

years — in cases like *FDA v. Brown & Williamson Tobacco Corp.*⁷⁹ — the Court has sometimes hinted that it will not extend *Chevron* deference to interpretations that permit agencies to decide politically controversial questions such as whether to use cost-benefit analysis.⁸⁰ But restricting *Chevron* in this way ignores an important rationale of the original *Chevron* opinion: because the executive branch is more politically accountable and more flexible than the judiciary, agencies — and not courts — are the proper bodies to make the policy decisions that Congress has not addressed. The *Entergy* decision reiterates the Court's commitment to this rationale and suggests the Court's renewed commitment to a stronger *Chevron* doctrine.

2. *Communications Act — Scope of Arbitrary and Capricious Review.* — The Federal Communications Commission's (FCC) jurisdiction over the content of television and radio programs highlights a significant tension between the Supreme Court's expansive interpretation of the FCC's statutorily granted administrative authority and the First Amendment's principled protection of free speech. In the 1978 case *FCC v. Pacifica Foundation*,¹ the Supreme Court upheld the FCC's authority to penalize a radio station for airing a twelve minute-long monologue that expressed and repeated certain indecent or profane words,² but declined to articulate any generally applicable boundary between the FCC's regulatory authority and constitutionally protected speech.³ Last Term, in *FCC v. Fox Television Stations, Inc.*,⁴ the Court again avoided delineating the constitutionally permissible scope of the FCC's authority over broadcast content but upheld its authority to regulate even "fleeting expletives" against a challenge that the policy was arbitrary and capricious. Although "arbitrary and capricious" review does not usually entail review of an agency's determination that its policy is constitutionally permissible, the Court should have concluded that such constitutional review is appropriate in the context of broadcast regulation. Because the FCC is statutorily required to consider the constitutionality of its policies, its determination that it could sanction fleeting expletives without running afoul of the First

⁷⁹ 529 U.S. 120 (2000). In that decision, the Court rejected an agency interpretation of the Food, Drug, and Cosmetic Act that would have permitted the FDA to regulate cigarettes. The Court explained that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

⁸⁰ Professor Cass Sunstein suggests that the Court actually has a whole set of "nondelegation canons" that it uses to avoid applying *Chevron* in cases involving significant policy issues that the Court believes are best resolved by Congress. See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

¹ 438 U.S. 726 (1978).

² *Id.* at 751.

³ *Id.* at 742 ("[O]ur review is limited to the question whether the [FCC] has the authority to proscribe this particular broadcast.").

⁴ 129 S. Ct. 1800 (2009).

Amendment served as a crucial predicate for its decision to change its policy of nonenforcement against broadcasts of fleeting expletives.

The FCC's statutory authority to police "indecent" speech arises from 18 U.S.C. § 1464, which threatens penalties for "[w]hoever utters any obscene, indecent, or profane language by means of radio communication."⁵ The FCC's authority to enforce § 1464 is limited by 47 U.S.C. § 326, which prohibits the FCC from engaging in "censorship."⁶ The Commission initially interpreted its statutory mandate narrowly, penalizing only repeated, deliberate uses of indecent language.⁷ Gradually, the agency broadened its enforcement policy, abandoning its "repetitive use" standard⁸ and establishing "principal factors" to guide its inquiries.⁹ However, at least for single "fleeting" instances, the FCC continued to limit its enforcement actions to literal (rather than nonliteral, or "expletive") uses of such language and insisted that it would examine the context of each use before assessing penalties.¹⁰

On March 18, 2004, the FCC issued the Golden Globe Awards Order, which notified broadcasters that they would be subject to potential enforcement actions for any broadcast of the word "fuck."¹¹ The order, issued in response to the performer Bono's utterance of the word during his award acceptance speech,¹² represented a shift from the agency's earlier indication that "isolated or fleeting broadcasts" of the word would not be penalized.¹³ The agency also held that the word constituted "profane" speech, expanding the definition of profanity beyond "words and phrases that contain an element of blasphemy or divine imprecation."¹⁴

The FCC applied the Golden Globe Awards Order in a subsequent Omnibus Order finding apparent liability against Fox Television for two broadcasts.¹⁵ The first was a 2002 broadcast of the Billboard Mu-

⁵ 18 U.S.C. § 1464 (2006).

⁶ 47 U.S.C. § 326 (2006). The statute provides, "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." *Id.*

⁷ *Fox*, 129 S. Ct. at 1806–07.

⁸ *Id.* at 1807 (internal quotation mark omitted).

⁹ *Id.* (internal quotation marks omitted).

¹⁰ *Id.*

¹¹ Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4982–83 (2004) [hereinafter Golden Globe Awards Order].

¹² After receiving his award, Bono stated, "[T]his is really, really, fucking brilliant." *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 451 (2d Cir. 2007).

¹³ Golden Globe Awards Order, *supra* note 11, at 4980.

¹⁴ *Id.* at 4981.

¹⁵ Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 2664, 2690–95 (2006) [hereinafter Omnibus Order]. The order addressed a multitude of other complaints, but only two were eventually reviewed by the Supreme Court.

sic Awards, during which the performer Cher accepted an award and stated, “People have been telling me I’m on the way out every year, right? So fuck ‘em.”¹⁶ The second was a broadcast of the 2003 awards show, in which Nicole Richie, functioning as an award presenter, rhetorically asked the audience, “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”¹⁷ Finding that both incidents violated the Golden Globe Awards Order, the agency determined that Fox’s broadcast of the words “fuck,” “fucking,” and “shit” transgressed legal prohibitions on indecency and profanity. Acknowledging that legal precedent before the Golden Globe Awards Order would have tolerated the broadcast, however, the agency declined to issue sanctions.¹⁸ Several parties, including Fox, sought review of the Omnibus Order in the Second Circuit, complaining that, because the FCC had not implemented sanctions, it had not provided interested parties with the opportunity to present their views before the Commission.¹⁹ The Second Circuit remanded the Order, and the FCC subsequently issued an order (the Remand Order) amending the relevant sections of the Omnibus Order.²⁰ Applying a more comprehensive legal test, the agency again concluded that both broadcasts “contained indecent and profane material,” but again declined to penalize Fox.²¹ In response, Fox, CBS, and NBC appealed the Remand Order, raising administrative, statutory, and constitutional challenges.

A divided panel of the Second Circuit vacated and remanded the Remand Order.²² Writing for the majority, Judge Pooler²³ held that the Remand Order was arbitrary and capricious because it failed to explain adequately why the FCC had reversed its longstanding policy of tolerating so-called “fleeting expletives.”²⁴ Limiting its assessment “to the reasons articulated by the agency itself,”²⁵ the court rejected the agency’s argument that the Golden Globe Awards Order was supported by the “first blow” theory identified by the Supreme Court in *Pacifica*, which emphasized the fact that “indecent material on the airwaves enters into the privacy of the home uninvited and without warning.”²⁶ The court noted that the FCC had provided no “reason-

¹⁶ *Id.* at 2690.

¹⁷ *Id.* at 2692 n.164.

¹⁸ *Id.* at 2692, 2695.

¹⁹ Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 F.C.C.R. 13,299, 13,301–02 (2006) [hereinafter Remand Order].

²⁰ *Id.* at 13,302.

²¹ *Id.* at 13,321, 13,326.

²² *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 467 (2d Cir. 2007).

²³ Judge Pooler was joined by Judge Hall.

²⁴ *Fox*, 489 F.3d at 455.

²⁵ *Id.* at 457.

²⁶ *Id.* at 457–58 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)). The “first blow” principle responded to the argument that unsuspecting viewers could avoid exposure to indecent

able explanation” for the shift from its earlier position that fleeting expletives did not pose an adequately harmful “first blow” to constitute a violation, a position to which the agency had adhered for nearly thirty years.²⁷ Citing the fact that “broadcasters have never barraged the airwaves with expletives even prior to [the Golden Globe Awards Order],”²⁸ the court rejected the FCC’s contention that reversal of the Remand Order would cause broadcasters to saturate their content with expletives “one at a time.”²⁹ The court then noted that children are now exposed to expletives “far more often from other sources than they [were] in the 1970s when the Commission first began sanctioning indecent speech” and asserted that the FCC’s policy shift required evidentiary support that fleeting expletives posed an actual threat.³⁰ It remanded the case to give the FCC an opportunity to provide a “reasoned analysis” supporting its policy shift, but expressed skepticism at the ability of the FCC to provide such an analysis that would also withstand constitutional scrutiny.³¹

The Supreme Court reversed.³² Writing for the majority, Justice Scalia³³ reaffirmed the Court’s *Pacifica* holding and upheld the agency’s decision to penalize broadcasters for failing to prevent the transmission of fleeting expletives.³⁴ He rejected the Second Circuit’s requirement that the FCC’s policy shift be justified by explanations articulating both the inadequacies of the older policy and the benefits of the new one.³⁵ Instead, he held that courts should review revisions of prior agency actions under the same standard as initial agency actions.³⁶ Although an agency would be required to “display awareness that it *is* changing position,” Justice Scalia maintained that “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.”³⁷ However, the reviewing court *could* set aside a policy shift as arbitrary and capricious if the agency failed to provide “a reasoned explanation . . . for disregarding

language by turning off the relevant medium by analogizing it to “saying that the remedy for an assault is to run away after the first blow.” *Pacifica*, 438 U.S. at 749.

²⁷ *Fox*, 489 F.3d at 458.

²⁸ *Id.* at 460.

²⁹ *Id.* (quoting Remand Order, *supra* note 19, at 13,309) (internal quotation mark omitted).

³⁰ *Id.* at 461.

³¹ *Id.* at 462–66.

³² *Fox*, 129 S. Ct. at 1819.

³³ Justice Scalia was joined by Chief Justice Roberts and Justices Thomas and Alito. Justice Kennedy joined the majority opinion except as to Part III-E.

³⁴ *Fox*, 129 S. Ct. at 1812–13.

³⁵ *Id.* at 1810.

³⁶ *Id.* at 1811.

³⁷ *Id.*

facts and circumstances that underlay or were engendered by the prior policy.”³⁸

Justice Scalia also declined to conduct a First Amendment inquiry during review under the arbitrary and capricious standard.³⁹ He pointed out that the Administrative Procedure Act⁴⁰ (APA) provides separately for constitutional review of agency actions, precluding consideration of such concerns within the scope of arbitrary and capricious review.⁴¹ Applying these principles to the Golden Globe Awards Order, Justice Scalia upheld the FCC’s decision,⁴² citing in particular the agency’s finding that “technological advances have made it easier for broadcasters to bleep out offending words.”⁴³

Turning to the specifics of the Second Circuit opinion, Justice Scalia chided the lower court for demanding that the FCC furnish evidence to support “propositions for which scant empirical evidence can be marshaled” and insisted that “it suffices to know that children mimic the behavior they observe.”⁴⁴ In addition to rejecting various arguments adopted by the Second Circuit and advanced by the dissents,⁴⁵ Justice Scalia dismissed the claim that *Pacifica* articulated the outermost boundaries of the FCC’s authority, a position that underlay the FCC’s earlier policy allowing fleeting expletives.⁴⁶ Finally, the Court declined to address the constitutionality of the FCC’s actions, noting that the Supreme Court “is one of final review, ‘not of first view.’”⁴⁷

Justice Thomas wrote a concurring opinion, agreeing with the majority’s administrative law holding, but questioning the continuing va-

³⁸ *Id.*

³⁹ *Id.* at 1811–12.

⁴⁰ 5 U.S.C. §§ 551–559, 701–706 (2006).

⁴¹ *Fox*, 129 S. Ct. at 1812 (citing 5 U.S.C. § 706(2)(A)). To support this argument, Justice Scalia cited § 706(2)(A) as providing for the invalidation of “unlawful” agency actions. *Id.* The quoted word does not appear in § 706(2)(A), however. See 5 U.S.C. § 706(2)(A). Instead, the word “unlawful” appears in the general language of § 706(2). *Id.* § 706(2). Given that Justice Scalia declared that “this is the only context in which constitutionality bears upon judicial review of authorized agency action,” *Fox*, 129 S. Ct. at 1812, it is possible that he meant to refer to § 706(2)(B), which authorizes invalidation of actions “contrary to constitutional right, power, privilege, or immunity,” 5 U.S.C. § 706(2)(B).

⁴² *Fox*, 129 S. Ct. at 1812–13.

⁴³ *Id.* at 1813.

⁴⁴ *Id.*

⁴⁵ Specifically, Justice Scalia addressed arguments that the FCC’s policy justification was incoherent to the extent that it did not lead to a categorical ban on expletives, *id.* at 1814, that the FCC’s status as an independent agency subjected its decisions to heightened judicial review, *id.* at 1815–16 (plurality opinion), and that the new rule would disproportionately burden small-town broadcasters, citing their inability to “attract foul-mouthed glitteratae from Hollywood,” *id.* at 1818.

⁴⁶ *Id.* at 1815 (majority opinion).

⁴⁷ *Id.* at 1819 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

lidity of the precedents set by *Red Lion Broadcasting Co. v. FCC*⁴⁸ and *Pacifica*.⁴⁹ He expressed concern with those cases' "reli[ance] on a set of transitory facts"⁵⁰ — namely, the "scarcity of radio frequencies"⁵¹ and the pervasiveness of broadcast television and radio as media forms — that are no longer accurate.⁵² He concluded that these changes would support a departure from *stare decisis* and suggested that, on a proper appeal, he would reconsider the validity of *Red Lion* and *Pacifica*.⁵³

Justice Kennedy wrote an opinion concurring in part and concurring in the judgment. Limiting the language of the majority opinion, he adopted the position that a policy change by an agency *might* require the "agency to provide a more-reasoned explanation than when the original policy was first announced."⁵⁴ Although he did not sign on to the dissenters' position that *all* policy changes should trigger heightened explanatory requirements, Justice Kennedy observed that if an agency's earlier policy had been supported by a more developed record, it could not "disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."⁵⁵ However, although he acknowledged that the FCC's reasoning was "not so precise, detailed, or elaborate as to be a model for agency explanation," Justice Kennedy nonetheless maintained that it was adequate, at least in part because the agency "based its policy on what it considered to be [the] holding in [*Pacifica*]" and "did not base its prior policy on factual findings."⁵⁶

Justice Stevens dissented. He objected to the Golden Globe Awards Order on statutory and administrative grounds. First, he questioned the validity of the FCC's changed interpretation of *Pacifica*, noting that the fleeting expletives doctrine had "not proved unworkable" since its adoption.⁵⁷ Additionally, he objected to the majority's broad construction of the term "indecent," insisting that the word did not encompass all expletives with "a sexual or scatological origin."⁵⁸ Because the Golden Globe Awards Order contemplated consistency with *Pacifica*, Justice Stevens found it appropriate to recognize that the agency had deviated from that holding; at a minimum, its

⁴⁸ 395 U.S. 367 (1969).

⁴⁹ *Fox*, 129 S. Ct. at 1819–20 (Thomas, J., concurring).

⁵⁰ *Id.* at 1820.

⁵¹ *Id.* (quoting *Red Lion*, 395 U.S. at 390).

⁵² *Id.* at 1821–22.

⁵³ *Id.* at 1822.

⁵⁴ *Id.* at 1822 (Kennedy, J., concurring in part and concurring in the judgment).

⁵⁵ *Id.* at 1824.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1826 (Stevens, J., dissenting).

⁵⁸ *Id.* at 1827.

failure to acknowledge that deviation made its policy shift arbitrary and capricious.⁵⁹

Justice Ginsburg also wrote a dissenting opinion, stating that “there is no way to hide the long shadow the First Amendment casts” over the FCC’s new policy.⁶⁰ She noted that “[t]he *Pacifica* decision, however it might fare on reassessment, was tightly cabined, and for good reason,” and suggested that the imposition of penalties on the broadcast of fleeting expletives might exceed constitutional boundaries.⁶¹

In his dissent, Justice Breyer⁶² reasoned that, although the setting of an initial policy for relatively weak reasons could be rational, an identical explanation could be inadequate to explain a subsequent policy shift.⁶³ Applying principles advanced by the Court’s earlier administrative law cases, Justice Breyer suggested that courts should review a shift from an old policy to a new one similarly to the rescission of an earlier policy.⁶⁴ He maintained that he was merely requiring compliance with the “minimal standards” necessary to prevent arbitrary and capricious decisionmaking,⁶⁵ and questioned the FCC’s revision of its understanding that the fleeting expletives doctrine was necessary to avoid transgressing constitutional lines.⁶⁶ He concluded by arguing that, even if the policy shift was valid from the perspective of administrative law, he would nonetheless remand the case for consideration of the policy’s constitutionality under reasoning similar to the constitutional avoidance doctrine.⁶⁷

The Court’s evasion of the constitutional question troublingly ignored the balance Congress struck between its delegation of administrative discretion in 18 U.S.C. § 1464 and its explicit regard for First Amendment protections in 47 U.S.C. § 326.⁶⁸ Although arbitrary and capricious review usually should not include evaluations of constitutional questions, the express statutory contemplation of First Amend-

⁵⁹ *Id.* at 1827–28.

⁶⁰ *Id.* at 1828 (Ginsburg, J., dissenting).

⁶¹ *Id.* at 1829 (citation omitted).

⁶² Justice Breyer’s dissent was joined by Justices Stevens, Souter, and Ginsburg.

⁶³ *Fox*, 129 S. Ct. at 1830–31 (Breyer, J., dissenting).

⁶⁴ *Id.* at 1831 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983)).

⁶⁵ *Id.* at 1832.

⁶⁶ *Id.* at 1834. Justice Breyer also expressed concern that the agency had inadequately considered the possibility that local broadcast stations would suffer from the new enforcement doctrine. *Id.* at 1835–38.

⁶⁷ *Id.* at 1840.

⁶⁸ Although § 326 might be construed as a redundant reminder of the responsibility that all agencies have to avoid constitutional transgressions, its inclusion in the Communications Act suggests that Congress wanted the FCC to pay particular attention to the First Amendment implications of its actions.

ment concerns in § 326 should have moved the Court to address the reasoning underlying the FCC’s constitutional position.⁶⁹

As a general matter, the Court’s exclusion of direct constitutional analysis from arbitrary and capricious review represents a reasonable interpretation of its earlier holdings. Review of agency policies under § 706(2)(A) of the APA requires a court to “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”⁷⁰ Under this “narrow” scope of review:

[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁷¹

In most cases, then, arbitrary and capricious review does not require a court to evaluate potential constitutional infirmities in an agency’s reasoning because the agency’s organic statute does not command explicit constitutional balancing.

However, 47 U.S.C. § 326 patently expresses a legislative concern with the constitutional issues that could be raised by the FCC’s regulation of broadcast speech. As a consequence, the constitutional integrity of the shift in the FCC’s enforcement policy became a “relevant factor[]”⁷² and “an important aspect of the problem”⁷³ being addressed by the agency. Recognition of this principle is implicit in the agency’s own language. The Golden Globe Awards Order at least partially relied on the finding that contemporary censoring technologies would prevent the new policy from “disproportionately disrupting the message of the speaker or performer.”⁷⁴ Likewise, the FCC also relied on its conclusion that, as a legal matter, the new policy remained within the limitations articulated by *Pacifica*,⁷⁵ a decision that, as Justice

⁶⁹ This argument parallels the reasoning articulated in Justice Breyer’s dissent, but is somewhat more limited in scope. Although Justice Breyer implied that constitutional review would be an appropriate component of arbitrary and capricious review whenever an agency rests its determination on a constitutional principle, *see Fox*, 129 S. Ct. at 1833–35 (Breyer, J., dissenting), this comment suggests more narrowly that constitutional review is appropriate when an agency is governed by a statute that mandates constitutional inquiry, as does 47 U.S.C. § 326.

⁷⁰ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

⁷¹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2529 (2007) (“Review under the arbitrary and capricious standard is deferential . . .”).

⁷² *Overton Park*, 401 U.S. at 416.

⁷³ *State Farm*, 463 U.S. at 43.

⁷⁴ *Golden Globe Awards Order*, *supra* note 11, at 4980.

⁷⁵ *Id.* at 4982.

Thomas noted, rested on factual predicates.⁷⁶ In other words, a crucial premise of the agency's policy shift was its belief not only that it had statutory authority to penalize fleeting expletives, but also that this authority was constitutional. Thus, by declining to evaluate the soundness of *all* elements of the FCC's reasoning, the Court artificially narrowed the definition of a "relevant factor" for purposes of arbitrary and capricious review to factual findings unrelated to constitutional issues.

In the majority opinion, Justice Scalia defended the bifurcation of the constitutional and administrative law issues by pointing out that the APA contemplated a difference between agency actions that are arbitrary and capricious and those that are "unlawful."⁷⁷ However, this argument overlooks the possibility that an agency's rationale for a policy shift — presumably required under the arbitrary and capricious standard — might rest explicitly on an unsound constitutional position. For example, suppose the Food and Drug Administration implemented a restriction that unconstitutionally encumbered a drug manufacturer's ability to advertise its product by arguing that, in the agency's judgment, the factual predicates of the Court's protection of commercial speech had eroded. If this factual finding were unsupported by evidence, the policy change would be arbitrary and capricious and could be invalidated on those grounds. However, because the factual determination was not directly used to justify the policy shift, but was employed to justify a shift in the agency's understanding of constitutional law, the policy change would *also* be contrary to constitutional right under § 706(2)(B). In other words, in light of the statutorily acknowledged constitutional sensitivity of policies restricting broadcast content, the agency's failure to undergird its constitutional determination would provide two separate, but equally valid, reasons for invalidation under the APA.

The separation of arbitrary and capricious review and constitutional review into different subsections of the APA may support the conclusion that each subsection articulates different *reasons* for invalidating an agency action,⁷⁸ but it seems fairly unsupportable and counterintuitive to suggest that § 706(2)(A) excludes *any* consideration of an agency's constitutional reasoning. In most cases, a constitutional infirmity in an agency's reasoning will only be subject to review under

⁷⁶ *Fox*, 129 S. Ct. at 1821 (Thomas, J., concurring).

⁷⁷ *Id.* at 1812 (majority opinion).

⁷⁸ See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." (emphasis added) (quoting 5 U.S.C. § 706(2)(A) (2006)) (citing *id.* § 706(2)(B)–(D))).

§ 706(2)(B), while § 706(2)(A) review would focus on infirmities in an agency's factual reasoning. In this case, however, the constitutional validity of the FCC's legal position was just as, if not more, necessary to its conclusion as were the factual justifications for its policy shift, not only because it relied on this position explicitly, but also — perhaps more significantly — because Congress essentially commanded the FCC to rely on sound constitutional groundwork when it enacted 47 U.S.C. § 326. A proper consideration of all “relevant factors”⁷⁹ by the agency would therefore include explicit and correct constitutional findings.

The Court in *Fox* should have evaluated the reasoning underlying the agency's constitutional determination. Although such an inquiry might not have produced straightforward results, a comprehensive and sound review under the arbitrary and capricious standard requires evaluation of all crucial premises upon which the agency action was justified, including constitutional ones. The Court's separation of the FCC's constitutional basis for the Golden Globe Awards Order from its factual and statutory bases creates an unprincipled and artificial dichotomy that unnecessarily multiplies the analyses required for thorough review.

Given the need to consider the constitutional validity of the Golden Globe Awards Order, the First Amendment concerns articulated by Justices Thomas and Ginsburg should have been drawn to the forefront of the litigation. As Justice Thomas noted, the Court's precedents supporting content-based broadcast regulations relied on “transitory facts,” namely, the scarcity of broadcast frequencies and the pervasiveness of broadcast as a media format.⁸⁰ The Court's recent decisions addressing more modern forms of communication, such as cable television⁸¹ and the internet,⁸² have implicitly acknowledged this change, focusing on the unconstitutional effects of the relevant regulations without regard to “scarcity” or “pervasiveness.”⁸³ In light of these factual and legal developments, an FCC revision of its constitutional position probably should have counseled *relaxation* of its enforcement policy, rather than expansion. At a minimum, in failing to evaluate the constitutional validity of the agency's position, the Court performed an incomplete review of the FCC's reasoning and permitted

⁷⁹ *Id.* at 416.

⁸⁰ *Fox*, 129 S. Ct. at 1821–22 (Thomas, J., concurring).

⁸¹ See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny to content-based speech restrictions on cable broadcasters).

⁸² See *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

⁸³ See Joshua B. Gordon, Note, *Pacifica Is Dead. Long Live Pacifica: Formulating a New Argument Structure To Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1477–80 (2006).

a constitutionally suspect — if not outright invalid — regulatory change.

H. Voting Rights Act

1. *Preclearance.* — Section 5, one of the most expansive provisions in the Voting Rights Act of 1965¹ (VRA), prohibits covered jurisdictions from making any changes to their voting procedures without first obtaining federal approval.² The Supreme Court has repeatedly voiced concern about this preclearance requirement's "federalism costs,"³ and more recently has taken measured steps to cabin section 5's applicability.⁴ Last Term, in *Northwest Austin Municipal Utility District No. One v. Holder*⁵ (*NAMUDNO*), the Supreme Court held that *any* political subdivision in the ordinary sense, and not just one satisfying a narrower definition provided in section 14(c)(2) of the VRA, can "bail out" of — that is, be exempt from — the preclearance provisions of the Act if it meets the statutory prerequisites.⁶ In reaching this conclusion, the Court abandoned the widely accepted convention that statutory definitions control the meaning of statutory words, asserting that the canon of constitutional avoidance necessitated a broader reading of "political subdivision."⁷ On the one hand, the *NAMUDNO* opinion can be characterized as minimalist: it adopts a consensus view that skirts the more difficult question of the VRA's constitutionality and largely leaves the preclearance system intact. On the other hand, the Court's largely status quo-preserving decision offers Congress little incentive to alter its current practice of political avoidance in the voting rights arena. Thus, in practical terms, the *NAMUDNO* decision more likely elevates, not diminishes, the future role of the Court in shaping the VRA's reach — a strongly maximalist result. A more holistic approach to judicial minimalism in *NAMUDNO* would have accounted for both the immediate consequences of the Court's ruling and the decision's effects on *future* cases.

¹ Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

² 42 U.S.C. § 1973c (2006).

³ *E.g.*, *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (quoting *Miller v. Johnson*, 515 U.S. 900, 926 (1995)) (internal quotation marks omitted).

⁴ *See, e.g.*, *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (holding that a reduction in the power of county commissioners in anticipation of the ascension of a black commissioner is not a change "with respect to voting," *id. passim* (quoting 42 U.S.C. § 1973c), in violation of section 5 of the VRA).

⁵ 129 S. Ct. 2504 (2009).

⁶ *Id.* at 2516; *see* 42 U.S.C. § 1973b(a) (2006) (listing six requirements that must have been met over the ten years before a subdivision can seek bailout).

⁷ *NAMUDNO*, 129 S. Ct. at 2513.