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# Timing Judicial Review of Agency Interpretations in *Chevron*'s Shadow

**ABSTRACT.** The Administrative Procedure Act (APA) permits judicial review of "final agency action." Agency action is "final" when it is both the "consummation of the agency's decision making process" and a decision by which "rights or obligations have been determined," or from which "legal consequences will flow." Some forms of agency action uncontroversially satisfy both of these conditions for finality. For example, "legislative rules" promulgated by agencies pursuant to congressional delegations of policy-making authority after a period of public notice and comment are certainly "final agency action" that can be challenged before their application. Other forms of agency action pose challenges for the finality doctrine. In particular, agencies sometimes issue nonlegislative "interpretative rules" construing arguably ambiguous statutory provisions. While these interpretative rules are often the consummation of an agency's decision-making process, do they determine rights or obligations? Do legal consequences flow from their issuance? The Supreme Court has only given this topic cursory treatment, and its precedents on the subject probably confuse more than they clarify. Given this lack of guidance, the courts of appeals have struggled to coalesce around a single approach to understanding the finality of interpretative rules. That said, some courts, including the D.C. Circuit, have demonstrated increasing interest in a bright-line rule deeming interpretative rules as nonfinal prior to enforcement. On this view, interpretative rules never determine rights or obligations, or produce legal consequences until they are applied to a regulated party. At the same time, however, several commentators have also argued that the legal-consequence condition for finality should be eliminated altogether.

This Note argues that the categorical exclusion of interpretative rules from the ambit of "final agency action" is presently unwarranted. It begins by canvassing the present doctrine and finding it wanting. The Note then turns to the contemporaneous history surrounding the APA's enactment for answers. Examining that history, it demonstrates that there existed a broad consensus shortly before and after the APA's adoption that legal consequence was the central determinant for whether a given agency action was judicially reviewable. Therefore, the academic critics of the finality doctrine's legal-consequence condition appear to have missed the mark. Moreover, the history demonstrates that while courts sometimes deferred to an agency's interpretative rules, those rules lacked the force of law because, at the end of the day, the courts always remained free to substitute their preferred statutory interpretation for the agency's. At first blush, therefore, it might appear that the categorical exclusion of interpretative rules from "final agency action" has a sound historic pedigree. However, the historical unreviewability of interpretative rules hinged on the premise that the rules could never bind the courts. But the current regime of *Chevron* deference undermines that premise and should change the calculus for whether interpretative rules produce the legal

consequences sufficient for finality. All told, any interpretative rule that is eligible for *Chevron* deference should also be "final agency action" under the APA. The Note concludes by explaining how a unified deference-finality doctrine might operate in practice.

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## NOTE CONTENTS

## INTRODUCTION

The Administrative Procedure Act of 1946 (APA) provides for judicial review of "final agency action."[1] "Agency action," as defined in the APA, covers a wide range of policy-making tools, including rules, orders, licensing, sanctions, and even failures to act.[2] But the modified term "final agency action" is undefined, and courts, along with commentators, have struggled for decades to discern what characteristics render agency action "final."[3] Certain administrative rules — nonlegislative rules — pose unique challenges for the finality doctrine.

Under the APA, a "rule," or "agency statement of general or particular applicability and future effect," can do many things.[4] Among these functions, administrative rules can "prescribe law or policy" or "interpret" a statute or other rule.[5] "Legislative rules" generally prescribe policy with the force and effect of law. When Congress delegates rulemaking authority to an agency, the agency effectively "stands in the place of Congress;" a legislative rule is therefore "binding upon all persons, and on the courts, to the same extent as a congressional statute."[6] Legislative rules, then, are uncontroversially "final agency action" that may be judicially reviewed before ever being enforced against a regulated party.[7]

But promulgating a legislative rule is not always easy. The APA demands that any binding legislative rule first be noticed to the public and subject to comment.[8] This process of notice-and-comment rulemaking can be costly and time consuming.[9] As a result, agencies increasingly make policy through "guidance"

1. 5 U.S.C. § 704 (2012).
2. *Id.* § 551(13).
3. *See infra* Part I.
4. 5 U.S.C. § 551(4).
5. *Id.*
6. Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987).
7. *See, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).
8. *See* 5 U.S.C. § 553(b)-(c).
9. *See, e.g.*, William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 69 (2004) (finding the average interval between the initiation of research for a policy and the publication of a proposed rule implementing that policy to be 4.3 years; finding the average length of the comment period to be 2.2 years).

or "nonlegislative rules"[10] that are exempted from notice-and-comment rulemaking.[11] This Note addresses whether these nonlegislative rules, particularly interpretative rules, are "final agency action" and therefore subject to pre-enforcement judicial review.

For a regulated party, obtaining judicial review of a nonlegislative rule before it is enforced matters a great deal. Otherwise, that party faces the undesirable choice of either complying with a dubious and possibly onerous policy or choosing to violate the rule, take its chances in court, and risk sanction. Imagine a car manufacturer. Suppose that the Clean Air Act (CAA) grants the Environmental Protection Agency (EPA) authority to demand a recall when a substantial number of any class of vehicles do not conform to EPA emission standards "when in actual use throughout their useful life."[12] Finally, suppose EPA issues an interpretative rule stating that it interprets that provision of the CAA to authorize EPA to recall *all* members of a nonconforming class of vehicles, regardless of the age or mileage of any given member.[13]

The car manufacturer might find the interpretative rule legally dubious. If EPA ever cites or relies upon that rule when recalling one of its vehicle classes, the manufacturer would certainly be able to challenge it at that time. And if the interpretative rule is a final agency action that leaves the manufacturer "adversely affected or aggrieved,"[14] it could challenge the rule upon its issuance. However, if the interpretative rule is not final agency action, the carmaker cannot challenge it until it is applied. In many cases, the car manufacturer will simply comply with the interpretative rule if it cannot challenge it when it is promulgated. As the government has itself acknowledged, even agency guidance documents "can

10. *See* Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 168 (2000); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1468-69 (1992); *see also* Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 785 (2010) ("Guidance documents greatly outnumber legislative rules . . . .").

11. 5 U.S.C. § 553(d)(2).

12. This hypothetical is based on Section 207(c)(1) of the Clean Air Act. 42 U.S.C. § 7541(c)(1) (2012).

13. This is almost exactly the interpretative rule at issue in *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984) (en banc).

14. 5 U.S.C. § 702.

have coercive effects or lead parties to alter their conduct."[15] The stakes of sorting out finality for nonlegislative rules are therefore weighty.[16]

Under the Supreme Court's current approach, agency action is final only if it is both "the 'consummation' of the agency's decision making process" and a decision by which "'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[17] Legislative rules mark the consummation of an agency's decision-making process and have legal consequences because they are legally binding.[18] Nonlegislative rules often mark the consummation of an agency's decision-making process, so long as "no further administrative process" is available to the challenging party.[19] But do nonlegislative rules determine "rights or obligations?" Do "legal consequences" flow from their issuance?

This Note advances a historical answer to these questions. To be sure, the modern administrative state scarcely resembles the fledgling bureaucracy that prompted the APA's passage. But when the APA's text answers a given legal question, that should be the end of the matter.[20] And as the Court has recently reit-

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15. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3435 (Jan. 25, 2007); *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1328 (1992); David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 305 (2010); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 407 (2007); A. Keith Lesar, Comment, *Timing of Judicial Review Under the Administrative Procedure Act*, 56 CALIF. L. REV. 1491, 1500-01 (1968).

16. Section 704 of the APA also requires that "final agency action" have "*no other adequate remedy in court*." 5 U.S.C. § 704 (2012) (emphasis added). One cannot simply assert that enforcement proceedings are always "adequate" to remedy unlawful interpretative rules. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 178 (1998) ("[E]nforcement proceedings can always provide an adequate *forum* for testing the validity of a regulation—no one thinks that courts reviewing enforcement proceedings are incapable of entertaining and deciding the validity of a regulation—but the relevant issue is whether the court at that later time will be capable of providing an adequate *remedy*, because the party may have already suffered harm that cannot be corrected by the remedies (injunctive and declaratory) then available."). The potentially coercive nature of some interpretative rules entails certain harms that cannot be adequately remedied during enforcement proceedings.

17. Bennett v. Spear, 520 U.S. 154, 178 (1997) (first quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948); then quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1970)).

18. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 (1979).

19. Ass'n of Am. R.Rs. v. Fed. R.R. Admin., 612 Fed. App'x 1, 2 (D.C. Cir. 2015).

20. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1206 (2015).

erated, it generally interprets statutes according to the relevant words' contemporaneous meaning—that is, the meaning they bore when adopted by Congress and the President.[21] The APA is no exception.

The history of the APA, including commentary published before, during, and shortly after its enactment, documents a consensus that interpretative rules and policy statements did not "have the force and effect of law"—a conclusion recently reaffirmed by the Supreme Court.[22] Moreover, although few commentators explicitly considered the availability of pre-enforcement judicial review for interpretative rules and policy statements, those who did uniformly argued that they could not be challenged prior to enforcement, largely because they did nothing more than express an agency's interpretation of a statute—an interpretation that could never bind the courts.[23]

While this historical understanding initially suggests that nonlegislative rules do not "determine rights and obligations" or produce "legal consequences," it rests on a premise that is no longer true: that an agency's interpretation of a statute could never bind the courts. Although judicial deference to administrative interpretations of statutes certainly existed before the APA,[24] this notion of deference was a far cry from the kind later adopted in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[25] Under *Chevron* deference, courts facing sufficiently ambiguous statutes *must* accept any reasonable agency statutory interpretation that meets other threshold criteria.[26]

After *Chevron*, certain nonlegislative rules interpreting ambiguous statutory provisions have the "force and effect of law" in that they are subject to the same "reasonableness" standard of review governing legislative rules. Justice Scalia expressed the point best:

> By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules' exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive

21. *See* Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014); *see also* Perrin v. United States, 444 U.S. 37, 42 (1979) ("[W]e look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961."). *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78-92 (2012) (discussing the "fixed-meaning canon").

22. *Perez*, 135 S. Ct. at 1204 (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

23. *See infra* Section II.C.

24. *See, e.g.*, Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944).

25. *See* 467 U.S. 837, 842-44 (1984).

26. *See infra* Section III.A.

> rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.[27]

For better or worse, *Chevron* deference for interpretative rules is contrary to the practice of judicial deference that existed when the APA was enacted.[28] While some have maintained that *Chevron* deference is also inconsistent with the APA itself,[29] this Note assumes that *Chevron* deference is neither precluded by the APA nor likely to be judicially or legislatively abrogated in the near future.[30]

Assuming that *Chevron* remains the law, the goal of this Note is to square *Chevron* and its progeny with the text of APA section 704. Harmonizing *Chevron* and the principles underlying the APA's finality requirement yields a simple conclusion: those nonlegislative rules that are eligible to receive *Chevron* deference have the "force and effect of law" and are therefore final agency action for which litigants can seek pre-enforcement judicial review. While some courts of appeals once recognized this link between judicial deference and finality, only one circuit — the Sixth — has maintained the connection.[31]

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**27.** *Perez*, 135 S. Ct. at 1211-12 (Scalia, J., concurring in the judgment); *see also id.* at 1221 (Thomas, J., concurring in the judgment) ("When courts give 'controlling weight' to an administrative interpretation of a regulation — instead of to the *best* interpretation of it — they effectively give the interpretation — and not the regulation — the force and effect of law.").

**28.** *See infra* notes 264-275 and accompanying text. *See generally* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017) (establishing *Chevron*'s departure from the judiciary's traditional rules of statutory interpretation prior to the APA's passage).

**29.** *See, e.g.*, Bamzai, *supra* note 28, at 1000 (stating that *Chevron* deference "cannot be squared with the text of section 706 of the APA"); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 788 (2010) ("The most startling thing about *Chevron* initially is that it appears inconsistent with the Administrative Procedure Act's ("APA") judicial review provisions."); Duffy, *supra* note 16, at 189-211.

**30.** If *Chevron* were to be abrogated or overruled, the following analysis would yield a much simpler conclusion regarding the finality of interpretative rules. Assuming that interpretative rules were only accorded interpretative weight commensurate to the interpretation's persuasive force, the generation that enacted the APA would not consider these rules eligible for pre-enforcement review. *See infra* Section II.C. While this conclusion might be important in its own right, it would yield zero practical guidance for agencies and regulated parties *today*, who must operate in *Chevron*'s shadow. Unless and until the sun sets on *Chevron* deference, parties must cope with its existence.

**31.** *See infra* Section I.C. Moreover, Professor Hickman has briefly noticed that the concept of "force of law" overlaps with the finality doctrine's concern for legal "rights and obligations." Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 472-73 n.25 (2013).

Following the Sixth Circuit's lead, this Note's approach to the finality doctrine has the advantage of reconciling finality's competing values of pragmatism and predictability.[32] Courts reviewing agency guidance should determine the level of interpretative deference *before* determining the finality of the agency action. Under such an approach, an agency is prevented from simultaneously arguing that its interpretation is both nonfinal, and thus immune from pre-enforcement review, and entitled to *Chevron* deference if a regulated party challenges it in a later litigation. Agencies would thus face a choice: either raise the shield of nonfinality today and lose the possibility of enhanced deference tomorrow, or accept that the nonlegislative rule is final agency action, seek *Chevron* deference today, and sacrifice any delay of judicial review.[33]

Part I of this Note canvasses the development of the Supreme Court's and circuit courts' doctrine of administrative finality, particularly as it relates to nonlegislative rules. Part II then examines theories of administrative law prevalent in the lead-up to the APA, as well as the circumstances surrounding the statute's adoption and early implementation. This second Part ultimately concludes that—consistent with *Bennett v. Spear*—legal effect was the critical determinant of pre-enforcement judicial review. Moreover, interpretative rules categorically lacked such legal effect because although they often received varying degrees of deference in the courts, judges were always free to reject them in favor of their own preferred reading of the statute. Finally, Part III explains how these historical understandings of reviewability, as applied to interpretative rules, must adapt to account for *Chevron* deference. This final Part will also illustrate how a post-*Chevron* approach to finality would operate in practice, applying the reconstructed doctrine to prior cases.

## I. THE CONFUSION WROUGHT BY *BENNETT V. SPEAR* AND ITS PROGENY

The APA categorizes agency action as either rulemaking or adjudication.[34] It further subdivides rulemaking into three types: legislative rules, "interpretative

Nevertheless, Professor Hickman chose not to address this question in any detail. *See id.* ("Whether nonlegislative rules that are ineligible for *Chevron* deference ought nevertheless to be justiciable as final agency action is a topic for another day.").

32. *Cf.* U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016) (emphasizing pragmatism); Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (emphasizing "clarity and predictability").

33. *See infra* Section III.B.

34. *See* 5 U.S.C. § 551(5), (7), (12) (2012); *see also* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) (distinguishing the two types of agency action).

rules," and "general statements of policy."[35] The latter two are frequently included under the umbrella of administrative guidance.[36] Litigants challenging agency guidance sometimes argue that purported interpretative rules or general statements of policy are, in fact, legislative rules and should not have been promulgated without notice and comment.[37] The categorization of agency policy making is also relevant for issues of finality. Since legislative rules are virtually always final and immediately reviewable,[38] litigants seeking to challenge an agency rule before it is enforced against them are incentivized to characterize it as legislative.[39] Unfortunately, the tests and standards courts use to sort legislative from nonlegislative rules are confused and difficult to apply—they have been described more than once as "enshrouded in considerable smog."[40]

Putting aside the lower courts' struggles to distinguish nonlegislative from legislative rules, courts have more recently exhibited confusion in determining the finality of concededly nonlegislative rules. Most notably, in a break from longstanding judicial practice, a pair of recent opinions by the D.C. Circuit held that virtually all bona fide interpretative rules and policy statements are not final unless, and until, they are relied upon to support agency action in a particular case.[41] In between these two precedents, though, another D.C. Circuit case entertained the possibility in dictum that interpretative rules could be final agency action prior to enforcement.[42] This doctrinal whiplash indicates the underlying conceptual confusion around finality. More importantly, it calls for a clarifying test to ensure that nonlegislative agency action is subject to a coherent set of finality rules.

All told, the more recent trend to question the finality of all interpretative rules and policy statements rests upon misunderstandings of the Supreme Court's finality precedents. While the D.C. Circuit has attempted to clarify and simplify the finality inquiry, its efforts obscure the Supreme Court's actual view of finality, which is itself somewhat confusing. This Part concludes that neither

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35. *See* 5 U.S.C. § 553(b)(3)(A).

36. Agencies also issue "rules of agency organization, procedure, or practice," *id.*, but these rules are not at issue in this Note.

37. *See, e.g.*, Gen. Elec. Co. v. EPA, 290 F.3d 377, 378-79 (D.C. Cir. 2002).

38. *See, e.g.*, *Nat'l Mining Ass'n*, 758 F.3d at 251.

39. *See, e.g.*, Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006).

40. Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (quoting Am. Bus. Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980)).

41. *See infra* Section I.C.

42. *See Nat'l Mining Ass'n*, 758 F.3d at 251.

the Supreme Court nor most of the courts of appeals have developed a coherent approach to the finality of nonlegislative rules.

As a remedy to the Supreme Court's doctrinal inconsistencies and the resulting confusion in the lower courts, scholars and judges should return to the history of the APA in order to better understand how the generation adopting the APA sought to balance the concerns of administrative flexibility and legal certainty that dominate the judicial discourse surrounding finality. More specifically, while some scholars think the APA's history discredits *Bennett*'s test for finality,[43] that history actually supports *Bennett*'s test. And while the D.C. Circuit increasingly maintains that nonlegislative rules can never satisfy *Bennett*, this reading of *Bennett* is unjustified in light of the APA's history. These conclusions yield a test for finality that retains the inquiry under *Bennett* (as applied to nonlegislative rules), while pragmatically recognizing the way in which nonlegislative rules can sometimes have meaningful legal consequences.

Section I.A introduces the Supreme Court's central precedent regarding administrative finality, *Bennett v. Spear*. Section I.B discusses the Supreme Court's post-*Bennett* opinions addressing the finality of interpretative rules and policy statements. Finally, Section I.C canvasses the various ways federal courts of appeals have used the *Bennett* test to determine the finality of nonlegislative rules.

### *A.* Bennett v. Spear*: The Supreme Court Distills Finality to a Two-Prong Test*

Since 1997, *Bennett v. Spear*'s[44] two-prong test has governed judicial determinations of "final agency action" under section 704. But before 1997, the Supreme Court had offered little clear-cut guidance on how to evaluate whether agency action was "final," rationalizing its somewhat unstructured precedents on administrative finality as "pragmatic" and "flexible."[45] In the 1980 case *FTC v. Standard Oil Co. of California* (*SOCAL*), the Court constructed a multi-factor balancing test for determining finality: (1) does the agency action represent a "definitive" statement of the agency's position; (2) does the action have a direct and immediate effect on the regulated party; (3) does the action have the status of law, such that immediate compliance is expected; (4) is the question presented by the challenge a legal issue fit for judicial resolution; and (5) would a pre-enforcement challenge speed enforcement of the relevant substantive statute?[46]

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**43.** *See infra* Section II.A.

**44.** Bennett v. Spear, 520 U.S. 154 (1997). For *Bennett*'s continued primacy, see U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016).

**45.** *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149-50 (1967).

**46.** *See* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 239-40 (1980).

Several of the factors the Court considered in *SOCAL* were seemingly derived from the judge-made "ripeness" doctrine, rather than section 704's text.[47] The ripeness doctrine counsels courts against "entangling themselves in abstract disagreements over administrative policies," and is designed to "protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[48] Agency rules are generally not "ripe" for judicial review until "the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him."[49] However, legislative rules are ripe upon their promulgation because "as a practical matter" they require a regulated party to "adjust his conduct immediately."[50]

Interpretative rules may be ripe depending on the circumstances of any given case. Ripeness requires courts to evaluate two factors: (1) the "fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration."[51] Issues are generally fit for judicial decision when the agency action at issue is "final" under the APA and when the issues presented are "purely legal."[52] Bracketing for now the question of finality, the validity of an interpretative rule can certainly pose a "purely legal" issue: whether an agency properly construed whatever statutory provision is at issue.[53] As for hardship to the parties, interpretative rules often "raise ripeness concerns" because of questions regarding "the binding effect of the rule."[54] Therefore, "[o]nly the strongest showing of the immediate and inescapable effect of the mere announcement of [an agency's] interpretation . . . would suffice" to justify pre-enforcement review under the ripeness doctrine.[55]

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**47.** *See, e.g.*, Solar Turbines Inc. v. Seif, 879 F.2d 1073, 1080 (3d Cir. 1989) (explaining that *SOCAL* "incorporated the ripeness standard into the standard for determining whether agency action is final").

**48.** *Abbott Labs.*, 387 U.S. at 148-49.

**49.** Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990).

**50.** *Id.*

**51.** Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003).

**52.** *Id.* at 812.

**53.** *See, e.g.*, *Abbott Labs.*, 387 U.S. at 149; *see also* Tenn. Gas Pipeline Co. v. FERC, 736 F.2d 747, 749 (D.C. Cir. 1984) (stating that the "fitness of the issues" prong for ripeness is a "commonly-met factor when administrators state their advice on what a statute means").

**54.** ACLU v. FCC, 823 F.2d 1554, 1577 (D.C. Cir. 1987).

**55.** Nat'l Ass'n of Ins. Agents, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 489 F.2d 1268, 1271 (D.C. Cir. 1974).

However, part of the reluctance to find that interpretative rules pose the practical hardship sufficient for pre-enforcement review rests on the assumed dichotomy between the "binding" quality of legislative rules (that are always ripe prior to their application against a party) and the nonbinding quality of interpretative rules. That dichotomy is itself premised on the notion that some interpretative rules' heightened deference does not imbue those rules with the force and effect of law. As described in more detail below, that same distinction also undergirds much of the hesitancy to characterize interpretative rules as "final agency action."[56] Thus, to the extent that courts grant deference to a given interpretative rule, the ripeness doctrine should also account for this very real hardship on regulated entities. In other words, the analysis presented throughout this Note counsels in favor of unifying finality and ripeness with respect to nonlegislative rules. Thus, if a nonlegislative rule is sufficiently binding to be "final agency action," the ripeness doctrine has no additional role to play.[57]

Shortly after equating several ripeness-related factors with finality in *SOCAL*, the Court began to simplify the finality inquiry. By 1983, the Court arguably narrowed the multi-factor analysis of *SOCAL* by homing in on only two considerations: (1) whether the agency action "represented a definitive statement of [the agency's] position," and (2) whether the action was one "determining the rights and obligations of the parties."[58] Seemingly taking the hint, some

**56.** *See infra* Section I.C.

**57.** In fact, perhaps the ripeness doctrine should have no role to play in APA cases whatsoever. As Professor Duffy has argued, the ripeness doctrine "has no place in the APA." Duffy, *supra* note 16, at 162. That said, to the extent ripeness persists in administrative-law doctrine, the Supreme Court has already recognized its impotency in denying pre-enforcement review to legislative rules. *See* Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 891 (1990) ("[A] regulation is not ordinarily considered the type of agency action 'ripe' for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in fashion that harms or threatens to harm him. (The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once, whether or not explicit statutory review apart from the APA is provided.)"). If interpretative rules eligible for *Chevron* deference bind the courts just as much as legislative rules, then for all intents and purposes they require a regulated party to "adjust his conduct immediately." If so, ripeness poses an equally minimal barrier for pre-enforcement review of interpretative rules.

**58.** Bell v. New Jersey, 461 U.S. 773, 780 (1983); *see also* Franklin v. Massachusetts, 505 U.S. 788, 797 (1992) ("The core question [under section 704] is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.").

lower courts likewise began to focus on only these two factors.[59] These post-*SOCAL* developments set the stage for the Court's sharpening of the finality inquiry in *Bennett v. Spear.*

*Bennett v. Spear* made explicit the Supreme Court's shift away from the pragmatic, multi-factor analysis in *SOCAL*. In its place, the Court adopted a narrower, two-prong test for finality. The petitioners in *Bennett*, a group of ranch operators and irrigation districts in Oregon, sued the Fish and Wildlife Service under the Endangered Species Act (ESA).[60] Writing for a unanimous Court, Justice Scalia held that the Service's Biological Opinion was a "final agency action" under section 704.[61] According to the Court, "two conditions must be satisfied for agency action to be 'final.'"[62] First, the action must "mark the 'consummation' of the agency's decisionmaking process"—that is, it must not be of a "merely tentative or interlocutory nature."[63] And second, the action "must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[64] The Biological Opinion was certainly the product of a completed agency process.[65] Moreover, because the Opinion authorized the Bureau of Reclamation to take the protected fish species "if (but only if) it complies with the prescribed conditions," it "alter[ed] the legal regime" to which the Bureau was subject, and therefore had "direct and appreciable legal consequences."[66]

While the *Bennett* Court's reformulation of finality narrowed the inquiry compared to the Court's older, less structured precedents, that "does not mean that *Bennett*'s test is easy to apply."[67] For some forms of agency action, the *Bennett* analysis is rather straightforward. For example, a legislative rule, promulgated pursuant to notice-and-comment rulemaking and putatively binding on both

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**59.** *See, e.g.*, G. & T. Terminal Packaging Co. v. Hawman, 870 F.2d 77, 80 (2d Cir. 1989); Dow Chem. v. EPA, 832 F.2d 319, 325 (5th Cir. 1987); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 437 (D.C. Cir. 1986).

**60.** *See* Bennett v. Spear, 520 U.S. 154, 159 (1997).

**61.** *See id.* at 178.

**62.** *Id.* at 177.

**63.** *Id.* at 177-78 (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)).

**64.** *Id.* at 178 (quoting Port of Bos. Marine Terminal Ass'n. v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1970)).

**65.** *See id.* ("It is uncontested that the first requirement is met here . . . .").

**66.** *Id.*

**67.** *See, e.g.*, William D. Araiza, *In Praise of a Skeletal APA:* Norton v. Southern Utah Wilderness Alliance, *Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 987 (2004).

the agency and the public constitutes final agency action under *Bennett*.[68] And coercive, noninterlocutory orders following formal adjudications likewise mark the consummation of an agency's processes and determine legal rights and obligations.[69] But other forms of agency action, including interpretative rules and statements of general policy, are not so easily classified.[70] The Supreme Court's treatment of these nonlegislative rules has been sparse, perfunctory, and confusing.[71]

### B. *The Supreme Court Clarifies (or Muddles) the Application of* Bennett *to Nonlegislative Rules*

Since *Bennett*, the Supreme Court has rarely addressed the question of finality, and its two most sustained discussions of the subject did not involve nonlegislative rules.[72] But two other Supreme Court precedents since *Bennett* indicate that the Court may be receptive to a flexible test for the finality of nonlegislative rules. Indeed, both cases imply that the Court prizes other factors (such as additional procedural protections) aside from whether a rule is legally binding.

First, in *Whitman v. American Trucking Ass'ns*, the Court seemed to maintain that a narrow subset of interpretative rules could be "final agency action."[73] There, the Court held that an EPA interpretation of the CAA was "final agency action" under the Act, whose finality requirement is the same as section 704's.[74] But the interpretation that the Court held to be final agency action did not take the form of a relatively informal memorandum, notice letter, or guidance document, which are the most frequent embodiments of an agency's nonlegislative actions.[75] Instead, EPA published it in the explanatory preamble accompanying

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**68.** *See, e.g.*, William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1335 (2001) ("If a rule is a legislative rule adopted after notice and comment, it is virtually without question final agency action.").

**69.** *See, e.g.*, Stephens Media, LLC v. NLRB, 677 F.3d 1241, 1249-50 (D.C. Cir. 2012) (holding that a decision and order of the NLRB — adopted based on a prior hearing before an Administrative Law Judge — was final under *Bennett*).

**70.** *See, e.g.*, Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 389-98 (2008).

**71.** *See infra* Section I.B.

**72.** *See* U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813-15 (2016); Sackett v. EPA, 566 U.S. 120, 126-27 (2012).

**73.** 531 U.S. 457 (2001).

**74.** *Id.* at 478.

**75.** *See* John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004).

a final legislative rule that itself was the product of notice-and-comment rulemaking.[76] The Court in *Whitman* thus emphasized that the agency had interpreted the CAA in light of the public comments it received following the notice of proposed rulemaking.[77] Moreover, the interpretation was prompted by a White House directive, and EPA had "refused in subsequent rulemakings to reconsider it," demonstrating that "EPA has rendered its last word on the matter."[78] All of these statements indicate that the *Whitman* Court cared greatly about the process leading to the adoption of the interpretation, consistent with the first prong of the *Bennett* test. But there is little in the opinion demonstrating much concern for *Bennett*'s second condition for finality.[79]

The majority opinion in *Whitman* cited only the first prong of the *Bennett* test and explained that because the preamble represented EPA's "last word" on the matter, it satisfied *Bennett*.[80] The *Whitman* Court never explicitly discussed *Bennett*'s second prong. *Whitman* came closest to the second prong of the *Bennett* test when it assessed the ripeness of the challenge.[81] In discussing the potential hardships to the parties under the preamble's interpretative rule, the Court sought to differentiate the CAA's judicial review provision from section 704. Justice Scalia openly questioned whether the preamble interpretation's effect on the state parties would "suffice in an ordinary case brought under the review provisions of the APA," but remarked that the "special judicial-review provision" of the CAA specifically provided for "preenforcement" review.[82] Therefore, statutes like the CAA "permit 'judicial review directly, even before the concrete effects normally required for APA review are felt.'"[83]

One could read *Whitman* as disposing of *Bennett*'s second prong on the basis of the CAA's unique preenforcement review provisions. But that explanation is unsatisfying given the Court's own reasoning. First, *Whitman* never explicitly discussed the CAA's independent judicial review provision in the context of finality and the required legal consequences, addressing it only in the context of

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**76.** *Whitman*, 531 U.S. at 478.

**77.** *Id.* at 478-79.

**78.** *Id.* (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 586 (1980)).

**79.** Bennett v. Spear, 520 U.S. 154, 177-78 (1997).

**80.** *Whitman*, 531 U.S. at 478.

**81.** *See, e.g.*, McKee, *supra* note 70, at 374; *see also* Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967) (discussing the rationales behind applying the ripeness doctrine to administrative actions). For a discussion of ripeness, see *supra* notes 47-55 and accompanying text.

**82.** *Whitman*, 531 U.S. at 479 (quoting Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 737 (1998)); *see also* 42 U.S.C. § 7607(b) (2012) (special judicial-review provision).

**83.** *Whitman*, 531 U.S. at 479-80 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990)).

ripeness and the required practical effects on the parties. Second, if the "special judicial-review provision" of the CAA actually modified the meaning of the "final action" provision in section 307(b)(1) of the CAA to include actions lacking the "concrete effects normally required for APA review," then why would the *Whitman* Court confidently declare that section 307(b)(1) "bears the same meaning . . . that it does under the [APA]"?[84] Given *Bennett*'s interpretation of 704 to require concrete legal effects, and given *Whitman*'s apparent conclusion that section 307(b)(1) does not require such effects, it seems implausible to conclude that the CAA's "final action" provision means the same thing as "final agency action" in section 704.

Moreover, *Whitman* left ambiguous not only whether its finality analysis was narrowly confined to the CAA and similar substantive statutes, but also whether it was limited to the unique form of agency guidance at issue. Cases since *Whitman* have reiterated that while it is possible for preambles "in some unique cases [to] constitute binding, final agency action . . . this is not the norm."[85] Ultimately, *Whitman*'s import for the general reviewability of nonlegislative rules in the form of freestanding guidance remains unclear. At the very least, however, *Whitman* dispelled any notion that interpretative rules writ large are never final.

Shortly after *Whitman*, the Court again addressed the finality of nonlegislative rules in *National Park Hospitality Ass'n* (*NPHA*) *v. Department of the Interior*.[86] *NPHA* concerned a challenge to a National Park Service (NPS) regulation that purported to exempt certain government contracts from the requirements of a federal statute.[87] The NPS had arrived at this interpretation of the relevant federal statute after engaging in notice-and-comment rulemaking.[88] However, the *NPHA* Court held that because Congress had not delegated rulemaking authority to the NPS in its substantive statute, the challenged interpretation could not be "a legislative regulation with the force of law."[89]

The Court went on to explain that the agency action—once shorn of its legislative character—did "not command anyone to do anything or to refrain from doing anything"; did "not grant, withhold, or modify any formal legal license, power or authority"; did "not subject anyone to any civil or criminal liability";

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**84.** *Id.* at 478-79.

**85.** Nat. Res. Def. Council v. EPA, 559 F.3d 561, 564 (D.C. Cir. 2009); *see also* Nat. Res. Def. Council v. EPA, 706 F.3d 428, 432-34 (D.C. Cir. 2013) (distinguishing *Whitman* and adhering to the norm against finding final agency action in preambles).

**86.** 538 U.S. 803 (2003).

**87.** *Id.* at 806.

**88.** *Id.*

**89.** *Id.* at 808.

and created "no legal rights or obligations."[90] Nevertheless, the Court held that the policy statement was "'final agency action' . . . within the meaning of" section 704 of the APA, even though it was ultimately unripe for review.[91] Not once in its analysis of finality did the *NPHA* court cite *Bennett*'s requirements for finality. Instead, the Court relied on *Abbott Laboratories*, the 1967 precedent whose "pragmatic" and "flexible" characterization of finality[92] appeared less tenable after *Bennett*'s concise, two-prong formulation.

*NPHA*, like *Whitman*, stands in significant tension with *Bennett*.[93] Unlike *Whitman*, where the Court could perhaps rely on the "special judicial-review provision" of the CAA,[94] the Court in *NPHA* had no analogous explanation for its departure from the second prong of the *Bennett* test.

But as in *Whitman*, it is possible to limit *NPHA* to its facts. *NPHA* involved a general statement of policy, but that nonlegislative rule was promulgated after public notice and comment. While this fact might not excuse the Court from entirely overlooking the *Bennett* test, it again demonstrates the apparent centrality of procedure, even if the consummation of that procedure yields only an interpretative rule (*Whitman*) or policy statement (*NPHA*) lacking the force and effect of law.

Ultimately, the Supreme Court's limited precedents have left the courts of appeals with guidance that is at best ambiguous, and sometimes confusing and contradictory. The lower courts have coped with this doctrinal morass through a variety of approaches, on a spectrum spanning from highly context-dependent assessments of practical effects to the D.C. Circuit's recent bright-line rule separating the reviewability of legislative rules from that of nonlegislative rules. Instead of following the Supreme Court's "pragmatic" application of *Bennett*,[95] the D.C. Circuit's emerging doctrine has taken a rather strict approach to *Bennett*'s second prong, and has seemingly rendered the entire category of nonlegislative rules unreviewable prior to agency enforcement.

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**90**. *Id.* (quoting Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998)).

**91**. *Id.* at 812; *see also id.* at 820 (Breyer, J., dissenting) ("[A]s the majority concedes, the Park Service's determination constitutes 'final agency action' within the meaning of the Administrative Procedure Act.").

**92**. Abbott Labs. v. Gardner, 387 U.S. 136, 149-150 (1967).

**93**. Bennett v. Spear, 520 U.S. 154, 178 (1997) (quoting Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1970)).

**94**. *See supra* notes 81-83 and accompanying text.

**95**. U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016).

### C. *The Courts of Appeals Apply* Bennett *to Nonlegislative Rules*

In the wake of *Bennett*, three broad approaches to the finality of nonlegislative rules have emerged in the circuit courts' treatment of finality for nonlegislative rules. One approach, emphasizing pragmatic effect, most frequently maintains that interpretative rules are final agency action. Under this approach, an interpretative rule's practical effects and substantial impact on regulated parties can be enough to meet *Bennett*'s second prong. A second approach, focusing on the need for agency action to carry the "force of law," rarely deems interpretative rules to satisfy *Bennett*'s test for finality. The D.C. Circuit has carried this second approach toward a bright-line rule that would categorically preclude from pre-enforcement review all interpretative rules and policy statements. A third approach, adopted by one circuit and echoed by two Justices, shares the second view that "final agency action" must carry the "force of law." However, this approach also recognizes that heightened deference to an agency's interpretative rule could imbue that rule with the "force of law." Ultimately, this Note concludes that this third approach best implements the original meaning of APA section 704, even though its previous advocates have failed to offer a historical defense of its correctness.

1. "The Pragmatic Approach." The Ninth Circuit has emphasized flexibility and pragmatism in its finality doctrine.[96] For example, in *Animal Legal Defense Fund v. Veneman*, it held that when an interpretative rule "has 'a substantial impact on the rights of individuals[,]' its promulgation may constitute final agency action for the purposes of judicial review,"[97] despite "lack[ing] formal status as law."[98] As long as the interpretative rule restricts the regulatory discretion of the agency—such as by providing a safe harbor for regulated parties to avoid liability—sufficient legal consequences flow from it to render it final agency action.[99] Another case, *Oregon v. Ashcroft*, held that interpretative rules can impose "obligations and sanctions in the event of violation" and therefore warrant pre-enforcement judicial review.[100] Like the Ninth Circuit, the Fifth Circuit has stressed

96. Animal Legal Def. Fund v. Veneman, 469 F.3d 826, 838 (9th Cir. 2006), *vacated on reh'g en banc*, 490 F.3d 725 (9th Cir. 2007) (mem.).

97. *Id*. at 838-39 (quoting Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 560 (D.C. Cir. 1983)).

98. *Id*. at 838.

99. *See id*. at 840.

100. Oregon v. Ashcroft, 368 F.3d 1118, 1120 (9th Cir. 2004) (quoting Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1085 (9th Cir. 2003)), *aff'd sub nom*. Gonzales v. Oregon, 546 U.S. 243 (2006); *see also id*. at 1147-48 (Wallace, J., dissenting) (explaining that the final agency action requirement is met if the interpretation "significantly and immediately alters the legal landscape" and

the need for a "'flexible' and 'pragmatic' approach to assessing the finality of agency action."[101] Thus, when an agency "commit[s] itself to applying" a guidance document "when conducting enforcement and referral actions," the resulting safe harbors for regulated parties meet *Bennett*'s standard of "legal consequences."[102]

2. "The Rigid Approach." The Fourth Circuit has hewed closely to a restrictive reading of *Bennett*'s second prong and held that "agency action producing only coercive pressures on third parties" was not reviewable final agency action.[103] Moreover, the court expressly refused to take a "pragmatic approach recognizing the [agency action's] powerful influence on other agencies and third parties," concerned that "then almost any agency policy or publication issued by the government would be subject to judicial review."[104] Similarly, the Seventh Circuit has held that the mere imposition of "additional administrative costs on regulated parties" is insufficient to demonstrate final agency action.[105] Finality, it held, requires the imposition of "new legal requirements on regulated parties," and that the agency action must appreciably "alter . . . the legal regime to which" those parties are subject.[106]

While the D.C. Circuit's approach has certainly evolved, it has eventually come to embrace a categorical approach. To be sure, the D.C. Circuit's early precedents seemed to support the pragmatic approach. For example, the Fifth Circuit relied partially on a prior D.C. Circuit opinion when holding that even an "oblig[atory]" guidance letter is not "final" when it has no practical effect on a party's rights and obligations.[107] The Ninth Circuit cited a different D.C. Circuit

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requires "immediate compliance," even if its "concrete legal effects are contingent upon a future event"). Although Judge Wallace dissented in the ultimate judgment of the case, he agreed with the majority that the panel had authority to resolve the dispute, although the issue was "given scant attention by the majority." *Id.* at 1146 (Wallace, J., dissenting).

**101.** Texas v. EEOC, 827 F.3d 372, 382 (5th Cir. 2016) (quoting Qureshi v. Holder, 663 F.3d 778, 781 (5th Cir. 2011)).

**102.** *Id.* at 381.

**103.** Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA, 313 F.3d 852, 859 (4th Cir. 2002).

**104.** *Id.* at 860-61.

**105.** Home Builders Ass'n of Greater Chi. v. U.S. Army Corps of Eng'rs, 335 F.3d 607, 616 (7th Cir. 2003).

**106.** *Id.* at 619.

**107.** *See* Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 756 (5th Cir. 2011) (citing Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review.")).

opinion for the proposition that whenever an interpretative rule has "a substantial impact on the rights of individuals," it can constitute final agency action even if not legally binding.[108]

Nevertheless, in three recent decisions, the D.C. Circuit has entrenched its preference for a categorical distinction between the finality of legislative and nonlegislative rules. A more thorough look at these precedents illustrates the confusing effect that the Supreme Court's sparse finality doctrine has had on the courts of appeals.

First, in 2013, the D.C. Circuit addressed the finality of nonlegislative rules in *American Tort Reform Ass'n v. OSHA*. It held that an interpretative rule was not final agency action under *Bennett* because it lacked the force of law.[109] The panel cited just two authorities to support this view: a treatise on federal standards of review authored by one of the members of the panel,[110] and a single Supreme Court case, *NPHA*.[111] Because interpretative rules cannot "command anyone to do anything or to refrain from doing anything," they do not create "adverse effects of a strictly legal kind," and therefore "typically cannot result in justiciable disputes."[112] The panel concluded that nonlegislative rules "generally do not qualify [as final agency action] because they are not 'finally determinative of the issues or rights to which [they are] addressed.'"[113]

The following year, in *National Mining Ass'n v. McCarthy*, the D.C. Circuit was asked to determine the finality of an EPA "Final Guidance" document.[114] In dicta, *National Mining Ass'n* interpreted the Supreme Court's holding in *Whitman v. American Trucking Ass'ns*[115] to maintain that legislative rules and "*sometimes even* interpretative rules may be subject to pre-enforcement judicial review, but general statements of policy are not."[116] But *Whitman*—the lone Supreme

108. Animal Legal Def. Fund v. Veneman, 469 F.3d 826, 838-39 (9th Cir. 2006) (quoting Am. Postal Workers Union v. U.S. Postal Serv., 707 F.2d 548, 560 (D.C. Cir. 1983)), *vacated on reh'g en banc*, 490 F.3d 725 (9th Cir. 2007) (mem.).

109. 738 F.3d 387 (D.C. Cir. 2013).

110. *See id.* at 393, 395 (citing HARRY T. EDWARDS ET AL., FEDERAL STANDARDS OF REVIEW 157, 161-62 (2d ed. 2013)).

111. Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803 (2003). *But see supra* notes 86-92 and accompanying text (explaining that *NPHA* found an agency policy statement to be "final" under section 704).

112. *Am. Tort Reform Ass'n*, 738 F.3d at 393, 396 (quoting *NPHA*, 538 U.S. at 809).

113. *Id.* at 395 (quoting HARRY T. EDWARDS ET AL., FEDERAL STANDARDS OF REVIEW 157 (2d ed. 2013)).

114. Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 246 (D.C. Cir. 2014).

115. 531 U.S. 457, 477-79 (2001).

116. *Nat'l Mining Ass'n*, 758 F.3d at 251 (emphasis added).

Court case *National Mining Ass'n* cited for this conclusion—is a curious choice to prove that interpretative rules meet the finality requirements but general statements of policy do not.[117] Recall that *Whitman* never cited *Bennett*'s second prong, unjustifiably conflated finality under the APA with the CAA's unique judicial-review provision, and even implied that perhaps only those agency interpretations embedded in preambles to legislative rules were final agency action. Given all of these quirks, the D.C. Circuit was perhaps too ambitious to declare, without further analysis, that *Whitman* stood for the broad proposition that interpretative rules might be final agency action. This dicta is particularly jarring in light of the conflicting view of interpretative rules expressed by the circuit only a year before in *American Tort Reform Ass'n*.[118]

While *National Mining Ass'n* suggested that some interpretative rules might be final agency actions, the D.C. Circuit rebuked that dicta sub silentio only a year later. In *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, petitioners sought review of a Federal Aviation Administration guidance document related to the stowage of portable electronic devices aboard commercial and other aircraft.[119] Relying on the Supreme Court's 2015 decision in *Perez v. National Mortgage Bankers Ass'n*, *Huerta* reiterated that interpretative rules, like policy statements, "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."[120] Ultimately, if a guidance document "reflects nothing more than a statement of agency policy or an interpretive rule," it lacks finality and may not be reviewed.[121]

Compared to *American Tort Reform Ass'n*, *Huerta* reflects a small but appreciable evolution in the D.C. Circuit's approach. First, *American Tort Reform Ass'n* only stated that interpretative rules and policy statements "*typically* cannot result in justiciable disputes" and that they "*generally* do not qualify" as final agency

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**117.** *See supra* notes 73-85 and accompanying text.

**118.** *National Mining Ass'n* also agreed with *American Tort Reform Ass'n* that policy statements were categorically not final agency action and cited *NPHA* to support this assertion. *See Nat'l Mining Ass'n*, 758 F.3d at 251. However, both *American Tort Reform Ass'n* and *National Mining Ass'n* erred in citing *NPHA* for this proposition because, as discussed above, there the Supreme Court held that pre-enforcement review of the policy statement at issue was unavailable because the challenge would not have been ripe, not because the policy statement was not final agency action. *See* Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 812 (2003). Therefore, even though *National Mining Ass'n* framed the issue presented as one of finality under section 704 of the APA, it ultimately conflated that question with a ripeness analysis that considers factors that are not necessarily part of the post-*Bennett* finality test (e.g., whether the question is purely legal and the costs of litigant compliance or defiance).

**119.** *See* 785 F.3d 710, 712 (D.C. Cir. 2015).

**120.** *Id.* at 713 (quoting Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015)).

**121.** *Id*. at 717.

actions.[122] The analysis of finality in *Huerta* shed qualifiers like "typically" and "generally" in favor of a categorical rule that also flies in the face of *National Mining Ass'n*'s more flexible dicta. And while *Huerta* cited *National Mining Ass'n* nine times, nowhere did the panel confront this inconsistency.[123]

Moreover, *Perez*'s resolution between *American Tort Reform Ass'n* and *Huerta* seems to have bolstered the D.C. Circuit's interest in withdrawing interpretative rules from the ambit of final agency action. In invalidating the D.C. Circuit's one-bite doctrine,[124] the Supreme Court held that genuinely interpretative rules need not be promulgated through public notice and comment because unlike legislative rules, they "do not have the force and effect of law."[125]

However, *Huerta* is perhaps overzealous in reading *Perez* as categorically rejecting the finality of interpretative rules. First, *Huerta*'s holding is difficult to square with *Whitman*, where the Supreme Court did permit pre-enforcement review of an agency interpretation that was never characterized as a legislative rule. *Huerta* is also inconsistent with *NPHA*, where the Court held that the dispute was not ripe for review but nevertheless conceded that the policy statement at issue was a "final agency action."[126] Second, if *Perez* had swept away *Whitman* and *NPHA*, it likely would have done so explicitly. Moreover, *Perez* itself involved a pre-enforcement challenge to an interpretative rule.[127] It would be odd for the Court to shut off pre-enforcement judicial review of interpretative rules by implication in a case it resolved in that posture. *Huerta* probably overestimated *Perez*'s effect on finality. *Perez* instead focused on a narrower procedural question—whether interpretative rules ever require notice-and-comment rulemaking.

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**122.** Am. Tort Reform Ass'n v. OSHA, 738 F.3d 387, 393, 395 (D.C. Cir. 2013) (emphasis added).

**123.** *See Huerta*, 785 F.3d at 713, 716, 718-19.

**124.** The D.C. Circuit's one-bite doctrine required agencies to engage in notice-and-comment rulemaking in order to change one of its interpretative rules. *See, e.g.*, Alaska Prof'l Hunters Ass'n v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997). *Perez* resolved the longstanding controversy as to whether that procedural requirement was inconsistent with the APA and the principles of *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

**125.** Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 (2015) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979)); *see also supra* note 118.

**126.** Nat'l Parks Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 812 (2003).

**127.** *See Perez*, 135 S. Ct. at 1205 (explaining how the Mortgage Bankers Association filed a complaint challenging the rule absent enforcement of the rule against the party in any concrete application).

Whether or not *Huerta* reflected a permanent shift in the D.C. Circuit's finality jurisprudence,[128] it is an important precedent for the future reviewability of nonlegislative rules.[129] At the very least, *Huerta* demonstrates that the D.C. Circuit seems to be moving away from the pragmatic and flexible approach that characterized both its own precedents and the principles expressed by the Supreme Court in *Whitman* and *NPHA*. More troublingly, the D.C. Circuit's path to this result has been paved with misreadings and oversimplifications of prior decisions. And perhaps most worrisome, *Huerta*'s errors produced an unfounded categorical rule that would completely preclude pre-enforcement judicial review of even those interpretative rules that practically bind a reviewing court.

3. "The Deference-Is-Legal-Consequence Approach." Standing apart from both the practical-effect and categorical camps is the Sixth Circuit, whose approach to finality addresses a different kind of "legal consequence": the effect of judicial deference on the status of agency interpretations.[130] Two opinions have sketched out this unique approach. First, in *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, the agency claimed that one of its bulletins was both unreviewable because it was not final and entitled to heightened deference under *Chevron*.[131] The Sixth Circuit refused to allow the agency to have it both ways: "When an agency has acted so definitively that its actions are defended based on *Chevron*, we believe that its action should be treated as final."[132] More than a decade later in *Air Brake Systems, Inc. v. Mineta*, the Sixth Circuit elaborated upon *Franklin*, holding that, because agency interpretations eligible for

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**128.** For what it's worth, at least two subsequent panels have implicitly rejected *Huerta*'s categorical rule, though they did not acknowledge *Huerta* at all. *See* Scenic Am., Inc. v. U.S. Dep't of Transp., 836 F.3d 42, 56 (D.C. Cir. 2016); Ass'n of Am. R.Rs. v. Fed. R.R. Admin., 612 Fed. App'x 1, 2 (D.C. Cir. 2015) (per curiam).

**129.** *But see* Ronald M. Levin, *Rulemaking and the Guidance Exemption* 70 (Wash. Univ. in St. Louis Legal Studies Research Paper No. 17-04-05, 2017), http://ssrn.com/abstract=2958267 [http://perma.cc/3R89-FU79] ("To proclaim that the [*Huerta*] court's fusion of the two lines of precedents [concerning interpretative rules and policy statements] necessarily represents the wave of the future would be premature.").

**130.** Long before its decisions in *American Tort Reform Ass'n* and *Huerta*, the D.C. Circuit advanced this same approach, concluding that an EPA interpretative rule was "final agency action" in part because it had "legal effect" stemming from the deference commanded by "an authoritative interpretation of an executive official." Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 437 (D.C. Cir. 1986) (quoting Nat'l Auto. Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 697 (D.C. Cir. 1971)). A year after *Ciba-Geigy*, another D.C. Circuit panel expressed the view that even under *Chevron* deference an interpretative rule could not bind the courts, and held an interpretative rule unripe for review. *See* Nat'l Latino Media Coal. v. FCC, 816 F.2d 785, 790 (D.C. Cir. 1987). The panel left ambiguous whether the agency action was also not "final."

**131.** 927 F.2d 1332, 1337 (6th Cir. 1991).

**132.** *Id*.

*Chevron* have "binding effect" on the courts, "legal consequences" flow sufficiently to satisfy the second prong of *Bennett*.[133] However, the *Air Brake Systems* panel refused to grant that the less potent "*Skidmore* respect" that any agency interpretation receives results in the kind of "legal consequence" sufficient to make that agency interpretation "final for purposes of direct review."[134]

While no other circuit has adopted the Sixth Circuit's approach, two Justices have seemed to echo the importance of interpretative deference when assessing "legal consequence" under *Bennett*. In *Perez*, Justices Scalia and Thomas, each separately concurring in the judgment, argued that the majority wrongly discounted the degree to which agency interpretations often "*do* have the force of law," at least under the *Seminole Rock-Auer* deference regime.[135] As Justice Scalia put the point, "Interpretive rules that command deference *do* have the force of law."[136] However, like the Sixth Circuit before them, neither Justice Scalia nor Justice Thomas attempted to support their intuitions beyond mere assertion. For example, how much deference is needed to approach the "force of law"? Apparently, Justices Scalia and Thomas thought *Seminole Rock-Auer* deference did the trick. But what about *Chevron* deference? *Skidmore* deference? More importantly, what basis did either the Sixth Circuit or Justices Scalia and Thomas have for concluding that judicial deference is relevant *at all* in determining whether agency action carries the "force of law"? Indeed, one wonders why Justices Scalia and Thomas — two of the Roberts Court's most historically minded jurists[137] — never appealed to the APA's history to support their theory that enough interpretive deference could give an interpretative rule the force of law.

Given the obvious confusion in modern judicial attempts to determine administrative finality, this Note advocates for a return to the historical origins of the APA. While history sometimes obscures, the benefits of a historical approach in this instance are clear. A careful examination of historical sources yields a

**133.** 357 F.3d 632, 642 (6th Cir. 2004) (quotation omitted).

**134.** *Id*. at 643.

**135.** Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring in the judgment); *see id*. at 1221 (Thomas, J., concurring in the judgment) ("When courts give 'controlling weight' to an administrative interpretation of a regulation — instead of to the best interpretation of it — they effectively give the interpretation — and not the regulation — the force and effect of law. To regulated parties, the new interpretation might as well be a new regulation."); *see also* Auer v. Robbins, 519 U.S. 452, 461 (1997) (treating an agency's own interpretation of its regulations as controlling unless it is "plainly erroneous or inconsistent with the regulation" (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989))).

**136.** *Perez,* 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

**137.** *See, e.g.*, Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1945 (2017) (describing Justices Scalia and Thomas as the two leading judicial practitioners of originalism in their era).

widespread understanding of the APA that enshrines the goals of both predictability[138] and pragmatic flexibility.[139] This historically informed understanding of the APA reveals that legal consequences ought to play a central role in finality analysis. However, courts reviewing nonlegislative rules cannot simultaneously blind themselves to an important practical reality of the modern administrative state: the role of *Chevron* deference in shifting interpretative authority from judges to agencies. A proper accounting of *Chevron* in finality doctrine respects

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**138.** *See* Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) ("An important continuing project for the Executive Branch, the courts, the administrative law bar, and the legal academy — and perhaps for Congress — will be to get the law [concerning nonlegislative rules] into . . . a place of clarity and predictability.").

**139.** *See* U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016) (describing the Court's longstanding approach to finality as "pragmatic"). For what it's worth, the Court's recent emphasis on pragmatism in section 704 cases is somewhat anomalous. For example, *Hawkes* cited two cases to support its pragmatic approach. The first, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), indeed advocated for a "pragmatic" and "flexible" approach to finality. *Id.* at 149-50. However, the central case it discussed, *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), only found certain Federal Communications Commission regulations to be reviewable prior to enforcement because they had "the force of law." *Id.* at 418. This focus on the "force of law" seems far more hospitable to bright-line rules than multifactor, all-things-considered balancing tests. Both *Hawkes* and *Abbott Laboratories* also emphasized the Court's opinion in *Frozen Food Express v. United States*, 351 U.S. 40 (1956). *See Hawkes*, 136 S. Ct. at 1815; *Abbott Labs.*, 387 U.S. at 150. In *Frozen Food Express*, the Court held that although the Interstate Commerce Commission "had no authority except to give notice of how the Commission interpreted" a relevant statute, *Abbott Labs.*, 387 U.S. at 150. One of its orders was nevertheless immediately reviewable because it "warns every carrier" acting inconsistently with the order that it "does so at the risk of incurring criminal penalties" in a future enforcement action. *Frozen Food Express*, 351 U.S. at 44.

*Hawkes*'s appeal to *Frozen Food Express* is curious for several reasons. First, *Frozen Food Express* did not explicitly concern the definition of "final agency action" in section 704. The lower court had found that the Commission's report and decision was not reviewable under the APA because it was "not an 'order' subject to judicial review under" the statute. Frozen Food Express v. United States, 128 F. Supp. 374, 378 (S.D. Tex. 1955), *rev'd*, 351 U.S. 40 (1956). The Supreme Court reversed and held that the Commission's action was an "order" within the meaning of the APA, *Frozen Food Express*, 351 U.S. at 44, but the question of finality was never actively litigated in the case, *see id.* at 44-45 (stating that the Commission "argued for finality of the order" rather than against it). Second, nowhere in *Hawkes* did the Court attempt to square *Frozen Food Express* with *Bennett*'s focus on *legal* consequences. The Court seemed to imply that whenever an agency action warns a regulated party that its continued behavior carries a "risk of significant criminal and civil penalties," that would support a finding of final agency action. *Hawkes*, 136 S. Ct. at 1815. However, it is far from self-evident that *Bennett* sweeps so broadly as to embrace as final *any* agency action that merely causes regulated parties to "fear" that the action "will increase their vulnerability to liability." Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA, 313 F.3d 852, 861 (4th Cir. 2002). While I take the Court's continued interest in pragmatic flexibility as a given, I question whether that interest has historical justification.

*Bennett*'s need for legal consequences while recognizing the practical reality that legal consequences can flow from *Chevron*'s theory of "delegation by ambiguity."[140]

## II. BACK TO BASICS: RETURNING TO THE HISTORICAL APA

While the Supreme Court likely thought it had reduced its finality precedents into a clear and administrable two-prong test in *Bennett*,[141] it most certainly did not, at least with respect to nonlegislative rules. *Whitman* and *NPHA* exemplify the Court's own uncertainties in applying that test to nonlegislative rules.[142] While the *Bennett* test has proven to be the Supreme Court's guiding light in its two most recent finality decisions,[143] neither of those decisions involved nonlegislative rules. The Supreme Court's inconsistent application of the finality doctrine since *Bennett* has only exacerbated the D.C. Circuit's struggle to interpret and reconcile those precedents.

This Part considers a variety of preexisting, contemporaneous, or near-contemporaneous sources—including cases, legislative history, treatises, and academic articles—to determine how an earlier generation of lawmakers and practitioners would have understood the APA's finality requirement as applied to nonlegislative rules. No single source is dispositive, and few conclusions can be drawn with certainty, but the most important takeaway is that while *Huerta* and the Supreme Court in *Perez* were correct that nonlegislative rules were widely recognized not to carry the force and effect of law, and were consequently unreviewable prior to application, that conclusion hinged on an important assumption: that courts decided what the statute being interpreted meant, and that interpretative regulations had no binding legal effect. Of course, after *Chevron*, this principle of independent judicial interpretation no longer applies in every case. Part III will analyze how to apply section 704's historical understanding in light of *Chevron*'s continued effect on judicial deference.

Section II.A justifies a historical approach to the APA's finality requirement. In particular, a historical approach is consistent with prior attempts to construct the finality doctrine and would tap into wisdom gleaned during the extensive deliberation the question received in the early 1900s. Section II.B evaluates the

**140.** *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit, rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

**141.** *See, e.g.*, *Hawkes*, 136 S. Ct. at 1813.

**142.** *See supra* Section I.B.

**143.** *See Hawkes*, 136 S. Ct. at 1813-15; Sackett v. EPA, 566 U.S. 120, 126-27 (2012).

criteria courts developed shortly before and after the APA's enactment for deciding whether a given agency action was reviewable prior to enforcement. This history demonstrates that *Bennett*'s legal-consequences prong rests on solid historical footing: agency actions without legal effect were unreviewable before their application. But what about interpretative rules? Did they possess the kind of legal effect necessary to warrant pre-enforcement review? In a word, no. Section II.C confirms *Perez*'s conclusion: interpretative rules did not carry the force and effect of law, even though they were accorded various degrees of deference. Nevertheless, the regime of deference for interpretative rules existing prior to the APA never went so far as modern-day *Chevron* deference. At the end of the day, courts retained discretion to reject an agency's interpretation of a statute, so long as the court came to a different view on the merits. That shift necessitates a corresponding alteration of the APA's finality regime that respects the importance of *Chevron* in the administrative landscape. In particular, Part III will build off of the Sixth Circuit's approach discussed in Part I and will attempt to unify the *Chevron* eligibility and finality inquiries. In reconciling the historical APA with the contemporary doctrine surrounding *Chevron*, Part III then calls for courts determine the degree of deference applicable to the agency interpretation *before* determining finality.

### *A. Justifying a Historical Interpretation of the APA*

Scholars and commentators continue to debate whether the APA's judicial review provisions were designed to merely codify existing administrative common law or to stake out new ground in administrative procedure.[144] But when the APA's failure to define a term like "final agency action" has bedeviled the federal courts, looking to the administrative common law preceding the APA is a useful—and heretofore underutilized—method of interpretation. As the Supreme Court stated long ago in *Aldridge v. Williams*, when a statute is sufficiently ambiguous, the courts must "look[], if necessary, to the public history of the times in which it was passed."[145] Likewise, as Justice Frankfurter wrote, "[w]ords must be read with the gloss of the experience of those who framed them."[146]

To be sure, the historical understanding of "final agency action" need not be the only basis on which one might evaluate either the propriety of *Bennett*'s second prong or the correctness of *Huerta*'s doctrinal innovation. Perhaps the APA's

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**144.** *See* sources cited *infra* note 161 and accompanying text.

**145.** 44 U.S. (3 How.) 9, 24 (1845).

**146.** United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

status as a transsubstantive statute designed to regulate constantly evolving administrative agencies justifies a dynamic approach to interpretation.

However, this argument is unjustified for at least two reasons. First, the arguably "dynamic" interpretations offered by the Supreme Court and the circuits have produced finality's existing doctrinal confusion. Second, much of the existing academic debate surrounding the finality of nonlegislative rules has already taken place on the field of history. In particular, *Bennett*'s second prong—requiring final agency action to determine legal rights and obligations or to produce legal consequences—has been the subject of sustained historical criticism. Much of this criticism is centered on the concern that *Bennett*'s second prong represents a departure from historical understandings of finality.[147] For example, Gwendolyn McKee has attempted to bury *Bennett*'s second prong by reference to the APA's legislative history and the cases prefacing *Bennett*.[148] McKee's treatment of the historical propriety of *Bennett* is likely the most thorough in the literature.

McKee's attempt to discredit *Bennett*'s second prong on the basis of the APA's history falls short. McKee argued[149] that *Bennett* wrongly quoted *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*[150] and two of its predecessor cases[151] for the proposition that a final agency action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."[152] But as McKee rightly noted, one of those predecessor cases, *Atlantic Coast Line*, involved an interpretation of the Administrative Orders

147. *See* McKee, *supra* note 70, at 406 ("To bring judicial review under the APA back in line with the APA itself, courts should limit the test for finality to only the first prong of *Bennett*, which asks whether the agency action being challenged is final."); *see also* Brief for the Cato Institute as Amicus Curiae in Support of Respondents at 1, U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807 (2016) (No. 15-290) ("This Court should abandon the second prong of the *Bennett* finality analysis."); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 379 (2011) ("There are serious questions as to whether th[e second] prong [of *Bennett*] really should be part of determining finality of a rule under the APA."); *cf.* William Funk, *Make My Day! Dirty Harry and Final Agency Action*, 46 ENVTL. L. 313, 318 (2016) (criticizing *Bennett*'s reliance on and interpretation of the preexisting case law it cited to support its second prong).

148. *See* McKee, *supra* note 70, at 403-04.

149. *See id.*

150. 400 U.S. 62, 71 (1970).

151. *See* Interstate Commerce Comm'n v. Atlantic Coast Line R.R. Co., 383 U.S. 576 (1966); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939).

152. Bennett v. Spear, 520 U.S. 154, 178 (1997) (quoting *Port of Bos.*, 400 U.S. at 71 (1970)).

Review Act (the Hobbs Act),[153] not section 704 of the APA.[154] The Hobbs Act speaks only of "final orders" made by certain agencies.[155] The APA, however, speaks not only of "orders" but also of "rules" and explicitly defines each.[156] Therefore, McKee concluded that the legal-consequences requirement applied only to orders and was never meant to apply to administrative rules or guidance documents.[157] Meanwhile, McKee brushed aside *Rochester Telephone*, the other predecessor case to *Port of Boston* — which implied that agency action constituting an "abstract declaration regarding the status" of the company under the relevant statute would be unreviewable[158] — because that case was decided seven years before the APA was adopted and also involved an administrative order, rather than a rule.[159]

McKee's criticism of *Bennett*'s second prong is less forceful than it might appear. First, while the distinction between "orders" and "rules" in the APA is surely meaningful, section 704 permits review of "final *agency action*," a category that includes both orders and rules.[160] While McKee is right that judicial precedents interpreting the Hobbs Act were not directly relevant to the APA, she also provides no evidence that the notion of "finality" as applied to orders under the Hobbs Act should not likewise be applied to rules and other forms of agency action under the APA. In fact, contemporary courts apply *Bennett* to Hobbs Act cases in addition to APA cases.[161] At the very least, without examining how courts reviewed rules at the time of the APA's passage, McKee cannot confidently

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**153.** 28 U.S.C. § 2342 (2012) (providing for judicial review of "all final orders" of certain enumerated administrative agencies and "all rules, regulations, or final orders" of other specified agencies).

**154.** *See* McKee, *supra* note 70, at 403. And while McKee did not mention it, *Port of Boston* also involved an interpretation of the Hobbs Act. *See Port of Bos.*, 400 U.S. at 70-71.

**155.** *See* 28 U.S.C. § 2342.

**156.** *See* 5 U.S.C. § 551(4) (2012) (defining a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"); 5 U.S.C. § 551(6) (defining an "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making").

**157.** *See* McKee, *supra* note 70, at 403.

**158.** Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939).

**159.** *See* McKee, *supra* note 70, at 403.

**160.** *See* 5 U.S.C. § 551(13) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); *see also* CASES AND MATERIALS ON ADMINISTRATIVE LAW 845 (Carl McFarland & Arthur T. Vanderbilt eds., 1947) ("The federal Administrative Procedure Act, however, does not distinguish between rule making and adjudication in its provisions for judicial review . . . .").

**161.** *See, e.g.*, Union Pac. R.R. Co. v. Surface Transp. Bd., 358 F.3d 31, 34 (D.C. Cir. 2004).

assert that a requirement of legal consequences could not apply to *both* orders and rules. Moreover, simply because *Rochester Telephone* was decided less than a decade before the APA does not negate its possible relevance. That *Rochester Telephone* was decided shortly before the APA means it is potentially useful in discerning the meaning of the statute that came after it. This is especially true if the APA's judicial review provisions were truly designed merely to "restate" or "codify" existing administrative common law, as many have argued.[162]

Having rebutted McKee's historical criticism, one can see how *Bennett* itself attempted to center the current doctrine of finality around its interpretation of the Court's longstanding precedents, indicating a desire to maintain continuity with the Court's prior interpretations of the APA.[163] While subsequent cases may have departed from the historical understanding of the APA, none have done so deliberately. In their efforts to faithfully apply *Bennett*, these courts have merely overlooked—rather than consciously disregarded—the history informing the test for finality established in *Bennett*. In none of the significant cases addressing the finality of nonlegislative rules discussed above did any opinion reference, let alone refute, the relevance of the history surrounding the APA, either with respect to pre-enforcement review generally or interpretative rules specifically. Rather, it appears that the relative paucity of readily available historical research on the subject, combined with the complacency of courts operating in a post-*Bennett* world, seems to have resulted in the judiciary's present oversights.

More importantly, even if the APA were a "superstatute"[164] establishing a new and important institutional framework with a correspondingly broad effect on federal law, its continued operation counsels against a broad or evolving interpretative approach. Under the superstatute theory, "[t]he process by which a

**162.** *Compare* Duffy, *supra* note 16, at 131-38 (1998) (criticizing the "restatement" interpretation of the APA's judicial review provisions), *with* JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 76-86 (2012) (siding largely with those arguing in favor of the restatement interpretation), Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 590 (1951) (explaining that the APA "does no more than restate the wide and vague grounds upon which judicial review may be sought"), *and* Alfred Long Scanlan, *Judicial Review Under the Administrative Procedure Act—In Which Judicial Offspring Receive a Congressional Confirmation*, 23 NOTRE DAME L. REV. 501, 509-24 (1948).

**163.** Bennett v. Spear, 520 U.S. 154, 178 (1997); *see also* U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016) (explaining that the *Bennett* Court had "distilled from [the Court's] precedents two conditions that generally must be satisfied for agency action to be 'final' under the APA").

**164.** *See generally* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (elaborating the theory of superstatutes).

statute becomes entrenched and that justifies evolutive interpretation of superstatutes involves Congress, agencies, and the public coming to a consensus, not simply the courts making pronouncements."[165] As Kathryn Kovacs has persuasively argued, because the APA is not administered by any single agency, the opportunity for deliberation and broad public consensus surrounding the meaning of the APA is diminished.[166] Therefore, courts interpreting the APA in a dynamic manner lack the civic-republican pedigree that would otherwise exist when following the lead of an agency that administers a statutory scheme in a way that interacts with and accounts for the public's changing concerns. Ultimately, she concludes:

> [G]iven the extraordinary legislative process that led to the APA's enactment and the relative paucity of agency-based deliberative feedback since then, courts should be particularly cautious about interpreting the APA's text in a way that shifts the balance Congress reached through the political process. Courts should look closely at the APA's individual provisions, including Congress's treatment of each provision in the original legislative process and the quality of deliberation the provision has seen since enactment.[167]

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**165.** Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1240 (2015).

**166.** *See id*. at 1243. To be clear, the simple fact that a federal statute is jointly administered by more than one agency does not mean that superstatute theory might not countenance an evolving interpretative approach. For example, the Civil Rights Act and Sherman Act are jointly administered by multiple agencies, and yet there are reasons to think that both might be superstatutes for which an evolving interpretation is appropriate. *See* Eskridge & Ferejohn, *supra* note 164, at 1231-42. The APA, however, is applicable to nearly every single federal executive institution and its purpose is procedural, not substantive. Unlike other putative superstatutes, around which agencies can invest in and construct norms and institutions rooted in the substantive purposes of the statute, the APA is rather sterile. Moreover, because of the APA's breadth, no agency can claim to possess a pedigree of experience or expertise giving rise to meaningful deliberative feedback sufficient to prompt courts to accede to its view of the APA. Finally, unlike substantive statutes, which often empower agencies just as much as they constrain them, the APA's procedural protections primarily constrain agencies' means for pursuing their substantive goals. Thus, it is less likely that agencies possess the correct set of incentives to deliberate on the APA's meaning without also systematically interpreting the statute to support the aggrandizement of their own authority in the pursuit of their substantive missions. In other words, agency incentives align with substantive superstatutes because the agency will often zealously pursue the power to which the substantive statute is directed. But agency incentives for additional power will more likely misalign with the constraining *telos* of the APA.

**167.** Kovacs, *supra* note 165, at 1254.

The questionable quality of judicial deliberation over section 704, described in Part I, combined with the public's lack of engagement with the provision, more than justifies a return to Congress's original bargain—informed by relevant, preexisting administrative common law—that can perhaps rescue the current doctrine.

That being said, one potentially awkward feature of a historically grounded understanding of section 704 could be the challenge of harmonizing that approach with the administrative common law that has developed since 1946, such as *Chevron* deference.[168] But common law is designed to fill gaps in statutory texts created by legislative silence.[169] If section 704 has a discoverable meaning—one that reflects the "balance Congress reached through the political process"[170]—that meaning must trump existing inconsistent administrative common law.

This Note assumes that *Chevron* is consistent with the APA,[171] and allows that section 704 may be agnostic regarding deference to agency interpretations of law. The goal is therefore modest: given an existing body of administrative common law that includes *Chevron*, how should interpreters apply the APA's finality requirement in section 704? The courts' existing interpretations of section 704 resemble a common law approach. Because they demonstrate manifest unawareness of the contemporaneous meaning of the term "final agency action," they appear to build a finality doctrine without genuine "guidance from any textual codification of law and policy."[172]

But the virtues of common law adjudication—coherence, increasing clarity, and experiential wisdom—are largely absent from the confused state of the finality doctrine. Rather than plucking a reading of "final agency action" from a range of potential meanings based on a policy preference, courts should begin to give priority to the views of those who adopted the APA. That generation forthrightly confronted the then-minimal constraints on the administrative state and weighed the optimal amount of power and constraint that would both permit agencies to function effectively and allow aggrieved parties the opportunity to protect their procedural rights in court. If the deliberations of the enacting Con-

168. *See, e.g.*, *id.* at 1215.

169. *See* Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 447 (2003).

170. Kovacs, *supra* note 165, at 1211.

171. *But see* Bamzai, *supra* note 28, at 985-90 (2016) (describing *Chevron*'s incompatibility with APA section 706). This Note is focused on the meaning of section 704 of the APA. Whether the present critics of *Chevron* deference are correct in their interpretations of APA section 706 and whether *Chevron* should thus be overruled are questions beyond the scope of this Note.

172. Duffy, *supra* note 16, at 115.

gress did not yield a baseline understanding of "final agency action," then perhaps the courts would be justified in filling in the interpretative gaps. But the history suggests that section 704 embodied a cognizable set of standards to guide courts in their interpretations of finality. Courts should abide by those boundaries.

### *B. The Historical Availability of Pre-Enforcement Judicial Review and the Centrality of Legal Effect*

Having explained the aspirations of a historical approach to the APA's finality requirement, I now turn to the first of two historical questions: In the era of the APA's enactment, what features of agency action generally determined the availability of pre-enforcement judicial review? If *Bennett*'s second prong is historically sound, then one would expect legal effect to play a central, if not dispositive, role in that inquiry. And indeed, as I argue below, the history seems to bear that conclusion out. Cases and commentary discussing the availability of judicial review before and after the APA generally limited pre-enforcement review to only those agency actions (usually orders) that fixed legal rights and obligations, akin to *Bennett*'s second prong. After establishing this point, the next Section takes up whether interpretative rules possessed the legal effect necessary to warrant pre-enforcement review.

The meaning of section 704's requirement of "final agency action" has long proved elusive. One contemporaneous commentator, attempting to explain section 704 to practitioners, admitted that the provision "reads like a product of a semantic Alice-in-Wonderland world populated by legislative draftsmen and German philosophers."[173] Ouch. Nevertheless, a few clues can be discerned from the text of section 704. In particular, while "final agency action" is never defined in the APA, section 704 specifies that any "preliminary, procedural, or intermediate agency action or ruling *not* directly reviewable is subject to review on review of the final agency action."[174] Because section 704 expressly juxtaposes "preliminary, procedural, [and] intermediate" agency action against "final" agency action, it is reasonable to conclude that "final" agency action cannot be preliminary, procedural, or intermediate.[175]

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**173.** Scanlan, *supra* note 162, at 519.

**174.** 5 U.S.C. § 704 (2012) (emphasis added).

**175.** *See* TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 103 (1947). In the context of agency adjudications and coercive orders, this reading of section 704 has generally been understood to at least impose an exhaustion requirement. *See, e.g.*, ADMINISTRATIVE PROCEDURE: A HANDBOOK OF LAW AND

But beyond this limited conclusion, section 704 raises far more questions than it answers. Chief among them is whether, and how, the requirement for finality applies to the availability of judicial review of administrative rules prior to enforcement. While many contemporaneous commentators believed that section 704 was simply a restatement of existing precedent,[176] one complication in this view is that before the APA, most administrative agencies acted directly on individuals through "orders" or "decisions" that were issued after proceedings resembling either formal or informal adjudication.[177] In addition, most avenues to judicial review came through the agencies' organic statutes, some of which provided for review of only "final" orders or decisions.[178] One such case involving the reviewability of an agency order was *Rochester Telephone*, the pre-APA case that indirectly served as the foundation of *Bennett*'s second prong.[179] This predominant focus on administrative orders requires those interested in the finality of nonlegislative rules to analogize from cases that dealt primarily with agency orders, as opposed to agency rules. As such, absent historical evidence indicating a relevant distinction between agency orders and rules, this Note proceeds with the understanding that one can, and should, infer finality principles applicable to agency rules from cases concerning agency orders.

More challengingly, even though courts today generally take for granted that regulated parties can challenge legislative rules prior to enforcement,[180] before the adoption of the APA that was a disputed question. For example, the 1941 Report of the Attorney General's Committee on Administrative Procedure explained that until recently, administrative regulations had only been subject to judicial review on collateral attack, "in actions brought to enforce them, in in-

PROCEDURE BEFORE FEDERAL AGENCIES ¶ 1939, at 127 (2d ed. 1946) [hereinafter ADMINISTRATIVE PROCEDURE HANDBOOK].

176. *See, e.g.*, 92 CONG. REC. 5654 (1946) (statement of Rep. Walter) ("The provisions of this [sub]section are technical but involve no departure from the usual and well understood rules of procedure in this field."); CLARK, U.S. DEP'T OF JUSTICE, *supra* note 175, at 101-03; F.J. Moreau, *The Developments in Administrative Law Since 1941*, 15 J. B. ASS'N ST. KAN. 1, 31 (1946); Morton H. Wilner, *Hearings and Judicial Review Under the Administrative Procedure Act*, 18 PA. B. ASS'N Q. 71, 81 (1946).

177. *See, e.g.*, 1 F. TROWBRIDGE VOM BAUR, FEDERAL ADMINISTRATIVE LAW 175 (1942); *see also* ADMINISTRATIVE PROCEDURE HANDBOOK, *supra* note 175, ¶ 1435, at 72 ("The ultimate and effective results of administrative adjudications are usually called 'orders,' which may be of various kinds.").

178. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 160(f) (2012); Social Security Act, 42 U.S.C. § 405(g) (2012); Railroad Unemployment Insurance Act, 45 U.S.C. § 355(f) (2012).

179. *See* Rochester Tel. Corp. v. United States, 307 U.S. 125, 143 (1939).

180. *See, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).

junction suits to prevent their enforcement, in declaratory judgment proceedings, in habeas corpus actions to obtain release from arrests for violation, or in private actions in which the results turned upon the effect of regulations."[181] The Committee implicitly expressed a preference for rules challenges in the context of "applying a regulation to a particular objector" because "[t]he decision w[ould] be the kind courts are accustomed to render[ing]."[182]

More overt in its distaste for pre-enforcement facial challenges of legislative rules was the separate set of recommendations published by three members of the Committee – Carl McFarland, Arthur Vanderbilt, and E. Blythe Stason. McFarland, Vanderbilt, and Stason proposed a bill that provided that "any rule may be judicially reviewed upon contest of its application to particular persons or subjects."[183] They argued that it was "unnecessary and unwise" for a general administrative procedure statute to provide for judicial review of rules "in the abstract."[184] The proposed bill also provided for declaratory judgments, but even then a rule would only be reviewable when it "interferes with or impairs, or threatens to interfere with or impair" constitutional or statutory rights.[185] This draft bill essentially sought to track existing case law requiring threat of "irreparable injury which is clear and imminent" to permit an action for an injunction.[186]

However, by the time the APA was ultimately adopted in 1946, this stark limitation on the review of agency rules and regulations was absent from the statute's text, and pre-enforcement challenges to certain rules had gained wider acceptance. Commentators recognized that because "binding [legislative] regulations must be granted the status of statutes, their reviewability by the courts follows the same principles which control the judicial reviewability of acts of the

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**181.** ATTORNEY GEN. COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 115 (1941) [hereinafter FINAL REPORT].

**182.** *Id.*

**183.** *Id.* at 230.

**184.** *Id.* at 231.

**185.** *Id.* at 230.

**186.** *See, e.g.*, Am. Fed'n of Labor v. Watson, 327 U.S. 582, 593 (1946) (listing prior cases). Even though declaratory judgment actions outside the field of administrative law would normally not condition relief on a showing of imminent irreparable harm, the existing law in the administrative context was different. As Professor Davis remarked shortly after the passage of the APA, "[w]hen lack of threat of irreparable injury bars an injunction against administrative action, lack of justiciable controversy bars a declaratory judgment." Kenneth Culp Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction: 2*, 28 TEX. L. REV. 376, 380 n.150 (1950) (citing United Pub. Workers v. Mitchell, 330 U.S. 75 (1947)).

Legislatures themselves."[187] But only when regulations "directly affect rights already established" could reviewability obtain for the purpose of injunctive relief.[188] For example, in *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, the Court explained that when Congress delegates a portion of its legislative power to an administrative agency, and the agency acts in a "quasi-legislative" manner, the agency action "is subject to the same tests as to its validity as would be an act of Congress intended to accomplish the same purpose."[189] Regulations are treated like statutes for the purpose of judicial review because they share fundamental, common features with ordinary exercises of Congress's legislative power: they "grant rights, impose obligations, or produce other significant effects on private interests."[190] And because statutes that affect or threaten to affect legal rights can be subject to pre-enforcement review,[191] it follows that "quasi-legislative" substantive regulations may be as well.[192]

Legislative rules' capacity to affect rights and impose obligations was the feature that justified pre-enforcement review. For example, shortly before the adoption of the APA, in *Columbia Broadcasting System, Inc. v. United States*, the Supreme Court confirmed that the legal effect of agency action dictated the availability of pre-enforcement judicial review.[193] The Federal Communications

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**187.** ARTHUR LENHOFF, COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION 759 (1949).

**188.** *Id.* at 759-60.

**189.** Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 388 (1932).

**190.** Batterton v. Marshall, 648 F.2d 694, 701-02 (D.C. Cir. 1980); *see also* INS v. Chadha, 462 U.S. 919, 986 (1983) (White, J., dissenting) ("When agencies are authorized to prescribe law through substantive rulemaking, the administrator's regulation is not only due deference, but is accorded 'legislative effect.' These regulations bind courts and officers of the federal government, may pre-empt state law, and grant rights to and impose obligations on the public. In sum, they have the force of law." (internal citations and footnote omitted)).

**191.** *See, e.g.*, REGINALD PARKER, ADMINISTRATIVE LAW: A TEXT 239 (1952).

**192.** *See* Davis, *supra* note 186, at 383 ("From the standpoint of timing a challenge, regulations are hardly distinguishable from statutes.").

**193.** 316 U.S. 407 (1942); *see also* Davis, *supra* note 186, at 384 (discussing *Columbia Broadcasting*). A brief point of clarification: administrative law scholars writing in the wake of the APA's passage often discussed the Urgent Deficiencies Act cases that follow in the context of "ripeness" rather than finality. *See* Duffy, *supra* note 16, at 166-75 (summarizing and critiquing Davis's and Professor Louis Jaffe's attempts to shoehorn these cases into the concept of "ripeness"). I wholeheartedly agree with Professor Duffy that these cases do not appear relevant to the judge-made, atextual ripeness doctrine; they rest instead on "traditional methods of statutory interpretation—including attention to the text, structure and history of the Urgent Deficiencies Act." *Id.* at 169. Importantly, one must therefore ask whether and how the Urgent Deficiencies Act's text aligns with section 704 of the APA. The Urgent Deficiencies Act permitted suits to "enforce, enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission." Act of June 18, 1910, ch. 309, § 1, 36 Stat. 539, 539. To what extent are

Commission issued an order promulgating a regulation that prohibited the granting of licenses to any broadcasting station entering into particular types of contracts with any of its networks.[194] The Commission attempted to characterize the regulations as mere policy statements[195] and, therefore, the order promulgating them would be "no more subject to review than a press release similarly announcing [the Commission's] policy."[196] Columbia Broadcasting brought a suit for an injunction under section 402(a) of the Communications Act of 1934, which incorporated provisions of the Urgent Deficiencies Act of 1913 and permitted suits to enjoin Commission "order[s]."[197]

The Court rebuked the Commission's characterization, holding that the purported policy statement was truly an order promulgating a legislative rule that carried "the force of law" and acted to "affect or determine rights generally."[198] The Court concluded by remarking upon the key distinguishing feature separating the Commission's reviewable regulations and the host of other agency actions that were traditionally unreviewable: "The ultimate test of reviewability is . . . [to be found] in the need of the review to protect from the irreparable injury threatened . . . by administrative rulings which attach *legal consequences* to

cases under the Urgent Deficiencies Act permitting only review of "orders" carrying the force of law probative of the APA's meaning? At first blush, the lack of the word "final"—assumed to be the key modifier in section 704—indicates that these cases should carry very little weight in understanding finality under the APA. But the Urgent Deficiencies Act's reference to "any order" was implicitly understood to encompass only "final orders." In fact, the "tendency of the courts" had been to construe the Urgent Deficiencies Act's reference to "any order" as "allowing review only of orders definitely settling controversies on the merits"—that is, final orders. Note, *Reviewability of "Negative" Administrative Orders*, 53 HARV. L. REV. 98, 104 (1939). Thus, any such definitive order "that so *affect[ed a] complainant's rights* that he [was] entitled to equitable relief could be construed as 'final' . . . ." *Id.* (emphasis added). Even beyond the Urgent Deficiencies Act the phrase "any order" meant "any *final* order." *See* Note, *Appealability of Administrative Orders*, 47 YALE L.J. 766, 773 n.38 (1938) ("Generally the phrases 'an order' and 'any order' have been interpreted as allowing appeals only from final orders."). And orders were "final" to the extent they "affect[ed a] complainant's rights." In other words, they were final if they determined rights and obligations or produced legal consequences, à la *Bennett*. In sum, even though the Urgent Deficiencies Act cases emphasizing legal effect did not necessarily turn on the meaning of the word "final," they offer perhaps the best indication we have of what defined "final orders" or "final agency action" before the adoption of the APA.

**194.** *See Columbia Broadcasting*, 316 U.S. at 408.

**195.** *See id.* at 411.

**196.** *Id.* at 422.

**197.** *Id.* at 408, 415-16.

**198.** *Id.* at 417-18.

action . . . ."[199] Meanwhile, those agency actions that "do not adjudicate rights or declare them legislatively" are thus not subject to judicial review.[200]

At most, *Columbia Broadcasting* simply reiterated the prevailing notion that legal effect was a prerequisite for judicial review prior to the adoption of the APA. For example, as far back as 1927, in *United States v. Los Angeles & Salt Lake Railroad Co.*, a unanimous Court held that a "final valuation" by the Interstate Commerce Commission could not be reviewed under the Urgent Deficiencies Act because it did not "command the carrier to do, or to refrain from doing anything," and it did not grant or withhold any privilege or license, nor did it subject the carrier to "any liability, civil or criminal."[201] It did not "change the carrier's existing or future status or condition" nor did it "determine any right or obligation."[202] Several other cases decided in the 1930s repeat these same ideas.[203]

*Columbia Broadcasting* thus clarified, shortly before the APA's adoption, that the reviewability of agency actions generally depended on the *effect* of the action. And while many commentators focused on the practical effects of nonlegislative rules,[204] the Supreme Court homed in specifically on the legal effect of the agency action: whether it carried the "force of law," "affect[ed] or determine[d] rights," or attached "legal consequences" to private action.[205] Of course, all of this language is echoed in *Bennett*'s second prong.[206]

Several commentators writing in the wake of the APA's passage asserted that *Columbia Broadcasting*'s requirement for legal effect was still applicable under the new transsubstantive statute. Arthur Lenhoff remarked that the APA "did not

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**199.** *Id.* at 425 (emphasis added).

**200.** *Id.* at 424.

**201.** 273 U.S. 299, 309-10 (1927).

**202.** *Id.* at 310.

**203.** *See* Rochester Tel. Corp. v. United States, 307 U.S. 125, 143-44 (1939) (holding reviewable under the Urgent Deficiencies Act an order that was "not a mere abstract declaration" but instead "necessarily and immediately carried direction of obedience to previously formulated mandatory orders"); Shannahan v. United States, 303 U.S. 596, 599 (1938) (holding unreviewable under the Urgent Deficiencies Act a report opining that a given carrier was subject to the requirements of the Railway Labor Act because it "neither commands nor directs anything to be done"); United States v. Atlanta, Birmingham & Coast R.R. Co., 282 U.S. 522, 527, 528 (1931) (holding unreviewable an agency "opinion as distinguished from a mandate" where the agency seeks to "secure the desired action without issuing a command").

**204.** *See, e.g.*, ADMINISTRATIVE PROCEDURE HANDBOOK, *supra* note 175, ¶ 1317, at 49-51; ROLAND PENNOCK, ADMINISTRATION AND THE RULE OF LAW 37 (1941); BERNARD SCHWARTZ, AMERICAN ADMINISTRATIVE LAW 34-35 (1950).

**205.** *Columbia Broadcasting*, 316 U.S. at 417.

**206.** Bennett v. Spear, 520 U.S. 154, 178 (1997).

change the result" of *Columbia Broadcasting*.[207] Bernard Schwartz also believed it was "settled" that judicial review under the APA was "governed by the established rule that only 'final' orders of administrative agencies which substantially *affect the rights* of private parties are reviewable."[208] And the Bureau of National Affairs's summary and analysis of the APA stated that "final action within the terms of this subsection [10(c)] includes any *effective or operative* agency action for which there is no other adequate remedy in any court."[209] Even the House and Senate Committee reports both mentioned that section 704 encompassed "effective" or "operative" agency action.[210]

Cases decided shortly after the APA's adoption confirmed the enduring significance of *Columbia Broadcasting*. For example, in *Eccles v. Peoples Bank*, decided in 1948, the Court declined to review a condition placed on banks seeking to become members of the Federal Reserve System.[211] The Court held that because the bank sought relief for a legal injury that required the concurrence of several contingent events, it was "too speculative to warrant anticipatory judicial determinations."[212] Justice Reed's dissent in *Eccles*, meanwhile, focused on the practical injury the bank faced by the condition placed on the bank's membership, including threats to the marketability of the bank's stock and its ability to attract customers.[213] One can trace a through-line back from *Bennett*'s second prong to *Eccles* and *Columbia Broadcasting* for the proposition that the legal effects of an agency action are determinative of whether pre-enforcement review is available.[214]

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**207.** LENHOFF, *supra* note 187, at 760.

**208.** Bernard Schwartz, *Administrative Finality and the Administrative Procedure Act*, 37 GEO. L.J. 526, 527 (1949) (emphasis added).

**209.** BUREAU OF NAT'L AFFAIRS, ADMINISTRATIVE PROCEDURE ACT: SUMMARY AND ANALYSIS BY THE EDITORIAL STAFF OF THE BUREAU OF NATIONAL AFFAIRS 34 (1946) (emphasis added).

**210.** *See* H.R. REP. NO. 79-1980, at 277 (1946); S. REP. NO. 79-752, at 213 (1945).

**211.** 333 U.S. 426, 427-28 (1948).

**212.** *Id*. at 432.

**213.** *See id*. at 435-37 (Reed, J., dissenting).

**214.** It is worth mentioning that *Eccles*, like practically all cases from the era surrounding the APA, is of only limited direct relevance. First, the bank sought a declaratory judgment and did not sue under the APA. *See id.* at 427 (majority opinion). Therefore section 704 did not directly apply. Nevertheless, several commentators recognized the relevance of *Eccles* to the APA's judicial review provisions, but they implicitly disagreed on whether the case informed section 704 or section 702, concerning the right of review for persons "suffering legal wrong" or "adversely aggrieved or affected" by agency action within the meaning of a relevant statute. *Compare* Schwartz, *supra* note 208, at 528 ("Our analysis thus far indicates that it is only 'agency action' within the meaning of section 2(g) of the A.P.A. that is subject to review under section 10. Likewise, . . . the courts will not intervene where only preliminary or procedural orders of

The most plausible inference from the preceding commentary and cases is that nonadjudicatory agency decisions that came closest to exercises of delegated "legislative power" were subject to the same pre-enforcement review as statutes. However, the admittedly limited record does not speak directly to the question of whether nonlegislative rules in particular were ever subject to pre-enforcement review. The analysis that follows establishes the widespread belief that nonlegislative rules did not carry the force and effect of law. That is, interpretative rules did not approach legislative power when the APA was enacted because they were only ever conclusive on the courts by virtue of their reliability and persuasiveness.

### *C. The Historical Understanding of Nonlegislative Rules' Legal (Non)Effect*

Recognizing the primacy of legal effect in securing pre-enforcement judicial review, I now turn to nonlegislative rules (particularly of the interpretative variety), beginning approximately seven years before the APA's enactment. On February 16, 1939, in response to a highly restrictive bill drafted by the American Bar Association and introduced in the Senate,[215] President Roosevelt asked Attorney General Frank Murphy to form a committee to consider potential administrative reforms and to propose legislation.[216] The Attorney General's Committee on Administrative Procedure issued its final report to Congress almost two years later. Most legal observers "applauded the research and recommendations" of the Committee report.[217] The report "refocused the debate about the deficiencies of the administrative process," and even prompted the comparatively anti-administration American Bar Association to offer bills that moved toward the Committee's recommendations and ultimately "mirrored the consensus" of the Committee.[218] Given the practical significance of the Committee's report in shaping the

an agency are involved."), *with* Scanlan, *supra* note 162, at 513 ("It would appear . . . that the Supreme Court will not be predisposed to grant judicial review of administrative rules unless the complainant can show that he is a person suffering a 'legal wrong.'"). Of course, it is possible that *Eccles* was relevant to both APA provisions, because even if there technically can be a legal wrong without "agency action," *see* Hearst Radio, Inc. v. FCC, 167 F.2d 225, 227 (D.C. Cir. 1948), the lack of final agency action indicates a strong likelihood that no legal wrong has yet been suffered.

215. *See* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1594 (1996).

216. *See id.*

217. GRISINGER, *supra* note 162, at 72.

218. *Id.* at 73-74.

public and political discourse surrounding administrative reform, a sound historical analysis of the APA should include the Committee's recapitulation and distillation of existing administrative common law.

The Committee recognized that Congress had conferred the power for some agencies to "enact legally binding regulations"[219]—that is, to enact legislative rules. But all agencies, regardless of congressional authorization, could also issue "interpretations, rulings, or opinions upon the laws they administer."[220] These interpretative regulations "are ordinarily of an advisory character, indicating merely the agency's present belief concerning the meaning of applicable statutory language."[221] The Committee commented that some agencies promulgated interpretative rules in the same form as other regulations "that have the force of law."[222] But while legislative rules were "legally binding" and had "statutory force upon going into effect," interpretative rules lacked both qualities: "The statutes themselves and not the regulations remain in theory the *sole criterion* of what the law authorizes or compels and what it forbids."[223]

However, the Committee's report also acknowledged that the neat line between legislative and interpretative rules was "blurred by the fact that the courts pay great deference to the interpretative regulations of administrative agencies, especially where these have been followed for a long time."[224] The Committee then quoted a 1930 Supreme Court opinion, which explained that "it is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."[225] Because this doctrine "ha[d] sufficient weight to give much finality to the interpretative regulations of administrative agencies," the Committee acknowledged that the "procedures by which [interpretative] regulations are prescribed become important to private interests."[226] Even in this nascent administrative-law regime, commentators recognized both

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**219.** FINAL REPORT, *supra* note 181, at 99.

**220.** *Id.*

**221.** *Id.* at 27.

**222.** *Id.* at 100.

**223.** *Id.* (emphasis added).

**224.** *Id.*

**225.** *Id.* (quoting Brewster v. Gage, 280 U.S. 327, 336 (1930)); *see also id.* at 27 ("[T]he agency's interpretations are in any event of considerable importance[;] . . . even if they are challenged in judicial proceedings, the courts will be influenced though not concluded by the administrative opinion.").

**226.** *Id.* at 100; *see also id*. at 27.

the legal distinctions between legislative and interpretative rules and the practical challenges that judicial deference posed to maintaining the boundary between the two types of rule.

The Committee's summary of distinctions between legislative and nonlegislative rules is instructive of the legal consensus at the time: legislative rules carried the force and effect of law, but interpretative rules did not.[227] Like the Committee, many commentators recognized the "blurring" between legislative rules and some interpretative rules. They agreed that courts "looked differently at interpretative rules than at substantive rules."[228] These interpretations remained, in theory, no more authoritative than any citizen's, but all recognized that they were also accorded some weight in the courts.[229] Nevertheless, as Senator Pat McCarran, one of the APA's cosponsors, said on the Senate floor, compared to legislative rules, "under present law interpretative rules, being merely adaptations of interpretations of statutes, are subject to a more ample degree of judicial review."[230] The Senate Judiciary Committee print of the APA agreed: "'[I]nterpretative' rules – as merely interpretations of statutory provisions – are subject

**227.** *See, e.g.*, MILTON M. CARROW, THE BACKGROUND OF ADMINISTRATIVE LAW 32 & n.7 (1948); JOHN PRESTON COMER, LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES 137 (1927); JAMES HART, AN INTRODUCTION TO ADMINISTRATIVE LAW 154 (1940); PENNOCK, *supra* note 204, at 36-37; SCHWARTZ, *supra* note 204, at 34-35 (1950); Ellsworth C. Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 COLUM. L. REV. 252, 259-61 (1940); Cecil T. Carr, *Delegated Legislation in the United States*, 25 J. COMP. LEGIS. & INT'L L. 3, 47, 50 (1943); Frederic P. Lee, *Legislative and Interpretative Regulations*, 29 GEO. L.J. 1, 2 (1940); Hans J. Morgenthau, *Implied Regulatory Powers in Administrative Law*, 28 IOWA L. REV. 575, 582 (1943); J. Hardy Patten, *Judicial Review of Treasury Regulations*, 4 NAT'L INCOME TAX MAG. 373, 395 (1926); David Reich, *Rule Making Under the Administrative Procedure Act*, *in* THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES 492, 516 (George Warren ed., 1947); Stanley S. Surrey, *The Scope and Effect of Treasury Regulations Under the Income, Estate, and Gift Taxes*, 88 U. PA. L. REV. 556, 558 (1940); *see also* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH. L. REV. 520, 541 (1977) (noting that the legal literature began to recognize the distinction between legislative and interpretative rules in the late 1920s).

**228.** Reich, *supra* note 227, at 516.

**229.** *See, e.g.*, HART, *supra* note 227, at 154; PENNOCK, *supra* note 204, at 37; SCHWARTZ, *supra* note 204, at 35; Robert M. Blair-Smith, *Forms of Administrative Interpretation Under the Securities Laws*, 26 IOWA L. REV. 241, 260 (1941); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 481-82 & n.53 (1950); Patten, *supra* note 227, at 395; Paul R. Dean, Note, *Rule Making: Some Definitions Under the Federal Administrative Procedure Act*, 35 GEO. L.J. 491, 497 (1947).

**230.** 92 CONG. REC. 2155 (1946) (statement of Sen. McCarran).

to plenary review, whereas 'substantive' rules involve a maximum of administrative discretion."[231]

While some commentators confidently asserted that interpretative rules "ha[d] no more the force and effect of law than the interpretation of a private individual,"[232] many more saw the shades of gray in the doctrinal landscape.[233] Reginald Parker explained the problem by citing to two seemingly inconsistent lines of cases. The first embodied the notion that "the construction of and interpretation of a statute as applied to justiciable controversies is a judicial function."[234] The second, however, afforded more deference to agency interpretations, claiming that agency regulations would be "sustained unless unreasonable and plainly inconsistent with the . . . statutes."[235] Because of the courts' inconsistent treatment of interpretative rules based on the individual circumstances of each case,[236] Parker believed the truth was found in the "golden middle road": agency interpretations were mere expert guidance whose weight varied with their indicia of reliability.[237]

While distinguishing between legislative rules and interpretative rules was always a frustrating task for agency officials, courts, and commentators,[238] the "theoretical distinction" between the two was considered "indispensable to understanding administrative rules."[239] Kenneth Culp Davis, a former staffer to the Attorney General's Committee on Administrative Procedure and one of the most

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**231.** S. COMM. ON THE JUDICIARY, 79TH CONG., SENATE JUDICIARY COMMITTEE PRINT, JUNE 1945 (Comm. Print 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 11, 18 (1946).

**232.** Morgenthau, *supra* note 227, at 582; *see also* Alvord, *supra* note 227, at 261 ("In other words, the Treasury's guess as to what the law means has no more legal effect than the taxpayer's."); Patten, *supra* note 227, at 395 ("[S]ince the court is finally to decide the correct interpretation to be applied to a substantive provision of a tax statute, it is erroneous to assume that interpretative regulations have the 'force and effect of law.'").

**233.** *See, e.g.*, JAMES HART, THE ORDINANCE-MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 50 (1925); SCHWARTZ, *supra* note 204, at 34.

**234.** Woods v. Benson Hotel Corp., 177 F.2d 543, 546 (8th Cir. 1949); *see* REGINALD PARKER, ADMINISTRATIVE LAW: A TEXT 199 n.59 (1952) (collecting cases).

**235.** Comm'r v. S. Tex. Lumber Co., 333 U.S. 496, 501 (1948); *see* PARKER, *supra* note 234, at 199 n.60 (collecting cases).

**236.** *See, e.g.*, Note, *Statutes — Construction — Effect Given to Practical Construction*, 20 MINN. L. REV. 56, 61 (1936).

**237.** *See* PARKER, *supra* note 234, at 199-200 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

**238.** *See, e.g.*, *id.* at 197; SCHWARTZ, *supra* note 204, at 34; Reich, *supra* note 227, at 516.

**239.** Kenneth Culp Davis, *Administrative Rules — Interpretative, Legislative, and Retroactive*, 57 YALE L.J. 919, 928, 934 (1948).

influential administrative law scholars writing in the wake of the APA,[240] wrote a series of law review articles that included a sophisticated and sustained focus on interpretative rules. In particular, Davis's analysis usefully summarized the existing doctrine and clarified how the interaction between interpretative rules and "the force of law" was hardly simple.

In a 1948 article, Davis elaborated on the vexing problem of distinguishing legislative from interpretative rules. While Davis seemingly accepted the core of the force-of-law distinction,[241] he likewise recognized that a categorical distinction was inaccurate, writing that legislative rules have the force of law and that "interpretative rules sometimes do."[242] The rigid dichotomy endorsed by so many commentators sat uneasily with the equally widely understood notion that courts always afforded some weight to interpretative rules. According to Davis, the disconnect between these two views could be reconciled once one accepted that the term "force of law" was a red herring: "A more significant inquiry is into degrees of authoritative weight."[243] Davis then distilled three factors of any agency statutory interpretation that caused courts to grant them authoritative weight approximating the force of law: (1) contemporaneous construction, (2) longstanding practice, and (3) implied approval through congressional reenactment.[244]

Davis's three factors were consistent with the long tradition of statutory interpretation,[245] as well as the views of others writing in the years surrounding the APA's enactment.[246] His insight in connecting these factors to the legal authority of interpretative rules was novel, although it seemingly made explicit the only rationale that could reconcile the commonly recognized doctrinal tensions. While not every commentator would have adopted Davis's sliding scale ap-

240. *See Present at the Creation: Regulatory Reform Before 1946*, 38 ADMIN. L. REV. 511, 512 (1986).

241. *See, e.g.*, Kenneth Culp Davis, *Administrative Powers of Supervising, Prosecuting, Advising, Declaring, and Informally Adjudicating*, 63 HARV. L. REV. 194, 229 (1949) ("The distinction between legislative and interpretative rules is necessary because only an agency having a power to make legislative rules may issue a binding ruling, since interpretative rules normally bind neither the agency nor the reviewing courts.").

242. Davis, *supra* note 239, at 934.

243. *Id.*

244. *See id.* at 936.

245. *See generally* Bamzai, *supra* note 28 (explaining the development and persistence of contemporaneous-and-customary-interpretation canons in the U.S. courts up through the adoption of the APA).

246. *See, e.g.*, WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS 313 (1940); HART, *supra* note 227, at 375.

proach, many would have agreed that interpretative rules did not receive authoritative weight in court merely *because* they were agency interpretations of ambiguous statutes.[247] Moreover, as Davis acknowledged, even when agency interpretations were contemporaneously made, were longstanding and uniform, or preceded a reenactment, the courts *still* maintained discretion to reject them depending on the courts' "views of the merits."[248] Even Davis's relatively nuanced view offers only minimal guidance for deciding when and how to defer to an agency's statutory interpretation.

Nevertheless, nearly all informed commentators of the time recognized that, as a theoretical matter, interpretative rules did not have the force and effect of law, despite the courts' practice of granting varying degrees of weight to those interpretations. Even if the distinction between judicial deference and the "force of law" seems tenuous today, as it did to some then,[249] because the courts before the APA were unwilling to cede complete interpretive power to agencies, it was "necessary to draw a line somewhere."[250] The prevailing consensus was that whatever weight interpretative rules were granted under traditional judicial practice, that weight did not rise to the level of the force and effect of law; the distinction between legislative rules and interpretative rules on the basis of legal effect was correct and essential, no matter how challenging to administer.[251]

Combined with Section II.B's conclusion that courts permitted pre-enforcement judicial review only when agency action had legal effect, this Section's historical analysis suggests that because interpretative rules lacked legal effect—the force and effect of law—they should not be subject to pre-enforcement review under APA section 704.

While there exist only a few examples from that time period specifically addressing pre-enforcement judicial review of nonlegislative rules, they all point in the same direction: nonlegislative rules were not subject to pre-enforcement review. For example, in the Attorney General's Committee on Administrative Procedure's Final Report, the Committee remarked that interpretative rules "do not

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**247.** This is not to say that there were not dissenters advocating for more radical forms of deference to agency interpretations. Davis himself commented that one recent writer had forcefully argued that Treasury interpretations should prevail in court "in the absence of a clear showing of error." Davis, *supra* note 239, at 935 (quoting Louis Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 HARV. L. REV. 477, 528 (1945)). But as Davis admitted, "[t]his proposition probably does not yet embody existing practice . . . ." *Id.*

**248.** *Id.* at 958; *see also* ROBERT M. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 294-95 (1942); Lee, *supra* note 227, at 29; Morgenthau, *supra* note 227, at 599.

**249.** *See, e.g.*, SCHWARTZ, *supra* note 204, at 35.

**250.** *See* Reginald Parker, *Administrative Interpretations*, 5 MIAMI L.Q. 533, 535 (1951).

**251.** *See* A.H. Feller, *Addendum to the Regulations Problem*, 54 HARV. L. REV. 1311, 1320 (1941).

receive statutory force and their validity is subject to challenge in any court proceeding in which *their application* may be in question."[252] Similarly, McFarland and Vanderbilt's 1947 casebook on administrative law stated, "But even in the case of a general 'interpretative' rule, a contest may be had only with reference to the facts of a particular case or particular situation in which the private party shows a legal interest sufficient to enable him to maintain proceedings."[253]

Jeter Ray, the Associate Solicitor of the Department of Labor, in a public forum at New York University in 1947, explained that section 10(c) of the APA (now section 704) raised the question of "whether advisory or interpretative opinions, issued by the Department, are directly reviewable."[254] Ray explained to the audience that these interpretations "indicate merely the Department's present belief concerning the meaning of applicable statutory language. They have no force and effect of law and are not binding upon the courts although the Supreme Court has said they are entitled to great weight."[255] But because these interpretations "do not themselves *create any rights or liabilities*," they are not directly reviewable by the courts.[256]

Even Davis, the most adamant proponent of the idea that interpretative rules could have the force and effect of law,[257] seemingly admitted that they were not subject to pre-enforcement review. Examining a set of 1949 regulations promulgated by the Federal Communications Commission, Davis explained that the Commission had disclaimed that it was "promulgating rules which constitute an exercise of delegated [lawmaking] authority" but was instead "issuing interpretative rules for the purpose of stating its understanding of what Congress itself has found to be contrary to the public interest."[258] Davis then conceded that if they were merely "interpretative," the regulations "may well be immune from challenge *before they are applied in a particular case*."[259] Moreover, Davis seemed to also imply that even if the regulations were not interpretative, they still might be

**252**. FINAL REPORT, *supra* note 181, at 100 (emphasis added).

**253**. CASES AND MATERIALS ON ADMINISTRATIVE LAW, *supra* note 160, at 395.

**254**. Jeter S. Ray, *Effect of the Administrative Procedure Act on the Regulatory Functions of the Department of Labor*, *in* THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES, *supra* note 227, at 438, 459-60.

**255**. *Id.* at 460.

**256**. *Id.* (emphasis added).

**257**. *See supra* notes 239-244 and accompanying text.

**258**. Davis, *supra* note 186, at 387-88 (quoting 1 PIKE & FISCHER, RADIO REGULATION 91:234 (Henry G. Fischer & John W. Willis eds., 1948)). *See generally* Note, *Administrative Enforcement of the Lottery Broadcast Provision*, 58 YALE L.J. 1093 (1949) (discussing the legal issues surrounding the Commission's regulations).

**259**. Davis, *supra* note 186, at 387-88 (emphasis added).

unreviewable prior to application because they "have no regulatory [i.e., legal] effect before that time."[260]

If one takes seriously the notion that the term "final agency action" in section 704 of the APA was a term of art designed largely to incorporate preexisting case law on reviewability, the historical record yields a rather simple set of conclusions. Only agency actions with concrete legal effects were reviewable. Legislative rules, because they carried the force and effect of law, could be subject to preenforcement review because of their legal effects. Interpretative rules, policy statements, and other forms of informal agency actions did not carry such legal effects — despite the courts' widespread practice of granting agencies some measure of deference when interpreting statutes — and were therefore unreviewable until applied.

## III. INCORPORATING *CHEVRON* INTO FINALITY ANALYSIS: THE WHY AND HOW

Returning to the current controversies facing the circuit courts, it would seem that *Huerta* and the categorical approach has largely captured the perspective of the generation that enacted the APA. Moreover, the growing chorus of critics of *Bennett*'s second prong seems to have missed the mark. While the current application of *Bennett*'s second prong might be objectionable, the idea that legal effect is essential to reviewability should be beyond dispute. Additionally, the historical understanding of interpretative rules evinces clear support for *Perez*'s conclusion that interpretative rules do not carry the force and effect of law. Likewise, the history seems to support *Huerta*'s position that because interpretative rules lack the force and effect of law, they cannot be final agency action.

But neither *Huerta* nor *Perez* recognized a second feature of the history presented above — that the level of deference the courts afforded to interpretative rules was both the subject of sustained scholarly and practical consideration, and highly relevant to the question of whether interpretative rules carried the "force and effect of law." And while the majority in *Perez* perfunctorily allayed the concerns of Justices Scalia and Thomas regarding the role heightened deference played in the "force of law" determination,[261] administrative law scholars carefully considered this question and recognized the analytical problems it posed. On the contrary, the history outlined above suggests that Justices Scalia and Thomas were onto something in *Perez* and that the Sixth Circuit's "third-way"

260. *Id.* at 388 n.180.

261. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1208 n.4 (2015) ("Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.").

approach to the finality of interpretative rules also has a previously unrecognized historical pedigree. Given the somewhat tentative nature of this intuition, there is thus far no precise framework for implementing this deference-dependent approach to finality.

This Part hopes to fill that gap. Section III.A discusses the uncertain applicability of *Chevron* deference to interpretative rules. In particular, ever since a series of Supreme Court decisions in the early 2000s, courts have struggled to determine whether and when informal agency interpretations are eligible for *Chevron* deference. And the Court's recent decision in *Perez* poses additional conceptual problems for interpreters attempting to understand *Chevron*'s relationship with interpretative rules. However, that Section ultimately concludes that *Chevron* eligibility (when obtained) goes hand-in-hand with finality under section 704. Section III.B then explains the practical contours of the integrated deference-dependent finality doctrine by applying its insights to a sample of prior cases. Ultimately, this reformed doctrine yields a kind of estoppel: agencies facing pre-enforcement challenges to interpretative rules may claim the mantle of nonfinality, so long as they are willing to forgo any future opportunity to claim *Chevron* deference.

### *A. The Uncertain Effect of* Chevron *Deference on the Authority of (Some) Interpretative Rules*

Virtually all commentators writing before and shortly after the APA seemed to agree with two propositions that arguably stood in tension. First, interpretative regulations and policy statements did not carry the force and effect of law.[262] Second, agency interpretations were given varying weight by courts, and sometimes that weight was significant.[263] However, at the end of the day, agency interpretations of federal statutes before the APA were "only an extrinsic aid in deciphering the meaning of an ambiguous statute."[264]

In *Chevron*,[265] the Supreme Court articulated the now well-known method for incorporating agency interpretations into the construction of a statute. First, the reviewing court, "employing traditional tools of statutory construction,"

**262.** *See supra* Section II.C.

**263.** *See supra* note 237 and accompanying text.

**264.** Lee, *supra* note 227, at 29; *see also* Jacobus tenBroek, *Interpretive Administrative Action and the Lawmaker's Will*, 20 OR. L. REV. 206, 209-10 (1941) ("In its most common form, contemporaneous construction is resorted to as one among a number of extrinsic aids all tending to the conclusion reached by the court, and is generally supplemented by a statement that the practice thus commenced has been consistently and continuously followed.").

**265.** Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

must determine whether "Congress has directly spoken to the precise question at issue."[266] If so, "that is the end of the matter" and the court "must give effect to the unambiguously expressed intent of Congress."[267] But if "Congress has not directly addressed the precise question at issue" because "the statute is silent or ambiguous," then the court only needs to determine "whether the agency's answer is based on a permissible construction of the statute."[268] In other words, under a *Chevron* analysis "a court may not substitute its own construction of a statutory provision for a reasonable interpretation" of an ambiguous statute by the agency charged with its administration.[269]

*Chevron* displaced the more unstructured approach to judicial deference preceding it that is today often labeled *Skidmore* deference.[270] First, the factors that most often yielded deference when the APA was adopted—contemporaneous and longstanding interpretations—are practically irrelevant under *Chevron*.[271] Second, as Thomas Merrill described, *Chevron* created an "on/off switch" for deference to agency interpretations; once the statute was deemed ambiguous, any reasonable agency interpretation would control.[272] Or, perhaps more accurately, while the traditional deference regime embodied in *Skidmore* was a system that gave agency interpretations various degrees of "weight," *Chevron* deference opened up "space" for agencies to exercise additional discretion in the administration of statutes.[273] In particular, under *Chevron*, once a court determines that the interpretation of the statutes falls within "space" allocated to the agency, the agency is "empowered to act in a manner that creates legal obligations or constraints."[274]

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**266.** *Id.* at 842, 843 n.9.

**267.** *Id.* at 842-43.

**268.** *Id.* at 843.

**269.** *Id.* at 844.

**270.** *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

**271.** In *Chevron*, the Court granted deference to an interpretation that was an admittedly "sharp break with prior interpretations" by the agency. *Chevron*, 467 U.S. at 862; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 ("[T]here is no longer any justification for giving 'special' deference to 'long-standing and consistent' agency interpretations of law.").

**272.** Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 977 (1992).

**273.** Peter L. Strauss, *"Deference" Is Too Confusing—Let's Call Them "*Chevron *Space" and "*Skidmore *Weight,"* 112 COLUM. L. REV. 1143, 1145 (2012); *see also* United States v. Mead Corp., 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion.").

**274.** Strauss, *supra* note 273, at 1145.

Of course, one prominent ambiguity in the wake of *Chevron* involved whether nonlegislative rules could receive such a strong degree of deference, since *Chevron* itself involved a legislative rule.[275] That ambiguity persisted until a pair of decisions in 2000 and 2001. First, in *Christensen v. Harris County*, the Court held that an opinion letter issued by the Acting Administrator of the Wage and Hour Division of the Department of Labor was not entitled to *Chevron* deference.[276] The Court held that an interpretation in an opinion letter, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," did not qualify for *Chevron* deference.[277] Although *Christensen* seemed to imply that any agency interpretation made outside of notice-and-comment rulemaking (or perhaps some form of adjudication) was precluded from receiving *Chevron* deference, the Court softened its position only a year later in *United States v. Mead Corp*.[278] In *Mead*, the Court acknowledged that "express congressional authorizations to engage in the process of rulemaking or [formal] adjudication" were generally "very good indicator[s] of delegation meriting *Chevron* treatment."[279] But *Mead* also acknowledged that agency statements of law made outside the notice-and-comment process could nevertheless receive *Chevron* deference so long as the Court was otherwise satisfied that Congress intended for the agency interpretation at issue to have the "force" or "effect" of law.[280]

*Mead* in turn introduced an unweighted, multifactor balancing test for determining whether an agency interpretation made outside of notice-and-comment rulemaking or formal adjudication could qualify for *Chevron* deference.[281] Among *Mead*'s factors are: whether the face of the relevant statute authorized the agency to make the interpretation; whether the interpretation has precedential effect; whether the agency action is subject to some kind of nonjudicial review; the elaborateness of the procedures by which the agency produces the interpre-

**275**. *See* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2093-94 (1990).

**276**. 529 U.S. 576, 586-87 (2000).

**277**. *Id.* at 587.

**278**. 533 U.S. at 227-31.

**279**. *Id.* at 229.

**280**. *Id.* at 221, 230-34.

**281**. *Id.* at 231-34.

tation; how many different interpretations are issued; and the extent of decentralization within the agency with respect to the processes for producing the interpretation.[282]

*Mead*'s emphasis on procedural elaborateness appears to align with the Court's finality considerations in *Whitman* and *NPHA*. Recall that the Court in both those cases found an interpretative rule (in *Whitman*) and a policy statement (in *NPHA*) to be final agency action under section 704 or an analogous finality provision *without* asking whether the rule at issue satisfied *Bennett*'s second prong. But both cases shared a common element: each involved a relatively rare occasion in which an agency issued a nonlegislative rule according to the notice-and-comment procedures that *must* preface a legislative rule. In other words, the Court appeared to allow a nonlegislative rule's underlying procedure to serve as a substitute for legislative legal effect, as required by *Bennett*. *Mead*,

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**282**. *See id*. *Mead*'s test was further refined and reinterpreted a year later in *Barnhart v. Walton*, 535 U.S. 212 (2002). Like *Mead*, *Barnhart* offered up a multifactor balancing test, but its factors differ from those emphasized in *Mead*. For example, *Barnhart* focuses on "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Id.* at 222. But *Barnhart* continued to allow informal agency interpretations to receive *Chevron* deference in some circumstances, *see id.* at 221-22, and arguably made it easier for agencies to claim deference for their comparatively informal interpretations even relative to *Mead*, *see* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 217 (2006) ("*Barnhart*'s influence is already substantial, as a number of lower courts have given *Chevron* deference to agency interpretations that are not a product of any kind of formal process."). *Mead* and *Barnhart* have both been criticized as confusing and inconsistently applied. *See, e.g.*, Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1448 (2005); Mark Seidenfeld, Chevron*'s Foundation*, 86 NOTRE DAME L. REV. 273, 280 (2011); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 347-49 (2003). And the Supreme Court itself has sometimes ignored these tests altogether, *see* Gonzales v. Oregon, 546 U.S. 243, 258-69 (2006), or supplemented them with other novel barriers to *Chevron* deference, *see* King v. Burwell, 135 S. Ct. 2480, 2488-89 (2015); Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2444 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000). Nevertheless, these precedents remain the law. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 306 (2013); *see also* Union Neighbors United, Inc. v. Jewell, 831 F.3d 564, 579-80 (D.C. Cir. 2016). That said, like *Chevron*, *Mead* and *Barnhart* might very well be mistaken. *See Mead Corp.*, 533 U.S. at 245-46 (Scalia, J., dissenting) (describing the *Mead* test as a "grab bag" of factors and fearing that it will be "hard to know what the lower courts are to make of [*Mead*'s] guidance"). Again, the impropriety of various deference regimes (*Chevron/Mead/Barnhart*, *Seminole Rock/Auer*, etc.) is outside the scope of this Note. My modest contribution is to provide guidance to courts and litigants in discerning administrative finality within the prevailing deference regimes. While *Mead* and *Barnhart* are hardly clearer than the confused finality analysis plaguing the courts, assuming their persistence allows us to isolate and zero in on the question of finality—an administrative law doctrine whose academic and judicial attention pales in comparison to *Chevron* deference.

for its part, likewise prioritizes the "fruits of notice-and-comment rulemaking" for *Chevron* eligibility.[283] While *Mead* likely assumed those "fruits" would amount to legislative rules, it's possible to imagine a procedural continuity between *Mead*'s test for *Chevron* and the Court's approach to finality in *Whitman* and *NPHA*.

Nevertheless, I would not hang much analytical weight on this parallel. *Mead*'s overarching focus centered on one consideration: actual legal effect. As *Mead* expressly held, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[284] Rather than aligning with *Whitman*'s or *NHPA*'s exceptions to *Bennett*'s framework, *Mead* maps more neatly with *Bennett* itself. If all relevant factors indicate that Congress delegated an agency authority to make interpretative rules with "the force of law" and the agency exercises that authority, then surely the resulting interpretative rules determine rights and obligations or entail legal consequences.[285] Therefore, any interpretative rule passing *Mead*'s test should, in theory, uniformly pass *Bennett*'s.

There is one obvious rebuttal to this line of reasoning: Didn't *Perez* expressly decide that interpretative rules can *never* carry the force and effect of law? If so, then how could an interpretative rule ever pass *Mead*'s test? To be sure, *Perez* held that interpretative rules categorically did not carry the force and effect of law.[286] But again recall Justices Scalia's and Thomas's critiques of that portion of *Perez*: the degree of deference courts afford to interpretative rules affects whether the rule carries the force of law.[287] The history canvassed in Section II.C seems to support those critiques, rendering dubious the *Perez* majority's insensitivity to the applicable deference regime.

Indeed, read only at face value, the *Perez* majority's analysis of interpretative rules seems to eviscerate *Mead*, which seemingly contemplated that agency interpretations *could* receive *Chevron* deference even if they are not the product of notice-and-comment rulemaking or formal adjudications. To be sure, *Mead*'s

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**283**. *Mead Corp.*, 533 U.S. at 230.

**284**. *Id.* at 226-27.

**285**. *See* Bennett v. Spear, 520 U.S. 154, 178 (1997).

**286**. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).

**287**. *See id.* at 1211-12 (Scalia, J., concurring in the judgment); *id.* at 1221 (Thomas, J., concurring in the judgment).

only cited example of an informal agency interpretation securing *Chevron* deference involved an informal adjudication, not an interpretative rule.[288] It is thus possible that *Mead* meant only to delineate *Chevron*'s scope to include legislative rules, formal adjudications, and some informal adjudications.[289] But later cases reiterate that public notice and comment is not required for nonlegislative *rules* to receive *Chevron* deference.[290] Thus, to the extent *Mead* and its progeny permit *Chevron* deference for certain interpretative rules that must—on *Mead*'s own terms—carry the force of law, they seem to directly conflict with *Perez*'s categorical admonition that interpretative rules *never* have the force of law.

It is possible that *Perez* partially abrogated *Mead* sub silentio, but I would hesitate to jump to that conclusion. More probable is that *Perez* and *Mead* speak past each other. In particular, I would surmise that *Perez* and *Mead* either have different conceptions of what agency actions count as "interpretative rules" or they have different ideas of what it means for agency action to carry the "force of law." For example, if *Perez* simply equated carrying "the force of law" with "being a legislative rule," then *Perez* and *Mead* could coexist because *Mead* never maintained that informal interpretations carrying the force of law were necessarily identical to legislative rules. Likewise, *Perez* might have assumed that "interpretative rules" are definitionally only a subset of informal agency interpretations that would never pass *Mead*'s test anyway. If so, then *Perez* would perhaps leave open the possibility of other informal interpretations that are similar to interpretative rules and yet somehow command *Chevron* deference. That said, neither of these attempts to reconcile *Perez* and *Mead* are wholly satisfying; maybe that's an indication that the *Perez* majority was wrong to conclude that interpretative rules could never carry the force and effect of law, regardless of the degree of deference afforded them. Or maybe it's a sign that *Mead* itself never meant to make interpretative rules eligible for *Chevron* deference. Or, to the extent *Mead* intended to include interpretative rules within *Chevron*'s domain, perhaps *Mead* itself was wrongly decided. Either way, it would seem hard to credit *both* cases as rightly decided.

But even if Justices Scalia and Thomas were right about deference and the force of law in *Perez*, their understanding of interpretative rules potentially suffers from a different conceptual problem. Specifically, attempting to embed their approach into the *Mead* regime risks descending into circular reasoning. Here's how their argument would likely have to proceed if applied to *Chevron*: all interpretative rules that receive *Chevron* deference carry the force of law, but to receive

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**288**. *See Mead Corp.*, 533 U.S. at 231 (citing NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57, 263 (1995)).

**289**. *See* Hickman, *supra* note 31, at 489.

**290**. *See* Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002).

*Chevron* deference under *Mead* the interpretative rule must carry the force of law. While this vicious circle presents a thorny theoretical problem for the Scalia/Thomas approach, it arguably matters little in practice; so long as a court runs through the *Mead* factors and is satisfied that they are met, then the interpretative rule possesses the authoritative indicia necessary to trigger *Chevron*, which, in turn, simultaneously imbues the rule with the force of law. Moreover, as I would argue based on the history presented in Part II, once the interpretative rule is eligible for *Chevron* deference, it also satisfies *Bennett* and is reviewable prior to enforcement. Therefore, even though the Scalia/Thomas approach sits somewhat uneasily with *Mead*, it at least avoids the outright contradiction one sees between the *Perez* majority and *Mead*, and it yields a unified test for both *Chevron* eligibility and finality. On balance, this seems like a better choice than straining to reconcile *Perez*'s majority and *Mead*, especially in light of the practical benefits I outline below in Section III.B.

All told, the doctrinal tensions teased out here are designed to illustrate the complexities courts must now navigate in the wake of *Chevron*, *Mead*, *Perez*, and *Bennett*—let alone *Whitman* and *NPHA*. *Chevron*, as modified by *Mead*, significantly complicates the simple historical picture painted in Part II regarding the deference afforded interpretative rules. The next Section attempts to apply section 704's historical understanding in a post-*Chevron*, post-*Mead* world.

### *B. Applying a Unified Deference-Finality Doctrinal Framework*

Based only on the history presented in Part II, one would reasonably conclude that those courts of appeals (including the D.C. Circuit) that categorically exclude interpretative rules from finality were correct: because the generation enacting the APA generally believed that interpretative rules and policy statements do not carry the "force and effect of law," the D.C. Circuit's recent opposition to the pre-enforcement review of nonlegislative rules appears to be vindicated.

However, the preceding historical examination also demonstrates that deference provided the key distinction separating interpretative rules—issued without explicit congressional delegation of authority and therefore lacking legal effect[291]—from the legislative rules backed by delegated authority, which carried the force of law. Because *Chevron* deference trades out the traditional framework of "*Skidmore* weight" for "*Chevron* space" when courts consider at least some nonlegislative rules, it makes those reasonable agency interpretations conclusive

**291.** *See* Patten, *supra* note 227, at 376.

on the courts. Under the prior understandings of legal effect, those agency interpretations entitled to *Chevron* deference have the force and effect of law. They are therefore final agency action under section 704 of the APA.

Of the three approaches sketched in Part I, only one appellate court—the Sixth Circuit—has maintained that the granting of *Chevron* deference for any agency interpretation, whether in the form of a legislative or nonlegislative rule, is a sufficient indicator of finality.[292] But the Sixth Circuit offered no justification other than common-sense notions of fairness—the inherent wrongness that seemed to stem from an agency claiming nonfinality today and then claiming nearly conclusive interpretative authority tomorrow. A historical approach vindicates the otherwise-ignored approach of the Sixth Circuit and places it on stronger footing. If applied, this historical argument might prompt the D.C. Circuit to reconsider the current trajectory of its precedents and return to an approach that circuit itself helped spur in the late 1980s.[293]

Constructing an administrable doctrine in line with the Sixth Circuit's position is quite simple. When a private party challenges an agency interpretation embedded in a nonlegislative rule in a pre-enforcement review proceeding, the agency may respond by claiming that the action is not final. However, if the agency wins on these grounds, it must also affirmatively concede that the interpretation lacks the force and effect of law. If the court agrees, the agency cannot later claim *Chevron* deference if the interpretation is challenged in a future enforcement proceeding. The court's initial finding that the interpretation lacked the force and effect of law would serve as estoppel whenever the agency attempts to argue for *Chevron* eligibility under *Mead*.[294] However, if the agency calculates that it would prefer to keep open the possibility of receiving *Chevron* deference (as opposed to weaker *Skidmore* weight) in a later proceeding, it can decline to

**292**. Air Brake Sys., Inc. v. Mineta, 357 F.3d 632, 642 (6th Cir. 2004); Franklin Fed. Sav. Bank v. Dir., Office of Thrift Supervision, 927 F.2d 1332, 1337 (6th Cir. 1991).

**293**. *See supra* note 130 and accompanying text.

**294**. The D.C. Circuit has previously contemplated estoppel-like arguments in analogous agency cases. For example, in *Public Citizen, Inc. v. U.S. Nuclear Regulatory Commission*, 940 F.2d 679 (D.C. Cir. 1991), the court confronted a challenge to an agency's policy statement in which the petitioners claimed the policy statement was, in truth, a legislative rule that could only be promulgated with public notice and comment. The court recognized that the agency's litigating position that the policy statement did not amount to a legislative rule would potentially "estop[] the Commission from arguing in the future that the policy was adopted as a substantive rule" and thus moot the challengers' claim. *Id.* at 681. However, the court regarded that point as "not altogether clear" and decided the case on ripeness grounds instead. *Id.* (citing Clarke v. United States, 915 F.2d 699, 702 (D.C. Cir. 1990); Farmland Indus., Inc. v. Grain Bd. of Iraq, 904 F.2d 732, 739 (D.C. Cir. 1990)).

assert the nonfinality defense in the pre-enforcement challenge and seek to win on the merits through heightened deference.[295]

The benefits of the preceding approach are twofold. First, the doctrine outlined above prioritizes flexibility—a fundamental concern of administrative law.[296] The doctrine offers an agency a simple choice that incentivizes it to adopt a healthy mix of noncoercive methods and those that the agency anticipates bringing to bear directly against regulated entities. For example, if the agency believes that a given regulatory goal is achievable without resort to legal coercion, it can defend against a challenge to an interpretative rule or policy statement by claiming the mantle of nonfinality. Moreover, to the extent the agency is unsure that the interpretative rule would pass *Mead*'s test, it might never want to test that question out of concern that a court would spurn its attempt to secure *Chevron* deference and rule against it under *Skidmore*. Under such circumstances, delaying review might be the preferable option. However, if the agency believes that optimal compliance will eventually require it to seek an enforcement action in district court against at least some significant segment of the regulated industry, or if the agency is particularly confident that the rule satisfies *Mead*, it will likely prefer to preserve *Chevron* deference. When an enforcement action looms, the almost conclusive force of *Chevron* deference would be preferable to the less definitive approach of delaying review. What the agency may not attempt is to have it both ways—to secure nonfinality today and *Chevron* deference tomorrow.

The second benefit secured from the proposed test is certainty. One admitted benefit of the D.C. Circuit approach is clarity—legislative rules are final and nonlegislative rules are not. While this is a perspicuous division, it misses the important reality of judicial deference. Meanwhile, the ad hoc approach of the Ninth Circuit likely better reflects the variety in the coercive effects that nonlegislative rules impose on regulated parties but sacrifices the predictability of a bright-line division. The framework advanced here possesses elements of both approaches—a constrained flexibility that captures the best of both worlds. Agencies would retain significant flexibility to choose whether to prioritize deference (should the agency anticipate the need to enforce the interpretation in order to secure compliance) or to prioritize unreviewability (should the agency not anticipate much need for enforcement). And while the reformed doctrine

**295**. Admittedly, this tactic might operate differently between circuits that have held that section 704 of the APA is not jurisdictional and those that believe it is. There is currently a split in the courts of appeals, and the ten circuits to address the question split equally five-to-five on whether section 704's finality requirement is jurisdictional. *See* Sundeep Iyer, Comment, *Jurisdictional Rules and Final Agency Action*, 125 YALE L.J. 785, 789 & nn.22-23 (2016). The D.C. Circuit, the most popular forum for administrative law litigation, has adopted the nonjurisdictional view of section 704. *See* Marcum v. Salazar, 694 F.3d 123, 129 (D.C. Cir. 2012).

**296**. *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

would not have quite such a razor-sharp rule as that endorsed in *Huerta*, it would trade out the seemingly ad hoc approach of the most pragmatically minded circuits for a simpler, more predictable inquiry: if the agency seeks *Chevron* deference and the interpretation qualifies, the interpretative rule is final agency action. If the interpretation is ineligible for *Chevron* deference (or the agency expressly waives its right to claim such deference in the future), the action is unreviewable until applied or enforced.

This proposed procedure could have been used in *American Tort Reform Association*. Even though the D.C. Circuit used near-categorical language to preclude pre-enforcement challenges to interpretative rules, the panel did discuss the level of deference OSHA sought for its statutory interpretation.[297] Citing *Chevron*, the panel mentioned that OSHA itself recognized that its interpretation should not be entitled to the "controlling weight" given to "agency regulations with the force of law."[298] The D.C. Circuit seemed to undertake this analysis to refute the contention that the OSHA interpretation was, in fact, a legislative rule. But nothing in *Mead*, *Barnhart*, or *Christensen* implies that an informal agency interpretation, once granted *Chevron* deference, transmogrifies into a legislative rule, a point affirmed in *Perez*.[299] The more reasonable inference, and one the D.C. Circuit has not yet made, is that while the level of deference doesn't change the *nature* of the agency action, it can change the *finality* of that action. Therefore, the panel in *American Tort Reform Association* could have simply decided the case on the narrow ground that because OSHA did not seek and would not be entitled to *Chevron* deference, its interpretation did not have the force and effect of law, and therefore was not final agency action.

Consider also *Whitman*, where the Court found an explanatory preamble—a form of interpretative rule—to be final agency action.[300] As Kevin Stack has persuasively argued, because agency preambles go through the process of notice-and-comment rulemaking, they are the product of precisely the same public-facing procedures that produce legislative rules and are therefore entitled to greater judicial deference than other forms of agency guidance.[301] In other words, because legislative rules themselves are presumptively entitled to *Chevron* deference under the "safe harbor" established by *Mead*, the same should apply to explanatory preambles that accompany those legislative rules. On this view, *Whitman* is justifiable, but again, based on a different rationale than that adopted

**297**. Am. Tort Reform Ass'n v. OSHA, 738 F.3d 387, 394 (D.C. Cir. 2013).

**298**. *Id.* (quoting Wyeth v. Levine, 555 U.S. 555, 577 (2009)).

**299**. 135 S. Ct. 1199, 1208 n.4 (2015).

**300**. *See supra* notes 73-79 and accompanying text.

**301**. *See* Kevin M. Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1277 (2016).

by the Court. Rather than ignoring *Bennett*'s second prong,[302] or relying on a special judicial review provision applicable only to the Clean Air Act,[303] a better approach would have been to simply argue that the preamble had sufficient legal consequence under *Bennett* as an interpretative rule to be considered final and would be uniquely entitled to *Chevron* judicial deference under *Mead*.

Two other cases that ultimately reached the Supreme Court, however, are not justifiable under this reconstructed approach to finality. First is *NPHA*,[304] when the Court recognized that the policy statement at issue could not receive *Chevron* deference, since NPS did not have authority to administer the statute. But if the policy statement was ineligible for *Chevron* deference, it could not carry the force and effect of law; the *NPHA* Court openly acknowledged as much.[305] Absent the authority of a legislative rule or an interpretative rule receiving *Chevron* deference, a rule like the one in *NPHA* cannot produce a legal consequence sufficient to satisfy *Bennett*'s second prong. Therefore, the Court was wrong to hold that the policy statement constituted final agency action. Second, in *Gonzales v. Oregon*, the Supreme Court held that an interpretative rule from the Attorney General regarding drugs used in assisted-suicide procedures was not entitled to *Chevron* deference against a pre-enforcement challenge.[306] But the Ninth Circuit held that the interpretative rule was final agency action without regard to the applicable level of deference.[307] While the Supreme Court was likely under no

**302**. *See supra* notes 60-64 and accompanying text.

**303**. *See supra* notes 81-83 and accompanying text.

**304**. *See supra* notes 86-89 and accompanying text.

**305**. *See* Nat'l Park Hosp. Ass'n v. Dep't of the Interior, 538 U.S. 803, 808 (2003) (admitting that the policy statement did "not command anyone to do anything or to refrain from doing anything;" did "not grant, withhold, or modify any formal legal license, power or authority;" did "not subject anyone to any civil or criminal liability;" and created "no legal rights or obligations" (quoting Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 733 (1998))).

**306**. 546 U.S. 243, 258 (2006).

**307**. *See supra* notes 96-100 and accompanying text. While the Ninth Circuit found that the Attorney General's interpretative regulation was not entitled to *Chevron* deference, it cursorily decided the issue of finality first, so its disposition on the question of finality made no mention of the applicable level of deference. Oregon v. Ashcroft, 368 F.3d 1118, 1120, 1129 (9th Cir. 2004). Meanwhile, Judge Wallace, who dissented from the result but concurred on reviewability, offered a more in-depth analysis of the finality issue, but nevertheless also failed to consider the relationship between the applicable deference regime and the interpretation's finality. *Id.* at 1147-48 (Wallace, J., dissenting).

obligation to reconsider the Ninth Circuit's holding without the Attorney General pressing the finality defense before them,[308] the general incompatibility between a rejection of *Chevron* and a finding of finality was clearly evident in *Gonzales*.

Curiously, the Department of Justice's Ninth Circuit brief in *Gonzales* argued that the interpretation was sufficiently final for purposes of reviewability,[309] but also advocated for nothing more than *Skidmore* deference.[310] Under the framework proposed here, the Department could make that choice (since finality would be waivable and left to the agency's discretion), but could also have asserted a nonfinality defense, assuming that the rule would be granted nothing greater than *Skidmore* deference in any future proceeding. More important, however, the Department's behavior in the *Gonzales* litigation demonstrates that agencies might not always have monolithic preferences when it comes to finality and deference. While one might assume that agencies generally prefer nonfinality (in order to delay litigating the substantive legal issue) and generally prefer *Chevron* deference (in order to maximize their chance of victory on the underlying issue), that might not always be the case. Ultimately, this framework leaves the agencies a good deal of discretion to balance these two general preferences, which is in line with the spirit of pragmatism that the Supreme Court continues to emphasize in its finality precedents.[311]

One interesting twist of the procedure outlined above is that even if an agency seeks *Chevron* deference, it might not receive it. The agency may not be granted such deference either because (a) it fails the threshold test under *Mead* for *Chevron* eligibility or (b) the statute is unambiguous.[312] If the agency fails either of these two tests, it could then argue, alternatively, that the nonlegislative rule is not "final agency action," or it could waive the finality defense altogether and argue that the court should reach the merits under *Skidmore* deference. But

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**308.** *See supra* note 295 and accompanying text (describing the issue of whether finality is jurisdictional under the APA).

**309.** Brief for Appellants at 14, Oregon v. Ashcroft, 368 F.3d 1118 (2004) (No. 02-35587), 2002 WL 32290869, at *14.

**310.** *Id.* at *22-23.

**311.** *See supra* notes 32-33 and accompanying text.

**312.** The agency's interpretation might also not be accepted by the court if it is not "reasonable." However, this stage of judicial review is not part of the determination for whether the agency will receive deference; the agency has received deference and even with such heightened deference, its interpretation flunked. Some might be tempted to distinguish this review of interpretative rules from legislative rules, but the "reasonableness" threshold applies just as much to judicial review of legislative rules. *See* Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936) ("[N]ot only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable.").

even if the agency ultimately wins on the alternative finality ground, the reviewing court's first holding—that the agency's interpretation was not entitled to *Chevron* deference—should preclude application of *Chevron* deference in future proceedings.

This revised approach to the "legal effects" prong of *Bennett* would also provide greater structure to the inquiry and is more administrable than the haphazard approach that has persisted in courts thus far. Moreover, it could provide some much-needed transparency in reviewing courts' determinations of agency deference. By forcing agencies to consider the *Chevron–Skidmore* question as a threshold matter, it is possible they (and the courts) will apply the current *Mead* framework more consistently and transparently, and perhaps even allow the *Mead* test to percolate toward something less confusing.[313]

Of course, the proposal offered here is not perfect. For example, to the degree that the *Mead* line of cases regarding *Chevron* eligibility remains confusing and challenging to apply, it will remain confusing and challenging even if front-loaded in the process of judicial review.[314] Nevertheless, at least this proposal

**313.** For example, William Eskridge and Lauren Baer's seminal study of agency deference in the Supreme Court found that 718 agency statutory interpretations out of the 1,014 the Court encountered between 1984 and 2006 involved review of an informal interpretation. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1148 (2008). All future numerical references from the Eskridge–Baer study come from the author's use of the Eskridge and Baer dataset, which is publicly available. *Replication Data For: The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, HARV. DATAVERSE (2011), http://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/16562 [http://perma.cc/3JBZ-KC9M]. Somewhat astoundingly, in only 23 of those 718 cases did the Supreme Court cite *Chevron*, and in only 10 did the Court apply the *Chevron* framework. And only four of those ten cases involved agency action approaching an interpretative rule. Lower courts have taken a similar tack, having found *Mead* so challenging to apply that they resort to engaging in "*Chevron* avoidance" by eliding the *Chevron* question and granting *Skidmore* deference to informal agency interpretations. *See* Bressman, *supra* note 282, at 1457-58. Nevertheless, another recent study of the courts of appeals has found that *Chevron* deference was still granted to roughly 45% of informal agency interpretations—accounting for 173 total decisions. *See* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 37-38 (2017). Perhaps by loading the *Mead* analysis into the threshold matter of finality, this doctrinal innovation could spur some much-needed judicial consideration of another challenging administrative law question.

**314.** That said, it's possible that *Mead* is simpler to apply in practice than in theory. For example, in a recent survey of *Mead*'s implications, Professor Hickman concluded that since the Court decided *Mead* in 2001, it "has never actually extended *Chevron* deference to interpretations lacking with notice-and-comment rulemaking or relatively formal adjudication procedures." Kristin E. Hickman, *The Three Phases of* Mead, 83 FORDHAM L. REV. 527, 548 (2014). And many, but not all, courts of appeals "in practice seem quite simply to extend *Chevron* review to the notice-and-comment regulations and formal adjudications." *Id.* at 550. If *Mead* truly

would retain only one vexing question (how to apply *Mead*) instead of the current system, which retains two vexing questions (how to apply *Mead* and whether agency action has sufficient "legal effects" to warrant finality). For example, under current finality doctrines, much rides on the characterization of the agency action as either a legislative or nonlegislative rule.[315] But if finality hinges on *Mead* instead of the "considerable smog" produced by the D.C. Circuit's precedents,[316] then at least the *Mead* factors provide some minimal guidance that (a) could be clarified through increased execution of the test and (b) could displace the separate (and disparate) tests the D.C. Circuit has adopted over the years for distinguishing legislative from nonlegislative rules.

Tying deference and finality together would potentially prove more administrable in practice than the status quo. The approach would also occupy a middle ground between the two extreme, all-or-nothing positions heretofore expressed. Contra some courts of appeals' rigid approaches, not all interpretative rules should be categorically excluded from being "final agency action." And contra the prevailing academic critiques of *Bennett*'s second prong, not all interpretative rules or policy statements should be "final agency action." That middle ground would preserve administrative flexibility while also ensuring that there are clear boundaries that agencies must respect that would allow regulated entities to structure their activities accordingly.

## CONCLUSION

The Supreme Court and courts of appeals' inconsistent jurisprudence in the area of administrative finality has been unsatisfying. In particular, the lower courts continue to struggle to discern the finality of nonlegislative rules pursuant to *Bennett*'s legal-consequences prong and have developed a variety of competing

confined *Chevron* to only those agency rules promulgated through public notice and comment, then Part II's historical discussion would seem to straightforwardly apply today: because interpretative rules generally are not promulgated through notice-and-comment rulemaking, they are not eligible for *Chevron* deference and therefore are not "final agency action." However, even Professor Hickman acknowledged that *Barnhart*'s later gloss on *Mead* has spurred some courts to take a more nuanced approach to agency guidance documents, *see id.* at 551-52, and Hickman has affirmatively argued that certain IRS guidance documents have the force and effect of law, and therefore should be eligible for *Chevron* deference, *see id.* at 552-53; *see also* Hickman, *supra* note 31, at 529. Moreover, the lower courts' failure to apply *Mead*'s and *Barnhart*'s nuance is "not quite doctrinally accurate." Hickman, *supra*, at 551. Assuming that *Perez* did not abrogate *Mead*, a doctrinally faithful approach to *Mead* and *Barnhart* must account for the possibility that some interpretative rules are eligible for *Chevron* deference.

**315.** *See supra* notes 275-277 and accompanying text.

**316.** Am. Bus. Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1980); *see also supra* notes 37-40 and accompanying text.

approaches. Importantly, the D.C. Circuit's recent turn toward a more categorical exclusion of interpretative rules demonstrates the growing barrier that *Bennett*'s legal-consequences prong erects for the pre-enforcement review of nonlegislative rules. At the same time, the academic scholarship grows increasingly skeptical of *Bennett*'s second prong.

Instead of calling for a wholesale rejection of *Bennett*'s second prong or a wholesale rejection of pre-enforcement review for interpretative rules, this Note charts a middle course. Based on the theories, commentary, and case law existing prior to and contemporaneously with the APA, I conclude that *Bennett*'s second prong rests on sound historical footing in concluding that legal consequence is essential for securing pre-enforcement review. Likewise, the D.C. Circuit's recent focus on interpretative rules lacking the force of law finds historical parallel in the era surrounding the APA's adoption. Nevertheless, that historical parallel does not justify a categorical rule precluding pre-enforcement review of interpretative rules. The persistence of *Chevron* deference, as modified and cabined by *Mead* and its progeny, grants at least some interpretative rules the "force of law" that they historically lacked. The Sixth Circuit and two Supreme Court Justices recognized this connection between interpretive deference, although they never attempted to relate this connection back to the APA's history. This Note has sought to buttress these earlier insights and explain how a unified deference-finality doctrine might work in practice. Ultimately, if courts were to explicitly connect the second prong of *Bennett* to the existing regime of *Chevron* deference, they may finally make that prong administrable as applied to nonlegislative rules and bring greater coherence to a doctrine in desperate need of reform.