FCC v. Fox Television Stations, Inc.: Awaiting the Next Act

*Robert Corn-Revere**

This term the U.S. Supreme Court considered the validity of the Federal Communications Commission's policies prohibiting broadcast indecency for the first time in 30 years.[1] In its only previous decision on the broadcast indecency restrictions, the Court in 1978 narrowly upheld an FCC reprimand issued to Pacifica Radio for its broadcast of the George Carlin monologue ''Filthy Words,'' more popularly known as ''the seven dirty words.'' The *Pacifica* decision also upheld the Commission's general definition of indecency.[2] In the intervening years, however, the FCC consciously followed a restrained enforcement policy.

Because *Fox* represented the Court's first review of the issue in three decades, the decision was widely anticipated. However, the case addressed only a specific application of the indecency policy—whether the FCC could legitimately enforce the law against so-called ''fleeting expletives.'' Once again, the Court narrowly upheld the Commission's decision. The 5-4 decision in *Fox* reversed the holding of the U.S. Court of Appeals for the Second Circuit that the FCC acted arbitrarily and capriciously when it abandoned its longstanding policy.

The case presented the question of whether the FCC could sanction Fox television stations for airing brief, unscripted remarks during the 2002 and 2003 broadcasts of the *Billboard Music Awards.* When

* Robert Corn-Revere, a partner at Davis Wright Tremaine LLP in Washington, D.C., practices First Amendment and communications law, and is a Cato Institute adjunct scholar. He represents CBS in *FCC v. Fox Television Stations, Inc.; CBS Corporation v. FCC;* and *ABC Inc. v. FCC.* The views expressed in this article are solely those of the author.

[1] FCC v. Fox Television Stations, Inc., 556 U.S. ____, 129 S. Ct. 1800 (2009), reversing 489 F.3d 444 (2d Cir. 2007).

[2] FCC v. Pacifica Found., Inc., 438 U.S. 726 (1978).

accepting an award in 2002, Cher stated, ''People have been telling me I'm on the way out every year, right? So fuck 'em.'' The following year, Nicole Richie, a presenter on the show, went off-script and said: ''Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple.''[3] The Second Circuit Court of Appeals examined not just the validity of the Commission's findings with respect to the Fox broadcasts, but also reviewed the agency's decision to eliminate its historic policy of treating such unplanned, spontaneous, and brief remarks as ''not actionable'' under its indecency rules. The circuit court ruled that the FCC failed to adequately explain its change in policy.

The Supreme Court reversed, however, with a slim majority holding that the Commission's explanation was sufficient. The fragmented decision generated six opinions. Justice Antonin Scalia wrote the opinion for the Court, joined by Chief Justice John Roberts and Justices Samuel Alito, Clarence Thomas and Anthony Kennedy, with Justices Thomas and Kennedy writing separate concurring opinions. Justice Stephen Breyer wrote a dissent joined by Justices David Souter, John Paul Stevens and Ruth Bader Ginsburg—the latter two of whom also wrote separate brief dissents.

The *Fox* decision focused solely on the narrow issue of whether the FCC's explanation for the policy change was adequate under the Administrative Procedure Act.[4] The majority concluded that agencies face no greater burden justifying their actions when changing existing policy than when setting policy in the first instance, and held that the FCC adequately explained why it would no longer forbear from enforcing broadcast indecency rules against fleeting expletives. Although an agency must show that good reasons support its change in policy under the APA, the Court held that this does not create an obligation to convince a reviewing court that the reasons are ''better'' than the rationale for the previous policy. Instead, it is necessary only to show that the new policy is permissible under the law, that there are good reasons for it, and ''that the agency *believes* it to be better.''[5]

[3] Fox Television Stations, Inc., 489 F.3d at 452.

[4] 5 U.S.C. § 551 et seq.; see *id.* § 706(2)(a).

[5] FCC v. Fox, 129 S. Ct. at 1811 (emphasis in original).

The Court rejected the idea that there should be heightened scrutiny of FCC actions ''that implicate constitutional liberties.'' Additionally, noting that the APA authorizes courts to set aside agency action that is ''unlawful,'' as well as action that is ''arbitrary and capricious,'' the Court declined to do so in this case because the ''lawfulness under the Constitution is a separate question to be addressed in a constitutional challenge.''[6] Thus, although the parties extensively briefed and argued whether the new policy violates the First Amendment, the decision focused solely on whether the FCC's decision was arbitrary and capricious under the APA.

For that reason, the *Fox* decision is far from the end of the story, and is more like an intermission between acts. The case was decided not only by a close vote, but on a narrow rationale. The Court remanded the case to the Second Circuit for further proceedings on issues that were not resolved in the initial appeal, including whether the new FCC policy violates the First Amendment. In addition, two other cases challenging FCC indecency enforcement actions are currently pending in circuit courts.[7] Consequently, more momentous judicial review of the FCC's ban on broadcast indecency is yet to come.

The Statutory Prohibition of Indecent Broadcasting

The law governing broadcast indecency was written when radio was the only electronic mass medium and at a time when that industry was in its infancy. Originally enacted as part of Section 29 of the Radio Act of 1927,[8] and incorporated into the Communications Act of 1934,[9] the statutory prohibition was transferred to the U.S. Criminal Code in 1948. Section 1464 of the Criminal Code provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.[10]

[6] *Id.* at 1812.

[7] See FCC v. CBS Corp., 129 S. Ct. 2176 (2009), granting cert., vacating, and remanding 535 F.3d 167 (3d Cir. 2008**).** The Third Circuit had reversed the FCC's imposition of a $550,000 fine for the 2004 Super Bowl broadcast in CBS. That case has been remanded to the Third Circuit and currently is subject to supplemental briefing. In ABC Inc. v. FCC, No. 08-0841 (2d Cir.), a challenge to an FCC fine for an episode of *NYPD Blue* is pending.

[8] Radio Act of 1927, § 29, 44 Stat. 1172–1173.

[9] Communications Act of 1934, §§ 312, 326, 501, 48 Stat. 1086, 1091 and 1100.

[10] 18 U.S.C. § 1464.

The law was adopted without any statutory definition of its key terms or clear indication of congressional intent.[11] The scant legislative history indicates ''that 'obscenity' was the concern of those members of Congress who spoke'' about the provision.[12] This is not surprising; the law was written at a time when the terms ''obscene,'' ''indecent,'' and ''profane'' were treated as essentially synonymous, long before the Supreme Court held that the First Amendment limited the government's ability to regulate in this area.[13]

Though Section 1464 is part of the Criminal Code, it is enforced primarily by the FCC, which construes the law's operative terms to establish what ''utterances'' fall within the statutory prohibition. The Communications Act gives the FCC authority both to determine whether Section 1464 has been violated and to impose penalties for such violations, ranging from civil sanctions called ''forfeitures,'' to conditional or short-term renewal of licenses, to license revocation. Criminal sanctions also are potentially available.[14]

Developing the ''Indecency'' Standard

For years, the FCC treated transgressions of Section 1464 as obscenity cases to the extent it made any distinction at all among the

[11] See, e.g., 67 Cong. Rec. 12615 (1926) (remarks of Sen. Dill); *id*. at 5480 (remarks of Rep. White); 68 Cong. Rec. 2567 (1927) (remarks of Rep. Scott); Hearings on S. 1 and S. 1754 before the Senate Committee on Interstate Commerce, 69th Cong. 121 (1926); Hearings on H.R. 5589 before the House Committee on the Merchant Marine and Fisheries, 69th Cong. 26, 40 (1926). See also Hearings on H.R. 8825 before the House Committee on the Merchant Marine and Fisheries, 70th Cong. (1928).

[12] See United States v. Simpson, 561 F.2d 53, 57 (7th Cir. 1977) (citing legislative history of Radio Act of 1927).

[13] See, e.g., Swearingen v. United States, 161 U.S. 446, 450–451 (1896) (describing the words ''obscene, lewd and lascivious'' as describing ''a single offense''). See generally Zechariah Chafee Jr., Free Speech in the United States 149–152 (2d ed. 1941) (equating laws regarding obscenity, indecency, profanity, and blasphemy); Edythe Wise, A Historical Perspective on the Protection of Children From Broadcast Indecency, 3 Vill. Sports & Ent. L.J. 15, 18 (1996) (''the concept of indecency has developed from an amorphous generalization poorly differentiated from obscenity'').

[14] See 47 U.S.C. §§ 503(b)(1)(D), 312(a)(6), 312(b)(2). See also 47 U.S.C. § 501 (criminal penalties for ''willful'' violations of the Communications Act). See Tallman v. United States, 465 F.2d 282, 284 (7th Cir. 1972) (Section 1464 conviction upheld for CB radio user). But see United States v. Simpson, 561 F.2d 53 (7th Cir. 1977) (conviction for CB radio user reversed).

statutory terms.[15] As the law of obscenity evolved and courts increasingly recognized that the First Amendment cabined its reach, however, the Commission began to develop a separate meaning for the statutory term ''indecency.'' In 1970, the FCC construed Section 1464's reference to ''indecent'' as material that ''is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value.'' This definition was a variation on the then-applicable test for obscenity.[16]

The Commission revisited the issue following the Supreme Court's revision of the obscenity standard in *Miller v. California*,[17] using as its vehicle a complaint concerning a broadcast of George Carlin's ''seven dirty words'' monologue. Specifically, the FCC sought to ''review the applicable legal principles and clarify the standards which will be utilized in considering the public's complaints about the broadcast of 'indecent' language.''[18] Noting that ''the term 'indecent' ha[d] never been authoritatively construed by the Courts in connection with Section 1464,'' the Commission ''reformulate[ed] the concept'' of indecent speech as:

> 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 day when there is a reasonable risk that children may be in the audience.[19]

Although the FCC's construction of Section 1464's regulation of ''indecent'' language was inspired by *Miller*, there are significant differences between that term and the Supreme Court's definition

[15] See, e.g., Ill. Citizens Comm. for Broad. v. FCC, 515 F.2d 397, 403–04 (D.C. Cir. 1974); Sonderling Broad., Corp., 41 FCC 2d 777, 782 n.14 (1975). See Wise, *supra* note 13 at 21 (''The Commission . . . did not focus on the distinction between obscenity and indecency in broadcasting until the 1970s.'').

[16] Eastern Educational Radio (WUHY-FM), 24 F.C.C.2d 408, 412 (1970).

[17] 413 U.S. 15 (1973).

[18] A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y., 56 F.C.C.2d 94, 99 (1975) (''FCC Pacifica Order'').

[19] *Id.* at 97–98.

of ''obscene'' speech that is not protected by the First Amendment.[20] The focus of indecency regulation is the impact of sexually oriented material on children, not on the ''average person'' in a community as in *Miller*.[21] Unlike the test for obscenity, the indecency standard does not require an examination of the work ''as a whole,'' and does not ask whether the material appeals primarily to the prurient interest.[22] Indecency is not limited to patently offensive depictions of sex acts that are ''specifically defined by law,'' and it is not a complete defense that the material has serious literary, artistic, political or scientific value.[23]

Rather than articulate a test with *Miller*'s level of specificity to keep Section 1464 within constitutional bounds, the Commission instead sought to avoid First Amendment problems by interpreting the term ''indecent'' narrowly and exercising its authority cautiously. As then-FCC Commissioner Glen O. Robinson explained, ''the statute (18 U.S.C. § 1464) on its face expresses no limit on our power to forbid 'indecent' language over the air, [but] the First Amendment does not permit us to read the statute broadly.''[24] The Commission therefore stressed that in order to ''avoid the error of overbreadth'' it was necessary ''to make explicit whom we are protecting and from

[20] *Miller* established a three-part test for obscenity under the First Amendment that requires the government to prove that (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals primarily to the prurient interest; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.'' 413 U.S. at 24.

[21] FCC Pacifica Order, 56 F.C.C.2d at 98.

[22] The Commission consistently has rejected claims that it ''is required [to] take into account the work as a whole.'' Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 998, 1004 (1993), aff'd, Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995), rev'd in part and aff'd in part sub nom. Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 717, 756 (1996).

[23] See Infinity Broad. Corp., 3 F.C.C.R. 930, 932 (1987), aff'd in part and rev'd in part on other grounds sub nom., Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (''ACT I'') (''We must . . . reject an approach that would hold that if a work has merit, it is not per se indecent.''). See *id.* at 937 n.36 (''[W]e would not permit merit to 'save' programming that is nonetheless patently offensive.'').

[24] FCC Pacifica Order, 56 F.C.C.2d 94 103–104 (1975) (Concurring statement of Commissioners Robinson and Hooks).

what.''[25] It reasoned that its updated indecency definition would not ''stifle robust, free debate on any of the controversial issues confronting our society'' and would not ''force upon the general listening public debates and ideas which are 'only fit for children''' because ''the number of words which fall within the definition of indecent is clearly limited.''[26]

In that regard, in denying a petition to reconsider its Pacifica Order, the Commission explained that inadvertent, isolated or fleeting transmissions of ''indecent'' language would not violate Section 1464 because it would be inequitable to hold a licensee responsible for indecent language when ''public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.''[27] Recognizing the vital First Amendment issues at stake, the Commission cautiously enforced its narrow construction of the statute. It stressed that ''in sensitive areas like this . . . the Commission can act only in clear-cut, flagrant cases'' and that ''doubtful or close cases are clearly to be resolved in the licensee's favor.''[28]

When it did take action pursuant to Section 1464, the FCC did not seek to impose punitive sanctions even in cases where there were repeated ''indecent'' utterances, and it sought to ensure unimpeded access to judicial review. Thus, the Commission did not impose any sanctions on Pacifica Radio for the ''verbal shock treatment'' of George Carlin's ''seven dirty words'' and merely placed the resulting order in the station's license file.[29] Similarly, the FCC levied a fine of only $100 for the broadcast of an interview with Grateful Dead guitarist Jerry Garcia in which ''comments were frequently interspersed with the words 'f—k' and 's—t', used as adjectives, or

[25] *Id.* at 98.

[26] FCC Pacifica Order, 56 F.C.C.2d at 99–100. See also *id.* at 108–109 (concurring statement of Commissioners Robinson and Hooks) (''[T]he legal enforcement of manners is an activity of government with a breathtakingly narrow scope in a free society.'').

[27] Petition for Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, N.Y., 59 F.C.C.2d 892, 893 n.1 (1976) (Pacifica Reconsideration Order).

[28] Eastern Educ. Radio, 24 F.C.C.2d 408, 414 (1970). See Wise, *supra* note 13 at 19 (''The path the Commission followed over the decades, with some detours, was toward narrowing the protected group and refining indecency's definition.'').

[29] FCC Pacifica Order, 56 F.C.C.2d at 99.

simply as an introductory expletive.''[30] The Commission imposed the fine only to ensure that the decision would be reviewable in court. Overall, the Commission did not seek to enforce a complete ban on broadcast indecency as the unambiguous language of the statute appeared to require.[31]

The FCC's Restrained Enforcement Policy

The FCC's enforcement of Section 1464 historically was governed by the overall philosophy of the Communications Act that the government should avoid involvement with licensees' editorial decisions. As a general matter, therefore, the Commission had made clear that program choice is ''the responsibility of the licensee'' and that ''the charge that the broadcast programs are vulgar or presented without 'due regard for sensitivity, intelligence, and taste,' is not properly cognizable by this government agency, in light of the proscription against censorship.'' The FCC explained that ''there can be no governmental arbiter of taste in the broadcast field.''[32] Particularly with respect to specific programming decisions, the Commission gave substantial deference to the ''editorial discretion of licensees.''[33]

The Commission expressly relied on this restrained approach to Section 1464 when it defended its definition of ''indecency'' in court. One week before oral argument at the D.C. Circuit Court of Appeals in *Pacifica,* the FCC issued its reconsideration order, which the court described as ''the most important ruling'' in that proceeding, because ''the Commission indirectly admitted it had gone too far in banning 'indecent' language from the airwaves.''[34] The court took special note of the FCC's clarifications that ''it would be inequitable to hold

[30] Eastern Educ. Radio, 24 F.C.C.2d at 414 (''We believe that a most crucial peg underlying all Commission action in the programming field is the vital consideration that the courts are there to review and reverse any action which runs afoul of the First Amendment.'').

[31] FCC Pacifica Order, 56 F.C.C.2d at 98 (emphasis in original).

[32] In re: Petition by Oliver R. Grace, 22 F.C.C.2d 667, 668 (1970).

[33] Eastern Educ. Radio, 24 F.C.C.2d at 414; see also Pacifica Reconsideration Order, 59 F.C.C.2d 892 (''the real solution to this problem [is] the 'exercise of licensee judgment, responsibility, and sensitivity to the community's needs, interests and tastes' ''); Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968) (FCC practice of according licensees broad discretion over programming, focusing on ''overall performance and good faith rather than on specific errors'' minimizes First Amendment tensions).

[34] Pacifica Found. v. FCC, 556 F.2d 9, 14–15 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978).

a licensee responsible for indecent language broadcast during live coverage of a newsmaking event'' and that it was preferable to ''trust the licensee to exercise judgment, responsibility and sensitivity to the needs, interest, and tastes of the community.''[35]

Nevertheless, the court of appeals rejected the FCC's construction of Section 1464, holding that despite the FCC's efforts to exercise restraint and construe the statute narrowly, the law remained overly broad and vague.[36] The court observed that the FCC's decision ''would prohibit the broadcast of Shakespeare's *The Tempest* or *Two Gentlemen of Verona*'' along with ''certain passages of the Bible'' and the ''works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift, and the Nixon tapes.''[37] It stressed that ''[t]o whatever extent . . . the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste.''[38]

On appeal to the Supreme Court, the FCC faulted the D.C. Circuit for considering a ''post-record parade of horribles'' and stressed that its decision should be limited to the facts of the case.[39] Specifically, the FCC argued that its decision ''must be read narrowly, limited to the language 'as broadcast' in the early afternoon.'' It emphasized ''the deliberate repetition of these words'' noting that the case involved ''prerecorded language with the words repeated over and over [and] deliberately broadcast.''[40] The Commission further asserted that its Pacifica Order ''was not retreating from previous decisions recognizing the broad programming discretion broadcast licensees enjoy'' and that it in fact addressed only ''a limited number of patently offensive words.''[41]

The Supreme Court Decision in *Pacifica*

The Supreme Court took the Commission at its word, and reversed the D.C. Circuit on a very limited basis. The Court characterized its

[35] *Id.* at 13.

[36] *Id.* at 17.

[37] *Id.* at 18.

[38] *Id.*

[39] Brief for the Federal Communications Commission, FCC v. Pacifica Found., No. 77–528 (March 3, 1978), 1978 WL 206838 at 44 (citation omitted).

[40] *Id.* at 25–26.

[41] *Id.* at 14.

5-4 decision as ''an emphatically narrow holding.''[42] As Justice Lewis Powell explained in his concurring opinion, the Court approved ''only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.''[43] Acknowledging that restrictions on indecent expression in other media have been found unconstitutional, the Supreme Court in *Pacifica* identified two attributes of the broadcast medium that it said justified a limited exception to the First Amendment norm. First, it noted that ''the broadcast media have established a uniquely pervasive presence in the lives of all Americans.'' Because of this, the Court said, ''prior warnings cannot completely protect the listener or viewer from unexpected program content.'' Second, it described broadcasting as ''uniquely accessible to children'' and observed that ''[o]ther forms of offensive expression may be withheld from the young without restricting the expression at its source.''[44]

In line with the FCC's defense of Section 1464, the *Pacifica* Court approved only a narrow definition of the term ''indecent.'' Justices Powell and Harry Blackmun, who supplied the crucial votes for *Pacifica*'s slim majority, noted ''[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.''[45] They stressed that the FCC does not have ''unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes.''[46] Critical to the Court's holding was the level of

[42] Pacifica, 438 U.S. at 742 (''our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast'' in a ''specific factual context''), *id.* at 750 (''[i]t is appropriate. . .to emphasize the narrowness of our holding''). See also Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989) (*Pacifica* was ''an emphatically narrow holding''); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74 (1983) (emphasizing narrowness of *Pacifica*); Cruz v. Ferre, 755 F.2d 1415, 1421 (11th Cir. 1985) (''[r]ecent decisions of the Court have largely limited *Pacifica* to its facts'').

[43] Pacifica, 438 U.S. at 755–56 (Powell, J., concurring).

[44] *Id.* at 748–749.

[45] *Id.* at 760–761 (Powell, J., joined by Blackmun, J., concurring).

[46] *Id.* See also *id.* at 772 (Brennan J., dissenting) (''I believe that the FCC is estopped from using either this decision or its own orders in this case . . . as a basis for imposing sanctions on any public radio broadcast other than one aired during the daytime or early evening and containing the relentless repetition, for longer than a brief interval, of [offensive language].'').

restraint the FCC historically had shown in construing and enforcing Section 1464. In that regard, Justice Powell noted the incentive to self-censorship in what he described as a ''relatively new and difficult area of law,'' but allowed the FCC some latitude because ''the Commission may be expected to proceed cautiously, as it has in the past.''[47] Powell expressed confidence that the Commission would recognize and reflect the danger of inhibiting the dissemination of protected expression ''as it develops standards in this area.''[48]

The FCC's Policy After *Pacifica*

After the Supreme Court upheld its authority to enforce Section 1464, the Commission continued—as it had promised—to show great restraint in its construction of the law. Its first opportunity to do so came just three weeks after the *Pacifica* decision, when it rejected a petition to deny the renewal of plaintiff WGBH-TV's broadcast license on indecency grounds. The activist group Morality in Media had challenged license renewal on grounds of alleged indecency, and submitted to the Commission ''five and one-half pages of characterizations of programs and/or words and phases'' it characterized as ''offensive, vulgar and otherwise . . . harmful to children.''[49] The Commission held, however, that ''we cannot base the denial of a license renewal application upon the 'subjective determination' of a viewer, or group of viewers, as to what is or is not 'good' programming.''[50]

With respect to the construction of Section 1464 as upheld by the Supreme Court, the Commission explained:

[47] *Id.* at 756, 760–61 (Powell, J., concurring).

[48] *Id.* at 760.

[49] WGBH Educ. Found., 69 F.C.C.2d 1250 (1978). The petition focused on (1) an unidentified installment of *Masterpiece Theater* that it described as ''a story principally concerned with adultery expressing a philosophy that approved of adulterous relationships''; (2) a program called *The Thin Edge,* that allegedly ''espoused a hedonistic attitude about guilt resulting from adultery and fornication''; (3) numerous episodes of *Monty Python's Flying Circus,* which it said ''relies primarily on scatology, immodesty, vulgarity, nudity, profanity and sacrilege'' for humor; (4) a program entitled *Rock Follies,* which it described ''as 'vulgar' and as containing 'profanity' (i.e., 'The name of God (six times)'), 'obscenities' such as 'shit,' 'bullshit,' etc., and action indicating some sexually-oriented content in the program''; and (5) other programs that allegedly contained nudity and/or sexually-oriented material.

[50] *Id.* at 1251–52.

> We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the ''indecent'' words in question. The opinion of the Court specifically stated that it was not ruling that ''an occasional expletive . . . would justify any sanction . . . .'' Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been ''repeated over and over as a sort of verbal shock treatment.'' He specifically distinguished ''the verbal shock treatment [in *Pacifica*]'' from ''the isolated use of a potentially offensive word in the course of a radio broadcast.''[51]

Consistent with this approach, the FCC in 1983 denied a license renewal challenge to Pacifica station WPFW based in part on indecency allegations, despite the fact that there were ''a number of instances where language similar to that in [the George Carlin monologue] was broadcast.''[52] The Commission concluded that the petitioner had ''failed to make a *prima facie* case that WPFW has violated 18 U.S.C. 1464'' because it had not shown that ''indecent'' programs were ''more than 'isolated use in the course of' a three year license term.''[53]

Over time, the Commission modified its approach to enforcement to apply beyond just Carlin's ''seven dirty words'' and to encompass what it called a ''generic definition'' of the statutory term ''indecent.'' In three declaratory rulings issued in 1987, it set forth what it described as a ''clarification'' of its construction of Section 1464 to apply to ''a broader range of material than the seven specific words at issue in *Pacifica*.''[54] The FCC did not purport to alter the indecency

[51] *Id.* at 1254 (internal citations omitted).

[52] Pacifica Found., 95 F.C.C.2d 750, 760 (1983). The Commission noted complaints alleging that ''a male announcer repeatedly used such words as 'motherfucker,' 'fuck' and similar indecent language'' during one morning program, as well as like allegations involving two other morning shows. It also noted complaints that evening and late evening programs contained the same type of language. *Id.*

[53] *Id.* at 760–761.

[54] Pacifica Radio, 2 F.C.C.R. 2698, 2699 (1987), aff'd on recon., Infinity Broad. Corp. of Pa., 3 F.C.C.R. 930 (1987), aff'd in part, rev'd in part, ACT I, 852 F.2d 1332. See Regents of the Univ. of Cal., 2 F.C.C.R. 2703 (1987) (same subsequent history); Infinity Broad. of Pa., 2 F.C.C.R. 2705 (1987) (same subsequent history). See also New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (1987) (''New Indecency Enforcement Standards'').

standard it had previously articulated, and it reaffirmed that isolated or fleeting utterances would not be actionable. It stressed that ''deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency,''[55] and that indecency ''must involve more than the isolated use of an offensive word.''[56] The D.C. Circuit approved the FCC's adoption of a ''generic'' definition of indecency, but it did so based on the ''expectation that Commission will continue to proceed cautiously.'' As then-Judge Ruth Bader Ginsburg explained, ''the potential chilling effect of the FCC's generic definition . . . will be tempered by the Commission's restrained enforcement policy.''[57]

In 2001, the Commission issued a policy statement to provide ''interpretive guidance'' to broadcasters regarding enforcement of the indecency rules.[58] The Indecency Policy Statement posited two fundamental determinations that must be made in any Section 1464 case: (1) whether the material depicts or describes sexual or excretory organs or activities, and (2) whether the material is ''patently offensive'' as measured by contemporary community standards for the broadcast medium.[59] To determine patent offensiveness, the FCC explained that it relies on three factors: (a) the explicitness or graphic nature of the depiction; (b) whether the material dwells on or repeats at length the depictions; and (c) whether the material appears to pander or is used to titillate or shock.[60] The FCC's analysis was based on a synthesis of various enforcement decisions issued over the years, and illustrative examples were set forth in the policy statement to provide guidance to broadcasters.

The FCC Changes Its ''Fleeting Expletives'' Policy

The FCC expressly abandoned its restrained enforcement policy toward fleeting expletives in March 2004, in a decision relating to

[55] Pacifica Radio, 2 F.C.C.R. at 2699.

[56] Infinity Broad. of Pa., 2 F.C.C.R. at 2705; Regents of the Univ. of Cal., 2 F.C.C.R. at 2703.

[57] ACT I, 852 F.2d at 1340 n.14.

[58] 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, 8008–09 (2001) (''Indecency Policy Statement'').

[59] *Id.* at 8002.

[60] *Id.* at 8002–03.

the January 2003 telecast of the *Golden Globe Awards.* U2's Bono had spontaneously declared that it was ''fucking brilliant'' that his band won a statuette. Complaints about the broadcast initially were dismissed by the FCC's Enforcement Bureau. Applying existing precedent, the Commission staff explained that ''fleeting and isolated remarks of this nature do not'' violate Section 1464, and that ''the material aired . . . does not describe or depict sexual and excretory activities and organs'' as required by the FCC's long-standing definition of indecent speech.[61]

After being subjected to significant pressure from Congress, however, the FCC reversed the Golden Globes Bureau Order.[62] In so doing, the FCC expressly held that its prior interpretations of Section 1464 suggesting ''that isolated or fleeting broadcasts of the 'F-Word' . . . are not indecent or would not be acted upon'' are ''no longer good law.''[63] The Commission also overruled similar cases cited in the Indecency Policy Statement and stated that licensees could no longer rely on ''unpublished staff decisions'' to the contrary.[64] The FCC explained that ''[t]he fact that the use of [an indecent] word may have been unintentional is irrelevant.''[65] It reinforced its new construction of Section 1464 by stressing that broadcasters failing to institute technological delays could be penalized if they inadvertently transmit ''indecent'' or ''profane'' material, regardless of

[61] Complaints Against Various Broadcast Licensees Regarding Their Airing of the ''Golden Globe Awards'' Program, 18 F.C.C.R. 19859, 19861–62 (Enf. Bur. 2003) (''Golden Globes Bureau Order''). The staff decision cited numerous previous cases in which the Commission had declined to take action to restrict fleeting expletives or had otherwise shown restraint. *Id.* at 19861 (citing Entercom Buffalo License LLC (WGR(AM)), 17 F.C.C.R. 11997 (Enf. Bur. 2002); L.M. Communications of S.C., Inc. (WYBB(FM)), 7 F.C.C.R. 1595 (Mass Med. Bur. 1992); Peter Branton, 6 F.C.C.R. 610 (1991); Indecency Policy Statement, 16 F.C.C.R. at 8008–09).

[62] See Complaints Against Various Broadcast Licensees Regarding Their Airing of the ''Golden Globe Awards'' Program, 19 F.C.C.R. 4975 (2004) (''Golden Globe Awards Decision'').

[63] *Id.* at 4980 (overruling portions of prior holdings that ''isolated use of expletives is not indecent'' including Pacifica Radio, 2 F.C.C.R. at 2699; Infinity Broad. of Pa., 2 F.C.C.R. at 2705; and Regents of the Univ. of Cal., 2 F.C.C.R. at 2703).

[64] *Id.* at 4890 n.32 (overruling Lincoln Dellar, Renewal of License for Stations KPRL (AM) and KDDB (FM), 8 F.C.C.R. 2582, 2585 (Mass Media Bur. 1993) and L.M. Communications of S.C., Inc. (WYBB(FM)), 7 F.C.C.R. 1595 (Mass Med. Bur. 1992)).

[65] Golden Globe Awards Decision, 19 F.C.C.R. at 4979.

whether they had otherwise taken precautions to prevent such a thing from occurring.[66]

Although broadcasters sought reconsideration of the Golden Globes Bureau Order and the Commission's revised policy, the agency did not act on the petitions. Instead, the FCC issued an ''omnibus'' indecency order in February 2006 that expanded on the policy change first announced in the Golden Globe Awards Decision and addressed several dozen shows against which indecency complaints had been filed over a three-year period.[67] The so-called Omnibus Order proposed fines against six programs on various networks and also found four other shows to be indecent and profane but declined to impose fines because the programs aired before the 2004 Golden Globe Awards Decision. The four programs in this final category included the 2002 and 2003 *Billboard Music Awards* on Fox (on which, respectively, Cher and Nicole Richie uttered brief unscripted expletives during the live awards show), episodes of *NYPD Blue* on ABC (that included various iterations of the word ''bullshit''), and a December 2004 edition of *The Early Show* on CBS (in which the interviewee in a news segment used the term ''bullshitter'').[68]

The FCC's action with respect to these four programs resulted in petitions for review in *Fox v. FCC.* The major broadcast networks and their affiliates filed petitions that were consolidated in the Second Circuit. After a brief mid-appeal remand in which the FCC reversed its decisions regarding *The Early Show* and *NYPD Blue,* the appellate proceeding continued with the Commission's decisions regarding the *Billboard Music Awards* still at issue.[69]

[66] *Id.* at 4981–82 (broadcasters can ensure ''they are not subject to an enforcement action'' by ''adopt[ing] and successfully implement[ing] a delay/bleeping system for live broadcasts'').

[67] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006) (''Omnibus Order'').

[68] *Id.* at 2690–2700.

[69] Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, FCC 06-166 (Nov. 6, 2006). In its remand order the FCC reaffirmed its findings against the 2002 and 2003 *Billboard Music Award* programs but reversed its indecency finding against *The Early Show.* It dismissed the complaints against *NYPD Blue* on procedural grounds.

The Second Circuit Reverses the FCC

In a 2-1 decision, the Second Circuit held that the FCC's decision to apply its broadcast indecency rules to ''isolated'' and ''fleeting'' expletives was arbitrary and capricious under the APA.[70] The circuit court did not limit its holding to the two episodes of the *Billboard Music Awards* on Fox, but invalidated the entire ''fleeting expletives'' policy, as first articulated in the Golden Globes Awards Decision. The court held that the policy was arbitrary and capricious because it departed from the FCC's longstanding policy of restraint and because the agency failed to articulate a reasoned basis for the change.

In addition to finding that the FCC had failed to adequately explain its change of policy, the court said that the FCC had an obligation to show that indecent speech is harmful in some way. The majority opinion noted that the FCC's order was ''devoid of any evidence that suggests a fleeting expletive is harmful, let alone establish[ing] that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech.''[71]

Because the majority decided that the FCC's decision was arbitrary and capricious, it found it unnecessary to reach the constitutional issues raised by the networks. However, the court issued several pages of dicta that expressed ''skepticism'' that ''the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster.''[72] The court broadly ''question[ed] whether the FCC's indecency test can survive First Amendment scrutiny,'' and sympathized with ''the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.''[73] It also stated that ''the FCC's indecency test'' raises ''the separate constitutional question of whether it permits the FCC to sanction speech based on [the agency's] subjective view of the merit of that speech,'' and

[70] Fox Television Stations, Inc., 489 F.3d at 447.

[71] *Id.* at 461.

[72] *Id.* at 462.

[73] *Id.* at 463.

added, ''we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency.''[74]

Judge Pierre Leval dissented on the ground that the FCC adequately explained its policy change, writing that the majority simply had a ''difference of opinion'' on the FCC's direction in altering course.[75] He characterized the reversal on ''fleeting expletives'' as a ''small change . . . by the FCC in its [indecency] standards'' that merely ''diminished the significance of the fact that the . . . expletive was not repeated.'' The dissent found the change in position justified by the FCC's ''sensible, although not necessarily compelling'' explanation that ''the 'F-Word' . . . inherently has a sexual connotation'' and ''is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language.'' This was sufficient, Leval argued, under the deferential standard of review afforded agencies and their right to make changes in policy. Judge Leval's dissent did not address the constitutional implications of the FCC's new policy.[76]

Supreme Court Reverses on Administrative Law Grounds

The Court's 5-4 decision in *Fox* focused solely on the narrow issue of whether the FCC's explanation for the policy change was adequate under the APA. As noted above, the Court did not address at length the lower court's discussion of the First Amendment, in which the Second Circuit was openly skeptical about the constitutionality of the Commission's new policy.[77] The majority opinion did acknowledge, however, that whether the policy is unconstitutional ''will be determined soon enough, perhaps in this very case.''[78] Accordingly, it remanded the case to the circuit court to consider whether the enforcement policy violates the First Amendment or is otherwise invalid.[79]

The narrow focus of the majority opinion tended to obscure the importance of the underlying constitutional challenge. In this

[74] *Id.* at 464.

[75] *Id.* at 473 (Leval, J., dissenting).

[76] *Id.* at 468–474.

[77] Fox Television Stations, Inc., 489 F.3d at 462.

[78] Fox, 129 S.Ct. at 1819.

[79] *Id.* at 1819.

respect, however, the combined opinions suggested that most justices may vote to reverse the FCC policy if the First Amendment issue returns to the Court. Among the five justices in the majority, Justices Thomas and Kennedy wrote that the answer might be different were the Court to review the policy on constitutional grounds. In particular, though he concurred on the APA issues, Justice Thomas wrote it may be time to reconsider the *Pacifica* and *Red Lion* cases that give the FCC greater leeway to regulate broadcast content.[80] Separately, Justice Kennedy stressed that his concurrence rested on a narrow, technical reading of the APA and did not take into account constitutional concerns.[81]

Justice Breyer's dissent noted the constitutional underpinnings of the Commission's formerly restrained enforcement policy and found the FCC's explanation for its policy change inadequate because it failed to address the underlying First Amendment issue. The result, he wrote, ''is not simply *Hamlet* without the prince, but *Hamlet* with a prince who, in mid-play and without explanation, just disappears.''[82] Justice Stevens, who wrote the *Pacifica* majority opinion in 1978, dissented separately and observed that ''*Pacifica* was not so sweeping, and the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court at the time.''[83] Similarly, Justice Ginsburg wrote in dissent that ''there is no way to hide the long shadow the First Amendment casts over what the Commission has done.''[84]

Given the arguments previously presented in the case, and particularly in light of most justices' comments in *Fox,* the First Amendment implications of the FCC's new enforcement policy regarding ''fleeting expletives'' will be foremost in the Second Circuit's review on remand. Accordingly, the constitutional basis for the Commission's previous forbearance from enforcing the law against fleeting or unintentional broadcasts of indecent material should play a critical role as the case progresses.

[80] *Id.* at 1822 (Thomas, J., concurring).

[81] *Id.* at 1824 (Kennedy, J., concurring).

[82] *Id.* at 1834 (Breyer, J., dissenting).

[83] *Id.* at 1825 (Stevens, J., dissenting).

[84] *Id.* at 1828 (Ginsburg, J., dissenting).

The Next Stage

Much has changed in the three decades since the Supreme Court last considered the constitutionality of the indecency standard in *Pacifica,* making it difficult to conclude with any certainty that the Court would reaffirm its earlier holding if the issue is squarely presented. Contrary to the underlying premise of *Pacifica,* that broadcasting must be regulated more intensively because it is ''uniquely pervasive,''[85] the FCC more recently has found that ''the modern media marketplace is far different than just a decade ago'' in that traditional media ''have greatly evolved,'' and ''new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.''[86] For that reason, the Second Circuit in *Fox* observed that ''it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.''[87]

Applying strict scrutiny would bring First Amendment review of broadcast content restrictions in line with the rule for all other media. The Supreme Court has invalidated efforts to restrict indecency in print,[88] on film,[89] in the mails,[90] in the public forum,[91] on cable television,[92] and on the internet.[93] Although the Court historically treated broadcasting differently because of technological reasons, it has also recognized that ''the broadcast industry is dynamic in terms of technological change,'' that ''solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded ten years hence.''[94]

[85] Pacifica, 438 U.S. at 748.

[86] 2002 Biennial Regulatory Review, 18 F.C.C.R. 13620, ¶¶ 86–87 (2003).

[87] Fox Television Stations, 489 F.3d at 465.

[88] Butler v. Michigan, 352 U.S. 380, 383 (1957). See also Hamling v. United States, 418 U.S. 87, 113–114 (1974) (statutory prohibition on ''indecent'' or ''obscene'' speech may be constitutionally enforced only against obscenity).

[89] United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973).

[90] Bolger, v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

[91] Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

[92] United States v. Playboy Entmt. Group, Inc., 529 U.S. 803 (2000).

[93] Reno v. ACLU, 521 U.S. 844 (1997).

[94] CBS v. DNC, 412 U.S. at 102.

In addition to technological changes, the law governing indecency has evolved significantly in the 30 years since *Pacifica.* The Supreme Court has confirmed that ''indecent'' speech is fully protected by the First Amendment and is not subject to diminished scrutiny as ''low value'' speech, as three justices who joined the *Pacifica* plurality opinion had suggested.[95] Instead, the Court has found that ''[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly,'' and that the government cannot assume that it has greater latitude to regulate because of its belief that ''the speech is not very important.''[96] Additionally, since *Pacifica* the Court has invalidated government-imposed indecency restrictions on cable television channels despite its finding that ''[c]able television broadcasting, including access channel broadcasting, is as 'accessible to children' as over-the-air broadcasting, if not more so.''[97]

With respect to online speech, the Court subjected the indecency standard to rigorous First Amendment review in *Reno v. ACLU,* and found it to be seriously deficient. Writing for a near-unanimous Court, Justice Stevens concluded that the indecency restrictions of the Communications Decency Act were invalid because of vagueness and overbreadth.[98] This finding is especially meaningful because the language of the CDA was virtually identical to the test the FCC uses to regulate broadcasting. Moreover, Stevens reaffirmed as a bedrock constitutional rule that the governmental interest in protecting children from harmful materials ''does not justify an unnecessarily broad suppression of speech addressed to adults.''[99] Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist, wrote an opinion concurring in part and dissenting in part on other grounds, but the Court unanimously held that the CDA provisions requiring

[95] Only Justices Stevens, William Rehnquist, and Chief Justice Warren Burger joined that part of the opinion asserting that indecent speech lies ''at the periphery of First Amendment concern.'' Pacifica, 438 U.S. at 743.

[96] Playboy Entmt. Group, 529 U.S. at 826.

[97] Denver Area Educ. Telecomms. Consortium, 518 U.S. at 744. The Court upheld a provision that permitted cable operators to adopt editorial policies for leased access channels, but rejected government-imposed restrictions on indecent programs on leased and public access channels.

[98] Reno, 521 U.S. at 875.

[99] *Id.* at 870–874, 881–882.

the screening of ''indecent'' displays from minors ''cannot pass muster.''[100]

In *Fox,* Justice Thomas signaled his willingness to reconsider precedents, like *Pacifica,* that he wrote have resulted in a ''deep intrusion into the First Amendment rights of broadcasters.''[101] Noting that logical weakness of such cases ''has been apparent for some time,'' he noted that, ''[w]hatever the merits of *Pacifica* when it was issued[,] . . . it makes no sense now.''[102] Thomas was the only justice to express such open skepticism of *Pacifica*'s continuing validity, although a solid majority of the Court raised constitutional doubts about the FCC's ''fleeting expletives'' policy.[103] In this regard, Justice Stevens wrote that he disagreed with Thomas ''about the continued wisdom of *Pacifica*,'' but stressed that ''the changes in technology and the availability of broadcast spectrum he identifies certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen.''[104]

This suggests that further First Amendment review, either by the Second Circuit or by the Supreme Court, may result in a reexamination of *Pacifica,* but it need not do so. Instead, additional constitutional review may ask whether the restrained enforcement policy that exempted fleeting or inadvertent expletives from FCC enforcement actions is constitutionally required. Such a conclusion has already been reached with another Commission enforcement policy—the so-called ''safe harbor'' rule. Even though the language of Section 1464 imposes a categorical ban on the broadcast of indecent

[100] *Id.* at 886.

[101] Fox, 129 S. Ct. at 1820 (Thomas, J., concurring).

[102] *Id.* at 1821 (Thomas, J., concurring) (quoting Action for Children's Television v. FCC, 58 F.3d 654, 673 (D.C. Cir. 1995) (Edwards, C.J., dissenting)).

[103] *Id.* at 1819 (predicting whether the FCC's policy change violates the First Amendment ''will be determined soon enough''). See also *id.* at 1824 (Kennedy, J., concurring) (reserving judgment on constitutional issues); *id.* at 1825 (Stevens, J., dissenting) (noting that ''the Commission's changed view of its statutory mandate certainly would have been rejected if presented to the Court'' in *Pacifica*); *id.* at 1828 (Ginsburg, J., dissenting) (noting that ''there is no way to hide the long shadow the First Amendment casts over what the Commission has done''); *id.* at 1840 (Breyer, J., dissenting) (describing the FCC's policy change as a ''constitutionally suspect interpretation of a statute'').

[104] *Id.* at 1828 n.5 (Stevens, J., dissenting).

utterances, the Commission recognized in 1975 that the First Amendment would not permit it to prohibit all on-air indecency.[105] Consequently, the Commission limited the enforcement of the indecency rules to certain hours (eventually settling on the hours between 6 a.m. and 10 p.m.), presumably the time when children may be in the audience. Reviewing courts subsequently held that the Commission-made limitation on enforcement is compelled by the First Amendment.[106] Consistent with such prior restrictions on the FCC's enforcement authority, remand proceedings in *Fox* may address whether a ''safe harbor'' for the broadcast of inadvertent or ephemeral material should continue to exist alongside the time-channeling safe harbor.

Further proceedings are also likely to address whether the unscripted and unplanned expletives at issue constitute a ''willful'' violation of Section 1464, as both the Communications Act and the First Amendment require.[107] This question was argued in the original *Fox* appeal but was not decided either by the Second Circuit or by the Supreme Court. However, the issue was addressed by the Third Circuit in *CBS Corp. v. FCC,* and the court held that ''the First Amendment precludes a strict liability regime for broadcast indecency.'' It explained that the Constitution requires the FCC to ''prove scienter [guilty knowledge] when it seeks to hold a broadcaster liable for indecent material,'' and that it would not be sufficient for the Commission to show that a broadcaster was negligent in permitting indecent material to air. Rather, the government must prove recklessness as a ''constitutional minimum.''[108] Although the *CBS* decision was remanded for reconsideration in light of *Fox,* nothing in the

[105] FCC Pacifica Order, 56 F.C.C.2d 94, 103–04 (Concurring statement of Commissioners Robinson and Hooks) (''the First Amendment does not permit us to read the statute broadly [as a total ban]'').

[106] See Action for Children's Television v. FCC, 932 F.2d 1504, 1509–10 (D.C. Cir. 1991) (''ACT II''); ACT I, 852 F.2d at 1342.

[107] The statutory authority for the FCC's civil indecency enforcement power is the forfeiture statute, 47 U.S.C. § 503(b), pursuant to which it can impose forfeitures only for ''willful'' or ''repeated'' violations of the Act, rules, or Commission orders. Specifically, Section 503(b)(1)(D) empowers the FCC to impose forfeitures for specific statutory provisions, including Section 1464. The First Amendment likewise requires scienter to avoid any unconstitutional chill on protected speech. See United States v. X-Citement Video, Inc., 513 U.S. 64, 71 (1994); Smith v. California, 361 U.S. 147 (1959).

[108] CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), cert. granted, vacated, and remanded, 129 S. Ct. 2176 (2009).

Supreme Court's discussion of the APA provides any basis for reconsidering the resolution of this issue.[109] Accordingly, the question of scienter or ''willfulness'' provides an independent reason to set aside the Commission's decision that presumably will be considered on remand.

Conclusion

The widely anticipated holding in *FCC v. Fox* did not produce the constitutional confrontation some had hoped for. Nor did it vindicate the FCC's decision to enforce its indecency rules against inadvertent, accidental, or fleeting expletives. Instead, the Supreme Court decided only that the Commission's explanation for its policy change was adequate to avoid being considered arbitrary and capricious under the APA. The resulting remand proceeding will determine the extent to which the FCC's more restrictive policy is vulnerable under what Justice Ginsburg described as ''the long shadow of the First Amendment.''[110]

[109] A grant, vacate, and remand order (known as a ''GVR'') is not ''a thinly-veiled direction to alter . . . course'' but asks only ''whether [the intervening decision] demands a different result.'' Gonzalez v. Justices of Mun. Court of Boston, 420 F.3d 5, 7–8 (1st Cir. 2005); Fontroy v. Owens, 23 F.3d 63, 66 (3d Cir. 1994).

[110] Fox, 129 S. Ct. at 1828 (Ginsburg, J., dissenting).