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The Quid Pro Quo for *Chevron* Deference: Enforcing the Public Participation Requirements of the Administrative Procedure Act

*by Gary F. Smith*

1. Introduction

“Administrative law is not for sissies.”¹ In 1984 the U.S. Supreme Court issued an opinion which, while little heralded at the time, has proven to be one of its most significant rulings of the past quarter century. In *Chevron USA, Inc. v. Natural Resources Defense Council*, the Court established a formal methodology for evaluating challenges to a federal agency’s interpretation of its governing statute.² Where the statute itself plainly addresses the “precise question” under review, then “that is the end of the matter” because the judiciary is “the final authority on issues of statutory construction” and must reject agency interpretations which are contrary to the plain meaning and intent of the legislation.³ Where, however, “the statute is silent or ambiguous” with respect to the specific point at issue, an agency’s “reasonable accommodation” of conflicting policies will be upheld “unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.”⁴ *Chevron* thus firmly held that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation” made by the agency.⁵

In the years following *Chevron*, courts have become increasingly reluctant to sustain substantive statutory challenges to federal agency policies.⁶ Indeed, judges and commentators repeatedly have warned that judicial deference to agency positions under *Chevron* “has the potential to become a self-perpetuating judicial abdication rather than judicial review.”⁷ However, an agency’s right to raise the potent shield of deference to ward off a substantive challenge to one of its rules comes with a price—public participation in the rule-making process.

The substantial deference bestowed by *Chevron* is generally available only to so-called legislative rules promulgat-

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³ *Id* at 842–43 & n.9.
⁴ *Id* at 841, 845.
⁵ *Id* at 844.
⁶ See notes 63–64 infra and accompanying text.
ed by an agency which has been delegated authority to "formulate[] policy" and "to fill any gap left, implicitly or explicitly, by Congress" in creating the statutory scheme.8 In other words, "a precondition to deference under Chevron is congressional delegation of administrative authority,"9 and indeed only through a congressional grant of such legislative power are agency rules and regulations imbued with "the force and effect of law."10 All such legislative rules must be adopted in accordance with the notice-and-comment procedures set forth in the Administrative Procedure Act (APA).11 Agency pronouncements "cannot be afforded the force and effect of law if not promulgated pursuant to the statutory procedural minimum"12 required by the APA.

The Supreme Court has stated that "[t]he Administrative Procedure Act was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."13 Unless an agency demonstrates that a rule or policy not subject to the notice-and-comment process of the APA falls within a statutory exemption to that process, the rule is "procedurally invalid" and unenforceable without regard to the rule's "substantive validity."14 Moreover, such nonbinding "interpretive" rules generally will not be accorded, on their merits, the substantial deference reserved by Chevron for "full dress regulations . . . adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation."15 As one court has put it, "If the quid pro quo of allowing an agency to promulgate such rules is that they will be promulgated with the benefit of public input . . ."16

The APA notice-and-comment framework creates a pre-publication dialogue which allows the agency to educate itself on the full range of interests the rule affects, and re-introduces a representative public voice, thus ensuring fairness to affected parties after governmental authority has been delegated to unrepresentative agencies, through sensitive, efficient governmental decision-making.17

Throughout the federal government, public programs of all varieties currently are being dismantled or restructured due to crippling budget reductions and sweeping "reform" efforts. In their haste to implement these statutorily driven changes, federal agencies may increasingly ignore their obligation, under the APA, to subject significant regulatory changes to the test of public criticism "at their still formative stages" before they become "chiseled into bureaucratic stone."18 Even greater rule-making pres-

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8 Chevron, 467 U.S. at 855; see pt. III B infra.
11 Administrative Procedure Act (APA), 5 U.S.C. §§ 553 et seq.
14 Mt. Diablo Hosp. Dist. v. Bowen, 800 F.2d 951, 955 (9th Cir. 1986); see Chrysler Corp., 441 U.S. at 314-16.
17 Alcala v. Block, 716 F.2d 593, 611 (9th Cir. 1983) (citations omitted).
18 Id. at 610.
sures may be placed upon state agencies, which often are subjected to notice-and-comment requirements under analogous state APA statutes. T
Poverty law advocates representing clients dev
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assed by the effect of new agency policies should be aware that rules and reg
ulations adopted without the public participa
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tion required by the APA (and its state counterparts) may be extremely vulnerable to procedural attacks upon

II. The Import of Chevron
A. Refinement of the Deference
  Doctrine

Long before Chevron's "watershed" expansion of the judicial deference doctrine,21 the courts had acknowledged that an agency's views on the meaning of its governing statute, while not controlling, might be entitled to "considerable weight"22 but that "[t]he weight of such a 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."22

Under this traditional notion of deference, the task of the reviewing court was to "carefully analyze the circumstances of each case to determine whether deference was due and, if so, how much."23 Two decades before Chevron, the Supreme Court, while confirming that "[t]he construction put on a statute by the agency charged with administering it is entitled to deference by the courts," firmly cautioned that judges "are not obliged to stand aside and rubberstamp their affirmation of administra
tive decisions that they deem inconsistent with a statutory mandate or that frustrate a congressional policy underlying a statute."24 Chevron itself cited such cases with approval,25 and in a contemporaneous opinion the Court emphasized that "deference is not to be a device that emasculates judicial review."26 Only four years after Chevron, however, a veteran federal circuit judge noted the increasing absence of the type of searching judicial scrutiny contemplated under traditional deference doctrine and warned that "indiscriminate judicial deference under Chevron may amount to judicial abdication."27

Chevron itself presented extremely technical and scientific issues concerning the validity of Environmental Protection Agency regulations governing standards for the issuance of certain air quality permits.28 It is hardly surprising that the Court deferred to the agency's expertise: "[T]he regulatory scheme is technical and complex, the agency considered the manner in a detailed and reasoned fashion, and the decision involves reconciling conflicting principles."29 Such deference was soon extended to recognize the alleged "significant expertise" brought to bear on the adoption of "complex and highly technical" regulations governing the administration of public benefit pro-

19 See pt. III C infra.
20 Knoll, 61 F.4d at 185 (Nygaard, J., dissenting).
21 Chevron, 467 U.S. at 864.
25 Chevron, 467 U.S. at 843 n.9, citing id. at 272.
28 Chevron, 467 U.S. at 840. Indeed, the Court's description of the formal rule-making proceedings conducted by the Environmental Protection Agency (EPA) is itself nearly indecipherable: id. at 854-59.
29 Id. at 865.
B. The Distinction Between “Legislative” and “Interpretive” Rules for Purposes of Deference

As noted above, the regulations to which the Court accorded substantial deference in *Chevron* were “legislative” in nature, rooted in a congressional delegation of rule-making authority to the agency. As described in an oft-cited opinion by the D.C. Circuit, such rules can be issued only if Congress has delegated to the agency the power to promulgate binding regulations in the relevant area. Legislative rules thus implement congressional intent; they effectuate statutory purposes. In so doing, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly confine the discretion of agency officials by largely determining the matter addressed. Finally, legislative rules have substantive legal effect.

Legislative rules, if properly promulgated, carry the full “force and effect of law.” They are accorded substantial deference on judicial review and will be upheld against substantive challenges so long as they represent the agencies’ “reasonable judgments” with respect to

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92 *Chevron*, 467 U.S. at 866.
93 *Knoll*, 467 U.S. at 195 (Scalia, J., dissenting).
94 Id. at 195-96 (discussing lack of agency responsiveness due to superior expertise and the phenomenon of “agency capture”).
96 Oregon v. Bureau of Land Management, 876 F.2d 1419, 1425 (9th Cir. 1989), citing *Chevron*, 467 U.S. at 843, n.9.
97 Marbury v. Madison, 5 U.S. 137, 177 (1803).
98 See note 8 supra and accompanying text.
99 *Chevron*, 467 U.S. at 843-44.
101 *Chrysler Corp.*, 441 U.S. at 518, Francis, 432 U.S. at 425 n.9.
Hot Lines

Programs considering whether to switch to a centralized intake system, or hot line, can seek information from the Technical Assistance/Hot Line Clearinghouse Project.

This joint project of the Administration on Aging, the Coordinated Advice and Referral Program for Legal Services (CARPLS), and the National Clearinghouse for Legal Services (NCLS) disseminates useful materials about hot lines.

An index of the materials appeared for the first time in the December 1996 CLEARINGHOUSE REVIEW. All of the materials are—or will soon be—available on disks.

To order the index and/or the indexed documents use the order form found at the back of this issue or contact NCLS, 205 W. Monroe St., 2d Floor, Chicago, IL 60606-5013; E-mail N0111 or nchs@interaccess.com; fax (312) 263-3846 or (312) 263-4608; phone (312) 263-3830.

the "meaning of ambiguous terms in statutes that they are charged with administering." Where Congress has "explicitly" directed the agency to promulgate rules on a specific issue (as opposed to the "implicit" delegation set forth in a more general statutory grant of rule-making authority), an even more deferential standard is applicable; such rules will not be disturbed unless they are "arbitrary, capricious, or manifestly contrary to the statute."

So-called interpretive rules, on the other hand,

are not determinative of issues or rights addressed. They express the agency's intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping measures organizing agency activities. They do not, however, foreclose alternatives courses of action or conclusively affect rights of private parties. Although an agency empowered to enact legislative rules may choose to issue non-legislative rule-making statements, an agency without legislative rule-making authority may issue only non-binding statements.

Under traditional canons of statutory construction, interpretive rules "carry no more weight on judicial review [of their merits] than their inherent persuasiveness commands." Thus, "[i]n reviewing an interpretive rule, [courts] are free to substitute their own judgment on the validity of the rule in light of the statute and the regulations."

In the years following Chevron, the Supreme Court on several occasions has reaffirmed that interpretive rules, while entitled to "some weight" on judicial review, do not deserve "the same deference as norms that derive from the [agency's] delegated lawmaking process." As one court candidly has put it, "[t]his is not to say that interpretive rules, while undeserving of substantial deference under Chevron, do not warrant any deference from a reviewing court. It simply means that we do not "rubberstamp" these rules."

Although interpretive rules need not be subject to the formalities of the APA,

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33 Smiley, 116 S. Ct. at 1733, citing Chevron, 467 U.S. at 842-43.
34 Chevron, 467 U.S. at 844; Bowen v. Yuckert, 482 U.S. 137, 142 (1987); see Tovar v. U.S. Postal Serv., 5 F.3d 1271, 1270-77 (9th Cir. 1993) (discussing difference in standards).
35 Balterton, 698 F.2d at 701-2 (citations omitted).
36 Id. at 702.
37 Louisiana Pac. Corp. v. Block, 699 F.2d 1205, 1217 (9th Cir. 1982). See also Sierra Club v. Watt, 608 F. Supp. 305, 329 (E.D. Cal. 1985) (interpretive rules are "freely reviewable").
any legislative rules which an agency intends to have substantive or binding effect upon the public must be promulgated in accordance with the APA's notice and comment requirements. Public participation in the rule-making process is therefore a necessary predicate for the substantial deference with which the courts review the validity of legislative rules.

Only statutory interpretations by agencies with rule-making powers deserve substantial deference. The principal rationale underlying this deference is that in this context the agency acts as a congressional proxy; Congress develops the statutory framework and directs the agency to flesh out the operational details. But Congress does not permit the agency to run free in this endeavor; the Administrative Procedure Act establishes certain procedures that the agency must follow. Chief among them is the notice-and-comment provision of the APA. 5 U.S.C. Section 553. This rulemaking process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny. It is this process that entitles the administrative rules to deference. 51

Accordingly, an "agency cannot ... contend that courts must accord to its policy the deference due a legislative rule when the agency has not followed the [notice and comment] procedures associated with force of law rule-making." 52 In other words, "agency attentiveness to parties' arguments must come sooner or later," and the agency must choose either to "pay now," through notice-and-comment rule-making, or "pay later" on substantive judicial review, where its "disregard of significant policy arguments will clearly count against it." 53

Recently some courts have suggested that, in the wake of Chevron, substantial deference should be accorded to interpretive as well as legislative rules. 54 The overwhelming position of the federal courts of appeals is to the contrary, and the proposal has been subject to vigorous academic and judicial criticism. 55 As one federal circuit judge recently has argued:

"[T]here is a great danger in giving Chevron deference (and often, legislative effect) to rules promulgated with the benefit of

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51 Field, 44 F.3d at 442 (emphasis supplied). See also Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1028 (D.C. Cir. 1978) ("In short, we are willing to entrust the agency with wide-ranging regulatory discretion ... so long as we are assured that its promulgation process provides a degree of public awareness, understanding, and participation.").
52 Doe v. Reno, 910 F.2d 1401, 1416 (7th Cir. 1987).
54 See, e.g., Knoll, 61 F.3d at 182, Health Ins. Assn of Am. v. Shahla, 23 F.3d 412, 424 n.8 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 1095 (1995). Justice Scalia subscribes to this view as well, Arabian Am. Oil Co., 499 U.S. at 260 (Scalia, J., concurring) (precedent according less deference to interpretive rules is an "anachronism").
55 For a thorough and scholarly discussion of this issue see Judge Nygaard's forceful dissent in Knoll, 61 F.3d at 198-94 & n.11 (collecting cases). See also, e.g., 1 Kenneth Davis & Richard Pierce, Administrative Law Treatise sec. 1.5, at 119-20 (Chevron deference inappropriate for nonlegislative rules).
Despite periodic reassurances from the courts that “deference is not abdication,” there is no doubt that Chevron poses a daunting hurdle to plaintiffs attacking agency rules as inconsistent with statutory intent.

formal formats. . . . Worse, it results in private parties . . . being bound “by a proposition they had no opportunity to shape and will have no meaningful opportunity to challenge when it is applied to them.” . . . I find such a result both politically undemocratic and jurisprudentially odious. 56

C. The Effect of Chevron upon Substantive Challenges to the Validity of Agency Rules

Despite periodic reassurances from the courts that “deference is not abdication,” 57 there is no doubt that Chevron poses a daunting hurdle to plaintiffs attacking agency rules as inconsistent with statutory intent. Applying the first step of the now familiar statutory construction paradigm which Chevron established, courts often find it “difficult indeed” to conclude that the meaning of a legislative term vigorously disputed by federal officials, lawyers for regulated entities, and perhaps even other judges is sufficiently “unambiguous” to disregard the agency’s interpretation. 58 Nevertheless, the relatively few successful challenges to agency rules nearly always prevail on this first prong of the Chevron analysis. 59 In the far more typical case, where the court determines that the statutory language is silent or unclear with respect to the question at issue and that the agency’s interpretation is therefore entitled to deference, the inquiry becomes “not whether the agency’s position represents the best interpretation of the statute, but whether it represents a reasonable one.” 60 Almost invariably, “the answer is obviously yes,” 61 and cases which invalidate administrative rules as “unreasonable” in the absence of controlling, contrary statutory language are quite rare. 62

Poverty law advocates, of course, have developed significant expertise in litigating statutory challenges to administrative policies and regulations in areas such as Aid to Families with Dependent Children, the Food Stamp Program, Medicare and Medicaid, and social security and Supplemental Security Income. In recent years, some courts still have been persuaded—inaudibly on the ground that the agency’s position transgressed a clear and contrary statutory mandate—to invalidate agency policies which have disadvantaged low-income clients. 63 Despite periodic successes, however, in the years since Chevron the losing side of this account ledger has lengthened dramatically, and


57 Arabian Am. Oil Co., 499 U.S. at 260 (Scalia, J., concurring).

58 Smiley, 116 S. Ct. at 1732 (disputed term at issue could hardly be characterized as unambiguous, given split among appellate courts—and division of judges within individual panels—as to its meaning).


60 Id.

61 Id.


III. Challenges to the Procedural Validity of Agency Rules Under the Administrative Procedure Act (APA)

A. The Purpose and Intent of the APA

The cornerstone of the APA is its requirement that proposed agency rules must first be published in the Federal Register in order to provide interested parties with advance notice and “the opportunity to participate in the rulemaking through submission of written data, views, or arguments, with or without opportunity for oral presentation.” The APA was designed to ensure that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations. Through the notice-and-comment process, interested and affected parties “are enabled to communicate their concerns in a comprehensive and systematic fashion to the legislative agency.” The “obvious importance” of this process is to promote the “policy goals of maximum participation and full information.”

Robert Anthony has observed that the “values served by the legislative rule-making process are large” and include the provision of fairness to affected parties, enhancement of the accuracy and thoroughness of the agency’s deliberations, increased acceptance, effectiveness, and perceived legitimacy of the final rule, and a heightened degree of agency accountability.

In addition, the courts traditionally have sought to “ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rule-making before an informed and skeptical public” and to protect against “the imposition of [agency] sanctions at the unruled will of executive officials . . . who are not formally accountable to the electorate.” Judicial insistence upon strict compliance with the APA’s procedural requirements thus “derives from an expectation that if the agency . . .

Some courts still have been persuaded to invalidate agency policies which have disadvantaged low-income clients, invariably on the ground that the agency’s position transgressed a clear and contrary statutory mandate.

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164 See, e.g., Sullivan v. Everhart, 494 U.S. 83 (1990); Bowen v. Yuckert, 482 U.S. 137 (1987); Warren v. N.C. Dep’t of Human Resources, 65 F.3d 985 (4th Cir. 1995); Strickland v. Comm’r, Me. Dep’t of Human Servs., 48 F.3d 12 (1st Cir. 1995); Wilkes v. Gomez, 32 F.3d 1324 (8th Cir. 1994); Gundy v. Grinker, 8 F.3d 948 (2d Cir. 1993); Stowell v. Secretary of HHS, 3 F.3d 599 (1st Cir. 1993); Skidgel v. Me. Dep’t of Human Servs., 994 F.2d 990 (1st Cir. 1993); Fairley v. Sullivan, 983 F.2d 405 (2d Cir. 1993); Cervantes v. Sullivan, 964 F.2d 229 (9th Cir. 1992); Briggs v. Sullivan, 954 F.2d 534 (9th Cir. 1992); Dunn v. Secretary of HUD, 521 F.2d 965 (1st Cir. 1975).


166 Manton, 415 U.S. at 232.

167 Hector v. USDA, 82 F.3d 105, 171 (7th Cir. 1996).


171 Alvarez, 746 F.2d at 641 (citation omitted), accord Dia Navigation Co. v. Pomercy, 34 F.3d 625, 1261 (3d Cir. 1994) (en banc); Batterson, 648 F.2d at 703.
infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have negated part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . . This definition sweeps broadly "to include nearly every statement an agency may make" and indisputably includes internal agency policies, programs, circulars, guidance memoranda, and manual provisions, as well as published rules and regulations. Agency "rule making" is defined as the "process for formulating, amending, or repealing a rule," and thus the Act expressly applies to agency efforts to change existing rules or policies.

Hastily adopted administrative policies may be more vulnerable to attacks upon their method of promulgation than upon their substantive validity, and the APA is a powerful weapon for exposing such procedural infirmities.

the dangers of arbitrariness and irrationality in the formulation of rules."

Finally, the "APA rule-making requirements imposed, upon the agencies[,] a salutary discipline," which "deters casual and sloppy action and thereby forestalls the confusion and needless litigation that can result from such action." Absent the APA, "[a]gencies may yield to temptation and seek to shield their regulations from the scrutiny occasioned by notice-and-comment procedures," and the theoretical availability of substantive judicial review over the final rule would "be of little comfort to prospective commentators."

B. The Scope of the APA

The APA is applicable to any agency "rule," which is defined as "the whole or

part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . . This definition sweeps broadly "to include nearly every statement an agency may make" and indisputably includes internal agency policies, programs, circulars, guidance memoranda, and manual provisions, as well as published rules and regulations. Agency "rule making" is defined as the "process for formulating, amending, or repealing a rule," and thus the Act expressly applies to agency efforts to change existing rules or policies.

The APA procedure is not applicable to agency "orders" which are the result of an agency "adjudication." Although an agency occasionally will attempt to avoid the reach of the APA by characterizing its action as an adjudication rather than a rule, any statement which has general prospective effect will be readily identified as a rule, and in any event the "rule-making provisions of the Act . . . which are designed to assure fairness and mature consideration of rules of general application . . . may not be avoided by the process of making rules in the course of adjudicatory proceedings." Any agency "rule" which falls within the broad sweep of Section 551(4)

72 Weyhermauser, 590 F.2d at 1027–28.
73 Anthony, supra note 69, at 1374.
75 5 U.S.C. § 551(4). The definition also includes "the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances thereof or of valuations, costs, or accounting, or practices bearing on any of the foregoing." Id. Thus the APA applies to agency rate making. See, e.g., Cal Almond, Inc. v. USDA, 14 F.3d 429, 441 (9th Cir. 1993).
76 Bannerman, 698 F.2d at 700.
77 See, e.g., Mt. Diablo Hosp., 860 F.2d at 955–56; Lano v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986). See also Lincoln, 113 S. Ct. at 2034 (noting "broad definition" of rule under the APA).
81 Yester Terrace Community Council v. Girneros, 37 F.3d 442, 448 (9th Cir. 1994) (distinguishing rules from adjudicatory orders).
"presumptively requires notice-and-comment rule-making." Unless the agency demonstrates that the rule falls within a statutory exemption from such rule making, the failure to comply with the notice-and-comment process renders the rule "invalid," "void," and unenforceable, without regard to its "substantive validity." The burden falls upon the agency to justify noncompliance with the notice-and-comment requirements. The statutory exceptions to the rule-making process are "narrowly construed and only reluctantly countenanced," and the courts have "consistently declined to allow the exceptions itemized in Section 553 to swallow the APA's well-intentioned directive." The agency's own characterization of its rule is "not dispositive," and the court must "independently determine . . . whether the agency's statements were adopted according to the appropriate procedure.

In order to challenge the procedural validity of an agency rule, one need not be a member of the "regulated community" but must (1) allege an incurred or imminent threatened concrete injury, (2) show that the injury is "fairly traceable" to the challenged rule, (3) demonstrate that a favorable decision will redress the injury, and (4) show that the interests it seeks to protect are "arguably within the zone of interests to be protected" by the statute. For example, public housing tenants potentially subject to eviction by public housing authorities pursuant to a policy and grievance process promulgated by the Department of Housing and Urban Development were held to have standing to challenge the procedural validity of the policy. Although the determination of whether a given agency action is subject to the notice-and-comment requirements is "an extraordinarily case-specific endeavor," that determination is a conclusion of law which is reviewed de novo on appeal.

C. Exceptions to the Notice-and-Comment Procedures

The APA rule-making process is generally inapplicable to matters "relat-

Unless the agency demonstrates that the rule falls within a statutory exemption, the failure to comply with the notice-and-comment process renders the rule "invalid," "void," and unenforceable, without regard to its "substantive validity."
ing to agency management or personnel or to public property, loans, grants, benefits, or contracts. 94 Issues relating to "agency management or personnel" are rarely subject to procedural challenges under the APA. 95 Although agency rules pertaining to "public benefits" also are included within this exemption, the federal agencies responsible for the administration of the principal public benefit programs formally waived reliance upon this exemption long ago and are thus subject to the APA rule-making requirements. 96

In addition to these general exemptions, the APA also provides for exceptions from the rule-making process for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 97 Of this group, the exception for "interpretive" rules is by far the most critical and is subject to the vast majority of the litigation under the APA. 98 Rules pertaining to "organization, procedure, or practice" have been described as internal "housekeeping" measures, and their promulgation is rarely subject to procedural challenge. 99

As one influential opinion recognized long ago, some agency actions "combine the qualities of interpretive rules, policies, internal procedures, and legislative rules, land their legal characterization for APA rule-making purpose-

could not be accomplished merely by asking if a given agency action is one or another of such thing." 100 Thus an agency policy which on its face was issued merely to guide internal agency procedures nevertheless will be subject to the notice-and-comment process if it otherwise meets the criteria for a "legislative" rule. 101

Agencies occasionally will defend the failure to subject a rule to the notice-and-comment process on the ground that the rule constitutes an exempt "general statement of agency policy." Such statements are "issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." 102 Such a statement "is merely an announcement to the public of the policy which the agency hopes to implement in future rule-makings or adjudications." 103 Although such a statement may "guide agency personnel in the exercise of their discretion," it cannot purported to establish a "binding norm." 104 Policy statements which qualify for the rule-making exemption have thus been likened to "press releases," 105 and a rule which does not simply "set a goal that future proceedings may achieve," but rather immediately establishes a change in existing law, policy, or methodology, will be deemed a legislative rule and held to be procedurally

94 U.S.C. § 553(a)(2). "Military or foreign affairs" functions also are exempt. Id. § 553(a)(1).
98 See pt. C. infra.
99 Chrysler Corp. v. Batterson, 441 U.S. 360 & n.41, Guadalupe v. Bowen, 859 F.2d 762, 771 (9th Cir. 1988), Batterson, 697 F.2d at 702.
100 Batterson, 697 F.2d at 704.
101 Phillips Petroleum, 22 F.3d 620.
102 Lincoln, 113 S. Ct. at 2044, quoting Chrysler Corp., 441 U.S. at 302 n.31.
104 Lake Mohave Boat Owners' Ass'n, 67 F.3d at 1487.
105 Pacific Gas & Elec., 506 F.2d at 58.
invalid absent compliance with the notice-and-comment process. 106

1. The Critical Distinction Between Interpretive and Legislative Rules

Procedural challenges under the APA typically are triggered when a party is adversely affected by an agency rule or policy (e.g., an agency manual provision) which has not been promulgated in accordance with the statute. 107 The plaintiffs will contend that such a rule is legislative (or "substantive") in character and is void for noncompliance with the APA's procedural requirements, the agency, on the other hand, will claim that the rule is merely "interpreting" the underlying statutory law and is exempt from the notice-and-comment process. 108 This determination of whether a given rule is interpretive or legislative is the "central distinction among agency regulations" which must be made under the APA. 109

The courts and commentators have grappled with the "extraordinarily case-specific" interpretive/legislative rule analysis for decades. 110 The District of Columbia Circuit Court of Appeals, which has decided scores of APA procedural challenges over the years, has at different times described this legal distinction as "fuzzy," "hazy," "tenuous," "blurred," "baffling," "idosyncratic," "metaphysical," and "enshrouded in considerable smog." 111 Accordingly, "analogizing to prior cases is often of limited utility" to determining whether a given rule is interpretive or legislative in character for APA purposes. 112

In 1979 the Supreme Court stated that one "important touchstone" for determining that a given rule is legisla-

This determination of whether a given rule is interpretive or legislative is the "central distinction among agency regulations" which must be made under the APA.

tive (or "substantive") in nature, assuming promulgation pursuant to an exercise of congressionally delegated legislative authority, is whether the rule "affect[s] individual rights and responsibilities." 113 This emphasis upon the substantive effect of the rule was understandable in light of the "significant body of law" which had developed at that time suggesting that even concededly interpretive rules should be subject to the notice-and-comment process if they had a "substantial impact" on the public. 114 Over time, however, courts began a "gradual move away from looking solely into the substantiality of the impact" of the rule, pursuant to a "candid recognition that even unambiguously procedural measures affect parties to some degree." 115 As one court recently has observed, an agency rule "can virtually always be described as affecting substance, but to pursue that line of

106 Phillips Petroleum, 22 F.3d at 620, see also American Hosp. Ass'n, 854 F.2d at 1046 (agency may not apply or rely upon a general statement of policy as law).

107 See, e.g., Lincoz, 800 F.2d at 874 (Medicare beneficiaries denied reimbursement for certain medical services because of provision in agency's Carrier Manual).

108 Id.

109 Lincoln, 113 S. Ct. at 2033, quoting Chrysler Corp., 441 U.S. at 301.

110 American Hosp. Ass'n, 854 F.2d at 1045.

111 American Mining Congress, 995 F.2d at 1108-10 (citations omitted); American Hosp. Ass'n, 854 F.2d at 1046-47. See generally, e.g., Anthony, supra note 69, at 1475-74. Anthony, supra note 59, at 9-22. Other circuits, of course, have had similar difficulties in this area of the law. See, e.g., Dia Navigation Co., 54 F.3d at 1264 (procedural claims under the APA decided under judicial tests "that are often circular and usually somewhat Delphic").

112 American Hosp. Ass'n, 854 F.2d at 1045.

113 Chrysler Corp., 441 U.S. at 902.

114 See generally Ohio Dep't of Human Servs. v. Department of Health and Human Servs., 862 F.2d 1224, 1235-36 (6th Cir. 1988); American Hosp. Ass'n, 854 F.2d at 1047.

115 American Hosp. Ass'n, 854 F.2d at 1047.
analysis results in the obliteration of the distinction that Congress demanded.\footnote{116} Most courts now avoid reliance upon the "substantive" effect (or "substantial impact") of the rule, and some have explicitly replaced the "substantive/interpective" expression of the APA dichotomy with the more helpful "legislative/interpective."\footnote{117} Nevertheless, advocates seeking to characterize a rule as "legislative" for rule-making purposes should continue to emphasize its impact upon "individual rights and obligations," insofar as the Supreme Court has never questioned the validity of that test "for distinguishing those rules that may be binding or have the force of law" and are therefore subject to the notice-and-comment process.\footnote{118} In addition, courts remain cognizant that, while "not every interest qualifies for notice-and-comment" treatment, the "issue is one of degree," and some "substantive effects are sufficiently grave that notice-and-comment are needed to safeguard the policies underlying the APA."\footnote{119}

In their struggle to develop criteria with which to distinguish legislative from interpretive rules, many courts have followed the familiar standard set forth by the D.C. Circuit in \textit{Batterton v. Marshall}:

\begin{quote}
[L]egislative ... rules can be issued only if Congress has delegated to the agency the power to issue binding regulations in the relevant area. Legislative rules thus implement congressional intent, they effectuate statutory purposes. In so doing they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly construe the discretion of agency officials by largely determining the issue addressed.\footnote{120}
\end{quote}

\textit{Batterton} contrasted such legislative pronouncements with interpretive rules, which it described as "non-binding" and "not determinative of issues or rights addressed" and which "do not . . . foreclose alternative courses of action or conclusively affect rights of private parties."\footnote{121}

The Ninth Circuit, for example, frequently has cited \textit{Batterton} (as well as the Supreme Court's opinion in \textit{Chrysler Corp.}) in seeking answers to the following inquiries: (1) whether the agency promulgated the rule pursuant to delegated statutory authority;\footnote{122} (2) whether the rule "affect[s] individual rights and obligations";\footnote{123} (3) whether the rule "grants rights, imposes obligations, or produces other significant effects on private interests";\footnote{124} (4) whether the rule "create[s] law, usually implementing to an existing law";\footnote{125} (5) whether the rule "effect[s] a change in existing law or

\footnote{116}JEM Broadcasting v. FCC, 22 F.3d 320, 327 (D.C. Cir. 1994) (citation omitted).
\footnote{117}Zhang, 55 F.3d at 745 n.8. See also Dait Navigation Co., 54 F.3d at 1265; White v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993), Metropolitan Sch. Dist. of Wayne Township v. Davila, 969 F.2d 485, 488 (7th Cir. 1992), Ohio, 862 F.2d at 1254, \textit{American Hosp. Ass'n}, 834 F.2d at 1047, Rivera v. Becerra, 714 F.2d 887, 890 (9th Cir. 1983), \textit{but see Phillips Petroleum}, 22 F.3d at 620 (continuing to apply "substantial impact" test under Fifth Circuit law).
\footnote{118}\textit{Chrysler Corp.}, 441 U.S. at 302 (quotations omitted); \textit{Dait Navigation Co.}, 54 F.3d at 1265 (substantial impact of a rule still relevant to its classification for APA purposes). In its most recent discussion of the notice and comment requirement, the Supreme Court noted briefly that the rule-making process would be required if an agency rule "adopted a new position inconsistent with any of the agency's existing regulations or if it effect[ed] a substantive change in the regulations." Shalala v. Guernsey Memorial Hosp., 115 S. Ct. 1252, 1259 (1995) (citation omitted).
\footnote{119}JEM Broadcasting, 22 F.3d at 327 (citations omitted), accord \textit{Dait Navigation Co.}, 54 F.3d at 1265 (important to consider the policies underlying the APA).
\footnote{120}Batterton, 648 F.2d at 701.
\footnote{121}Id. at 702.
\footnote{122}W.C., 807 F.2d at 1504; Cukarski v. Heckler, 781 F.2d 1421, 1426 (9th Cir. 1986).
\footnote{123}W.C., 807 F.2d at 1504.
\footnote{124}Zaffarano v. Heckler, 744 F.2d 711, 714 (9th Cir. 1984).
\footnote{125}Alcaraz, 746 F.2d at 613.
policy";\(^{120}\) (6) whether the rule establishes a "binding norm" or otherwise "substantially limits an agency's discretion";\(^{127}\); and (7) whether the rule creates an "exception" to a more general statute or regulatory scheme.\(^{128}\)

Affirmative responses to any of these questions are indicative of a rule that is legislative in character and void if promulgated without prior notice and comment.\(^{129}\) Interpretive rules, by contrast, "simply clarify or explain existing laws or regulations,"\(^{130}\) do little more than track existing provisions of the relevant statute or regulations,\(^{131}\) are "hierarchical" rather than binding,\(^{132}\) and are "used more for discretionary fine-tuning than for general law making."\(^{133}\)

The courts have recognized that the application of these and similar tests for resolving procedural challenges to agency rules have produced "idiosyncratic" results on a case-by-case basis, to say the least.\(^{134}\) Accordingly, there have been efforts in recent years to formulate an analysis that looks more to the essential legal basis of the rule than to its various effects upon either the public or upon the agency. Under this view, if the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretations of those provisions, it is an interpretive rule. If, however, the rule is based on the agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.\(^{135}\)

In other words, if the policy embodied in the rule is fairly discernible from or traceable to the language of the governing statute (or other legislative rule), then it is more likely to be deemed interpretive. If, however, the governing law is silent as to the issue under consideration, then it is more likely that in promulgating the rule the agency was exercising its delegated discretion to "create new laws, rights, or duties" which are "not already outlined in the governing law itself"\(^{136}\) and therefore was engaged in legislative rule making.

This approach, while arguably better grounded in theory than the tests which focus upon the rule's effects, nevertheless can lead to "rather metaphysical" distinctions "between instances where an agency merely declares its understanding of what a statute requires (interpretive), and ones where an agency goes beyond the text of a statute (legislative)."\(^{137}\) This task of distinguishing between "construing" a statutory provision and "supplementing" it is often a difficult one because "almost every rule may seem to do

\(^{120}\) Yesler Terrace Community Council, 37 F.3d at 449, Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1989).

\(^{127}\) Mada Luna v. Fitzpatrick, 813 F.2d 1006, 1117 (9th Cir. 1987), W.C., 807 F.2d at 1509.

\(^{129}\) Mt. Diablo Hosp., 800 F.2d at 958, Limoz, 800 F.2d at 877.

\(^{130}\) See Yesler Terrace Community Council, 37 F.3d at 449 (attempting to summarize circuit standards).

\(^{131}\) Id. at 449.

\(^{132}\) Powderly, 704 F.2d at 1098.

\(^{133}\) C Havana, 781 F.2d at 1426.

\(^{134}\) Alair, 716 F.2d at 613.

\(^{135}\) American Hosp. Ass'n, 833 F.2d at 1047.

\(^{136}\) Diet Navigation Co., 54 F.3d at 1264, quoting United Technologies Corp. v. EPA, 821 F.2d 714, 719-20 (D.C. Cir. 1987).

\(^{137}\) Diet Navigation Co., 54 F.3d at 1264, quoting, inter alia, La Casa Del Conejalecente v. Sullivan, 965 F.2d 1175, 1177 (1st Cir. 1992). See also, e.g., Rocha v. National Transp. Safety Bd., 929 F.2d 14, 18 (1st Cir. 1991) (a rule which "depends upon the statute for its substantive meaning is not in itself substantive"); Rocky Mountain Helicopters, Inc. v. FAA, 971 F.2d 549, 546-47 (10th Cir. 1992) (same).
both. As one court has observed, "unless a statute or regulation is of crystalline transparency, the agency enforcing it cannot avoid interpreting it," and courts have struggled to discern how far an agency can "go beyond the text of the statute" without limiting its interpretive discretion to a "mere paraphrase" of the statutory text.

In an effort to clarify and reconcile its large body of precedent which has addressed the legislative/interpretive dichotomy over the years, a panel of the D.C. Circuit recently formulated a four-part inquiry, which it summarized as follows:

Accordingly, insofar as our cases can be reconciled at all, we think it almost exclusively on the basis of whether the purported interpretive rule has "legal effect," which in turn is best ascertained by asking (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.

This analysis appears to be gaining broader judicial and academic acceptance. Nevertheless, advocates challenging the procedural validity of a rule labeled by the agency as "interpretive" would do well to comb through all the various criteria and numerous semantic tests applied by courts trying to make the distinction because there is a good chance that under at least one of them virtually any rule at issue may be deemed "legislative" and therefore unenforceable absent compliance with the notice-and-comment process.

2. "Good Cause" Exception for Legislative Rules

Even rules which indisputably are legislative in character may be issued without resort to the APA's formal procedures "when the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." This exception generally is interpreted "extremely narrowly." A "mere recitation that good cause exists, coupled with a desire to provide immediate guidance, does not amount to good cause." "Bald assertions" and "conclusory statements" of good cause clearly are insufficient, and the courts consistently have refused to treat the

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139 American Mining Congress, 995 F.2d at 1110 (citation omitted).
140 Hector, 82 F.3d at 170.
141 Orongo Caraballo, 11 F.3d at 195.
142 American Mining Congress, 995 F.2d at 1112.
143 See, e.g., Knoll, 61 F.3d at 181; New York City Employees Retirement Sys. v. SEC, 45 F.3d 7, 15-16 (2d Cir. 1995); Anthony, supra note 50, at 15-22.
144 5 U.S.C. § 553(d)(3)(B). This exception is distinct from yet another "good-cause" provision, which allows agencies to dispense with the general thirty-day period between issuance of a properly promulgated final rule and the commencement of its effective date. Id. § 553(d)(3). For discussions of the application of this latter exception, see, e.g., Omincourt Corp. v. FCC, 76 F.3d 620, 630-31 (D.C. Cir. 1996); Cal-Almond, 14 F.3d at 442; Western Oil & Gas Ass'n v. EPA, 933 F.2d 803, 810-12 (9th Cir. 1980).
145 Alcon, 746 F.2d at 642; National Nutritional Foods Ass'n v. Kennedy, 572 F.2d 577, 584 (2d Cir. 1978).
Homeless Persons’ Eligibility for Earned Income Tax Credit

The National Law Center on Homelessness & Poverty has prepared an information packet for nonprofit organizations to assist them in obtaining the Earned Income Tax Credit (EITC) for their eligible homeless and low-income clients. Studies have shown that up to 39 percent of homeless people work, and application for the EITC can result in a significant refund.

The packet addresses who is eligible to receive the EITC and how it is affected by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. It also includes a list of agencies answering specific questions about the credit and a list of phone numbers of free tax-assistance clinics.

To obtain the free information packet, contact Antonia Fasanelli, National Law Center on Homelessness & Poverty, 918 F St. NW #412, Washington DC 20004, (202) 638-2535, fax (202) 628-2737.

D. “Statement of Basis and Purpose” Requirement

Section 553(c) of the APA requires agencies, upon adoption of rules promulgated after notice and comment, to “incorporate in the rules adopted a concise general statement of their basis and purpose.” This “basis and purpose statement” must “identify what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.” The basis and purpose statement is “not intended to be an abstract explanation addressed to imaginary complaints” but to “respond in a reasoned manner to comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule.”

Failure to publish an adequate basis and purpose statement will render a rule procedurally invalid even if it was properly subject to the notice and com-

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148 Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479, 1485 (9th Cir. 1992).
149 Levesque v. Block, 723 F.2d 175, 84 (1st Cir. 1984).
150 Action on Smoking & Health, 713 F.2d at 800; Buschmann v. Schweiker, 676 F.2d 852, 857 (9th Cir. 1982).
151 Omnicon Corp., 78 F.3d at 629.
152 See Western Oil & Gas, 633 F.2d at 812 (noting that the circuit had upheld a claim of good cause only once in all its reported decisions under the APA).
153 Cal Almond, 14 F.3d at 444 (citation omitted).
154 Action on Smoking & Health, 713 F.2d at 800.
155 See Omnicon Corp., 78 F.3d at 629–30 (court excused agency’s shortened comment period when other requirements of the process were fulfilled).
157 Rodway v. USDA, 514 F.2d 809, 817 (D.C. Cir. 1975) (citations omitted).
The issue presented is whether the final rule may be fairly characterized as a "logical outgrowth" of the proposed rule.

E. "Adequacy of Notice" Issues

Occasionally, following the agency's consideration of comments, a promulgated final rule will bear so little resemblance to the proposed rule that commenters and other affected parties will contend that "the original notice did not adequately frame the subjects for discussion" and that therefore a second round of comments addressed to the "new" rule is required. The issue presented is whether the final rule may be fairly characterized as a "logical outgrowth" of the proposed rule.

As courts have recognized, "[i]t is of course, elementary that a final rule need not be identical to the proposed rule," and indeed "[t]he whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different—and improved—from

156 St. James Hosp., 760 F.2d at 1469–70.
157 Roden v. 514 F.2d at 817; accord Amoco Oil Co. v. EPA, 501 F.2d 722, 739 (D.C. Cir. 1974).
158 Action on Smoking & Health, 713 F.2d at 799 (citation omitted).
159 Cal Almond, 714 F.2d at 443.
160 Simmons v. D.C., 829 F.2d 150, 156 (D.C. Cir. 1987).
162 The court rejected plaintiffs' challenge to the adequacy of the basis and purpose statement because the court was able to "discern the agency's path," however "skimpy" its explanation of the new rule was.
the rules originally proposed by the agency. An agency’s “change of course, so long as generally consistent with the tenor of its original proposals, indicates that the agency treats the notice and comment process seriously, and is willing to modify its position where the public’s reaction persuades the agency that its initial regulatory suggestions were flawed.” Accordingly, even the outright reversal of a proposed rule in response to public criticism may demonstrate “not that the agency acted arbitrarily, but simply that the administrative process was working.”

An agency must be able to “respond flexibly” to comments, and indeed it would be “an absurdity” to permit an agency to respond to comments with appropriate modifications “only at the peril of starting a new procedural round of commentary.” However, “a rule will be invalidated if no notice was given of an issue addressed by the final rule.” A notice must describe the range of alternatives with reasonable specificity, and notices which are too general, or which only allude to the issue raised by the final rule, will be deemed insufficient. In analyzing the adequacy of the notice, “the key focus is whether the purposes of notice and comment have been served.” Although an agency’s rule-making notice “need not identify precisely every potential regulatory change,” it must “fairly apprise interested parties of the scope and substance of the substantially revised final rule,” and any substantial changes must “relate in part to the comments received.”

The complete absence of comments relating to an issue embodied in the final rule is, of course, strongly indicative that the notice given was inadequate. Conversely, the submission of some comments addressing the issue, while “not dispositive on the question of notice, list at least probative evidence that the notice given was adequate.” However, the courts have emphasized that “if a general rule, an agency must itself provide notice of a regulatory proposal . . . if it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come—if at all—from the agency.”

Thus the fact that a few more prescient or knowledgeable parties did anticipate the disputed issue will not save a defective notice because “others possibly not so knowledgeable” were entitled to adequate warning and opportunity to present their views.

Adequate notice to the public of a proposed rule not only is demanded by basic notions of fundamental fairness to
affected parties but also serves other important policy goals underlying the APA. As the First Circuit observed,

because the public never saw this provision until the final rule was promulgated, it is not surprising that the petitioners are now raising so many challenges to this provision since this court provides the first and only forum that they have had in which to express their concerns. Had the [agency] opened a new comment period when [it] promulgated this never before proposed or foreshadowed rule, a significant number of the complaints that were before us could have been resolved by the agency or by adequately explaining why the commenters’ suggestions were not adopted.\(^{177}\)

**E. Remedial Issues**

Agency rules promulgated in violation of the APA are void and unenforceable. Any “agency action taken under a void rule has no legal effect,” and a procedurally invalid rule may not be applied to the detriment of the plaintiff.\(^{178}\) This remedy will apply without regard to the rule’s substantive validity.\(^{179}\) The denial of notice and an opportunity to comment on a proposed rule is inherently prejudicial and cannot be dismissed as a mere “technicality”:

We believe that the [APA provisions serve] an important interest, the right of the people to present their views to government agencies which increasingly permeate their lives. The interchange of ideas between the government and its citizenry provides a broader base for intelligent decision-making and promotes greater responsiveness to the needs of the people, especially in cases such as this where Congress has only roughed in [sic] its program. Indeed, a meaningful pre-publication dialogue between plaintiffs and the Secretary may have even avoided this lawsuit. . . . [The APA’s] procedural safeguards are just as important for social security recipients as they are for powerful corporations.\(^{181}\)

Thus an agency may not excuse its failure to promulgate a rule lawfully by pointing to its alleged validity on the merits because “we do not know, of course, how the [agency] would have responded”\(^{182}\) to plaintiffs’ comments if they were received and considered before the rule at issue became “chiseled into bureaucratic stone.”\(^{183}\)

Accordingly, an agency may not enforce a procedurally invalid rule unless and until it repromulgates the rule in compliance with the APA’s rule-making process. Where the agency has enforced a procedurally defective rule for a period of time, and then later (perhaps in response to a procedural challenge) subjected it to the proper process, the appropriate remedy is to make the plaintiffs whole for any loss suffered on account of the rule or policy during the period prior to its lawful promulgation.\(^{184}\) Although under extraordinary circumstances affecting the public interest a court may leave the defective rule in place pending repromulgation, the agency nevertheless will

\(^{177}\) *Natural Resources Defense Council*, 824 F.2d at 1285 (footnotes omitted).


\(^{179}\) *Mt. Diablo Hosp.*, 860 F.2d at 955; *Linez*, 890 F.2d at 878; *AFL-CIO*, 757 F.2d at 530 n.6.

\(^{180}\) *County of Del Norte v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984); *cf. Buschmann*, 676 F.2d 352, 357 (9th Cir. 1982).

\(^{181}\) *Buschmann*, 676 F.2d at 357.

\(^{182}\) *Small Refiner*, 705 F.2d at 550; *Natural Resources Defense Council*, 824 F.2d at 1285.

\(^{183}\) *Almarz*, 736 F.2d at 610.

\(^{184}\) *Buschmann*, 676 F.2d at 358; *Almarz*, 728 F.2d at 1470.
be required to comply with the notice-and-comment process and consider plaintiffs' views.\textsuperscript{185}

A procedurally deficient rule is unenforceable even if it would be upheld as substantively valid when measured against the governing statute.\textsuperscript{186} By the same token, a determination under the APA that a rule is "interpretive" in character, while disposing of any procedural challenge, does not decide "the substantive validity of that interpretation," and whether or not the rule is "an incorrect interpretation of the agency's statutory authority" presents issues of statutory construction and deference doctrine.\textsuperscript{187}

Advocates who challenge both the procedural validity and the merits of a rule or policy which was not subject to the APA process will put the agency in a difficult defensive position. If the agency argues that the merits of its rule should be accorded substantial deference, it will in effect be tagging the rule with a "legislative" label and thus leave it vulnerable to procedural attack. On the other hand, if the agency persuades the court that the rule is interpretive in nature for APA purposes, it should receive little judicial deference on review of the merits.

In \textit{Cervantes v. Sullivan}, plaintiffs challenged both the procedural and substantive validity of a Supplemental Security Income (SSI) regulation which was published in the \textit{Federal Register} but not subjected to the notice-and-comment process.\textsuperscript{188} The district court invalidated the regulation on substantive grounds without reaching plaintiffs' APA claims.\textsuperscript{189} On appeal, the Ninth Circuit, according the agency's interpretation of the SSI statute substantial deference under \textit{Chevron}, reversed and upheld the merits of the rule (again without discussing the APA claim).\textsuperscript{190} In considering plaintiffs' procedural claims on remand, the district court "agreed" with plaintiffs that the standard of review used by the \textit{court of appeals} is a strong indication that the rule is legislative and struck down the regulation for noncompliance with the APA.\textsuperscript{191} Thus, in automatically reaching for the familiar sword of deference to defend its rules against legal attack, an agency may find itself wielding a truly two-edged weapon if the complaint includes both procedural and substantive claims.

Where an agency's violation of the APA "clearly had no bearing on the procedure used or the substance of the decision reached," courts may deem the error to be harmless.\textsuperscript{192} Obviously an agency may not claim harmless error by arguing that it "would have adopted the same rule even if it had complied with the APA procedures," and therefore "[t]o avoid gutting the APA's procedural requirements, harmless error analysis . . . must

\textbf{Advocates who challenge both the procedural validity and the merits of a rule or policy which was not subject to the APA process will put the agency in a difficult defensive position.}
focus on the process as well as the result. Application of the harmless-error doctrine to APA violations is thus limited, for example, to cases involving only technical procedural defects which do not affect a party’s opportunity for a fair hearing on the rule at issue, or to cases involving alleged deficiencies in notice where the complaining party in fact had actual notice of the proposed rule and fair opportunity for comment.

G. State APA Claims

Advocates with clients harmed by rules hastily issued by state agencies should determine whether state law may provide a basis to challenge the process by which those rules were formulated. California, for example, has enacted a state APA which exceeds the federal APA in scope and effect. The state APA imposes public notice, comment, hearing, and publication requirements upon any agency “standard of general application”; the exceptions to this process are fewer in number than those of its federal counterpart and are narrowly construed. As with federal law, a failure to comply with the state APA process renders the proposed rule void and “without legal effect.” Moreover, under state law the standing requirements for challenging government policies pertaining to public rights and duties are quite relaxed. In recent months advocates in California successfully have used the state APA to block implementation of unfavorable state rules involving eligibility for food stamps and emergency medical services for noncitizens.

193 Riverbend Farms, 958 F.2d at 1487.
194 Id., Sagebrush Rebellion, 790 F.2d at 709.
195 Association of Oil Pipelines, 85 F.3d at 1432; Omniflight Corp., 78 F.3d at 630; Cal-Almond, 11 F.3d at 442; County of Del Norte, 732 F.2d at 1467.
197 Cal. Govt Code § 11342.2(g). This standard is extremely broad in its coverage; Wenzler & Kelly v. Department of Indus. Relations, 121 Cal. App. 3d 120, 127 (1981), and applies to virtually any agency statement which has “external impact” upon the public, Gierer v. Kizer, 219 Cal. App. 3d 422, 437 (1990).
198 See, e.g., Gierer, 219 Cal. App. 3d at 429 (exception for rules pertaining to internal agency management); Poschman v. Dunke, 31 Cal. App. 3d 932 (1973) (exception for “emergency” regulations).
199 Gierer, 219 Cal. App. 3d at 431.
201 Melgar v. Department of Social Servs., No. 96AS05723 (Sacramento County Super. Ct.) (Order of Oct. 31, 1996) (food stamps); Doe v. Wilson, No. 982521 (San Francisco County Super. Ct.) (Order of Nov. 26, 1996) (medical services).
IV. Conclusion

In the post-Chevron era of "deference run amok," substantive challenges to agency rules have become difficult to sustain, while poor people increasingly will suffer from the hasty judgments and ill-considered policies of budget cutting and reform-minded agency bureaucrats. The APA, however, remains a legal shield "protecting a free people from the danger of coercive state power undergirding pronouncements that lack the essential attributes of deliberativeness present in statutes." In the coming years poverty law advocates should look to that shield to obtain a measure of protection from and participation in the administrative rule-making process for their clients.

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202 Knoll, 61 F.3d at 198 (Nygaard, J., dissenting).
203 Community Nutrition Inst., 818 F.2d at 951 (Starr, J., concurring and dissenting).