}.\textsuperscript{128} Justice Scalia essentially creates a new standard of review for 5 U.S.C. §706(2)(A), the APA’s ‘arbitrary and capricious’ control of agency actions: for an agency’s actions to be found not arbitrary and capricious, “[i]t suffices that the agency have knowledge that it is changing a precedent or prior policy, that there are goods reasons and an explanation for the change in policy, and that the agency’s action not be outside of what is permissible under the enabling statute.”\textsuperscript{129} This new standard seems to run counter to the case law since \textit{Overton Park} and \textit{State Farm}—under which the court is willing to significantly

\textsuperscript{123} \textit{Id.} at 1810.
\textsuperscript{124} \textit{State Farm}, 463 U.S. at 43.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}
\textsuperscript{128} \textit{State Farm}, 463 U.S. at 43.
\textsuperscript{129} \textit{FCC v. Fox}, 1811.
analyze an agency’s fact finding and policy conclusions—and inappropriately returns the federal courts to a very deferential position vis-à-vis federal agencies. ¹³⁰

Indeed, it seems that Justice Scalia and maybe the majority are set on modifying, if not eventually overturning, the APA case law, and returning the federal courts to a position of extreme deference to agencies. The “good reasons” standard that Justice Scalia speaks of seems to hark back to the pre-APA case law, such as in Consolidated Edison Co. of N.Y. v. N.L.R.B. where the U.S. Supreme Court upheld federal agency action under the “substantial evidence” standard as long as there was more than a scintilla of evidence, to reasonably support an agency action.¹³¹ ‘Reasonable’ and ‘more than a scintilla’ are, of course, not equivalent to ‘substantial.’ Nevertheless, Justice Kennedy’s concurrence (providing the Vth vote for the majority) takes some of the bite away from Justice Scalia’s new standard when he notes that an agency may be required to explain in detail a change in policy depending on the circumstances, and most importantly the type of data available to the agency.¹³² However, Justice Kennedy does not directly contradict Justice Scalia’s “good reasons” verbiage, and even Justice Scalia notes that much of the court’s review under the arbitrary and capricious standard will turn on the type of data involved, whether hard data or soft data with significant policy decision implicated.¹³³ It is, however, probably necessary to wait for an affirming case to see how durable the “good reasons” standard of Justice Scalia will be.

¹³⁰ State Farm, at 43.
¹³¹ Consolidated Edison Co. of N.Y. v. N.L.R.B., 305 U.S. 197, 217 (1938); see also State Farm, 463 U.S. at 43; see also FCC v. Fox, 129 S.Ct. at 1811. Consolidated Edison involved a challenge by Consolidated Edison and its affiliated companies to the NLRB’s order finding that Consolidated Edison engaged in unfair labor practices and order the company and its affiliates to cease interfering with the rights of their employees to unionize. Part of the challenged rested on the assertion that the NLRB did not base its order on substantial evidence, as required by the enabling statute. See Consolidated Edison, 305 U.S. 216–217.
¹³² See FCC v. Fox, 129 S.Ct. at 1822–1824 (Kennedy, J., concurring) (stating that essentially in this case, given the type of data and the policy decisions involved, the FCC gave an adequate explanation, but that in other cases, the agency may be required to provide a more detailed, factual explanation of a change in pre-existing policy).
¹³³ Id.; see also id. at 1811 (Justice Scalia reasoning that when “facts” change, then more explanation and investigation by the agency may be necessary under the APA’s arbitrary and capricious standard).
Under its new standard, the majority held that the FCC’s actions were not arbitrary and capricious. More precisely, the majority noted that the FCC gave reasons for wanting to change the policy (fleeting expletives rule would increase foul language on air and foul language is harmful to children), and the FCC noted that the distinction between expletives (no direct appeal to sex or excrement) and literal, offensive words (a direct appeal to sex or excrement) was nonsensical because all foul language derives its power to insult and shock from its sexual or excretory nature. In other words, the FCC has “good reasons” and its decision was “reasonable.”

The majority then goes on to criticize the dissent, saying that the dissent is looking for a ‘heightened standard of review’ in all situations where an agency changes policy. The dissent, said Justice Scalia, would create two standards: one for when an agency takes initial action and another for when the agency changes action. This argument is an ignoratio elenchi. The dissent neither asks for a heightened standard of review, nor does it say that the agency must explain why it changed policy in all circumstances. Rather, an agency must provide an explanation of why the change only in those situations where the circumstances, in order to conform with the standard of review set out in State Farm, would require such an explanation (such as when the FCC is dealing with important constitutional issues or reversing a long-standing policy on facts that have not particularly changes). Justice Scalia then blows the straw man away by doing a strict statutory analysis of the APA: 5 U.S.C. §706(2)(A) makes no mention of 2 different standards, nor does the case law.

State Farm can shed some light on the debate whether or not the FCC’s actions were arbitrary and capricious, after all it is the prime precedent on the standard of review, cited
even by Justice Scalia in the majority opinion.\textsuperscript{142} The Department of Transportation is statutorily charged with road safety, a duty for which it has delegated its rule-making authority to the National Highway Traffic Safety Administration (NHTSA).\textsuperscript{143} When former President Reagan came into power and placed his appointees in the federal agencies, the NHTSA rescinded Modified Standard 208, the rule requiring that all new motor vehicles produced after September 1982 be equipped with passive restraints, whether automatic seatbelts or airbags.\textsuperscript{144} The U.S. Supreme Court held that the NHTSA had acted arbitrarily and capriciously in so doing.\textsuperscript{145}

In rescinding the requirement, the NHTSA argued there was no longer a good basis for the passive restraint requirement – automatic seatbelts or airbags – as many automatic seatbelts are detachable, and drivers do detach such seatbelts, and thus the NHTSA could not assure an increase in seatbelt use, nor could it predict a subsequent increase in road safety or a decrease in deaths.\textsuperscript{146} The majority in \textit{State Farm} laid out in clear terms the standard of review, declaring that although the standard was narrow, there still had to be good reasons and a rational connection between the facts presented and the policy conclusion expressed the agency’s disputed action.\textsuperscript{147} In holding the NHTSA’s rescission of Modified Standard 208 arbitrary and capricious, the majority focused in particular on how the NHTSA failed to consider the use of airbags (and making their inclusion mandatory), and how the NHTSA failed to consider the use of automatic seatbelts that are not detachable to give effect to a rule that the NHTSA claimed was no longer valid because unattainable.\textsuperscript{148} The NHTSA

\textsuperscript{142} \textit{Id.} at 1810.
\textsuperscript{143} \textit{State Farm}, 463 U.S. at 34, n.3.
\textsuperscript{144} \textit{Id.} at 38–39.
\textsuperscript{145} \textit{Id.} at 34.
\textsuperscript{146} \textit{Id.} at 38–39.
\textsuperscript{147} \textit{Id.} at 43.
\textsuperscript{148} \textit{Id.} at 46–57.
essentially failed to consider all aspects of the problem, and provided a justification for
rescission that is coherent only if a significant array of facts were ignored.\textsuperscript{149}

The facts in \textit{State Farm} and \textit{FCC v. Fox} exemplify a similar logical problem: Just as
in \textit{State Farm} the NHTSA had available to it empirical data which it ignored, so too in \textit{FCC v. Fox} the FCC failed to consider important aspects of the situation before it.\textsuperscript{150} The FCC failed to gather readily available empirical facts for some of the assertions used to justify changing policy (such as the increase in foul language on the air since the agency’s fleeting expletive rule in 1978, or the impact of the new rule on local broadcasters).\textsuperscript{151} The majority in \textit{FCC v. Fox} unfortunately glosses over these analytical deficiencies, and relies on a much less
demanding standard of review that is really not found in the cases it cites, particularly \textit{State Farm}.\textsuperscript{152} The majority also focuses on how ‘data’ were not completely available for some of
the aspects of the policy before the FCC (such as the harmful impact of foul language on
children), instead of focusing on the data that were rather easily available to the FCC.\textsuperscript{153}

However, to focus on ‘data’ is to lose sight of the forest for the trees. That is, data are
merely numerical expressions of some interaction(s) or phenomenon(s), but these interactions
and phenomena can also be described with words.\textsuperscript{154} The FCC knew of the many ‘aspects’ to
the fleeting expletive policy it had upheld for 30 years, and could have easily discussed these
aspects, and sought out further scientific guidance where possible, rather than superficially
glossing over these aspects because they are not easily quantifiable.\textsuperscript{155} \textit{State Farm} makes

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} \textit{See generally} FCC v. Fox at 1829–1841 (Breyer, J., dissenting) (noting that the FCC failed to show how the
safe harbour rule increased foul language on the air, the nature of expletives in relation to sex and excrement,
and the impact of the new rule on local broadcasters).

\textsuperscript{151} \textit{Id.}

\textsuperscript{152} \textit{See id.} at 1811 (majority stating the standard of review); \textit{see also} State Farm, 463 U.S. at 43 (majority
clarifying standard of review under 5 U.S.C. §706(2)(A)).

\textsuperscript{153} FCC v. Fox, 129 S.Ct. at 1819.

\textsuperscript{154} \textit{Id.} at 1839 (Breyer, J., dissenting) (stating that studies of the effects of foul language on children are
available).

\textsuperscript{155} \textit{Id.} at 1829–1841 (Breyer, J., dissenting) (taking the FCC to task for failing to provide data on the assertion
that the fleeting expletives rule was a safe harbor, that foul language had a specific impact on children, and that
its new rule did not constitute an excessive burden on local broadcasters).
clear that in the ‘arbitrary and capricious’ standard of review for agency actions, the different facets of an issue before an agency, and how that agency processes those facets to create policy, are what is [must be] analyzed by the court, and not whether or not there are some handy statistics available.\textsuperscript{156} In short, the reviewing court looks at the logical process of the agency.\textsuperscript{157}

One of the aspects that the FCC failed to sufficiently consider when reversing its 30 year precedent was the impact of its new rule on freedom of speech.\textsuperscript{158} In its final Fox Television order, the FCC spent four pages supposedly dealing with constitutional issues, according to the majority in \textit{FCC v. Fox}.\textsuperscript{159} However, almost none of this space was devoted to explaining why the FCC now finds that it is constitutional to ban one-off offensive words, when in 1978 the FCC immediately incorporated \textit{FCC v. Pacifica} into its policy, excepting fleeting expletives from sanctions and sanctioning generally only those words involved in the George Carlin monologue, largely out of concerns for freedom of speech.\textsuperscript{160} Moreover, in 2001, the FCC underscored the thin constitutional line that it walks in censoring foul language, declaring it “must both identify a compelling interest for any regulation…and choose the least restrictive means to further that interest.”\textsuperscript{161} The constitutional right to freedom of speech is fundamental, and the FCC for 30 years let it be known in its decisions that it was up against important constitutional implications in its censorship.\textsuperscript{162} Why did the FCC then all of a sudden abandon its precedent, adopt a strict new policy, and not explain how this impacts constitutional rights?\textsuperscript{163} Why were constitutional rights an issue for 30 years, and then not so much an issue in 2006?\textsuperscript{164}

\textsuperscript{156} \textit{Id.} at 43.

\textsuperscript{157} \textit{Id.}

\textsuperscript{158} \textit{Id.} at 1834–1835 (Breyer, J., dissenting).

\textsuperscript{159} \textit{Id.} at 1817.

\textsuperscript{160} \textit{Id.} at 1834–1835 (Breyer, J., dissenting).

\textsuperscript{161} \textit{Id.} at 1834.

\textsuperscript{162} \textit{Id.} at 1834.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.}
Justice Breyer points out in the minority opinion that the dissent is not asking for a heightened standard of review for when an agency changes policy, versus an initial agency action.\[^{165}\] Rather, certain circumstances merit an explanation of why the agency changed course so that one can, following the course of logic of an agency, get from the old policy to the new one.\[^{166}\] If the policy in question involves fundamental rights, such circumstances would seemingly merit an explanation of why constitutional rights were an issue for 30 years, and then so nonchalantly ignored.\[^{167}\] It does not suffice either to say, as the FCC did in its Fox decision, that the past 30 years of orders on fleeting expletives were, implicitly, not official policy because they were primarily written by ‘staff’, and therefore the FCC has less explaining to do on its reversal.\[^{168}\] The State Farm requirement that an agency address all the data and arguments, or factors, underlying a policy, is not merely formal; it is essential to the legitimacy of the policy.\[^{169}\]

A second aspect that the FCC failed to appropriately consider was the impact of its rule on local broadcasters.\[^{170}\] The dissent points out that by allowing for the sanctioning of even a single expletive, the FCC has put a heavy burden on local broadcasters who often cannot afford the ‘bleeping’ technology that both the FCC and the majority in FCC v. Fox praise as game-changers in censorship.\[^{171}\] Local broadcasters could also be less likely to cover local events, out of fear of being held responsible for the foul language of a random person before the camera at a live event.\[^{172}\] There was even testimony before the FCC on the first remand of the disproportionate costs to local broadcasters for this technology and the subsequent disincentives to live, local coverage it creates.\[^{173}\] In its final opinion, the FCC said

\[^{165}\] Id. at 1831 (Breyer, J., dissenting).
\[^{166}\] Id.
\[^{167}\] Id.
\[^{168}\] Id. at 1809.
\[^{169}\] State Farm, 463 U.S. at 43.
\[^{170}\] Id. at 1835 (Breyer, J., dissenting).
\[^{171}\] Id.
\[^{172}\] Id. at 1835 (Breyer, J., dissenting).
\[^{173}\] Id.
absolutely nothing of these concerns.\textsuperscript{174} How does Justice Antonin Scalia sweep away these concerns? He asserts first that local broadcasters won’t be affected that much because they receive programming from their parent companies.\textsuperscript{175} But, the FCC did not even examine that aspect of the problem, even though there is ample data present on the structure of the local broadcasting market.\textsuperscript{176} But, the pièce de résistance is yet to come: Justica Scalia then opines that the FCC’s new rule won’t really have an effect on local broadcasters covering local events because small-town folk simply don’t swear.\textsuperscript{177} Or, as Justice Scalia exactly stated:

We doubt, to begin with, that small-town broadcasters run a heightened risk of liability for indecent utterances. In programming that they originate, their down-home local guests probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood.\textsuperscript{178}

Whether or not the minority is asking for a heightened standard of review, this failure to analyze the effect of a new censorship policy on local broadcasters, despite testimony before the FCC on this exact point, is a blatant failure to consider an important aspect of the problem, as required by \textit{State Farm}.\textsuperscript{179} However, the new arbitrary and capricious standard ‘synthesized’ by the majority removes this problem, as its standard only requires the agency to provide good reasons and an explanation for its policy.\textsuperscript{180} In \textit{FCC v. Fox}, the majority has revised the standard of review under 5 U.S.C. §706(2)(A), and greatly increased the

\begin{itemize}
\item \textsuperscript{174} \textit{Id.}
\item \textsuperscript{175} \textit{Id.} at 1818.
\item \textsuperscript{176} \textit{Id.} at 1835 (Breyer, J., dissenting).
\item \textsuperscript{177} \textit{Id.} at 1818.
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{State Farm}, 463 U.S. at 43.
\item \textsuperscript{180} \textit{Id.} at 1811.
\end{itemize}
judiciary’s deference to the administrative State.\textsuperscript{181} However, as James M. Landis highlighted in the \textit{Administrative Process}, a primary justification of the administrative state is its power of rationality, which includes the investigation of relevant facts and rationally connecting the facts to the conclusion.\textsuperscript{182} How can one justify such deference by the courts to federal agencies when of all the sovereign acts reviewed by the judiciary, agency action is supposed to conform most heavily to an efficient and logical method, a logical method that it would seem factually- and rationally-based Justice could follow and analyze?\textsuperscript{183}

The majority also accepts the FCC’s contention that reversing the ‘fleeting expletive’ rule is justifiable because even though expletives do not directly appeal to sex or excrement, they derive their power to insult from their inherent sexual or excretory meaning.\textsuperscript{184} This is a debatable contention. The FCC could have easily examined the issue more scientifically, maybe by listening to language experts or psychologists.\textsuperscript{185} Today, the younger to youngish crowd generally accepts that foul language can express valid emotions, and this foul language does not conjure up images of sex or excrement.\textsuperscript{186} For example, most under 40-year old viewers would probably contend that when Cher exclaimed in 2002 to “fuck” her critics, they did not immediately think of her critics engaging in sex, nor did they say to themselves, ‘I am so offended because sex is inherently bad and ‘fuck’ conjures up sex, therefore ‘fuck’ is bad.’\textsuperscript{187} That is an important point: today, in a post-sexual revolution society, what is so bad about sex, and why can the implicit negativity (to most conservatives or a few liberals) of sex

\textsuperscript{181} Id.
\textsuperscript{182} See James M. Landis, \textit{The Administrative Process} 43–46 (Yale University Press 1938) (1938) (citing the capacity of the administrative tribunal to find the relevant facts and determine appropriate policy, and how this is the modern answer to the legislative and judicial process).
\textsuperscript{183} See id. at 123–126 (detailing the inability of the courts to deal with the fact and policy determinations in which the administrative agencies engage).
\textsuperscript{184} Id. at 1808.
\textsuperscript{185} Id. at 1839 (Breyer, J., dissenting).
\textsuperscript{187} See FCC v. Fox, 129 S.Ct. at 1812 (stating that expletives are functionally equivalent to obscene words, those literally describing sex and excrement, because expletives’ power to shock comes from their sexual or excretory nature).
justify censorship of words that long ago lost their strong sexual connotations? It is just not acceptable that the FCC (and Justice Scalia) make such blanket assumptions about language without even considering some social studies, or listening to expert testimony on the matter.\textsuperscript{188} After all, one of the justifications of the administrative State is its expertise.\textsuperscript{189} Moreover, such shaky assumptions about the meaning of language certainly don’t explain why the FCC finds its new policy correct with regards to the freedom of speech, while the past 30 years the FCC specifically avoided censoring fleeting expletives out of concerns for fundamental constitutional rights.\textsuperscript{190}

Lastly, the FCC tries to justify its reversal of precedent by saying that the fleeting expletive rule will lead to an increase in foul language on the air, creating a “safe harbor” for foul language and such language and would harm children.\textsuperscript{191} However, the FCC was quite aware of the harm-to-children theory 30 years ago.\textsuperscript{192} What has changed in the past 30 years that now makes its reversal of policy necessary?\textsuperscript{193} The FCC gives no new reasons.\textsuperscript{194} How can the fear of a “safe harbour” and impact on children justify the fleeting expletive exception for the past 30 years, and then also justify a new draconian foul language policy?\textsuperscript{195} The FCC did not consider any data or social studies either on these two points.\textsuperscript{196} Furthermore, in its final order against Fox, the FCC asserted that the fleeting expletive policy would lead to more foul language, but that same policy had existed for 30 years.\textsuperscript{197} Certainly there were quantifiable data on this point.\textsuperscript{198} And, what about the claim that foul language hurts

\textsuperscript{188} FCC v. Fox, 129 S.Ct. at 1812 (asserting that expletives’ power to insult comes from their sexual and excretory meaning).
\textsuperscript{189} See id. at 1823 (Kennedy, J., concurring) (explicitly recognizing that the “expertise” of an agency will implicitly guide the court’s review of the agency’s actions).
\textsuperscript{190} Id. at 1834 (Breyer, J., dissenting).
\textsuperscript{191} Id. at 1839 (Breyer, J., dissenting).
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id. at 1838–1839 (Breyer, J., dissenting).
\textsuperscript{198} Id.
children? The majority dismisses controlling the FCC on this point, saying it is unethical to
design a control group study where children are raised either with or without foul language.\textsuperscript{199} However, the minority aptly notes that there is a whole plethora of information on this subject.\textsuperscript{200} The data may not give a precise quantifiable answer, but appropriate, scientific
discussion of the problem would be in order.\textsuperscript{201} The minority is able even to cite a review of empirical evidence that vulgarities in the media have little to no negative impact on children under the age of 12.\textsuperscript{202} The shallow analysis of the FCC and its failure to consider certain aspects of the problem before it should lead one to conclude that the agency’s actions were indeed arbitrary and capricious.\textsuperscript{203}

\textbf{Conclusion}

In \textit{FCC v. Fox}, the majority seems to have made up their minds about a preferred policy decision and then looked for a legal justification, overlooking the FCC’s failure to consider essential aspects of the censorship issue such as freedom of speech, and cost-technology burdens on local broadcasters.\textsuperscript{204} The majority did great injustice to \textit{State Farm} by radically revising the arbitrary and capricious standard of review without any indication that the standard was unjustifiably burdensome on the courts or the agencies. \textit{FCC v. Fox} could potentially be the controlling authority on the standard of review for federal agencies’ alleged arbitrary and capricious actions in the future, yet the large deference by the courts severely undermines the legitimacy of the administrative decision-making process.\textsuperscript{205} For the immediate future, however, Justice Kennedy’s qualified concurrence leaves open the issue of a settled standard of review.\textsuperscript{206}

\textsuperscript{199} \textit{Id.} at 1813.
\textsuperscript{200} \textit{Id.} at 1839 (Breyer, J., dissenting).
\textsuperscript{201} \textit{Id.}
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{See id.} at 1841 (Breyer, J., dissenting).
\textsuperscript{204} \textit{Id.} at 1838–1841 (Breyer, J., dissenting).
\textsuperscript{205} \textit{Compare} \textit{State Farm, 463 U.S. 43; with FCC v. Fox, 129 S.Ct. at 1811.}
\textsuperscript{206} \textit{FCC v. Fox, 129 S. Ct. at 1822–1823 (Kennedy, J., concurring).}
The narrow-mindedness of Justice Scalia opinion, and the majority’s opinion in general, coupled with its lack of critical analysis, is at times shocking (such as when Justice Scalia declared readily supported concerns over cost and technological burdens on local broadcasters to not be a problem because small-towners don’t swear and are not Hollywood “glitteratae”). It really brings the reader back to timeless and disingenuous Scalia classics, like his minority opinion in Lawrence v. Texas contending that it is constitutional to only criminalize homosexual sodomy, but not heterosexual sodomy, because a ban on homosexual sodomy applies both to homosexuals and heterosexuals alike.

Worse though is the majority’s willingness to whisk away concerns on the fundamental right to free speech because presumably all foul language appeals to sex or excrement, and implicitly sex or other natural human functions are bad or something of which one should be overly ashamed. If the majority’s standard of review for 5 U.S.C. §706(2)(A) is affirmed in later rulings, this case could represent a further unjustified and unexplained redistribution of power from the federal judiciary to the federal agencies—agencies essential to the governmental exercise of power, but whose legitimacy largely depends on the empirical and logical formulation of their policies.

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207 Id. at 1818.
208 539 U.S. 558, 599 (2003) (“Men and women, heterosexuals and homosexuals, are all subject to [the only-homosexual sodomy] prohibition of deviate sexual intercourse with someone of the same sex.”). I assume Justice Scalia is making the assertion that homosexuality is not immutable, and that gay people “choose” to engage in gay sodomy. Yet, to be consistent, something Justice Scalia seems to discount, this argument would naturally hold that straight people also “choose” to engage in straight sex and are just as equally capable of pleasurably engaging in both gay and straight sex . . . of course, with no negative social and psychological repercussions on the repression of their heterosexual desires.
209 FCC v. Fox, 129 S.Ct. at 1812.