suffering from impairments of "comparable severity" to those which would entitle an adult to benefits, and the Court believed that the HHS rule would inevitably deny benefits to some children who met that statutory standard. Thus, although the Court has strongly supported the use of rulemaking, it also acknowledges that an agency's rulemaking power is circumscribed by whatever substantive provisions define the agency's regulatory authority.

1. B. SUMMARY JUDGMENT

Another way in which an agency can avoid unnecessary hearings is to adopt a summary judgment procedure. For the most part, administrative summary judgment rules are similar to Rule 56 of the Federal Rules of Civil Procedure: a judgment on the merits may be rendered without hearing when there is no genuine issue of material 298

fact to be tried. Kourouma v. FERC, 723 F.3d 274 (D.C. Cir. 2013). An agency, however, typically has much wider substantive policymaking authority than a court. It can sometimes use this authority to redefine the underlying legal standards, and then enter summary judgment against parties who fail to show a triable

issue under the new standards.

The Supreme Court addressed one example of this technique in Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973). In 1962, Congress directed the Food and Drug Administration to withdraw from the market any therapeutic drug that could not be proved by its manufacturer to be effective. More than 16,000 claims of effectiveness had to be reviewed, yet the statute required the agency to give a manufacturer "due notice and opportunity for hearing" before withdrawing approval of any drug. To cope with its massive assignment, the FDA promulgated rules stating that it would evaluate the effectiveness of a given drug only on the basis of adequate and well-controlled clinical studies, not anecdotal reports from sources such as practicing physicians. The agency also adopted a summary judgment procedure, under which a manufacturer facing disapproval of a drug would be denied a hearing unless it could demonstrate in advance that it could present a "genuine and substantial issue of fact" under the new rules. In *Hynson,* a company that had been subjected to summary judgment sought judicial review, claiming that the FDA's procedure violated its

statutory right to a full hearing. The Court generally upheld the FDA's summary judgment practice. A 299

primary factor in the Court's reasoning was the common sense notion that it would be pointless to hold a hearing if the challenging party had no chance of succeeding on the merits. It was also clear that the FDA could not accomplish its statutory mission of getting ineffective drugs off the market if it were obliged to grant a trial-type hearing on every claim, however insubstantial.

The Supreme Court's support for summary judgment has continued since *Hynson*, see Costle v. Pacific Legal Found., 445 U.S. 198 (1980), and its use in the agencies seems to be growing. Nevertheless, judges have drawn upon their experience in civil litigation to prevent agencies from abusing the device. Thus, when courts have found that the parties to a case have each submitted evidence on a disputed proposition, so as to create a genuine issue of material fact, they have invalidated administrative summary judgments and required the agency to allow full evidentiary proceedings, just as they would do in a civil case. See, e.g., Crestview Parke Care Center v. Thompson, 373 F.3d 743 (6th Cir. 2004); Rogers Corp. v. EPA, 275 F.3d 1096

(D.C. Cir. 2002).

1. C. OFFICIAL NOTICE

In the same manner that courts can bypass the normal process of proof by taking judicial notice of facts, administrative agencies sometimes overcome deficiencies in the record of a formal proceeding by taking "official notice" of material facts. Indeed, agencies enjoy considerably wider power than courts to dispense with formal proof. In federal courts, for

example, the rules of evidence limit judicial notice of adjudicative facts to propositions that are "beyond reasonable dispute, in that [they are] either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). These strict limits are unsuitable for administrative agencies, which often are created precisely so that they can become repositories of knowledge and expertise. Because they are continuously active in the fields of their specialties, agency officials are frequently aware of extra-record facts that bear on

cases pending before them. A liberal system of official notice can contribute to the convenience and efficiency of the decisional process, by avoiding the need for repetitive, time-consuming proof of matters that have already been thoroughly investigated.

It is sometimes argued that an agency should have especially broad freedom to take official notice of "legislative" facts (general facts bearing on law or policy) as opposed to "adjudicative" facts (facts concerning the immediate parties to a case). This proposition is implicit in the above-mentioned evidence rule, which applies only to adjudicative facts and thus imposes no curbs at all on judicial notice of legislative facts. Fed. R. Evid. 201(a). The distinction rests on the widely held belief that trial-type processes are relatively unhelpful in the development of legislative facts (see pp. 235–236 supra), and thus may be foregone more readily when an agency wants to rely on such facts. Indeed, the

procedures for taking official notice in an adjudication, described later in this section, closely resemble the procedures that agencies typically use in the rulemaking process, which is expressly designed for resolution of legislative fact issues.

One should not assume, however, that an agency may never take official notice of an adjudicative fact except in the circumstances specified in Rule 201(b). For example, in Market Street Ry. v. Railroad Comm'n, 324 U.S. 548 (1945), the agency was setting rates for a streetcar company and needed to know the company's operating revenues for 1943. It took notice of figures in the company's monthly operating reports, which had been filed with it after the record closed. The Supreme Court upheld this procedure, noting that the company had never contended that the figures in its own reports were erroneous or had been cited misleadingly. The modern trend, then, is to apply a "rule of convenience" under which a wide range of facts, both legislative and adjudicative, are potentially susceptible of official notice. Castillo-Villagra v. INS, 972 F.2d 1017 (9th Cir. 1992).

However, official notice is often confused with the application of expertise in the *evaluation of evidence*. In drawing conclusions from a record, administrative law judges and agencies may rely on their special skills in engineering, economics, medicine, etc., just as judges may freely use their legal skills in reading statutes and applying decided cases in the