

**F.U.C.K.: FCC’S UNLIMITED CENSORSHIP KEEPS-GOING;
WHEN WILL THIS SHIT END?**

*John W. Lees**

I. INTRODUCTION

In *FCC v. Fox Television Stations, Inc. (Fox II)*, the United States Supreme Court upheld a Federal Communications Commission (FCC) decision and continued the expansion of the FCC’s regulation of speech over television broadcasts.¹ During the past thirty-four years, censorship of speech in this medium has become more limiting with each decision made by the FCC.²

The FCC first enforced the indecency ban on a broadcast in 1975.³ Since then, the FCC’s interpretation of sanctionable material has expanded over the years, from requiring certain language to be “repeated over and over as a sort of verbal shock treatment”⁴ to the nonliteral use of certain words, even when used only once.⁵

During the 2002 *Billboard Music Awards*, Cher made the statement, “I’ve also had critics for the last forty years saying that I was on my way out every year. Right. So fuck ‘em.”⁶ In the *Billboard Music Awards* ceremony the following year, Paris Hilton warned Nicole

* John W. Lees, Candidate for Juris Doctor, May 2011, Florida Coastal School of Law; B.S., Biological Science, Florida State University.

¹ *FCC v. Fox Television Stations, Inc. (Fox II)*, 129 S. Ct. 1800, 1819 (2009).

² *See id.* at 1806.

³ *See FCC v. Pacifica Found.*, 438 U.S. 726, 729-31 (1978).

⁴ *In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254 (1978) (quoting *Pacifica Found.*, 438 U.S. at 757).

⁵ *See In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 F.C.C.R. 4975, 4978 (2004) [hereinafter *Golden Globes Order*].

⁶ Brief for the Petitioners at 9, *Fox II*, 129 S. Ct. 1800 (No. 07-582), 2008 WL 2308909, at *9. It is interesting to note that when Justice Scalia quotes the same material in his opinion, he has taken the extra step to censor the offending words. *See Fox II*, 129 S. Ct. at 1808. Perhaps the uncertainties of the limits on the FCC’s power have cautioned his pen.

Richie to “watch the bad language,” to which Nicole Richie followed by asking the audience, “Why do they even call it *The Simple Life*? Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”⁷

The Supreme Court permitted the FCC’s rule change to prohibit this type of language, as an agency does not have to show that a change in policy is better, merely that it is permissible and the agency believes it to be better.⁸ When applied, this standard may allow federal agencies to change policy based on a political whim of the commissioners.⁹ This standard would be in direct opposition to one of the few limits courts may use to nullify an agency action, which includes arbitrary or capricious actions.¹⁰

II. BACKGROUND

A. Statutory Creation of the FCC and its Power

The Radio Act of 1927 created the Federal Radio Commission (FRC), a precursor to the FCC.¹¹ Section 29 of the Act not only contained an anticensorship provision, but also prohibited the utterance of any obscene, indecent, or profane language.¹² One of the FRC’s methods of enforcing this, along with other provisions of the Act, was to review past programming content in consideration of whether to grant renewal applications for licenses.¹³

⁷ Brief for the Petitioners, *supra* note 6, at *9-10.

⁸ *Fox II*, 129 S. Ct. at 1819.

⁹ See 47 U.S.C. § 154(a) (2006) (“The [FCC] shall be composed of five commissioners appointed by the President”); 47 U.S.C. § 154(b)(5) (“The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.”).

¹⁰ See *Fox II*, 129 S. Ct. at 1811 (“[The Administrative Procedure Act] instructs a reviewing court to . . . ‘hold unlawful and set aside agency action, findings, and conclusions found to be [among other things] . . . arbitrary [or] capricious’” (quoting 5 U.S.C. § 706(2)(A) (2006))).

¹¹ Radio Act of 1927, ch. 169, § 3, 44 Stat. 1162 (repealed 1934).

¹² *Id.* § 29, 44 Stat. 1172-73.

¹³ See *Trinity Methodist Church, S. v. Fed. Radio Comm’n*, 62 F.2d 850, 852 (D.C. Cir. 1932); *KFKB Broad. Ass’n v. Fed. Radio Comm’n*, 47 F.2d 670, 672 (D.C. Cir. 1931).

Through the Communications Act of 1934, Congress created the FCC to take the place of the FRC in order to “regulat[e] interstate and foreign commerce in communication by wire and radio.”¹⁴ The anticensorship provision and restrictions on language under section 29 of the Radio Act carried over to the Communications Act of 1934.¹⁵ However, in 1948 Congress moved the prohibition of indecent broadcasts to the criminal code through 18 U.S.C. § 1464.¹⁶

B. Expansion of the FCC’s Powers by Enforcing the Indecency Ban

The FCC’s first instance of prohibition of an indecent broadcast was against a George Carlin monologue in 1975.¹⁷ The Supreme Court, in *FCC v. Pacifica Foundation*, held this regulation did not violate the First Amendment, distinguishing the medium of broadcasting from print media by observing that broadcasting had a “uniquely pervasive presence” and was “uniquely accessible to children.”¹⁸ Once the Court determined the FCC could regulate speech in broadcasts, it subsequently found that the words used were indecent.¹⁹

After *Pacifica*, the FCC voluntarily expressed its intention to follow the *Pacifica* holding, which “relied in part on the repetitive occurrence of the ‘indecent’ words in question.”²⁰ The FCC then changed this view to prevent being limited to the actual words contained within George Carlin’s monologue.²¹ The FCC’s final expansion of its inter-

¹⁴ 47 U.S.C. § 151 (Supp. I 2007).

¹⁵ *FCC v. Pacifica Found.*, 438 U.S. 726, 735-36 (1978).

¹⁶ *Id.* at 738.

¹⁷ *See id.* at 729-30. The case originated from an informal complaint submitted by a listener who heard the Carlin monologue broadcast on the radio while driving with his young son. *Id.* at 730. The FCC responded with a declaratory order granting the complaint in which it stated that it intended to “clarify the standards” used to evaluate the numerous complaints it received. *Id.* at 730-31.

¹⁸ *Id.* at 748-49.

¹⁹ *Id.* at 748-50 (clarifying the holding does not assert that “an occasional expletive . . . would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution”).

²⁰ *In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250 (1978).

²¹ *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (1987) (“We find that the definition of indecent broadcast material set forth in *Pacifica* appropriately includes a broader range of material than the seven specific words at issue in *Pacifica*.”).

pretation on actionably indecent words took place in 2004 after Bono, of the band U2, commented during the 2003 *Golden Globe Awards*, “This is really, really, fucking brilliant.”²² While the word in question functioned as an intensifier rather than a literal descriptor, the FCC determined after a full Commission review that “any use of that word . . . inherently has a sexual connotation” because “[it] invariably invokes a coarse sexual image.”²³ The FCC did not issue sanctions, as broadcasters did not have notice about this latest change in policy, although it was within its discretion to do so.²⁴

C. *FCC Definitions Within the Indecency Ban*

The indecency ban prohibits three categories of material: obscene, indecent, and profane.²⁵ Enforcement of the ban ranges from a blanket prohibition to a restricted broadcasting time frame.²⁶

1. Obscene

The First Amendment does not protect obscene speech,²⁷ and therefore the indecency ban prohibits broadcasting obscene speech at any time.²⁸ To be considered obscene, the material must meet a three part test: (1) “‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient²⁹ interest[;]” (2) the material must “depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable

²² *Golden Globes Order*, 19 F.C.C.R. 4975, 4983 n.4 (2004).

²³ *Id.* at 4978-79.

²⁴ *Id.* at 4981-82. Sanctions for liability have a statutory maximum of \$27,500 for each violation; however, violations for each station owned by a broadcasting corporation are aggregated and can easily exceed very large sums. *See In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show*, 19 F.C.C.R. 19230, 19230 (2004) (issuing a monetary forfeiture in an aggregate amount of \$550,000 against Viacom Incorporated for the infamous slip by Janet Jackson during the halftime show).

²⁵ *See* 18 U.S.C. § 1464 (2006).

²⁶ 47 C.F.R. § 73.3999 (2008).

²⁷ *Roth v. United States*, 354 U.S. 476, 485 (1957).

²⁸ 47 C.F.R. § 73.3999(a).

²⁹ Prurient is defined as “[c]haracterized by or arousing inordinate or unusual sexual desire.” BLACK’S LAW DICTIONARY 1347 (9th ed. 2009).

law[;]” and (3) the material, taken as a whole, must lack “serious literary, artistic, political, or scientific value.”³⁰

2. Indecent

The FCC must give limited First Amendment protection to indecent material when it does not rise to the level of obscenity.³¹ This protection prevents the FCC from implementing a blanket prohibition of indecent material; however, the FCC has restricted the broadcasting of such material to times between ten p.m. and six a.m., a period considered to pose the lowest risk to children, known as the safe harbor.³²

To be indecent, material must “depict[] or describe[] sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.”³³ This requires two findings: first, that the content is within the scope of indecency by depicting sexual or excretory organs; and second, that the content is patently offensive.³⁴ In determining whether material is patently offensive, the FCC employs three factors: (1) whether the description or depiction is explicit or graphic, (2) “whether the material dwells on or repeats at length descriptions of sexual or excretory organs[,]” and (3) “whether the material appears to pander or is used to titillate” or shock.³⁵

³⁰ *Miller v. California*, 413 U.S. 15, 24 (1973) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

³¹ *See Action for Children’s Television v. FCC*, 59 F.3d 1249, 1253 (D.C. Cir. 1995) (“Unlike obscenity, indecent speech is protected under the first amendment; it may be regulated only by the least restrictive means necessary to promote a compelling state interest.” (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989))); *see also* 47 C.F.R. § 73.3999(b).

³² 47 C.F.R. § 73.3999(b); *see Playboy Entm’t Group, Inc. v. United States*, 945 F. Supp. 772, 774 (D. Del. 1996).

³³ *Golden Globes Order*, 19 F.C.C.R. 4975, 4977 (2004).

³⁴ *See id.*

³⁵ *Id.* at 4977-78 (emphasis removed).

3. Profane

Material is profane if it is so highly offensive that it “amount[s] to a nuisance.”³⁶ Depending on the context, this would include any utterance of *fuck* or its variants.³⁷ Broadcasters can use profane material as it is protected by the First Amendment;³⁸ however, like indecent material, the FCC restricts profane material to the period between ten p.m. and six a.m.³⁹

D. The FCC’s Finding of Indecency for the 2002 and 2003 Billboard Music Awards

The FCC determined the *Billboard Music Awards* broadcasts involving Cher in 2002 and Nicole Richie in 2003 were actionably indecent.⁴⁰ In discussing the 2003 *Billboard Music Awards* dialogue between Paris Hilton and Nicole Richie, the FCC concluded the use of the word *shit* clearly falls within the scope of the indecency standard—depicting or describing sexual or excretory activities or organs.⁴¹ The Commission found the use of *fuck* also falls in the indecency category, following the same logic set forth in the *Golden Globes Order*, that “any use of that word has a sexual connotation even if the word is not used literally.”⁴² The FCC then determined the dialogue to be patently offensive, as it was graphic, it aired during a time when children would be in the audience, and the speaker presented it in a pandering manner.⁴³

Regarding the 2002 *Billboard Music Awards*, Fox Television Stations, Incorporated (Fox) asserted the expletive used by Cher was not a depiction or description of sexual activity, but rather a “vulgar expletive directed as an insult toward an individual or group against

³⁶ Tallman v. United States, 465 F.2d 282, 286 (7th Cir. 1972).

³⁷ *Golden Globes Order*, 19 F.C.C.R. at 4981 (“Use of the ‘F-Word’ . . . is also clearly the kind of vulgar and coarse language that is commonly understood to fall within the definition of ‘profanity.’”).

³⁸ *See id.* at 4977.

³⁹ 47 C.F.R. § 73.3999(b) (2008).

⁴⁰ *In re Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 F.C.C.R. 13299, 13308, 13314 (2006) [hereinafter *Remand Order*].

⁴¹ *Id.* at 13303-04.

⁴² *Id.* at 13304-05.

⁴³ *Id.* at 13305.

whom the speaker held deep-seated feelings of ill-will”⁴⁴ Fox argued that Cher’s statement was not actionably indecent because it filled mere seconds of a two-hour program and was not presented to pander to or shock the audience.⁴⁵ However, the FCC again reiterated its logic from the *Golden Globes Order*, finding any use of the word *fuck* to be legally actionable.⁴⁶

As both *Billboard Music Awards* shows took place prior to the *Golden Globes Order*, the FCC did not issue sanctions in either case, although it had the discretion to do so.⁴⁷ As the FCC did not issue sanctions, Fox had no further opportunity to object to the indecency findings.⁴⁸ However, the FCC later provided this opportunity by obtaining a voluntary remand from the court of appeals.⁴⁹ The court of appeals found the FCC failed to provide a reasoned analysis that would justify the change in policy, and that the new policy set forth in the *Golden Globes Order* was invalid under the Administrative Procedure Act (APA).⁵⁰

III. ANALYSIS

If a statute administered by an agency is ambiguous and the implementing agency’s construction is reasonable, courts will generally defer to that agency’s interpretation of the statute.⁵¹ If Congress’s intent is unclear from the statute, courts must uphold any reasonable interpretation by the agency, despite a court’s belief that a better interpretation of the statute may be found.⁵²

⁴⁴ *Id.* at 13323.

⁴⁵ *Id.*

⁴⁶ *Id.* (“Cher’s use of the ‘F-Word’ . . . to express hostility to her critics is inextricably linked to the sexual meaning of the term.” (citation omitted)).

⁴⁷ *See id.* at 13321, 13326.

⁴⁸ *See Fox II*, 129 S. Ct. 1800, 1808 (2009).

⁴⁹ *Id.*; *see Fox Television Stations, Inc. v. FCC (Fox I)*, 489 F.3d 444, 453 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1800 (2009).

⁵⁰ *Fox I*, 489 F.3d at 462. *See generally* Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2006).

⁵¹ *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

⁵² *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

Inconsistency is not a reason for courts to reject an agency's interpretation of a statute;⁵³ however, APA provisions still apply.⁵⁴ Under the APA, courts are to set aside any agency action they determine to be arbitrary or capricious.⁵⁵ Unexplained inconsistency may be a basis for holding an interpretation to fall within this narrow standard.⁵⁶ This provision does not, however, allow a court "to substitute its judgment with that of the agency[.]"⁵⁷ and courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."⁵⁸

While the court of appeals determined that a justified explanation must be given for an agency's change in policy not to be considered arbitrary or capricious,⁵⁹ the Supreme Court disagreed. Writing for the majority, Justice Antonin Scalia explained, "[O]ur [previous] opinion . . . neither held nor implied that every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance."⁶⁰ The only requirement to prove a reasoned explanation in a change of policy is that an agency show it realizes that it changed its position.⁶¹ The agency does not have to show the new policy is better, only that it believes it to be better—which the agency demonstrates by the awareness of its change in position—and that there are good reasons for the new policy.⁶² Regarding a change of policy, an agency's actions will only be arbitrary or capricious if: (1) the new policy is based on factual findings contradicting those underlying the old policy or (2) the old policy created "reliance interests that must be taken into account."⁶³

⁵³ *Id.* at 981.

⁵⁴ *See id.*

⁵⁵ 5 U.S.C. § 706(2)(A) (2006).

⁵⁶ *Nat'l Cable & Telecomms. Ass'n*, 545 U.S. at 981.

⁵⁷ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁸ *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

⁵⁹ *Fox I*, 489 F.3d 444, 457 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

⁶⁰ *Fox II*, 129 S. Ct. 1800, 1810 (2009).

⁶¹ *Id.* at 1811 (also stating that an agency must show "good reasons for the new policy").

⁶² *Id.*

⁶³ *Id.* (citing *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

A. *The Supreme Court Finds the FCC's Change in Policy to Include Fleeting Expletives Within the Indecency Ban as Reasonable*

The *Fox II* majority referenced the *Golden Globes Order* to show the FCC's acknowledgement of its change to prior policy.⁶⁴ The Court found that this change in policy was not arbitrary, as it is reasonable to leave no distinction between a literal and a nonliteral use of certain expletives.⁶⁵ The FCC explained that the "power [of the word *fuck*] to insult and offend derives from its sexual meaning"⁶⁶ and that "any use of that word has a sexual connotation even if the word is not used literally."⁶⁷

The necessity to move away from the *Pacifica* policy, which "limits a finding of indecency to deliberate, repetitive use of the seven words actually contained in the George Carlin monologue[,]"⁶⁸ stems from the finding that the old policy was "at odds with the Commission's overall enforcement policy"⁶⁹ Even a first blow to children could be harmful,⁷⁰ and even a safe harbor for individual words could nonetheless lead to increased use of the offensive language.⁷¹ The majority also decided that technological advances have made it easier to bleep out offending words, thus supporting a more stringent policy.⁷²

B. *The Supreme Court Rejects the Court of Appeals Finding That the Change in Policy Was Arbitrary and Capricious*

The court of appeals offered three grounds for finding the FCC's action arbitrary and capricious, all of which were rejected by the Su-

⁶⁴ *See id.* at 1812.

⁶⁵ *Id.*

⁶⁶ *Remand Order*, 21 F.C.C.R. 13299, 13323 (2006).

⁶⁷ *Id.* at 13304. *But see Fox II*, 129 S. Ct. at 1827 (Stevens, J., dissenting) ("As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent.").

⁶⁸ *In re Pacifica Found., Inc.*, 2 F.C.C.R. 2698, 2699 (1987).

⁶⁹ *Remand Order*, 21 F.C.C.R. at 13308.

⁷⁰ *Fox II*, 129 S. Ct. at 1812-13 (citing *Remand Order*, 21 F.C.C.R. at 13309).

⁷¹ *Id.* (citing *Golden Globes Order*, 19 F.C.C.R. 4975, 4979 (2004)).

⁷² *Id.* at 1813 (citing *Golden Globes Order*, 19 F.C.C.R. at 4980).

preme Court in *Fox II*. The first was the FCC's failure to show why it did not ban nonrepetitive use of expletives in prior policy.⁷³ After dismissing this as not requisite for a change in policy, Justice Scalia went on to explain the impossibility of obtaining any empirical evidence to support this, stating "it suffices to know that children mimic the behavior they observe—or at least the behavior that is presented to them as normal and appropriate."⁷⁴

Second, the Supreme Court rejected the finding that the new first blow theory would ban all expletives.⁷⁵ The FCC's policy continues to be a context-based approach in determining if an expletive is patently offensive;⁷⁶ however, it now permits certain words to automatically fall within the scope of indecency regardless of the word's use or context.⁷⁷

Lastly, the Supreme Court accepted the FCC's argument that not banning fleeting expletives would lead to an increased use of expletives.⁷⁸ For the majority, the FCC's determination made sense⁷⁹ and was consistent with the general rule discussed earlier that a court should not substitute its judgment for that of an agency.⁸⁰

IV. CONCLUSION

The *Fox II* majority incorrectly decided that the FCC's change in policy was not arbitrary or capricious. By allowing such a narrow restriction on invalidating an agency's change in position, the Supreme Court effectively permitted policy change for nearly any reason. A simple explanation that the agency knows it is changing the policy and it

⁷³ *Fox I*, 489 F.3d 444, 458 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

⁷⁴ *Fox II*, 129 S. Ct. at 1813 ("One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts (and insulated from all other indecency), and others are shielded from all indecency.").

⁷⁵ *See id.* at 1814.

⁷⁶ *See id.*

⁷⁷ *See id.* at 1807-08.

⁷⁸ *See id.*

⁷⁹ *Id.* (noting that making the connection between broadcasting fleeting expletives and an increase in their use was an "exercise in logic rather than clairvoyance").

⁸⁰ *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

thinks the new policy is better would satisfy the majority, as long as there are no contradictory factual findings or significant reliance interests, and the agency can articulate a good reason for the change.⁸¹ This explanation for the change in policy may be the same reason the policy was first adopted⁸² and need not address both sides of an argument.⁸³

The Supreme Court also erred by failing to find the application of the FCC's new policy to be arbitrary and capricious. The nebulous definition used by the FCC of what is obscene, indecent, or profane⁸⁴ gives them the final decision on what to sanction. While an exact definition of these terms may never be found,⁸⁵ the ruling from this case allows the FCC to use its context-based review in an arbitrary manner. Justice Scalia asserts that the "agency's decision to retain some discretion does not render arbitrary or capricious its regulation of the deliberate and shocking uses of offensive language at the award shows"⁸⁶ However, the FCC's contradictory rulings appear to be both arbitrary and capricious.

A. Granting Absolute Discretion to the FCC Leads to Conflicting Results on What is Offensive

The FCC found the daytime broadcast of *Saving Private Ryan* not actionable under the indecency ban, even though the movie contains repetitive uses of the exact expletives deemed actionably indecent in *Fox II*.⁸⁷ The FCC made this determination, in part, by finding the sus-

⁸¹ See *Fox II*, 129 S. Ct. at 1811.

⁸² See *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50 (1978) (noting the governmental interest in protecting the well being of children, and the ease in which they access broadcasted material); see also *Fox II*, 129 S. Ct. at 1808 (explaining the necessity to safeguard children from offensive language).

⁸³ See *Fox II*, 129 S. Ct. at 1808 (noting the technological advances that make it easier to delete expletives from a broadcast); see also *id.* at 1835 (Breyer, J., dissenting) (noting the FCC's lack of thought for smaller independent broadcasters, who may not be able to afford technology to delete expletives).

⁸⁴ See *supra* Part II.C.

⁸⁵ Justice Stewart has been famously quoted on his definition of obscene material. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it").

⁸⁶ *Fox II*, 129 S. Ct. at 1814.

⁸⁷ See *In re Complaints Against Various Television Licensees Regarding Their Broad. On Nov. 11, 2004, of the ABC Television Network's Presentation of the Film*

pense and graphic nature of the movie would put parents on notice and dissuade the vulnerable from watching.⁸⁸ While the exact nature of the *Billboard Music Awards* is far different from the graphic violence in a dramatic war movie, one can easily find that contemporary community standards would expect erratic behavior from celebrities during live broadcasts. The large number of tabloids sold that report on this type of behavior even suggests that a desire to witness erratic behavior is the exact reason people choose to watch these broadcasts.

By making an exception that puts parents on notice, the FCC further nullified its argument that community interests require the banning of fleeting expletives.⁸⁹ Despite advanced notices, any channel surfer is able to encounter the many repetitive expletives broadcasted in *Saving Private Ryan*. The graphic nature or suspenseful action of the film would do nothing to prevent this first blow. The FCC might do better to classify these instances of offensive language to the unsuspecting viewers as *first taps*, as they apparently are not as offensive, even when used in a sexual context, as the instances of nonliteral expletives which are patently offensive.

The majority's reason for accepting the FCC's change in policy—that “children mimic the behavior they observe”⁹⁰—continues to illustrate why the FCC's determinations on what is actionably indecent are arbitrary. Children are as capable of mimicking language used in war movies as they are for language used in a music awards ceremony. The argument that the nature of the film places parents on notice of objectionable content⁹¹ undercuts the governmental interest in the “well-being of its youth.”⁹² Parental and governmental overview cannot work in concurrence, as banning material the government deems inappropriate will naturally take that discretion away from parents.

“Saving Private Ryan,” 20 F.C.C.R. 4507, 4513 (2005). The film's use of expletives goes so far as to include a major subplot, whereby the acceptance of a new member into the squad is symbolized by his discovery of the acronym *F.U.B.A.R.* (fucked up beyond all recognition). *SAVING PRIVATE RYAN* (DreamWorks Studios 1998).

⁸⁸ *Fox II*, 129 S. Ct. at 1814.

⁸⁹ See *Golden Globes Order*, 19 F.C.C.R. 4975, 4980 (2004).

⁹⁰ *Fox II*, 129 S. Ct. at 1813.

⁹¹ *Id.* at 1814.

⁹² *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

***B. Technological Advances Have Decreased
the Need for Censorship***

The *Fox II* majority accepts the FCC's contention that technological advances to bleep out expletives support this expansion of power.⁹³ However, the majority fails to consider additional technological advances, such as the V-Chip.

The V-Chip is capable of blocking out objectionable content from viewers simply by entering a pass code.⁹⁴ This technology exists in all televisions larger than thirteen inches manufactured after January 1, 2000, and is available as a set-top box for those with older televisions.⁹⁵ Not only would full utilization of this system prevent the first blows of expletives by requiring a pass code to access rated content, it could also restore the lessened constitutional rights to the spectrum of broadcasting. There is numerous data to show that a majority of households do not use the V-Chip,⁹⁶ although presumably one of the main reasons is that parents themselves regulate what their children watch.

C. The Supreme Court's Avoidance of the Constitutional Issue

In making its decision based on the APA, the lower court of appeals in *Fox II* could not reach the constitutional challenges of the case.⁹⁷ The court of appeals did, however, offer an opinion on the con-

⁹³ *Fox II*, 129 S. Ct. at 1813.

⁹⁴ Fed. Commc'ns Comm'n, The V-Chip: Putting Restrictions on What Your Children Watch, <http://www.fcc.gov/cgb/consumerfacts/vchip.html> (last visited May 2, 2010).

⁹⁵ Comm'n Proposes Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, No. 97-260, 1997 WL 591887 (F.C.C. Sept. 25, 1997); *see also* Fed. Commc'ns Comm'n, V-Chip: Viewing Television Responsibly, <http://www.fcc.gov/vchip> (last visited May 2, 2010).

⁹⁶ *In re* Implementation of the Child Safe Viewing Act; Examination of Parental Control Techs. for Video or Audio Programming, 24 F.C.C.R. 3342, 3348 (2009) ("A study conducted from 1999-2001 by the Annenberg Public Policy Center found that only 8 percent of the families studied had the V-chip programmed and were using it.").

⁹⁷ *See* *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." (citations omitted)).

stitutional challenges, saying the FCC's definition of what is patently offensive may be unconstitutionally vague, possibly gives the FCC too much discretion in the regulation of speech, and that the special exception for treating the broadcasting spectrum differently from other forms of speech may no longer exist.⁹⁸

During oral argument at the Supreme Court level, Justice Ruth Bader Ginsburg characterized the ruling based solely on the APA as "ignoring the big elephant in the . . . room."⁹⁹ The majority opinion simply declined to address the constitutional questions, as the Second Circuit did not rule on the constitutionality of the Commission's orders, and the Supreme Court is a court of final review.¹⁰⁰ Justice Clarence Thomas, in his concurring opinion, offered insight into his view of the constitutional issue, noting the "questionable viability of the . . . FCC's assertion of constitutional authority to regulate the programming at issue in this case."¹⁰¹ Justice Thomas described two arguments supporting regulation—there is a scarcity of broadcasting frequencies and that broadcasting has a uniquely pervasive presence and unique accessibility to children as weak—and concluded that there is no constitutional basis for regulation.¹⁰² He then agreed with the court of appeals, stating even if these factors were constitutionally valid when first created, they no longer exist.¹⁰³

D. The Future of FCC Regulation Under the Ruling Issued

Unless the Court reverses *Fox II* on constitutional grounds, the holding from it will allow the FCC to continue expanding its regulation of speech. History shows the FCC is likely to do just that.¹⁰⁴ Under the guise of a change in policy, the FCC can declare any variant of *fuck* to be patently offensive. It may be only a matter of time before the FCC and courts interpret seemingly harmless words such as *freak*, *flipping*,

⁹⁸ *Fox I*, 489 F.3d 444, 463-65 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1800 (2009).

⁹⁹ Transcript of Oral Argument at 27, *Fox II*, 129 S. Ct. 1800 (2009) (No. 07-582).

¹⁰⁰ *Fox II*, 129 S. Ct. at 1819.

¹⁰¹ *Id.* at 1819-20 (Thomas, J., concurring).

¹⁰² *Id.* at 1820-22.

¹⁰³ *See id.* at 1822.

¹⁰⁴ *See supra* Part II.B.

phunk,¹⁰⁵ or even a string of alpha numeric characters, such as @#!\$, the same as *fuck*. After all, their use can have the same effect as using *fuck*, which is always indecent, and may be patently offensive depending on which five commissioners are in the FCC at the time.¹⁰⁶ The majority of the Court seems to approve of this result as long as the FCC knew it was changing its position, and believed the new position was better.¹⁰⁷

Justice Stephen Breyer's dissenting opinion shows a more reasoned argument, by asking the simple question "if it is *always* legally sufficient for the agency to reply to the question 'why change?' with the answer 'we prefer the new policy[,] . . . then why bother asking the agency to focus on the fact of change?'"¹⁰⁸ Had the majority followed this logical conclusion, restraint on the ever-expanding powers of the FCC could have been exercised for the first time in seventy-five years. For now, we will have to wait and hope that the decision to protect our First Amendment rights will overturn this decision on a constitutional basis.

¹⁰⁵ Some radio stations have opted to replace a song by the Black Eyed Peas, *Don't Phunk With My Heart*, to *Don't Mess With My Heart*.

¹⁰⁶ See *supra* note 9 and accompanying text.

¹⁰⁷ See *Fox II*, 129 S. Ct. at 1811.

¹⁰⁸ *Id.* at 1832 (Breyer, J., dissenting).

