sidebar 15.4

Standard of Review of Agency Actions

The Federal Communications Commission (FCC) is charged with regulatory broadcasters. One of the controversial areas of FCC regulation concerns the censorship of indecent language in broadcasts. In a series of actions since 2003, the FCC has narrowed the permissible use of certain words. Even a one-time use of a word that inherently has a sexual connotation or a word that refers to excrement can be considered vulgar and censored as indecent.

Broadcasters challenged the FCC's penalty for broadcasting these words during the presentation portion of an awards show. The Second Circuit reversed the FCC finding the agency had not adequately reasoned its conclusion. While the Second Circuit did not reach a final conclusion on the

constitutional protection of the one-time use of certain words, it did question the FCC's conclusion.

The Supreme Court reversed the Second Circuit and reinstates the FCC's ruling and penalty. The Court relies on the long-held principle that judges should defer to the administrator's ruling unless the court finds the administrator's action was arbitrary or capricious. The Court concludes that the Second Circuit failed to apply this standard. Furthermore, the Court did not find the FCC acted in an improper manner, even though the FCC's ruling was controversial.

Source: *Federal Communications Commission v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009).

Authority Exceeded? Although it is highly unlikely that a court would hold a delegation invalid because of indefiniteness or lack of standards, from time to time courts do find that agencies exceed their authority. Courts will hold that an agency exceeds its authority if an analysis of legislative intent confirms the view that the agency has gone beyond that intent, however noble its purpose may be.

Case 15.2 presents a case that impacts all of us. Regardless of your personal views on smoking, the Supreme Court's analysis of the agency's authority to regulate

cigarettes is quite interesting. Notice how the Court struggles with the dilemma present in this case and how the rules of **administrative law** assist in reaching a decision.

case 15.2

FOOD AND DRUG ADMINISTRATION v. BROWN & WILLIAMSON TOBACCO CORPORATION

120 S. Ct. 1291 (2000)

O'CONNOR, J.: This case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use. In 1996, the Food and Drug Administration (FDA), after having expressly disavowed any such authority since its inception, asserted jurisdiction to regulate tobacco products. The FDA concluded that nicotine is a "drug" within the meaning of the Food, Drug, and Cosmetic Act (FDCA or Act), and that cigarettes and smokeless tobacco are "combination products" that deliver nicotine to the body. Pursuant to this authority, it promulgated regulations intended to reduce tobacco consumption among children and adolescents. The agency believed that, because most tobacco

consumers begin their use before reaching the age of 18, curbing tobacco use by minors could substantially reduce the prevalence of addiction in future generations and thus the incidence of tobacco-related death and disease.

Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law. And although agencies are generally entitled to deference in the interpretation of statutes that they administer, a reviewing court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.

The FDCA grants the FDA . . . the authority to regulate, among other items, "drugs" and "devices." The Act defines "drug" to include "articles (other than food) intended to affect the structure or any function of the body." It defines "device," in part, as "an instrument, apparatus, implement, machine, contrivance, . . . or other similar or related article, including any component, part, or accessory, which is . . . intended to affect the structure or any function of the body." The Act also grants the FDA the authority to regulate so-called "combination products," which "constitute a combination of a drug, device, or biologic

product." The FDA has construed this provision as giving it the discretion to regulate combination products as drugs, as devices, or as both.

On August 11, 1995, the FDA published a proposed rule concerning the sale of cigarettes and smokeless tobacco to children and adolescents. . . . A public comment period followed, during which the FDA received over 700,000 submissions, more than "at any other time in its history on any other subject."

On August 28, 1996, the FDA issued a final rule entitled "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents." The FDA determined that nicotine is a "drug" and that cigarettes and smokeless tobacco are "drug delivery devices," and therefore it had jurisdiction under the FDCA to regulate tobacco products. . . .

Based on these findings, the FDA promulgated regulations concerning tobacco products' promotion, labeling, and accessibility to children and adolescents. The access regulations prohibit the sale of cigarettes or smokeless tobacco to persons younger than 18; require retailers to verify through photo identification the age of all purchasers younger than 27; prohibit the sale of cigarettes in quantities smaller than 20; prohibit the distribution of free samples; and prohibit sales through self-service displays and vending machines except in adult-only locations. The promotion regulations require that any print advertising appear in a black-and-white, text-only format unless the publication in which it appears is read almost exclusively by adults; prohibit outdoor advertising within 1,000 feet of any public

playground or school; prohibit the distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer's brand name; and prohibit a manufacturer from sponsoring any athletic, musical, artistic, or other social or cultural event using its brand name. . . .

Respondents, a group of tobacco manufacturers, retailers, and advertisers, filed suit . . . challenging the regulations. . . .

We granted the Government's petition for certiorari to determine whether the FDA has authority under the FDCA to regulate tobacco products. . . .

A threshold issue is the appropriate framework for analyzing the FDA's assertion of authority to regulate tobacco products. Because this case involves an administrative agency's construction of a statute that it administers, our analysis is governed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778 (1984). Under *Chevron*, a reviewing court must first ask "whether Congress has directly spoken to the precise question at issue." If Congress has done so, the inquiry is at an end; the court "must give effect to the unambiguously expressed intent of Congress." But if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible. Such deference is justified because the responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones, and because of the agency's greater familiarity with the ever-

changing facts and circumstances surrounding the subjects regulated. . . .

Viewing the FDCA as a whole, it is evident that one of the Act's core objectives is to ensure that any product regulated by the FDA is "safe" and "effective" for its intended use. This essential purpose pervades the FDCA. . . .

In its rulemaking proceeding, the FDA quite exhaustively documented that "tobacco products are unsafe," "dangerous," and "cause great pain and suffering from illness." It found that the consumption of tobacco products "presents extraordinary health risks," and that "tobacco use is the single leading cause of preventable death in the United States." . . .

These findings logically imply that, if tobacco products were "devices" under the FDCA, the FDA would be required to remove them from the market. . . .