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**FCC, Fox, and That Other F-Word**  
BY JOHN P. ELWOOD, JEREMY C. MARWELL,  
AND ERIC A. WHITE

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## FCC, Fox, and That Other F-Word

*John P. Elwood, Jeremy C. Marwell, and Eric A. White\**

When Solicitor General Donald Verrilli stepped to the podium on January 10, 2012, Court watchers were poised for a blockbuster. After *FCC v. Fox Television Stations* made its first trip to the Supreme Court on administrative-law grounds during October Term 2008, the U.S. Court of Appeals for the Second Circuit had struck down the indecency policy of the Federal Communications Commission as unconstitutionally vague. The parties had fully briefed not only the due process theory adopted by the court of appeals, but also the larger issue of whether the Court should overrule *FCC v. Pacifica Foundation*,<sup>1</sup> finally discarding the Court's increasingly dated tolerance for restrictions on broadcast television and radio networks that it would not condone for other media. The Second Circuit had all but urged that disposition by emphasizing that "we face a media landscape that would have been almost unrecognizable in 1978," but noting pointedly that only the Court could make the decision to abandon the *Pacifica* framework.<sup>2</sup> That option appeared to be very much under consideration before the Supreme Court. Questions about the First Amendment consumed most of the oral argument, where the justices asked a series of pointed questions about what standard, if any, should replace *Pacifica*.

More than five months later, on the term's last day, the Court issued a short opinion and unanimously vacated the judgment below. Seven justices agreed on a narrow, as-applied due process

\* The authors are appellate lawyers in the Washington, D.C. office of Vinson & Elkins LLP. Part III of this article is adapted from the *amici curiae* brief filed by Messrs. Elwood and White on behalf of the Cato Institute, Center for Democracy & Technology, Electronic Frontier Foundation, Public Knowledge, and TechFreedom in support of respondents in *FCC v. Fox Television Stations, Inc.*, available at <http://www.cato.org/pubs/legalbriefs/FCCvFox.pdf>.

<sup>1</sup> 438 U.S. 726 (1978).

<sup>2</sup> *Fox Television Stations, Inc. v FCC*, 613 F.3d 317, 326–27 (2d Cir. 2010)

rationale that left in place both *Pacifica* and the FCC's current indecency policy—at least for the time being. While attention soon turned to the health care challenges, the *Fox* decision warrants closer review, both to assess the Court's due process analysis and to examine what it may portend for the success of any future First Amendment challenge.

## **I. The Regulatory and Procedural History of *FCC v. Fox*: From “Dirty Words” to Cleaning a Purse**

As the justices remarked at oral argument, the case's regulatory and procedural history is complex.<sup>3</sup> But because the Court's due process analysis turned in large part on how the FCC's indecency policy had evolved before the three incidents in question, we begin by summarizing that history.

### *A. The FCC's Indecency Policy, 1975–2004*

In the Communications Act of 1934, Congress established a “system of limited term broadcast licenses subject to various ‘conditions’ designed ‘to maintain the control of the United States over all the channels of radio transmission.’”<sup>4</sup> One of the conditions that Congress has imposed on licensees is the indecency ban in 18 U.S.C. § 1464, which prohibits “utter[ing] any obscene, indecent, or profane language by means of radio communication.” Since 1992, Congress has instructed the FCC to enforce section 1464 between 6 a.m. and 10 p.m.<sup>5</sup>

The commission first attempted to enforce the indecency ban in 1975, declaring actionably indecent a New York radio station's broadcast of George Carlin's “Seven Dirty Words” monologue at 2 p.m. on a Tuesday in October 1973.<sup>6</sup> The monologue consisted of

<sup>3</sup> See Tr. of Oral Arg. at 10–11, *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293) (Jan. 10, 2012) (“Fox II Tr.”).

<sup>4</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 505–06 (2009) (“Fox I”) (quoting 47 U.S.C. § 301 (2000 ed.)).

<sup>5</sup> Public Telecommunications Act of 1992, §16(a), 106 Stat. 954, note following 47 U.S.C. § 303; see also *Action for Children's Television v. FCC*, 58 F.3d 654, 669 (D.C. Cir. 1995) (en banc).

<sup>6</sup> In re Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), 56 F.C.C. 2d 94 (1975). A transcript of the performance of the monologue that was the subject of the FCC's first enforcement action is appended to the *Pacifica* decision, see 438 U.S. at 751–55. A version of the monologue from July 1978 is available on YouTube, [http://www.youtube.com/watch?v=3\\_Nrp7cj\\_tM](http://www.youtube.com/watch?v=3_Nrp7cj_tM).

the comedian riffing on “words you couldn’t say on the public airwaves . . . list[ing] those words and repeat[ing] them over and over again in a variety of colloquialisms,”<sup>7</sup> an effect Justice Lewis Powell later deemed “verbal shock treatment.”<sup>8</sup> The FCC received a complaint about the New York broadcast and ultimately issued a declaratory order that the broadcaster, which was owned by the Pacifica Foundation, “ ‘could have been the subject of administrative sanctions.’ ”<sup>9</sup> The commission characterized the language in the monologue as “patently offensive,” and—in a formulation that the commission has retained to this day—explained that the concept of “indecen[cy]” was “ ‘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.’ ”<sup>10</sup>

In reviewing the FCC’s order, the *Pacifica* Court began with the observation that, “of all forms of communication . . . broadcasting . . . has received the most limited First Amendment protection.”<sup>11</sup> It then noted two considerations: First, “broadcast media have established a uniquely pervasive presence in the lives of all Americans,” because “material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>12</sup> Second, broadcasting is “uniquely accessible to children, even those too young to read.”<sup>13</sup> In the Court’s view, a broadcast of the Carlin monologue, unlike written communications, “could have enlarged a child’s vocabulary in an instant.”<sup>14</sup> “The ease with which children may obtain access to broadcast material, coupled with the concerns

<sup>7</sup> *Pacifica*, 438 U.S. at 729.

<sup>8</sup> *Id.* at 757 (Powell, J., concurring in part and concurring in the judgment).

<sup>9</sup> *Id.* at 730 (quoting 56 F.C.C.2d at 99).

<sup>10</sup> *Id.* at 731–32 (quoting 56 F.C.C.2d at 98).

<sup>11</sup> *Id.* at 748.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 748–49.

<sup>14</sup> *Id.* at 749.

recognized in *Ginsberg* [*v. New York*, 390 U.S. 629 (1968)],” and the interest in preserving the well-being of youth and supporting parents’ authority in the household, “amply justify special treatment of indecent broadcasting.”<sup>15</sup> With that minimal analysis, the Court concluded that the commission’s order did not violate the First Amendment. The Court emphasized, however, the “narrowness of [its] holding,” in particular that it was not addressing whether an “occasional expletive . . . would justify any sanction.”<sup>16</sup>

For almost a decade after *Pacifica*, the FCC “did not go beyond the narrow circumstances of [that case] and brought no indecency enforcement actions” between 1978 and 1987.<sup>17</sup> Declining to view *Pacifica* as a “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,” the commission drew a line between “repetitive occurrence of the ‘indecent’ words” and “isolated” or “occasional” expletives.<sup>18</sup>

In 1987, the FCC broadened its indecency standard beyond the material at issue in the Carlin monologue.<sup>19</sup> In doing so, it relied on the “generic definition of indecency”<sup>20</sup> from its 1975 *Pacifica* order—that is, material is indecent if it “ ‘expos[es] [] 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.’ ”<sup>21</sup> In applying that context-specific standard, however, the commission “continued to note the important difference between isolated [or ‘fleeting’ usage] and repeated broadcasts of indecent material.”<sup>22</sup> Regarding the use of expletives, the commission stated that “deliberate and repetitive use in a patently offensive manner” would be a prerequisite to finding actionable indecency. But for speech “involving the description or depiction of sexual or excretory functions,” the “mere fact”

<sup>15</sup> *Id.* at 749-50.

<sup>16</sup> *Id.* at 750.

<sup>17</sup> FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2313 (2012) (“*Fox II*”).

<sup>18</sup> *Id.* (quoting In re Application of WGBH Educ. Foundation, 69 FCC 2d 1250, 1254 (1978)).

<sup>19</sup> *Id.* (citing In re Pacifica Foundation Inc., 2 FCC Rcd. 2698, 2699 (1987) (“*Pacifica Order*”).

<sup>20</sup> 132 S. Ct. at 2313.

<sup>21</sup> See 438 U.S. at 731-32, (quoting 56 FCC 2d at 98).

<sup>22</sup> *Fox II*, 132 S. Ct. at 2313 (quoting In re Infinity Broad. Corp., 3 FCC Rcd. 930 (1987)).

that words are “not repeated” would not compel the conclusion that the use is not indecent.<sup>23</sup>

In 2001, the FCC issued a policy statement to provide guidance to broadcasters.<sup>24</sup> It reaffirmed that material would only be treated as indecent if it depicted sexual or excretory organs or activities and was “patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>25</sup> The FCC identified three factors to guide the analysis: (1) the “explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities”; (2) “whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities”; and (3) “whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.”<sup>26</sup> Regarding the second factor, the commission explained that “repetition of and persistent focus on sexual or excretory material” would exacerbate the potential offensiveness of a broadcast, while material that was “passing or fleeting in nature” would weigh against a finding of indecency.<sup>27</sup>

#### *B. The FCC's Enforcement Action*

The litigation before the Supreme Court arose from the commission's attempt to expand its indecency policy following three incidents on broadcasts by Fox and ABC, which collectively have vastly increased the number of occurrences of the phonetic euphemisms “F-word” and “S-word” in the *U.S. Reports*. The first incident, which occurred during Fox's broadcast of the 2002 *Billboard Music Awards*, involved Cher's use of the F-word in an unscripted statement.<sup>28</sup> The second occurred during Fox's broadcast of the 2003 *Billboard Music Awards*, at which “a person named Nicole Richie” used the F- and

<sup>23</sup> *Id.* (quoting Pacifica Order, 2 FCC Rcd. at 2699).

<sup>24</sup> See *In re Industry Guidance on Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999 (“2001 Policy Statement”).

<sup>25</sup> *Id.* at 8002.

<sup>26</sup> *Id.* at 8003.

<sup>27</sup> *Id.* at 8008.

<sup>28</sup> Cher's statement in question was: “I've also had my critics for the last 40 years saying that I was on my way out every year. Right. So f\*\*\* 'em.” 132 S. Ct. at 2314.

S-words in her own unscripted remarks.”<sup>29</sup> The third involved ABC’s 2003 broadcast of an episode of the show *NYPD Blue*, which “showed the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast.”<sup>30</sup>

After the three incidents occurred, the FCC issued an order finding an unscripted use of the F-word by U2’s Bono during NBC’s broadcast of the 2003 Golden Globe Awards to be actionably indecent.<sup>31</sup> The commission reasoned that the F-word is “one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language” and that its use “in any context” has a sexual connotation. It then held that “the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”<sup>32</sup>

The FCC applied the standard from the *Golden Globes* Order to the three incidents involving ABC and Fox. But because the Fox and ABC incidents involved different facets of the indecency policy (expletives versus displays of nudity), the commission’s orders applied different rationales.

The FCC concluded that the expletives used during the two Billboard Music Award broadcasts on Fox were actionably indecent. In doing so, it invoked not only the three-prong standard from its 2001 policy statement, but also the statement from the *Golden Globes* Order that requiring the “repeated use of expletives” to find indecency was inconsistent with the general approach under *Pacifica*. The commission conceded, however, that it was “not apparent that Fox could be penalized for Cher’s comment at the time it was broadcast.”<sup>33</sup>

<sup>29</sup> Both Cher and Bono were identified by a single name (or pseudonym) as “singer[s],” but the footnote-averse Justice Anthony Kennedy apparently did not wish to devote space in the text to explaining that Richie, singer Lionel Richie’s daughter, is a reality television star. *Id.* Ms. Richie made the following unscripted remark about her television show at the time: “Why do they even call it ‘The Simple Life?’ Have you ever tried to get cow s\*\*\* out of a Prada purse? It’s not so f\*\*\*ing simple.” Fox I, 556 U.S. at 510.

<sup>30</sup> Fox II, 132 S. Ct. at 2314.

<sup>31</sup> Bono’s acceptance speech included the unscripted remark, “This is really, really f\*\*\*ing brilliant. Really, really great.” *Id.* (quoting In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 FCC Rcd. 4975, 4976 n.4 (2004) (“*Golden Globes* Order”).)

<sup>32</sup> *Id.* (quoting *Golden Globes* Order at 4978-80).

<sup>33</sup> See In re Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002, and Mar. 8, 2005, 21 FCC Rcd. 13299 (2006) (“Remand Order”).

The Second Circuit vacated the Remand Order as arbitrary and capricious under the Administrative Procedure Act, relying in part on circuit precedent that required an agency to provide a more substantial explanation for a change of policy than under ordinary arbitrary-and-capricious review. In *FCC v. Fox Television Stations, Inc.* (“*Fox I*”), the Supreme Court reversed, holding that under the APA, an agency’s change of position is not necessarily “subject to more searching review.”<sup>34</sup>

The Second Circuit again struck down the commission’s policy, this time as unconstitutionally vague.<sup>35</sup> The panel criticized the FCC’s past “determination[s] as to which words or expressions are patently offensive,” noting inconsistencies such as finding “bullshit” actionable but “dick” and “dickhead” not.<sup>36</sup> And it found the commission’s presumptive prohibition on the F- and S-words impermissibly vague because the FCC had previously allowed fleeting use of those words and had failed to explain with sufficient clarity how the exceptions to the presumption (for “artistic necessity,” where expletives are “demonstrably essential to the nature of an artistic or educational work,” or for “bona fide news”) would apply. In the panel’s view, the FCC’s “indiscernible standards” created the risk of discriminatory enforcement, noting prior disparate treatment of profanity in the film *Saving Private Ryan* and the documentary *The Blues*. And the panel looked to evidence that the indecency policy had “chill[ed] a vast amount of protected speech,” not only in the cases before it but in decisions by other broadcasters.<sup>37</sup> The Court struck down the indecency policy in its entirety.

As to the ABC broadcast of *NYPD Blue*, the FCC concluded that the episode’s display of nude buttocks was actionably indecent and imposed a \$1.2 million fine. It explained that the images fell within the category of “sexual or excretory organs” under its 2001 policy statement, because the depiction was “widely associated with sexual

<sup>34</sup> 556 U.S. 502, 513–14 (2009) (citing *Motor Vehicles Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). For further analysis of that ruling and how it led to the decision that is the subject of this essay, see Robert Corn-Revere, *FCC v. Fox Television Stations, Inc.*: Awaiting the Next Act, 2008–2009 *Cato Sup. Ct. Rev.* 295 (2009).

<sup>35</sup> *Fox*, 613 F.3d at 330.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 335.

arousal and closely associated by most people with excretory activities.”<sup>38</sup> And the commission found the display had been presented in a manner that “panders to and titillates the audience.” The Second Circuit vacated the forfeiture order based on its earlier *Fox* decision. The FCC successfully sought Supreme Court review of both cases.

*C. Fox II: A Narrow Vagueness Analysis*

The Supreme Court vacated both decisions, holding in an 18-page opinion that the FCC’s orders violated the Fifth Amendment’s Due Process Clause with respect to both ABC and Fox. Although the briefs presented several broad questions, including whether to overrule *Pacifica*, the Court’s narrow due process analysis hewed fairly closely to existing precedent. The Court was able to do so in part because, in its view, the due process violation arising from the FCC’s rulemaking history and its abrupt change of policy was so stark.

The Court began from the uncontroversial principle that laws “must give fair notice of conduct that is forbidden or required.”<sup>39</sup> It then drew from its due process precedents a general “requirement of clarity in regulation”—that laws must “ ‘provide a person of ordinary intelligence fair notice of what is prohibited’ ” and cannot be “ ‘so standardless that [they] authorize[ ] or encourage[ ] seriously discriminatory enforcement.’ ”<sup>40</sup> The Court explained that due process protects two “connected but discrete” concerns: first, notice—that regulated parties “should know what is required of them so they may act accordingly”; second, clarity—that the laws provide “precision and guidance” so that those enforcing the laws “do not act in an arbitrary or discriminatory way.”<sup>41</sup> It suggested (though technically did not need to apply) the notion that heightened due process scrutiny applies where First Amendment interests are at stake, noting that such cases require “rigorous adherence” to due process requirements.<sup>42</sup>

<sup>38</sup> *Fox II*, 132 S. Ct. at 2316-17 (quoting *In re Complaints Against Various Television Licensees Concerning Their February 24, 2003 Broadcast of the Program “NYPD Blue,”* 23 FCC Rcd. 3147, 3150 (2008)).

<sup>39</sup> *Id.* at 2317 (citing *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

<sup>40</sup> *Id.* (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

<sup>41</sup> *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

<sup>42</sup> *Id.* (“When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”).

Applying these principles, the dispositive factor in the Court's analysis was that the FCC had reversed course between the 2001 policy guidelines and the 2004 *Golden Globes* Order, which it issued *after* the three broadcasts in question. The Court explained that, in its view, the 2001 guidelines had established that a key consideration in deciding whether material is indecent is whether it "dwell[ed] on or repeat[ed] at length" the offending description.<sup>43</sup> The *Golden Globes* Order had fundamentally "changed course" and taken the opposite view, that even fleeting expletives could violate the indecency prohibition.<sup>44</sup> The FCC then "applied the new principle promulgated in the *Golden Globes* Order" to conduct occurring after its adoption "and determined fleeting expletives and a brief moment of indecency were actionably indecent."<sup>45</sup>

Framed in these terms, the Court had little difficulty concluding that the FCC had erred by applying "the new principle promulgated in the *Golden Globes* Order" essentially retroactively to decide whether the ABC and Fox incidents were actionable. The FCC policy simply "gave *no notice* to Fox or ABC" that either the fleeting expletives or brief shot of nudity at issue could be actionable.<sup>46</sup> A regulatory change "this abrupt" would support finding a due process violation on "*any subject*"—and thus it was "surely the case" that the commission violated due process given the First Amendment interests at stake.<sup>47</sup> The Court noted that the government "*concede[d]* that 'Fox did not have reasonable notice at the time of the broadcasts that the Commission would consider non-repeated expletives indecent.'"<sup>48</sup>

The Court had no more difficulty rejecting the government's counterarguments. As to Fox's two fleeting expletives broadcasts, the network could establish a due process violation even though the FCC had "not impose[d] a sanction." Despite the FCC's promise it would not consider the "indecent broadcasts" for license renewal or "any other context," the Court viewed a "policy of forbearance"

<sup>43</sup> *Id.* at 2318.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

as insufficient to moot the issue.<sup>49</sup> Moreover, the FCC retained the “statutory power to take into account ‘any history of prior offenses’”—even if the commission explained now that it would not exercise that power.<sup>50</sup> The Court also noted the significant “reputational injury” Fox had suffered with “viewers and advertisers,” in part from the FCC’s strong language disapproving of the broadcasts, as further reason for giving relief to Fox.<sup>51</sup>

Regarding ABC’s display of nudity, the Court rejected the suggestion that prior FCC opinions had provided adequate notice that “televising of nudes might well raise a serious question of programming.”<sup>52</sup> It dismissed the prior FCC case cited in the solicitor general’s brief as an “isolated and ambiguous statement from a 1960 Commission decision,” a degree of notice the Court viewed as insufficient given that the government “intends to impose over a \$1 million fine for allegedly impermissible speech.”<sup>53</sup> The opinion emphasized that prior FCC decisions had found “isolated and brief moments of nudity” inactionable.<sup>54</sup> As an example, the Court noted that the FCC had treated as inactionable a scene from the movie *Schindler’s List* depicting naked concentration camp victims, even while acknowledging the quite different circumstances presented there. And the Court noted one FCC decision issued prior to the ABC order that treated “30 seconds of nude buttocks [as] ‘very brief’ and not actionably indecent.”<sup>55</sup> It also appeared to criticize the rationale of the commission’s order, which had argued that the display of nudity in *NYPD Blue* had “more shots or lengthier depictions of nudity” than in broadcasts previously approved.<sup>56</sup> The “broad language” in the FCC explanation (presumably the comparison with scenes that were “not as lengthy or repeated”) the Court concluded, “fail[ed] to demonstrate that ABC had fair notice.”<sup>57</sup> In short, the FCC had “point[ed] to *nothing*” that would have given the network

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> *Id.* at 2318–19.

<sup>52</sup> *Id.* at 2319.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

“affirmative notice that its broadcast would be considered actionably indecent.”<sup>58</sup>

The Court then spelled out in unusual detail what issues it was *not* deciding. The length of the final section of the Court’s opinion both reflects the importance of the questions reserved and offers a chance to parse language for hints of the justices’ views. First, the Court explained that it “need not address the First Amendment implications of the Commission’s indecency policy,” including the arguments for overruling *Pacifica*.<sup>59</sup> Second, it was likewise “unnecessary” to address the constitutionality of the FCC’s “current indecency policy as expressed in the *Golden Globes* Order and subsequent adjudications.”<sup>60</sup> The Court thus left for another day the networks’ broader due process challenges to the FCC’s indecency policy, and did not prohibit the FCC from applying its current indecency policy to broadcasts occurring after it. The Court concluded with what seems deliberately pointed language that the FCC remains “free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements.”<sup>61</sup>

Justice Ruth Bader Ginsburg concurred only in the judgment, arguing that *Pacifica* was “wrong when it issued” and that “[t]ime, technological advances, and the Commission’s untenable rulings in the [Fox and ABC cases] show why *Pacific* bears reconsideration.”<sup>62</sup>

Justice Sonia Sotomayor was recused, presumably because at least part of the case under review came from the Second Circuit during her tenure on that court.

## II. Vagueness Analysis: A Self-Consciously Narrow Extension of Existing Law

Although the Court’s narrow holding sidestepped the most significant constitutional claims briefed and argued by the parties, its due process analysis is significant in several ways.

<sup>58</sup> *Id.* (emphasis added).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 2320.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 2321 (Ginsburg, J., concurring in the judgment).

*A. A Constitutional Overlay for Administrative Law Principles*

The Court's decision in *Fox II* reflects a cautious approach toward imposing a due process overlay on traditional statutory administrative-law principles. The opinion was narrow not only in the sense of sidestepping the First Amendment claims but also in its application of the due process framework itself. It limited its analysis to just the notice aspects of due process, as applied to the three broadcasts at issue, avoiding broader concerns about whether the FCC's policy was so unclear it could not be enforced going forward. The Court's reasoning appeared to be self-consciously narrow, taking pains to characterize the regulatory history in terms that would starkly show the lack of notice. It concluded, for instance, that "the Commission policy in place at the time of the broadcasts gave *no notice* to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent"<sup>63</sup> and characterized the FCC as having "changed course" "abrupt[ly]" in the 2004 *Golden Globes* Order.<sup>64</sup>

The Court's characterization of the regulatory history may have reflected concern about the vast range of government action that could be affected by a broader constitutional overlay to the traditional statutory standards for review of agency action under the Administrative Procedure Act. Put differently, a due-process-based ruling for the broadcasters that acknowledged incremental evolution in the FCC's policy or colorable support for the orders in prior precedents would have opened the door to future due process challenges to many routine agency actions. It is telling to contrast how *Fox I* and *Fox II* characterized the regulatory history: While *Fox II* portrayed it as involving a recent, abrupt shift, *Fox I* recounted the regulatory history in more incremental and evolutionary language. *Fox I*, for instance, explained that the commission had taken "a cautious, but *gradually expanding* approach" to indecency enforcement;<sup>65</sup> concluded that the 1987 policy had "*repudiated* the view that its enforcement power was limited to '*deliberate, repetitive* use of the seven words actually contained in the George Carlin monologue' "<sup>66</sup> and

<sup>63</sup> *Fox II*, 132 S. Ct. at 2318 (emphasis added).

<sup>64</sup> *Id.*

<sup>65</sup> 556 U.S. at 507 (emphasis added).

<sup>66</sup> *Id.* (citing *Pacifica Order*, 2 FCC Rcd. at 2699 ¶ 12 (emphasis added)). See also 556 U.S. at 508 (noting that FCC had "expanded its enforcement beyond the 'repetitive use of specific words or phrases' " (citing *Pacifica Order*, 2 FCC Rcd. at 2699 ¶ 13)).

quoted the commission's statement in its 2001 policy guidance that "[n]o single factor . . . generally provides the basis for an indecency finding."<sup>67</sup> *Fox I* also suggested that the 2004 *Golden Globes* Order merely "took one step further" the FCC's indecency policy, even while noting that it was "the first time" the commission had stated that expletives could be actionably indecent "when the word is used only once," and that the *Golden Globes* Order had disclaimed prior precedents as "no longer good law."<sup>68</sup>

A comparison of *Fox I* and *Fox II* illustrates the overlap between due process concerns and the normal statutory standards that govern agency action under the APA. Although the constitutional and APA doctrines are certainly distinct, notice concerns may often be implicated where an agency has even arguably changed a prior policy or position. Both cases, of course, involved challenges to the very same change in policy. *Fox II* sustained a due process challenge on essentially the same facts that the Court previously held (as to Fox) did not violate the APA's arbitrary-and-capricious standard. Indeed, *Fox I* specifically addressed notice considerations in adjudicating the APA challenge, concluding that the FCC's decision not to impose a forfeiture or other sanction "precludes any argument that it is arbitrarily punishing parties without notice of the potential consequences of their action."<sup>69</sup> By contrast, the failure to impose a sanction was not dispositive in the constitutional due process context; there, the FCC's mere "statutory power" to take account of past penalties in future actions and the reputational injury to Fox was enough.<sup>70</sup>

The two cases also illustrate the interplay of statutory and constitutional concerns—how agency actions that can help withstand review under one regime can make them vulnerable under the other—and thus demonstrate the need for agency counsel to consider both. In *Fox I*, the Court made clear that an agency must "display awareness [in explaining a decision] that it is changing position" to satisfy ordinary arbitrary-and-capricious review.<sup>71</sup> That requirement may, however, bolster due process challenges like those in *Fox II*; an

<sup>67</sup> *Id.* at 508.

<sup>68</sup> *Id.* at 508-10 (quoting 19 FCC Rcd. at 4980-82).

<sup>69</sup> *Id.* at 518.

<sup>70</sup> *Fox II*, 132 S. Ct. at 2318-19.

<sup>71</sup> *Fox I*, 556 U.S. at 515 (emphasis original).

agency will defend against APA claims by acknowledging that it is changing policy, but litigants might seize on that concession in bringing due process claims. By contrast, the Court's holding in *Fox II* that the due process violation stemmed from the FCC's failure to give *any* notice will give agencies an incentive to ground their policies in past decisions and orders.

*B. Hints About How a "Heightened" Due Process Analysis Applies  
When First Amendment Interests Are Affected*

In the past, the Court has stated that when a statute "interferes with the right of free speech or of association, a more stringent vagueness test should apply."<sup>72</sup> In recent cases, the Court has embraced that proposition sometimes obliquely, appearing to acknowledge it while offering little detail about precisely how it applies.<sup>73</sup> *Fox II* nominally continues that approach but offers some hints about how a more stringent due process analysis might apply in practice. In summarizing its due process precedents, the *Fox II* Court stated only that "rigorous adherence" to due process norms is "necessary to ensure that ambiguity does not chill protected speech," without specifying whether such an approach modifies the underlying standards of notice or clarity (or both).<sup>74</sup> The Court found it unnecessary to apply a heightened standard of review, explaining that it would find a due process violation "with respect to a regulatory change this abrupt on *any subject*"—even if it was strengthened in that conclusion by the view that it "is surely the case when applied to the regulations in question, regulations that touch upon 'sensitive areas of basic First Amendment freedoms.'"<sup>75</sup>

Other portions of the Court's opinion, however, may provide practical clues about how due process norms apply in the First Amendment context. In explaining why the FCC had not provided constitutionally adequate notice to ABC that the display of nudity was actionably indecent, the Court concluded that the language of the 1960 FCC opinion "does not suffice for the fair notice required when

<sup>72</sup> *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

<sup>73</sup> See, e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) (analyzing due process issue "to the extent a heightened vagueness standard applies").

<sup>74</sup> 132 S. Ct. at 2317.

<sup>75</sup> *Id.* at 2318 (emphasis added) (citations omitted).

the Government intends to impose over a \$1 million fine for allegedly impermissible speech.”<sup>76</sup> Unlike other portions of the opinion, where the Court suggested the degree of notice would be insufficient for any purpose, the Court’s rationale here arguably suggests that an agency must show a closer fit between prior precedent and the new decision when regulating speech, particularly where seeking to impose a significant fine.<sup>77</sup>

C. *A Bumpy Road Ahead for the FCC’s Indecency Policy?*

In resolving the networks’ due process claims, the Supreme Court took a narrower approach than the Second Circuit. Where the court of appeals had struck down the FCC’s indecency policy in its entirety based on concerns about notice, discriminatory enforcement, and chilling effects on speech that went beyond the facts before it, the Supreme Court focused narrowly on notice considerations as applied to the three incidents in question. In doing so, the Court hewed to its recent admonition in *Holder v. Humanitarian Law Project* that in adjudicating vagueness claims, courts must “consider whether a statute is vague as applied to the particular facts at issue, for ‘[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.’”<sup>78</sup> As *Holder* and *Fox II* demonstrate, that rule “makes no exception for conduct in the form of speech.”<sup>79</sup>

*Fox II* may reflect the Roberts Court’s general disfavor of facial vagueness claims. In language that spoke directly to the Second Circuit’s rationale in *Fox*, *Holder* admonished that “a Fifth Amendment vagueness challenge does not turn on whether a law applies

<sup>76</sup> *Id.* at 2319.

<sup>77</sup> *Fox I* explicitly rejected the suggestion that “a more stringent arbitrary-and-capricious review [applies] to agency actions that implicate constitutional liberties”—that is, First Amendment concerns. 556 U.S. at 516. Looking to the text and structure of the statute, the Court concluded that the APA’s authorization for courts to set aside “unlawful” agency action “is the only context in which constitutionality bears upon judicial review of authorized agency action.” *Id.*

<sup>78</sup> 130 S. Ct. 2705, 2718–19 (2010) (quoting *Hoffman Estates*, 455 U.S. at 495). The Second Circuit dismissed *Holder* as “inapposite” on the basis that it arose in a “different procedural posture.” 613 F.3d at 333 n.9.

<sup>79</sup> 130 S. Ct. at 2719.

to a substantial amount of protected expression.”<sup>80</sup> Otherwise, the Court explained, the doctrines of vagueness and overbreadth would be “substantially redundant.”<sup>81</sup> Because *Fox II* resolved the case on as-applied grounds, however, the Court did not need to consider how *Holder* relates to the continuing doctrinal uncertainty about the standard for facial challenges. Some justices have suggested that an overbreadth standard—whether a law’s impermissible applications are substantial in relation to its “plainly legitimate sweep”<sup>82</sup>—should govern. But applying that test to vagueness claims creates a tension with *Holder*’s admonition that vagueness and overbreadth should remain distinct.

Although the Supreme Court focused on the backward-looking “notice” aspect of the due process analysis (whether prior FCC decisions had provided adequate warning), the Court acknowledged that broader due process concerns might apply in future cases. Whether the FCC’s indecency policy provides sufficient “precision and guidance” so that “those enforcing the law do not act in an arbitrary or discriminatory way” is one question the Court found unnecessary to address, both as to the *Golden Globes* Order and “subsequent adjudications.”<sup>83</sup> Despite expressly reserving the question, however, portions of the Court’s analysis might give support to future challenges. As the Court itself recognized, the notice and clarity aspects of due process analysis are analytically “connected.”<sup>84</sup>

Thus, in assessing whether FCC orders had provided ABC adequate notice that nudity was actionable, the Court criticized the commission’s attempt to articulate a limiting principle based on the “lengt[h]” and “repe[tition]” of nudity, finding its “broad language” insufficient for due process purposes.<sup>85</sup> The Court’s passing remark that its decision leaves the Commission “free to modify its current

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (opinion of Stevens, J., joined by Souter and Ginsburg, JJ.); see also Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes in Toto*, 98 Va. L. Rev. 301, 307–14 (2012) (surveying doctrinal confusion).

<sup>83</sup> *Fox II*, 132 S. Ct. at 2320.

<sup>84</sup> *Id.* at 2317.

<sup>85</sup> *Id.* at 2319.

indecentcy policy” may also hint about the Court’s view of such changes.<sup>86</sup>

### III. *Pacifica*, with Its Increasingly Archaic Vision of Broadcast Media, Remains Good Law—for Now

*Fox II* delivered a victory for broadcasters but brought disappointment to the many who hoped that the Court would seize the chance to overturn its 1978 decision in *Pacifica*.

Even assuming that the decision was correct when decided, *Pacifica* has not aged well. To state the obvious, the media environment has changed profoundly since 1978: Today, Americans—adults and children alike—are increasingly accessing new video content through cable and satellite operators such as Comcast’s Xfinity, EchoStar’s DISH Network, AT&T’s U-verse, Verizon’s FiOS, and DirecTV; over the Internet on popular websites such as YouTube, iTunes, and Hulu; via podcasts; by online video streaming through services such as Netflix; and through DVD purchases and rentals.<sup>87</sup> None of this would have been imaginable at the time *Pacifica* was decided.

Far from remaining “uniquely pervasive,” the traditional television broadcast at issue in *Pacifica* is on its way to becoming a marginal medium, a thing of the past. Not only are more people accessing video content by means besides broadcast television, but broadcast content is increasingly available through these new forms of media. Individuals routinely access broadcast programming through cable and satellite services, and network programming is increasingly available on the Internet. For example, entire episodes of popular network shows such as *MasterChef* (Fox), *Parks and Recreation* (NBC), *Dancing with the Stars* (ABC), and *Survivor* (CBS) can be viewed on the networks’ websites for free.<sup>88</sup> Broadcasters even sometimes post their content online before its release on traditional broadcast platforms. As early as March 2005, NBC debuted its situation comedy

<sup>86</sup> *Id.* at 2320.

<sup>87</sup> See, e.g., Tom Rosensteel et al., How People Learn About Their Community, Pew Internet and American Life Project (Sept. 26, 2011), available at [http://pewinter.net.org/~media/Files/Reports/2011/Pew%20Knight%20Local%20News%](http://pewinter.net.org/~media/Files/Reports/2011/Pew%20Knight%20Local%20News%20).

<sup>88</sup> See FOX.com Full Episodes, <http://www.fox.com/full-episodes>; NBC Video Library, <http://www.nbc.com/video/library/full-episodes>; ABC.com Player, <http://abc.go.com/watch>; CBS, <http://www.cbs.com/video>.

*The Office* on the Internet a week before the show premiered on network television.<sup>89</sup> More recently, NBC launched a series of “webisodes” of that show—short vignettes featuring the show’s characters—that are only available online.<sup>90</sup>

Network shows and other broadcast programming are also now available on a number of websites, such as iTunes and YouTube. NBC, an intervenor in *Fox*, launched its own popular website and subscription services, Hulu.com (“a hub for network TV shows and movies”<sup>91</sup>) and Hulu Plus (with wider choices for “on-demand television viewing”<sup>92</sup>). Many broadcast programs can be downloaded on demand through video game consoles, viewed as streaming content by using external devices such as a Roku or Apple TV, or accessed directly on Internet-ready televisions. Complete seasons of most broadcast shows are available for rent or purchase on DVD soon after the TV season comes to a close. The explosive growth in the iPad and tablet computer market in particular is rapidly expanding viewers’ options. Users can download broadcast content online from a number of services to watch on their tablets or, indeed, by “syncing” them, to watch on any device that they own.<sup>93</sup>

These new means of accessing video programming (and in particular broadcast content) are not merely toys for early adopters. They are rapidly becoming pervasive, if not predominant. Indeed, they seem destined to become the *preferred* method for viewing video content because they provide what viewers want—and indeed, what

<sup>89</sup> Anne Becker, NBC’s *Office* Gets Web Broadcast, *Broadcasting & Cable* (March 16, 2005), <http://www.broadcastingcable.com/article/CA511340.html>.

<sup>90</sup> NBC.com, *The Office*, [http://www.nbc.com/The\\_Office/webisodes](http://www.nbc.com/The_Office/webisodes).

<sup>91</sup> Jeremy Caplan et al., Best Inventions of 2008, *Time Magazine*, [http://www.time.com/time/specials/packages/article/0,28804,1852747\\_1854195\\_1854116,00.html](http://www.time.com/time/specials/packages/article/0,28804,1852747_1854195_1854116,00.html) (ranking Hulu.com the fourth-best invention of 2008 and opining, “When cable eventually dies, websites like Hulu will be held responsible.”).

<sup>92</sup> Brian Stelter, Hulu Unveils Subscription Service for \$9.99 a Month, *N.Y. Times Media Decoder* (Posted June 29, 2010, 1:24 P.M.), <http://mediadecoder.blogs.nytimes.com/2010/06/29/hulu-unveils-subscription-service-for-9-99-a-month>.

<sup>93</sup> See, e.g., Inside iTunes, Access Previously Purchased TV Shows with All Your Devices, <http://www.apple.com/itunes/inside-itunes/2011/08/access-your-previously-purchased-tv-shows-with-all-your-devices.html> (“The ability to watch previously purchased TV shows on your iPhone, iPad, iPod touch or computer, regardless of which device you used to purchase them, is now included in iTunes in the Cloud beta.”).

they have wanted since at least the year *Pacifica* was decided—the convenience of watching what they want, when they want. In *Sony Corporation of America v. Universal City Studios*, the Court recognized the legitimacy of “time shifting”—“the practice of recording a program to view it once at a later time.”<sup>94</sup> In *Sony*, the Court noted that two 1978 studies indicated that “time shifting” was the principal use of videocassette recorders, which, the Court added, “enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch.”<sup>95</sup> These new mechanisms perfect time shifting, because they permit on-demand viewing without even requiring the viewer to record the program. And the availability of mobile devices such as tablet computers permits viewers to take advantage of short periods of “interstitial” time between appointments that characterize many viewers’ overscheduled lives. Between watching a program at the time a network executive has chosen and when it fits their schedules, viewers are likely to prefer the latter. Nor are the benefits one-sided; these mechanisms offer content producers something that the traditional television format no longer can—the ability to prevent viewers from skipping commercials. Many sites that make content available on demand require that the viewer first sit through advertising, or require payment of a subscription fee.

Americans increasingly have the means to access media in this manner. Today, well over three-quarters of all Americans use the Internet, up from about half in 2000, and under a third in 1997.<sup>96</sup> Although Internet access is primarily associated with younger individuals, a majority of Americans aged 65 or older are now regular

<sup>94</sup> 464 U.S. 417, 423 (1986).

<sup>95</sup> *Id.*

<sup>96</sup> Digital Differences, Pew Internet & American Life Project Surveys (April 13, 2012), [http://www.pewinternet.org/~media/Files/Reports/2012/PIP\\_Digital\\_differences\\_041312.pdf](http://www.pewinternet.org/~media/Files/Reports/2012/PIP_Digital_differences_041312.pdf), at 4 (finding that, at the time of the most recent general survey in August 2011, 78 percent of all Americans used the Internet); Internet Adoption, 1995–2011, Pew Internet & American Life Project Surveys (March 2000–May 2011), <http://www.pewinternet.org/Static-Pages/Trend-Data/Internet-Adoption.aspx>.

Internet users.<sup>97</sup> “As of April 2012, 66 percent of American adults have a high-speed broadband connection at home.”<sup>98</sup> And nearly three-quarters of adults on the web use video-sharing websites.<sup>99</sup>

In the decade when *Pacifica* was decided—when the Internet “as we understand it today was not widely available for consumer and commercial use”<sup>100</sup>—primitive VCRs “cost an average of \$1,955.”<sup>101</sup>

Today, alternatives to broadcast are available to all but the poorest households. For instance, Netflix subscriptions, which provide subscribers “unlimited movies and TV episodes instantly over the Internet” through their computers or televisions, start at \$7.99 per month.<sup>102</sup> There are currently over 27 million Netflix subscribers, most in the United States.<sup>103</sup> A basic Roku device, meanwhile, which allows users to access Internet content on their televisions, costs less than \$60.<sup>104</sup> New DVD players are readily available for under \$35,<sup>105</sup> and DVDs are widely available for rent at automated supermarket kiosks for as little as 99 cents.<sup>106</sup> None of these myriad options existed at the time the Court found broadcast radio and television to be “uniquely pervasive.”<sup>107</sup>

The *Pacifica* Court’s other justification for according the broadcast medium lesser First Amendment protection—that it is “uniquely

<sup>97</sup> Kathryn Zickhur & Mary Madden, Older Adults and Internet Use, Pew Internet & American Life Project (June 6, 2012), <http://pewinternet.org/Reports/2012/Olderadults-and-internet-use.aspx>.

<sup>98</sup> Broadband and Dial-Up Adoption, 2000–2012, Pew Internet & American Life Project Surveys (March 2000–April 2012), [http://pewinternet.org/Trend-Data-\(Adults\)/Home-Broadband-Adoption.aspx](http://pewinternet.org/Trend-Data-(Adults)/Home-Broadband-Adoption.aspx).

<sup>99</sup> Kathleen Moore, 71% of Online Adults Now Use Video Sharing Sites, Pew Internet & American Life Project, at 2 (July 25, 2011), <http://www.pewinternet.org/~media/Files/Reports/2011/Video%20sharing%202011.pdf>.

<sup>100</sup> Jeffrey Stavroff, Damages in Dissonance: The “Shocking” Penalty for Illegal Music File Sharing, 39 Cap. U. L. Rev. 659, 714 (Summer 2011).

<sup>101</sup> Julie Macedo, Comment, Meet the Television of Tomorrow. Don’t Expect to Own It Any Time Soon, 6 UCLA Ent. L. Rev. 283, 308 n.140 (Spring 1999).

<sup>102</sup> Netflix, <http://www.netflix.com/HowItWorks> (click “How Does Netflix Work?”).

<sup>103</sup> Netflix, <http://ir.netflix.com>.

<sup>104</sup> Roku, <http://shop.roku.com>.

<sup>105</sup> See, e.g., Walmart, <http://www.walmart.com/ip/Sony-DVD-Player/20370550>.

<sup>106</sup> Redbox, <http://www.redbox.com/> (click “find a location”).

<sup>107</sup> *Pacifica*, 438 U.S. at 748.

accessible to children,”<sup>108</sup>—also has been undercut by three decades of rapid technological development. Ironically, children are the ones leading the shift away from broadcast television to a variety of new (and largely unregulated) media outlets and technologies, such as websites, blogs, social networking services, and cable and satellite networks, which they access not through televisions but iPads, iPods, various other tablet computers and MP3 players, smartphones, and other devices too hip for the authors to even know they exist.<sup>109</sup>

Internet access among the young exceeds that of older generations: Upward of 87 percent of U.S. children ages 12 to 17 use the Internet and when children watch broadcast content, they do so increasingly through nonbroadcast means.<sup>110</sup>

In addition to producing alternatives to broadcast content, technological innovations have helped parents police the content their children access. Parental-control technology has flourished on the Internet despite—or because of—the absence of government regulation. Internet service providers such as Comcast, Verizon, and Charter provide parental-control features to their subscribers. An array of software filtering and other tools is available, often as free downloads, and websites such as [www.GetNetWise.org](http://www.GetNetWise.org) provide information to help parents compare available tools.<sup>111</sup> Parental controls are bundled into the predominant operating systems provided by Microsoft and Apple. And falling computer memory costs means it is easier than ever to archive preferred content on computer systems—so a personal computer can supplement or even replace a television.

<sup>108</sup> *Id.* at 749.

<sup>109</sup> See Mary Madden, Internet Penetration and Impact, Pew Internet & American Life Project 3–4 (April 2006), available at [http://www.pewinternet.org/~media/Files/Reports/2006/PIP\\_Internet\\_Impact.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2006/PIP_Internet_Impact.pdf.pdf); Amanda Lenhart, Mary Madden, & Paul Hitlin, Teens and Technology: Youth Are Leading the Transition to a Fully Wired and Mobile Nation, Pew Internet & American Life Project I (July 27, 2005), available at [http://www.pewinternet.org/~media/Files/Reports/2005/PIP\\_Teens\\_Tech\\_July2005web.pdf.pdf](http://www.pewinternet.org/~media/Files/Reports/2005/PIP_Teens_Tech_July2005web.pdf.pdf).

<sup>110</sup> Amanda Lenhart et al., *supra* note 109, at 2–3.

<sup>111</sup> Adam Thierer, Parental Controls & Online Child Protection: A Survey of Tools and Methods 113–43 (Summer 2009), available at [http://www.pff.org/parentalcontrols/Parental%20Controls%20&%20Online%20Child%20Protection%20\[VERSION%204.0\].pdf](http://www.pff.org/parentalcontrols/Parental%20Controls%20&%20Online%20Child%20Protection%20[VERSION%204.0].pdf).

Nor are the diminishing number of households that lack Internet access easy prey to the “intruder” feared in *Pacifica*. Today, even the most basic television sets have built-in content controls that allow parents to regulate their children’s exposure to programming they deem inappropriate. The V-chip has been installed in all television sets with screens 13 inches or larger made since 2000 and allows parents to block broadcast content based on ratings that use age-based designations as well as specific content descriptors (for coarse language, sex, and violence) to permit parents to tailor the programming to which their children will have access. These ratings are displayed prominently at the beginning of programs, in onscreen menus and interactive guides, and in local newspaper listings.<sup>112</sup>

The tools built into televisions can be supplemented with even more sophisticated parental-control devices in the many households with DVD players, digital video recorders (DVRs), or video on-demand (VOD) services, all of which allow parents to accumulate libraries of preferred (or pre-screened) programming for their children and to determine exactly when that programming will be viewed. Using these tools, households can tailor programming to their specific needs and values. Indeed, these new technologies have proved so effective in providing parents control that even one of the *amici* that supported the FCC in *Fox* proudly—and, in light of its position in *Fox*, ironically—told its members to “[g]o ahead, give your kids the remote,” because with these technologies, “you’ll never have to worry again about what your children are watching on TV.”<sup>113</sup>

Ownership of these types of content-control devices is rapidly increasing as their costs plummet. In just seven years, the percentage of households with a DVD player climbed from 13 percent in 2000 to 83 percent in 2007.<sup>114</sup> DVRs and VOD are experiencing similarly rapid growth as the price of units has fallen from more than \$1,000

<sup>112</sup> Adam Thierer, *Why Regulate Broadcasting? Toward a Consistent First Amendment Standard for the Information Age*, 15 *CommLaw Conspectus* 431, 472 (2007).

<sup>113</sup> Parents Television Council Online Store, <http://www.parentstv.org/store/default.asp>.

<sup>114</sup> Comments of the Progress & Freedom Foundation and the Electronic Frontier Foundation before the Federal Communications Commission, No. 09-194, at 35 (Feb. 24, 2010), available at <http://ecfsdocs.fcc.gov/filings/2010/02/24/6015538029.html>.

only a few years ago to less than \$100 today.<sup>115</sup> Today, it is estimated that 2 out of 5 U.S. households have a DVR, up from 1 in 5 households in 2007 and 1 in 13 in 2005.<sup>116</sup> And for the 86 percent of U.S. households subscribing to cable or satellite television services,<sup>117</sup> the cost is even lower, as most video service providers now offer DVR functionality bundled into their cable and satellite set-top boxes. Meanwhile, “nearly 90% of U.S. digital cable subscribers had access to VOD, and 46% of all basic cable customers were offered the service” as of March 2007.<sup>118</sup> Some forecasts estimate that each home will be watching nearly two hours of on-demand content nightly by the end of 2012.<sup>119</sup> These technologies—unimaginable in 1978—are already well within reach of most Americans.

All of these developments lead to the \$64,000 question: Just when will the Court revisit *Pacifica*? Two justices appear ready to do so, and poised to overturn it when they do. Justice Clarence Thomas said as much in *Fox I*, in which he lamented “the deep intrusion into the First Amendment rights of broadcasters.”<sup>120</sup> To him, *Pacifica* was “unconvincing when [it was] issued, and the passage of time has only increased doubt regarding [its] continued validity,” in part because “traditional broadcast television and radio are no longer the ‘uniquely pervasive’ media forms they once were.”<sup>121</sup> Justice Ginsburg now agrees: “In my view, the Court’s decision in [*Pacifica*]

<sup>115</sup> Compare *id.* at 40, with Tivo, <http://www.tivo.com/products/home/index.html>.

<sup>116</sup> Compare DVRs Now in 40% of U.S. TV Households, Leichtman Research Group, (Sept. 27, 2010), <http://www.leichtmanresearch.com/press/092710release.html> and Bill Carter & Brian Stelter, DVRs and Streaming Prompt a Shift in the Top-Rated TV Shows, N.Y. Times, Mar. 4, 2012, at B1 (“DVRs are now in 43 percent of the American households that have televisions.”) with DVRs Now in Over One of Every Five U.S. Households, Leichtman Research Group (Aug. 21, 2007), <http://www.leichtmanresearch.com/press/082107release.html>.

<sup>117</sup> See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 24 FCC Rcd. 542, at ¶8 (2009).

<sup>118</sup> VOD Availability Grows with Digital Platform, VOD & ITV Investor, SNL Kagan, No. 106 (May 30, 2007), at 6, <http://www.snl.com/products/samples/media comm/kvi/sample1.pdf>.

<sup>119</sup> Scott Sleek, Video on Demand Usage: Projections and Implications, Pike & Fischer (Oct. 2007), <http://www.roadbandadvisoryservices.com/researchReports/BriefsInd.asp?repId=541>.

<sup>120</sup> *Fox I*, 556 U.S. at 531.

<sup>121</sup> *Id.* at 530, 533.

was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration."<sup>122</sup>

But *Fox II* provided a prime opportunity to reexamine the holding in *Pacifica*. The Second Circuit decision under review emphasized that "we face a media landscape that would have been almost unrecognizable in 1978," and essentially urged reconsideration of *Pacifica*.<sup>123</sup> That the Court did not take that opportunity—even though oral argument focused on the First Amendment issues—suggests that some of the justices might be reluctant to do so and raises the question why.

One possibility is that the normally very pro-free speech Justice Anthony Kennedy in this instance has sympathy for the idea of preserving broadcast television during the specified hours as a sort of "island of decency" or, as he put it at argument, "an important symbol for our society that we aspire to a culture that's not vulgar . . . in a very small segment."<sup>124</sup> Another possibility is that the Court dodged the *Pacifica* issue because it split the participating justices evenly, four to four (with Justice Sotomayor recused).<sup>125</sup> Eugene Volokh has similarly suggested, for instance, that together with Justices Ginsburg and Thomas, Justices Kennedy and Elena Kagan

<sup>122</sup> *Fox II*, 132 S. Ct. at 2321 (Ginsburg, J., concurring in the judgment).

<sup>123</sup> *Fox*, 613 F.3d at 326.

<sup>124</sup> *Fox II* Tr. at 18. Chief Justice Roberts and Justice Scalia also expressed support for this idea. See *id.* at 28 (Roberts, C.J.) ("All we're asking for, what the Government is asking for, is a few channels where you can say I'm not going to—they're not going to hear the "S" word, the "F" word. They're not going to see nudity. So, the proliferation of other media, it seems to me, cuts against you."); *id.* at 22 (Scalia, J.) ("[S]ign me up as supporting Justice Kennedy's notion that this has a symbolic value . . . . [I]f these are public airwaves, the government is entitled to insist upon a certain modicum of decency.").

<sup>125</sup> See Lyle Denniston, Opinion recap: TV indecency policy awaits next round, SCOTUSblog (Posted June 21, 2012, 2:29 PM), <http://www.scotusblog.com/?p=147158> ("Conceivably, with an eight-member Court, the Justices could not come up with a five-member majority either way on the constitutionality of the FCC policy, so the due process, lack-of-notice approach was adopted as a fallback to avoid a four-to-four split that would have simply upheld the Second Circuit ruling nullifying the policy."). Of course, there is no guarantee the Court would have split evenly, particularly given uncertainty expressed in questioning at oral argument about what alternative test the respondents were suggesting, and the number (at least four) of alternate tests proposed in response. See *Fox II* Tr. at 48–52.

might vote to overrule *Pacifica*, with Chief Justice John Roberts and Justices Antonin Scalia, Samuel Alito, and Stephen Breyer favoring “preserving some aspects of the *Pacifica* regime.”<sup>126</sup> The prospect of affirming the Second Circuit’s decision by an equally divided Court may have been particularly unattractive given that the Second Circuit had invalidated the FCC’s policy. This logic would seem to suggest that, absent a changing of the guard, Justice Sotomayor’s vote could be pivotal in any future case that considers whether to overturn, limit, or reaffirm *Pacifica*.

\* \* \*

Until one of the current justices’ papers are released to an archivist, Court watchers will not know for sure what transpired between argument and decision that led the Court to resolve the case on a narrow ground. While the disposition may simply reflect the Roberts Court’s (intermittent) judicial minimalism, there are signs to the contrary—including the Court’s focus on First Amendment issues at argument and the long period that elapsed before the virtually unanimous opinion was issued. Given the on-the-record statements from now two sitting justices and the Court’s apparent interest in the subject, a future petition for certiorari may soon have the FCC’s broadcast-indecency regime back before the Court.

<sup>126</sup> Eugene Volokh, *FCC v. Fox Television Decided Narrowly on Lack-of-Fair Notice Grounds* (Jun. 21, 2012), <http://www.volokh.com/2012/06/21/fcc-v-fox-television-decided-narrowly-on-lack-of-fair-notice-grounds/>.





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