

Non-Regulatory Agency Actions and Agency Inaction

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Statutory Interpretation and Regulatory Practice
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Announcements and Updates

- Practice exam – uploaded to website and available on website after class today.
 - Will post model answers and explanations on Monday, April 13.
 - Be sure to review make-up asynchronous class on legislative history prior to exam
- Final exam procedures – shorter exam, more flexible time slot to take exam itself.
- Review session – voluntary, after final class
- Feedback – diploma privilege?



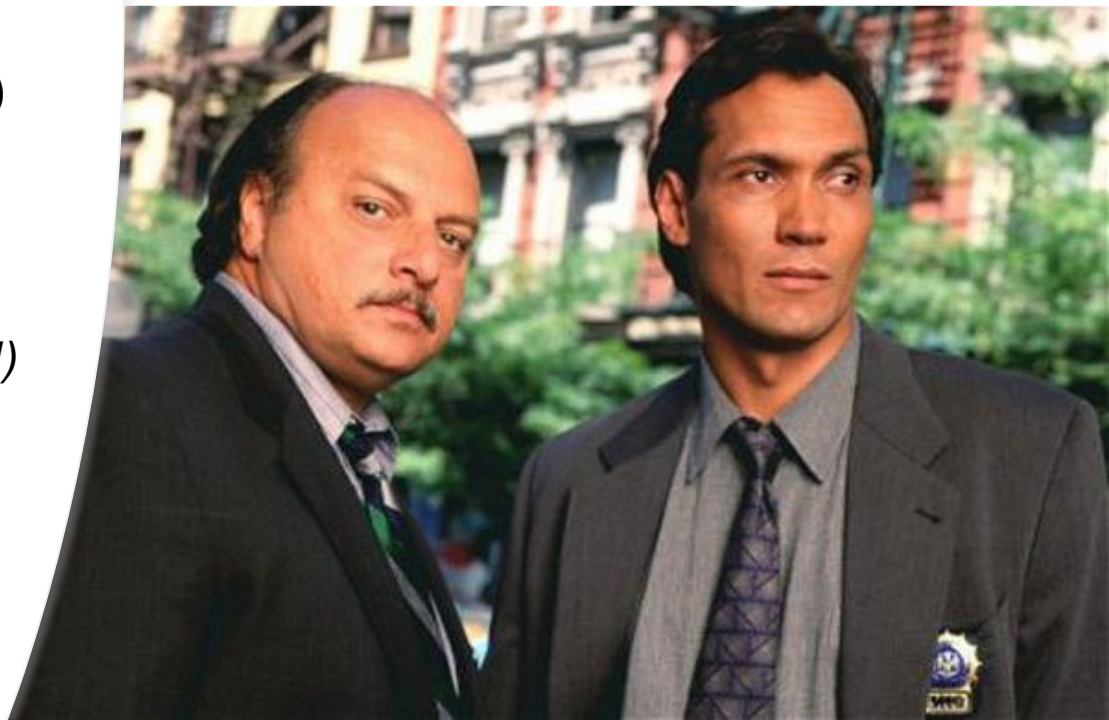
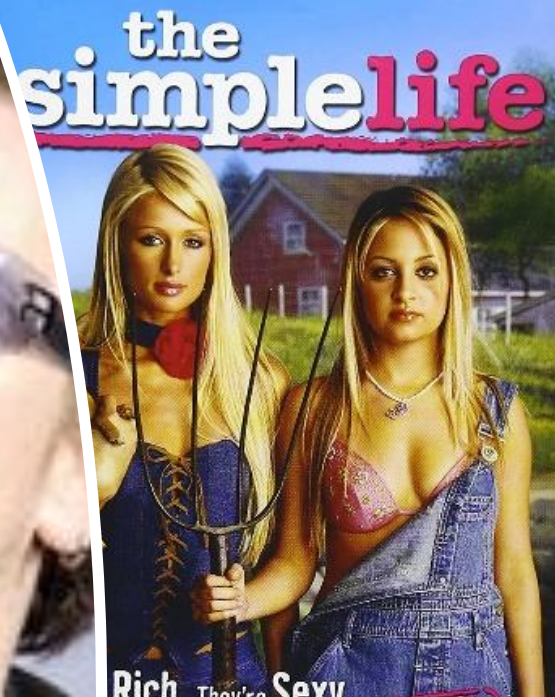
Quick look back: Agency Adjudication

- Remember -- “Rules” vs “Orders”, and informal vs. formal methods of action

	Rules	Orders (or Adjudications)
Formal	Rule by trial – APA section 556-557 Limited to parties; rarely used	Developing rules via case-by-case decisions in common law fashion “On The Record”
Informal	Notice-and-comment process Vast majority of agency rulemaking activity	Agencies can choose how much process to give for informal orders, but Due Process Applies

Agency Adjudications and Indecent Speech

- *Golden Globes Awards*
- *FCC v. Fox Broadcasting (Fox I)*
- *FCC v. Fox Broadcasting (Fox II)*



Key Themes for the Indecent Speech Trio

- Formal and informal rulemaking – have different procedures and judicial review under APA
- Most agency adjudication is informal, but still must meet minimal Due Process requirements
- Agencies can change course via rulemaking or orders, but
 - Still must meet arbitrary and capricious (but not more)
 - Must explain reasoning behind changes in policy or ruling
 - The paradox of *stare decisis*
- Advantages and disadvantages of adjudication vs. rulemaking



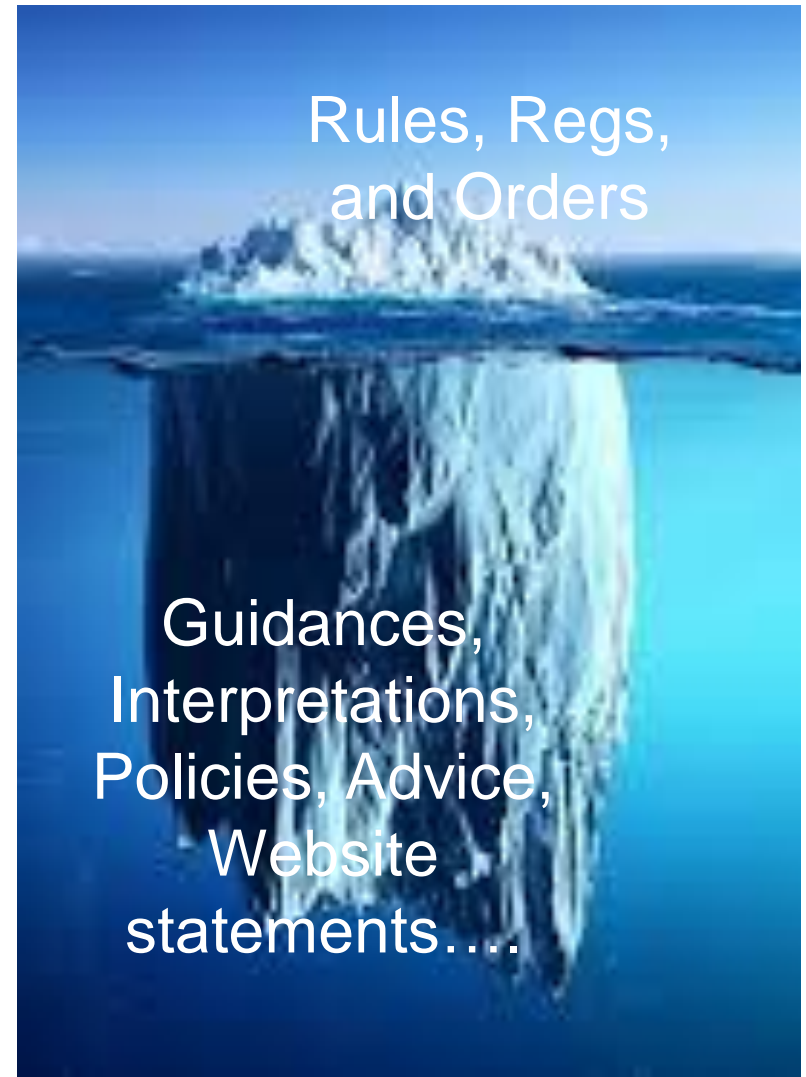
Other Forms of Agency Action

- It's not all regulations and orders...
- The administrative law iceberg



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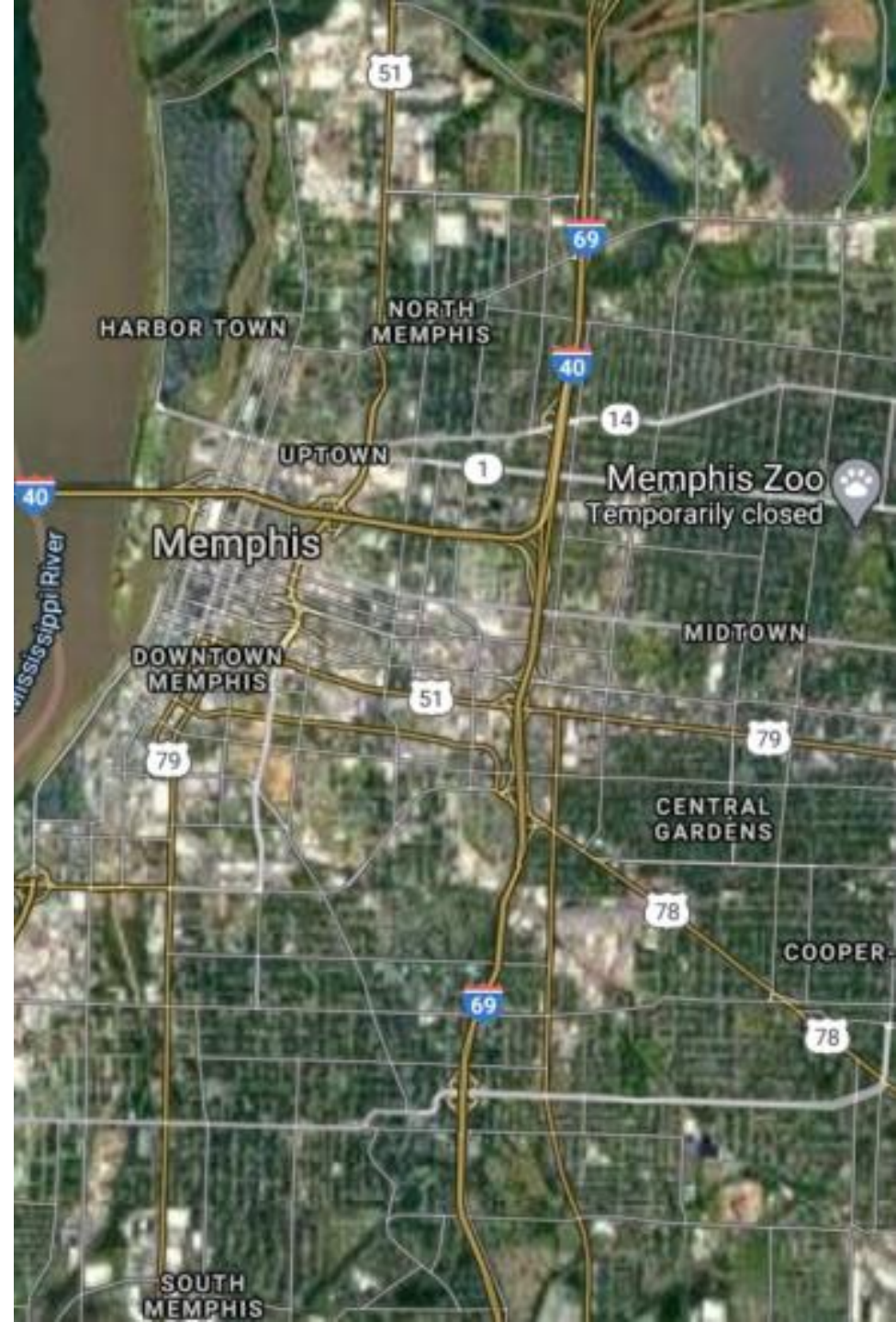
Other Forms of Agency Action

- So how do courts review this type of informal agency action?
 - APA 701(a) – “committed to agency discretion by law”
 - Statutory prohibition on judicial review (it happens)
 - NOTE – no notice and comment process needed for “interpretative rules” or “general statements of policy” (APA 553(b)(3)(A))



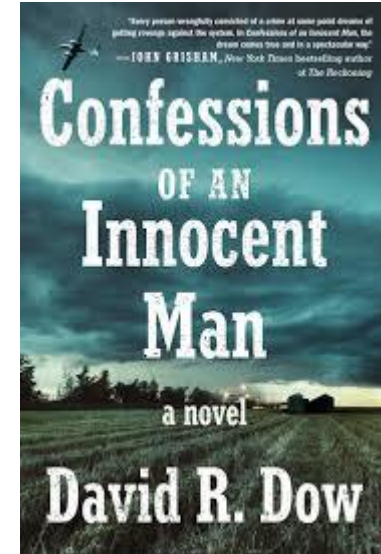
Citizens to Preserve Overton Park v. Volpe

- Decision at issue?
- Basis for judicial review?
- Why not leave to the Secretary's discretion to choose the best route?
- What standard did the Court use to review the Secretary's decision? Why?
- Substance vs Procedure?



Heckler v. Chaney

- What statute, and issue, is involved here?
- Why doesn't the APA's definition of "agency action" answer the question? See APA 551(13)
- What presumption does Justice Rehnquist create here? Why?
- How does Justice Rehnquist's conclusion differ from Justice Marshall's concurrence?
- What incentives does this presumption create for agencies? Can you get around it as an advocate?



Massachusetts v. EPA

- *Brown v. Board of Education* for environmental law
- Focus on its admin dimension:
 - Why not a simple *Heckler* ruling?
 - What did EPA get wrong when it rejected the power to regulate greenhouse gases?
 - Why didn't EPA have discretion to not take action?
- What's the remedy for agency inaction here?



Next class – *Chevron* and *Skidmore* doctrine

- Judicial review of agency statutory interpretations
- Hugely contentious and likely target of new Supreme Court majority
- Stay tuned, and take note!





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