CONSTITUTIONAL LAW — VAGUENESS — SECOND CIRCUIT STRIKES DOWN THE FCC'S INDECENCY POLICY AS VOID FOR VAGUENESS. — *Fox Television Stations, Inc. v. FCC*, 613 F.3d 317 (2d Cir. 2010).

Courts have struggled with the puzzle of according proper deference to agency interpretations of law that raise serious constitutional questions.[1] Arbitrary enforcement practices pose a particular challenge,[2] since agencies may render the statutes they administer unconstitutionally vague if such practices are granted deference. The Federal Communications Commission (FCC) has skirted these issues when interpreting its own indecency policy,[3] surviving both First Amendment[4] and vagueness[5] challenges since 1975. Recently, in *Fox Television Stations, Inc. v. FCC*[6] (*Fox II*), however, the Second Circuit struck down the FCC's indecency policy as unconstitutionally vague because the FCC had applied its "patently offensive" standard and the policy's two exceptions so inconsistently that television broadcasters could not predict when they would be subject to sanction.[7] The court implicitly assumed that the FCC's enforcement practices were authorized by its indecency policy. Instead, the court should have held that the FCC's enforcement practices were arbitrary, unauthorized imple-

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[1] *See* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 77–82 (2008) (comparing different approaches by courts in prioritizing substantive canons and doctrines of deference when the two yield conflicting interpretations).

[2] Vagueness doctrine holds that an enactment violates the Due Process Clause if it does not notify regulated parties what conduct is prohibited or if it authorizes enforcers to engage in arbitrary or discriminatory enforcement. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

[3] The FCC is charged by statute with prohibiting indecent speech on broadcast networks. 18 U.S.C. § 1464 (2006); 47 U.S.C. § 503(b)(1)(D) (2006 & Supp. III 2009). The agency has long employed a two-prong test that identifies indecency as speech that (1) describes or depicts a sexual or excretory organ or activity and (2) is "patently offensive" as measured by contemporary community standards. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., 56 F.C.C. 2d 94, 98 (1975). In 2001, the FCC set forth three factors to guide it in its "patently offensive" determinations: (1) whether the material is explicit or graphic, (2) whether it dwells on or repeats a description at length, and (3) whether it panders to, titillates, or shocks the audience. Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8003 (2001) [hereinafter Industry Guidance]. The FCC has also articulated exceptions to this policy for speech that is either (1) demonstrably essential to the nature of an artistic or educational work or (2) essential to informing viewers on a matter of public importance. *See* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 2664, 2668, 2686 (2006) [hereinafter Omnibus Order].

[4] *See* FCC v. Pacifica Found., 438 U.S. 726, 748–51 (1978).

[5] *See* Action for Children's Television v. FCC, 852 F.2d 1332, 1338–39 (D.C. Cir. 1988), *overruled in part by* 58 F.3d 654 (D.C. Cir. 1995) (en banc).

[6] 613 F.3d 317 (2d Cir. 2010).

[7] *Id.* at 330–32.

mentations of an otherwise constitutionally sound indecency policy. Such a holding, amply supported by precedent, would have permitted the FCC to preserve its viable indecency framework and avoided establishing a costly and incoherent deference regime.

In 2002, the performer Cher dismissed her critics during Fox's live broadcast of the Billboard Music Awards by announcing "fuck 'em."[8] The following year, Nicole Richie referred to her show "The Simple Life" during the same ceremony by asking, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."[9] In its Omnibus Order against Fox and several other networks,[10] the FCC found that Cher's and Richie's use of "fleeting expletives" violated the FCC's two-prong indecency policy under the interpretation the agency had proffered in its 2004 Golden Globes Order.[11] The FCC found that the words "fuck" and "shit" inherently satisfied its indecency policy's subject-matter prong by describing sexual or excretory activities.[12] They were also "patently offensive" under the policy's three-factor balancing test because the words invoked explicit sexual or excretory images,[13] they were shockingly and gratuitously used in front of children,[14] and, while they were not repeated, repetition was not necessary for a finding of indecency.[15] After Fox and the other major broadcast networks appealed the Omnibus Order to the Second Circuit, the FCC requested and received a voluntary remand to reconsider its decision.[16]

In its Remand Order,[17] the FCC upheld the bulk of its Omnibus Order and reiterated its application of the two-prong indecency definition.[18] Justifying its finding that fleeting expletives may be actionably indecent, the FCC dismissed prior statements suggesting that such expletives are not actionable as "staff letters and dicta,"[19] argued that it is difficult and illogical to distinguish between expletives and depic-

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8 Omnibus Order, *supra* note 3, at 2690.

9 *Id.* at 2693 n.164.

10 The Commission made findings against two additional programs in which fleeting expletives were used, *id.* at 2696, 2698–99, but both were dismissed in the Commission's subsequent order on remand. *See* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 13,299, 13,328–29 (2006) [hereinafter Remand Order].

11 Omnibus Order, *supra* note 3, at 2691, 2693–94. The FCC first took action against fleeting expletives in its Golden Globes Order. *See* Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globes Awards" Program, 19 FCC Rcd. 4975, 4975–76 & n.4 (2004) [hereinafter Golden Globes Order].

12 Omnibus Order, *supra* note 3, at 2691, 2693.

13 *Id.*

14 *Id.* at 2691, 2693–94.

15 *Id.* at 2691, 2693 (citing Golden Globes Order, *supra* note 11, at 4980).

16 Fox Television Stations, Inc. v. FCC (*Fox I*), 489 F.3d 444, 453 (2d Cir. 2007).

17 Remand Order, *supra* note 10.

18 *Id.* at 13,304–05, 13,323–24.

19 *Id.* at 13,306.

tions of sexual or excretory functions,[20] and alleged that granting an exemption for fleeting expletives would force viewers to suffer "the first blow" by hearing them without warning.[21]

Reviewing the case for the first time, the Second Circuit vacated the FCC's orders.[22] Writing for a divided Second Circuit panel, Judge Pooler held that the FCC's decision to begin classifying fleeting expletives as actionably indecent speech was arbitrary and capricious under the Administrative Procedure Act (APA)[23] because the FCC had failed to offer a sufficiently reasoned explanation for its decision to change policy.[24] The Supreme Court reversed and remanded,[25] holding that the APA did not impose heightened review for an agency's decision to change policy,[26] and that the reasons the FCC had offered for its change were sufficient.[27] Both courts declined to address the constitutional issues in the case.[28]

On remand, the Second Circuit once again vacated and remanded.[29] Writing for a unanimous panel, Judge Pooler[30] held that the FCC's indecency policy was void for vagueness because it was so inconsistently applied that networks could not predict what speech would be found actionably indecent.[31] The court first noted that regulations of speech are subject to heightened vagueness scrutiny to avoid chilling protected speech.[32] The court dismissed the FCC's arguments that it should lower that vagueness standard for the indecency policy either because broadcast television is entitled to lower First Amendment scrutiny than other forms of speech,[33] or because an indecency policy that proscribed only specific words might be ineffective.[34]

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[20] *Id.* at 13,308, 13,324.

[21] *Id.* at 13,309 (quoting FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978)).

[22] *Fox I*, 489 F.3d 444, 447 (2d Cir. 2007).

[23] *Id.* at 455.

[24] *Id.* at 456–57. The court found that the FCC had not explained why its longstanding practice to the contrary was no longer adequate, had not squared its new policy with the bona fide news and artistic necessity exceptions, and had not offered any evidence that hearing fleeting expletives constituted a harmful "first blow." *Id.* at 458–61.

[25] FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).

[26] *Id.* at 1810.

[27] *Id.* at 1819. The Court reasoned that allowing fleeting expletives could easily lead to more frequent use, that no empirical evidence was necessary for the claim that expletives harm children who hear them, and that the policy's exceptions for news and artistic necessity appropriately considered context. *Id.* at 1812–14.

[28] *Id.* at 1819; *Fox I*, 489 F.3d. at 462.

[29] *Fox II*, 613 F.3d at 319.

[30] Judge Pooler was joined by Judge Hall and Senior Judge Leval.

[31] *Id.* at 330.

[32] *Id.* at 327–28.

[33] *Id.* at 329. The court argued that this special treatment of broadcast was outdated and irrational, but concluded that it was bound by Supreme Court precedent. *Id.* at 325–27 (citing FCC v. Pacifica Found., 438 U.S. 726 (1978)).

[34] *Id.* at 331.

Turning to the "indecency policy" itself — a term the court alternately employed to refer either to the FCC's entire two-prong framework or simply to its enforcement policies since 2004[35] — the Second Circuit concluded that the FCC's definition of "patently offensive" and its exceptions for bona fide news and artistic necessity were impermissibly vague.[36] The FCC's conclusory allegations that one of the three offensiveness factors had been satisfied failed to give broadcasters fair notice of which speech the agency would find offensive.[37] And the policy's two exceptions, the court held, "result[ed] in a standard that even the FCC cannot articulate or apply consistently."[38] As evidence for this proposition, the court cited the Commission's inconsistent and potentially discriminatory treatment of two apparently similar entertainment programs, its reversal of a particular decision to apply the news exception, and its counsel's inability to answer definitively whether a hypothetical program would be covered by the news exception.[39] Given this record, the court held that there was a risk that the FCC would apply its indecency policy in a discriminatory, subjective, and content-based manner in the future.[40] It identified evidence indicating that the FCC's policy had already chilled broadcasters from airing protected speech.[41]

The Second Circuit's deeply methodologically flawed ruling in *Fox II* will likely prohibit the FCC from retaining its two-prong indecency policy. Either the court intended to declare that policy unconstitutionally vague — as appears likely[42] — or it employed ambiguous and expansive enough language to deter the FCC from readopting a policy that would face near-certain litigation and a considerable risk of invalidation.[43] Yet any holding invalidating more than just the FCC's enforcement decisions was unjustified. Even if the court was correct

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[35] *Compare id.* at 330 (referring to the two prongs and three subfactors laid out in the FCC's Industry Guidance as "the FCC's indecency policy," and characterizing subsequent FCC orders as "interpret[ations of] this policy"), *with id.* at 322 ("In 2004 . . . the FCC's policy on indecency changed."), *and id.* at 324 (referring to the FCC's fleeting expletives policy as its "indecency policy").

[36] *Id.* at 330, 332.

[37] *Id.* at 330.

[38] *Id.* at 332.

[39] *Id.* at 331–32.

[40] *Id.* at 332–33.

[41] *Id.* at 334–35.

[42] In the clearest statement of its holding, the court held that "the indecency policy is impermissibly vague" one sentence after it had referred to the FCC's Industry Guidance as its "indecency policy" and to subsequent decisions as interpretations of that policy. *Id.* at 330.

[43] *Cf.* William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106, 159–60 (arguing that the increased litigation prompted by uncertainty regarding a rule's legality may "deter appropriate agency rulemaking," *id.* at 160). This uncertainty is compounded by a circuit split, because the Second Circuit and the D.C. Circuit appear to disagree on whether the indecency policy is vague in the first place. *See Fox II*, 613 F.3d at 329 n.8.

that the FCC's enforcement practices were unconstitutionally arbitrary, the court failed to consider the logically prior question of whether the FCC's enforcement practices were *authorized by* its indecency policy. While an agency is ordinarily entitled to deference in interpreting the scope of its own policy's authorization, this deference need not extend to an interpretation that would render the underlying policy unconstitutional. Because the FCC's indecency policy is susceptible to a constitutionally narrow interpretation, the Second Circuit might have declined to give deference to the FCC's unconstitutionally vague interpretations and remanded to the agency to craft a constitutional interpretation of its own regulation. Such a holding would have preserved the FCC's constitutionally unproblematic indecency policy and avoided subjecting administrative agencies to the costs of an incoherent deference regime.

Because vagueness doctrine prohibits only laws that fail either to give proper notice to regulated parties or to meaningfully limit the discretion of their enforcers, courts cannot determine a law's constitutionality simply by examining how it is enforced. The reason is readily apparent: if a court makes only the determination that an enforcer is behaving arbitrarily and with unrestrained discretion, it cannot know whether the enforcer's actions are authorized by an unconstitutionally vague law, or whether the enforcer is acting outside of the authority granted by a sufficiently tailored constitutional law.[44] Therefore, a court conducting a vagueness inquiry must construe the law at issue, rather than simply examine the actions of its enforcer. And as a practical matter, courts invariably perform such an analysis.[45]

The court in *Fox II* thus skipped a crucial first step of its vagueness analysis by confining its inquiry to whether the FCC was enforcing its indecency policy according to sufficiently narrow and discernible standards. The court did not interpret the FCC's indecency policy itself, but merely examined the FCC's avowed efforts[46] to enforce the policy's two prongs, three subfactors, and two exceptions.[47] It thus rested its finding on the assumption that the FCC's enforcement prac-

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[44] *See, e.g.*, Keeffe v. Library of Cong., 777 F.2d 1573, 1581–82 (D.C. Cir. 1985). Narrow laws that would undoubtedly pass vagueness scrutiny are often enforced in an arbitrary and standardless manner. *See* Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 255, 324–27 (2010).

[45] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 732–33 (2000) (rejecting finding of vagueness because text was clear); Kolender v. Lawson, 461 U.S. 352, 358 (1983) (finding statute vague because text as construed by state courts set no standard); U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 576–79 (1973) (finding regulation not vague by examining text); *Keeffe*, 777 F.2d at 1581–82 (finding Library of Congress regulation not vague on its face).

[46] *See* Golden Globes Order, *supra* note 11, at 4977–78; Omnibus Order, *supra* note 3, at 2667–68; *see also* Remand Order, *supra* note 10, at 13,303–04.

[47] *See Fox II*, 613 F.3d at 330–33.

tices were authorized by the indecency policy, when they may in fact have exceeded the authority that the policy granted.

Indeed, the Second Circuit would have had ample reason to discard this assumption under the doctrine of constitutional avoidance. While the FCC is entitled to deference in determining whether its own actions are authorized by the policies it has created, this deference is not absolute.[48] It is particularly inapplicable where an agency has attempted to enforce its organic statute, or a policy it has promulgated, according to an unconstitutional interpretation. In such cases, courts regularly apply the constitutional avoidance canon, which requires them to adopt a reasonable narrowing construction of a law if it would preserve the law's constitutionality.[49] This canon is often used to trump an agency's interpretation of its organic statute, even where the agency's interpretation would otherwise be entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[50] Moreover, courts have applied this canon to save otherwise vague statutes;[51] to narrow an agency's construction of its own regulations;[52] and to trump an agency's interpretation of its own regulation, even when that interpretation is otherwise entitled to maximal deference.[53]

In *Fox II*, the Second Circuit conceded that the FCC had, in the past, interpreted its policy in a constitutionally narrow manner by employing a "restrained enforcement policy."[54] Therefore, at least one

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[48] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (holding that an agency's interpretation of its own regulation controls unless it is "plainly erroneous or inconsistent with the regulation" (citation omitted)).

[49] *See* Bamberger, *supra* note 1, at 72–73.

[50] 467 U.S. 837 (1984); *see, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575–78 (1988); Bamberger, *supra* note 1, at 77.

[51] *See* Skilling v. United States, 130 S. Ct. 2896, 2929–30 (2010); *see also* Boos v. Barry, 485 U.S. 312, 330–32 (1988); *see generally* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 295 n.145 (2003) (citing cases).

[52] *See, e.g.*, Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1476–77 (9th Cir. 1994); McGehee v. Casey, 718 F.2d 1137, 1146 (D.C. Cir. 1983); Nw. Hosp., Inc. v. Hosp. Serv. Corp., 687 F.2d 985, 992 (7th Cir. 1982). Two of the core rationales for constitutional avoidance — judicial restraint and constitutional enforcement — apply to regulations as much as to statutes. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1207, 1212 (2006) (identifying rationales).

[53] *See Meinhold*, 34 F.3d at 1476–79.

[54] *See Fox II*, 613 F.3d at 329 & n.8 (distinguishing *Fox II* on this ground from FCC v. Pacifica Found., 438 U.S. 726 (1978); Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988), *overruled in part by* 58 F.3d 654 (D.C. Cir. 1995) (en banc)). The court defined "restrained enforcement" to include the three factors the FCC articulated in 2001, *id.* at 321–22 ("Despite its move to a more flexible standard, the FCC continued to exercise restraint. . . . In 2004, however, the FCC's policy on indecency changed."), and the since-abandoned "serious merit" factor of the FCC's policy, a vaguer precursor to the current policy's artistic merit and news exceptions, *Action for Children's Television*, 852 F.2d at 1339; *see* Infinity Broad. Corp., 3 FCC Rcd. 930, 931–32 (1987).

constitutional interpretation of the FCC's indecency policy existed,[55] and so the Second Circuit could have applied the constitutional avoidance canon in *Fox II* to invalidate the FCC's unconstitutional enforcement practices as an interpretation of the indecency policy not entitled to deference. The court need not — and should not — have selected a particular constitutional construction of the indecency policy.[56] It should instead have remanded to the FCC the decision to adopt new enforcement practices that, like the FCC's former restrained practices, fell within the constitutional limits of its indecency policy.

The court's tacit refusal to apply the avoidance canon in this way will impose enormous and unnecessary costs on the FCC and the broadcast networks subject to its indecency policy. The Second Circuit likely prohibited the FCC from readopting its two-prong indecency policy, even if the FCC were to interpret it according to a different, constitutionally narrow principle.[57] Yet the FCC's indecency policy was crafted in a narrow policy space: the agency needed to interpret Congress's broad indecency statute within the confines of the First Amendment,[58] balance the constitutional proscription on vagueness with the FCC's own need for a flexible, workable standard,[59] and mediate the political struggle between broadcast media, consumer advocates, and FCC commissioners of both political parties.[60] Therefore, in the limited range of policy choices available to the FCC, the indecency policy's resilience over the course of several decades gives rise to a reasonable inference that the FCC believed this two-prong policy

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[55] *See, e.g.*, *Boos*, 485 U.S. at 331 (requiring limiting construction of potentially unconstitutional law where construction is "fairly possible").

[56] Because the FCC's indecency policy undoubtedly supports more than one constitutional interpretation, the court would have lacked the authority to impose an interpretation as it would at *Chevron* Step One. Rather, the court could have struck down the FCC's interpretation as unreasonable only at *Chevron* Step Two and remanded to the agency to select a different, reasonable interpretation. *See* AFL-CIO v. FEC, 333 F.3d 168, 179–80 (D.C. Cir. 2003) (applying constitutional avoidance in precisely this way); *see also* Bamberger, *supra* note 1, at 113 & n.197, 114 (endorsing this approach and citing to several opinions doing same); Matthew C. Stephenson & Adrian Vermeule, Essay, Chevron *Has Only One Step*, 95 VA. L. REV., 597, 607–08 (2009) (arguing that the reasonableness inquiry is the same regardless of at which step of *Chevron* the canon is invoked).

[57] *See Fox II*, 613 F.3d at 330 ("The Networks argue that the policy [in the FCC's Industry Guidance] is impermissibly vague and that the FCC's decisions interpreting the policy only add to the confusion of what will be considered indecent. We agree with the Networks that the policy is impermissibly vague.").

[58] *See Pacifica,* 438 U.S. at 750.

[59] *See Fox II*, 613 F.3d at 331.

[60] For a description of the difficulty of reaching policy decisions of any sort at the FCC, see Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 693 (2009); and Harry M. Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637, 650 (1998).

best enabled it to carry out its indecency mandate.[61] It is unlikely that the FCC could find a formulation better able than "patently offensive," for instance, to both pass constitutional muster and cover the range of indecent speech the FCC seeks to prohibit.[62] The court's decision to actually or effectively strike this policy down will thus force the FCC to adopt a suboptimal indecency framework.

Moreover, the precedent of *Fox II* is a costly and incoherent addition to administrative law. If other courts follow *Fox II* and unnecessarily strike down rules that agencies had interpreted unconstitutionally, agencies will need to undergo onerous, prolonged rulemaking procedures to replace them. Agencies would thus be motivated to ossify interpretations of their own regulations, since a single unconstitutional interpretation of a regulation would cause the regulation itself to be struck down, perhaps permanently.[63] Regulated parties would enjoy no corresponding benefit because, if an agency's regulation is not itself unconstitutional, striking it down does nothing more to reduce vagueness than simply vacating an agency's unconstitutional interpretation. Furthermore, employing deference in this way is doctrinally problematic. The core predicate for the deference presumption in *Chevron* and *Auer* is that agencies are the institutional actors best able to make expert policy choices.[64] Unnecessarily limiting an agency's expert policy choices by granting deference entirely inverts this purpose.

The court in *Fox II* thus did considerable harm to indecency policy and administrative efficiency through its vagueness holding. The heavy hand of constitutional review is not well suited for intricate areas of agency lawmaking; and where the FCC left an opening through its aggressive interpretation of its own indecency policy to be reversed on subconstitutional grounds, the Second Circuit should have readily taken it.

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[61] *See* Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1068–72 (2007) (arguing that an entrenched agency policy choice is likely a desirable one, even accounting for the risk of inertia). The indecency policy's very longevity, and the reliance interests and familiarity it generated, probably increased its value. *See* Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670–73, 1701–02 (2002).

[62] The FCC's first-best policy choice would of course be one that prohibited all of the speech it found indecent in its Golden Globes Order, Omnibus Order, and Remand Order. But a policy that achieved precisely this outcome could not be constitutional after *Fox II*, and so the FCC's second-best choice — namely one that is able to prohibit as much of this speech as possible — is most likely its longstanding two-prong policy for the reasons stated.

[63] *See* Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 487 (1997).

[64] *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 630–31 (1996).