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FCC v. Fox Television Stations and the Role of Logical Error in Hard Look Review

I. INTRODUCTION

Logical reasoning plays an important but delicate role in the American legal system. We expect the branches of government responsible for applying the law—the judicial and executive branches—to do so faithfully. Their actions have concrete consequences for real people, and, therefore, we expect such actions to be supported with valid, logical reasoning. Of course, we also hope the legislative branch selects its policies after exploring the options and that it uses logic to choose those that make the most sense, but the inherent uncertainties surrounding policy decisions and the legislature’s political accountability for bad choices perhaps demand less logical rigor in the policymaking process.

Administrative agencies, however, occupy a unique position in the American legal system. Agencies are not directly accountable to the people as are Congress and the President,¹ yet their power embraces executive, legislative, and even judicial authority. The political checks that ensure Congress does not stray too far from reason, therefore, are perhaps less effective against agencies as policymakers. Independent agencies are even more insulated from political pressure—their officials may enjoy tenure of office and are therefore free from an important source of control from the President.² Considering the broad power exercised by administrative agencies and the reduced political accountability, surely we must expect this “fourth branch”³ of government to exercise good reasoning in administering the laws.

1. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

2. While there have been those who challenge the constitutionality of independent agencies ever since the Supreme Court upheld them in *Humphrey’s Executor v. United States*, see, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 582 (1994), the Court has yet to seriously entertain the possibility that *Humphrey’s Executor* should be overruled.

3. See *Fed. Mar. Comm’n v. S.C. State Ports*, 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (citation omitted).

In fact, Congress has taken steps to ensure that administrative agencies adhere to logical reasoning, at least to some extent. The Administrative Procedure Act (“APA”) prescribes certain procedures that agencies must follow in rulemaking and adjudications⁴ and makes agency decisions reviewable by the courts.⁵ While formal rulemaking and adjudicatory decisions must be borne out completely by the evidence developed in an administrative record,⁶ more informal decisions are upheld as long as they are not “arbitrary, capricious, [or] an abuse of discretion.”⁷ Thus, even if an agency is not always required to justify its decision with hard evidence, it must offer *some* non-arbitrary justification for its decisions.

But how rigorous must the agency’s logic process be to convince a court that its decision is not arbitrary, capricious, or an abuse of discretion? Certainly, the agency must offer some explanation for its action that does not defy logic,⁸ but even courts—the bastions of logic in the American legal system—often indulge in informal fallacies without batting an eye.⁹ Thus, it would not be surprising to discover that the courts are willing to tolerate some degree of error in the logical processes of administrative decision-making.

This Note explores one of the Supreme Court’s most recent cases reviewing an agency’s exercise of policymaking discretion and the role of logic in that process. In *FCC v. Fox Television Stations*,¹⁰ the Court heard a challenge to the Federal Communication Commission’s (“FCC”) decision to change its policy regarding the prohibition of broadcast indecency and profanity. Following a number of complaints for broadcasts of the “F-Word” during live broadcasts, the FCC abandoned its earlier policy that held that broadcasts of fleeting expletives did not amount to indecent speech.¹¹

4. See Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2009).

5. 5 U.S.C. §§ 701–06 (2006).

6. 5 U.S.C. § 706(2)(E) (2006).

7. 5 U.S.C. § 706(2)(A) (2006).

8. See David H. Becker, *Changing Direction in Administrative Agency Rulemaking: “Reasoned Analysis,” The Roadless Rule Repeal, and the 2006 National Park Service Management Policies*, 30 ENVIRONS: ENVTL. L. & POL’Y J. 65, 69–70 (2006).

9. See generally BRETT G. SCHARFFS, *LAW AND THE LIMITS OF LOGIC* (forthcoming).

10. 129 S. Ct. 1800 (2009).

11. *Id.* at 1807–08.

While all of the Justices purported to agree that a heightened standard of review is not necessary, the Court sharply divided on what the “arbitrary or capricious” standard required in this case.¹² The majority upheld the FCC’s decision, ignoring and, at times, endorsing logically fallacious arguments put forward by the FCC. This treatment of the FCC’s explanation for its decision signals a willingness on the part of the Court to overlook informal errors in agency reasoning, at least when the agency decision does not ignore factual findings. This relaxation of “hard look” review may, in turn, allow agencies that desire to change policy for purely political reasons to do so as long as they can provide some justification that does not completely defy logic.

This Note proceeds as follows: Part II reviews the FCC’s history in regulating broadcast indecency and profanity and introduces *Fox Television Stations*. Part III explains the principles of hard look review that guide review of informal agency policymaking decisions. Part IV discusses the logical errors employed by the FCC in defending its decision to change its broadcast indecency policy and suggests that the logically flawed justification it provided may have masked primarily political motivations. Part V offers a brief conclusion.

II. FCC REGULATION OF BROADCAST INDECENCY AND PROFANITY

The FCC is an independent federal agency “charged with regulating interstate and international communications by radio, television, wire, satellite and cable.”¹³ The FCC’s five Commissioners are appointed by the President and confirmed by the Senate to serve five-year terms, and no more than three Commissioners may be members of the same political party.¹⁴ While the President designates the FCC chairman,¹⁵ he has no authority to remove Commissioners without cause and, therefore, has no formal power to direct the FCC in its regulatory activities.

The FCC’s organic statute, the Communications Act of 1934, established the FCC and created a system whereby private entities

12. *See id.* at 1810–11 n.2.

13. Federal Communications Commission, About the FCC, <http://www.fcc.gov/aboutus.html>.

14. *Id.*

15. 47 U.S.C. § 154(a) (2006).

may obtain limited-term broadcast licenses.¹⁶ The licensing system ensures that the United States “maintain[s] . . . control . . . over all the channels of radio transmissions,” while granting persons the use of those channels.¹⁷ The government’s ability to control the content of broadcasts is limited, however, by statute and the First Amendment. The Communications Act proclaims:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.¹⁸

However, while the FCC may not engage in censorship, Congress has also forbidden by criminal statute the “utter[ance] [of] any obscene, indecent, or profane language by means of radio communication”¹⁹ and has instructed the FCC to enforce this prohibition for broadcasts made on public television between the hours of 6 a.m. and 10 p.m.²⁰

A. Pacifica and Its Aftermath

While the indecency ban has been on the books since 1934, the FCC did not invoke it until 1975, when it found a daytime broadcast of George Carlin’s monologue, “Filthy Words,” to be

16. 47 U.S.C. § 151 *et seq.* (2000, Supp. V).

17. 47 U.S.C. § 301 (2000); *see also* CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (“A licensed broadcaster is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.” (internal quotation marks omitted) (quoting Office of Comm’n of United Church of Christ v. FCC, 359 F.2d 994, 1003 (1966))).

18. 47 U.S.C. § 326 (2006).

19. 18 U.S.C. § 1464 (2006).

20. Public Telecommunications Act of 1992, P.L. 102-356 § 16(a), 106 Stat. 954 (1992) (codified at 47 U.S.C. § 303, note) (“The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).”). The U.S. Court of Appeals for the District of Columbia has held the prohibition on indecent speech between the hours of 10 p.m. and midnight unconstitutional. *Action for Children’s Television v. FCC*, 58 F.3d 654, 669–70 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

actionably indecent.²¹ In defining the term “indecent,” the FCC concluded that the concept is “intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.”²²

Significantly, this definition of “indecent” differs from the definition of “obscene,” and therefore includes language that is indisputably subject to some degree of First Amendment protection.²³ The FCC reasoned that indecent language, when broadcast at a time when children are likely to be in the audience, was similar to a public nuisance, and should, therefore, generally be regulated using nuisance principles.²⁴ Thus, while the definition of “indecent” should not depend on the audience, a different standard would perhaps be appropriate “[w]hen the number of children in the audience is reduced to a minimum.”²⁵

The radio station that had broadcast the monologue challenged the FCC’s order, but failed to convince the Supreme Court either that section 1464 only prohibited obscene language, or that the statute as applied violated the First Amendment.²⁶ In *FCC v. Pacifica Foundation*, the Court upheld the FCC’s definition of “indecent,” and concluded that the statute, as applied in that case, did not impermissibly infringe the radio station’s freedom of speech.²⁷ In his majority opinion, Justice Stevens concluded by emphasizing the narrowness of the Court’s opinion: “We have not decided that an occasional expletive in [a two-way radio conversation or a telecast of

21. Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 1975 WL 29897 (1975).

22. *Id.* ¶ 11.

23. The FCC explicitly disavowed its prior decisions that had defined “indecent” in terms of an earlier formulation of obscenity. *Id.* ¶ 10 (“The Commission did offer a definition in *WUHY-FM*, but relied substantially on the then existing definition of obscenity. In view of subsequent decisions (*Miller* and *Illinois Citizens*), we are reformulating the concept of ‘indecent.’” (citations omitted)).

24. *Id.* ¶ 11.

25. *Id.* ¶ 12.

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

27. *Id.* at 747–51.

an Elizabethan comedy] . . . would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution.”²⁸

Justice Powell further emphasized the narrowness of the Court’s opinion in his concurrence. He, joined by Justice Blackmun, both of whom were necessary to form a majority, made it clear that “[t]he Commission’s holding, and certainly the Court’s holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here.”²⁹

The FCC responded to the Court’s signals in *Pacifica* by developing a fairly narrow enforcement policy over the next several years.³⁰ In particular, the FCC distinguished between literal uses of offensive words that have to do with sex or excretion and expletive uses of those words.³¹ The FCC stated, “If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.”³² Whereas fleeting uses of offensive words in a nonliteral sense would not constitute indecency, actual “description or depiction of sexual or excretory functions” would be “examined in context to determine whether it is patently offensive under contemporary community standards applicable to the broadcast medium.”³³

Thus, after *Pacifica*, the FCC took a very cautious approach to regulating broadcast speech. Indeed, while the statute prohibits both indecent and profane speech, the FCC eschewed any interpretation of profanity that would encompass speech that was not also indecent or obscene, holding that “[p]rofanity that does not fall under one of the above two categories is fully protected by the First Amendment

28. *Id.* at 750.

29. *Id.* at 760–61 (Powell, J., concurring).

30. See Application of WGBH Educ. Found., 69 F.C.C.2d 1250, 1254, ¶ 10, 1978 WL 36042 (1978) (expressing its “inten[tion] strictly to observe the narrowness of the *Pacifica* holding”); *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699, ¶ 12, 1987 WL 345577 (1987) (holding that enforcement power not limited to “deliberate, repetitive use of the seven words actually contained in the George Carlin monologue”); *Id.* ¶ 13 (preserving distinction between literal and nonliteral uses of evocative language and suggesting that “deliberate and repetitive use . . . is a requisite to a finding of indecency” when complaint focuses solely on expletive use).

31. *Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 ¶ 13 (1987).

32. *Id.*

33. *Id.*

and cannot be regulated.”³⁴ In sum, after *Pacifica*, the test for indecency prescribed a two-prong analysis. The FCC and reviewing courts must ask two questions: (1) whether the language, in context, depicts or describes sexual or excretory activities or organs, and (2) whether it does so in terms patently offensive as measured by contemporary community standards for the broadcast medium.³⁵

B. The FCC Changes Course

On March 3, 2004, the FCC adopted an opinion and order (the *Golden Globes Order*) holding that daytime broadcasts of single or fleeting uses of the “F-Word,” “S-Word,” and other profanities “as highly offensive as the ‘F-Word’” would no longer be tolerated.³⁶ The case arose after the FCC received several complaints alleging that the 2003 Golden Globes Awards program included a broadcast of the singer Bono saying, “[T]his is really, really, fucking brilliant. Really, really great.”³⁷ The Enforcement Bureau, applying the “fleeting expletives exception,” had found that the material “did not describe, in context, sexual or excretory organs or activities and that the utterance was fleeting and isolated.”³⁸ On appeal, the FCC found that the utterance constituted both actionable indecency and profanity, and announced that the fleeting expletives exception is “no longer good law.”³⁹

In analyzing the question whether Bono’s statement constituted indecency, the FCC applied the two-prong test developed from *Pacifica*. First, it determined that, “given the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.”⁴⁰ The FCC asserted that its conclusion was consistent with the original *Pacifica* decision, “in which the Commission held that the ‘F-Word’ does depict or

34. FCC, THE PUBLIC AND BROADCASTING (1999), available at 1999 WL 391297 (F.C.C.).

35. Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8002 (2001).

36. Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, 4981 (2004) [hereinafter *Golden Globes Order*].

37. *Id.* at 4976 n.4.

38. *Id.* at 4975–76.

39. *Id.* at 4980–81.

40. *Id.* at 4978 (emphasis added).

describe sexual activities.”⁴¹ The FCC also found that the language was “patently offensive under contemporary community standards for the broadcast medium.”⁴² The FCC argued that, as one of the “most vulgar, graphic and explicit descriptions of sexual activity in the English language,” use of the “F-Word” “invariably invokes a coarse sexual image.”⁴³ In the *Golden Globes* case, its use was “shocking and gratuitous” and lacked any “political, scientific or other independent value . . . or any other factors to mitigate its offensiveness.”⁴⁴ The FCC feared that failing to take action against isolated uses of such language “would likely lead to more widespread use of the offensive language.”⁴⁵

Finally, the FCC asserted that its decision was “not inconsistent with the Supreme Court ruling in *Pacifica*” because the Court had “left open the issue of whether an occasional expletive could be considered indecent.”⁴⁶ While the FCC justified its decision with reference to *Pacifica*, it conceded that its holding constituted a change in FCC policy, both in terms of indecency law and profanity law.⁴⁷ Because the broadcast would not have been actionable under the FCC’s previous standards, it declined to impose sanctions against the offending broadcast licensees.⁴⁸

Following the *Golden Globes Order*, the FCC issued notices of apparent liability for several broadcasts aired between 2002 and 2005 that it deemed actionably indecent, but again refrained from imposing sanctions.⁴⁹ After a remand from the Second Circuit to

41. *Id.* For an analysis of this argument as a vicious abstraction, see *infra* Part IV.A.1.

42. *Golden Globes Order*, 19 F.C.C.R. 4975, 4979 (2004).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 4982.

47. *Id.* at 4980 (“In *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698, 2699 (1987) . . . the Commission stated as follows: ‘If a complaint focuses solely on the use of expletives, we believe that . . . deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency.’ . . . We now depart from this portion of the Commission’s 1987 *Pacifica* decision as well as . . . any similar cases holding that isolated or fleeting use of the ‘F-Word’ or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent.”). The FCC’s new rule regarding profanity itself has serious First Amendment implications as well as implications for hard look review. However, because in *Fox Television Stations* neither the parties nor the Supreme Court focused on the FCC’s new profanity rule, this Note also defers that discussion to another day.

48. *Id.* at 4981–82.

49. See *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1808–10 (2009).

allow the licensees to contest the decisions, the FCC upheld most of its findings of indecency.⁵⁰ Two of these broadcasts involved programs aired by Fox Television Stations—the 2002 Billboard Music Awards and the 2003 Billboard Music Awards.⁵¹ Fox had failed to “bleep out” offensive language uttered by Cher as she accepted an award in the 2002 show, and by Nicole Richie as an awards presenter in the 2003 broadcast.⁵² While the FCC in its *Remand Order* contended that the broadcasts would have been actionable prior to the *Golden Globes Order*,⁵³ the *Golden Globes Order* removed any doubt that the language was actionable.⁵⁴

In justifying its findings under the *Golden Globes Order*, the FCC rejected any “strict dichotomy between ‘expletives’ and ‘descriptions or depictions of sexual or excretory functions’” because “an ‘expletive’s’ power to offend derives from its sexual or excretory meaning.”⁵⁵ Furthermore, the FCC referenced the difficulty in certain cases of determining whether a word is being used in an expletive or literal sense.⁵⁶ Finally, the FCC believed that “categorically requiring repeated use of expletives in order to find material indecent is inconsistent with [its] general approach to indecency enforcement, which stresses the critical nature of context.”⁵⁷ Such a requirement would “permit broadcasters to air expletives at all hours of a day so long as they did so one at a time.”⁵⁸

50. *Id.*; see Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C.R. 13299 (2006) [hereinafter *Remand Order*].

51. *Fox Television Stations*, 129 S. Ct. at 1808–10.

52. *Id.*

53. Cher’s use of the “F-Word,” the FCC argued, involved a description or reference to “a sexual act as a metaphor to express hostility to her critics. The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions.” *Remand Order*, 21 F.C.C.R. 13299, 13324 (2006). Nicole Richie, for her part, had used the “F-Word” as an expletive, but had also used the “S-Word” as a literal description of excrement. *Id.* at 13307–08. Furthermore, the FCC believed her language could have been indecent under the previous standard because it involved more than one offensive word and appeared to be deliberate. *Id.*

54. *Fox Television Stations*, 129 S. Ct. at 1809 (citing *Remand Order*, 21 F.C.C.R. 13299, 13308 ¶ 23, 13325 ¶ 61).

55. *Remand Order*, 21 F.C.C.R. 13299, 13308 (2006).

56. *Id.*

57. *Id.*

58. *Id.* at 13309.

III. HARD LOOK REVIEW

Needless to say, Fox was not happy with the FCC's order. Even though the FCC had not imposed sanctions for the offending broadcasts, Fox, joined by other intervening broadcasters, appealed to the Second Circuit. The Court of Appeals set aside the agency's orders after finding the FCC's change of policy in the *Golden Globes Order* to be arbitrary and capricious in violation of the Administrative Procedure Act.⁵⁹ A sharply divided Supreme Court, however, reversed the Second Circuit, and reinstated the FCC's orders.⁶⁰ While the Justices agreed that no heightened scrutiny was needed for agency changes in policy, they strongly disagreed on what the "arbitrary and capricious" standard required in this context.⁶¹

In deciding *FCC v. Fox Television Stations*, all of the Justices agreed that the decision required application of the principles of "hard look" review.⁶² This method of reviewing informal agency policymaking decisions by asking whether the agency took a "hard look" at the salient problems . . . and . . . genuinely engaged in reasoned decision-making," originated in the Court of Appeals for the D.C. Circuit.⁶³ But the current approach to arbitrary and capricious review was laid down by the Supreme Court in *Motor Vehicle Manufacturers Ass'n. v. State Farm*.⁶⁴

In *State Farm*, the Court reviewed a decision by the National Highway Traffic Safety Administration ("NHTSA") rescinding its previously promulgated motor vehicle safety standards.⁶⁵ In accordance with its mandate under the National Traffic and Motor Vehicle Safety Act, which directed the agency to issue motor vehicle safety standards, the NHTSA had developed a rule, also known as Standard 208, requiring auto manufacturers to include passive restraints in new vehicles.⁶⁶ At various stages in the rulemaking process, the regulation included requirements for airbags, automatic seatbelts, ignition interlocks for manual seatbelts, and manually

59. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 454 (2007), *rev'd* 129 S. Ct. 1800 (2009).

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

61. *Id.*

62. *Id.*

63. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

64. 463 U.S. 29 (1983).

65. *Id.*

66. *Id.* at 33–37.

detachable automatic seatbelts.⁶⁷ At times, the process was politically charged, with Congress stepping in to ban the unpopular ignition interlock system and asserting a potential legislative veto on “any safety standard that could be satisfied by a system other than seatbelts.”⁶⁸ The President also appeared to have stepped into the controversy, as Justice O’Connor recognized that “the agency’s changed view of the standard seems to be related to the election of a new President of a different political party.”⁶⁹

After a “complex and convoluted” rulemaking process, the agency finally rescinded its adopted rule.⁷⁰ The final rule had mandated the phasing in of passive restraints, but left discretion with automakers in determining whether to use airbags or automatic seatbelts.⁷¹ In explaining the rescission, the agency argued “it was no longer able to find . . . that the automatic restraint requirement would produce significant safety benefits.”⁷² The Supreme Court, however, found the agency’s reasoning insufficient and directed it to “consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports.”⁷³

The Court struck down the agency’s rescission as arbitrary and capricious because the stated reasons for the decision did not support the result. After automakers largely opted to comply with the regulation by installing automatic belts rather than airbags, the agency determined that the “detachable automatic belts will not attain anticipated safety benefits because so many individuals will detach the mechanism.”⁷⁴ The Court, however, did not see how this conclusion, even if true, would justify a complete rescission of the rule. According to the Court, this conclusion

standing alone . . . would not justify any more than an amendment of Standard 208 to disallow compliance by means of the one technology which will not provide effective passenger protection. It

67. *Id.*

68. *Id.* at 36.

69. *Id.* at 59 (O’Connor, J., concurring in part and dissenting in part).

70. *Id.* at 34 (majority opinion).

71. *Id.* at 37.

72. *Id.* at 38.

73. *Id.* at 34.

74. *Id.* at 47.

does not cast doubt on the need for a passive restraint standard or upon the efficacy of airbag technology.⁷⁵

State Farm established two important principles. First, the Court held that rescissions of agency action should be treated the same as positive agency action, and because a

“settled course of behavior embodies the agency’s informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress[,]” . . . an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.⁷⁶

Second, the Court confirmed that when agencies exercise discretion to make policy, they must provide a reasoned explanation connecting their findings with the decisions they make.⁷⁷ In determining whether an agency has met this standard, courts must ask whether

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁷⁸

Thus, while a change in policy does not require a stricter standard of review than that applied to initial agency policy decisions, the agency must give valid reasons for making the change.

State Farm’s test for arbitrary and capricious review suggests that agency decisions should be guided only by agency expertise informed by a rigorous investigation of available evidence. And while lower courts have upheld agency decisions based on policy considerations when factual findings are unavailable,⁷⁹ agencies generally justify

75. *Id.*

76. *Id.* at 41–42 (quoting *Atchison T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807–08 (1973)).

77. *Id.* at 34 (“Briefly summarized, we hold that the agency failed to present an adequate basis and explanation for rescinding the passive restraint requirement and that the agency must either consider the matter further or adhere to or amend Standard 208 along lines which its analysis supports.”).

78. *Id.* at 43.

79. *See, e.g.,* *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 315–16 (D.C. Cir. 1992) (upholding a decision by the Federal Highway Administration (FHA) to require inspections of underwater bridge members every five years (the period recommended

their policy decisions in technocratic, scientific terms.⁸⁰ Political influences might motivate an agency to decide to address a particular problem, but *State Farm* indicates that they should not provide the sole justification for a final decision.

However, in spite of *State Farm*'s direction that political considerations may not, by themselves, formally justify agency policy decisions, hard look review may not always effectively deter agencies from basing their decisions on political factors in practice. First, in some cases the agency may have insufficient data to make any decision. In those instances, even outright recognition of political motivation may be sufficient to justify the agency action.⁸¹ In other cases, the evidence might support more than one outcome. As long as the agency can justify its choice between alternatives with a rational explanation based on the evidence, it may hide the fact that political preferences tipped the scale one way or the other. In these instances, hard look review may not effectively deter essentially political decisions to the fullest extent.

The level of deterrence possible may depend, however, on how rigorous courts are in analyzing the logic of agency decisions. For example, if an agency selects one alternative for political reasons when evidence or reason weigh more heavily in favor of another alternative, we might expect to find fallacious arguments in the agency's explanation for its decision. If courts demand strictly logical explanations, then agencies may have fewer opportunities to mask their essentially political decisions. If, however, courts are willing to tolerate a degree of fallacious argument in finding an agency explanation rational, then agencies may often succeed in placing significant weight on political considerations.

IV. INFORMAL FALLACIES IN *FCC v. FOX TELEVISION STATIONS*

FCC v. Fox Television Stations is significant because it signals a willingness on the part of the Supreme Court to tolerate logical errors in agency reasoning, at least when the basis for a decision turns on the construction of judicial precedent rather than factual

by the American Association of State Highway and Transportation Officials) even though FHA did not have any factual findings to support its decision).

80. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5, 5 n.4 (2009).

81. See *Ctr. for Auto Safety*, 956 F.2d at 315–16.

findings. Every Supreme Court Justice agreed that the FCC's decision to abandon its fleeting expletives policy required a reasoned explanation under *State Farm*, but the majority ignored or even endorsed several logically fallacious arguments that the FCC included in its *Golden Globes Order* and *Remand Order*. This willingness to tolerate logical error is particularly significant in light of the Court's explicit recognition that the FCC had reached its decision under political pressure from Congress. While it may be too soon to say that agencies have been granted a broad license to base their decisions on political preferences, the Supreme Court's ruling in this case almost certainly reinforced agencies' perceptions that their decisions need not be "model[s] for agency explanation"⁸² in order to survive "a 'searching and careful' review by the courts."⁸³

A. Logical Errors in the FCC Orders

The FCC's *Golden Globes Order* and *Remand Order* provide several explanations for its decision to abandon the fleeting expletive exception to the prohibition on broadcast indecency and profanity. Three areas of the FCC's decision, in particular, are problematic. First, its explanation for abandoning the distinction between literal and nonliteral uses of offensive words relies on appeals to authority, vicious abstraction, and irrelevant arguments. Second, the FCC's decision to change its policy because the fleeting expletive exception required viewers to suffer the "first blow" indulges in a fallacious slippery slope argument and also focuses on the wrong question. Finally, its decision that the new policy was constitutional entirely avoids relevant arguments.

1. Abandoning the distinction between literal and nonliteral usage

In supporting its new policy, Justice Scalia found that the FCC had reasoned that "it made no sense to distinguish between literal and nonliteral uses of offensive words, requiring repetitive use to render only the latter indecent."⁸⁴ However, while the Court found this to be a rational reason for the FCC to "expand[] the scope of its

82. *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1824 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

83. *Id.* (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

84. *Id.* at 1812.

enforcement activity,”⁸⁵ there is room to doubt the soundness of the FCC’s argument.

It is not clear why a distinction between literal and nonliteral uses of offensive words makes no sense. In the *Golden Globes Order*, the FCC had argued that the “F-Word” *always* describes or depicts sexual activity,⁸⁶ and in the *Remand Order* it explained that this is because “the word’s power to insult and offend derives from its sexual meaning.”⁸⁷ But the FCC’s bald assertion that “given the core meaning of the ‘F-Word,’ any use of that word or a variation, *in any context*”⁸⁸ describes or depicts sexual activity does not make it so. And at no point has the FCC offered an explanation for why every use of the “F-Word” must “fall[] within the first prong of [its] indecency definition” other than its belief that the “F-Word” bears an inherently sexual connotation.⁸⁹

In the *Golden Globes Order*, the FCC supported its conclusion by appealing to the authority of its original opinion in *Pacifica*, which, it noted, had been upheld by the U.S. Supreme Court.⁹⁰ While agency decisions may legitimately rely on agency precedent, and indeed may be set aside for ignoring relevant precedent,⁹¹ the FCC’s reliance on its 1975 *Pacifica* decision in this case is unfounded. In *Pacifica*, the FCC explicitly noted that its conclusion was made by applying a number of considerations to a monologue, which, in its context, had used those offensive, sexually charged words in a way that actually did describe sexual and excretory activity and organs.⁹² While the FCC’s original order in *Pacifica* did categorically declare

85. *Id.*

86. *Golden Globes Order*, 19 F.C.C.R. 4975, 4978 (2004).

87. *Remand Order*, 21 F.C.C.R. 13299, 13323 (2006).

88. *Golden Globes Order*, 19 F.C.C.R. at 4978 (emphasis added).

89. *Id.*

90. *Id.*

91. *See, e.g., Lemoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60–61 (D.C. Cir. 2004) (“An agency is by no means required to distinguish every precedent cited to it by an aggrieved party. . . . But where, as here, a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.”).

92. *See* Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, ¶ 14 (1975) (“*Applying these considerations to the language used in the monologue* broadcast by Pacifica’s station WBAI, in New York, the Commission concludes that words such as ‘fuck,’ ‘shit,’ ‘piss,’ ‘motherfucker,’ ‘cocksucker,’ ‘cunt’ and ‘tit’ depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly ‘indecent’ when broadcast on radio or television.” (emphasis added)).

that “words such as ‘fuck,’ . . . depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium,”⁹³ it made that statement in the context of a daytime broadcast of an unquestionably lewd comedy routine. If *Pacifica*’s broad language did mean that any use of the “F-Word” always depicts or describes sexual or excretory activities, then it probably committed the fallacy of division—it would have based its conclusion that a particular offensive word is always indecent on the premise that Carlin’s monologue was indecent as a whole. On the other hand, if *Pacifica* merely stands for the proposition that use of the “F-Word” is indecent when it actually describes or depicts sexual activities, then the FCC’s reliance on *Pacifica*’s broad language is a vicious abstraction because it ignores the context of the language in *Pacifica*.

Furthermore, the authority of the FCC’s *Pacifica* decision seems questionable considering the narrowness of the Supreme Court opinion that upheld it⁹⁴ and the FCC’s subsequent interpretation of the Supreme Court’s opinion. Following *Pacifica*, the FCC took the position that First Amendment principles act as a significant constraint on enforcement of Congress’s policy.⁹⁵ In a 1978 order, the FCC proclaimed:

With regard to “indecent” or “profane” utterances, the First Amendment and the “no censorship” provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464. The Supreme Court’s decision in *FCC v. Pacifica Foundation* . . . , decided July 3, 1978, affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding.⁹⁶

Because the FCC’s *Pacifica* decision generally, and the language cited from that decision specifically, are less than mandatory, the FCC’s appeal to authority in this case is fallacious. A careful review would question the adequacy of this reasoning to support the FCC’s

93. *Id.*

94. *See supra* Part II.A.

95. *See* Application of WGBH Educ. Found., 69 F.C.C.2d 1250, ¶ 10 (1978).

96. *Id.*

rather drastic change. Nevertheless, the Supreme Court ignored the logical errors in this explanation and upheld the FCC's decision.

The FCC's explanation supporting its abandonment of the literal/nonliteral distinction relied heavily on its *Pacifica* decision, but it did eventually provide somewhat more than a blatant appeal to authority. In the *Golden Globes Order*, the FCC's argument was entirely conclusory: "[W]e believe that, given the core meaning of the 'F-Word,' any use of that word . . . inherently has a sexual connotation, and therefore [depicts or describes sexual activities]."⁹⁷ But in *Fox Television Stations*, the FCC expounded somewhat on this reasoning, arguing that the "F-Word"'s "power to 'intensify' and offend derives from its implicit sexual meaning."⁹⁸ Furthermore, the FCC noted that "the first dictionary definition of the 'F-Word' is sexual in nature."⁹⁹

But even assuming the FCC is correct, the fact that a word's power to offend derives from its sexual meaning does not inevitably lead to the conclusion that the word *necessarily* depicts or describes sexual activity in any context. Speakers may use strong or offensive language to express the magnitude of their feelings on a particular topic or to cope with pain¹⁰⁰ or, perhaps, simply to convey a persona of badassness. For instance, it may be offensive to many people to describe a music award as "fucking brilliant," but it takes a stretch of the imagination to conjure up a sexual mental image from that comment. When the speaker does not intend to describe or depict sexual activities or organs, and the listeners, while shocked or offended, do not receive a sexual message, it is nonsensical to conclude that the word does, in fact, convey a sexual message simply because of one of its dictionary definitions.¹⁰¹ Of course, there may

97. *Golden Globes Order*, 19 F.C.C.R. 4975, 4978 (2004).

98. *Remand Order*, 21 F.C.C.R. 13299, 13304-05 (2006) (citing Robert F. Bloomquist, *The F-Word: A Jurisprudential Taxonomy of American Morals (In a Nutshell)*, 40 SANTA CLARA L. REV. 65, 98 (1999)). The citation to Bloomquist without more is yet another appeal to authority.

99. *Id.* at 13304 (citing AMERICAN HERITAGE COLLEGE DICTIONARY 559 (4th ed. 2002) (defining the "F-Word" as "1: to have sexual intercourse with").

100. As anyone who has hit his or her thumb with a hammer can attest.

101. The fact that the F-Word's "first" definition is sexual is irrelevant. As Stephen Mouritsen has observed, dictionary definitions are rarely organized by hierarchical significance and those dictionaries that do attempt to put "core" definitions first have no scientifically defensible methodology for their ordering. Stephen Mouritsen, Comment, *The Dictionary Is Not a Fortress: Definitional Fallacies and a New Way Forward in the Resolution of Lexical Ambiguity*, 2010 BYU L. REV. (forthcoming). As a matter of common sense, I am willing to

be cases where it is unclear whether the usage is literal or nonliteral,¹⁰² but this does not lead to the conclusion that the distinction makes no sense. Rather, it indicates that the distinction may *sometimes* be difficult to draw.

In spite of these flaws, the Supreme Court endorsed the FCC's arguments. Speaking for the majority, Justice Scalia concluded without any discussion that "[i]t was certainly reasonable to determine that it made no sense to distinguish between literal and nonliteral uses of offensive words"¹⁰³ Justice Breyer, on the other hand, assumed the validity of the FCC's argument but could not see how the argument explained the FCC's decision to change: "The FCC was aware of the coarseness of the 'image' the first time around."¹⁰⁴ Further, the FCC had originally made the distinction to avoid constitutional problems of censorship, and "[s]imply to announce that the words, whether used descriptively or as expletives, call forth similar 'images' is not to address those reasons."¹⁰⁵ Overall, the Court's highly deferential approach to the FCC's argument signals that agencies may indulge in fallacious reasoning to bolster their decisions when more sound arguments are unavailable.

2. *Protecting the listener from the "first blow" of offensive language*

The majority in *Fox Television Stations* also accepted the FCC's argument that the fleeting expletive policy should be abandoned

concede that the F-Word's "core" meaning is sexual. However, when the context of a statement clearly shows that a *different* meaning is intended, I fail to see how, as a matter of logic, the core meaning should take precedence anyway.

102. Even while eschewing the literal/nonliteral distinction, the FCC argued that Cher's use of the "F-Word" during the 2002 Billboard Music Awards was literal:

In this case, Cher did more than use the "F-Word" as a mere interjection or intensifier. Rather, she used the word to describe or reference a sexual act as a metaphor to express hostility to her critics. The fact that she was not literally suggesting that people engage in sexual activities does not necessarily remove the use of the term from the realm of descriptions or depictions.

Remand Order, 21 F.C.C.R. 13299, 13324 (2006). Justice Scalia characterized the FCC's explanation of why Cher's statement would have violated its earlier policy as "not entirely convincing," but nevertheless superfluous. *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1812 (2009). This is one example where it might be difficult to distinguish between literal and expletive uses of offensive words. However, the FCC's argument appears to tacitly admit that "interjection[s] or intensifier[s]" are rarely, if ever, meant to be taken literally. *Remand Order*, 21 F.C.C.R. at 13324.

103. *Fox Television Stations*, 129 S. Ct. at 1812.

104. *Id.* at 1838 (Breyer, J., dissenting).

105. *Id.*

because prime-time broadcasts of offensive language require the listener to suffer the “first blow.”¹⁰⁶ This idea stems from the Supreme Court’s reasoning in *Pacifica* that, because radio broadcasts intrude into the privacy of the home where audiences are constantly tuning in or out, the “individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”¹⁰⁷ According to the Court, “To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.”¹⁰⁸

In applying the “first blow” rationale to the context of fleeting expletives in the *Remand Order*, the FCC worried that a per se exception would allow broadcasters “to air expletives at all hours of a day so long as they did so one at a time.”¹⁰⁹ In Justice Scalia’s view, this reasoning appeared to build upon the FCC’s worry, expressed in the *Golden Globes Order*, that routine non-action against fleeting expletives “would ‘likely lead to more widespread use of the offensive language.’”¹¹⁰

The FCC’s primary argument—that a per se exception would *allow* broadcasts of fleeting expletives at all hours of the day—is sound. However, the contention that broadcasters will seize on the exception and proliferate the use of offensive language is a fallacious, slippery slope argument. As Justice Breyer observed, the FCC’s fleeting expletive policy had been in effect for twenty-five years, yet

106. FCC v. Fox Television Stations, 129 S. Ct. 1800, 1812–13 (2009); see also *Remand Order*, 21 F.C.C.R. ¶ 25.

107. FCC v. *Pacifica*, 438 U.S. 726, 748 (1978) (citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970)).

108. *Id.* at 748–49. The “first blow” argument perhaps employs the informal fallacy of false analogy. Speech is qualitatively different from physical assault. Indeed, in public settings, the Supreme Court *does* say that the remedy for such an assault is to run away after the first blow. See *Cohen v. California*, 403 U.S. 15 (1971) (“Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities [caused by offensive language on Cohen’s jacket] simply by averting their eyes.”). On a basic level, *Pacifica* upheld restrictions on radio transmission not because offensive speech is always analogous to physical assault, but because that assault on the sensibilities occurred within the privacy of a person’s home. Even if it is technically fallacious, however, this analogy hits rhetorical paydirt. Because individuals *do* have rights to be free from offensive language in their homes, the analogy that failed in *Cohen* works wonderfully here.

109. *Remand Order*, 21 F.C.C.R. 13299, 13309 (2006).

110. See FCC v. Fox Television Stations, 129 S. Ct. 1800, 1812–13 (quoting *Golden Globes Order*, 19 F.C.C.R. 4975, 4979 (2004)).

the FCC had presented no evidence that broadcasters used it as a license to air offensive language one program at a time.¹¹¹

The majority recognized the slippery slope quality of the FCC's fear but accepted the argument anyway. Justice Scalia concluded that "[i]t is surely rational (if not inescapable) to believe that a safe harbor for single words would 'likely lead to more widespread use of the offensive language.'"¹¹² He even endorsed the FCC's slippery slope argument, arguing that "even in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense. . . . [The prediction] seems to us an exercise in logic rather than clairvoyance."¹¹³ Thus, the majority opinion signals that courts should, at least in some circumstances, defer to agency predictions of negative consequences stemming from an existing policy—and should accordingly uphold departures from that policy on the basis of such predictions—even when the prediction is unsupported by any evidence, and the likelihood of it actually occurring is low.

While the FCC's "first blows" rationale relies on a slippery slope argument, perhaps the more serious problem is that it answers the wrong question. Justice Breyer observed that the idea of "first blows" was available to the FCC when it first adopted its fleeting expletives policy, but the FCC adopted the policy anyway, presumably to avoid the First Amendment issues that would accompany stricter enforcement.¹¹⁴ Therefore, while the "first blow" rationale does support the FCC's policy choice as such, it does not, by itself, support the decision to *change* policy.¹¹⁵ If the question is whether the FCC was justified in changing course,¹¹⁶ its discussion of

111. *Id.* at 1839 (Breyer, J., dissenting).

112. *Id.* at 1812–13 (majority opinion).

113. *Id.* at 1814.

114. *See id.* at 1839 (Breyer, J., dissenting).

115. *See id.*

116. *State Farm* appeared to direct courts to focus on the reason for change in asking whether a shift in policy is arbitrary or capricious. It held that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Justice Scalia, however, rejected the proposition that an agency must always focus on the fact of change:

[T]he agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is

first blows is irrelevant. Rather, the FCC should have focused on why the first blows argument did not caution against a fleeting expletives exception originally, but now does.

Overall, the FCC's reasoning that the fleeting expletives exception must be abandoned to avoid subjecting children to the first blow of offensive language is, at best, moderately persuasive. The FCC employed a slippery slope argument and ignored the question of whether a first blow rationale justified a change in policy in light of the reasons for adopting its original policy. These arguments were, however, persuasive enough to convince five members of the Supreme Court not to set aside its orders as arbitrary and capricious. The Court's decision signals that agencies may commit errors in reasoning and still receive substantial deference.

3. Constitutional questions

The FCC's decision to abandon its fleeting expletives exception has potentially serious implications for the constitutional right to freedom of speech. Most obviously, the new standard appears to prohibit any intentional broadcast of the "F-Word" or other, similarly offensive language.¹¹⁷ However, even assuming the

needed for disregarding the facts and circumstances that underlay or were engendered by the prior policy.

Fox Television Stations, 129 S. Ct. at 1811 (majority opinion). Nevertheless, if the agency's action may be cast as a decision to *change* a policy rather than a decision to *adopt* a policy, and *State Farm* requires a reasoned explanation for the decision itself, then it makes sense to say that the appropriate question is whether the explanation supports the decision to change policy and not just whether the explanation supports the decision to adopt the policy. Justice Breyer offered an extreme but insightful example supporting this point of view:

To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, "Why did you change?" And a rational answer to this question typically requires a more complete explanation than would prove satisfactory were change itself not at issue. An (imaginary) administrator explaining why he chose a policy that requires driving on the right-side, rather than the left-side, of the road might say, "Well, one side seemed as good as the other, so I flipped a coin." But even assuming the rationality of that explanation for an *initial* choice, that explanation is not at all rational if offered to explain why the administrator *changed* driving practice, from right-side to left-side, 25 years later.

Id. at 1830–31 (Breyer, J., dissenting).

117. Whether such broadcasts actually are entitled to First Amendment protection may very well be a close question. The FCC was probably correct in its observation that *Pacifica* left the question open. See *Golden Globes Order*, 19 F.C.C.R. 4975, 4982 (2004). However, in *Fox Television Stations*, Justice Thomas expressed doubts on the continuing viability of both *Pacifica* and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), in that they carve out

constitutionality of that prohibition, the rule also has a potential chilling effect on broadcasts that would warrant protection. In particular, small local broadcasters who cannot afford “bleeping” technology¹¹⁸ may not be willing to provide coverage of live events for fear of accidentally broadcasting a fleeting expletive.¹¹⁹ Despite these concerns, the FCC concluded that the First Amendment does not forbid the new rule. And while the FCC’s justification for its conclusion that the new policy is constitutional includes instances of fallacious reasoning, the Supreme Court upheld the FCC’s action.

The main problem with the FCC’s treatment of the constitutionality of its action was pointed out by Justice Breyer in his dissent to *Fox Television Stations*. He argued that the FCC’s reasoning on the First Amendment implications of its decision was deficient because it was entirely nonexistent.¹²⁰ While the FCC did produce “four full pages of small-type, single-spaced text”¹²¹ defending the constitutionality of broadcast indecency regulations, that discussion was entirely irrelevant to whether the agency could justify its change in policy. In fact, the FCC’s discussion of constitutional issues in the *Remand Order* does little more than reject the petitioner’s argument that *Pacifica* itself has been so eroded as to be no longer viable.¹²² The FCC’s discussion certainly supports its argument that *Pacifica* remains good law,¹²³ but it does

the broadcast medium for different First Amendment treatment. *See Fox Television Stations*, 129 S. Ct. at 1819–20 (Thomas, J., concurring) (“I write separately . . . to note the questionable viability of the two precedents that support the FCC’s assertion of constitutional authority to regulate the programming at issue in this case.”). While Thomas was alone in his concurrence, it would not be surprising if other Justices who were unwilling to venture any views on the First Amendment question without full briefing would, given an appropriate case, agree that *Pacifica* and *Red Lion* have outlived their usefulness. Scholars have also criticized those cases and called for their abandonment. *See, e.g.*, Erwin Chemerinsky, *Tucker Lecture, Law and Medium Symposium*, 66 WASH. & LEE L. REV. 1449, 1453–54 (2009) (arguing that, with the advent of the internet, medium-by-medium approach to the First Amendment no longer makes any sense); *see also* Robert Corn-Revere, *FCC v. Fox Television Stations, Inc.: Awaiting the Next Act*, 2008–09 CATO SUP. CT. REV. 295, 313–315 (observing that much has changed since the Court decided *Pacifica*, including advancements in technology and developments in the law governing indecency).

118. *See infra* notes 126–28 and accompanying text.

119. *See Fox Television Stations*, 129 S. Ct. at 1835–37 (Breyer, J., dissenting).

120. *Id.* at 1834 (Breyer, J., dissenting).

121. *See id.* (quoting plurality opinion, 129 S. Ct. at 1817–18).

122. 21 F.C.C.R. 13299, 13316–21 (2006).

123. *See Fox Television Stations*, 129 S. Ct. at 1834 (Breyer, J., dissenting) (“In [responding to industry arguments that changes in the nature of the broadcast industry made

not explain why the FCC should revise its understanding of the scope of permissible restrictions on speech that *Pacifica* approved. The FCC's observation that its decision was "not inconsistent with the Supreme Court ruling in *Pacifica* . . . [does] not acknowledge that an entirely different understanding of *Pacifica* underlay the FCC's earlier policy."¹²⁴

In sum, Justice Breyer's complaint is not that *Pacifica* necessarily requires a different result—perhaps the FCC could have articulated valid reasons for changing its reading of *Pacifica*—but rather that the agency failed to explain why it once believed *Pacifica* required a different result but no longer does.

Yet, even if the FCC had provided an explanation for reinterpreting *Pacifica*, it would still have been necessary to address the constitutional question as a matter of first impression. Until the *Golden Globes Order*, the FCC had never found the use of a fleeting expletive to be indecent, so it had never had to decide whether such a finding would be constitutional. The FCC is charged with the responsibility to enforce the prohibition on indecent speech, but also with a responsibility not to censor the airwaves. It, therefore, has a statutory responsibility to consider and decide First Amendment questions when its policies might interfere with freedom of expression.¹²⁵ Simply announcing that a decision with serious constitutional implications is "not inconsistent" with a Supreme Court case that did not even address the question abdicates that responsibility.

According to Justice Breyer, one aspect in particular deserved greater treatment by the FCC—the chilling effect the FCC's new policy would have on small local broadcasters' ability to provide live coverage of local events.¹²⁶ Broadcasters had contended through

all indecency regulation unconstitutional, the FCC] repeatedly *reaffirmed* its view that *Pacifica* remains good law.”).

124. *Id.* (quoting *Golden Globes Order*, 19 F.C.C.R. 4975, 4982 (2004)).

125. See *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 352, 360–61 (2009) (arguing that the Supreme Court should have reached the constitutional question in *Fox Television Stations* because “Congress essentially commanded the FCC to rely on sound constitutional groundwork when it enacted 47 U.S.C. § 326”). Whether the Court should have reached the constitutional question itself is beyond the scope of this Note. However, the FCC unquestionably should have made a constitutional determination and its reliance on *Pacifica* was insufficient to support its decision that the new policy was constitutional even though *Pacifica* itself does not require a finding that the new policy was *un*constitutional.

126. See *Fox Television Stations*, 129 S. Ct. at 1835–37 (Breyer, J., dissenting).

every stage of the litigation that the FCC's new policy would create a substantial burden on small local broadcasters. They complained that "the costs of bleeping/delay systems, up to \$100,000 for installation and annual operation, place that technology beyond the financial reach of many smaller independent local stations."¹²⁷ With a threat of fines up to \$325,000 for a broadcast of indecent speech, some local broadcasters had already halted coverage of "live events where crowds are present . . . unless they affect matters of public safety or convenience."¹²⁸

The FCC, however, said nothing in response to these claims. Rather, it responded only to general objections to the mandatory use of delay systems, arguing that, at least for live awards shows, a delay of several seconds does not "significantly implicate[] First Amendment values."¹²⁹ Therefore, the FCC concluded that "[h]olding Fox responsible for airing indecent material in this case does not place live broadcasts at risk or impose undue burdens on broadcasters."¹³⁰ In syllogistic terms, the argument may be restated as follows: a delay of several seconds in the broadcast of a live awards show does not implicate the First Amendment; the offensive language in question occurred during the broadcast of live awards shows; therefore, holding Fox responsible does not place live broadcasts at risk or impose undue burdens on broadcasters.

This argument is a non sequitur. First, the premise—that requiring a delay for live awards shows broadcast by a major network—does not necessarily support the conclusion that non-awards show broadcasts by other broadcasters are not at risk or

127. *Id.* at 1835–36.

128. *Id.* at 1836.

129. *Remand Order*, 21 F.C.C.R. 13299, 13313 (2006). The FCC noted that the Billboard Music Awards cases did not deal with breaking news or sports programming. *Id.* at 13313 n.102. However, it did reverse its earlier indecency determination against CBS for broadcasting the word, "bullshitter," during a live interview on the *Early Show*. *Id.* at 13326–28. While the complaints had characterized the interview as no more than promotion for CBS's entertainment program, *Survivor: Vanuatu*, the FCC deferred to CBS's contention that the broadcast was a bona fide news interview. The FCC stated, "in light of the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations, it is imperative that we proceed with the utmost restraint when it comes to news programming." *Id.* at 13327. It is worth noting that the FCC's willingness to brave the treacherous grounds of distinguishing between "news programming" and entertainment or promotional programming—retaining a fleeting expletive exception in the one but not the other—creates some tension with its conclusion that it makes no sense to distinguish between literal and expletive uses of offensive words.

130. *Id.* at 13313.

subject to an undue burden. The argument might be more persuasive if the FCC could assume that all broadcasters have access to delay equipment, but parties before the FCC explicitly refuted the assumption. Thus, the argument ignores the scenario actually put forward that might render the rule facially invalid.

Neither can the FCC's conclusion be sustained by its promise to exercise caution when reviewing broadcasts of news or sports programming.¹³¹ Local stations that lack access to delay/bleeping equipment may want to cover live events that would not qualify as news or sports programming.¹³² And even if a particular broadcast does qualify as news or sports programming, a guarantee of caution does not equal the absence of risk.

Thus, the FCC's assurance that its new policy does not place live broadcasts by broadcasters that cannot afford delay/bleeping equipment at risk seems fairly hollow, and the behavior of small broadcasters following the FCC's new rule reflects a disquieting lack of confidence in the FCC's reasoning. In spite of the order's language, the new rule does impose a risk on live broadcasts, and the FCC should have offered an explanation for why imposing that risk is constitutional.

Notwithstanding these errors in the FCC's reasoning, a majority of the Supreme Court did not find the "plight of the small local broadcaster"¹³³ problematic. While Justice Scalia's specific responses to the dissent's arguments commanded only four votes,¹³⁴ the majority did specifically decline Justice Breyer's suggestion to remand the case so that the agency could "reconsider its policy

131. *See id.* ("This case does not involve breaking news coverage that Fox and other broadcasters have traditionally presented in so-called 'real time.'").

132. Furthermore, whether a particular broadcast qualifies as news or sports programming may sometimes present a difficult question. *See supra* note 129.

133. *See Fox Television Stations, Inc.*, 129 S. Ct. at 1818.

134. *See id.* at 1815–19. Justice Kennedy agreed with the bulk of Justice Scalia's opinion, but did not join the portion of the opinion refuting Justice Breyer's arguments. In his concurrence, Justice Kennedy asserted that the FCC had merely changed its reading of *Pacifica* and, while "[t]he reasons the agency announces for this change are not so precise, detailed, or elaborate as to be a model for agency explanation[,] . . . the reasons for its action were the sort of reasons an agency may consider and act upon." *Id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment). Even though it does not have the full weight of a majority, Justice Scalia's defense of the FCC decision in the plurality portion of the decision indicates the willingness of a substantial portion of the Court to tolerate and even endorse logical error in administrative policymaking decisions.

decision in light of constitutional concerns.”¹³⁵ The majority concluded such a remand would equate to “judicial arm-twisting or appellate review by the wagged finger.”¹³⁶

The plurality portion of Justice Scalia’s opinion goes much farther, however, in defending the FCC’s reasoning. Scalia first addressed Justice Breyer’s contention that the FCC failed to explain “why [it] changed its mind about the line that *Pacifica* draws or its policy’s relation to that line.”¹³⁷ According to Scalia, such an explanation is unnecessary: “*Pacifica* . . . drew no constitutional line; to the contrary it expressly declined to express any view on the constitutionality of prohibiting isolated indecency.”¹³⁸ Scalia is correct that *Pacifica* did not draw any constitutional line, which makes his argument is persuasive, but the argument could well be criticized as a vicious abstraction. Justice Breyer’s characterization of *Pacifica* as drawing a “constitutional line” is imprecise, but when read in the context of his opinion as a whole, his argument is not so easily overcome. Breyer’s opinion did not argue that *Pacifica* itself had drawn a line, but rather that the FCC *believed* a line had been drawn and acted accordingly.¹³⁹ Thus, Justice Breyer’s argument is not that one reading of *Pacifica* is correct, but rather that when an agency changes from a narrow interpretation of a Supreme Court opinion to a more constitutionally suspect interpretation, it should explain why the new approach is constitutional.

Justice Scalia also defended the FCC against the “plight of the small local broadcaster.” In general, Justice Scalia’s tone is sarcastic—perhaps to minimize the concerns pointed out by Justice Breyer and to portray the opposing argument as frivolous. For instance, Justice Scalia expressed his doubt “that small-town broadcasters run a heightened risk of liability for indecent utterances. In programming that they originate, their down-home local guests

135. *Id.* at 1812 n.3 (majority opinion).

136. *Id.* This characterization of the dissent’s argument probably misses the point since Justice Breyer would demand only that the FCC provide a reasoned explanation for its decision, not that it reach any particular outcome. The majority apparently saw Justice Breyer’s argument as an attempt to address the constitutional questions that the Court wished to avoid.

137. *Id.* at 1817 (plurality portion of majority opinion) (quoting *id.* at 1834 (Breyer, J., dissenting)).

138. *Id.*

139. *See id.* at 1833 (Breyer, J., dissenting) (“The FCC . . . made clear that it thought that Justice Powell’s concurrence set forth a constitutional line that its indecency policy should embody.”).

probably employ vulgarity less than big-city folks; and small-town stations generally cannot afford or cannot attract foul-mouthed glitteratae from Hollywood.”¹⁴⁰ This argument not only attempts to poison the well by ridiculing the opposing argument, it also completely misconstrues the opposing argument. Justice Scalia confuses “small *local* broadcasters,” which might very well exist in the heart of Hollywood and other big cities, with “small-*town* broadcasters,” which, according to Justice Scalia, should have no problems with indecent language. Furthermore, just as the FCC avoided the scenarios that are most troubling, Justice Scalia’s argument ignores the major argument put forward. The live programming that the petitioners feared would be chilled was not so much “guest shows” as live local events—city council meetings, sporting events, community dance contests, and so forth.¹⁴¹ The plurality simply dismissed these concerns as unimportant or, at most, not urgent.¹⁴²

Arising out of sarcasm, Justice Scalia does make a fairly persuasive argument—that Justice Breyer’s concerns rely on a “demonstrably false assumption that the *Remand Order* makes no provision for the avoidance of unfairness—that the single-utterance prohibition will be invoked uniformly, in all situations.”¹⁴³ This argument appears persuasive because, if correct, Justice Breyer’s position would be defeated from the outset. But, even if Justice Breyer did make that assumption (he probably does not) and the assumption is false (it probably is), Justice Breyer’s argument on the whole does not stand or fall on the assumption. Perhaps the FCC’s assurance that it “would consider the facts of each individual case” in determining “what, if any, remedy is appropriate”¹⁴⁴ is sufficient to prevent fines for broadcasts that are actually within First Amendment protection. However, it does not eliminate the risk that is most likely to chill

140. *Id.* at 1818 (plurality portion of majority opinion).

141. *See id.* at 1836 (Breyer, J., dissenting).

142. *See id.* at 1819 (plurality portion of majority opinion) (“Justice BREYER can safely defer his concern for those yeomen of the airwaves until we have before us a case that involves one.”). Justice Scalia’s move to defer the decision of a facial attack on the constitutionality of the FCC’s new rule is consistent with the Court’s unanimous decision not to reach constitutional questions in a challenge under the APA. The problem here is not that the rule should be set aside because it is constitutionally overbroad, but because the FCC failed to even consider an important argument.

143. *Id.* at 1818 (plurality portion of majority opinion).

144. *Id.* (quoting *Remand Order*, 21 F.C.C.R. 13299, 13313 (2006)).

expression—the risk of *prosecution* for allegedly indecent broadcasts. Justice Breyer’s main concern is not that small broadcasters will be treated unfairly in prosecutions, but that the threat of prosecution and punishment will cause self-censorship by small broadcasters who could not afford to risk even the possibility of an indecency fine. The FCC should have at least addressed this constitutional dilemma beyond a conclusory assertion that its decision would not “impose undue burdens on broadcasters.”¹⁴⁵ Justice Scalia, however, would defer to the FCC’s conclusion without further support.

Finally, Justice Scalia defends the FCC’s resolution of the First Amendment question by criticizing Justice Breyer for comparing the agency decision-making process to what would have been required had the agency engaged in notice and comment rulemaking.¹⁴⁶ Scalia dismisses this argument by citing *Vermont Yankee*, which foreclosed attempts by courts to incorporate “all of the Administrative Procedure Act’s notice-and-comment procedural requirements into arbitrary-and-capricious review of adjudicatory decisions.”¹⁴⁷ Justice Scalia’s appeal to *Vermont Yankee* is probably appropriate in refuting the premise he attributes to Justice Breyer. *Vermont Yankee* did, in fact, abolish the judicial practice of imposing upon agencies procedures not required by the APA.¹⁴⁸

However, Justice Scalia oversimplified Justice Breyer’s actual argument. While courts are not free to impose onerous procedures, arbitrary and capricious review requires a determination of whether the agency considered all “important aspect[s] of the problem.”¹⁴⁹ Because the reviewing court must make its determination by reference to the record developed by the agency,¹⁵⁰ even informal proceedings (including adjudications) must develop an

145. See *Remand Order*, 21 F.C.C.R. at 13313. It is clear that the FCC thought this statement addressed the concerns regarding small broadcasters; the *Remand Order* included a footnote to the portion of the networks’ joint comments that raised the issue. See *id.* at 13313 n.101 (citing Joint Comments of Fox Television Stations, Inc., CBS Broadcasting Inc., NBC Universal, Inc., and NBC Telemundo License Co., at 12–16).

146. *Fox Television Stations*, 129 S. Ct. at 1819 n.8 (plurality portion of majority opinion).

147. *Id.* (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 545–49 (1978)).

148. See generally *Vt. Yankee*, 435 U.S. 519 (1978).

149. *Fox Television Stations*, 129 S. Ct. at 1838 (Breyer, J., dissenting) (quoting *Motor Vehicle Mfr. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

150. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971).

administrative record sufficient to demonstrate that the agency considered all the important aspects of the problem.¹⁵¹ Justice Breyer's argument is that the FCC orders failed to develop and rely upon such a record, and Justice Breyer probably referenced notice and comment rulemaking procedures simply to highlight the agency's failures in this case.¹⁵²

In sum, the FCC's explanations for its decision to abandon the fleeting expletives policy were riddled with logical error. Not only are the reasons for the new policy logically suspect, but more importantly, the reasons for the change and for why the new policy comports with the First Amendment are almost entirely absent. The Court's decision appears to stand for the proposition that, at least in cases where an initial agency decision is merely based on a particular, nonexclusive, reading of Supreme Court precedent,¹⁵³ the agency may select a different reading of that precedent without providing any rigorous discussion of potential constitutional problems attending the new policy.

B. Political Motivations and Logical Error

Overall, the logical flaws in the FCC's reasoning cast suspicion on the claim that the *Golden Globes Order* and *Remand Order* are the products of an unbiased and logic-driven decision-making process. And if the decisions were not driven by logic, it seems likely that political preferences substituted as the motivating force. Indeed, as Justice Scalia observed, the *Golden Globes Order* came on the heels of hearings before the House Subcommittee on Telecommunications and the Internet wherein FCC Commissioners "were grilled about enforcement shortcomings."¹⁵⁴

151. See *Center for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992).

152. See *Fox Television Stations*, 129 S. Ct. at 1838 (Breyer, J., dissenting) ("Here the agency did not make new policy through the medium of notice and comment proceedings. But the same failures here—where the policy is important, the significance of the issues clear, the failures near complete—should lead us to the same conclusion.").

153. See *id.* at 1824 (Kennedy, J., concurring in part and concurring in the judgment) ("The present case does not raise the concerns addressed in *State Farm*. Rather than base its prior policy on its knowledge of the broadcast industry and its audience, the FCC instead based its policy on what it considered to be our holding in *FCC v. Pacifica Foundation* But, as the opinion for the Court well explains, the FCC's reasons for its action were the sort of reasons an agency may consider and act upon.").

154. *Id.* at 1816 n.4 (plurality portion of majority opinion).

Assuming that politics, and not logic, motivated the FCC decision, the question remains whether political motivation is acceptable.¹⁵⁵ While a plurality recognized some political pressure,¹⁵⁶ the majority upheld the orders because they were supported by sufficiently reasonable explanations, not because the Commissioners were directed to change the policy by those with political power over them. Had the FCC attempted to justify its orders simply by saying, “The House Subcommittee threatened to defund an important program unless we abandoned the fleeting expletives exception,” its decision probably would have been set aside as arbitrary and capricious, or possibly even as a violation of principles of separation of powers.¹⁵⁷ The Court’s decision in *Fox Television Stations* appears to cling to the ideal that agency decisions will be justified by expertise and logic rather than politics. But its reference to the significant political pressure from Congress suggests that the Court recognizes a role for politics in agency action. Rather than developing the role political factors may legitimately play, the Court appears to have simply lowered the bar for what qualifies as a reasoned decision. While it may be too early to make definitive conclusions after one case, *Fox Television Stations* suggests that an agency might get away with making a decision solely for political reasons as long as it can provide a non-political explanation, even if the explanation relies on fallacious reasoning. As long as the agency’s explanation does not ignore prior factual findings that motivated an earlier contrary decision,¹⁵⁸ courts may tolerate a fairly high degree of informal logical error.

V. CONCLUSION

Administrative agencies and independent agencies in particular, occupy a unique position in the American legal framework. On the

155. See *supra* text accompanying note 81.

156. *Fox Television Stations*, 129 S. Ct. at 1816 n.4 (plurality portion of majority opinion).

157. The answer to a possible separation of powers challenge would be far from clear, but the argument would be that an agency wielding executive power cannot constitutionally take direction directly from Congress or any of its members. The separation of powers dilemma might be alleviated were the political direction to come from the President, but even in that case *State Farm* has been widely read to mean that agency decisions may not be justified solely by political considerations. See Watts, *supra* note 80, at 19–20.

158. See *Fox Television Stations*, 129 S. Ct. at 1824 (Kennedy, J., concurring in part and concurring in the judgment).

one hand, the Constitution provides little guidance on how agencies may exercise power or how much power they may exercise. Thus, broad authority within an agency gives rise to a well-founded fear of abuse. On the other hand, the political realities of modern life require authority to lie within administrations; without at least some agency authority, government might grind to a halt.

Thus, while perhaps it must be accepted that agencies will wield great power, the American system demands that this power be constrained. Congress established a constraint on agency power by providing that any agency decision that is arbitrary, capricious, or an abuse of discretion may be reversed upon review in the courts. The Supreme Court gave this constraint meaning in *State Farm*, where it held that exercises of agency discretion must be supported by a reasoned explanation. However, at least in cases where agency action does not require factual findings, *Fox Television Stations* seems to suggest that the Court will grant significant leeway to logical error in an agency's explanation for its actions, leaving the door open for agency decisions to be driven by politics rather than logic.

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