Essay

Avoiding the Chill:
A Proposal to Impose the Avoidance Canon on the FCC

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"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[1]

Introduction

Imagine[2] a local television station (W-UHOH), covering a minor league baseball game. The visiting team—the Blue Sox—has lost twenty-three straight games against the home team—the Yonkers—but is currently winning by four runs in the bottom of the ninth. After the final batter grounds out, the Sox players rush the field. W-UHOH's camera zooms in on the players celebrating on the field, only to catch them yell "F——k the Yonkers!" at the opposing team's dugout.

Susie is a five-year-old child in the Yonkers' hometown who was watching the game on W-UHOH with her parents at the time of the expletive outburst. Susie's parents promptly file a complaint with the

* J.D., 2010, The George Washington University Law School; B.A., 2007, The Pennsylvania State University. I thank Josh Schwartz for his invaluable guidance and advice; Paul Stepnowsky, Daniel George, Andrew Welz, and Brian Smith for their thoughtful comments and suggestions; and Brian Schnapp, Chris Healey, Ashley Eiler, and Andrew Pruitt for their careful editing.

1 NAACP v. Button, 371 U.S. 415, 433 (1963).

2 The following vignette is fictional.

Federal Communications Commission ("FCC" or "Commission"), which opens an investigation. Pursuant to that investigation, the FCC fines W-UHOH $20 million and publicly reprimands the station. W-UHOH's national broadcast affiliate drops the local channel almost immediately. The local station responds that it bleeps out expletives in prerecorded content but does not have—and cannot afford—the technology or personnel to bleep live programming. Its arguments are to no avail, however, so it shutters its offices, leaving a number of residents unemployed.

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At first glance, the foregoing scenario may seem far-fetched. It is not. The constitutionality of a similar scenario is currently being litigated in the federal courts in *Fox Television Stations, Inc. v. FCC*.[3] Under a 2004 change in FCC policy, the Commission may severely sanction broadcasters for single instances of "indecent" content broadcast over the airwaves,[4] also known as "fleeting expletives." As the first step in exercising this discretionary power, the FCC decides whether broadcast speech violates Congress's ban on indecent content.[5] If it finds the speech indecent, the Commission can punish the offending broadcaster in a number of ways.[6] For example, the FCC can fine the broadcaster,[7] revoke its license,[8] or refuse to renew that license.[9] These powers of sanction are not limited to national corporate broadcasters;[10] as the introductory passage suggests, local and in-

3 Fox Television Stations, Inc. v. FCC, No. 06-1760-ag, slip op. at 4 (2d Cir. July 13, 2010), *available at* http://www.ca2.uscourts.gov/opinions.htm (search "Search All" for "06-1760-ag"). The incidents giving rise to the case took place during the 2002 and 2003 Billboard Music Awards programs, which were broadcast by Fox Television Stations, Inc. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808 (2009). The 2002 broadcast involved a single utterance of the "F-word" by the performer Cher, and the 2003 presentation included one use each of the "S-word" and F-word during a presentation by entertainers Nicole Richie and Paris Hilton. *Id.* In March 2006, the Commission told Fox that the presentations had violated federal indecency policy. *Id.* Fox—and numerous other broadcasters who had received similar notices—sought review of the Commission's decision in the United Sates Court of Appeals for the Second Circuit. *Id.*

4 *See Fox*, 129 S. Ct. at 1806, 1819.

5 *Id.* at 1806.

6 *Id.*; *see* note following 47 U.S.C. § 303 (2006) ("Broadcasting of Indecent Programming; FCC Regulations").

7 47 U.S.C. § 503(b)(1) (2006).

8 *Id.* § 312(a)(6).

9 *Id.* § 309(k)(2)(3).

10 *See id.* §§ 307–308, 310 (not limiting airwaves license eligibility to broadcasters of national scope); *Fox*, 129 S. Ct. at 1818–19 (discussing application of the Commission's new indecency policy to small, local broadcasters and assuming that it could—though doubting it would—

dependent broadcasters likely will be among the hardest hit by such a policy because they do not have the resources to bleep out indecent material during live programming.[11]

When it reviewed the Commission's fleeting expletives policy in 2007, the Second Circuit refused to decide whether the policy was constitutional,[12] instead deciding the case on statutory grounds.[13] It held the policy defective[14] under the Administrative Procedure Act ("APA").[15] The Supreme Court likewise avoided the constitutional question;[16] unlike the Second Circuit, however, it upheld the policy as statutorily sound.[17] On remand, the Second Circuit once again struck down the policy, this time on First Amendment grounds.[18]

Given the Second Circuit's decision, another trip to the Supreme Court for this case seems all but inevitable. In the meantime, the FCC's fleeting expletives policy remains in flux—unconstitutional in the Second Circuit but valid elsewhere. As of this writing, six years have passed since the Commission first adopted the policy, yet its ultimate fate remains unclear. Such uncertainty chills free expression and unduly restrains the free market of ideas.

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be applied to them); *id.* at 1835–37 (Breyer, J., dissenting) (faulting the Commission's failure to consider the impact of indecency policy on small, local broadcasters). *But see* Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005, 21 F.C.C.R. 13,299, 13,311 (2006) (noting that "it may be inequitable to hold a licensee responsible for airing offensive speech during live coverage of a public event under some circumstances" without listing the factors to be balanced). *See generally id.* (omitting any analysis of the particular hardships the policy might impose on local broadcasters, notwithstanding broadcasters' extensive comments on the issue).

11 *Fox*, 129 S. Ct. at 1835–37 (Breyer, J., dissenting) (discussing the impact on small and independent broadcasters and citing numerous sources to support the assertion).

12 *See* Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 462 (2d Cir. 2007) ("[W]e refrain from deciding the various constitutional challenges . . . raised by the Networks."), *rev'd*, 129 S. Ct. 1800, 1819 (2009).

13 *See id.* at 467.

14 *See id.* at 454–55, 462.

15 *See* 5 U.S.C. § 706(2)(a) (2006) (stating that a court reviewing agency action shall set aside all agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

16 *Fox*, 129 S. Ct. at 1819 ("It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case . . . . *We decline to address the constitutional questions at this time*." (emphasis added)).

17 *See id.* at 1812, 1819.

18 *See* Fox Television Stations, Inc. v. FCC, No. 06-1760-ag, slip op. at 4 (2d Cir. July 13, 2010), *available at* http://www.ca2.uscourts.gov/opinions/htm (search "Search All" for "06-1760-ag").

The Supreme Court may ultimately hold the Commission's fleeting expletives policy unconstitutional.[19] If that happens, this particular barrier to free expression will be removed. Yet this Essay's focus is broader than any single FCC policy; rather, it seeks to change the *process* by which the Commission makes—and courts review—policies regulating free speech. The FCC must have understood both that this particular indecency policy would face a strong First Amendment challenge and that it might ultimately be held unconstitutional. Yet the Commission proceeded anyway.

Because of the Commission's power to regulate speech and the media that convey it, the First Amendment looms over many FCC decisions—including the indecency regulation discussed above.[20] When making constitutionally sensitive decisions, the FCC has sometimes acknowledged a responsibility to adopt policies that are clearly constitutional rather than press the boundaries of its lawful authority.[21] Notwithstanding that acknowledgment, the Commission has sometimes chosen to adopt policies of obviously questionable constitutionality.[22] This Essay addresses this practice by suggesting that Congress require the Commission to assess the constitutional bases for its decisions and adopt only those policies that are free from "serious constitutional doubts."[23]

In prescribing a constraint on agency decisionmaking, this Essay builds on the recent debate between Professors Jerry Mashaw and Richard Pierce on whether agencies should follow the same interpretive methods as courts.[24] Professor Mashaw argues that the two insti-

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19 *See Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting) (noting the "long shadow the First Amendment casts over what the Commission has done").

20 *See, e.g.*, *id.*

21 Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, 62 Fed. Reg. 16,093, 16,095 (Apr. 4, 1997) ("Although decisions about the constitutionality of congressional enactments are generally outside the jurisdiction of administrative agencies, we have an obligation under Supreme Court precedent to construe a statute where fairly possible to avoid substantial constitutional questions and not to impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by the [Supreme Court]." (internal quotation marks omitted)).

22 *See, e.g.*, *Fox*, 129 S. Ct. at 1828 (Ginsburg, J., dissenting).

23 *Id.* at 1811 (majority opinion).

24 *See* Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889 (2007) [hereinafter Mashaw, *Agency-Centered*]; Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501 (2005) [hereinafter Mashaw, *Norms*]; Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007).

tutions do and should use different tacks,[25] whereas Professor Pierce asserts that a common approach is warranted.[26] This Essay remains agnostic as to whether, as a general rule, agencies and courts should adopt the same interpretive rules. Rather, it asserts that the FCC's unique position vis-à-vis the First Amendment demands a unique approach. The Mashaw-Pierce debate nevertheless remains important because it informs the broader question of how agencies, including the FCC, should interpret the statutes they administer.

This Essay proceeds in three parts. Part I begins by describing the traditional rules of constitutional avoidance as developed by the federal courts. Part II then proposes a solution to the problem identified above: a new statute that would require the FCC to explain the constitutional bases for its decisions[27] and to adopt only those policies that it determines to be free from serious constitutional doubt. Part III addresses possible counterarguments.

I. Canons to the Left of Them, Canons to the Right of Them[28]: The Avoidance Canon(s) Explained

This Essay advises imposing the avoidance canon on the FCC. But simply saying "the avoidance canon" is impossibly vague, because there are actually multiple versions of the canon. This Part therefore begins by describing the canon's different versions and then presents the virtues and vices often attributed to each.

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25 Mashaw, *Agency-Centered*, *supra* note 24, at 891 ("For example, it seems normatively appropriate for agencies to give significant deference to presidential directions concerning how they should interpret their statutes. By contrast, a court would be perfectly justified in treating presidential pronouncements on statutory meaning as quite irrelevant to its interpretive task . . . ."); *see* Mashaw, *Norms*, *supra* note 24, at 504 ("There are persuasive grounds for believing that legitimate techniques and standards for agency statutory interpretation diverge sharply from the legitimate techniques and standards for judicial statutory interpretation."); *id.* at 537–42.

26 Pierce, *supra* note 24, at 203 ("To the best of its ability, the agency should attempt to use exactly the same interpretive process a court would use . . . .").

27 Under the APA, 5 U.S.C. §§ 551–559, 701–706 (2006), the Commission already must explain the factual and policy bases for its decision. *See, e.g.*, *id.* § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose."); *id.* § 557(c) ("All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of . . . findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ."). This Essay's proposal would make unequivocally clear that the FCC must *always* consider and explain the constitutional predicates for its decisions.

28 *See* Alfred Lord Tennyson, *The Charge of the Light Brigade*, *in* Selected Poems 215, 215 (Christopher Ricks ed., 2007).

The rule of constitutional avoidance has deep roots in federal law.[29] Opinions differ on how many avoidance canons exist.[30] This Essay, however, focuses on three approaches derived from the Supreme Court's avoidance cases. The first—and narrowest[31]—holds that, given two permissible readings of a statute, only one of which is constitutional, the court should choose the constitutional one, even if the other (i.e., the unconstitutional) reading is a more plausible construction of the statute.[32]

The second form of the canon holds that courts should avoid all—and only—those interpretive questions that raise *serious* doubts as to a statute's constitutionality.[33] Under this view of the canon, the court generally avoids addressing the constitutional question altogether, whereas under the first version, the court actually addresses that question but then avoids adopting an unconstitutional reading.[34]

The third—and broadest[35]—approach would have courts avoid interpretations that raise *any* constitutional doubts, unless it is clear

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29 John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495, 1499 (1997); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997) ("Avoidance is perhaps the preeminent canon of federal statutory construction . . . ."); *see, e.g.*, United States v. Coombs, 37 U.S. (12 Pet.) 72, 75–76 (1838).

30 *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 917 (4th ed. 2007). Professor Adrian Vermeule, for example, has identified two versions of the canon: "classic" and "modern." *See* Vermeule, *supra* note 29, at 1949; *see also* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1202–03 (2006) (employing Professor Vermeule's classification). Dean Lisa Kloppenberg identifies two "major approaches" to the use of the canon—"broad" and "narrow"—but also acknowledges the existence of "a wide range of formulations" of the two main groupings she identifies. *See* Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 10–12 (1996). This Essay identifies three main classes of avoidance decisions: narrow, intermediate, and broad. *See infra* notes 31–38 and accompanying text.

31 Here, "narrow" means that the canon gives the smallest, most finely calibrated zone of protection to the constitutional value at issue. That is, it may be invoked only where the most plausible reading of the statute actually would be unconstitutional. As seen below, other versions of the canon would eschew the most plausible construction without actually reaching the question of its constitutionality. *See infra* notes 33–38 and accompanying text. Conversely, a "broad" reading of the canon is one that creates a large, prophylactic area around the specific constitutional principle implicated by the statute.

32 Nagle, *supra* note 29, at 1506 & n.51; *cf.* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (observing that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

33 *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)) (describing the canon and collecting authorities); Crowell v. Benson, 285 U.S. 22, 62 (1932).

34 *See* Nagle, *supra* note 29, at 1496–97.

35 *See supra* note 31.

that Congress intended the constitutionally suspect meaning.[36] This approach is the most controversial[37] because it could seriously frustrate the will of Congress by substituting a less plausible reading of a statute for a more plausible one, even if there is no serious doubt that the most plausible construction actually is constitutional.[38]

Each approach has strengths and weaknesses. The first approach is desirable because it vindicates constitutional values without overprotecting them; it creates no penumbras.[39] That is, only if a reading were actually unconstitutional would that reading be jettisoned in favor of another.[40] Many criticize this approach, however, because it can be viewed as a license to issue advisory opinions.[41] Because the Court ultimately decides merely that a given statutory construction *would be* unconstitutional, the opinion amounts to impermissible advice to legislators on dodging constitutional pitfalls.[42]

Critics decry the third approach as grossly overprotective of constitutional norms.[43] It prevents courts from addressing constitutional questions even if the questioned interpretation is clearly constitutional.[44] It nevertheless has benefits, such as forcing Congress to be explicit when it wishes to enact constitutionally questionable policy.[45]

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36 *See* ESKRIDGE ET AL., *supra* note 30, at 917; *see, e.g.*, NLRB v. Catholic Bishop, 440 U.S. 490, 500, 507 (1979). This approach bears many similarities to the imposition of clear statement rules, which require a clear expression of congressional intent to achieve a particular result. *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 401–02 (2010). These rules apply in select substantive areas, such as imposition of retroactive civil liability and encroachment on regulatory areas traditionally entrusted to the States. *Id.* at 410–12. Like the third approach referenced in the text, clear statement rules give protected constitutional values a very wide berth, *see generally* Manning, *supra*; they arguably go further, however, by eschewing case-by-case determination of the existence of a constitutional question, instead requiring a clear statement of congressional intent in all cases implicating the relevant value.

37 *See* ESKRIDGE ET AL., *supra* note 30, at 917.

38 *See, e.g.*, *Catholic Bishop*, 440 U.S. at 508–11 & n.1 (Brennan, J., dissenting).

39 *Cf.* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983) (arguing that the serious-doubts version of the canon *does* create penumbras around various constitutional provisions). *But cf.* Manning, *supra* note 36, at 421–22 (pointing out that scholars and courts have not articulated a coherent, comprehensive rationale explaining why penumbras are inappropriate interpretive tools).

40 *See supra* notes 31–36 and accompanying text.

41 Morrison, *supra* note 30, at 1204–05; Nagle, *supra* note 29, at 1518.

42 *See* sources cited *supra* note 41.

43 *See, e.g.*, *Catholic Bishop*, 440 U.S. at 508–11 & n.1 (Brennan, J., dissenting).

44 *See* Morrison, *supra* note 30, at 1203 (noting that avoidance of constitutional doubt—as opposed to avoidance of unconstitutionality itself—"allow[s] serious but potentially unavailing constitutional objections to dictate statutory meaning").

45 *See Catholic Bishop*, 440 U.S. at 504–07 (hesitating to read a general grant of regulatory authority as authorizing intrusion into religious organizations' affairs where there is no "clear expression of an affirmative intention of Congress"); *see also, e.g.*, William K. Kelley, *Avoiding*

It also protects constitutional norms, such as federalism, that Congress regularly ignores or wantonly tramples.[46]

The second approach attempts to strike a middle ground. It dodges the advisory-opinion quagmire by not actually deciding whether a given interpretation would be unconstitutional; rather, it decides only that a given construction would raise serious concerns as to the statute's constitutionality and then rejects that reading of the statute in favor of one that is clearly constitutional.[47] It is also narrower than the third approach because it avoids constitutional doubts only when those doubts are "grave" or serious.[48] Still, it refuses to accept the soundest reading of a statute, even though that version may be constitutional.[49] Moreover, the keystone of the approach—the modifier "serious"—is open ended and can be defined only through the traditional common law process. Finally, this method is slow and does not give Congress a solid basis on which to rely in passing future legislation.

Rule-of-law proponents criticize all three approaches.[50] Essentially, they submit that courts disrespect Congress when they set aside statutes' most probable meanings in favor of less likely ones.[51] If the courts truly respected the will of Congress, the argument continues, they would accept statutes as passed and readily adjudicate their constitutionality; if the laws are unconstitutional, the courts should say so and then leave to Congress the task of crafting others to replace those that were stricken.[52]

Notwithstanding these critiques, the federal courts continue to employ the avoidance canon(s),[53] with the serious-doubts version be-

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Constitutional Questions as a Three-Branch Problem, 86 CORNELL L. REV. 831, 847–49 (2001) (analyzing *Catholic Bishop* and what it reveals about the norms underlying the avoidance canon).

46 *Cf.* ESKRIDGE ET AL., *supra* note 30, at 918 & n.g (noting that by giving effect to narrow constructions of the law, due process and free speech norms, for example, are likely to be protected).

47 *See* United States *ex rel.* Att'y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407–08 (1909); Morrison, *supra* note 30, at 1204–05.

48 *See Del. & Hudson*, 213 U.S. at 408.

49 Morrison, *supra* note 30, at 1203.

50 *See* ESKRIDGE ET AL., *supra* note 30, at 917–18.

51 Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 74 (1996) ("Yet in interpreting statutes so as to avoid 'unnecessary' constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and, constitutional questions aside, in ways that its drafters may not have preferred.").

52 *See id.*

53 *See, e.g.*, Fox Television Stations, Inc. v. FCC, 489 F.3d 444, 462 (2d Cir. 2007), *rev'd* 129 S. Ct. 1800, 1819 (2009). They apply it not only when reviewing statutes directly, but also when

ing the one used most often.[54] And, as Professor Pierce notes, as long as the federal courts continue to apply the avoidance canon, the FCC—and the other federal agencies—will ignore it at their peril.[55] This Essay does not merely acknowledge the mode of analysis reviewing courts will apply; instead, it proposes requiring that the Commission apply the canon itself, to restrain its own decisions.

II. Imposing Avoidance

To address the problems posed by the use of the canon by the courts but not by the Commission, Congress should require the FCC to apply the serious-doubts version of the avoidance canon in all of its actions that implicate First Amendment values.

A. Proposed Statutory Text

Congress should enact the FCC Constitutional Concerns Avoidance Act ("FCCAA" or "Act"), which should read principally as follows:

> § 1. Definitions
> As used in this Act:
>
> (1) The term "Commission" means the Federal Communications Commission or a successor agency established by act of Congress.
>
> (2) The term "decision" means a concluded rulemaking or adjudication by the Commission.
>
> (3) The term "covered decision" means a decision issued after the effective date of this Act.
>
> (4) The term "serious constitutional doubts" has the same meaning as in *Crowell v. Benson*,[56] *Ashwander v. Tennessee Valley Authority*,[57] and their progeny in the Supreme Court.

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reviewing agency interpretations of those statutes. *See* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66–67 (2008) (discussing the majority rule that courts apply normative canons, such as the avoidance canon, when reviewing agency rulemakings). Although there is some debate over the proper role of such canons in the review of agency action, *see id.*, that question is tangential to this Essay's focus because the proposed Act specifies the test to be applied by a court reviewing the Commission's decision. *See infra* Parts II.A, II.B.3.b.

54 *See* ESKRIDGE ET AL., *supra* note 30, at 917; Kloppenberg, *supra* note 30, at 92; Vermeule, *supra* note 29, at 1949 n.24.

55 *See* Pierce, *supra* note 24, at 202–03. *See generally* Bamberger, *supra* note 54 (discussing the role of substantive canons, such as the avoidance canon, in federal court reviews of agency decisionmaking).

56 Crowell v. Benson, 285 U.S. 22, 62 (1932).

57 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

§ 2. Avoidance Required

(a) Decisions Requiring Avoidance. The Commission may not make, maintain, or enforce a decision that raises serious constitutional doubts.

(b) Required Explanation. The Commission shall, in each covered decision, explain why the decision does not raise serious constitutional doubts.

(c) Consequences of Commission's Failure to Avoid.

(1) Except as provided in paragraph (2), a court reviewing a decision shall void the decision if the decision is found to raise serious constitutional doubts, even if such doubts did not exist at the time of the underlying decision.

(2) A reviewing court may not void a decision as provided in paragraph (1) if both of the following—

(A) the decision would have raised serious constitutional doubts when the decision was made, but the decision was not challenged at the time of the original decision; and

(B) at the time of the review, the decision no longer raises serious constitutional doubts.

(3) If the Supreme Court abrogates—

(A) the serious-doubts version of the avoidance canon in favor of a different version of the canon, the Commission shall continue to apply the serious-doubts canon as defined in section 1(4).

(B) all forms of constitutional avoidance, this Act shall cease to operate.

§ 3. Judicial Review; Procedure on Remand

(a) Deference to the Commission.

(1) A reviewing court shall accord an interpretation of the Commission no greater deference than is permissible under *Skidmore v. Swift & Co.*[58]

(2) A reviewing court may not defer to either—

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58 Skidmore v. Swift & Co., 323 U.S. 134 (1944). Alternatively, Congress could prescribe that the FCC receive no deference. That result seems overly harsh, however, because the Commission still possesses expertise and other attributes that counsel in favor of some deference. Under no circumstances, however, should the Commission be accorded the type of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). That would give the FCC too much power to manipulate the standards governing it. *See infra* Part II.B.3.b.

(A) a Commission decision on the existence of serious constitutional doubts; or

(B) the Commission's reasoning regarding the existence of serious constitutional doubts.

(b) Review of Decisions Potentially Raising Serious Constitutional Doubts.

(1) If the Commission has reason to believe that one of its decisions may raise serious constitutional doubts, the Commission shall—

(A) review the decision to determine whether the decision raises serious constitutional doubts; and

(B) publish the results of its review in the *Federal Register* within 120 days of initiating the review.

(2) The Commission's published determination required by paragraph (1) shall include—

(A) an express statement stating the Commission's opinion whether the decision raises serious constitutional doubts; and

(B) a detailed explanation of the bases for the opinion required by section 3(b)(2)(A).

(3) In order to conduct a review required by this section, the Commission may seek a voluntary remand from a court reviewing the constitutionality of a decision, if the Commission—

(A) voluntarily enjoins enforcement of the decision from the date it requests the remand until it publishes the results of its review; and

(B) certifies to the reviewing court that the Commission has reason to believe that the policy raises serious constitutional doubts.

(4) If the Commission determines that—

(A) the reviewed decision does raise serious constitutional doubts, the Commission shall—

(i) rescind the reviewed decision;

(ii) set forth and explain the reasons for the rescission; and

(iii) issue a new decision that complies with the requirements of this Act.

> (B) the reviewed decision does not raise serious constitutional doubts—
>
> (i) the Commission may not oppose an attempt by the party seeking review—
>
> (I) to secure a judicial determination of the decision's legality, including its constitutionality; and
>
> (II) to expedite any such judicial determination;
>
> (ii) if the attempt to obtain such a judicial determination is filed before or within one year of publication in the *Federal Register* of the Commission's review denying the existence of serious constitutional doubts.

B. The Statute Explained

1. Definitions: Covered Decisions[59]

The term "decision" embraces both rulemakings and adjudications. Both have the ability to impact regulated entities and the public at large, so the avoidance rules should apply to both. Because the Commission cannot immediately review and reenact every policy issued before the Act's passage, the Commission's duty to explain its decisions' constitutional-doubts status attaches only to decisions finalized after the Act's effective date. Because all decisions that raise serious constitutional doubts will be held void under section 2(c), however, the Act also gives the Commission an incentive to review and justify its past decisions.

2. Avoidance of Serious Constitutional Doubts

a. Avoiding Serious Doubts: A Definition

The Act makes the FCC subject to the evolving definition of the serious-doubts canon. This version of the avoidance canon is the most appropriate of the three discussed in Part I. Under the APA, the FCC already has a duty to avoid enacting unconstitutional policies.[60] The

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59 The term "serious constitutional doubt(s)" also requires explication. Because it is so closely related to the subject of section 2 of the Act, however, it is discussed in Part II.B.2, *infra*.

60 FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1812 (2009) ("[T]he Administrative Procedure Act separately provides for setting aside agency action that is 'unlawful,' 5 U.S.C. § 706(2)(A), which of course includes unconstitutional action."). Some might argue that this duty makes the proposed statute superfluous. It does not. In the run of cases, the Act should

first version of the canon thus would not add anything to the Commission's existing obligations. The third version of the canon is too broad to be workable. First Amendment values underlie virtually all of the FCC's jurisdiction. Requiring the FCC to adopt policies free from constitutional doubt unless it could point to a "clear expression of Congress'[s] intent"[61] would immobilize the Commission and would force upon Congress virtually the entire task of communications regulation. The serious-doubts version of the canon strikes the appropriate balance between those two extremes. It sets a higher bar than does current APA review, while allowing the Commission to fulfill its purpose as an independent agent applying the law.

The Act defines the term "serious constitutional doubt" by reference to the seminal cases that established the serious-doubts version of the canon: *Crowell v. Benson* and *Ashwander v. Tennessee Valley Authority*. Continued development of the term's meaning is likely, if not inevitably, to occur. In particular, it is foreseeable that the import of the word "serious" could fluctuate over time.[62] As the standard vacillates with the Court's—and, by proxy, the American people's—tolerance for constitutional avoidance, it would be highly artificial to have the Commission's standard remain absolutely fixed. It is likely that the standard would, in actuality, be anything but.[63] The reference to the progeny of *Crowell* and *Ashwander* accounts for this likely evolution.

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deter the Commission from adopting questionable policies and would therefore prevent speech-chilling rules. If the Commission were to adopt a questionable policy, judicial review for the existence of serious doubts would likely be easier than would assessment of the actual constitutional question or somersaults of statutory construction in avoiding it. Also, the Act provides the benefit of reserving contentious decisions of free speech policy to those with stronger democratic bona fides than the FCC possesses.

61 NLRB v. Catholic Bishop, 440 U.S. 490, 507 (1979).

62 It is similarly possible that the substantive constitutional law could evolve, making a concern that was once "serious" no longer so (and vice versa), even assuming a fixed definition of the term "serious."

63 Some might allege that a dynamic definition will open the door to judicial activism and abuse. Such charges are neither uncommon nor meritless. *Cf., e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 278 (1991) (Marshall, J., dissenting) (accusing the majority of transforming a presumption into a clear statement rule in order to frustrate Congress's intent to have Title VII apply extraterritorially). Nevertheless, this critique has not persuaded Congress to amend other laws, such as 42 U.S.C. § 1983 (2006) or the Sherman Act, 15 U.S.C. § 1 (2006), to curtail courts' abilities to use common law definitions or methods to find laws' meanings. The potential for judicial activism is a serious, ongoing concern that should inspire vigilance by the Commission, Congress, and—above all—the American people. It should not, however, forestall congressional attempts to restrain agencies from trampling on individual liberties.

b. Avoiding Serious Doubts: Duty and Enforcement

Section 2 is the heart of the Act. Section 2(a) recognizes that the Commission has a duty to avoid enacting, preserving, or acting upon policies that unduly constrain free speech. A rule that would apply only to future decisions could leave many constitutionally doubtful policies in place. Such prospectivity would defeat the Act's goals of streamlining review of Commission decisions and clarifying the state of the law.

Section 2(c) gives teeth to the notion that FCC policy should not raise serious constitutional doubts. The analytical touchstone for this subsection is whether a decision *currently* raises serious constitutional doubts. Thus, because the present adverse effects of a decision would be the same regardless of whether a decision raised serious doubts when it was first made, it is irrelevant whether doubts existed when the decision was made. Similarly, even if a decision raised serious doubts when it was first made, it would nevertheless be upheld on later review if it did not raise a serious doubt at the time of that review.

This provision is straightforward, albeit controversial: voiding questions that raise serious constitutional doubts could be seen as penalizing the Commission for evolutions of the law that were unforeseeable at the time it made the challenged decision. This decision, however, is *not* intended to be punitive. Instead, it incentivizes vigilance by the Commission in reviewing its policies in light of subsequent developments in the law.[64]

3. Judicial Review

The Commission would get little deference under the FCCAA—much less than it would under traditional deference rules. The below discussion first traces administrative law's traditional deference principles and then advocates giving little deference to certain Commission actions.

a. Traditional Deference Regimes

Two deference regimes predominate in administrative law: *Chevron* and *Skidmore*. Under *Chevron U.S.A. Inc. v. Natural Resources*

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64 Although it provides a strong incentive for the Commission to reconsider its policies over time, the difference between incentive and coercion is a significant one. *Cf.* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 589–90 (1937)).

Defense Council, Inc.,[65] the FCC and other administrative agencies are eligible for strong deference to their interpretations of the statutes they implement.[66] To qualify for this deference, several criteria must be met. First, Congress must make an express or implied delegation of interpretive authority to the agency.[67] Second, the interpretation must be made via a process containing sufficient formality.[68] The final two requirements come from the oft-cited two-step test applied in *Chevron* itself: (1) "Congress [must] not [have] previously spoken to the precise question at issue," and (2) "the agency's interpretation [must be] reasonable."[69] A reviewing court must uphold any agency action that meets these requirements.[70]

Even if an agency fails to meet the requirements for strong *Chevron* deference, it still may qualify for a lesser degree of deference under *Skidmore v. Swift & Co.*[71] "'The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"[72]

b. Deference Under the FCCAA

Under the FCCAA, the Commission would receive only *Skidmore* deference for its interpretations of the statute and no deference at all for its judgments regarding the existence of serious constitutional doubts in its enactments. Strong deference to the agency's interpretations of the Act could let it evade the law's strictures. For example, it could adopt a narrow definition of what counts as a "decision," taking many of its actions outside of the FCCAA. *Some* deference is appropriate because the Commission possesses expertise in communications law, media, and technology. As such, its views de-

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65 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

66 United States v. Mead Corp., 533 U.S. 218, 229–31 (2001).

67 *Id.* at 229.

68 *Id.* at 230–31 & n.13. This test is usually satisfied only in formal and informal rulemakings and formal adjudications, though there are exceptions. *See id.*

69 *Chevron*, 467 U.S. at 842–45.

70 *Id.*

71 *Mead*, 533 U.S. at 234–38.

72 *Id.* at 228 (alteration in original) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)) (listing factors to consider when deciding how much deference to accord agency judgments, including "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position").

serve "some weight"[73] in the interpretation of the statute, though the reviewing court should remain free to fix the statute's meaning.

Also, deference to the Commission's views on the existence of serious constitutional doubts would defeat the whole purpose of the Act by transferring oversight power from reviewing courts to the Commission itself. Even without an official deference regime, however, a court would be free to accept any thorough, well-reasoned argument by the Commission on either the meaning of the Act or the existence of serious constitutional doubts.

4. Commission Reconsideration of Prior Policies

Section 3(b) of the Act requires the Commission to reconsider a decision if it ever has "reason to believe" that the decision raises serious constitutional doubts. The "reason to believe" standard is intended to prevent willful blindness on the part of the Commission. If the standard were "believes," then the Commission could deny having such a belief until it became completely clear that serious constitutional doubts existed. With the "*reason* to believe" standard, however, the Commission would have to reexamine the policy once it possessed information that *should* call into question the decision's continued freedom from serious constitutional doubts.

The Commission need not enjoin a policy it is reviewing unless it also seeks a voluntary remand from a court that is also reviewing that policy. It would not be fair to allow the Commission to keep the questionable rule in place while stalling judicial review, however. Doing so would invite abuse.

The Commission may ultimately conclude that a given policy actually does not raise serious constitutional doubts, perhaps because of an intervening Supreme Court decision or other development. If it so decides, the only cost to the Commission is that it must not attempt to frustrate further attempts to secure prompt judicial review of its decision. Examples of prohibited dilatory tactics include seeking a second voluntary remand or attempting to dispose of the case on a procedural ground rather than on the merits. This should further discourage the use of the voluntary remand as an instrument of delay.

C. Application of the FCCAA to Fox

This Section describes how *Fox* would have unfolded had the FCCAA been in place. The most desirable option would be that the

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[73] *See* Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991).

Commission, forced to justify its decision as free from serious constitutional doubts, would have realized at the outset that the cause was hopeless and would have retained its prior policy, which declined to penalize broadcasters for fleeting expletives.[74]

Failing that restraint, the Second Circuit would have held the policy void as violating section 2(c) of the FCCAA,[75] because the Court's jurisprudence makes it rather suspect whether the government may impose substantial penalties for isolated utterances of a single expletive.[76] In this counterfactual example, the Second Circuit may not even have reached the APA question on which the Supreme Court reversed.[77] Even if the Second Circuit had decided both questions, the Supreme Court likely would have either denied certiorari or would have reversed on the APA question while affirming on the FCCAA issue, thus requiring the Commission to revisit its decision regarding fleeting expletives.

III. Potential Objections

The Act faces three main objections. First is the critique that the Act would impede the resolution of crucial constitutional issues. Second, some might argue both that the serious-doubts approach would overprotect free speech values and that such overprotection is normatively undesirable. Third, some may argue that Congress, not an administrative agency, should be acting to safeguard constitutional rights.

Some commentators might first object that the FCCAA expressly endorses the federal courts' ongoing refusal to resolve difficult constitutional questions. In response, it should be noted that the Act does not worsen the problem; indeed, it merely reflects the status quo.[78]

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74 *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1809 (2009). The FCC based its previous fleeting expletives regime—"immunity for isolated indecent expletives"—on staff rulings and Commission dicta, not an express Commission holding. *Id.*

75 Although there was no monetary penalty at issue in *Fox*, *see id.* at 1808–10, any monetary penalty or other sanction based on violation of the policy would also be overturned.

76 *See, e.g.*, *id.* at 1828 (Ginsburg, J., dissenting) (noting the "long shadow the First Amendment casts over [the Commission's fleeting expletives policy]"); FCC v. Pacifica Found., 438 U.S. 726, 750 (1978) (reserving the question of whether an isolated expletive may be considered actionably indecent); *cf. id.* at 760–61 (Powell, J., dissenting) ("[T]he Court's holding today[ ] does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast . . . .").

77 *Compare Fox*, 129 S. Ct. at 1812–13 (holding that the FCC's decision did not violate the APA), *with id.* at 1813–14 (discussing the Second Circuit's holding that the decision violated the APA).

78 The only time the Commission and the courts would fall out of step would be if the

Further, if the federal government is to take a position on sensitive First Amendment issues, it seems more prudent to leave that task to Congress, the President, and the lawmaking procedures provided in Article I, Section 7.[79]

In addition, if the FCC were to receive a specific congressional command to enact policies that would raise serious constitutional doubts, that specific congressional directive would trump the general mandate of the FCCAA, thereby requiring a reviewing court to evaluate the constitutionality of the underlying statute. In such a case, if the congressional act were specific enough to direct the Commission to make a constitutionally suspect decision, then it likely would be specific enough to require the reviewing court to decide the constitutional question directly rather than avoid it under the avoidance principles discussed in Part I.

A second possible critique is that the FCCAA overprotects the substantive constitutional norms at issue—the free speech protections of the First Amendment. There are two parts to this critique: (1) as a descriptive matter, the FCCAA protects more speech than the First Amendment does; and, (2) as a normative matter, this is a bad thing.

The descriptive assessment is correct. The normative critique, however, overlooks the fact that modern First Amendment jurisprudence regularly creates prophylactic zones around First Amendment speech.[80] The void-for-vagueness and overbreadth doctrines are prominent examples of such expression-preserving prophylaxis.[81] The

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Court repudiates the serious-doubts version of the avoidance canon in favor of a different version. As noted above, however, *see supra* notes 39–46 and accompanying text, neither the narrow nor broad versions of the canon would be appropriate for the Commission. The narrow version essentially replicates the Commission's current duty to avoid adopting unconstitutional policies. *See supra* note 60 and accompanying text. The broad version would paralyze the Commission because an explicit command from Congress to adopt a certain policy would likely be rare, and the FCC could not act without such clear commands. *See supra* note 61 and accompanying text. The relatively low probability of such an abrogation, coupled with the unworkable nature of the alternatives, makes the proposed approach the most viable one.

79 *See* U.S. CONST. art. I, § 7.

80 *See, e.g.*, Cohen v. California, 403 U.S. 15, 16, 26 (1971) (invalidating a California statute prohibiting disturbing the peace by offensive conduct, where defendant was convicted for wearing a jacket bearing the statement "Fuck the Draft" in a California courthouse).

81 RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW § 20.8–.9 (4th ed. 2009). "An overbroad statute is one that is designed to burden or punish activities that are not constitutionally protected, but the statute includes within its scope activities that are protected by the First Amendment." *Id.* § 20.8(a). Although the void-for-vagueness doctrine applies to all criminal laws, not merely those involving the First Amendment, *id.* § 20.9(b), it has special force in the free speech arena because of (1) the danger of chilling fundamental rights; (2) the avoidance of selective enforcement; and (3) the need to encourage reasoned deliberation by the legislature, *see id.* § 20.9(c).

FCCAA's free speech protections accord with the broader corpus of First Amendment law, even though they extend beyond that which the Amendment itself would safeguard.

Third, one might argue that Congress should instead enact substantive First Amendment protections itself. This approach fails to appreciate the practical difficulty of enacting numerous statutes on a subject as complex and politically charged as free speech protections.[82] The debate in Congress would likely turn as much on politics and personal philosophy as considered First Amendment judgment.[83] The goal of this Essay's proposal is to ensure that policies affecting First Amendment rights are made on the firmest possible constitutional basis, a goal not served by allowing Congress to handle the matter directly. In addition, it is uncertain whether Congress would enact needed statutes, given the many costs involved. All things considered, the goals of this Essay are better served by modifying the Commission's powers rather than stripping them.

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It bears emphasizing that this Essay does not propose imposing the avoidance canon on all federal agencies, though there may be a few others that would, in fact, benefit from it.[84] Such instances would likely be rare, however, and a comprehensive survey of all federal

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82 As noted above, however, this proposal would leave to Congress the task of imposing rules that come close to infringing on the freedom of speech. Doing so would not only place that decision in democratically accountable hands but would also leave the burden of inertia in favor of greater speech protections.

83 Such a result would be contrary to the theory of due process of lawmaking, which states that lawmaking functions should be performed by the most competent and appropriately responsible institution. *See* Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 669 & n.181 (1996); *see also, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 90, 114, 116 (1976) (invalidating the Civil Service Commission's citizenship requirement because Congress and the President, not the Commission, were the actors best equipped to weigh the foreign affairs and naturalization benefits of such a requirement). Although Congress is more *politically* accountable than the Commission, it is a less appropriate institution because it lacks the substantive expertise and ability to engage in nuanced legal analysis that the Commission possesses.

84 The ubiquity of serious constitutional questions in FCC decisions makes it a strong candidate for applying avoidance, whereas most other agencies neither face such serious questions nor confront them as regularly. This Essay advocates an awareness of the circumstances in which each agency regulates, including its area of subject matter competence, the frequency with which it must make legal determinations, and the standards or rules reviewing courts are likely to apply to its decisions. With respect to the FCC, these factors counsel in favor of imposing avoidance, but this is likely an uncommon result. If other agencies' circumstances stacked up similarly, avoidance might be appropriate. The Federal Election Commission and National Labor Relations Board spring to mind as possible candidates.

agencies is beyond the scope of this Essay. For present purposes, it suffices that the FCC's unique mandate and the serious chilling effect that prolonged uncertainty could have on free speech interests justify the special treatment proposed above.

Conclusion

The Federal Communications Commission wields great power over the channels of media communication in the United States. It should not be allowed to use that power to adopt policies that seriously risk exceeding the constitutional limits of Congress's lawmaking power. To realize this constraint, Congress should enact the proposed FCC Constitutional Concerns Avoidance Act. It would require the FCC to avoid serious constitutional questions in future adjudications and rulemakings and would incentivize an ongoing review of past decisions for continued compliance with that stricture. Adopting the Act would further enhance free speech protections and the democratic values they foster and would not worsen the current pattern of nonadjudication of constitutional questions in the federal courts.