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 non-legislative “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.

**AUTHOR.** Yale Law School, J.D. 2017. I am particularly grateful to Bill Eskridge for supervising this project and for encouraging me to develop a solution to what seemed like an intractable problem. I am also indebted to Nick Parrillo, who first introduced me to this topic and offered perceptive feedback on an earlier draft. And I would be remiss if I did not thank Jamie Durling, Joe Falvey, and Mark Pinkert for several illuminating conversations during the Note’s early stages. Finally, the editors of the *Yale Law Journal*, especially Patrick Baker and Joaquin Gonzalez, offered immensely helpful editorial suggestions. All remaining errors are my own.
NOTE CONTENTS

INTRODUCTION 2451

I. THE CONFUSION WROUGHT BY BENNETT V. SPEAR AND ITS PROGENY 2456
   A. Bennett v. Spear: The Supreme Court Distills Finality to a Two-Prong Test 2458
   B. The Supreme Court Clarifies (or Muddles) the Application of Bennett to Nonlegislative Rules 2462
   C. The Courts of Appeals Apply Bennett to Nonlegislative Rules 2466

II. BACK TO BASICS: RETURNING TO THE HISTORICAL APA 2474
   A. Justifying a Historical Interpretation of the APA 2475
   B. The Historical Availability of Pre-Enforcement Judicial Review and the Centrality of Legal Effect 2481
   C. The Historical Understanding of Nonlegislative Rules’ Legal (Non)Effect 2488

III. INCORPORATING CHEVRON INTO FINALITY ANALYSIS: THE WHY AND HOW 2495
   A. The Uncertain Effect of Chevron Deference on the Authority of (Some) Interpretative Rules 2496
   B. Applying a Unified Deference-Finality Doctrinal Framework 2502

CONCLUSION 2509
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”

---

2. Id. § 551(13).
3. See infra Part I.
5. Id.
7. See, e.g., Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014).
or “nonlegislative rules”\textsuperscript{10} that are exempted from notice-and-comment rule-making.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,”\textsuperscript{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


\textsuperscript{11} 5 U.S.C. § 553(d)(2).

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

\textsuperscript{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).

\textsuperscript{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-

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) (“Enforcement 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.
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. 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. 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.

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, 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.* Under *Chevron* deference, courts facing sufficiently ambiguous statutes must accept any reasonable agency statutory interpretation that meets other threshold criteria.

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


23. *See infra Section II.C.*


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

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.”).


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. 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.

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.

1. **The Confusion Wrought by *Bennett v. Spear* and Its Progeny**

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


33. See infra Section III.B.

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

---

³⁶ Agencies also issue “rules of agency organization, procedure, or practice,” id., but these rules are not at issue in this Note.
³⁸ See, e.g., Nat’l Mining Ass’n, 758 F.3d at 251.
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, this 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 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.” 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?

43. See infra Section II.A.
Several of the factors the Court considered in SOCAL were seemingly derived from the judge-made “ripeness” doctrine, rather than section 704’s text. 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.” 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.” However, legislative rules are ripe upon their promulgation because “as a practical matter” they require a regulated party to “adjust his conduct immediately.”

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.” 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.” 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. As for hardship to the parties, interpretative rules often “raise ripeness concerns” because of questions regarding “the binding effect of the rule.” 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.

---

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”).
50. Id.
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).
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.” 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.

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.” 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.\textsuperscript{59} These post-SO\textsuperscript{CAL} developments set the stage for the Court’s sharpening of the finality inquiry in \textit{Bennett v. Spear}.

\textit{Bennett v. Spear} made explicit the Supreme Court’s shift away from the pragmatic, multi-factor analysis in \textit{SO\textsuperscript{CAL}}. In its place, the Court adopted a narrower, two-prong test for finality. The petitioners in \textit{Bennett}, a group of ranch operators and irrigation districts in Oregon, sued the Fish and Wildlife Service under the Endangered Species Act (ESA).\textsuperscript{60} Writing for a unanimous Court, Justice Scalia held that the Service’s Biological Opinion was a “final agency action” under section 704.\textsuperscript{61} According to the Court, “two conditions must be satisfied for agency action to be ‘final.’”\textsuperscript{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.”\textsuperscript{63} And second, the action “must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”\textsuperscript{64} The Biological Opinion was certainly the product of a completed agency process.\textsuperscript{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.”\textsuperscript{66}

While the \textit{Bennett} Court’s reformulation of finality narrowed the inquiry compared to the Court’s older, less structured precedents, that “does not mean that \textit{Bennett’s} test is easy to apply.”\textsuperscript{67} For some forms of agency action, the \textit{Bennett} analysis is rather straightforward. For example, a legislative rule, promulgated pursuant to notice-and-comment rulemaking and putatively binding on both

\textsuperscript{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).

\textsuperscript{60} See Bennett v. Spear, 520 U.S. 154, 159 (1997).

\textsuperscript{61} See \textit{id.} at 178.

\textsuperscript{62} \textit{Id.} at 177.

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

\textsuperscript{64} \textit{Id.} at 178 (quoting Port of Bos. Marine Terminal Ass’n v. Rederiaktiebolaget Transatl., 400 U.S. 62, 71 (1979)).

\textsuperscript{65} See \textit{id.} (“It is uncontested that the first requirement is met here . . . .”).

\textsuperscript{66} \textit{Id.}

the agency and the public constitutes final agency action under Bennett.\textsuperscript{68} And coercive, noninterlocutory orders following formal adjudications likewise mark the consummation of an agency’s processes and determine legal rights and obligations.\textsuperscript{69} But other forms of agency action, including interpretative rules and statements of general policy, are not so easily classified.\textsuperscript{70} The Supreme Court’s treatment of these nonlegislative rules has been sparse, perfunctory, and confusing.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{75} Instead, EPA published it in the explanatory preamble accompanying

\begin{itemize}
\item \textsuperscript{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.”).
\item \textsuperscript{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).
\item \textsuperscript{70} See, e.g., Gwendolyn McKee, Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine, 60 ADMIN. L. REV. 371, 389-98 (2008).
\item \textsuperscript{71} See infra Section I.B.
\item \textsuperscript{73} 531 U.S. 457 (2001).
\item \textsuperscript{74} Id. at 478.
\item \textsuperscript{75} See John F. Manning, Nonlegislative Rules, 72 GEO. WASH. L. REV. 893, 893 (2004).
\end{itemize}
a final legislative rule that itself was the product of notice-and-comment rule-

making.\textsuperscript{76} The Court in \textit{Whitman} thus emphasized that the agency had inter-

preted the CAA in light of the public comments it received following the notice of proposed rulemaking.\textsuperscript{77} Moreover, the interpretation was prompted by a White House directive, and EPA had “refused in subsequent rulemakings to re-

consider it,” demonstrating that “EPA has rendered its last word on the matter.”\textsuperscript{78} All of these statements indicate that the \textit{Whitman} Court cared greatly about the process leading to the adoption of the interpretation, consistent with the first prong of the \textit{Bennett} test. But there is little in the opinion demonstrating much concern for \textit{Bennett’s} second condition for finality.\textsuperscript{79}

The majority opinion in \textit{Whitman} cited only the first prong of the \textit{Bennett}
test and explained that because the preamble represented EPA’s “last word” on the matter, it satisfied \textit{Bennett}.\textsuperscript{80} The \textit{Whitman} Court never explicitly discussed \textit{Bennett’s} second prong. \textit{Whitman} came closest to the second prong of the \textit{Bennett}
test when it assessed the ripeness of the challenge.\textsuperscript{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 “preelement” review.\textsuperscript{82} Therefore, statutes like the CAA “permit judicial review directly, even before the concrete effects normally required for APA review are felt.”\textsuperscript{83}

One could read \textit{Whitman} as disposing of \textit{Bennett’s} second prong on the basis of the CAA’s unique preelement review provisions. But that explanation is unsatisfying given the Court’s own reasoning. First, \textit{Whitman} never explicitly discussed the CAA’s independent judicial review provision in the context of fi-

nality and the required legal consequences, addressing it only in the context of

\begin{itemize}
\item \textsuperscript{76} \textit{Whitman}, 531 U.S. at 478.
\item \textsuperscript{77} \textit{Id.} at 478-79.
\item \textsuperscript{78} \textit{Id.} (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 586 (1980)).
\item \textsuperscript{79} \textit{Bennett v. Spear}, 520 U.S. 154, 177-78 (1997).
\item \textsuperscript{80} \textit{Whitman}, 531 U.S. at 478.
\item \textsuperscript{81} \textit{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 \textit{supra} notes 47-55 and accompanying text.
\item \textsuperscript{82} \textit{Whitman}, 531 U.S. at 479 (quoting Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 737 (1998)); \textit{see also} 42 U.S.C. § 7607(b) (2012) (special judicial-review provision).
\item \textsuperscript{83} \textit{Whitman}, 531 U.S. at 479-80 (quoting Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 891 (1990)).
\end{itemize}
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—one 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”;
and created “no legal rights or obligations.” 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. 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 appeared less tenable after Bennett’s concise, two-prong formulation.

NPHA, like Whitman, stands in significant tension with Bennett. Unlike Whitman, where the Court could perhaps rely on the “special judicial-review provision” of the CAA, 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, 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.

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.”).
94. See supra notes 81-83 and accompanying text.
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

---

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.
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.\textsuperscript{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 \textit{American Tort Reform Ass’n v. OSHA}. It held that an interpretative rule was not final agency action under \textit{Bennett} because it lacked the force of law.\textsuperscript{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,\textsuperscript{110} and a single Supreme Court case, \textit{NPHA} .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.”\textsuperscript{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.’”\textsuperscript{113}

The following year, in \textit{National Mining Ass’n v. McCarthy}, the D.C. Circuit was asked to determine the finality of an EPA “Final Guidance” document.\textsuperscript{114} In dicta, \textit{National Mining Ass’n} interpreted the Supreme Court’s holding in \textit{Whitman v. American Trucking Ass’ns}\textsuperscript{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.”\textsuperscript{116} But \textit{Whitman}—the lone Supreme Court opinion said that a text in a National Park Service statement that directed on-duty compliance officers to “do what the Director tells you” was final agency action.

---

\textsuperscript{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)), \textit{vacated on reh’g en banc}, 490 F.3d 725 (9th Cir. 2007) (mem.).

\textsuperscript{109} 738 F.3d 387 (D.C. Cir. 2013).

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

\textsuperscript{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 \textit{NPHA} found an agency policy statement to be “final” under section 704).

\textsuperscript{112} \textit{Am. Tort Reform Ass’n}, 738 F.3d at 393, 396 (quoting \textit{NPHA}, 538 U.S. at 809).

\textsuperscript{113} \textit{Id. at 395 (quoting HARRY T. EDWARDS ET AL., FEDERAL STANDARDS OF REVIEW 157 (2d ed. 2013)).}

\textsuperscript{114} Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 246 (D.C. Cir. 2014).


\textsuperscript{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

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. 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.

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, 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.”

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.” 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. 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.

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).
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, it is an important precedent for the future reviewability of nonlegislative rules. 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. 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*. 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.” 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

---

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).


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. 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.”

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. As Justice Scalia put the point, “Interpretive rules that command deference do have the force of law.” 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—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 Roberton 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).
TIMING JUDICIAL REVIEW OF AGENCY INTERPRETATIONS IN CHEVRON’S SHADOW

widespread understanding of the APA that enshrines the goals of both predictability and pragmatic flexibility. 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

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 140-50. 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 multi-factor, 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.”

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, 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. While the Bennett test has proven to be the Supreme Court’s guiding light in its two most recent finality decisions, 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

---


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

142. See supra Section I.B.

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

144. See sources cited infra note 161 and accompanying text.
145. 44 U.S. (3 How.) 9, 24 (1845).
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. 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. 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 that Bennett wrongly quoted Port of Boston Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic and two of its predecessor cases 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.” 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 the 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 Env’tl. 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.


Review Act (the Hobbs Act), not section 704 of the APA. The Hobbs Act speaks only of “final orders” made by certain agencies. The APA, however, speaks not only of “orders” but also of “rules” and explicitly defines each. Therefore, McKee concluded that the legal-consequences requirement applied only to orders and was never meant to apply to administrative rules or guidance documents. 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—because that case was decided seven years before the APA was adopted and also involved an administrative order, rather than a rule.

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. 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. At the very least, without examining how courts reviewed rules at the time of the APA’s passage, McKee cannot confidently

---

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.


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.


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 . . . .”)

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


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”).

statute becomes entrenched and that justifies evolutive interpretation of super-
statutes involves Congress, agencies, and the public coming to a consensus, not
simply the courts making pronouncements.\textsuperscript{165} As Kathryn Kovacs has persuasively
argued, because the APA is not administered by any single agency, the op-
portunity for deliberation and broad public consensus surrounding the meaning
of the APA is diminished.\textsuperscript{166} Therefore, courts interpreting the APA in a dynamic
manner lack the civic-republican pedigree that would otherwise exist when fol-
lowing 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:

\textit{[G]iven the extraordinary legislative process that led to the APA’s enact-
ment 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 polit-
cal process. Courts should look closely at the APA’s individual provi-
sions, including Congress’s treatment of each provision in the original
legislative process and the quality of deliberation the provision has seen
since enactment.\textsuperscript{167}}

\textsuperscript{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 ad-
ministered by multiple agencies, and yet there are reasons to think that both might be super-
statutes for which an evolving interpretation is appropriate. See Eskridge & Ferejohn, \textit{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 sub-
stantive 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 con-
strain them, the APA’s procedural protections primarily constrain agencies’ means for pursu-
ing their substantive goals. Thus, it is less likely that agencies possess the correct set of incen-
tives 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 mis-
sions. 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 \textit{telos} of
the APA.

\textsuperscript{167} Kovacs, \textit{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—informned 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. But common law is designed to fill gaps in statutory texts created by legislative silence. If section 704 has a discoverable meaning—one that reflects the “balance Congress reached through the political process”—that meaning must trump existing inconsistent administrative common law.

This Note assumes that *Chevron* is consistent with the APA, 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.”

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.
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.
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 out that conclusion. 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.” 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.” 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.

---

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

---

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


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.”).


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.\footnote{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 would be the kind courts are accustomed to render[ing].”\footnote{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.”\footnote{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.”\footnote{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.\footnote{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.\footnote{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

\footnote{181}{ATTORNEY GEN. COMM. ON ADMIN. PROCEDURE, FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 115 (1941) [hereinafter FINAL REPORT].}
\footnote{182}{Id.}
\footnote{183}{Id. at 230.}
\footnote{184}{Id. at 231.}
\footnote{185}{Id. at 230.}
\footnote{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."\textsuperscript{187} But only when regulations "directly affect rights already established" could reviewability obtain for the purpose of injunctive relief.\textsuperscript{188} For example, in \textit{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."\textsuperscript{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."\textsuperscript{190} And because statutes that affect or threaten to affect legal rights can be subject to pre-enforcement review,\textsuperscript{191} it follows that "quasi-legislative" substantive regulations may be as well.\textsuperscript{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 \textit{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.\textsuperscript{193} The Federal Communications

\textsuperscript{187} \textsc{Arthur Lenhoff}, Comments, Cases and Other Materials on Legislation 759 (1949).
\textsuperscript{188} \textit{Id.} at 759–60.
\textsuperscript{190} \textit{Batterton v. Marshall}, 648 F.2d 694, 701-02 (D.C. Cir. 1981); \textit{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)).
\textsuperscript{191} \textit{See, e.g., Reginald Parker, Administrative Law: A Text} 239 (1952).
\textsuperscript{192} \textit{See Davis, supra} note 186, at 383 (“From the standpoint of timing a challenge, regulations are hardly distinguishable from statutes.”).
\textsuperscript{193} 316 U.S. 407 (1942); \textit{see also Davis, supra} note 186, at 384 (discussing \textit{Columbia Broadcasting}).
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 statements195 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.
Meanwhile, those agency actions that “do not adjudicate rights or declare them legislatively” are thus not subject to judicial review.\(^\text{200}\)

At most, \textit{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 \textit{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.”\(^\text{201}\) It did not “change the carrier’s existing or future status or condition” nor did it “determine any right or obligation.”\(^\text{202}\) Several other cases decided in the 1930s repeat these same ideas.\(^\text{203}\)

\textit{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,\(^\text{204}\) the Supreme Court homed in specifically on the legal effect of the agency action: whether it carried the “force of law,” “affect[ed] or determin[ed] rights,” or attached “legal consequences” to private action.\(^\text{205}\) Of course, all of this language is echoed in \textit{Bennett}'s second prong.\(^\text{206}\)

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

\(^{199}\) 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., \textit{Administrative Procedure Handbook}, supra note 175, ¶ 1317, at 49-51; \textit{Roland Pennock, Administration And The Rule Of Law} 37 (1941); \textit{Bernard Schwartz, American Administrative Law} 34-35 (1950).

\(^{205}\) \textit{Columbia Broadcasting}, 316 U.S. at 417.

change the result” of Columbia Broadcasting. 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.” 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.” Even the House and Senate Committee reports both mentioned that section 704 encompassed “‘effective’ or ‘operative’ agency action.”

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. 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.” 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. 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.

207. LENHOFF, supra note 187, at 760.
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, President Roosevelt asked Attorney General Frank Murphy to form a committee to consider potential administrative reforms and to propose legislation. 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. 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. 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.


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

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. 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.” 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. 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.” 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).

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


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).


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.

influential administrative law scholars writing in the wake of the APA, 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, he likewise recognized that a categorical distinction was inaccurate, writing that legislative rules have the force of law and that “interpretative rules sometimes do.” 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.” 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.

Davis’s three factors were consistent with the long tradition of statutory interpretation, as well as the views of others writing in the years surrounding the APA’s enactment. 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-

---

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.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{249} because the courts before the APA were unwilling to cede complete interpretive power to agencies, it was “necessary to draw a line somewhere.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{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, \textit{supra} note 239, at 935 (quoting Louis Eisenstein, \textit{Some Iconoclastic Reflections on Tax Administration}, 58 Harv. L. Rev. 477, 528 (1945)). But as Davis admitted, “[i]t has been argued that the APA was derived from the statute, and that Treasury interpretations should prevail in court when there has been no clear showing of error.”\textsuperscript{248} Id. at 958; see also ROBERT M. BENJAMIN, \textit{ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK} 294–95 (1942); Lee, \textit{supra} note 227, at 29; Morgenthau, \textit{supra} note 227, at 509.

\textsuperscript{249} See, e.g., SCHWARTZ, \textit{supra} note 204, at 35.

\textsuperscript{250} See Reginald Parker, \textit{Administrative Interpretations}, 5 Miami L.Q. 533, 535 (1951).

\textsuperscript{251} See A.H. Feller, \textit{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).
255. Id. at 460.
256. Id. (emphasis added).
257. See supra notes 239-244 and accompanying text.
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.”

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 pre-enforcement 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. Second, agency interpretations were given varying weight by courts, and sometimes that weight was significant. 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.”

In *Chevron*, 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.”).

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 \textit{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.\(^{269}\)

\textit{Chevron} displaced the more unstructured approach to judicial deference preceding it that is today often labeled \textit{Skidmore} deference.\(^{270}\) First, the factors that most often yielded deference when the APA was adopted—contemporaneous and longstanding interpretations—are practically irrelevant under \textit{Chevron}.\(^{271}\) Second, as Thomas Merrill described, \textit{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 \textit{Skidmore} was a system that gave agency interpretations various degrees of “weight,” \textit{Chevron} deference opened up “space” for agencies to exercise additional discretion in the administration of statutes.\(^{273}\) In particular, under \textit{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.”\(^{274}\)

\(^{266}\) Id. at 842, 843 n.9.

\(^{267}\) Id. at 842-43.

\(^{268}\) Id. at 843.

\(^{269}\) Id. at 844.


\(^{271}\) In \textit{Chevron}, the Court granted deference to an interpretation that was an admittedly “sharp break with prior interpretations” by the agency. \textit{Chevron}, 467 U.S. at 862; see also Antonin Scalia, \textit{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.").


\(^{273}\) Peter L. Strauss, \textit{“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 \textit{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. 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. 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. 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*. In *Mead*, the Court acknowledged that “express congressional authorizations to engage in the process of rulemaking or [formal] adjudication” were generally “very good indicators of delegation meriting *Chevron* treatment.” 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.

*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. 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-

---

277. Id. at 587.
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, 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., 553 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. 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 *NHPA*.

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.” 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. 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. 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. 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

284. *Id.* at 226-27.
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. It is thus possible that *Mead* meant only to delineate *Chevron’s* scope to include legislative rules, formal adjudications, and some informal adjudications. But later cases reiterate that public notice and comment is not required for nonlegislative rules to receive *Chevron* deference. 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

---


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— 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. 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.

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*. 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


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.  

The benefits of the preceding approach are twofold. First, the doctrine outlined above prioritizes flexibility—a fundamental concern of administrative law. 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 Marek v. Salazar, 694 F.3d 123, 129 (D.C. Cir. 2012).

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. 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.” 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. 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. 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. 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.

298. Id. (quoting Wyeth v. Levine, 555 U.S. 555, 577 (2009)).
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,\(^\text{302}\) or relying on a special judicial review provision applicable only to the Clean Air Act,\(^\text{303}\) 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,\(^\text{304}\) 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.\(^\text{305}\) 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.\(^\text{306}\) But the Ninth Circuit held that the interpretative rule was final agency action without regard to the applicable level of deference.\(^\text{307}\) 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 v. Sierra Club, 523 U.S. 726, 733 (1998))).


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, 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, but also advocated for nothing more than *Skidmore* deference. 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.

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. 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

---

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


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. But if finality hinges on *Mead* instead of the “considerable smog” produced by the D.C. Circuit’s precedents, 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

---

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 categori-
cal exclusion of interpretative rules demonstrates the growing barrier that Bennett’s legal-consequences prong erects for the pre-enforcement review of nonlegis-
lative 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.