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How Detailed of an Explanation is Required When an Administrative Agency Changes an Existing Policy? Implications and Analysis of FCC v. Fox Television Stations, Inc. on Administrative Law Making and Television Broadcasters

By David Lee

I. INTRODUCTION

Imagine a scenario where you are sitting at home watching a local high school football game on public access television. During the middle of the closely contested game a ref rules that a player was in fact out of bounds when he caught the ball. In frustration, an enraged parent of one of the players sitting close to the broadcaster’s microphone yells that, “the ref can’t see a fucking thing.” This profanity, yelled during a live, unpredictable sporting event, could subject the public access station to crippling fines by the Federal Communication Commission (“FCC”) in the hundreds of thousands of dollars, which could put the station out of business.

The FCC has the power to regulate what it deems indecent material broadcast on either television or radio. For twenty-five years the FCC policy allowed one expletive to be broadcast if the word was neither repeated nor uttered intentionally; however, in Golden Globes the FCC changed its regulatory policy by giving itself the discretion to fine broadcasters if an expletive was said only once, even accidentally.¹ The purpose of this article is twofold. The first is

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¹ David Lee is finishing up the last semester of his third year at Pepperdine School of Law. David received a Bachelor of Arts in Political Science from Pitzer College. I would like to thank my family; Michael, Mom, and Dad for all their support and love throughout law school. My article wouldn't have happened without the help and tireless work of the awesome NAALJ staff and its editors, Shant and Danny.
to explore the factors that the FCC examines in deciding whether material broadcast on the airwaves is indecent and the type of expletive utterances that may now subject broadcasters to indecency fines. The second is to examine how detailed and thorough an explanation a federal agency must give when announcing a change in regulatory policy when the new regulations depart from a standard that the agency had previously created. This article will achieve both those ends by briefly tracing the history of the FCC’s regulatory policy. The majority of this article will be spent discussing and analyzing the Supreme Court’s plurality decision in *FCC v. Fox Television Services, Inc.* in which the Court both upheld the FCC’s new regulatory policy and articulated the analysis an agency must undertake in creating new regulations that deviate from the old.  

II. HISTORICAL BACKGROUND

A. *FCC v. Pacifica*

The holding in *FCC v. Pacifica* established the test that the FCC used in determining whether material broadcast on the airwaves was indecent, which had been in place over twenty-five years. Indecent content only exists in the broadcast setting and cannot be found in, “print, cable, satellite or the internet.” The Pacifica Foundation owned a radio station that aired a twelve minute comedic monologue entitled, “Filthy Words” by George Carlin at roughly two in the

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4 Mark Conrad, “Fleeting Expletives” and Sports Broadcasts: A Legal Nightmare Needs a Safe Harbor, 18 J. LEGAL ASPECTS OF SPORTS 175, 177 (2008). The 1934 Communication Act required all television and radio broadcasters to obtain licenses from the government to broadcast on the electromagnetic spectrum. *Id.* The Communication Act served as the legislative underpinning that allowed the Federal Government to regulate material broadcast over the airwaves. *Id.*
afternoon. The FCC derived its power to regulate indecent material on the airwaves from 18 U.S.C. § 1464. The FCC described indecent material in *Pacifica* as any material that at the time of broadcast would be “patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day where there is a reasonable risk that children may be in the audience.” The context in which a word was spoken was crucial to the analysis of deciding whether the word was indecent. Justice Stevens wrote that he wanted to emphasize the narrowness of the holding in this case by explicitly stating that the Court had not held “an occasional expletive . . . would justify any sanction.” Justice Stevens said rather colorfully that, when “a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.” Again, the Court reiterated the holding that the FCC must consider the context in which an expletive was spoken, whether the expletive was used intentionally, and finally the repetitive nature of the phrase in

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5 *See Pacifica*, 438 U.S. at 729. In George Carlin’s monologue entitled “Filthy Words,” he began the comedic routing by telling a live studio audience that he was about to tell them about, “the words you couldn’t say on public, ah, airwaves, um, the ones you definitely wouldn’t say ever.” *Id.* George Carlin repeatedly said throughout his routine seven expletives which were, “shit, piss, fuck, cunt, cocksucker, motherfucker, and tits.” George Carlin, *Filthy Words*, http://www.cba.uni.edu/decencyl/7words.html (last visited Sept. 28, 2010). George Carlin continued his comedic monologue by emphasizing why he thought these words were particularly offensive and repeated the words over and over again. *See Pacifica*, 438 U.S. at 729. The FCC received a letter of complaint about the broadcast from a man who was driving with his young son while the monologue was broadcast on the radio. *See id.* at 730.

6 *See id.* 18 U.S.C. § 1464 (2006) states, “Whoever utters any obscene, indecent, profane language by means of radio communication shall be fined . . .” The FCC interpreted § 1464 in conjunction with 47 U.S.C. § 303(g) as giving them the ability to treat broadcast speech differently from other types of speech and to regulate indecent speech spoken on the airwaves. *See Pacifica*, 438 U.S. at 731.

7 *Id.* at 732 (quoting In re A Citizen’s Complaint Against Pacifica Found. Station Wbai (Fm), New York, N.Y. Declaratory Order, 56 F.C.C.2d 94, 98 (1975)).

8 *Id.* at 750.

9 *Id.*

10 *Id.* at 750-51.
determining whether the broadcaster should be subject to monetary penalties. The policy of not fining broadcasters for one unintentional obscene word that was uttered became known as the "fleeting expletive" policy, which the FCC abruptly announced an end of within the Golden Globes order.

B. In re Golden Globes

For twenty-five years the FCC followed the fleeting expletive policy set out in Pacifica, but in 2004 the FCC reinterpreted Pacifica by removing an essential step of the analysis. Contrary to Pacifica's holding, the context which an expletive was spoken was no longer determinative in itself as to whether a broadcaster would be fined when an indecent word or phrase was spoken on public airwaves. Furthermore, this departed from the practice of the FCC's restrained enforcement policy. The FCC departed from the previous interpretation of Pacifica and prohibited the broadcast of any indecent word or phrase during prime time hours; if an indecent word was spoken on the airwaves the FCC could now levy large fines against the broadcaster. During the 2003 broadcast of the Golden

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11 See id. at 751.
13 See id.
14 See Robert Corn-Revere, Speech and Elections: FCC v. Fox Television Stations, Inc.: Awaiting the Next Act, CATO SUP. CT. REV. 2008-09, at 295, 302. The FCC had previously given, “substantial deference to the ‘editorial discretion of licensees.’” Id. The FCC previously refrained from fining broadcasters for obscenities that were aired on the airwaves unless they involved the repeated intentional use of profanities. Id. The FCC would only fine broadcasters if the broadcast was as profanity riddled, or close to, George Carlin's “Filthy Words” monologue. Id. at 307. In the aftermath of Pacifica, broadcasters were worried that the Pacifica decision would cause them to curtail their programming. See Faith Sparr, From Carlin’s Seven Dirty Words to Bono’s One Dirty Word: A Look at the FCC’s Ever-Expanding Indecency Enforcement Role, 3 FIRST AMEND. L. REV. 207, 221 (2005). FCC Chairman Charles D. Ferris told broadcasters that, “the FCC was ‘far more dedicated to the First Amendment premise that broadcasters should air controversial programming [than were] worried about an occasional four-letter word.’” Id.
15 See Golden Globes, 19 F.C.C.R. at 4986. This analysis overturned the prior fleeting expletive policy. The FCC stated that, “while prior Commission and staff
Globes, Bono, lead singer of the band U2, said in accepting the award for Best Original Song, “this is really, really, fucking brilliant. Really, really great.” The FCC received hundreds of complaints from viewers who saw Bono use the F-word on live television.

The Commission used a three factor test to determine whether material broadcast was indecent. In making the indecency determination, the Commission was to look at the following three factors and the context which the material was broadcast:

1. the explicitness or graphic nature of the description or description of sexual or excretory organs or activities;
2. whether the material dwells on or repeats at length description 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.

In the FCC’s new analysis the Commission required two preliminary findings that must be made before material broadcast could be found to be indecent: 1) “the material must describe or depict sexual or excretory organs or activities,” and 2) “the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.”

The Commission found the first prong of the indecency test satisfied because the F-Word used in any context, variation, or manner is inherently indecent because of the F-Word's implicit sexual connotation; meaning Bono’s utterance of the F-Word fell squarely within the first factor established by

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action have indicated that isolated or fleeting broadcasts of the “F-Word” . . . are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law.” Id. at 4980. Prior to Golden Globes, a single profane utterance was often found not to be indecent; a news announcer’s statement, “Ooops, fucked that one up” found not to be indecent; Cher saying, “fuck ‘em” on the Billboard Awards Show found not to be indecent. See id. at 4980 n.32.

16 Id. at 4976.
17 Id.
18 See id. at 4977.

19 Id. at 4978.
20 Id. at 4977. This would also mean that any use of the F-Word on television or radio would satisfy the first prong of the test.
The Commission found the F-Word to be one of the most shocking, graphic, vulgar words in the English language and therefore any use of the F-Word is patently offensive to contemporary community standards, thus satisfying the second prong of the test. By finding that the F-Word is patently offensive, regardless of its context, the FCC departed from its previous interpretation of *Pacifica*.

The Commission also relied upon advances in technology that allow broadcasters to add a delay to live broadcasts as one of the reasons for the new regulatory policy. Prior to this decision, the Commission focused on what is profane in the context of blasphemous speech. The Commission gave a blatant warning to broadcasters by saying that the Commission will now, "consider under the definition of 'profanity' the 'F-Word' and those words (or variants thereof) that are as highly offensive... to the extent language is broadcast between 6 a.m. and 10 p.m." The Commission jumped upon a perceived opening in *Pacifica*; the FCC said that the Court left open the issue of whether a single expletive

21 See Golden Globes, 19 F.C.C.R. at 4977. Even though the Commission agreed that the F-Word can be used as a synonym for really or very they still thought that the use of the F-Word, even as an "intensifier," conjures up images of sexual activities. See *id*. This means that the F-Word used in any context whatsoever is indecent without any special attention paid to the context that the F-Word was said.

22 See *id*. at 4979. The Commission found that even though the use of the F-Word in this instance was unintentional, the use of the F-word was still shocking. *Id*. The mere fact the word is uttered is enough. *Id*.

23 See *id*. at 4978. When the Commission said that its new interpretation of *Pacifica* was not inconsistent with the *Pacifica* opinion, they were relying on the concurrence rather than the majority. See Sparr, *supra* note 15, at 244. This part of the concurrence of *Pacifica* was intended to limit the enforcement powers of the FCC rather than broaden them. See Golden Globes, 19 F.C.C.R. 4979.

24 See *id*. at 4980. The advancement in so called "bleeping technology" allows broadcasters to avoid indecency violations by adding a delay to a live broadcast which is sufficiently long enough that the broadcaster would be able to catch and bleep any indecent word even if the utterance was spoken only once. See *id*.

25 See *id*. at 4981.

26 See *id*. The Commission jumped upon a perceived opening in *Pacifica* when they said that the Court left open the issue of whether a single expletive could be considered indecent. See *id*.
could be considered indecent.\textsuperscript{27} This is a blatant change in policy from allowing a single fleeting explicative during prime time hours to banning all indecent phrases during primetime hours. In determining the profane or innocent nature of a phrase, the FCC dramatically decreased the emphasis to be placed upon the context which a word was spoken in the analysis that is to be performed when considering whether or not to fine a broadcaster. The Commission’s decision in \textit{Golden Globes} forced the Supreme Court to address the question of how precisely a federal agency explicate the reasons for abrupt deviations from earlier policies that come without any guidance from Congress or the Executive Branches of government.

\textit{C. In re Various Television Broadcasts}

The FCC exercised the expanded regulatory power that they gave themselves in the \textit{Golden Globes} decision for the first time in \textit{In re Complaints Regarding Various Television Broadcasts}.\textsuperscript{28} This FCC administrative order is the case that eventually made its way in the Supreme Court in \textit{FCC v. Fox Television Stations, Inc.}. In this opinion the FCC held that various television broadcasters had broadcast profane, indecent material during hours where children were likely to be watching television.\textsuperscript{29} The FCC looked at complaints leveled against thirty-two different broadcasts that aired from February 2, 2002, to March 8, 2005.\textsuperscript{30} The FCC found that twenty-eight of the broadcasts did not violate the indecency standard, but four broadcasts were found to be indecent.\textsuperscript{31} One of the complaints stemmed from the 2002 broadcast of the Billboard Music Awards, which aired at eight in the evening on December ninth.\textsuperscript{32} While accepting an award Cher yelled, “people have been telling me I’m on my way out every year, right? So fuck ‘em.”\textsuperscript{33} Another broadcast eventually found to be indecent stemmed from The 2003

\textsuperscript{29} See id.
\textsuperscript{30} Id.
\textsuperscript{31} See id. at 13300.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
Billboard Music Awards which was broadcast on December 10, 2003.34 During this broadcast, Nicole Richie, who was presenting an award, said, “have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”35 Both of these statements were made in similar contextual settings in that, both were made during live national award shows, adlibbed without any advance warning to broadcasters, and repeated only once in the respective broadcasts.

1. The 2003 Billboard Music Awards

The television broadcaster Fox argued that even though Ms. Richie used the F-Word, the broadcast could not found to be actionably indecent.36 Fox said that in this context the F-Word did not describe or depict sexual activities, but was a vulgar word used to, “express emphasis.”37 The FCC disagreed.38 The FCC laid out its indecency analysis before explicating why Ms. Richie’s comment was considered indecent.39 The FCC relied upon its reinterpretation

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35 Id. At the time the award show aired, Nicole Richie and Paris Hilton starred in a television show called, The Simple Life. In The Simple Life, these two socialites were taken from the city to live in the rural countryside which was a dramatic departure from the luxurious lifestyles that these two young women had previously enjoyed. The other complaint stemmed from the repeated use of the word, “bullshit” on several NYPD Blue episodes that were broadcast on various dates in 2003. See id. The final complaint that the commission found to be indecent stemmed from a broadcast of The Early Show at eight thirty in the morning on December thirteenth; a guest on the show, Twila Tanner, was a contestant on CBS Survivor Vanuatu and she referred to another contestant on that show as a, “bullshitter.” See id. at 13301.

36 Id. at 13303.

37 Id.

38 See id.

39 See id. The FCC defined indecent speech as material that, “in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.” Id. The FCC must first find the material falls into the FCC indecency definition by describing sexual or excretory activities, then the FCC must also find that the material is patently offensive by current community standards. See id. at 13304-05. In determining whether the material is patently offensive the FCC looked at the context in which the words were spoken and three principal factors: “(1) the explicitness or graphic nature of the description; (2) whether the material
of Pacifica rather than the twenty-five years of jurisprudence that the FCC abruptly departed from in Golden Globes. The FCC said that any use of the F-Word has sexual connotation even if the word is used as an intensifier rather than literally. By finding any use of the F-Word now falls within the scope of the FCC indecency definition, the FCC essentially ignored the element of the Pacifica indecency analysis that required the FCC to look at the context in which a potentially indecent word was spoken. Worryingly, the FCC also dramatically expanded its regulatory power since it could fine broadcast stations for a single, fleeting expletive.

Since the FCC found Ms. Richie’s utterance fell within the indecent definition, the FCC went onto the second prong of the analysis, which was determining whether the F-Word was patently offensive as measured by contemporary community standards. The FCC found that the description of someone scraping cow excrement out of a designer bag was designed to shock, titillate, and pander. Due to the large number of children expected to be in the audience, and because the Billboard Awards is a popular awards show, the FCC found the description of the cow excrement, coupled with the use of the F-Word, "shocking and vulgar" by contemporary community standards.

Although the FCC recognized that the Golden Globes order changed the indecency analysis, it put forth three reasons why Ms. Richie’s comments would have still been held to be indecent using pre-Golden Globes jurisprudence. The fact that the FCC took the time to explicate why it still would have found both cases to be indecent under the indecency policy established in Pacifica reveals that the FCC was aware just how dramatic a departure the new indecency policy was from the old Pacifica analysis. First, the “S-Word” was used in an excretory sense, which was integral to a

dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.” Id at 13304.


41 See id.

42 See id.

43 See id. at 13305.

44 See id.

45 See id.
graphic description. Second, repetitive use was not required pre-Golden Globes. Third, Ms. Richie's comments were deliberate because the majority of the comments were planned in advance. The FCC further explained that this decision was indecent post-Golden Globes because that decision did away with the requirement that specific words or phrases had to be repeated to be found indecent. The FCC argued that Ms. Richie's vulgar remarks could have been avoided if they had been read off of a script rather than adlibbed on live television.

2. 2002 Billboard Music Awards

The FCC once again found that Cher's use of the F-Word satisfies the first prong of the indecency test because the nonliteral use of the F-Word still invoked implicit images of sexual conduct. The FCC repeated much of its analysis regarding the graphic nature of the F-Word, which it used when describing Ms. Richie's comments. The FCC described in detail the large number of children who were watching the 2002 Billboard Music Awards and

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47 Id.
48 See id.
49 See id.
50 Id. at 13312. The FCC added that Fox shown have known that Ms. Richie would say something profane during the awards show. See id. During the running of The Simple Life, in which Ms. Richie starred, Fox bleeped the F-Word nine times, yet they still chose her to be a broadcaster. The FCC implied that it was obvious and likely that she would in fact use the F-word on live television. See generally id. The FCC found that the five second delay that Fox was using to censor the event was neither adequate nor reasonable as they used the same system during the 2002 Billboard Music Awards which did not prevent the profanity that Cher uttered from making it onto the air. Id. at 13313.
51 See id. at 13323. The FCC linked Cher's hostile use of the F-Word to refer to her critics as reference to the sexual act. See id.
used this fact as a critical part of its reasoning in holding the broadcast was actionably indecent.53

D. Procedural History

1. Fox v. FCC, 489 F.3d 444 (2nd Cir. 2007)

Fox Television Station and various broadcasters petitioned the Second Circuit to appeal the new indecency regime the FCC laid out in its 2004 Golden Globes order.54 The appellate court began its analysis by tracing the history of when the FCC began to regulate indecent speech on the airwaves.55 The appellate court went onto discuss how the FCC had regulated indecent speech in the immediate aftermath of the Pacifica holding.56 The FCC did not find another broadcast indecent for ten years after the Pacifica decision.57 The appeals court then listed the factors that the FCC used to determine indecent speech.

53 See id. The FCC stated Nielsen statistics, which revealed that 2,608,000 people under the age of 18 were watching the award show and 1,186,000 were between the ages of two and eleven. Id.
54 Fox v. FCC, 489 F.3d 452 (2nd Cir. 2007).
55 The appellate court found that the FCC’s regulatory power governing indecent speech was derived from 18 U.S.C. § 1464. See id. at 447. The appellate court then discussed the holding of Pacifica, which was the first time that the FCC actively regulated indecent material that was broadcast on the airwaves. See id. The Second Circuit saw the holding of Pacifica as incredibly narrow. See id. at 448. The appellate court found that Pacifica only applied to the question of whether Carlin’s monologue was indecent rather than the general question of what can be categorized as indecent speech. See id. The appeals court read Pacifica as allowing for the FCC to regulate indecent speech on the airwaves without running afoul of the First Amendment. See id.
56 The appellate court listed various cases where the FCC refused to define and categorize speech as indecent on the airwaves. See id. at 449. The FCC declined to hold speech indecent in three separate occasions when during the morning hours a broadcaster aired programs containing language such as “motherfucker,” “fuck,” and “shit.” Id.
57 See id. The appellate court cited In re Infinity Broad. Corp. of Pennsylvania, 3 F.C.C. 930 (1987) which stated:

Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975. Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical satirized in the Carlin ‘Filthy Words’ monologue. See id.
whether speech was indecent in a 2001 settlement agreement.\textsuperscript{58} The Second Circuit then turned its attention to the *Golden Globes* decision, which, as already mentioned, had abruptly eliminated the policy of permitting broadcasters a single, fleeting expletive without imposing large monetary sanctions on the broadcasters.\textsuperscript{59}

### 2. Discussion

The appellate court began its analysis by setting forth the statute giving it the authority to set aside agency decisions.\textsuperscript{60} The statute requires agencies to articulate a satisfactory explanation for its change in policy, which must be rooted in facts rather than politics.\textsuperscript{61} An agency must follow the reasoning and deliberation process that Congress intended the agency would follow when changing existing policy.\textsuperscript{62} The Second Circuit agreed with the networks that the FCC made a “180-degree turn” regarding its indecency policy because the FCC did not supply an adequate explanation of why it was changing policy.\textsuperscript{63}

The FCC argued that nonliteral uses of profane words fell within its indecency definition because it would be impossible to “distinguish whether a word was being used as an expletive or as a

\textsuperscript{58} See id. at 451. The FCC then explained that an indecency finding involves the following two determinations: (1) whether the material falls within the “subject matter scope of [the] indecency definition – that is, the material must describe or depict sexual or excretory organs or activities; and (2) whether the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium.” See id. (internal quotation marks omitted).

\textsuperscript{59} See id. Since the FCC found the “F-Word” to be the most profane and indecent in the English language, uttering it once would be enough to warrant indecency fines. See id.

\textsuperscript{60} See Fox v. FCC, 489 F.3d at 454. The court has the power to overturn agency decisions that are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

\textsuperscript{61} See Fox, 489 F.3d at 455.

\textsuperscript{62} See id.

\textsuperscript{63} Id. When an agency decides to create a new policy, it must give the reasons for the change, show that the rule is consistent within the scope of their regulatory powers, address alternative policies, and finally, give reasons for the rejection of those alternatives. See id. at 456 (quoting Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 863 (1984)).
literal description of sexual or excretory functions." The Second Circuit said that this reasoning defied both common sense and logic. The appellate court also took issue with the Commission’s rationale that if the Commission allowed broadcasters an exemption for a single fleeting expletive then the broadcasters would air profane words at all hours of the day if the old policy allowing fleeting expletives was still in place. The fleeting expletive exemption had been the FCC’s indecency policy for twenty-five years, yet broadcasters had never flooded the airwaves with profanity during that time. There is no reason why the broadcasters would begin increasing the amount of expletives spoken on their shows in the upcoming months and years.

The appellate court declined to address the constitutional challenges raised by the networks in their briefs but raised some constitutional questions regarding the tensions that exist between the First Amendment and the FCC’s indecency policy. The court then vacated and remanded the case so that the Commission could set forth the detailed analysis required by the appellate court.

3. Dissent

The dissent, written by Judge Leval, argued that the FCC gave a well thought out explanation for its change of policy regarding expletives. The dissent did not find the agency’s reasoning particularly compelling, but Judge Leval found the change modest and within its regulatory authority. He found that the Commission complied with the requirements required of it in explicating its decision. The dissent had no issue with the fact that the new policy

64 Id. at 459.
65 See id. Bono’s speech during the Golden Globes where he pronounced that winning the award was, “really, really fucking brilliant” is a perfect example of an indecent word being used in a non-literal way with no sexual connotation. See id.
66 See id. at 460.
67 See Fox, 489 F.3d at 460.
68 See id. at 462.
69 See id. at 467. (Leval, J., dissenting).
70 See id. at 469.
71 See id. at 470.
of the Commission was inconsistent with its old. The dissent levied the serious allegation that the majority was disingenuous in its opinion because Judge Leval felt the majority simply disagreed with the new policy the FCC had set out rather than believing that the FCC’s new expletive policy ran afoul of the requirements imposed by the law.

III. ANALYSIS OF OPINION


This plurality opinion was delivered by Justice Scalia. Justice Scalia began the opinion by reciting the holding of FCC v. Pacifica. Justice Scalia then traced the history of where the FCC had received its congressional mandate to regulate obscene material, which was found in 18 U.S.C. § 1464. Justice Scalia then explained the Commission’s evolving definition of what materials fit within the scope of the indecency definition. He saw that the Commission expanded its indecency regulation beyond the repeated use of indecent words, while still preserving a distinction between “literal and non-literal (or ‘expletive’) uses of evocative language.” Justice Scalia still believed that the context in which expletives were used

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72 See id. at 471. For the dissent the only issue was whether or not the Commission had the authority to change its policy as it had. See id.
73 See Fox, 489 F.3d at 474 (Leval, J., dissenting). The court is supposed to give deference to agency’s decisions, even when those decisions are not the same one that the court would have reached.
74 FCC, 129 S. Ct. at 1800. Justices Kennedy, Roberts, Thomas, and Alito joined Parts I, II, III-A through III-D and IV.
75 See id. at 1806. The holding of Pacifica was in part that federal law prohibits the broadcasting of indecent language, which includes references to sexual activity or organs. See id.; see also 18 U.S.C. 1464.
76 See FCC, 129 S. Ct. at 1806. 18 U.S.C. § 1464 bars any indecent language through the broadcast medium between the hours of 6 a.m. and 10 p.m. See also 18 U.S.C. § 1464. Justice Scalia then recited the holding of Pacifica, where the Court held that the First Amendment allowed for indecent material to be regulated because of the material’s accessibility to children. See id.
77 See FCC, 129 S. Ct. at 1806.
78 See id. at 1807.
was still a crucial factor in deciding whether or not the profane utterance warranted the Commission to take some sort of action.  

Justice Scalia acknowledged that, in 2004, the Commission expanded the scope of the indecency regulatory definition by declaring non-literal use of the F- and S-words could be indecent, subjecting the broadcasters to action taken against them. Justice Scalia then recited Bono’s use of the F-word during his 2004 Golden Globes performance. The Justice then briefly repeated the Commission’s holding from the case in which the Commission expanded the definition of indecency. Golden Globe made it absolutely clear that a single profane utterance, regardless of the context, could be found actionably indecent.

1. Plurality Analysis

Justice Scalia took issue with the Second Circuit’s reading of the holding in State Farm. He did not find that the Administrative Procedure Act required a heightened standard of review when an agency changed one of its former policies. Justice Scalia found no distinction in 5 U.S.C. § 706 between initial agency action and later actions reversing the former policy. However, there still existed the requirement that an agency explain the change of policy with well thought out reasons explaining why the new policy is a good policy. Justice Scalia just found that the agency need not spend more time

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79 See id.

80 See id.

81 See id. Scalia also rehashed Nicole Richie’s profane utterance during her award show. See id.

82 See id. at 1809. The Commission disregarded its previous dichotomy of implicit and explicit uses of the F-Word because they found that the F-Word is such a vulgar word that it offends regardless of the contexts in which it is used. See id.

83 See FCC, 129 S. Ct. at 1810.

84 See id. The Justice did not see the State Farm holding, “implicitly or explicitly,” that agencies’ policy changes must be justified by more substantial reasoning than when the policy was first announced. See id.

85 See id. at 1811. The statute gives the court the power to set aside agency action found to be, “arbitrary, capricious.” 5 U.S.C. § 706(2)(A).

86 See FCC v. Fox Television, 129 S. Ct. at 1811.
explicating the new change in policy than when the original policy was articulated.³⁷ It is enough for the agency to have regulatory authority under a statute and reason why the new policy is better than the old.³⁸ An agency must only explain the change in regulatory policy when its new policy "rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."³⁹ Scalia declined, just as the appellate court did, to answer the First Amendment questions raised by the broadcasters in their briefs.⁴⁰

Scalia found the FCC's change in policy during Golden Globes to be completely consistent with the standard imposed upon the agency by 5 U.S.C. § 706.⁴¹ Scalia saw that the Commission's decision of looking at isolated uses of profane utterances was consistent with the Pacifica decision.⁴²

2. Addressing the Appellate Court's Reasoning

Justice Scalia raised and subsequently dismissed the three main reasons that the court of appeals used to find the Commission's change in policy arbitrary and capricious.⁴³ First, the court of appeals did not think the Commission had adequately explained the change in policy.⁴⁴ As Scalia previously explained, there was no heightened requirement imposed by law for when a federal agency

³⁷ See id.
³⁸ See id.
³⁹ See id.
⁴⁰ See id.
⁴¹ See id. at 1812. The agency knew that it was changing its former policy and took the appropriate steps to explicate its new policy; that is why the agency did not impose fines upon broadcasters who initially violated the new, strict, fleeting expletive policy. See id.
⁴² See FCC v. Fox Television, 129 S. Ct. at 1811. Advances in censoring technology has made it easier for the broadcasters to bleep out single offensive words which lends support to the Commission's increased enforcement policy. See id.
⁴³ See id. at 1813.
⁴⁴ See id.
changes its former policy. Second, the appellate court thought that the Commission's new policy would require it to ban all indecent expletives, throwing out the context based approach. Scalia disagreed with this analysis; he saw that the Commission could still consider on a case-by-case basis if an expletive was considered profane or indecent. Third, the court of appeals was not convinced that a per se exemption for a single profane utterance would cause increased use of expletives across all broadcast networks. Justice Scalia found that continuing to allow for complete immunity for fleeting indecent phrases could in fact lead to an increased use of expletives, which he saw to be "an exercise in logic rather than clairvoyance."

3. Justice Scalia's Treatment of the Dissents

Justice Scalia began his treatment of the dissents with Justice Breyer's dissent. Justice Scalia disagreed with Justice Breyer's characterization of the degree of oversight courts must exercise over agencies. Justice Scalia noted that independent agencies are no longer subservient to the President, as Justice Breyer insisted, but instead independent agencies follow the guidance of Congress in formulating new policies. Justice Scalia pointed to evidence that

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95 Id.
96 See id. at 1814.
97 See id. The broadcasters used the fact that the Commission had found a broadcast of the film Saving Private Ryan as not indecent to show that the new policy was arbitrary and capricious. See id. Scalia disagreed because the violent nature of the movie would put parents on notice that profanity may be uttered and the material was not suitable for young children. Id.
98 See FCC v. Fox Television, 129 S. Ct. at 1814.
99 See id. Justice Scalia did not address the reasons why he thought it was logical to assume that there would be an increase in expletives on television while there had not been for the twenty-five years that the former policy had been in place.
100 Id. at 1815.
101 See id.
102 See id.
the FCC changed policy after pressure from Congress rather than the executive branch.103

Justice Scalia then went on to address the dissent of Justice Stevens.104 Justice Stevens recognized that Congress, rather than the Executive, had political control over independent agencies, but he still thought that agencies must explain why their former policies are no longer sound before they change course.105 Justice Scalia believed that Justice Stevens’s arguments were illogical.106 Justice Stevens wanted the Commission to explain why the FCC departed from the line that Pacifica drew regarding whether banning fleeting expletives would violate the First Amendment.107 Scalia took issue with this reasoning because the Court drew no constitutional line in Pacifica and the Court expressly declined to address the constitutional issues regarding banning fleeting expletives in the Pacifica decision.108

Justice Scalia disagreed with Justice Breyer’s analysis of the financial burdens that would be placed on small broadcasters by the new regulations.109 Justice Breyer said that small broadcasters might not be able to afford the technology that bleeps out indecent words during live broadcasts.110 These small broadcasters would be subject to monetary sanctions that could put them out of business.111 Justice Scalia doubted the reality of this situation because he believed the FCC would not penalize every single broadcaster uniformly for each

103 See id. Justice Scalia pointed to the hearing that the House’s Oversight Committee held on the FCC’s broadcast indecency enforcement on January 28, 2004. See note 4 at 1816. During the hearing, members of the Subcommittee felt that broadcasters were engaged in a “race to the bottom, pushing the decency envelope to distinguish themselves in the increasingly crowded entertainment field.” Id. There was another hearing two weeks later where the Subcommittee held hearings on a bill that would increase fines for indecency violations. See id.
104 FCC v. Fox Television, 129 S. Ct. at 1816.
105 Id.
106 See id. If the Commission was an agent of Congress, then their change of policy would be at the direction of Congress and require no increased explanation since the agency was merely carrying out the wishes of Congress. Id.
107 See id. at 1817.
108 See id. at 1817-18.
109 See id. at 1818.
110 FCC v. Fox Television, 129 S. Ct. at 1818.
111 Id.
fleeting expletive spoken on television or radio. Despite the broadcasters asking the Court to do so, the majority declined to address First Amendment issues, as the lower courts had not taken them up.

The plurality concludes the opinion by dismissing the Second Circuit’s claim that even though children are more likely to hear indecent language today than they were in the 1970’s, there should not be any more stringent regulation governing indecent speech on broadcast networks. The majority finally concluded by finding the Commission’s orders neither arbitrary nor capricious, by reversing the judgment of the Second Circuit, and by remanding the case for further proceedings consistent with the opinion.

4. Justice Thomas’s Concurrence

Justice Thomas agreed with the Court’s opinion upholding the FCC’s change in regulatory policy, but questioned the reasoning the majority used to reach their decision. Justice Thomas argued that Red Lion and Pacifica are incorrect opinions, which should no longer be relied upon by the Court. In Red Lion, the Court affirmed the reasoning that broadcasters had limited First Amendment protection

112 See id. Scalia cited the original FCC remand order which stated regarding the penalties assessed to small broadcasters that, “the Commission would consider the facts of each individual case,” meaning that the same penalty imposed on a broadcaster such as Fox may not be imposed on a small town local Fox affiliate. See id. This scenario was too hypothetical for Justice Scalia to even want to consider, as he only would address the issue of small broadcasters if that issue were to come up before the Court in a subsequent case. See id.
113 See id. The Supreme Court is a court of final review not first impression. Id. at 1819.
114 See id.
115 See id.
116 See FCC v. Fox Television, 129 S. Ct. at 1819 (Thomas, J., concurring).
117 See id. at 1820. Justice Thomas’s main issue with Red Lion and Pacifica was with the cases treatment of the First Amendment. See id. Red Lion upheld the “fairness doctrine” which was a requirement that when public issues were presented on broadcast stations each side of the issue was to be given fair coverage. See id. The Court in Pacifica then relied upon Red Lion to say that broadcasters were to receive limited First Amendment rights. See id. Thomas did see the decisions as an adequate explanation for why broadcasters’ First Amendment rights were eroded. See id. at 1822.
because of the scarcity of frequencies on the airwaves. The creation of modern technology had eviscerated the argument regarding the limited frequencies that the Court used in its earlier decisions. By declaring that broadcasters were subject to limited First Amendment rights, the Court, in Thomas’s view, was violating the Constitution because “Red Lion adopted and, Pacifica reaffirmed, a legal rule that lacks any textual basis in the Constitution.”

5. Justice Kennedy’s Concurrence

Justice Kennedy agreed that the FCC’s change in policy should be upheld, but for different reasons than the majority. Justice Kennedy agreed in part with Breyer’s dissent that when an agency decides to change an existing policy, the new policy can be arbitrary and capricious if the agency does not provide a detailed explanation for the change. However, not every change in agency policy requires a more reasoned explanation than the original policy.

When an agency changes a long-standing policy there could be times when new discoveries in science, advances in technology, or other modern societal changes create a substantial need for a new policy. These advances may have created a significant amount of empirical data for the agency to rely upon in changing their policy. The key question that dictates the thoroughness an agency must declare in its explanation of policy is,

[Whether the agency’s reasons for the change, when viewed in light of the data available to it, and when informed by the experience and expertise of the agency, suffice to demonstrate that the new policy rests upon principles that are rational, neutral, and in accord with the agency’s proper understanding of its authority. That showing

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118 See id. at 1820.
119 See id. at 1822.
120 Id. at 1821.
121 See id. at 1822 (Kennedy, J., concurring). Justice Kennedy joined Parts I, II, III-A through III-D, and IV of the majority.
122 See FCC v. Fox Television, 129 S. Ct. at 1822.
123 See id.
124 See id. at 1823
125 See id.
may be required if the agency is to demonstrate that its action is not, "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law."126

This view is persuasive. When an agency changes policy it should have to explicate the policy to make it clear that the reasons for the change were not political. When an agency changes an existing policy, the change in policy should be rooted in the current law, level of technology, scientific sophistication, and societal norms. There are delicate constitutional issues to address when dealing with agencies. The Federal Government could not function without administrative agencies; but if agencies are permitted to do as they please without explaining their actions adequately, they could run afoul of constitutional principles of the separation powers and checks and balances.127

6. Justice Ginsburg’s Dissenting Opinion

Justice Ginsburg began her decision by announcing that she was joining the dissent of Justice Breyer.128 She agreed that the FCC policy switch was arbitrary, capricious, and inconsistent with the holding of Pacifica.129 Justice Ginsburg wrote a separate dissent to discuss the First Amendment issues raised by the new policy that the FCC had undertaken with its new expletive policy.130 She found that George Carlin’s monologue was distinguishable from the facts at issue in the current case.131

George Carlin’s monologue involved the scripted repeated use of expletives while during the award ceremonies at issue in this case the

126 See id.
127 See id.
129 See id.
130 See id. Justice Ginsberg went onto describe Georg Carlin’s “Filthy Words” monologue and how it gave rise to the holding in Pacifica. Id. The Justices in Pacifica stressed that Carlin intentionally repeated profane words throughout the monologue with the purpose to shock the audience listening to the monologue. See id.
131 See id. at 1828-29.
expletives were “neither deliberate nor relentlessly repetitive.”\(^{132}\) 
Pacifica was a narrowly written opinion which was only supposed to cover repetitive deliberate expletives.\(^{133}\) Justice Ginsburg wanted the Court to be careful that if the First Amendment issue ever reached the Supreme Court that, “‘in our land of cultural pluralism’ . . . we should be mindful that words unpalatable to some may be ‘commonplace’ for others.”\(^{134}\)

7. Justice Breyer’s Dissenting Opinion

Justices Stevens, Souter, and Ginsberg joined Justice Breyer’s dissent.\(^{135}\) Justice Breyer did not think that the FCC adequately explained the decision to change the indecency policy from permitting fleeting uses of expletives to a policy that made no exception for single profane utterances.\(^{136}\) Instead of focusing on two critical factors, the FCC instead discussed several factors which were already discussed in Pacifica; these factors by themselves were inadequate to allow for a change in policy.\(^{137}\) Therefore, the FCC decision was arbitrary and capricious, and should have been overturned according to the dissent.\(^{138}\)

Justice Breyer began by discussing the law that grants independent administrative agencies the power to set their own regulatory policy.\(^{139}\) The law required agencies to explain new regulatory policies when a new policy departs from an old and the law bars agencies from implementing new policy for purely political reasons.\(^{140}\) Agencies are not accountable to voters so that independence allows them to create policy free from “political

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\(^{132}\) See id. at 1828 (Ginsburg, J., dissenting) (quoting Justice Brennan’s dissent in Pacifica, 438 U.S. at 775).

\(^{133}\) See FCC v. Fox Television, 129 S. Ct. at 1829.

\(^{134}\) See id. (Ginsburg, J., dissenting) (quoting Justice Brennan’s dissent in Pacifica, 438 U.S. at 775).

\(^{135}\) FCC v. Fox Television, 129 S. Ct. at 1829 (Breyer, J., dissenting).

\(^{136}\) See id.

\(^{137}\) See id.

\(^{138}\) See id.

\(^{139}\) See id.

\(^{140}\) Id.
oversight.” However, that independence from voters makes it all the more critical that courts review agencies’ decision making process to assure that they follow procedures that are in compliance with the law.

When agencies undertake a new policy through reasoned argument and deliberation, the policy the agency has undertaken is not arbitrary. It is up to the courts to determine whether a change of policy was based on relevant facts such as new scientific evidence or advances in technology. Agencies must follow their own policy and act consistently in enforcing their regulatory authority. Changing a policy requires more deliberation than explaining why a new policy is good. The agency must also answer the question of “[w]hy did you change” your former regulatory policy. The explanation to that question must be more thorough and detailed than if the agency was announcing the change in the first place. This is the key distinction between the dissent and the majority. Justice Scalia did not think that a heightened level of reasoning was required when an agency changed an existing policy.

Justice Breyer then explained the level of reasoning he thought an agency must undertake when changing a pre-existing administrative

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141 FCC v. Fox Television, 129 S. Ct. at 1829 (quoting Freytag v. Comm’s, 501 U.S. 868, 916 (1991)). “That insulation helps to secure important government objectives, such as the constitutionally related objective of maintain broadcast regulation that does not bend too readily before the political winds.” See id. at 1829-30.
142 See id. at 1830. The Justice went onto say that the applicable law governing agencies’ decision making process is the Administrative Procedure Act, supra. Courts exercise their discretionary power over agencies sparingly but have not given them unlimited reign to create policy that is not in accordance with the law. See id.
143 See id. The agencies have to follow a rational and logical decision making process. Id. The Justice reasoned that when an agency articulates a new policy, the policy “must reflect the reasoned exercise of expert judgment.” See id.
144 See id.
145 See id. Justice Breyer again reiterates that when an agency changes its former policy, the reasons for changing that policy must be adequately explained. See id.
146 Id.
147 FCC v. Fox Television, 129 S. Ct. at 1830.
148 See id.
policy through a hypothetical example.\textsuperscript{149} The hypothetical went as such: if an agency created a policy that required driving on the right-side of the road rather than the left-side, the agency might say, "[w]ell, one side seemed as good as the other, so I flipped a coin."\textsuperscript{150} This explanation would be adequate for the initial choice of formulating the policy; however, if the agency changed the law by restricting drivers to the left side of the road twenty-five years later, this initial explanation would not be adequate.\textsuperscript{151} Justice Breyer then explained the requirements that \textit{State Farm} imposed on an agency decision that rescinded earlier policy.\textsuperscript{152} In \textit{State Farm}, the unanimous Court wrote that an agency must provide a more thoroughly reasoned explanation for a policy than its initial reasoning during the conception of a policy.\textsuperscript{153} The more detailed explanation applies to both policy rescissions and modifications of earlier policy.\textsuperscript{154}

Justice Breyer disagreed with the majority’s characterization of his opinion as he would not require a heightened standard of review for agency decisions.\textsuperscript{155} It is the law that requires agencies to focus on how their policy has changed, not the Court.\textsuperscript{156} The Justice was aware of the fact that sometimes the explanation that “we now weigh relevant considerations differently" is enough as required by law, but often it is not enough.\textsuperscript{157} When an agency can, it should say more.\textsuperscript{158} An agency explicates its new policy further than its initial formulation of a policy when it reinterprets the same facts and laws, or when new facts have presented themselves requiring the agency

\textsuperscript{149} See id. at 1831.
\textsuperscript{150} See id.
\textsuperscript{151} See id.
\textsuperscript{152} See id.
\textsuperscript{153} See FCC v. Fox Television, 129 S. Ct. at 1831 (citing \textit{State Farm}, 463 U.S. at 41).
\textsuperscript{154} Id. Justice Breyer listed a series of questions that the agency decision must address: “[w]hy does it now reject the considerations that led it to adopt the initial policy? What has changed in the world that offers justification for the change? What other good reasons are there for departing from the earlier policy?” Id.
\textsuperscript{155} See id.
\textsuperscript{156} See id.
\textsuperscript{157} Id.
\textsuperscript{158} See id.
to change course. Rather than require a better reason for an initial policy decision, Justice Breyer would require agencies to explain why they changed the policy.

Justice Breyer was alarmed over how the majority’s holding could significantly change judicial review over agencies decisions, and not in a “healthy direction.” The issue is that if it is always legally sufficient for the agency to merely state that it preferred the new policy then there would be no point in asking the agency why it had changed the policy in the first place. The Justice fears that this is all that would be required under the majority’s opinion. By not adopting a heightened standard of review, agencies have too much leeway in setting new policies without explaining their new regulations.

In part two of the dissent, Justice Breyer said that the Court must apply the standards set forth in State Farm and Overton Park for governing what is required by the FCC in their change of fleeting expletive policy. The dissent did not think the FCC satisfied the minimum standards as required by law in justifying the new policy. Justice Breyer felt that there were two critical factors the FCC failed to address in Golden Globes that caused the order to fall short of the requirements imposed by the law. First, the FCC did not address the relationship between its fleeting expletive policy and the First Amendment requirement to avoid censorship. This needed to be addressed because the FCC had explicitly decided its

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159 See FCC v. Fox Television, 129 S. Ct. at 1831.
160 See id.
161 See id. at 1832.
162 See id.
163 See id.
164 See id.
165 FCC v. Fox Television, 129 S. Ct. at 1832. Justice Breyer wrote that the change in issue was, (1) the old policy that would normally permit broadcasters to transmit a single, fleeting use of an expletive to (2) a new policy that would threaten broadcasters with large fines for transmitting even a single use (including its use by a member of the public) of such an expletive, alone with nothing more.

Id.
166 See id.
167 See id. at 1833.
168 Id.
prior policy so it would not run afoul of the First Amendment. The majority in Pacifica explicitly said that the decision does not involve cases of the isolated use of an offensive word; if that were the regulation in force, it may in fact run afoul of the First Amendment.

Justice Breyer thought the FCC made clear that it would adhere to the constitutional line of Justice Powell’s concurrence in Pacifica. The FCC wrote that the First Amendment put limitations on how far it could go regulating indecency in a 1978 opinion. In 1983 the FCC again repeated that it had interpreted Pacifica to require the “repetitive occurrence of the ‘indecent’ words in question.” As recently as 2001, the FCC said that any regulation governing broadcasting must be based upon a compelling interest that is accomplished by the least restrictive means. All these cases point to the fact that the FCC had repeatedly stated it had to avoid coming too close to the constitutional line established by Justice Powell’s Pacifica concurrence.

The FCC said in its Golden Globes order that its decision was not inconsistent with the Supreme Court’s ruling on First Amendment issues in Pacifica because the Court left open the issue of whether a fleeting expletive could be actionably indecent. To Justice Breyer

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169 Id.
170 Id. Justice Powell and Blackmun noted in Pacifica that the Court “does not speak to cases involving the isolated use of a potentially offensive word . . . as distinguished from the verbal shock treatment administered by respondent here.” Id. (emphasis in original). In Pacifica, expletives were repeated over a hundred times in the middle of the day when children were very likely to be listening. See id.
171 FCC v. Fox Television, 129 S. Ct. at 1833.
172 Id. (citing In re Application of WGBH Educ. Found., 69 F.C.C.2d 1250, 1254).
173 See id. (quoting In re Application of Pacifica Found., 95 F.C.C.2d 750, 760). In another opinion written in 1987, the FCC again stated that the First Amendment forced it to take a hard, careful, and restrained approach to issues involving broadcast programming because of the relevant First Amendment free speech issues. See Id. at 1833-34 (citing In re Infinity Broad., 2 F.C.C.R. 2705 (1987)).
174 See id.
175 See id.
176 See id.
this was a discussion rather than explanation of the change in the fleeting expletive policy. The FCC did not explain why it now thought Pacifica left open the fleeting expletive issue while in the past the FCC interpreted the constitutional line that Pacifica drew differently. The Justice wanted to know why the FCC abandoned its compelling interest and less restrictive alternative test, which were articulated in earlier FCC orders.

The Justice used the opinion written by the dissenting FCC Commissioner to reinforce his own view of what explanation is required when changing policy. The dissenting Commissioner said that the new policy was “not the restrained enforcement policy encouraged by the Supreme Court in Pacifica.” Justice Breyer emphasizes that agencies do not always have to take into account possible constitutional issues when formulating a policy, but because of the nature of the policy at issue here, the FCC should be required to explain relevant First Amendment issues.

The second main issue with the FCC’s lack of explanation of its new policy is the fact the FCC never explained the impact of its policy on small local broadcasters. This issue would not have needed to be addressed had the FCC not taken on the issue of the potential impact on broadcasters. The FCC reasoned that the lower costs and the ease of installing bleeping technology justified the policy change of fining broadcasters for fleeting expletives.

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177 FCC v. Fox Television, 129 S. Ct. at 1833-34.
178 Id.
179 Id. Justice Breyer wrote that the explanation in policy did “not explain the transformation of what the FCC had long thought an insurmountable obstacle into an open door. The result is not simply Hamlet without the prince, but Hamlet with a prince who, in mid-play and without explanation, just disappears.” Id.
180 Id.
181 Id. (citing In re Complaints Regarding Various Television Broads. Between February 2, 2002 and March 8, 2008, 21 F.C.C.R. 13299, 13334 (2006)).
182 See id. at 1835. Justice Breyer said that the “FCC works in the shadow of the First Amendment,” because the FCC is primarily concerned with regulating broadcast speech. See id. Whenever a government is regulating or censoring speech, there are always going to be First Amendment issues that should be addressed no matter how minor they may be.
183 FCC v. Fox Television, 129 S. Ct. at 1835.
184 Id.
185 See id.
The FCC said nothing about small independent broadcasters who still would not be able to afford the bleeping technology. The Justice was concerned with any detrimental impact that the new fleeting expletive policy could have on small broadcasters. He believed that local broadcasters play a crucial role in increasing media coverage of local events that would not necessarily receive airtime on a major network; any policy that may curtail the ability of these local broadcasters to continue their same level of coverage should be seriously examined. The broadcasters told the Court that the cost of bleeping systems could cost hundreds of thousands of dollars for the installation and annual operation of that technology, which is beyond the financial ability of small broadcasters to pay.

The majority acknowledged the FCC did not adequately discuss the impact of this regulation on small broadcasters, but they did not think the FCC needed to address this issue to have reasoning that complied with the law. The majority addressed three reasons why small town broadcasters would not be exposed to increased fines. First, the majority explained “vulgar expression is less prevalent (at least among broadcast guests) in smaller towns.” Justice Breyer could not say whether vulgar expression was indeed less prevalent in small towns, but he did note that independent stations also exist in

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186 *Id.* Many of these small broadcasters are public service broadcasters and the decline of their ability to afford the bleeping technology would reduce their local coverage of many public events such as local high school sports, political speeches, and debates. *Id.*

187 *See id.* The reasons that the technology costs over a hundred thousand dollars annually is that “personnel costs associated with installing, maintaining, and operating delay equipment sufficient to cover all live news, sports, and entertainment programs could conceivably exceed the net profits of a small local station for an entire year.” *Id.* at 1836 (internal citation omitted).

188 *See id.* at 1835-36. The fear is that small broadcasters would cut back on their coverage rather than risk exorbitant fines. *Id* at 1836. One small station manager told the FCC that he had cut back on new coverage of live events where crowds are present to reduce the risk of a fleeting expletive from a raucous crowd member. *Id.* Only during civil emergencies will the manager permit coverage of local events where there are crowds. *Id.*

189 FCC v. Fox Television, 129 S. Ct. at 1835-36.

190 *Id.* at 1837.

191 *Id.*
both large and medium sized cities.\textsuperscript{192} Second, the plurality said that there is only increased risk of fines when they broadcast local news.\textsuperscript{193} Justice Breyer did agree that local news events did pose the greatest risk to small broadcasters of violating the fleeting expletive policy.\textsuperscript{194} Third, the plurality thought the FCC would exercise its discretion and decline to impose fines on small broadcasters.\textsuperscript{195} Justice Breyer strongly disagreed with this assertion.\textsuperscript{196} There is no language in the new policy that small broadcasters will not be fined.\textsuperscript{197} By implementing fines for any fleeting expletive, the FCC has in fact put a new policy in place that has greatly increased small broadcasters’ risk of being fined.\textsuperscript{198} If the FCC considered the effect on small broadcasters, and granted them an exemption, or at least explained why the fleeting expletive policy would apply to them, Justice Breyer would have been more inclined to find the new policy explanation adequate.\textsuperscript{199}

The dissent is scared of the chilling effect the law would have on broadcasters.\textsuperscript{200} This chilling effect is one which the law has been concerned about for decades, and is one that the broadcasters raised in their arguments before the FCC; however, the chilling effect on speech was not addressed anywhere in the FCC’s \textit{Golden Globes} order.\textsuperscript{201} Since the FCC failed to discuss the potential chilling effect on the free speech rights of broadcasters, and the effect of the fleeting expletive policy on small broadcasters, the dissent would hold that

\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{See id.} One could foresee a local sporting event, such as a high school football game, where after catching a pass, a young football player shouts an expletive in frustration close enough for the camera to pick up the audio of what he said.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} FCC v. Fox Television, 129 S. Ct. at 1837.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.} There may be an exception for human error in using the delay equipment. \textit{Id.} However, the remand order says nothing about stations that could not afford to purchase the bleeping equipment and whether or not this would exempt the stations from the new fleeting expletive policy. \textit{Id.}
\textsuperscript{199} \textit{See id.}
\textsuperscript{200} \textit{See id.}
\textsuperscript{201} \textit{See FCC v. Fox Television, 129 S. Ct. at 1837.}
the FCC’s explanation regarding its change in policy is inadequate as
required by law.

Justice Breyer then raised and explained why each of the reasons
that the FCC articulated for changing its existing regulatory policy
are inadequate.\textsuperscript{202} The FCC said that expletives such as the F-Word
always conjure up excretory or sexual images; the Justice found the
problem with this explanation to be that it does not explain why it is
now viewing the F-Word differently than it had in the past.\textsuperscript{203} The
FCC was aware of the impact on listeners when it formulated its
initial policy, which is when the FCC had distinguished between the
literal use of the F-Word and non sexual uses of the F-word; Justice
Breyer wanted to know in fact why its description of the F-Word had
changed.\textsuperscript{204} The FCC said that the most important reason for the new
policy was that the new policy was more consistent with the agency’s
approach to indecency as a whole.\textsuperscript{205} Once again Justice Breyer
reiterated this was a statement rather than an explanation for why the
policy changed.\textsuperscript{206}

The Solicitor General argued that 18 U.S.C. § 1464, on its face,
prohibited any broadcast of indecent language.\textsuperscript{207} Justice Breyer
implicitly admitted he found these arguments persuasive, but failed to
address them when he said, “We must consider the lawfulness of an
agency’s decision on the basis of the reasons the agency gave, not on
the basis of those it \textit{might have} given.”\textsuperscript{208} Another reason that the
FCC gave for its new policy was that the new policy better protects
children against being forced to hear an expletive.\textsuperscript{209} Justice Breyer
was concerned that the FCC gave no empirical data suggesting that

\textsuperscript{202} Id. at 1838.
\textsuperscript{203} See id.
\textsuperscript{204} See id.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} FCC v. Fox Television, 129 S. Ct. at 1838. The Solicitor General argued
that the entire purpose of the statute was to eliminate all uses of expletives on the
airwaves. \textit{Id}. The Solicitor General also argued that Congress “did not intend a
safe-harbor for a fleeting use of that language.” \textit{Id}.
\textsuperscript{208} Id. (emphasis in original). He is suggesting that the agency had to include
that reasoning in its \textit{Golden Globes} order itself rather than being raised for the first
time to the Supreme Court. \textit{See id}.
\textsuperscript{209} See id. at 1839.
hearing an expletive just once dramatically influences and changes the behavior of children. The Justice argued that in this situation not relying on any empirical data weakened the strength of the FCC’s conclusions.

For the past twenty-five years the broadcasters had a fleeting expletive policy allowing an occasional expletive to be broadcast, yet the broadcasters never aired a parade of expletives on their programs as the FCC contended that the broadcasters would begin to do if the fleeting expletive policy was not changed. The FCC gave no reasons for why broadcasters would now choose to increase the number of expletives on the airwaves other than it was “logic” that the broadcasters would begin to air more indecent phrases. Justice Breyer sees this reasoning as inadequate because this “logic” was available to the FCC in 1978, when they formulated the initial policy allowing fleeting expletives, but the FCC of yesteryear still chose to create the fleeting expletive policy.

The Justice then turned to the doctrine of constitutional avoidance. The Justice did not think, as the majority did, that the doctrine of constitutional avoidance should be applied to this case. Justice Breyer would have ordered a remand to be briefed on the relevant First Amendment issues that may be problematic with the FCC’s new regulatory policy. Unlike the majority, Justice Breyer would have remanded the case so that the FCC could be given the

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210 See id. Justice Breyer did not think new research or data is always necessary when an agency implements a new policy decision, but he did think that it would be helpful in this situation. See id.
211 Id.
212 See id.
213 FCC v. Fox Television, 129 S. Ct. at 1839.
214 Id.
215 Id. at 1840. Justice Breyer explained that the doctrine “seeks to avoid unnecessary judicial consideration of constitutional questions, assumes that Congress, no less than the Judicial Branch, seeks to act within constitutional bounds,...thereby diminish[ing] the friction between the branches that judicial holdings of unconstitutionality might otherwise generate.” Id. The doctrines also assumes that instead of risking a constitutional holding that would throw out the statute, Congress would prefer a “less-than-optimal” interpretation of the statute in question. Id.
216 Id.
217 Id.
opportunity to elaborate more on why it changed the fleeting expletive policy.\textsuperscript{218} Justice Breyer ended his dissent by reiterating the two biggest omissions that the FCC made while creating the new policy.\textsuperscript{219} First, the Justice wanted to know how the new policy would affect local broadcasters.\textsuperscript{220} Second, why the agency has now chosen to reinterpret Pacifica differently than it did twenty-five years ago.\textsuperscript{221} In essence, the dissent’s argument could be summed up as requiring the FCC to answer one question in regard to the new policy: “Why change?”\textsuperscript{222}

\textbf{B. IMPACT OF THE COURT’S DECISION}

\textit{1. Impact on Administrative Agency Policy Making}

The impact of this plurality decision on the administrative agency process for changing existing policy will be significant. When an agency changes an existing policy, regardless of how long that policy has been in effect, the agency will no longer be required to explain the reasons why it had switched policies. The agency will still be required by law to explicate the reasons for the change overall, but it will not be required to say why it did not choose to create the current regulatory policy as its initial policy. The problem with the majority’s decision in \textit{FCC v. Fox Television} is that federal agency heads are often appointed by the President; these political appointees can now bow more easily to political pressure to change administrative regulatory policies to ones that suit the current party in office.\textsuperscript{223} Courts have already begun to use \textit{FCC v. Fox Television} for the proposition that, “court[s] should uphold decisions of ‘less

\textsuperscript{218} See id.
\textsuperscript{219} FCC v. Fox Television, 129 S. Ct. at 1840.
\textsuperscript{220} See id. at 1841.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} See Kathryn A. Watts, Proposing a Place for Politics in Arbitrary and Capricious Review, 119 Yale L.J. 2, 10 (2009). “Justice Scalia’s opinion, which rejects the notion that agency change must be subjected to more searching judicial review, arguably makes it easier for agencies to change their policies due to changes in the political wind.” Id.
than ideal clarity’ so long as ‘agency’s path may be reasonably discerned.’”

2. Impact on Broadcasters

The new indecency policy may have a chilling effect on the free speech rights of broadcasters. Prior to Golden Globes, and after Chairman Powell’s appointment to the FCC in 2001, broadcasters would self-censor in response to the increased number of instances where fines were being imposed on broadcasters. The Supreme Court did not take up the First Amendment issue of whether the new policy of fining broadcasters for a single fleeting expletive violates their free speech rights. This issue is likely to come up before the Court in the near future as the Court declined to address the First Amendment issue, which Justice Ginsburg, Breyer, and Thomas all wanted to address.

Local sporting events pose a problem for small broadcasters in particular because, unlike recorded programs, which are heavily edited, sporting events are live, unrehearsed, and, most importantly, unpredictable. The big risk in sporting events comes from fans chanting expletives or athletes cursing, both of which can be often picked up by microphones. Prior to Golden Globes there were various instances of expletives being picked up by microphones at

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225 Sparr, supra note 14, at 245. The fines for indecency violations increased from $48,000 in 2000 to $91,000 in 2001 and $440,000 in 2003. Id. at 246. In 2004 the FCC levied more fines on broadcasters for indecency violations than in “the previous ten years combined.” Id. Out of fear of being fined, various broadcasters began editing out content. Id. at 247. For example, NBC removed a scene from ER showing the breast of an eighty-year-old woman receiving medical care, and PBS cut out seconds of a love scene from a documentary on Emma Goldman because there was too much cleavage in the scene. Id. One legal scholar wrote, “[i]ndecency enforcement generally abated during the Clinton era FCC, but came back with a vengeance in the George W. Bush years.” Conrad, supra note 4, at 183.
226 Id. at 188.
227 Id.
sporting events.\textsuperscript{228} However, under pre-\textit{Golden Globes} jurisprudence, the FCC declined to fine these broadcasters.\textsuperscript{229} Under \textit{FCC v. Fox}, all of these indecent broadcasts would have been actionable. It is foreseeable that under the current regulatory regime the FCC could impose fines upon a broadcaster for not bleeping an obscenity. I am not as convinced as Justice Breyer that the FCC would actually impose fines on small independent broadcasters if an expletive made its way onto a live broadcast. However, the FCC should tackle this issue head-on and carve out an exception for sporting events, or at least articulate what its current policy regarding live sporting events is. Otherwise, there may be a chilling effect on small local broadcasters, who may now refuse to broadcast local high school and college sporting events out of fear of being fined by the FCC.

\textit{3. Oral Arguments in Remand to the Second Circuit}

\textit{FCC v. Fox} was reargued during remand before the Second Circuit on January 13, 2010. The Supreme Court had ruled that the FCC’s explanation for changing its regulatory policy was adequate, but broadcasters now argued that the fleeting expletive policy violated their First Amendment rights.\textsuperscript{230} The counsel for the broadcasters argued that the Second Circuit should use either intermediate or strict scrutiny in determining whether the policy of fining for single indecent phrases on broadcast television violated the First Amendment.\textsuperscript{231} The broadcasters believed that the policy would fail both intermediate and strict scrutiny analysis. The broadcasters saw \textit{Pacifica} as the outer limit of what was permitted in regulating

\textsuperscript{228} \textit{Id.} at 189. A microphone picked up a player yelling “motherfucker” during a baseball playoff game in 2001. In that same year, an NFL player used the same expletive during the introduction ceremony of the Super bowl broadcast on national television. \textit{Id.} One more example to illustrate the unpredictability of sporting events was highlighted when John McEnroe yelled “shut the fuck up” into the headset of an NBC cameraman. \textit{Id.}

\textsuperscript{229} \textit{Id.}


\textsuperscript{231} See \textit{id.}
free speech. The intervener for NBC had issue with the fact that the FCC was the one to define what current contemporary community standards were. Since Golden Globes, the FCC decides if a program is newsworthy or artistic. If the FCC decides that a certain subject is neither artistic nor newsworthy they could subject the broadcasters to fines, creating a very subjective process. The counsel for the broadcasters pointed to a number of cases in which broadcasters that had previously shown programs on the air under the pre-Golden Globes regulatory scheme now refused to carry those programs for fear of being fined. For example, many broadcast affiliates refused to carry Saving Private Ryan after 2004 even though many had carried it in 2001. Lack of predictability has made it impossible to determine both what a violation is and what the consequences would be for a violation. The broadcasters were also incredibly concerned about the chilling effect of free speech on live news programs and sporting events.

IV. CONCLUSION

FCC v. Fox has settled the question of how detailed an agency's rational explanation for a change in regulatory policy must be when the new policy departs from the old. There is no higher standard imposed on an agency when that agency explicates the new policy. The agency only needs to go into the reasoning that it would have had if it had created the policy initially. This means that an agency does not necessarily need to answer the question of why the policy was being changed, as the dissent in FCC v. Fox argued that it had to do. The holding of FCC v. Fox was summed up succinctly by Justice Scalia when he wrote in the opinion that, "our opinion . . . neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those

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232 See id.
233 See id.
234 See id.
235 See id.
237 See id.
required to adopt the policy in the first instance."\textsuperscript{238} This decision leaves more room for agency heads to order administrative policy changed for purely political reasons, since they do not necessarily need to account for why the new policy is better than the old.

While \textit{FCC v. Fox} answered one question, it raised another. The Supreme Court said that the FCC's rationale explaining the new policy was adequate and met the standard imposed by law, but the Supreme Court explicitly declined to address the issue of whether the new fleeting expletive policy was constitutional.\textsuperscript{239} On remand to the Second Circuit the broadcasters focused their argument on challenging the constitutionality of the decision on First Amendment grounds. However the Second Circuit decides, the case will probably make its way back up to the Supreme Court, as many of the justices appeared open to consideration of the First Amendment issue and reexamination of \textit{Pacifica}.\textsuperscript{240} Writing in his concurrence, Justice Thomas wrote regarding \textit{Pacifica}, "[t]his deep intrusion into the First Amendment rights of broadcasters, which the Court has justified . . . is problematic."\textsuperscript{241} Justice Ginsburg also seemed to be very concerned about First Amendment issues, and invited a challenge on those grounds when she wrote, "[t]here is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today’s decision does nothing to diminish that shadow."\textsuperscript{242} The FCC's fleeting expletive policy must be reexamined in light of the First Amendment or broadcasters may decide to air fewer live sporting events and news casts out of fear of being fined by the Commission. In considering the relevant First Amendment issues of the FCC's policy, the Court must remember that "words unpalatable to some may be ‘commonplace’ for others."\textsuperscript{243}

\textsuperscript{238} \textit{FCC v. Fox}, 129 S. Ct. at 1810.
\textsuperscript{239} \textit{Id.} The majority wrote, "[t]he Second Circuit did not definitively rule on the constitutionality of the Commission's orders, but respondents nonetheless ask us to decide their validity under the First Amendment . . . We decline to address the constitutional question at this time." \textit{Id.}
\textsuperscript{240} \textit{Id.} at 1821.
\textsuperscript{241} \textit{Id.} at 1820. Justice Thomas went on to argue that \textit{Pacifica} "lack[ed] any textual basis in the Constitution." \textit{Id.} at 1821.
\textsuperscript{242} \textit{Id.} at 1828.
\textsuperscript{243} \textit{Id} at 1829.