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Pursuing Pragmatic Finality in Agency Action

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[Note to conference attendees: The following is very much a draft-in-progress—incomplete and underfootnoted, with some passages included as placeholders as we struggle to refine our ideas. Comments are very welcome.]

Pursuing Pragmatic Finality in Agency Action

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Introduction

The Administrative Procedure Act (APA) authorizes judicial review for "final agency action for which there is no other adequate remedy in a court."[3] In *Abbott Labs v. Gardner*, the Supreme Court interpreted the APA as "embod[ying] the basic presumption of judicial review" for "final agency action," provided other justiciability requirements such as standing are satisfied.[4] A key question for judicial review of agency action, therefore, has been under what circumstances agency action might be considered final.

Purporting to synthesize existing doctrine rather than chart a new course, the Supreme Court in *Bennett v. Spear* articulated a two-part test that provides the framework for contemporary administrative finality analysis: "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow."[5] As with many doctrinal standards in administrative law, the Court has counseled applying the two-part test for administrative finality pragmatically, rather than legalistically or mechanically.[6] The test seems concrete but in practice has not been so. The lower courts have applied finality doctrine highly variably, drawing from Supreme Court and their own precedent to elaborate *Bennett*'s two-part standard with their own criteria, with applications ranging along a continuum from formal and legalistic to flexible and pragmatic.

Part of the difficulty in applying conventional finality analysis is the evolution of every-day administrative practices away from those that shaped the APA and administrative law doctrine in the first place. The APA and the jurisprudence interpreting it are predicated on certain

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[3] 5 U.S.C. § 704.

[4] Abbott Labs v. Gardner, 387 U.S. 136, 140 (1967).

[5] Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

[6] *See, e.g.*, U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807, 1815 (2016) (quoting *Abbott Labs* in describing the Court's approach to finality as "pragmatic"). *Cf.* Bell v. New Jersey, 461 U.S. 773, 779-80 (1983) ("Our cases have interpreted pragmatically the requirement of administrative finality ... ."); FTC v. Standard Oil Co. of Calif., 449 U.S. 232 (1980) (quoting several precedents as supporting a "flexible" and "pragmatic" approach to finality).

assumptions regarding how government agencies function, and on a division of agency actions between those that satisfy certain thresholds of consequence and those that do not. Administrative decisions that are sufficiently consequential are made by presidentially-appointed and Senate-approved decisionmakers using extensive statutory rulemaking and adjudication procedures designed to facilitate transparency and accountability.[7] Agency actions that are insufficiently consequential are not subject to such requirements.[8] When agency actions are sufficiently consequential, judicial review serves to ensure that agencies act within their statutory authority, comply with procedures, and engage in reasoned decisionmaking.[9] By contrast, judicial review is unavailable for agency actions that are insufficiently consequential to the parties challenging them.[10] Agency actions that are sufficiently consequential are eligible for greater judicial deference than those that are insufficiently consequential.[11] Administrative law jurisprudence uses various terms—words and phrases like "force of law," "binding," "discretion," and "rights and obligations"—to describe just when agency action is sufficiently consequential to require adherence to procedure, to be eligible for judicial review, or to warrant greater deference. But the binary distinction holds.

As a growing scholarly literature recognizes, however, the assumptions that underlie administrative law jurisprudence really only describe a small part of agency action today.[12] Many contemporary administrative practices do not fit the traditional assumptions and are quite controversial for seeming deliberately to dodge APA procedural requirements and judicial review while pursuing broadly-applicable and highly-consequential policy goals.

Our article will explore finality jurisprudence and will advocate particularly for a finality doctrine that falls more toward the flexible and pragmatic end of the present jurisprudential continuum and thereby allows for a greater judicial role in policing the growing collection of informal agency actions that fall outside the traditional APA boxes. We justify this more expansive approach to justiciability on the ground that, in the absence of more extensive procedural protections, robust judicial review of the reasonableness of agency action is necessary to provide legitimacy for administrative action.

Part I of the article will summarize the law as it stands now with respect to finality, focusing first on the Supreme Court's finality precedents, then turning to how the circuit courts have applied those precedents. Part II will provide examples of types of administrative actions that do not necessarily fit comfortably within the more legalistic applications of existing finality doctrines, but that nonetheless have substantial effects on regulated parties. Part III of the article will draw

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[7] Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Review*, 92 Tex. L. Rev. 1137 (2014) (describing assumptions driving administrative law doctrine).

[8] *See, e.g.*, 5 U.S.C. § 553(b) (exempting interpretative rules and policy statements from notice-and-comment rulemaking procedures).

[9] Cite.

[10] *See, e.g.*, 5 U.S.C. §§ 702 & 704 (authorizing judicial review only for challenges to "final agency action" brought by parties "adversely affected or aggrieved" by such; *see also* Abbott Labs, 387 U.S. at 140 (acknowledging that the APA's presumption of reviewability is not unlimited).

[11] *See* United States v. Mead Corp., 533 U.S. 218 (2001) (calling for *Chevron* deference for agency actions that carry "the force of law" and the less deferential *Skidmore* review for those that do not).

[12] *E.g.*, Farber & O'Connell, *supra* note 7; Richard J. Pierce, Jr., *Primary Jurisdiction*, 69 Admin. L. Rev. 431 (2017); Emily Hammon, *Double Deference in Administrative Law*, 116 Colum. L. Rev. 1705 (2016); Abbe R. Gluck, et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 Colum. L. Rev. 1789 (2015).

from existing jurisprudence to outline the parameters of our practical finality approach. Lest we swing the pendulum too far in the direction of justiciability, we seek to strike the right balance between flexibility and efficiency on the one hand and transparency and accountability on the other. Even as we are troubled that the judiciary is presently failing to provide an adequate check against agency arbitrariness, we are also concerned about arrogating too much power to the judiciary.

I. Judicial Applications of the Finality Requirement

Although courts generally recognize the aforementioned two-part test from *Bennett v. Spear* as governing finality determinations, the Court in that case did not purport to announce a new standard. Rather, *Bennett*'s standard is better understood as synthesizing and building upon the Court's pre-existing finality jurisprudence. Nevertheless, by articulating its previously fluid finality precedents as two-part framework, *Bennett* arguably shifted the direction of the Court's finality analysis at least somewhat. Notwithstanding the Court's subsequent efforts to clarify its intentions, the federal circuit courts of appeals have struggled at times to understand and apply *Bennett*'s two-part standard. Appreciating the challenges facing contemporary finality analysis requires exploring both the Court's pre- and post-*Bennett* case law as well as the different approahces to *Bennett* taken by the federal circuit courts.

A. Supreme Court Decisions

The Supreme Court's finality jurisprudence did not begin or end with *Bennett v. Spear*. In the decades since Congress adopted the APA and, thus, the requirement that agency action be "final" before it is subject to judicial review, the Supreme Court has issued a number of major decisions concerning the APA's finality requirement. Consequently, any consideration of *Bennett*'s two-part test must begin with examining the Court's finality jurisprudence more broadly.

1. Early Cases

One of the Court's earliest finality pronouncements came in *Frozen Food Express v. United States*, which involved a provision of the Interstate Commerce Act exempting motor carriers from a permit requirement so long as they carried only agricultural commodities.[13] The Interstate Commerce Commission issued an order interpreting the provision to mean that certain agricultural commodities were not eligible for to this exemption, and thus that motor carriers carrying these commodities would be required to obtain a permit.[14] A carrier of one of the non-exempt commodities challenged the order in court, but a special three-judge district court panel dismissed the lawsuit on the ground that the order was not judicially reviewable.[15] The panel's decision focused on the fact that "the order had no authority except to give notice of how the Commission interpreted the relevant statute, and would have effect only if and when a particular action was

[13] 351 U.S. 40, 41 (1956).

[14] *See* Determination of Exempted Agricultural Commodities, 52 M.C.C. 511 (1951)).

[15] Frozen Food Express v. United States, 128 F. Supp. 374, 378 (S.D. Tex. 1955). Interestingly, the ICC disagreed with the lower court regarding the justiciability of its order. See Brief of the Interstate Commerce Commission, 1956 WL 89628 (Jan. 13, 1956), at *18.

brought against a particular character."[16] Only then, the panel suggested, would the plaintiff be entitled to judicial review of the order's substance.[17]

The Supreme Court reversed, rejecting the panel's characterization of the Commission order. In an important passage, the Court explained:

> The determination by the Commission that a commodity is not an exempt agricultural product has an immediate and practical impact on carriers who are transporting the commodities, and on shippers as well. The 'order' of the Commission warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. Where unauthorized operations occur, the Commission may proceed administratively and issue a cease and desist order. Such orders of the Commission are enforceable by the courts. And willful violation of a cease and desist order is ground for revocation of a certificate or permit. The determination made by the Commission is not therefore abstract, theoretical, or academic. . . . The 'order' of the Commission is in substance a 'declaratory' one, and sets the standard for shaping the manner in which an important segment of the trucking business will be done. The consequences we have summarized are not conjectural.[18]

The Court's early willingness in *Frozen Foods* to find justiciability based upon the "immediate and practical impact" on a regulated party's day-to-day operations was significant. At the time the Court decided that case, pre-enforcement judicial review of agency action was uncommon. That norm changed just over a decade later, when the Court issued its seminal decision in *Abbott Laboratories v. Gardner*.[19]

Abbott involved a pre-enforcement challenge to a regulation, published by the Commissioner of Food and Drugs, requiring manufacturers of prescription drugs to print certain information on drug labels and advertisements.[20] The government sought dismissal of the suit on several grounds, one of which was that the regulation did not constitute final agency action.[21] According to the government, the only agency action that could be considered final would be "that kind of action which justifies the conclusion that at no future time will the plaintiff suffer an impact 'more conclusive, definite or substantial,'" so that the agency could have "the opportunity to adjust its tentative views."[22]

By a vote of six-to-three, the Supreme Court rejected the government's definition of finality. The majority opinion began by observing that the APA's legislative history "manifests a congressional intention that it cover a broad spectrum of administrative actions," so that earlier

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[16] U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1815 (2016) (describing *Frozen Food*).
[17] *Frozen Food*, 128 F. Supp. at 378–79.
[18] *Frozen Food*, 351 U.S. at 43–44 (citations omitted).
[19] 387 U.S. 136 (1967).
[20] *See id.* at 138.
[21] *See id.* at 139.
[22] Brief for the Respondents, 1966 WL 115408 (Nov. 29, 1966), at *42 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 149, 154, n.4 [year]).

Supreme Court precedents had called for giving "the [APA's] generous review provisions . . . a hospitable interpretation."[23] Along the same lines, the majority pointed out that "[t]he cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way," and with a "flexible view" of the doctrine.[24]

Applying that pragmatic and flexible approach, the majority explained why the regulation at issue was final agency action. In the first place, the majority pointed out, the regulation was a "definitive" statement of the Commission's position, "purport[ing] to give an authoritative interpretation" of the underlying statute."[25] There was "no hint that [the] regulation [was] informal, or only the ruling of a subordinate official, or tentative."[26] Just the opposite, the regulation had "the status of law," had been "made effective upon publication," and agency staff had told the district court "that compliance was expected."[27]

Taking an even more practical approach, the majority emphasized that the regulation had a "direct and immediate . . . effect on the day-to-day business" of regulated parties," effectively forcing them to choose between incurring the substantial costs of complying with the regulations or to ignore the regulations and risk "serious criminal and civil penalties"[28] The majority found it untenable that such a consequential pronouncement should be immune from pre-enforcement review:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance[.][29]

Lastly, the majority found it significant, for purposes of finality, that the question posed by the lawsuit was a "legal issue . . . fit for judicial resolution," and that, because the plaintiffs represented nearly all of the parties affected by the regulations, "a pre-enforcement challenge [was] calculated to speed enforcement" of the law at issue.[30]

The Supreme Court subsequently clarified *Abbott*'s teachings in a distinct lack of finality in the agency action at issue in *F.T.C. v. Standard Oil Co. of California*.[31] That case concerned a complaint issued by the FTC under the Federal Trade Commission Act, which complaint served to initiate investigative proceedings against the recipient, Standard Oil.[32] The Court unanimously held that the complaint was not final, but rather represented merely a threshold determination that further inquiry was warranted, as opposed to a final finding of culpability.

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[23] *Id.* at 140–41 (quotation marks omitted).
[24] *Id.* at 149, 150.
[25] *Id.* at 153.
[26] *Id.* at 151 (citations omitted).
[27] *Id.*
[28] *Id.* at 152–53.
[29] *Id.* at 153.
[30] *Id.* at 151–54.
[31] 449 U.S. 232 (1980)
[32] *Id.* at 242.

In reaching that conclusion, the Court reviewed the holding from *Abbott*, and drew from it five "pragmatic" factors to be used in assessing finality. They were: (1) the legal and practical effect of the agency action; (2) the definitiveness of the ruling; (3) the availability of an administrative solution; (4) the likelihood of unnecessary review; and (5) the extent to which judicial review would interfere with the functioning of the statute under which the agency acted. The Court had little trouble concluding that each of the five factors cut against judicial review of the FTC's complaint against Standard Oil. The Court held that the first factor cut against judicial review because issuance of the complaint lacked "any [] legal or practical effect, except to impose upon [the subject of the complaint] the burden of responding to the charges made against it"; the second factor cut against judicial review because the complaint served merely to initiate adjudicatory proceedings, as opposed to deciding them[33]; the third factor cut against judicial review because the governing statutes and regulations already provided means for regulated parties to contest adverse findings and conclusions before administrative bodies[34]; the fourth factor cut against judicial review because of the possibility that the Commission would simply dismiss the complaint before it was prosecuted[35] ; and the fifth factor cut against judicial review because judicial intervention would "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise," and would "also lead[] to piecemeal review," which would be inefficient and possibly unnecessary, depending on the agency's ultimate conclusions.[36] The Court also expressed concern that, if regulated parties could challenge FTC complaints, the judiciary would be deluged with claims like the one before the Court, which would have the unfortunate effect "of turning prosecutor into defendant before adjudication concludes."[37]

2. A More Legalistic Line?

Although the Court's early finality pronouncements clearly emphasized the pragmatic, day-to-day impacts as well as potential legal consequences of agency actions, its next series of cases offered language that arguably might seem to narrow the scope of finality doctrine in a more legalistic direction, starting with the Court's decision in *Franklin v. Massachusetts*.[38] The case involved a challenge to the method for counting overseas federal employees in the 1990 census. The automatic reapportionment statute required that, after the census, the Secretary of Commerce submit to the President a "tabulation of total population by States."[39] The President was then required to "transmit to Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population."[40] When, as a result of reapportionment, Massachusetts lost a seat in the House of Representatives, it sued the Secretary and the President, alleging that the Secretary's report had erred in its counting of overseas federal

[33] *Id.* at 242.
[34] *Id.* at 241.
[35] *Id.* at 242.
[36] *Id.*
[37] *Id.* at 242–43.
[38] 505 U.S. 788 (1992).
[39] *Id.* at [pinpoint].
[40] *Id.* at [pinpoint].

employees.[41] A district court held that the Secretary's allocation of overseas employees was arbitrary and capricious, and the Supreme Court granted certiorari.[42]

The Court began its decision by setting out a nonexclusive list of factors that had informed its decisions in previous finality cases:, including whether the impact of the agency action at issue "is sufficiently direct and immediate" and has a "direct effect on . . . day-to-day business," and whether the action "is only 'the ruling of a subordinate official,' or 'tentative.'"[43] Nevertheless, foreshadowing the two-part *Bennett* standard, the Court went on to state that "[t]he *core question* is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.[44]

Applying those factors to the case at bar, the Court held that the Secretary's report to the President was not final agency action. In particular, the Court said that, because the President was not required to use the data in the Secretary's report, and was in fact free to amend the report as he saw fit, the Secretary's report "carrie[d] no direct consequences for the reapportionment," meaning it "serve[d] more like a tentative recommendation than a final and binding determination."[45] It was only to the extent that the President acted on the report that it had a "direct effect on reapportionment," which, the Court explained, made the report less like final agency action and more "like the ruling of a subordinate official."[46]

Things might have been different, the Court indicated, if presentation of the report itself compelled some action by the President, or, put differently, if the President had no discretion to modify the report before transmitting it to Congress. Under those circumstances, the Court implied, the report would have been analogous to other agency actions the Court had deemed final.[47] But, the Court emphasized, that was not the case with respect to the Secretary's report because, despite the "admittedly ministerial nature of the apportionment calculation itself," the President was "not expressly required to adhere to the policy decisions reflected in the Secretary's report."[48] The Court thus concluded its finality analysis by explaining that, "Because it is the President's personal transmittal of the report to Congress that settles the apportionment, until he acts there is no determinate agency action to challenge. The President, not the Secretary, takes the final action that affects the States."[49]

Two years after *Franklin*, in *Dalton v. Specter*, the Court considered the finality of a recommendation to the President from the Defense Base Closure and Realignment Commission about which military installations the government should close.[50] The Defense Base Closure and Realignment Act of 1990 established a two-step process for shutting down military installations.[51]

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[41] *Id.* at [pinpoint].
[42] *Id.* at [pinpoint].
[43] *Id.* at [pinpoint].
[44] *Id.* at [pinpoint] (emphasis added).
[45] *Id.* at [pinpoint].
[46] *Id.* at [pinpoint].
[47] *Id.* at [pinpoint].
[48] *Id.* at [pinpoint].
[49] *Id.* at [pinpoint].
[50] 511 U.S. 462 (1994).
[51] *See id.* at 464–65.

First, the Defense Base Closure and Realignment Commission would submit a report to the President recommending installations to be shut down.[52] Then the President would decide whether to accept or reject the list as a whole; he had no discretion to add or subtract items from the list.[53]

The Court held that the list was not reviewable as final agency action. Here again, the Court emphasized as "the core question . . . whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."[54] Comparing the circumstances to those in *Franklin*, the Court observed that the Commission's list would only "directly affect bases" to the extent the President certified or declined to certify it, meaning it was the President, not the Commission or the Secretary of Defense, who would make the final decision, and thus take the final action, that would affect the subject military installations.[55]

Finally, just a few years later, the Court decided *Bennett v. Spear*,[56] which has since emerged as its leading finality precedent. *Bennett* concerned biological opinions, which are issed under the Endangered Species Act (ESA). Specifically, the ESA requires that, when any federal action might adversely affect a threatened or endangered species, the agency must formally consult with the Fish and Wildlife Service, which must provide the agency with a written statement — the biological opinion — explaining how the proposed action will affect the species or its habitat. If the Service finds that the federal action in question will jeopardize or adversely modify the habitat of a threatened or endangered species, the biological opinion must set out "reasonable and prudent alternatives" that the Service believes will avoid that consequence. If the biological opinion concludes that no jeopardy or adverse habitat modification will result, or if it offers reasonable and prudent alternatives, the Service must issue a written statement — called an incidental take statement — to accompany the biological opinion and specify the terms and conditions under which an agency may "take" (*i.e.*, harm) the species. One issue in *Bennett* was whether issuance of a biological opinion constitutes final agency action.

The Court unanimously held that it did. It began its finality analysis by setting out what has since become the canonical standard for ascertaining finality:

> As a general matter, two conditions must be satisfied for agency action to be "final." First, the action must mark the consummation of the agency's decision-making process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.[57]

The Court had little trouble concluding that biological opinions accompanied by incidental take statements met that standard. The first prong was "uncontested" in *Bennett*.[58] The second prong

[52] *Id.*
[53] *Id.* at 465.
[54] Id. at 469.
[55] *Id.* at 469–70.
[56] 520 U.S. 154 (1997)
[57] *Id.* at [pinpoint].
[58] *Id.* at [pinpoint].

was satisfied, the Court explained, because "the Biological Opinion and accompanying Incidental Take Statement alter the legal regime to which the action agency is subject, authorizing it to take the endangered species if (but only if) if complies with the prescribed conditions."[59] It was irrelevant, the Court stated, that the action agency might opt not to adhere to the terms of a biological opinion, because, either way, the biological opinion had "direct and appreciable legal consequences."[60] That fact, explained the Court, distinguished the action in *Bennett* from the action in *Franklin*.

The *Bennett* Court's entire discussion of finality — which has become the lynchpin of many courts' finality decisions — was contained in a single paragraph that did not so much as mention, let alone address, almost any of the Supreme Court's leading precedents in the field

3. A Return to Pragmatism?

Since *Bennett*, the Supreme Court has issued just two major finality decisions, each involving the Environmental Protection Agency's (EPA's) determination of its own jurisdiction under the Clean Water Act (CWA). Both arguably again shift the Court's finality jurisprudence in a more pragmatic direction.

The first of those decisions was *Sackett v. Environmental Protection Agency*.[61] The plaintiffs in *Sackett* had received a compliance order from EPA. The order notified them of EPA's belief that a wetland on their property qualified as a "water of the United States" for purposes of the CWA, so that, before disturbing the wetland (as they had planned), the plaintiffs were statutorily required to either go through the expensive and time-consuming process of obtaining a CWA permit, or go through the equally expensive and time-consuming process of proving that the wetland on their property was not, in fact, a water of the United States under the CWA. Except by doing one of those two things, the plaintiffs could not fill in the wetland on their property without risking massive civil penalties — twice what they would be exposed to without the compliance order.

The plaintiffs sued EPA, alleging that the jurisdictional determination underlying the order was flawed. Like every other court of appeals in the country to address the issue, the Ninth Circuit held that the compliance order — including the jurisdictional determination — was unreviewable because it was merely advisory, and thus not final agency action.

Applying *Bennett*'s two-part standard for discerning finality, the Supreme Court unanimously reversed. It held that the first *Bennett* prong (consummation of the agency's decisionmaking process) was satisfied because, among other things, parties subject to compliance orders have no right to a formal administrative hearing to address EPA's factual findings or determinations. It did not matter that the plaintiffs were free to "engage in informal discussion of the terms and requirements" of the order with EPA, or to inform EPA of any allegations the plaintiffs believed were inaccurate, because none of that entitled the plaintiffs to further agency

[59] *Id.* at [pinpoint].
[60] *Id.* at [pinpoint].
[61] 132 S. Ct. 1367 (2012).

review.[62] As the Court stated: "The mere possibility that an agency might reconsider [its jurisdictional decision] in light of 'informal discussion' and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal."[63]

With respect to *Bennett*'s second prong (legal consequences and determination of rights or obligations), the Court identified several features of the compliance order that warranted treating it as final. For one thing, the Court pointed out, the order required the plaintiffs "to 'restore' their property according to an agency-approved Restoration Work Plan, and [to] give the EPA access to their property and to 'records and documenatation related to the conditions at the Site.'"[64] In addition, the Court found it significant that, when property owners become subject to compliance orders, they are thereby exposed to twice the regulatory penalties they could otherwise face if subsequently found to be in violation of the CWA. Lastly, the court noted that, under a related provision of the CWA, an EPA compliance order makes it considerably more difficult for regulated parties to obtain important permits from the Army Corps of Engineers.

There were two concurrences in *Sackett*. The first, by Justice Ginsburg, emphasized that the Court had resolved only whether order recipients under the Clean Water Act may bring judicial challenges relating to questions of Clean Water Act jurisdiction.[65] The Court's decision should not, she continued, be read to decide, one way or the other, whether pre-enforcement review is also available regarding the terms and conditions of a compliance order. In a separate concurrence, Justice Alito explained that he found the Government's position — that something as obviously consequential as a compliance order was not subject to judicial review — "unthinkable . . . in a nation that values due process."[66] This was particularly so, he explained, given the notoriously murky nature of EPA's jurisdiction under the CWA.

The Court's most recent pronouncement on finality came in *United States Army Corps of Engineers v. Hawkes Co., Inc.*[67] As in *Sackett*, the plaintiffs in *Hawkes* sought judicial review of an agency determination that their property was subject to the CWA's permitting requirements. This time, the agency at issue was the Army Corps of Engineers and its conclusions were contained in a document known as an "approved jurisdictional determination" (approved JD). When the plaintiffs sued the Corps, the Corps asserted that approved JDs were unreviewable because they were not final agency action.

All but one of the federal courts of appeals to have addressed the issue had held that approved JDs were not final agency action. So, of course, the Supreme Court unanimously held that they were. In reaching that result, the Court purported to apply *Bennett*'s two-pronged framework. The Court gave several reasons why the first prong was satisfied:

> It is issued after extensive factfinding by the Corps regarding the physical and hydrological characteristics of the property, and is typically not revisited if the permitting process moves

[62] *Id.* at [pinpoint].
[63] *Id.* at [pinpoint].
[64] *Id.* at [pinpoint].
[65] *Id.* at [pinpoint] (Ginsburg, J., concurring).
[66] *Id.* at [pinpoint] (Alito, J., concurring).
[67] 136 S. Ct. 1807 (2016).

> forward. Indeed, the Corps itself describes approved JDs as "final agency action," and specifies that an approved JD "will remain valid for a period of five years."

The Court contrasted approved JDs with "preliminary JDs — which are 'advisory in nature' and simply indicate that 'there may be waters of the United States on a parcel of property.'" Preliminary JDs, the Court implied, were obviously not final because they failed to satisfy *Bennett*'s first prong. Not so, approved JDs. The possibility that the Corps might revise an approved JD within the five-year period based on new information did "not make an otherwise definitive decision nonfinal." The possibility of revision, the Court noted, is merely "a common characteristic of agency action." What was important for purposes of *Bennett*'s first prong, the Court emphasized, was that, in issuing an approved JD, the Corps "for all practical purposes 'has ruled definitively' that [the subject] property contains jurisdictional waters."

Turning to *Bennett*'s second prong, the Court identified several "direct and appreciable legal consequences" of approved JDs. To illustrate those consequences, the Court first discussed the consequences of a "negative JD," which is an approved JD stating that property does not contain jurisdictional waters. The Court noted that a negative JD not only binds the Corps for five years, but — thanks to a memorandum of agreement between the Corps and EPA, which are the two agencies responsible for enforcing the CWA — also creates a five-year safe harbor from enforcement proceedings brought by the Government and limits the potential liability a property owner faces from a citizen suit under the CWA. Because, thanks largely to the memorandum of agreement, "a negative JD both narrows the field of potential plaintiffs and limits the potential liability a landowner faces for discharging pollutants without a permit," the Court reasoned, it had legal consequences sufficient to satisfy *Bennett*'s second prong. And because an "affirmative JD" — that is, an approved JD stating that property contains jurisdictional waters — effectively denied those beneficial legal consequences to property owners, affirmative JDs also met *Bennett*'s second prong.

The Court could have ended its finality analysis there. Instead, it made a point of emphasizing the practical consequences of an approved JD, irrespective of whether the JD itself could be the subject of an enforcement action. As the Court explained, the Corps' determination in an affirmative JD "not only deprives [landowners] of a five-year safe harbor from liability under the [CWA], but warns that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." The Court analogized that circumstance to the one at issue in *Frozen Food*, where the Commission's order effectively served notice on regulated parties that certain activities were subject to new rules. In that way, the Court observed, its finality holding "track[ed] the 'pragmatic' approach [the Court had] long taken to finality."

There were three concurring opinions in *Bennett*. Justice Kennedy, joined by Justices Thomas and Alito, joined in the whole of the Court's opinion, but wrote separately only "to point out that, based on the Government's representations in this case [about the scope and significance of a JD], the reach and systemic consequences of the Clean Water Act remain a cause for concern," especially because "the Act's reach is 'notoriously unclear' and the consequences to landowners even for inadvertent violations can be crushing." "Even if, in the ordinary case, an agency's internal agreement with another agency cannot establish that its action is final," Justice Kennedy wrote, "the Court is right to construe a JD as binding in light of the fact that in many instances it

will have a significant bearing on whether the [CWA] comports with due process." Justice Kennedy concluding by noting his view that the CWA "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."

Justices Kagan and Ginsburg also wrote separate, one-paragraph concurrences debating the application of *Bennett*, not only in the case at bar, but also more broadly. Justice Kagan wrote to note that, for her, "the memorandum of agreement between the [Corps] and [EPA] [was] central to the disposition" in *Hawkes*. In her view, it was the memorandum which gave JDs the power to create a safe harbor for property owners, and it was the safe harbor which established the "direct and appreciable legal consequence" necessary to satisfy *Bennett*'s second prong.

Justice Ginsburg, by contrast, wrote to point out that she did not think the memorandum had any significance to the finality determination, because, regardless of the memorandum, the JD in the case was "'definitive,' not 'informal' or tentative,' and ha[d] 'an immediate and practical impact.'" In a footnote, Justice Ginsburg stated that *Bennett* did "not displace or alter the approach to finality established by [*Abbott*] and *Frozen Food Express*," because "*Bennett* dealt with finality quickly, and did not cite those pathmarking decisions."

4. Synthesis

The Court's own decisions illustrate the difficulty in reconciling some of those precedents. In *Bennett*, for instance, the Court attempted to distinguish *Franklin* and *Dalton* on the ground that the reports in those cases "were purely advisory and in no way affected the legal rights of the relevant actors."[68] But the biological opinion and incidental take statement in *Bennett* also did not directly implicate the rights or obligations of private parties, except to the extent the two documents authorized government action which might then affect the plaintiffs. If that suffices for to make an action final, then perhaps the reports in *Franklin* and *Dalton* were final, too, since their issuance triggered presidential powers that also might eventually have affected the plaintiffs.

The same apparent inconsistency haunts other aspects of the Court's finality jurisprudence. For example, *Standard Oil*, *Franklin*, and *Dalton* all suggest that, where some additional action must occur before regulated parties feel the effects of an agency action, the action is not final.[69] If that is so, though, then *Abbott Labs*, *Bennett*, and *Sackett* arguably should have come out differently, because, in each of those cases, the consequences of the challenged agency action depended on enforcement proceedings that might never have occurred.[70]

And what of *Frozen Food*, where the Court found finality based entirely on the order's "immediate and practical impact" on the way carriers "order[ed] and arrang[ed] their affairs"?[71] That opinion did not turn at all on the subject order's legal consequences or legal effects. In *Hawkes*, though, the Court went to some length to point out that the JD did, in fact, carry direct

[68] *Bennett*, 520 U.S. at 178.

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legal consequences for the plaintiffs.[72] That detailed analysis — about which not all the justices agreed[73] — seemingly would have been unnecessary if practical consequences, like the ones in *Frozen Food*, suffice for purposes of establishing finality.

When the decisions are read apart from their contexts, things only get more muddled. Should courts "interpret[] the finality element in a pragmatic way," with an eye to "practical impact[s]"?[74] Or must the court focus on "direct and immediate" consequences bearing squarely on regulated parties' legal rights and obligations?[75] The decisions contain enough seemingly contradictory language that lower courts can cherry-pick quotes to support a range of decisions. And, indeed, that is exactly what lower courts have done, as the next section shows.

B. Circuit Court Decisions

No federal circuit court of appeals denies that the two-part test articulated by the Supreme Court in *Bennett v. Spear* governs finality analysis. The *Bennett* test, however, provides a standard, rather than a bright-line rule, for evaluating the finality of agency action. As the D.C. Circuit has observed, "case law interpreting this standard is 'hardly crisp,' and it 'lacks many self-implementing, bright-line rules, given the pragmatic and flexible nature of the inquiry as a whole.'"[76] As a result, some amount of variability is to be expected among applications of the *Bennett* test by the several federal circuit courts and even different panels within those courts.

A review of finality decisions among the federal circuit courts, however, uncovers more than the standard range of understandings regarding what the *Bennett* test requires and when it allows for judicial review of agency action.

1. The Third Circuit's Five Factor Gloss

Drawing from its own pre-*Bennett* precedents, which in turn drew from the Supreme Court's decisions in *FTC v. Standard Oil* and *Abbott Labs v. Gardner*, the Third Circuit uses five factors to evaluate whether agency action satisfies *Bennet*'s two-part test: [77]

> (1) Whether the decision represents the agency's definitive position on the question; (2) whether the decision has the status of law with the expectation of immediate compliance; (3) whether the decision has immediate impact on the day-to-day operations of the party seeking review; (4) whether the decision involves a pure question of law that does not

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[74] *Abbott Labs.*, 387 U.S. at 149.

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[76] Friedman v. FAA, 841 F.3d 537, 541 (D.C. Cir. 2016) (quoting Rhea Lana, Inc. v. Department of Labor, 824 F.3d 1023, 1027 (D.C. Cir. 2016), in turn quoting Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers, 417 F.3d 1272, 1279 (D.C. Cir. 2005)).

[77] See, e.g., CEC Energy Co., Inc. v. Pub. Serv. Comm. of the Virgin Islands, 891 F.2d 1107, 1110 (3d Cir. 1989) (listing five factors); Solar Turbines Inc. v. Seif, 879 F.2d 1073, [pinpoint] (3d Cir. 1989) (same). The Solar Turbines court purported to draw the five factors from the Supreme Court's reasoning in FTC v. Standard Oil Co. of Calif., 449 U.S. 232 (1980), and Abbott Labs v. Gardner, 387 U.S. 136, 149-53 (1967). Solar Turbines, 879 F.2d at [pinpoint]. CEC Energy cited Solar Turbines. 891 F.2d at 1110.

require further factual development; and (5) whether immediate judicial review would speed enforcement of the relevant act.[78]

Beyond mere application, the Third Circuit has not explained how its five factors ought to be weighed in relation to one another, nor has the Third Circuit specified exactly how its five factors interact with *Bennett*'s two-part test. In *Ocean County Landfill Corp. v. U.S. EPA*, concerning the finality of a letter ruling issued in conjunction with a permitting process, the court recited *Bennett*'s two part test but subsequently ignored it in favor of the five factors.[79] In *Minard Run Oil Co. v. U.S. Forest Services*, evaluating the finality of a policy statement issued pursuant to a settlement agreement, the court applied these five factors separately from and in addition to the two parts of the *Bennett* test.[80] In *Tennessee Valley Authority v. Whitman*, the Eleventh Circuit applied a similar five factors, and interpreted *Bennett v. Spear* as making the second of those factors "mandatory."[81] The Third Circuit has not said the same, however, and subsequent Eleventh Circuit cases evaluating finality have neither cited *Tennessee Valley Authority* nor applied the five factors.[82]

Some of the Third Circuit's five factors either overlap *Bennett*'s two inquiries substantially or are at least consistent with the Supreme Court's pronouncements that finality analysis ought to be pragmatic. Yet, other of the Third Circuit's factors arguably pull the analysis in a more legalistic direction, for example by requiring the agency's action to have the status of law and to involve a purely legal question. Perhaps influenced by its own factors, the *Minard Run* court suggested that *Bennett*'s "legal consequences" factor could only be satisfied if the agency's action "require[ed] an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance"[83]—a position that seems distinctly at odds with the Supreme Court's conclusion in *Bennett*.

2. The D.C. Circuit's Internal Disagreement Over *Ciba-Geigy*

More than a decade prior to the Supreme Court's decision in *Bennett*, the D.C. Circuit offered an extended discussion of the APA's finality requirement in *Ciba-Geigy Corp. v. EPA*.[84] Since the D.C. Circuit decided *Ciba-Geigy*, something of an internal split has emerged within the circuit regarding how to read that decision. *Bennett*'s two-part standard has been swept into that disagreement.

Ciba-Geigy concerned the applicability of pesticide labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Through a series of informal notifications including a "mailgram" and a letter from the EPA's Director of Pesticide Programs,

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[78] See, e.g., Ocean City Landfill Corp. v. EPA, 631 F.3d 652 (3d Cir. 2011) (applying the five factors); Minard Run Oil Co. v. U.S. Forest Services, 670 F.3d 236, 249 (3d Cir. 2011) (same); University of Medicine and Dentistry of New Jersey v. Corrigan, 347 F.3d 57, 69 (3d Cir. 2003) (same).

[79] 631 F.3d 652 (3d Cir. 2011)

[80] 670 F.3d 236, 249 (3d Cir. 2011).

[81] 336 F.3d 1236, 1248 (2003) (citing FTC v. Standard Oil Co. of Calif., 449 U.S. 232 (1980), as the origin of the five factors).

[82] See, e.g., [cites].

[83] Minard Run Oil Co., 670 F.3d at 248 (quoting Abbott Labs v. Gardner, 387 U.S. 136, 154 (1967)).

[84] Ciba-Geigy Corp. v. EPA, 801 F.2d 430 (D.C. Cir. 1986).

the EPA told Ciba-Geigy to re-register under a different classification and relabel one of its products or face an enforcement action for misbranding. Ciba-Geigy filed suit, challenging those actions and claiming the EPA could not require such re-registration and relabeling without first canceling the product's existing registration using statutory adjudication procedures. The EPA disagreed, sending another letter threatening an enforcement action. In considering whether the case was ripe for judicial review, the court separately addressed the finality of the EPA's actions. Describing its evaluation as " 'flexible' and 'pragmatic'" under *Abbott Labs*, and citing also *FTC v. Standard Oil*, the court focused on "whether the agency's position is definitive and whether it has a direct and immediate effect on the day-to-day business of the parties challenging the action."[85] Separately, the court observed that Ciba-Geigy "did not challenge the merits of EPA's labeling requirements or the sufficiency of EPA's case for misbranding [but] raised instead a pure legal question of what procedures EPA was obliged to follow when requiring a labeling change."[86] The court noted further that the EPA's communications "admit[ted] of no ambiguity regarding the EPA's position, demanded "immediate compliance," and were "equally definitive" in asserting that "Ciba-Geigy had no statutory right to" the requested hearing.[87] The court additionally found that the EPA's Director of Pesticide Programs possessed authority to speak for the EPA, so that his statement regarding the EPA's position was not " 'only the ruling of a subordinate official' that could be appealed to a higher level of EPA's hierarchy."[88] For these reasons, the court held that the EPA's actions had sufficient "practical effect" to constitute final agency action.[89]

Both before and after the Supreme Court's decision in *Bennett*, the D.C. Circuit has continued to rely upon and apply *Ciba-Geigy*—sometimes to emphasize the need to apply *Bennett*'s two steps pragmatically, but at other times substantially more legalistically. In particular, although the *Ciba-Geigy* court's application of finality to the agency action at bar reflects a capacious approach to reviewability, subsequent panels have focused instead on rhetoric from *Ciba-Geigy* supporting a more limited construction of finality. For example, in *CSI Aviation Services, Inc. v. U.S. Department of Transportation*, the court quoted *Bennett*'s two steps as governing its analysis.[90] But, describing *Ciba-Geigy* as " 'complementary' to *Bennett*,"[91] the court derived from *Ciba-Geigy*'s analysis three factors that, in application, may be even more legalistic than the five-factor approach adopted by the Third Circuit: (1) whether "the agency [has] taken a 'definitive' legal position concerning its statutory authority"; (2) whether "the case present[s] 'a purely legal' question of 'statutory interpretation" such that "there [is] no benefit in waiting for the agency to develop a record before granting judicial review"; and (3) whether the agency's action "impose[s] an immediate and significant practical burden on" regulated parties.[92]

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[85] *Id.* at 435-36.

[86] *Id.* at 435.

[87] *Id.* at 436.

[88] *Id.* (quoting Abbott Labs).

[89] *Id.* at 437 (quoting FTC v. Standard Oil Co. of Calif.).

[90] 637 F.3d 408, 411 (D.C. Cir. 2011).

[91] *Id.* at 411 (quoting Reckitt Benckiser, Inc. v. EPA, 613 F.3d 1131, 1137 (D.C. Cir. 2010)); *see also* John Doe Inc. v. DEA, 484 F.3d 561, 566 (D.C. Cir. 2007) (also describing *Ciba-Geigy* as offering "a complementary analysis" to that of Bennett).

[92] *Id.* at 412 (quoting *Ciba-Geigy Corp.*, 801 F.2d at 435-37); *cf.* USAA Federal Savings Bank v. McLaughlin, 849 F.2d 1505, 1510 (D.C. Cir. 1988) (describing *Ciba-Geigy* rationale similarly)

Whether all of the *Ciba-Geigy* factors must be satisfied for the D.C. Circuit to consider agency action final is unclear. The court has not specified how the factors function with respect to one another. In *Ciba-Geigy* itself, the court found all of the factors present. Likewise, in *CSI Aviation*, the court said that the agency action at issue satisfied all three *Ciba-Geigy* factors. In a third case, *Reckitt Benckiser Inc. v. EPA*, the court discussed *Ciba-Geigy* at length in a blended analysis of ripeness and finality and concluded that the agency action in question was "sufficiently final" because it was "definitive" and "authoritative," with "practical and significant legal effects," and that judicial review would not "disrupt the orderly process of administrative decisionmaking,"[93] as well as that it satisfied *Bennett*'s two factors for similar reasons.[94] In *John Doe, Inc. v. DEA*, however, the court said that "the lack of a comprehensive administrative record to assist judicial review" was not dispositive.[95] Also, many cases cite *Ciba-Geigy* in favor of finality without fully engaging all of the factors.[96] And in *CSX Transportation, Inc. v. Surface Transportation Board*, the court distinguished "'comply-or-else' cases" like *Ciba-Geigy* from other types of agency actions, thereby suggesting that *Ciba-Geigy*'s factors may only apply in a subset of finality cases. In short, in addition to debating how to apply the two-factors of *Bennett v. Spear*, the D.C. Circuit seems divided over when and how to apply *Ciba-Geigy* as gloss on *Bennett*.

3. Legislative Rules, *Chevron*–Eligibility, and Finality

The Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, counseling judicial deference to agency interpretations of ambiguous statutes,[97] predates *Bennett v. Spear*. *Bennett v. Spear*, in turn, predates the Court's decision in *United States v. Mead Corp.*, wherein the Court specified that eligibility for *Chevron* deference depends upon whether the agency interpretation in question carries "the force of law."[98] The Supreme Court has never signaled a direct correlation between the finality of agency action and either its status as a legislative rule or its eligibility for *Chevron* deference. Nevertheless, a few circuits have drawn just such a connection particularly with respect to the second part of the *Bennett* test, asking whether the agency action determines rights or obligations or generates legal consequences.

Many years before the Supreme Court decided *Mead*, in the *Ciba-Geigy* case discussed above, the D.C. Circuit suggested that a letter written by the EPA's Director of Pesticide Programs clarifying the EPA's interpretation of the law as applied to a particular regulated party's circumstances would be eligible for *Chevron* deference, and thus would have sufficient "*legal* effect" on that regulated party as to establish finality.[99] Post-*Mead*, the Eleventh Circuit suggested in *LabMD, Inc. v. Federal Trade Commission* that a finding that a court had extended *Chevron* deference to a particular type of agency action "would imply a finding of finality."[100]

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[93] 613 F.3d 1131, 1137 (D.C. Cir. 2010).

[94] *Id.* at 1140-41.

[95] 484 F.3d 561, 567 (D.C. Cir. 2007).

[96] *See, e.g.*, Clean Air Council v. Pruitt, 862 F.3d 1, 7 (2017); Friedman v. FAA, 841 F.3d 537, 542 (D.C. Cir. 2016).

[97] 467 U.S. 837, 842 (1984).

[98] 533 U.S. 218 (2001).

[99] 801 F.2d 430, 437 (D.C. Cir. 1986) (emphasis in original).

[100] 776 F.3d 1275, 1278-79 (11th Cir. 2015).

In *National Mining Association v. McCarthy*, in an opinion by Judge Brett Kavanaugh, the D.C. Circuit linked the legal consequences, and thus the finality, of an EPA guidance document with its characterization as a legislative rule eligible for *Chevron* deference.[101]

> The APA divides agency action, as relevant here, into three boxes: legislative rules, interpretive rules, and general statements of policy. A lot can turn on which box an agency action falls into. In terms of reviewability, legislative rules and sometimes even interpretive rules may be subject to pre-enforcement judicial review, but general statements of policy are not. Legislative rules generally require notice and comment, but interpretive rules and general statements of policy do not. Legislative rules generally receive *Chevron* deference, but interpretive rules and general statements of policy often do not.[102]

With that windup, however, the court went on to suggest that reviewability depended upon whether the guidance at issue was a legislative rule or a policy statement, with the former being categorically reviewable and the latter categorically not.[103] Concluding that "[a]s a legal matter, the Final Guidance is meaningless" and "impose[d] no obligations or prohibitions on regulated entities," and noting that the agency had specified its intention not "to require anyone to do anything or to prohibit anyone from doing anything," the court held that the guidance document was a mere policy statement, and thus was "not a final agency action subject to pre-enforcement review."[104]

The D.C. Circuit's *National Mining Association* opinion is loaded with hedges. Its discussion of the APA's "three boxes" can be read as suggesting that the lines between an action's APA characterization and its eligibility for pre-enforcement review or *Chevron* deference are not precise. The court blamed the parties' framing, rather than its own, for approaching the finality question in such a legalistic and categorical way.[105] And the substance of the petitioner's claim was that the agency's guidance document was a legislative rule that should have been promulgated using notice and comment procedures,[106] as opposed to a claim that the agency's action was arbitrary and capricious under *State Farm*, which would not be limited to legislative rules.[107] Nevertheless, as an application of *Bennett v. Spear*'s two-part test, the D.C. Circuit's *National Mining Association* analysis effectively requires a demonstration that agency action carries the force and effect of law on regulated parties to establish finality and, thus, justiciability.

The most extensive analysis of a relationship between *Chevron* and finality analysis, however, comes from the Sixth Circuit in *Air Brake Systems, Inc. v. Mineta*. In that case, in considering the finality of two opinion letters posted by the Acting Chief Counsel of the National Highway Traffic Safety Administration, the court treated eligibility for *Chevron* deference as a

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[101] 758 F.3d 243 (D.C. Cir. 2014).
[102] *Id.* at [pinpoint]
[103] *Id.* at [pinpoint]
[104] *Id.* at 252-53.
[105] *See id.* at 251.
[106] *See id.* at [pinpoint].
[107] [Cite to Administrative Law Treatise.]

"relevant 'legal consequence'" for purposes of *Bennett*'s second prong.[108] The court was careful to describe *Chevron* eligibility as a "*sufficient* legal consequence," rather than a *necessary* one, for establishing finality.[109] Nevertheless, the court also specified that the fact that the Court in *Mead* limited the scope of *Chevron*'s applicability "[did] not alter the relevance" of *Chevron* eligibility in evaluating finality under the *Bennett* standard.[110] Instead, said the court, the effect of *Mead* would be "that less agency action will qualify for *Chevron* deference and less agency action accordingly may qualify for federal-court review," and "cases will now arise involving agency action that we once might have considered 'final' for APA-review purposes as a result of *Chevron*'s legal effect but that we will no longer consider final because *Chevron* does not apply."[111] The court went on to conclude that the Acting Chief Counsel's opinion letters "have no claim to deference of any sort" and were "not 'final' agency action under the APA."[112]

Although the Sixth Circuit's opinion in *Air Brake Systems* comes close, none of these cases conclusively requires proof that an agency's action carries the force and effect of law with respect to regulated parties as a prerequisite for declaring agency action to be final. In particular, *Air Brake* seems to have treated *Chevron* eligibility more as sufficient to establish finality, rather than necessary. Nevertheless, any explicit linkage between finality and other doctrines that focus on an agency action's legal force is highly legalistic, rather than pragmatic. Distinguishing between legislative rules, interpretative rules, and policy statements is a never-ending challenge, but the standards the courts employ for that purpose focus principally on the legal force of the pronouncement in question vis a vis regulated parties.[113] The *Mead* decision makes clear that *Chevron* is not limited to notice-and-comment rulemaking and formal adjudication.[114] Since deciding *Mead*, however, the Supreme Court has yet to extend *Chevron* deference to interpretations offered through other formats.[115] A few circuit court decisions have applied *Chevron* more expansively,[116] but such cases are a narrow exception from the broad rule that formats lacking such procedures can be *Chevron* eligible.

Meanwhile, the courts that have cited these other legal doctrines in conjunction with finality analysis have declined to indicate just how far finality's outer boundary may stray from a requirement that agency action carry the force of law. In the absence of such explication, incorporating an agency action's characterization as a legislative rule or its eligibility for *Chevron* deference as a factor in finality analysis may tend to tug the application of *Bennett*'s two-part test in a more legalistic direction.

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[108] 357 F.3d 632, 641-42 (6th Cir. 2004).

[109] *Id.* at 641.

[110] *Id.* at 642.

[111] *Id.*

[112] *Id.* at 642-44.

[113] Cite to American Mining Congress, Community Nutrition Institute v. Young, others.

[114] United States v. Mead Corp., 533 U.S. 218, [pinpoint] (2001).

[115] *See* Kristin E. Hickman, *Three Phases of* Mead, 83 Fordham L. Rev. 527, 547-49 (2014) (surveying Supreme Court applications of the *Mead* standard for *Chevron* eligibility).

[116] Cites.

II. Contemporary Examples of Finality Disputes

Even as the federal circuit courts of appeals have strayed toward more legalistic interpretations of the two-part *Bennett* test, contemporary administrative practices have shifted toward greater use of seemingly less formal agency actions to direct regulated party behavior and accomplish agency goals. Examples of the latter abound. Not all of these examples have found their way into the courts. At least anecdotally, one reason they have not is the perception that the courts will apply finality doctrine to preclude judicial review, rendering litigation pointless as a check against the agency actions in question. Nevertheless, the following are examples that we believe ought to be often, if not even typically, considered final.

A. Interpretive Letters

Nearly every agency in the federal government issues letters announcing how it interprets the statutes and regulations it administers. A typical interpretive letter will begin by describing the statute or regulation to be interpreted, then describe a thing or set of circumstances, and then explain whether and why the statute or regulation will or won't be applied in those things or circumstances.

Almost none of these letters purport to be final agency action. Indeed, most of them contain boilerplate language disclaiming any formal legal effect. In addition, many of the letters come, not from the agencies' heads, but from agency staff, a distinction that some courts have held cuts against treating a pronouncement as final. And most of the letters address stipulated — potentially hypothetical — facts or conditions, as opposed to facts as the agency has actually found them. All of those factors, courts have found, typically cut against treating letters as final.

And yet courts frequently do find that agency interpretive letters are final. They do so, one senses, chiefly because, as a practical matter, regulated parties often have no choice but to treat the interpretation in the letter as binding. In the first place, it is usually a safe bet that the interpretation reflected in the agency's letter will be the one the agency implements through enforcement actions and other compliance-ensuring mechanisms. That is so because, as the circumstances surrounding issuance of these letters often reveals, the letters are typically the product of extensive consideration and review within the agency. What is more, the letters are often written and issued by the very people within the agency charged with enforcing the provision being interpreted. And many of these letters deal with subjects that are the special province of particular subject matter experts in the agency, which not only has the effect of giving the experts' opinions more weight, but making it concomitantly less likely that those opinions will be second-guessed by others within the agency.

Beyond that, the consequences of disregarding an interpretive letter can be dire. If a regulated party decides not to treat an interpretive letter as binding and to act contrary to the letter's interpretation, the result can be anything from litigation to ruinous civil penalties. The deference that such letters typically receive from courts makes it all the less likely that the regulated party will prevail in litigation challenging the interpretation announced in the letter, which provides a further reason for the regulated party to fall in line rather than risk the consequences of misjudging the agency's position.

So not all the indicia of finality point in the same direction for these letters. Not surprisingly, therefore, federal courts have reached markedly different results when it comes to assessing whether such letters are final.

[Need to provide examples. One potential example: an EEOC letter of determination stating that AT&T had unlawfully discriminated against one of its employees. The Court held that the letter was not final agency action because it did not actually inflict any injury on AT&T. Rather, the Court pointed out, the EEOC's view of the law "has force only to the extent the agency can persuade a court to the same conclusion." And because the EEOC was not even bound to act on the letters — that is, it was not obligated to sue AT&T after finding a violation. The Court held that:

> In these circumstances, to allow AT&T to institute litigation with the Commission over the lawfulness of its policy would be to preempt the Commission's discretion to allocate its resources as between this issue and this employer, as opposed to other issues and other employers, as well as its ability to choose the venue for its litigation, as the statute contemplates. *See* 42 U.S.C. § 2000e-5(f)(1), (f)(3). For the court to find here final agency action subject to judicial review, therefore, would disrupt the administrative process in a manner clearly at odds with the contemplation of the Congress.]

B. IRS Notices

IRS notices represent another example of contemporary agency that does not quite fall neatly into the traditional assumptions of administrative law doctrine. In the Internal Revenue Manual, the IRS defines notices merely as "public pronouncement[s] by the Service that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law."[117] Historically, the IRS used notices for an eclectic mix of relatively benign communications regarding IRS policy. The first notice so-labeled seems to have been published in the IRB in 1976.[118] The IRS published just a few notices in the late 1970s, without serial numbering, and for seemingly random purposes: for example, waiving a filing requirement because governing regulations had not been finalized,[119] or publishing and updating a list of countries subject to certain international boycott limitations.[120]

The notice format became more regularized in the 1980s, including more frequent IRS utilization of notices and a sequential numbering format incorporating the year of issuance.[121] The

[117] INTERNAL REVENUE MANUAL, www.irs.gov/irm, at § 32.2.2.3.3 (Aug. 11, 2004).
[118] I.R.S. Notice, 1976-1 C.B. 541. Although contemporary notices are numbered, this notice was not.
[119] *Id.*
[120] I.R.S. Notice, 1977-1 C.B. 528 (titled "List of Countries Requiring Cooperation With An International Boycott"); I.R.S. Notice, 1976-2 C.B. 627 (titled "List of Countries Requiring Cooperation with an International Boycott"). Although these notices appear in the C.B. with titles, they are not numbered. The IRS updated this list of countries regularly through 1995 using the notice format. *See, e.g.*, I.R.S. Notice 95-65, 1995-2 C.B. 342; I.R.S. Notice 95-41, 1995-2 C.B. 328; I.R.S. Notice 95-20, 1995-1 C.B. 303; I.R.S. Notice 95-3, 1995-1 C.B. 290; I.R.S. Notice 94-95, 1994-2 C.B. 564.
[121] *See, e.g.*, I.R.S. Notice 80-1, 1980-1 C.B. 576.

subject matter thereof, however, continues to be and still is highly variable.[122] Some notices provide interest rate or other tables in connection with various provisions of the I.R.C.[123] Some notices respond to new issues, for example by telling taxpayers how the IRS interprets and intends to enforce recently-enacted substantive tax laws,[124] or by offering taxpayers extensions, penalty waivers, or other temporary relief until the IRS can provide further guidance essential for effective implementation.[125] Still other notices grant other relief to taxpayers affected by natural disasters[126] or other identified crises.[127] In theory, at least, notices are less formal than revenue rulings or revenue procedures, and thus are better suited to provide meaningful substantive guidance quickly.[128] [Need to update this paragraph for more recent notices, but you get the drift.]

Nevertheless, there are two particularly significant functions for which the IRS now routinely publishes notices. The first arises particularly in the context of arguably abusive tax transactions, a.k.a. tax shelters. Over the past decade (at least), the IRS has issued numerous notices declaring particular transactions to be "listed transactions."[129] By regulation, taxpayers who participate in transactions so designated must file a disclosure statement with the IRS.[130] Other notices merely identify certain transactions as potentially abusive, and thus "of interest," but also subject to special disclosure requirements.[131] These notices tend to provide factual descriptions of the transactions at issue but little legal analysis to explain or support the designation. Nevertheless, the labeling represents a substantive legal conclusion with particular consequences because, again, taxpayers engaging in such transactions must file disclosure statements with the IRS or face substantial financial penalties.[132]

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[122] *See* Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 DUQ. L. REV. 323, 339-40 (2008) (noting that topics of notices "can include changes to forms or to other previously published materials, solicitation of public comments on issues under consideration, and advance notice of rules to be provided in regulations when the regulations may not be published in the immediate future").

[123] *See, e.g.*, I.R.S. Notice 2009-16, 2009-8 I.R.B. 572; I.R.S. Notice 2009-2, 2009-4 I.R.B. 344; I.R.S. Notice 2008-114, 2008-51 I.R.B. 1322; I.R.S. Notice 2008-85, 2008-42 I.R.B. 905.

[124] *See, e.g.*, I.R.S. Notice 2009-12, 2009-6 I.R.B. 446; I.R.S. Notice 2008-109, 2008-50 I.R.B. 1282; I.R.S. Notice 2008-101, 2008-44 I.R.B. 1082.

[125] *See, e.g.*, I.R.S. Notice 2009-14, 2009-7 I.R.B. 516; I.R.S. Notice 2009-11, 2009-5 I.R.B. 420; I.R.S. Notice 2008-90, 2008-43 I.R.B. 1000.

[10] *See, e.g.*, I.R.S. Notice 2008-87, 2008-42 I.R.B. 930; I.R.S. Notice 2008-66, 2008-31 I.R.B. 270; I.R.S. Notice 2008-58, 2008-28 I.R.B. 81; I.R.S. Notice 2008-57, 2008-28 I.R.B. 80; I.R.S. Notice 2005-73, 2005-2 C.B. 723; *see also* I.R.C. § 7805A (granting Treasury and IRS authority and discretion to grant certain relief in response to Presidentially-declared disasters).

[127] *See, e.g.*, I.R.S. Notice 2008-88, 2008-42 I.R.B. 933; I.R.S. Notice 2008-55, 2008-27 I.R.B. 11.

[128] *See, e.g.*, Korb, *supra* note [ ], at 339 (emphasizing relative informality of notices and consequent suitability for providing immediate guidance).

[129] *See, e.g.*, I.R.S. Notice 2008-111, 2008-51 I.R.B. 1299; I.R.S. Notice 2008-34, 2008-12 I.R.B. 645; I.R.S. Notice 2007-83, 2007-45 I.R.B. 960. A more complete list of transactions designated by the IRS as abusive, including listed transactions and delisted transactions, is available on the IRS website. *See* Internal Revenue Service, Recognized Abusive and Listed Transactions, https://www.irs.gov/businesses/corporations/listed-transactions (last visited July 25, 2017).

[130] Treas. Reg. § 1.6011-4.

[131] *See, e.g.*, I.R.S. Notice 2009-7, 2009-3 I.R.B. 312; I.R.S. Notice 2008-99, 2008-47 I.R.B. 1194; I.R.S. Notice 2007-73, 2007-36 I.R.B. 545; I.R.S. Notice 2007-72, 2007-36 I.R.B. 544.

[132] *See* I.R.C. § 6707A (West 2008).

The IRS also frequently uses the notice format as a companion to the APA's notice-and-comment rulemaking process. Many notices announce that the IRS is contemplating a potential regulation or other guidance project and solicit preliminary comments.[133] These notices often include "interim guidance" in the form of preliminary rules that the IRS proposes to incorporate in the forthcoming proposed rules.[134] Sometimes, the IRS explicitly proclaims the rules announced in such notices as optional "safe harbors" until the rulemaking process converts the safe harbors to requirements.[135] The IRS also has used notices to announce changes in effective dates for final regulations[136] or to preliminarily attempt to alleviate unanticipated problems arising from existing regulations pending further regulatory action.[137]

Generally, notwithstanding the comparative informality of notices, taxpayers and their professional advisers can be penalized should they decline or otherwise fail to comply with legal interpretations expressed though such action. For example, I.R.C. § 6662 imposes a 20% penalty for any "underpayment of tax required to be shown on a return" attributable to, among other things, "[n]egligence or disregard of rules or regulations."[138] For this purpose, by regulation, Treasury has defined "rules or regulations" expansively as including not only I.R.C. provisions and Treasury regulations but also notices.[139]

Additionally, and uniquely, Congress has extended to the IRS the authority to adopt regulations with effective dates that are backdated to the date the IRS issues a notice "substantially describing the expected contents of [the] temporary, proposed, or final regulation."[140] The IRS's efforts to regulate one set of arguably abusive transactions, known as inversions, illustrates the IRS's use of this authority. In Notice 2014-52 and Notice 2015-79, the IRS stated its intention to adopt regulations at some unspecified future date that would interpret IRC §§ 367 and 7874 to alter the tax consequences of inversion transactions.[141] Whether those statutory provisions or others give Treasury and the IRS the power to issue such regulations at all is unclear. Former Treasury Secretary Jacob Lew at one point claimed they did not,[142] although tax experts favoring a regulatory response to inversion transactions then argued that they do.[143] Regardless, in Notice

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[133] *See, e.g.*, I.R.S. Notice 2009-17, 2009-8 I.R.B. 575; I.R.S. Notice 2008-27, 2008-10 I.R.B. 543; I.R.S. Notice 2008-13, 2008-3 I.R.B. 282; I.R.S. Notice 2007-8, 2007-3 I.R.B. 276.

[134] *See, e.g.*, I.R.S. Notice 2008-116, 2008-52 I.R.B. 1372; I.R.S. Notice 2009-8, 2009-4 I.R.B. 347; I.R.S. Notice 2006-96, 2006-46 I.R.B. 902.

[135] *See, e.g.*, I.R.S. Notice 2008-78, 2008-41 I.R.B. 851; I.R.S. Notice 2008-23, 2008-7 I.R.B. 433; *see also* I.R.S. Notice 2008-68, 2008-34 I.R.B. 418; I.R.S. Notice 2008-62, 2008-29 I.R.B. 130.

[136] *See, e.g.*, I.R.S. Notice 2008-98, 2008-44 I.R.B. 1080; I.R.S. Notice 2008-21, 2008-7 I.R.B. 431; I.R.S. Notice 2008-9, 2008-3 I.R.B. 277.

[137] *See, e.g.*, I.R.S. Notice 2009-13, 2009-6 I.R.B. 447; I.R.S. Notice 2008-43, 2008-15 I.R.B. 748.

[138] I.R.C. § 6662(a)-(b)(1) (2000).

[139] Treas. Reg. § 1.6662-3(b)(2) (as amended in 1991); T.D. 8381, 1992-1 C.B. 374, 376 (adopting regulatory definition).

[140] I.R.C. § 7805(b)(1)(C).

[141] Notice 2015-79, 2015-49 I.R.B. 775; Notice 2014-52, 2014-42 I.R.B. 712.

[142] Maureen Farrell & Damian Paletta, *Obama Explores Tax-Code Weapons in Inversion-Merger Fight*, [Wall Street Journal Aug. 14, 2014] (quoting Secretary Lew as saying, "we do not believe we have the authority to address this inversion question through administrative action.").

[143] *E.g.*, Stephen E. Shay, *Mr. Secretary, Take the Tax Juice Out of Corporate Expatriation*, [Tax Notes July 28, 2014]; Steven M. Rosenthal, *Professor Shay Got It Right: Treasury Can Slow Inversions*, [Tax Notes Sept. 22, 2014].

2014-52 and Notice 2015-79, the IRS indicated that it would backdate the contemplated regulations to cover transactions that had not closed as of those dates. Notice 2014-52 offered some draft regulatory language but also requested comments regarding issues that Treasury had not yet decided whether or how to address in the eventual regulations. Notice 2015-79 responded to some of the comments received with additional draft regulatory text. Neither document, however, was published in the Federal Register or otherwise purports to comply with APA rulemaking procedures. Later, on April 4, 2016, Treasury issued temporary and proposed regulations that were at partly backdated to the dates of the earlier notices. Regardless, merely by issuing the notices, Treasury triggered its authority to adopt regulations retroactively effective to September 22, 2014, and November 19, 2015, irrespective of when Treasury gets around to finalizing those regualtions. As a result, inversion transactions immediately ground to a halt, even though several taxpayers had to pay sizeable breakup fees to terminate transactions that had been signed but not closed prior to Notice 2014-52. Taxpayers affected by the temporary regulations have challenged their validity in court.[144]

Usually, the IRS claims that IRS notices are nonjusticiable pursuant to a special provision in the Internal Revenue Code known as the Anti-Injunction Act, which limits judicial review in tax cases. Whether the Anti-Injunction Act applies in the context of APA challenges to IRS rules and regulations is unclear.[145] In the only case in which a court has addressed the finality of an IRS notice is *Cohen v. United States*, the D.C. Circuit concluded not only that the AIA was inapplicable but also that the notice at issue was final agency action. In that case, however, the IRS disclaimed any intent to pursue regulatory action beyond issuing the notice itself. Are notices like Notice 2014-52 and Notice 2015-79 similarly final, when the IRS intends further regulatory action?

C. Agency Stays

Administrative stays are another area that raises significant questions about finality. A variety of statutes authorize federal agencies to stay implementations of final rules under certain circumstances. The APA, for instance, provides that, "When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. The Clean Air Act § 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), authorizes EPA to reconsider final rules when a timely petition for reconsideration is filed, and to stay the effective date of the rule for up to three months during such reconsideration. Section 409(e) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 348(e), likewise authorizes the Commissioner to stay effectiveness of a food additive regulation upon which a hearing has been requested.

The significance of administrative stays has been magnified during the transition from the Obama Administration to the Trump Administration. During his campaign, President Trump made no secret of his intention to roll back or undermine a great many Obama era regulations. And, since he took office, President Trump's administrative agencies have made use of practically every weapon at their disposal to frustrate the effectiveness of Obama administration rules. To that end, President Trump's agencies have invoked administrative stay provisions to an uncommon degree,

[144] Chamber of Commerce v. IRS, Civil Action No. 1: 16-cv-944 (W.D. Tex.) (filed August 4, 2016); CIC Services, LLC v. Internal Revenue Service, No. 3:17-cv-110 (E.D. Tenn. Apr. 5, 2017).

[145] Cite to Jerry's and my article.

typically as a means of preventing Obama era regulations from taking effect before they can be replaced or rescinded altogether. They have done so across myriad industries — [list a few].

Predictably, groups supportive of the Obama era regulations have brought court challenges to the Trump Administration's stays of those regulations. One issue that has arisen in a number of those cases is whether an administrative stay — particularly one undertaken during reconsideration of a regulation — is reviewable as final agency action. The only court to have addressed the issue held that such a stay is final agency action, but it split 2-1. *Clean Air Council v. Pruitt* concerned an Obama-era EPA rule governing methane emissions. The rule at issue became final near the very end of the Obama Administration. Industry groups promptly sought administrative reconsideration of the rule on a number of grounds. Once the Trump Administration assumed control of EPA, that agency agreed that reconsideration was warranted. It further granted a 90-day stay of the methane rule, pursuant to CAA § 307(d)(7)(B), pending reconsideration. Environmental groups challenged the stay as unlawful and the D.C. Circuit agreed. It held that, although reconsideration is not final agency action, a stay is. As two members of the Court explained, "EPA's stay . . . is essentially an order delaying the rule's effective date, and this court has held that such orders are tantamount to amending or revoking a rule," action that would undoubtedly is final.

Judge Brown dissented, characterizing the stay as merely one feature of the reconsideration process, and that reconsideration is the antithesis of final agency action.She pointed out that the CAA says that "[t]he effectiveness of the rule may be stayed during such reconsideration [] by the Administrator or the court for a period not to exceed three months." She went on to observe that a "stay — designed so EPA can devote resources to reconsidering the rule rather than enforcing it, and so industry can avoid implementing changes that reconsideration may later obviate — is subsidiary to the reconsideration itself. . . . It may be annoying, disappointing, ill-advised, even unlawful, but that does not transform a stay to facilitate reconsideration into 'final agency action.'" Thus, there is at least some evidence that the finality of administrative stays remains a question that is at least debatable.

III. Fixing Finality

[**Author's Note:** This portion of the draft is the most "in progress" portion of this paper. The following represents more a collection of random thoughts at this point than a coherent analysis as we attempt to organize our thoughts regarding the appropriate direction for finality jurisprudence.]

While staunch opponents of the regulatory state may be skeptical, our own sense is that agencies do not always utilize informal formats solely for the express purpose of avoiding both APA procedural requirements and judicial review. We suspect that agencies often merely seek expediency in pursuing their preferred policy outcomes. Nevertheless, irrespective of agencies' intentions, there can be little doubt that agency reliance on these formats at least conveys the impression that agencies are trying to evade burdensome procedures and judicial review. But procedure and judicial review are the mechanisms relied upon by Congress to ensure public participation, transparency, and accountability. Those mechanisms in turn enhance public perceptions of legitimacy of agency action. And the courts' muddling of finality doctrine further diminishes the courts' ability to serve their congressionally-intended function as agency watchdogs against both intentional and unintentional abuses of agency power.

As the above analysis suggests, existing finality jurisprudence has created tremendous uncertainty regarding the justiciability of agency action as "final." The two-part test of *Bennett v. Spear*, while necessarily flexible as a standard rather than a bright-line rule, has been undertheorized and poorly explained by the Court. As the circuit courts have struggled to fill that void, the results are a higher-than-usual degree of variability in finality doctrine that leaves regulated parties subject to administrative action uncertain as to whether judicial review is available to them, as well as a series of circuit court cases nudging finality away from practical consequences and toward a more formal, legalistic requirement that closes off judicial review precisely at a time when judicial review is needed to shore up the credibility of administrative action.

In attempting to offer thoughts regarding the proper scope of the finality requirement, the competing concerns are obvious. Making too many agency actions reviewable by the courts will chill agency communications, diminishing transparency in agency decisionmaking and undermining public faith that agencies are behaving reasonably in the public interest. Making too few agency actions reviewable by the courts, however, likewise risks perceptions that agencies are abusing their authority. The question is how to strike the right balance between the two.

Moreover, as agencies act more and more in ways that don't fit neatly within any of the familiar APA boxes (*i.e.*, in ways that can't readily be classified as regulations, interpretive rules, or policy statements), finality questions will become even harder to resolve. The increasing prevalence of these once atypical agency actions makes it even more imperative to figure out what we mean when we say that agency action is only reviewable if it is "final."

A. The Purposes of Finality Requirement

Why do we have the finality requirement? What's the point of it? Courts discussing the rationale for the finality requirement often focus on concerns similar to those raised in connection with common law ripeness and exhaustion: respecting the authority and role of agencies and conserving scarce judicial resources by avoiding premature and potentially unnecessary judicial intervention into agency proceedings.[146] Justifying the finality requirement in this way makes particular sense when one realizes that courts frequently confuse and conflate ripeness, exhaustion, and finality doctrines with one another.[147] But unlike either ripeness or common law exhaustion, the finality exhaustion is statutory—a requirement of the Administrative Procedure Act.[148] Consequently, the animating concerns that finality doctrine shares with ripeness or common law exhaustion requirements must be balanced against the APA's underlying goals of promoting public faith in administrative action through public participation, transparency, and accountability through robust judicial review.[149]

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[146] See Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986); see also Abbott Labs, 387 U.S. at 149-52 (offering similar justifications in connection with ripeness doctrine), McCarthy v. Madigan, [cite] (justifying common law exhaustion requirement similarly).

[147] See Richard J. Pierce, Jr., Administrative Law Treatise [Chapter 15, I think] (5th ed. 2010) (making this observation).

[148] 5 U.S.C. § 704 (calling for judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court").

[149] [cites]

A few conclusions flow from these observation. First, at a minimum, although it is entirely plausible that a court might find that a particular agency action is final but also unripe,[150] or that judicial review of final agency action is precluded by a regulated party's failure to exhaust administrative remedies,[151] courts ought not to construe agency action to be nonfinal if ripeness and exhaustion doctrines seem to be satisfied. Surely the goals of the APA will be best served by judicial review where ripeness and exhaustion are satisfied, even if the case in favor of finality is comparatively marginal. Indeed, APA § 704 arguably suggests as much by telling courts that they may not use common law exhaustion to cut off judicial review of APA-based claims for otherwise final agency actions.[152] In other words, the APA's goals and the role of judicial review in accomplishing those goals trump the concerns that animate merely prudential justiciability limitations.

Second, rather than evaluating the concept of the two-part *Bennett* standard, and particularly its "legal consequences" element, either in the abstract or by comparison to other doctrines in administrative law, courts applying finality doctrine ought not only to ask whether the agency action is legally binding on regulated parties but also should consult the broader statutory scheme at stake to evaluate whether and to what extent the agency action more broadly alters the legal landscape under which regulated parties and agencies are operating—"whether legal consequences flow"—sufficiently that the APA's goals of public participation, transparency, and accountability are brought into play.

B. How A Narrow, Legalistic Approach to Finality Defeats the Purposes of the Doctrine and the APA

An overly narrow and legalistic view of finality does not strike anything like a reasonable balance. It allows for major decisions with real and substantial consequences for regulated parties to go unreviewed, just because those decisions do not take particular decisionmaking formats previously recognized by the courts as legally consequential—no matter how crystallized or definitive the agency's position is, and no matter how readily reviewable the underlying legal question is. The aforementioned benefits or goals of finality doctrine do not accrue for either agencies or courts, beyond an artificially reduced judicial workload. Meanwhile, negative consequences accrue. Agencies are not held accountable for their actions. Regulated parties face the Hobbesian choice between incurring whatever expenses are required to comply with the agency's pronouncement (no matter the form the pronouncement takes) or doing something that they can be certain will expose them to potentially ruinous civil and criminal liability. Since *Abbott Labs*, the Supreme Court has repeatedly said that regulated parties ought not be forced to make that choice.

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[150] See, e.g., Toilet Goods v. Gardner (finding a final regulation to be unripe for judicial review).

[151] See, e.g., [cites].

[152] See 5 U.S.C. § 704 ("Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsidreation, or, unless the agency otherwise requires by rule and provides that the action is meanwhile inoperative, for an appeal to superior agency authority."); see also Darby v. Cisneros, [cite] (interpreting this provision).

Taking a step back from the purposes of the finality requirement, and looking at the administrative state more broadly, a narrow and legalistic approach to finality also has serious drawbacks. For one thing, to the extent agencies can be certain that pronouncements issued in certain formats will be unreviewable, they have a powerful incentive to use those formats to regulate the public, rather than relying on the APA-specified (and presumably preferred) methods of regulation. For another thing, a narrow application of the finality requirement further weakens the link between the constitutional branches of government and the administrative state, undermining the administrative state's legitimacy and giving force to the "headless fourth branch" argument. Finally, there are due process concerns. As Justices Alito and Kennedy have written, some of these ostensibly informal decisions can have sweeping, life-altering consequences for members of the public. If the pronouncements are not judicially reviewable — for instance, because they don't have sufficiently immediate legal consequences — and if the public doesn't otherwise have a meaningful opportunity to participate in their making — as with notice-and-comment rulemaking — then the question arises: What process is left for members of the public? The point here is that, not only does a cramped construction of the finality requirement actively hinder the purposes of the finality doctrine, but it has deleterious effects for the administrative state as a whole. In elaborating this point, we intend to draw from academic literature on political legitimacy.

In the face of those serious objections, there seem to be only a handful of even remotely compelling reasons for a narrower approach. The most significant is that subjecting more agency pronouncements to judicial review will have a chilling effect on agencies generally. That is to say, agencies will avoid issuing guidance or other interpretive help because they will worry about getting sued when they do, and that will leave regulated parties less certain of where they stand in the eyes of the law. The short answer to that objection, we suggest, is "yes, but maybe fewer agency pronouncements that have major practical effects would not be such a bad thing." By way of example, consider a regulation and an opinion letter. Both say the same thing. Both prompt the same response from regulated parties. And the issuing agency knows that both will prompt the same response from regulated parties. If all of that is true (and it's almost always true because regulated parties know enough to pay attention when agencies speak with any kind of definitiveness), it seems anomalous to treat the regulation as reviewable and the letter as unreviewable. Just the opposite, we want the letter to be reviewable for the same reason we want the regulation to be reviewable: because we recognize that agencies make mistakes and that regulated parties should have recourse to the courts to review deficient pronouncements before they inflict real damage on the public. The APA's structure is consistent with a vision of judicial review of administrative action that curtails agencies' incentives to issue pronouncements that function as regulations but that do not go through the prescribed rulemaking process.

Relatedly, some people might contend that a narrow approach to finality is necessary to preserve the APA's exception to judicial review for policy statements (and other so-called guidance). We are skeptical. To the extent a policy statement represents something less than the agency's definitive or crystallized position, so that regulated parties have legitimate reason to think the articulated position might change, then there's no need for a strict reading of finality; a more expansive approach to finality will also protect emerging or nascent policies or views. It's only when a policy statement or guidance document reflects something more — that is, when it reflects the agency's settled position on a given issue, and does so in a way that regulated parties can reasonably understand to represent a settled position — that the policy statement or guidance

document takes on the sort of action-forcing effects that typify final agency action. Even under a more expansive approach to finality analysis, a distinction exists between agency actions that are truly nonconsequential—as would be the case with many or even most policy statements—and those perceived as final and, thus, subject to judicial review for arbitrariness.

C. What Would a More Pragmatic Approach Look Like?

A more pragmatic, less legalistic approach to finality yields the opposite results. It comports with what we understand to be the purposes of the finality requirement, in that it allows courts to focus expressly on the pragmatic concerns that motivate the finality requirement. (To that extent, we suspect a pragmatic interpretation of finality doctrine comports with the APA's legislative history, which is itself a benefit of the approach, though we need to pin down this point.) It also helps legitimize administrative action. And it opens up the court doors to parties affected by agency pronouncements, which alleviates the due process concerns that some justices have expressed. Finally, it makes it possible to reconcile some Supreme Court precedents — like *Abbott Labs* and *Bennett* — that are otherwise difficult to square. For all of those reasons, courts should look for ways to apply a pragmatic approach to finality — rather than just paying lip service to the presumption of reviewability and emphasis on pragmatism in *Abbott Labs.*

The question, then, is how to go about doing that. The answer, we think, is by looking at the Supreme Court's finality jurisprudence more holistically to elaborate the elements of the two-part test of *Bennett v. Spear* in terms that capture the essential pragmatism of the Court's interpretation of the finality requirement. For example, *Bennett*'s language emphasizing rights and obligations and legal consequences is not best understood by reference to legal force but as a broader consideration of the legal landscape in which agencies and those affected by their actions operate. From here, we anticipate offering a number of examples, identifying several specific finality considerations mentioned in Supreme Court opinions and explaining how each can be interpreted pragmatically.

Conclusion

This Article is merely an initial expedition into the broader thicket of issues surrounding the justiciability of agency action. Judicial review is critical to perceptions of the administrative state's political legitimacy. Changes in contemporary administrative practices that skirt traditional understandings of justiciability raise significant concerns. If one accepts, as we do, that the modern regulatory statute is unlikely to disappear entirely in coming decades, confronting threats to public perceptions of its legitimacy by preserving and promoting robust judicial review of agency action is essential.