THE SUPREME COURT MAKES IT HARDER TO CONTEST ADMINISTRATIVE AGENCY POLICY SHIFTS IN *FCC v. FOX TELEVISION STATIONS, INC.*

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> Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty.[1]

Nearly sixty years ago, Justice William O. Douglas dissented from a decision in which the Supreme Court upheld an action, taken by the Interstate Commerce Commission, raising intrastate railroad fare prices to comparable interstate levels.[2] The Court did not issue an opinion with its decision; Justice Douglas did. Justice Douglas was troubled by what he saw as the Commission's failure to "justify its action."[3] The details are

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1. New York v. United States, 342 U.S. 882, 884 (1951) (Douglas, J., dissenting).
2. *Id.* at 882.
3. *Id.* at 883.

unimportant; as Justice Douglas himself remarked, "This case is perhaps insignificant in the annals."[4] Though the facts were arguably trivial, the potential ramifications of the decision worried Justice Douglas. Justice Douglas's warning seems, in hindsight, strangely alarmist. Still, while his words may have been menacing, the relevancy of his message remains true today. The administrative state wields an extraordinary amount of power and influence.[5] When courts fail to insist that administrative agencies supply thoroughly reasoned and rational explanations for their decisions, the social and economic liberties of all citizens may become implicated.[6] In a recent case, the Supreme Court arguably validated Justice Douglas's fears by washing away a judicial gloss on the Administrative Procedure Act's (APA's) arbitrary and capricious standard of judicial review, making it much easier for agencies to reverse themselves in the future.[7]

INTRODUCTION

In *FCC v. Fox Television Stations, Inc.* (*Fox II*),[8] the Federal Communications Commission (FCC or Commission) asked the Court to reconsider a ruling of the U.S. Court of Appeals for the Second Circuit holding the FCC's recent decision (that so-called fleeting expletives[9] may be found indecent) an arbitrary and capricious exercise of agency discretion under the APA.[10] Since the Court upheld the constitutionality of the FCC's enforcement powers in the late 1970s,[11] the FCC had followed a policy of forgoing indecency findings when only a single, isolated expletive was at issue.[12]

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4. *Id.* at 884.

5. *See, e.g.*, WILLIAM O. DOUGLAS, POINTS OF REBELLION 79 (1969) ("The examples are legion and they cover a wide range of subjects from food stamps, to highway locations, to spraying of forests or grasslands to eliminate certain species of trees or shrubs, to the location of missile bases, to the disposal of sewage or industrial wastes, to the granting of off-shore oil leases.").

6. *See* ANDREW F. POPPER & GWENDOLYN M. MCKEE, ADMINISTRATIVE LAW 2 (1st ed. 2009) ("Unelected administrative officials can announce standards that interpret statutes and shift significantly interests and entitlements . . . .").

7. The Administrative Procedure Act (APA) instructs courts to "set aside agency action" which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006).

8. 129 S. Ct. 1800 (2009).

9. That is, an "isolated use of an offensive expletive." Dave E. Hutchinson, *"Fleeting Expletives" Are the Tip of the Iceberg: Fallout from Exposing the Arbitrary and Capricious Nature of Indecency Regulation*, 61 FED. COMM. L.J. 229, 231 (2008).

10. 5 U.S.C. §§ 551–559.

11. *See* FCC v. Pacifica Found., 438 U.S. 726, 729 (1978) (declaring that the Federal Communications Commission (FCC) holds the "power to regulate a radio broadcast that is indecent but not obscene").

12. *See, e.g.*, *In re* Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, 8008 (2001)

This regime changed in 2004 when the FCC decided repetition would no longer be a requisite factor leading to an indecency finding.[13] Fox Television challenged the FCC's new enforcement regime.[14] The network raised numerous issues with the policy,[15] but the Second Circuit reached only one of them: finding the FCC's change in policy arbitrary and capricious under the APA, the court instructed the FCC to proffer a "reasoned analysis" that could survive APA review.[16]

The Supreme Court reversed the Second Circuit in a 5–4 ruling.[17] Whereas the Second Circuit felt the FCC failed to supply a "reasoned basis"[18] for its shift, the Supreme Court disagreed: "The Commission could rationally decide it needed to step away from its old regime where nonrepetitive use of an expletive was *per se* nonactionable because that was 'at odds with the Commission's overall enforcement policy.'"[19] Like *New York v. United States*,[20] the facts and underlying dispute in *Fox II* may well fade into obscurity; nonetheless, the central holding of this case—setting a very low threshold for agencies to clear before reversing or rescinding existing policies—will remain on the books, perhaps waiting to be picked up and trumpeted by an overzealous administrative body.[21]

Arguably, the Court granted certiorari to clear up some uncertainty among the lower courts with respect to the appropriate standard of review to be utilized when an agency reverses itself.[22] Section 706(2)(A) of the APA states that a court may set aside agency action that is arbitrary and capricious.[23] Just what level of scrutiny the test entails has confused some courts—the Supreme Court itself was accused of sending "conflicting signals" for a number of years.[24] In a prior opinion, the Court defined the

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("[W]here sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency.").

13. *Fox II*, 129 S. Ct. at 1807.

14. Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444 (2d Cir. 2007), *rev'd*, *Fox II*, 129 S. Ct. 1800 (2009).

15. *See* 489 F.3d at 454 (listing seven arguments against the validity of the policy).

16. The court made its offer with the caveat that no matter how reasoned the new rationale might be, it was nevertheless unlikely to survive *constitutional* review. *Id*. at 462, 467.

17. *Fox II*, 129 S. Ct. at 1805.

18. *Fox I*, 489 F.3d at 447.

19. *Fox II*, 129 S. Ct. at 1813 (quoting *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 2664 (2006)).

20. 342 U.S. 882 (1951).

21. *See Fox II*, 129 S. Ct. at 1832 (Breyer, J., dissenting) (warning that the Court's ruling would "change judicial review . . . and not in a healthy direction").

22. *See* Hutchinson, *supra* note 9, at 240 (discussing the "apparent confusion regarding the scope and standard of arbitrary and capricious review").

23. 5 U.S.C. § 706(2)(A) (2006).

24. Lisa Schultz Bressman, *Judicial Review of Agency Discretion*, *in* A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 177, 178 (John F. Duffy & Michael Herz

inquiry as "searching and careful,"[25] yet also cautioned that the test is a "narrow one."[26] Some courts, in turn, have taken advantage of the inconsistency by favoring one approach over the other (i.e., by adhering to the narrow approach or, on the other hand, by engaging in a broader review).[27] In any event, if there was any doubt as to what an agency had to show before it could change extant regulations, the Supreme Court has now provided an answer: Not very much at all.

I. FACTUAL BACKGROUND

While accepting a 2003 Golden Globe Award, Bono, the lead singer of the rock band U2, declared "[t]his is really, really, f***ing brilliant" in front of over twenty million television viewers.[28] This incident ultimately resulted in the FCC concluding—for the first time ever—that a so-called "nonliteral . . . use of the F- and S-Words could be actionably indecent, even when the word is used only once."[29]

The FCC determined that henceforth, any use of the F-word—because the word "inherently has a sexual connotation"—would fall within its regulatory reach.[30] Thus, even when the F-word is used as nothing more than an "intensifier" (as Bono supposedly employed it), the material would nonetheless qualify as indecent.[31] Further, that the word was used only once (i.e., in a fleeting way) would no longer be dispositive.[32] As the FCC noted, "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."[33] Because this new approach was a departure from its previous policy, the FCC declined to impose any forfeiture penalties as it recognized "existing precedent would have permitted this broadcast."[34] Nevertheless, the networks were now on

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eds., 2005).

25. Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

26. *Id.*

27. *See generally* Bressman, *supra* note 24, at 178 (describing the "tension" arising from the Court's seemingly bipolar treatment of the matter).

28. *Fox II*, 129 S. Ct. 1800, 1807 (2009) (internal quotation marks omitted).

29. *Id*.

30. *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4978 (2004).

31. *Id.*

32. *See id.* at 4980 (announcing that those "cases holding that [the] isolated or fleeting use of the 'F-Word' or a variant thereof . . . is not indecent" were no longer "good law").

33. *Id.*

34. *Fox I*, 489 F.3d 444, 452 (2d Cir. 2007) (citing *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4981 (2004)).

notice.

On March 15, 2006, the FCC released an order responding to the "concerns" of broadcasters and viewers.[35] Seeking to "provide substantial guidance to broadcasters and the public," the FCC's report examined a number of "factual patterns" (i.e., examples of broadcasts possibly constituting indecency).[36] One of the incidents examined in the order involved another entertainer receiving an award who also expressed her emotions through colorful language. On December 9, 2002, over nine million people watched on television as Cher received an "Artist Achievement Award."[37] During her acceptance speech, Cher took a shot at her detractors, saying, "[s]o f[***] 'em. I still have a job and they don't."[38] The FCC again declared that "any use of [the F-word] inherently has a sexual connotation."[39] The order referred to the Bono incident when it noted that lack of repetition no longer shielded "otherwise patently offensive" material from an indecency finding.[40] No sanctions were imposed as a result of this incident, however, because the event took place prior to the Bono incident.[41]

One year after the Cher incident, the 2003 Billboard Music Awards broadcast to ten million viewers. This time, it would not be the entertainers receiving the awards who would incur the wrath of the FCC but the entertainers presenting them. Paris Hilton and Nicole Richie, who "play themselves as two spoiled, rich young women"[42] on "reality" television, were selected to present an award during the ceremony.[43] The women were supposed to follow a scripted monologue; however, Richie took some artistic liberties with her lines. Where Richie was supposed to rhetorically ask the audience, "Have you ever tried to get cow manure out of a Prada purse? It's not so freaking simple," she instead queried, "Have you ever tried to get cow s[***] out of a Prada purse? It's not so f[***]ing simple."[44]

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35. *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 2664, 2665 (2006).

36. *Id*.

37. Brief for Federal Communications Commission & United States at 11, *Fox I*, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760-ag).

38. *Id.*

39. *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. at 2691.

40. *Id.* (quoting *In re* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4980 (2004)).

41. *Id.* at 2692.

42. *Fox I,* 489 F.3d 444, 468 (2d Cir. 2007) (Leval, J., dissenting).

43. Brief for Federal Communications Commission & United States at 12, *Fox I*, 489 F.3d 444 (2d Cir. 2007) (No. 06-1760-ag) (citing *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. at 13,303).

44. *Id.* at 12–13 (citing *In re* Complaints Regarding Various Television Broads. Between

This incident was also analyzed in the 2006 report.[45] Once again, the FCC reiterated its earlier statement as to the F-word's supposedly inherent sexual connotation. Similarly, the order viewed Richie's use of the S-word as "invariably invok[ing] a coarse excretory image."[46] And, as before, the lack of repetition did not weigh against a finding of indecency.[47] Finally, the order noted the "shocking and gratuitous" nature of Richie's dialogue.[48] The FCC again declined to impose sanctions.[49]

The Second Circuit determined that the validity of the FCC's new indecency regime was arbitrary and capricious because the FCC's new direction "represent[ed] a dramatic change in agency policy without adequate explanation."[50] The Second Circuit singled out three reasons why the FCC's stated rationale for its new approach did not pass muster under arbitrary and capricious review. First, the court rejected the FCC's argument that were the FCC to maintain the previous policy, viewers would be forced to take a "harmful first blow."[51] Second, the court also dismissed the FCC's first-blow argument because the theory had no "rational connection" to the revised enforcement approach.[52] Finally, the court described the FCC's prediction that, without the new approach, broadcasters would inevitably begin to barrage the airwaves with fleeting expletives "so long as they did so one at a time" as "divorced from reality."[53] Thus, the court concluded that the FCC's proffered reasons failed to comprise the necessary "reasoned analysis justifying its departure."[54] The Supreme Court, however, reversed the Second Circuit's decision.

II. THE SUPREME COURT'S ANALYSIS

In reversing the Second Circuit, the Court held that the FCC's decision to go against its previous fleeting expletives regime and sanction as indecent "offensive words" that "are not repeated" was not an arbitrary and

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Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. at 13,303, 13,311).

45. *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. at 2692.

46. *Id.* at 2693.

47. *Id*.

48. *Id.* at 2694.

49. *See id.* at 2695 (declining penalties because the precedent at the time of the broadcast was to the contrary).

50. *Fox I*, 489 F.3d 444, 454 (2d Cir. 2007) (majority opinion).

51. *Id.* at 458.

52. *Id.*

53. *Id.* at 460 (quoting *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. at 13,309).

54. *Id.* at 462.

capricious change in policy.[55] The Court concluded that the FCC acted in accordance with the APA because, first, it acknowledged the change,[56] and second, the FCC's supplied rationale for changing its policy was "entirely rational."[57] Declining to extend its review beyond what was appealed, the Court passed on the serious constitutional questions surrounding the FCC's new direction.[58]

As this case turned on an administrative law question, the Court looked to the language of the APA. Additionally, because the administrative law issue revolved specifically around the reversal of an agency's policy, the Court turned to the leading case on that topic, *Motor Vehicle Manufacturers Ass'n of the U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*[59] Noting that neither the APA nor *State Farm* calls for heightened scrutiny above what the normal arbitrary and capricious standard entails, the majority dismissed any notion that courts should engage in a "more searching review" of agency changes.[60] Whether a court is examining original agency action or agency change, all that is required is a "satisfactory explanation for [that] action."[61] Justice Scalia, writing for the majority, explained what would constitute such an explanation:

> [T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. . . . And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates.[62]

In other words, the Court's test for scrutinizing agency changes under arbitrary and capricious review reads something like the following:

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55. *Fox II*, 129 S. Ct. 1800, 1805, 1812 (2009).

56. *Id.* at 1812.

57. *Id.*

58. *See id.* at 1819 ("This court . . . is one of final review, 'not of first view.'" (quoting Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

59. 463 U.S. 29 (1983).

60. *Fox II*, 129 S. Ct. at 1810. *But see* Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467, 502 n.20 (2002) (distinguishing *State Farm* in that it "may be read as prescribing more searching judicial review").

61. *Fox II*, 129 S. Ct. at 1810 (quoting *State Farm*, 463 U.S. at 43).

62. *Id.* at 1811.

(1) The agency must explicitly acknowledge its change in policy; and

(2) The agency must give good reasons to support the change, which turns on whether—

(A) The change is in accordance with the agency's organic statute; and

(B) The agency believes it to be better than the prior approach.

As the majority notes, Step (2)(B) is basically self-fulfilling, so its consideration seems irrelevant to the final analysis. Essentially, an agency attempting to show that its policy change satisfies arbitrary and capricious review has a fairly easy task. Step 1 is easily accomplished—either the agency acknowledges its change or it does not. Step 2(A) is also fairly straightforward—the agency cannot violate existing law. Step 2(B), again, is apparently automatically satisfied by the change. Thus, the only portion of the Court's standard that seems open to discussion is the requirement that the agency supply "good reasons." If any of the steps might occasion litigation, this is probably it; indeed, what is good enough for a good reason?

A good reason, first of all, does not equate to "good enough" in the eyes of the reviewing judge.[63] And a good reason may require no more than the justification necessary for an original agency action.[64] Applying its newly delineated test to the FCC's revised approach, the Court accepted the FCC's view that any version (i.e., literal or nonliteral) of the F-word inherently possesses a "sexual meaning" as a good reason for its change in policy.[65] Additionally, the Court noted it was "surely rational" for the FCC to predict that continuing its prior policy—which, according to the Court, essentially amounted to a safe harbor for fleeting expletives—would lead to an increased presence of such language over the airwaves.[66] The majority observed that the FCC's overall approach to indecency regulation turned primarily on context; thus, an automatic exemption for a single expletive was "at odds with the Commission's overall enforcement policy."[67] Finally, the Court saw "technological advances" as weighing in favor of tougher enforcement; with the relative ease broadcasters today have in blocking

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63. *See id.* ("[The agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one . . . .").

64. On the other hand, the majority does note that when an agency turns its back on previous "factual findings," or if its new approach jeopardizes "serious reliance interests," these factors must be considered by the agency; however, the Court reiterates that this does not mean any "further justification" is needed, just "reasoned explanation." *Id.*

65. *Id.* at 1812.

66. *Id.* at 1812–13.

67. *Id.* at 1813 (quoting *In re* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C.R. 2664, 13,308, ¶ 23 (2006)) (internal quotation marks omitted).

offensive language, any expletive—fleeting or not—should be a rare occurrence on the airwaves.[68]

Notably, even if the change is of questionable constitutional validity, this will not upset the Court's arbitrary and capricious analysis.[69] *FCC v. Pacifica Foundation*[70] delineated the constitutional scope of the FCC's enforcement regime; while that scope expanded slightly over time to include words other than only those uttered in the George Carlin monologue at issue in the case, judicial decisions from *Pacifica* forward exhibited an expectation that the FCC would tread cautiously and that the occasional, isolated use of a single expletive would not incur liability.[71] The FCC's new indecency enforcement approach deviates from these expectations, so the approach arguably deviates from the constitutionally acceptable to perhaps the unconstitutional.[72] This fact, however, did not influence the Court's arbitrary and capricious review. The Court, while acknowledging that the constitutionality of the new policy may be open to challenge, did not see that fact as having any bearing on the arbitrary and capricious analysis.[73]

After establishing the governing principles and applying them to the FCC's action, Justice Scalia devoted the rest of the opinion to scrutinizing

68. *Id.*

69. Traditionally, agency statutory interpretations and policy rationales are entitled to judicial deference. *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). Fox argued that this situation should not be entitled to the usual level of deference (*Chevron* deference) because it was a special case with constitutional issues inextricably intertwined with the administrative law question. *See* Brief for Respondent Fox Television Stations, Inc. at 19, *Fox II*, 129 S. Ct. 1800 (2009) (No. 07-582) ("Simply put, the First Amendment trumps *Chevron*."). Yet contrary to what Fox suggested, the plurality cabined its opinion very tightly. *Fox II*, 129 S. Ct. at 1817–18 (plurality opinion). Apparently the First Amendment does not "trump *Chevron*."

70. 438 U.S. 726 (1978).

71. *See, e.g.*, *id*. at 761 n.4 (Powell, J., concurring) ("[S]ince the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights." (citation omitted)); *see also, e.g.*, Action for Children's Television v. FCC, 852 F.2d 1332, 1340 n.14 (D.C. Cir. 1988) ("[T]he FCC has assured this court, at oral argument, that it will continue to give weight to reasonable licensee judgments when deciding whether to impose sanctions in a particular case. Thus, the potential chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's *restrained enforcement policy*." (citation omitted) (emphasis added)).

72. *Cf. Fox II*, 129 S. Ct. at 1827 (Stevens, J., dissenting) ("The narrow treatment of the term 'indecent' in *Pacifica* defined the outer boundaries of the enforcement policies adopted by the FCC in the ensuing years.").

73. *See id.* at 1812 (majority opinion) (noting that the APA provides a separate section for unlawful agency action, including unconstitutional action). *But cf.* Raoul Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55, 83 (1965) ("The fact that arbitrariness tinged with racial or religious factors offends still other constitutional guarantees may make courts more alert to the slightest trace of arbitrariness in that area.").

both the Second Circuit's reasoning and the dissent's arguments.[74] The Court's repudiation of the Second Circuit's reasoning is helpful primarily in that it provides further explanation for what would pass for "good reasons." Recall that the Second Circuit found the first-blow theory lacking because the FCC "fail[ed] to explain why it had not previously banned fleeting expletives as 'harmful first blow[s].'"[75] The FCC did not proffer any evidence showing that a fleeting expletive is harmful enough to "warrant government regulation."[76] The majority countered that not every subject of an administrative agency's regulation will be as easily quantifiable and reducible to a proper analysis as, say, the effect of airbags on the rate of traffic accident fatalities.[77] Additionally, the majority argued that the Second Circuit was wrong to demand evidentiary support on a topic "for which scant empirical evidence can be marshaled." Indeed, for the majority, it seemed satisfactory to allow the FCC to rely on the common perception "that children mimic the behavior they observe."[78]

Again, the Second Circuit's biggest problem with the first-blow theory was not so much that the FCC failed to adopt it in the past but that it seemed to be in conflict with the FCC's insistence that context was all-important.[79] If the FCC's first-blow theory is taken to its logical extreme, then a per se ban on fleeting expletives would seem to be called for.[80] Yet throughout the proceedings the FCC stressed the importance of context in the indecency analysis. The agency did not, for instance, find the word "bulls[**]tter"—uttered during a live news broadcast—to be indecent under its revised approach.[81] The Second Circuit found this fatally contradictory.[82] The Supreme Court, on the other hand, saw the Second

74. *Fox II*, 129 S. Ct. at 1813–15 (majority opinion); *id.* at 1815–19 (plurality opinion).

75. *Id.* at 1813 (majority opinion) (quoting *Fox I*, 489 F.3d 444, 458 (2d Cir. 2007)) (alteration in original).

76. *See Fox I*, 489 F.3d at 461 (emphasizing that when an agency changes a previously settled view, the agency must provide a reasoned basis for that change).

77. *See 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.").

78. *See id.* (reiterating that Congress has decided to let the FCC enforce the ban on indecent material that is harmful to children).

79. *Fox I*, 489 F.3d at 458.

80. *Cf.* Brief for Respondent Fox Television Stations, Inc. at 13, *Fox II*, 129 S. Ct. 1800 (2009) (No. 07-582) ("The first blow theory ma[kes] sense only if the FCC presumed that mere exposure to potentially offensive language harmed the broadcast audience.").

81. *See id.* ("The FCC . . . permitted some isolated and fleeting expletives if, for example, they occurred during a '*bona fide* news interview' . . . .").

82. *See Fox I*, 489 F.3d at 459 n.9 (expressing doubt as to the logical consistency of the FCC's new approach).

Circuit's reasoning as misdirected.[83] The agency has to maintain some amount of discretion with its enforcement responsibilities, according to the majority. Indeed, they had the same level of discretion under the previous policy.[84]

Finally, the Second Circuit balked at the FCC's prediction that, absent the new approach, networks might begin to barrage the airwaves with fleeting expletives.[85] For the Supreme Court majority, however, deduction and past experience apparently play negligible roles in determining an agency's "good reasons." If the agency's estimation is *theoretically* possible, this is, presumably, perfectly acceptable as a good reason in support of a change.[86] In closing, the majority remarked that both the "pervasiveness of foul language" and the growth in alternative forums where indecency restrictions play no part (i.e., cable television and the Internet) provided further good and rational reasons why the agency needed to change.[87]

III. IMPLICATIONS

Fox II is an important case for several reasons. The facts underlying the dispute involve potentially substantial constitutional law implications. This case stands a very good chance of coming back to the Court, possibly as a vehicle for revisiting *Pacifica*.[88] For now, though, the ruling's primary impact would seem to be in the field of administrative law. The opinion could equate, over time, to greater judicial deference toward agencies when they act to upset long-existing policies.[89] Whether one agrees with the majority's ruling or not, the opinion is helpful in at least one respect: There should no longer be much ambiguity surrounding the appropriate standard of review when an agency's decision to change its policies is challenged.[90]

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83. *See Fox II*, 129 S. Ct. at 1814 ("Any complaint about the Commission's failure to ban only some fleeting expletives is better directed at the agency's context-based system generally rather than its inclusion of isolated expletives.").

84. *Id.*

85. *See Fox I*, 489 F.3d at 460 n.11 (observing that the theory "is both unsupported by any evidence and directly contradicted by prior experience").

86. *Fox II*, 129 S. Ct. at 1814 ("Even in the absence of evidence, the agency's predictive judgment (which merits deference) makes entire sense.").

87. *Id.* at 1819.

88. *See id.* ("It is conceivable that the Commission's orders . . . [are] beyond the Commission's reach under the Constitution. Whether . . . it is unconstitutional [] will be determined soon enough, perhaps in this very case.").

89. *See, e.g.*, Brief of Federal Appellees at 44 n.16, Humane Soc'y v. Gutierrez, 558 F.3d 896 (9th Cir. 2009) (No. 08-36038) (noting that "the proposition that a change in agency interpretation must be supported by a reasoned analysis over and above that required for an interpretation in the first instance" has ceased to be "good law." (internal quotation marks omitted)).

90. *See* David L. Hudson, Jr., *Was the FCC's Change in Policy Regarding Broadcast Expletives*

The Court has now made clear that an administrative agency changing its policies should face little resistance from the Judiciary.[91]

Judicial review in this area is now very deferential; agencies must act in accordance with law and acknowledge the change, but once these requirements are satisfied the only thing left for the agency to do is provide good reasons for changing.[92] And these reasons—it would seem from the opinion—can be contradictory to experience and unsupported by empirical evidence yet still be acceptable as adequate justification when an agency turns its back on prior policies.

A. *Judicial Deference to Agency Predictions*

For instance, the Court accepted the agency's prediction that, without the new indecency regime, networks might begin exploiting the exemption for fleeting expletives by "barrag[ing] the airwaves" with isolated incidents involving indecent words.[93] The Court conceded that in nearly thirty years this had not happened.[94] Yet this did not weigh in favor of a finding of arbitrary change. Because the agency's prediction is *theoretically* possible, the rationale is acceptable.[95]

In other words, deference borders on ignorance.[96] Courts are instructed to ignore whether the agency's fear has been realized in the past and defer to agency predictions *if* the prediction *could* occur. It is understandable that the Court thinks it best to defer to an agency's "predictive judgment."[97] After all, some agencies are involved in regulating complex subject matter

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Arbitrary and Capricious?, 36 PREVIEW U.S. SUP. CT. CASES 141 (2008) (suggesting that *Fox II* would be helpful because it would give "more guidance in this post-*Chevron* era as to just how much deference administrative agencies receive when their policies impact constitutional rights").

91. *See* Posting of Jonathan Adler to the Volokh Conspiracy, http://volokh.com/posts/1240966018.shtml (Apr. 28, 2009, 20:46 EST) ("Some courts have read a prior Supreme Court case to require more evidence and explanation when an agency is shifting policy. The Court rejected this view. . . . Justice Scalia's opinion . . . make[s] such shifts by agencies easier and at least at the margins should improve the agency's chances of surviving judicial review.").

92. *See Fox II*, 129 S. Ct. at 1811 (making the additional point that the agency is not required to show the court that the rationale underlying the new policy change is better than that for the previous one).

93. *Id.* at 1814 (internal quotation marks omitted).

94. *See id.* (postulating that this might have been due to the fact that "its prior permissive policy had been confirmed (save in dicta) only at the staff level").

95. *Id.*

96. *Cf.* Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n, 390 U.S. 261, 272 (1968) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." (alteration in original)).

97. *Fox II*, 129 S. Ct. at 1814.

which many judges (and even Justices) may not fully understand. Few would find it appropriate for a court to thoroughly scrutinize an agency's decision on a "scientific determination," for instance.[98] Were a court to do so, the chance that it might impermissibly "substitute its judgment for that of the agency"[99] seems great because of the possibility that the court is, frankly, not qualified to make the necessary determinations. Where, however, the issue is not complex and simply involves the use of deduction,[100] the chance that a court would substitute its judgment seems far less likely. For instance, in *State Farm*, while it was perhaps theoretically possible that the inclusion of automatic safety belts would not lead to a decrease in traffic fatalities, the agency's predictive judgment on this matter (which is at least equally if not more complex than indecency) did not warrant the Court's deference.[101]

B. *Does Arbitrary and Capricious Review Equate to Rational Basis Review?*

The Court's treatment of the agency's predictions and assumptions seems incompatible with *State Farm* for another reason as well. Upholding agency predictions on the grounds that they theoretically could occur (despite the fact that the converse actually occurred) and allowing an agency to rely on assumptions (despite the fact that contrary evidence exists) seems to imply similarities to the rational basis analysis courts utilize to review legislation.[102] But *State Farm* dismissed the idea that rational basis review and arbitrary and capricious analysis were alike.[103] Arguably, when the *State Farm* Court distinguished rational basis review from arbitrary and capricious review, it meant to suggest the former affords more deference than the latter; it would seem odd to imply that arbitrary and capricious review entails *greater* deference than rational basis review.[104] Now, though,

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98. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 103 (1983).

99. *Fox II*, 129 S. Ct. at 1810 (quoting Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

100. For example, in the absence of *X*, *Y* does not occur for thirty years. Thus, *Y* probably will not occur even if agency *A* fails to promulgate *X*.

101. *See, e.g.*, *State Farm*, 463 U.S. at 54 ("[S]tatements that passive belts will not yield substantial increases in seatbelt usage apparently take no account of the critical difference between detachable automatic belts and current manual belts.").

102. *See, e.g.*, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that *it might be thought* that the particular legislative measure was a rational way to correct it." (emphasis added)).

103. *State Farm*, 463 U.S. at 43 n.9.

104. *See* Alan B. Morrison, *Administrative Agencies Are Just Like Legislatures and Courts—Except*

the two seem roughly equivalent; under the deferential approach adopted by the Court, agencies are closer in stature to legislatures than ever before.

CONCLUSION

Practitioners should understand what *Fox II* means for administrative law. Where a person or an entity—either of whom is subject to an administrative agency's regulatory reach—seeks to challenge the reversal or rescission of an agency's policies, the prospects for successful prosecution of such a claim have been lessened.[105] This is not to say that a challenge to a regulatory change will never be successful; however, the requirements agencies must meet are few and easily satisfied.

When They're Not, 59 ADMIN. L. REV. 79, 96 (2007) ("[Agencies] are not forbidden from changing their minds, but if they do so, they must explain why—or at least how they reconcile the disparate treatment of similar matters. *Congress is under fewer restraints in terms of consistency* . . . ." (emphasis added)).

105. Already, some do seem aware of the case's impact. On the website for the law firm Wiley Rein LLP, the firm suggests that a better approach to contesting agency change in the future would be to challenge "flaws in statutory interpretation" rather than attempting to persuade a court to "second-guess agency policy judgments." *See* Bert W. Reign & Thomas W. Queen, Wiley Rein LLP, Administrative Law Bulletin: *FCC v. Fox*—The Supreme Court Gives the Green Light to Regulatory Change (May 7, 2009), http://www.wileyrein.com/publications.cfm?sp=articles&id=5135.