STATUTORY TIME LIMITS ON JUDICIAL REVIEW OF RULES: VERKUIL REVISITED

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INTRODUCTION

I am pleased to participate in this Festschrift honoring Paul Verkuil on the occasion of his retirement from the Cardozo School of Law faculty to become Chairman of the Administrative Conference of the United States (ACUS). Verkuil has long been a generous colleague to me during the course of our work together in the ABA Administrative Law and Regulatory Practice Section. Most importantly, he served as the leader of the Section’s Administrative Procedure Act Review Project, an ambitious examination of decades of case law interpreting the Administrative Procedure Act (APA). That project came to fruition in 2000-2001, when I was Chair of the Section, and it gave me bragging rights as a Section accomplishment during my term of office.1 President Obama has made an inspired choice in selecting Verkuil as the head of the revived ACUS, and I am looking forward to the good things that I predict his chairmanship will produce.

There are a number of ways in which one might approach a symposium of this nature. The approach that I have chosen is to take an early Verkuil article and assess what has happened in the law since he wrote it. For this purpose, I have selected one of my favorite law review articles on judicial review, Congressional Limitations on Judicial Review of Rules,2 which Verkuil published in the Tulane Law Review in 1983. Fittingly enough for today’s reappraisal, the article was a revised version of a report that Verkuil wrote as a consultant for

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the Administrative Conference, and it gave rise to ACUS Recommendation 82-7. I will be discussing both in this Article.

The article and the recommendation discussed a group of about two dozen regulatory statutes that allow a person to obtain judicial review of a rule by filing a petition for review within a short stated time period, such as sixty days, after the rule has been adopted. Some of these statutes go on to provide that such a rule is immune from challenge after the expiration of the stated period (except on grounds arising after that period), even if the challenge is asserted in a proceeding to enforce the rule. The Clean Air Act, Clean Water Act, and several other environmental laws have provisions of this nature. A number of other statutes that provide a time period for seeking judicial review of a rule contain no language that expressly prohibits review of the rule following the expiration of that period—yet the very existence of the time limit could easily be interpreted as implying such a foreclosure of review. The Occupational Health and Safety Act fits this latter pattern, as does the Hobbs Act, which governs judicial review of several federal agencies, including the Federal Communications Commission and Nuclear Regulatory Commission.

These statutes do not have as high a profile as the somewhat similar “jurisdiction-stripping” provisions that periodically seize the attention of constitutional scholars, most recently in connection with Congress’s attempt to restrict Guantanamo detainees’ access to habeas corpus relief. In a more mundane and less ideologically charged way, however, the time limit statutes pose significant challenges for courts and administrative law practitioners. A core idea behind these provisions is that rules adopted in these regulatory areas can entail enormous up-front investments of money, effort, and advance planning.
Both the agency and the private sector have interests in getting the legality of these rules settled one way or the other relatively quickly. On the other hand, the prospect of a proceeding to enforce a rule in which the defending party has no opportunity to make a case that the rule is unlawful is troubling. Against the background of this basic tension, the Verkuil article and the ACUS recommendation addressed how these provisions should be applied and how similar ones should be written.

I read this article soon after it was published and greatly admired the complexity of Verkuil’s vision of both the virtues and limitations of judicial review. Both before and after he wrote, the administrative law literature on congressional control of the availability of review has been dominated by a relatively simple conception, which goes something like this: Judicial review is fundamental to the integrity and legitimacy of administrative action. Therefore, the narrative goes, the courts have established a “presumption of reviewability.” Congress occasionally curtails review for one reason or another, but the courts should be strongly inclined to push back against these incursions on reviewability. For institutional reasons they can go only so far to enforce the presumption, but at least the ideal state of affairs is relatively clear. In the Tulane article, however, Verkuil accepted the descriptive reality and normative legitimacy of at least one species of limitations on review, and this premise cleared the way for him to probe the proper occasions for their use. The article had a point of view, but it weighed arguments running in each direction fairly and dispassionately.

This article was a guidepost for me when I was writing an article a few years later on the “committed to agency discretion” doctrine, which is a parallel limitation on judicial review where congressional direction is not involved. I posited a “common law of preclusion” whereby the courts seem to have developed predictable patterns by which they construe statutory limitations on review. I also discerned in the case law and legislative background a hierarchy of types of issues that were more easily precluded than others. This was ironic, I suggested, because preclusion is in theory supposed to be governed by

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9 See Daniel B. Rodriguez, The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences, 45 VAND. L. REV. 743, 751-52 (1992) (stating that the presumption of reviewability “is so deeply ingrained that it takes some effort to think somewhat more dispassionately about the concept and consequences of more rather than less aggressive review”).


13 Levin, supra note 11, at 739-40.
positive law; if courts can be pragmatic in that realm, they should be at least equally so when they administer a doctrine of judicial limitation that is supposed to stem entirely from case law. I relied on Verkuil’s article as a prominent example of this methodology and the distinctions that it could engender.14

Now, almost thirty years later, I want to take a retrospective look at the Verkuil article and the ACUS recommendation, appraising how far they have survived and in what ways the law has evolved. I will suggest that in this particular area the “common law of preclusion” that I posited in the mid-1980s is alive and well, although it still has some gaps. The legal system has largely adhered to Verkuil’s and ACUS’s guidelines, but some distinctions have been sharpened, and new ambiguities have emerged.

The reader might assume that by now, three decades later, the problems in this area would have been worked out. There is some truth to that assumption, but some of the challenges that Verkuil and the Conference addressed, and the uncertainties that attend those challenges, are still with us. For confirmation of that assertion, one can look at a 2007 Supreme Court case called Environmental Defense v. Duke Energy Corp.15 This was an enforcement case against Duke for violating the EPA’s rules under the Clean Air Act. Duke had several arguments against the validity of these rules, and there was a question as to whether section 307(b) of the Act, the provision that limits the timing of judicial review, should prevent the Court from responding to those arguments. This threshold question was extensively briefed, and it stimulated very vigorous questioning in the oral argument.

But when the opinion came out, the Court was conspicuously silent about the import of section 307(b). Justice Souter’s opinion seemed to enforce the jurisdictional prohibition with respect to part of Duke’s argument, while also reviewing a statutory issue that under a literal reading of section 307(b) would seemingly be foreclosed from review.16 The situation seemed to cry out for an analysis of what section 307(b) does and does not cover, but the Court did not provide one. I will discuss this episode in more detail below.17 The reason I mention it at this preliminary stage is not to fault the Court for failing to wade into waters that were admittedly quite murky, but instead to suggest that it is evidence of the need for a continuing dialogue among administrative lawyers about how the statute and others like it should be applied.

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14 Id. at 748-49 n.298.
16 Id. at 573-81.
17 See infra notes 115-21 and accompanying text.
In the following pages I will first summarize the Verkuil article and Conference recommendation (briefly and somewhat incompletely), and then discuss what has happened since. I will conclude with some reflections about these developments and about some theoretical questions regarding the legitimacy and desirability of this body of statutory presumptions.

I. PRELIMINARIES

In one sense, the time limit statutes do not present a problem of preclusion of review at all. They do, after all, permit a challenger to contest a rule, so long as the challenge is promptly filed. That distinction is important, because one can easily argue that a limitation of this kind should be more acceptable than an outright prohibition. Outside of the context of time limits, even constitutional challenges to regulations and other agency actions have at times been turned aside where an adequate alternative forum was deemed to be available.\(^{18}\)

This is a legitimate point that will loom large in the analysis that follows, but one does not want to make too much of the distinction. Even statutes that merely postpone judicial review until the enforcement stage are often characterized as implicating preclusion issues\(^ {19}\) and inflicting significant burdens upon affected persons.\(^ {20}\) Some of the time limit statutes have that same effect, as will be seen below. Moreover, statutes that also foreclose review at the enforcement stage itself are even more analogous to preclusion in the usual sense, because by the time they are invoked, the challenger’s opportunity to seek review at a supposedly more appropriate time has already expired. In this respect, even if the time limit statutes are not termed “preclusion” provisions in

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\(^{19}\) See, e.g., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207, 216 (1994); see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010) (“We do not normally require plaintiffs to ‘bet the farm . . . by taking the violative action’ before ‘testing the validity of the law,’ and we do not consider this a ‘meaningful’ avenue of relief.” (citations omitted)).

\(^{20}\) This is the same burden that courts typically recite as a justification for lenient applications of the ripeness doctrine. E.g., Abbott Labs. v. Gardner, 387 U.S. 136, 152-54 (1967).
the strict sense, their effects are similar. Not surprisingly, the case law doctrines applying these two types of legislation tend to converge.

The APA furnishes a structure of analysis for the problems analyzed in Verkuil’s article, but only in general terms. The basics are familiar to administrative lawyers. Section 702 grants a default right of judicial review, but it is qualified by section 701(a), which makes that right inapplicable “to the extent that—(1) statutes preclude judicial review, or (2) agency action is committed to agency discretion by law.”

Time limit statutes can readily be seen as falling within the scope of clause (1). However, section 703 offers what may be a better fit. It provides that the “form of proceeding for judicial review is the special statutory review proceeding specified by statute,” or, if none exists, “any applicable form of legal action.” It then adds: “Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.” The time limit statutes do, of course, say that an opportunity for “prior” review within the statutory period will, at least sometimes, be “exclusive” of enforcement review. Section 703 thus invites consideration in a particular case of whether the opportunity provided was “adequate.” Opinions could differ as to whether that issue is properly viewed as “preclusion,” but for reasons just discussed, I doubt that the label matters very much. Regardless, it seems obvious that the APA itself provides few answers and thrusts the main burden of providing guidance onto the courts.

This Article examines only those limitations on judicial review of rules that derive from time limit statutes, as distinguished from limitations imposed by other statutes or by background principles of administrative law. Thus, for example, the Article does not examine the doctrine of issue exhaustion. Under that doctrine, a litigant may be foreclosed from contesting a rule on a ground that the litigant failed to present to the agency during the rulemaking process. This requirement sometimes, though not always, rests on a statutory foundation. That sort of foreclosure comes into play, if at all, even if

22 Id. § 703.
review is commenced within the statutory deadline, so the time limit in a judicial review statute is not directly relevant to it.

II. THE VERKUIL ARTICLE AND RECOMMENDATION

A. The Article

In his article, Verkuil forthrightly defended the legitimacy of statutes that impose time limits on judicial review of rules issued under them. Where Congress has “made findings of the need for expedition, uniformity, and finality,” he argued, these statutes are an acceptable compromise between an outright prohibition of review and the standard review model. On the other hand, he took it to be clear from the Supreme Court’s case law that, under the constitutional plan, agency action must always be subject to at least some judicial review. Thus, he suggested, when a regulatory statute allows judicial review of a rule only during a specified time period, and the rule is then challenged in an enforcement proceeding, the statute should be read to allow review up to this constitutional minimum, but no more, or perhaps only a little more.

He found support for this reconciliation of competing concerns in the 1944 case of *Yakus v. United States*. The statute involved in that case required that price control regulations issued during World War II be challenged immediately upon their issuance or not at all. Mr. Yakus was prosecuted for violating one of these regulations. The Court upheld the judicial review scheme and rejected his challenge to the validity of the rule, but it noted in doing so that this case did not involve a contention that the regulation was unconstitutional on its face.

Working from the major premises just described, Verkuil next undertook to spell out the extent to which the Constitution does mandate judicial review of rules in an enforcement context. To use his terminology, the goal was to define the scope of “constitutional review” as distinguished from ordinary “judicial review.” He argued that constitutional review should extend at least to substantive constitutional arguments. It should also include review of factual premises underlying the rule, but only to the same extent as a court would review

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25 Verkuil, supra note 2, at 742-43; see also id. at 755 (“[T]he focus is on situations in which there is a clear need for quick establishment of uniform standards to implement an important national interest.”).
27 Id. at 446-47; see Verkuil, supra note 2, at 740.
28 Verkuil, supra note 2, at 740.
29 Id.
a statute, i.e., minimum rationality. Thus, it would not include review of the adequacy of factual support in the rulemaking record, because that level of scrutiny—an essential feature of modern “hard look” judicial review—goes well beyond what the Constitution requires.

Finally, Verkuil argued, constitutional review of rules should extend to the question of whether they “are properly applied to a respondent in an enforcement proceeding.” He discerned an antecedent for this type of review in Adamo Wrecking Co. v. United States. The defendant in that case, a demolition company, was prosecuted for violating an “emission standard” issued under the Clean Air Act. The rule required demolition companies to spray asbestos materials with water before removing them, in order to prevent asbestos fibers from escaping into the air. The statutory thirty-day period (now sixty days) for seeking review of emission standards had long since expired, but the Court nevertheless permitted the company to argue that the rule was not an “emission standard” at all, but rather a “work practice standard,” because it did not set a numerical limit on asbestos emissions. On this reasoning, the rule was not covered by the time limit on review. The Court reached this result on statutory grounds, but Verkuil suggested that broader concerns about fairness, perhaps of constitutional dimension, lay in the background. He acknowledged that allowing “as applied” challenges to rules could prove unruly and open up more opportunities for review than Congress would have wanted, but he considered it constitutionally unavoidable.

This concept of an as-applied challenge is somewhat elusive, both in general and in relation to Adamo Wrecking in particular; I will return to it later.

Now, on the other side of the coin, what did Verkuil’s concept of constitutional review exclude? For one thing, it meant that procedural challenges could be limited to the sixty-day period. Since the Constitution imposes few if any limits on the procedures agencies use in agency rulemaking, Verkuil argued, these challenges should not be available at the enforcement stage if a statute purported to bar them. As for contentions that a rule exceeds an agency’s statutory authority, Verkuil maintained that, although the case law contained mixed signals, the better view was that such contentions are not ipso facto of

30 Id. at 748 (citing Pac. States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935)).
31 Id. The Court acknowledged this divergence soon after the publication of Verkuil’s article in Motor Vehicle Manufacturers Ass’n of the U.S. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 n.9 (1983).
32 Verkuil, supra note 2, at 748-49.
34 Verkuil, supra note 2, at 749, 751.
35 Id. at 744-45.
Therefore, pursuant to his premise that an explicit time limit statute permits only “constitutional review” after the statutory period, he concluded that Congress could require that ultra vires claims be raised only at the time of promulgation, not at the enforcement stage. He acknowledged, however, that a defendant’s claim that an agency has exceeded its statutory authority does touch on important values. Therefore, he recommended that such claims should not be deemed foreclosed unless Congress has made its intention to do so very clear.  

In the case of enabling acts that impose a time limit on review but do not expressly forbid judicial review at the enforcement stage, Verkuil proposed, or at least seemed receptive to, a simpler and less restrictive principle of construction: the statute should be read as foreclosing procedural challenges to the rule, but not substantive challenges, after the expiration of the statutory time period.  

He saw this distinction as amounting, in effect, to a separation between “complaints that relate to the rulemaking process” and “those that relate to the ultimate legality of the rule itself.” Rule process challenges “should be heard before the events surrounding promulgation become stale and difficult to reconstruct.” Thus, this distinction is simply a way for Congress to decide issues efficiently. Since process questions will never be more ripe than just after the rule is promulgated, they should be decided then. Moreover, if there is any deficiency in the procedural or substantive [factual] support for a rule, it should be revealed immediately so that the agency involved can revise the regulation promptly.

Verkuil concluded by suggesting that, if the foregoing restrictions on judicial review appeared too stringent, agencies might ameliorate the situation by allowing waivers of their rules in particular situations, as well as petitions to modify the rules themselves; but he warned that neither courts nor agencies were likely to allow these safety valves to extend so broadly as to swallow up the sphere of limitation of judicial review that Congress had intended.

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36 Id. at 751-53. The Court subsequently endorsed this view in Dalton v. Specter, 511 U.S. 462, 472 (1994).
37 Verkuil, supra note 2, at 753.
38 Id. at 760-62.
39 Id. at 762-63.
40 Id. at 763.
41 Id. at 764-68.
42 Id. at 766, 768-71.
B. ACUS’s Response and Recommendation

If we now compare the recommendation of the Administrative Conference with the position of its consultant, we see a few contrasts but a fundamentally similar frame of reference. The recommendation focused on how new preclusion statutes should be drafted, rather than on how existing ones should be construed. It suggested factors for the legislature to take into account in deciding when to pursue time limits. Verkuil had barely touched on that topic, except at the most general level. His article basically assumed without detailed inquiry that Congress had, in various statutes, imposed time limits for good and sufficient reasons.

However, the recommendation’s typology of kinds of issues, in terms of their susceptibility to being foreclosed at the enforcement stage, adhered closely to that of the article. Like Verkuil, the Conference indicated that procedural issues and issues as to the adequacy of factual support for a rule in the administrative record could be foreclosed at the enforcement stage. The recommendation explained:

- When objections on procedural grounds are raised early, errors may be remedied promptly and the rulemaking process recommenced with a minimum of disruption to the interests of those affected by the rule. And objections based on asserted inadequacy of the administrative record may lose their relevance as that record itself becomes dated.

- On the other hand, the recommendation said that review-limiting statutes should exempt issues “relating to the constitutional basis for the rule or the application of the rule to a particular respondent or defendant.” And finally, the Conference treated issues “relating to the statutory authority for the rule” as an intermediate category. These issues should be precluded only where Congress finds a “compelling need to achieve prompt compliance with the rule on a national or industry-wide basis.” And the recommendation followed the lead of the article in noting that in “an exceptional case” the court may dismiss or stay the proceedings and refer the rule to the agency for reconsideration.

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43 ACUS Recommendation 82-7, supra note 3.
44 Id. ¶ 1.
45 See supra note 25 and accompanying text.
46 ACUS Recommendation 82-7, supra note 3, ¶ 2.
47 Id. pmbl.
48 Id. ¶ 2.
49 Id. ¶ 3.
One other point of contrast between the article and the recommendation is that ACUS did not rely on the concept of constitutional review to define the scope of the courts’ inquiry at the enforcement stage. It defended its distinctions among types of issues on purely pragmatic grounds, including convenience, efficiency, and fairness to parties.\textsuperscript{50} Of course those values also underlie the constitutional doctrines that Verkuil had explored, but the Conference did not explicitly make that connection.

III. THE AFTERMATH

A. Introduction

It is now time to examine what has happened since the early 1980s in this area. A few subsequently enacted statutes have put a time limit on judicial review of rules,\textsuperscript{51} but most of the case law has stemmed from regulatory statutes that were already on the books at the time of the Verkuil recommendation and report. The ramifications of the analyses by Verkuil and ACUS have, therefore, been hashed out primarily in ongoing interpretations of those statutes. To that extent, the consultant’s approach seems more relevant in hindsight than that of the Conference. Statutory time limits on judicial review of administrative rules remain the exception rather than the rule in our legal system.

It is interesting to compare American law, in this regard, with that of the European Union (EU). Under the applicable treaty provisions,\textsuperscript{52} all reviewable actions of the European Commission, including regulations, are subject to a two-month time limit for commencement of an “annulment” action in the EU courts.\textsuperscript{52} Annulment is comparable to the APA action in the United States. Applicants who miss the deadline will usually have to resort to the national courts if they wish to obtain pre-enforcement review of a regulation. However, a separate provision of the treaty allows an EU court to hold a regulation “inapplicable” when

\begin{footnotesize}
\textsuperscript{50} Id. pmbl.
\textsuperscript{51} Oil Pollution Act of 1990, 33 U.S.C. § 2717(a) (2006) (90-day limit, petition to be filed in D.C. Circuit only); National Child Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-32 (60 days). The latter statute is a rare example of a provision that sets a short time limit on initiation of judicial review of a rule relating to a government benefit (compensation for injuries resulting from vaccines) rather than regulation of private conduct.
\textsuperscript{52} Treaty on the Functioning of the European Union art. 263(5), Mar. 25, 1957, 1957 O.J. (C 83) 162 [hereinafter TFEU]; see RONALD M. LEVIN, FRANK EMMERT & CHRISTOPH T. FEDDERSEN, ADMINISTRATIVE LAW OF THE EUROPEAN UNION: JUDICIAL REVIEW 62-63 (George Bermann et al. eds., 2008). The same time limits apply to an annulment action alleging a failure to act. TFEU, supra, art. 265(2).
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its validity is at issue in an enforcement case. Such a holding excuses the respondent from liability but does not cause the regulation itself to be set aside (although that distinction may be more theoretical than real).

Where statutory time limits on judicial review do exist in the United States, the courts’ interpretation of them has tended to follow the ACUS approach more closely than Verkuil’s in this sense: The “constitutional review” category has never become prominent as an organizing principle for interpretation of these provisions. Instead, the case law seems to use functional and prudential considerations as the basis for determining which issues will be most readily foreclosed and which issues will be most often shielded from foreclosure. This body of doctrine, consisting of background principles of interpretation, bears at least a resemblance to my “common law of preclusion” concept. Later in this Article, after spelling out these principles, I will offer some tentative explanations as to why the law has gone in this direction.

A point worth noting at the outset is that there was a way in which the courts could have used more orthodox statutory interpretation methodology as a tool for delineating exceptions to the time limiting language of the review provisions. Most statutes that expressly foreclose judicial review of regulations after a stated period contain an express exemption for petitions that are based on matters that arose after the end of that period. For example, under section 307(b)(1) of the Clean Air Act, a petition for review must be filed “within sixty days . . . except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.” Per section 307(b)(2), foreclosure of subsequent judicial review applies only to actions “with respect to which review could have been obtained under” section 307(b)(1).

53 TFEU, supra note 52, art. 277. This treaty article authorizing a “plea of illegality” has an idiosyncratic case law. See LEVIN ET AL., supra note 52, at 128-37.

54 LEVIN ET AL., supra note 52, at 138.


57 Id. § 7607(b)(2). Similarly, see Clean Water Act § 509(b), 33 U.S.C. § 1369(b) (2006) (allowing application for review to be filed after 120 days “only if such application is based solely on grounds which arose after such 120th day”); Noise Control Act § 16(a), 42 U.S.C. § 4915(a) (similar provision). CERCLA is less explicit on this point but could be read similarly. Id. § 9613(a) (“Any matter with respect to which review could have been obtained under this subsection [within ninety days] shall not be subject to judicial review” in any enforcement proceeding).
Verkuil’s article and the ACUS recommendation did not focus on these congressionally prescribed limitations on the preclusive effects of the time limit statutes, and the courts seldom, if ever, mention them. That reticence seems odd, because the exemptions could have supported at least some of the distinctions the courts were trying to draw. Of course, they could not have played this role with regard to statutes in which the foreclosure of judicial review is itself only implied.\textsuperscript{58} Another explanation may be that, even where the exemption is potentially available, courts do not really need it, because the case law doctrine of ripeness covers much of the same ground.\textsuperscript{59} The courts have held in a variety of contexts that if a challenge was unripe for review at the time of promulgation, a time limit statute does not prevent it from being raised later, such as in an enforcement proceeding\textsuperscript{60} (although they sometimes add that if the ripeness of an issue is in doubt, one must at least try to raise the argument within the statutory period, and be refused, in order to take advantage of this exception\textsuperscript{61}). In any event, the courts do tend to rely primarily on judicially created principles of construction, rather than statutory language, to support their emerging hierarchy.

Whatever may have been the theoretical underpinnings of their results, the courts have, in applying the time limit statutes, tended to distinguish among legal, factual, and procedural issues, as the article and recommendation suggested. In fact, these same distinctions among issues have migrated into related areas. Generally, they are applied not only where agencies take the initiative to enforce or apply longstanding rules to specific fact situations, but also where private entities seek direct review of these rules after the expiration of the statutory review period. And they are often applied not only to statutes that impose unusually short periods for review, in the interest of some perceived special need for certainty or finality, but also in cases in which persons seek review of garden-variety rules after the expiration of the six-year time period.

\textsuperscript{58} In addition, as will be seen, some issues, such as constitutional claims, can undoubtedly be raised after the statutory deadline even if the grounds for the challenge were plainly visible at the time of promulgation.

\textsuperscript{59} Cf. Consolidation Coal Co. v. Donovan, 656 F.2d 910 (3d Cir. 1981). This case arose under the Federal Mine Safety and Health Act, which contains an express preclusion provision but no explicit exemption for late-developing claims. Nevertheless, the Court carefully considered whether the petitioner’s arguments on the merits had ripened after the expiration of the statutory review period, making its otherwise belated petition timely.

\textsuperscript{60} Clean Air Implementation Project v. EPA, 150 F.3d 1200, 1204 (D.C. Cir. 1998); see Atl. States Legal Found. v. EPA, 325 F.3d 281 (D.C. Cir. 2003) (dismissing appeal as unripe, notwithstanding statutory deadline, but noting that challenger could file later when case ripened); Cronin v. FAA, 73 F.3d 1126 (D.C. Cir. 1996) (dismissing appeal as unripe, although it was filed within the statutory time period).

\textsuperscript{61} Eagle-Picher Indus. v. EPA, 759 F.2d 905 (D.C. Cir. 1985).
statute of limitations that federal law imposes on administrative appeals where no such special time limit exists.

B. Procedural Claims

According to Verkuil’s and ACUS’s analysis, a statutory time limit on judicial review of rulemaking should ordinarily be construed to foreclose post-deadline claims that an agency adopted a rule without following correct rulemaking procedure. When Verkuil published his article, he recognized that a line of cases involving the Occupational Safety and Health Administration (OSHA) had followed a path that was somewhat out of sync with this proposition. These early OSHA cases may be best viewed as transitional in nature. Over time, judicial decisions have increasingly adhered to the Verkuil-ACUS prescription.

Section 6(f) of the Occupational Safety and Health Act (OSH Act) is an “implied” preclusion statute. It authorizes judicial review of OSHA health and safety standards within sixty days of their promulgation but does not explicitly forbid review after the statutory period. In National Industrial Constructors, Inc. v. OSHRC (NIC), the Eighth Circuit interpreted the section to mean that procedural, but not substantive, challenges were foreclosed after sixty days:

While the unreasonableness of a regulation may only become apparent after a period during which an employer has made a good faith effort to comply, procedural irregularities need not await the test of time and can be raised immediately. The agency’s interest in finality, coupled with the burden of continuous procedural challenges raised whenever an agency attempts to enforce a regulation, dictates against providing a perpetual forum in which the Secretary’s procedural irregularities may be raised.Were there no limitation upon the time within which procedural attacks could be made, the resulting uncertainty might inhibit employers, otherwise able and willing, from complying with a regulation.

Of course, this was essentially the same position that Verkuil and ACUS would later endorse. Most contemporary cases on section 6(f), however, rejected the NIC distinction. They interpreted section 6(f) to

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62 See supra notes 35, 47 and accompanying text.
63 Verkuil, supra note 2, at 760-61.
65 Section 6(f) applies only to judicial review of OSHA “occupational safety or health standards” as opposed to other “regulations” authorized by the OSH Act. Edison Elec. Inst. v. OSHA, 411 F.3d 272, 276-78 (D.C. Cir. 2005).
66 583 F.2d 1048 (8th Cir. 1978).
67 Id. at 1052.
foreclose procedural review in a pre-enforcement context only.\textsuperscript{68} In an enforcement context, however, they allowed both procedural and substantive challenges to be raised. For example, in \textit{Deering Milliken, Inc. v. OSHRC},\textsuperscript{69} the Fifth Circuit disagreed with \textit{NIC}, pointing to the usual presumption of reviewability and also to the legislative history of the OSH Act.\textsuperscript{70} The Senate Report on that Act had indicated that “\textquote[\textit{Deering Milliken, Inc. v. OSHRC}]{[\textit{while section 6(f)}] would be the exclusive method for obtaining pre-enforcement judicial review of a standard, the provision does not foreclose an employer from challenging the validity of a standard during an enforcement proceeding.}”\textsuperscript{71} Four other circuits reached essentially the same conclusion.\textsuperscript{72}

The Senate report language on which these courts relied makes these holdings easy to understand. Indeed, Verkuil himself explained them as attributable to demonstrable legislative intent.\textsuperscript{73} So viewed, the results do not seem very generalizable. Few if any other cases have turned on such specific indications from Congress as to how courts should apply a statutory time limit on judicial review of rules.\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{68} The proposition that section 6(f) forbids pre-enforcement review of procedural challenges is still good law. \textit{See Nat’l Ass’n of Mfrs. v. OSHA}, 485 F.3d 1201 (D.C. Cir. 2007).
\item \textsuperscript{69} 630 F.2d 1094 (5th Cir. 1980).
\item \textsuperscript{70} \textit{Id.} at 1099.
\item \textsuperscript{71} \textit{Id.} (quoting S. REP. NO. 91-1282, at 8 (1970)).
\item \textsuperscript{72} Simplex Time Recorder Co. v. Sec’y of Labor, 766 F.2d 575, 582-83 n.2 (D.C. Cir. 1985); Daniel Int’l Corp. v. OSHRC, 656 F.2d 925, 930 (4th Cir. 1981); Marshall v. Union Oil Co., 616 F.2d 1113, 1118 (9th Cir. 1980); Atl. & Gulf Stevedores v. OSHRC, 534 F.2d 541, 550 (3d Cir. 1976) (dictum); \textit{see also} Thomas J. Ryan, \textit{Note, Judicial Review of OSHA Standards: The Effect of the Right to Pre-enforcement Review of OSHA Standards on Subsequent Challenges}, 54 FORDHAM L. REV. 117, 120-24 (1985) (endorsing the majority view).
\item \textsuperscript{73} Verkuil, \textit{supra} note 2, at 761.
\item \textsuperscript{74} In \textit{Deering Milliken}, the Fifth Circuit also offered a more conceptually satisfying explanation for its willingness to entertain procedural challenges to OSHA standards in an enforcement case. The standards involved in that case (and equivalent cases in other circuits) were issued under section 6(a) of the OSH Act. \textit{29 U.S.C.} § 655(a) (2006). That provision had authorized OSHA to adopt, as an interim measure during its first two years of operation, requirements found in extant regulations and industry self-regulatory codes. The agency could adopt these requirements \textit{without using rulemaking procedure}. OSHA had responded by promulgating two hundred and fifty pages of regulations in the Federal Register on a single day. Ryan, \textit{supra} note 72, at 123. Against that background, the court said that “[i]ndustry would have found it quite burdensome to comb through every section 6(a) regulation and object to inappropriate promulgations within sixty days.” \textit{Deering Milliken}, 630 F.2d at 1099. This reasoning suggests that, in the specific context of section 6(a) standards, the sixty days allowed for appeal under section 6(f) may not have constituted what the APA calls an “adequate” opportunity to obtain judicial review prior to enforcement proceedings. \textit{5 U.S.C.} § 703 (2006); \textit{see supra} note 22 and accompanying text. It also implies that the sixty day limit might well prevent a litigant in an enforcement case from challenging the validity of a standard that OSHA promulgated after the initial two year period. Such standards are issued pursuant to elaborate rulemaking procedures under section 6(b) of the OSH Act, \textit{29 U.S.C.} § 655(b). The same court did, in fact, apply section 6(f) to foreclose enforcement review of such a standard in \textit{RSR Corp. v. Donovan}, 747 F.2d 294, 299-301 (5th Cir. 1984). Although the claim raised in \textit{RSR Corp.} was substantive rather than procedural, it actually appears to have been a fact-dependent attack on the
In any event, in recent years the OSHA cases have faded out of view. Meanwhile, in other contexts, the courts have consistently held that a litigant who seeks judicial review after the expiration of a statutory time limit may not argue that a rule was adopted with incorrect procedure. One of the clearest holdings to this effect appeared in *JEM Broadcasting Co. v. FCC*, which rejected an attack on FCC procedures for handling license applications. The regulations had been adopted without notice and comment, purportedly in reliance on the “procedural rules” exemption in the APA. The court concluded that the sixty-day time limit in the Hobbs Act deprived JEM of the right to challenge the rules in an enforcement proceeding in which the Commission invoked the rules to deem JEM’s application defective.

The courts have been less than clear in explaining why they have found procedural challenges to be foreclosed by time limit statutes—even though, as will be discussed presently, substantive challenges get more generous treatment. In *NRDC v. Nuclear Regulatory Commission*, the court argued that the time limit in the Hobbs Act “serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations.” This explanation is not entirely satisfying, because essentially the same point could be made about substantive challenges. One might assume that the practical factors suggested by Verkuil and ACUS have influenced the courts’ choice. Or perhaps judges simply feel that substantive objections, usually based on an

reasonableness of the standard in question. As such, it was not a strong candidate for enforcement review under Verkuil’s and ACUS’s analysis. See supra notes 31, 47 and accompanying text.


76 22 F.3d 320.

77 *Id.* at 324-26. In an alternative holding, however, the court reached the merits of the APA challenge and held that the rules had been validly issued. *Id.* at 326-29.


79 *Id.* at 602.

80 See supra notes 40, 47 and accompanying text. One factor emphasized by Verkuil was that a procedural challenge to a rule will normally be as ripe for review when the rule is promulgated as it will ever be. That premise is normally true, but an exception might occur in a case in which the plaintiff’s claim is that an agency is not entitled to an exemption from notice and comment because it is likely to apply a so-called policy statement or guidance document in a binding way. See, e.g., Colwell v. HHS, 558 F.3d 1112, 1128 (9th Cir. 2009); Municipality of Anchorage v. United States, 980 F.2d 1320, 1323-25 (9th Cir. 1992); Pub. Citizen v. NRC, 940 F.2d 679, 683 (D.C. Cir. 1991). Whether the agency will behave in this way would not necessarily be ascertainable when the rule is issued. Probably, however, any difficulties that this scenario might present could be solved through application of the existing doctrine that excuses compliance with a time limit statute for claims that do not ripen until after the statutory review period. See supra notes 60-61 and accompanying text.
alleged constitutional or statutory violation, are simply more fundamental than claims based on a deficiency in rulemaking procedure.

The United States Code also contains a default six-year statute of limitations, 28 U.S.C. § 2401(a), for claims against the United States. Some lower court cases have interpreted this section as foreclosing APA procedural challenges after the six years are up. That interpretation seems reasonable. However, the Second Circuit has suggested that the six-year limit also applies to situations in which a challenger attacks an old regulation collaterally in the course of pursuing a private cause of action that was itself timely commenced. This latter interpretation seems more dubious, because § 2401(a) applies by its terms only to suits commenced against the United States. The Supreme Court appears to have rejected the Second Circuit’s theory, at least sub silentio, in a 2007 case that considered whether a 1974 Department of Labor regulation had been issued without proper notice and comment. Even the government did not argue in that case that the challenge was time-barred.

At the state level, the logic of the cases just described has been extended much farther than federal law provides. The 2010 Model State Administrative Procedure Act (and for that matter, its predecessor Acts as well) provides that judicial review of any rule, when sought on the ground of noncompliance with the rulemaking procedures of that Act, must be commenced not later than two years after the effective date of the rule. Challenges on substantive grounds have no equivalent time limitation. When compared with these provisions, federal law looks relatively lenient.

81 “[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.” 28 U.S.C. § 2401(a) (2006).
82 Sai Kwan Wong v. Doar, 571 F.3d 247, 263 n.15 (2d Cir. 2009); Preminger v. Sec’y of Veterans Affairs, 517 F.3d 1299, 1306-07 (Fed. Cir. 2008); Wind River Mining Corp. v. United States, 946 F.2d 710, 712-15 (9th Cir. 1991). But cf. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs, 191 F.3d 845, 853 (7th Cir. 1999) (suggesting that claim does not accrue until challenger knows it is subject to rule), rev’d on other grounds, 531 U.S. 159 (2001).
83 Schiller v. Tower Semiconductor, Ltd., 449 F.3d 286, 293 & n.7 (2d Cir. 2006) (dicta).
85 See REVISED MODEL STATE ADMIN. PROCEDURE ACT § 503(a) (2010) (“Judicial review of a rule on the ground of noncompliance with the procedural requirements of this [act] must be commenced not later than [two] years after the effective date of the rule. Judicial review of a rule or guidance document on other grounds may be sought at any time.”); MODEL STATE ADMIN. PROCEDURE ACT § 3-113(b) (1981), 15 U.L.A. 53 (2000); id. § 3(c) (1961), 15 U.L.A. 213 (2000).
C. Substantive Claims and Implied Preclusion Statutes

Now let us turn to the manner in which the courts apply time limit statutes to judicial review of rules when the basis of the challenge is substantive rather than procedural. We will look first at statutes in which there is no express preclusion of review, so that the court has to decide what inference to draw from the time limit itself. As noted earlier, Verkuil recommended a relatively generous approach to judicial review in this context, and that is what has emerged.

This is particularly true when review of a rule is sought in an enforcement context. Notwithstanding the expiration of one of these time limits on filing for judicial review, courts have consistently accorded parties a right to challenge the constitutional\(^\text{86}\) and statutory\(^\text{87}\) validity of a rule when the agency applies or enforces it in a particular case. Sometimes they go so far as to entertain challenges at the enforcement stage that might be most precisely described as abuse of discretion arguments.\(^\text{88}\) In view of the frequently close relationship between review for statutory compliance and review for arbitrariness (particularly at the so-called second step of the \textit{Chevron} analysis),\(^\text{89}\) it is not surprising that scrutiny of whether an agency correctly \textit{interpreted} a statute sometimes spills over into an examination of whether the agency reasonably \textit{applied} it—the traditional domain of abuse of discretion review.\(^\text{90}\)

Although the right to obtain collateral review of a rule in an enforcement case does seem to contravene the logical implication of the time limits spelled out in various review statutes, it has a strong policy

\(^{86}\) Terran v. Sec’y of Health & Human Servs., 195 F.3d 1302, 1310-11 (Fed. Cir. 1999); Graceba Total Commcs., Inc. v. FCC, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997).


\(^{88}\) See Alvin Lou Media, 571 F.3d at 9-11; Indep. Cnty. Bankers, 195 F.3d at 35-36.


\(^{90}\) Sometimes, however, a litigant attacks what appears to be a relatively pure exercise of discretion, raising no significant issues about the meaning of the agency’s underlying statutory authority, and the challenge is turned aside. See, e.g., Sacramento Mun. Dist. v. Fed. Energy Regulatory Comm’n, 428 F.3d 294, 299 (D.C. Cir. 2005) (disallowing a collateral challenge to a tariff because, \textit{inter alia}, “Sacramento does not object to the Commission’s constitutional or statutory authority”).
justification, as articulated in frequently quoted language from an early case, *Functional Music, Inc. v. FCC*[^91]:

As applied to rules and regulations, the statutory time limit restricting judicial review of Commission action is applicable only to cut off review directly from the order promulgating a rule. It does not foreclose subsequent examination of a rule where properly brought before this court for review of further Commission action applying it. For unlike ordinary adjudicatory orders, administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity.[^92]

Because the statutes involved do not expressly prescribe foreclosure of review, courts have predictably adhered to the usual presumption favoring reviewability.

Indeed, the courts’ receptivity to post-deadline review has not stopped there. They have carved out a niche for *pre-enforcement* review of a rule after the expiration of the statutory period. Regulated entities will typically welcome that niche, because it enables them to obtain review without risking a penalty if their attack on the validity of a rule should prove unsuccessful. A company may, for example, have overlooked its exposure to liability when the rule was first issued, or it may not have been in a position to appeal from the rule at that time, but when it becomes aware of the potential exposure it will have a strong interest in seeking review.

According to the prevailing doctrine, a litigant that wishes to mount a pre-enforcement challenge after the statutory period for appeal has run out must proceed by petitioning the agency to amend or revoke the rule, and then, if the petition is denied, appeal the denial to the courts. This procedure in effect creates a new agency action, and on that basis it can be rationalized as not offending the congressionally prescribed time limit.[^93] The usual situation involves a contention that the rule should be changed or rescinded because it is beyond the statutory authority of the agency. In this context, the challenger’s

[^91]: 274 F.2d 543 (D.C. Cir. 1958).
[^92]: Id. at 546. This reasoning differentiates limitations on rulemaking review from adjudication situations. In adjudication cases, the courts regularly enforce short time limits on review petitions, see, e.g., Petrotech Trading Co. v. United States, 985 F.2d 1072 (Temp. Emer. Ct. App. 1993), although such time limits are not necessarily “jurisdictional,” Henderson v. Shinseki, 131 S. Ct. 1197 (2011). A similar requirement, usually strictly enforced, is the rule that an appeal from a district court judgment must be filed within the period prescribed by law. See, e.g., Bowles v. Russell, 551 U.S. 205 (2007).
[^93]: Am. Rd. & Transp. Builders Ass’n v. EPA, 588 F.3d 1109 (D.C. Cir. 2009); Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv., 112 F.3d 1283, 1287 (5th Cir. 1997); Wind River Mining Corp. v. United States, 946 F.2d 710, 715 (9th Cir. 1991).
option to use the rulemaking petition route in order to obtain judicial review is relatively clear.\(^\text{94}\)

In \textit{NLRB Union v. Federal Labor Relations Authority},\(^\text{95}\) the D.C. Circuit, in an opinion by Judge Edwards, stated that the analysis would be different if the challenger alleges a substantive error other than the agency’s lack of statutory authority to issue the rule. In that context, the court said, the challenger would have the right to petition, but the court’s review would be “limited to the ‘narrow issues as defined by the denial of the petition for rulemaking,’ and \textit{does not extend to a challenge of the agency’s original action in promulgating the disputed rule.}\(^\text{96}\) In other words, the court appears to be saying that a time limit statute does operate to foreclose subsequent review of an alleged factual or discretionary error underlying a rule. That proposition seems broadly consistent with the suggestions by Verkuil and ACUS that those types of review should be relatively susceptible to foreclosure if Congress perceives for it.\(^\text{97}\) In practice, cases in which parties seek out-of-time review in order to litigate questions of fact or discretion appear to be quite rare.\(^\text{98}\)

A more important limitation is the threshold requirement of a rulemaking petition itself. Litigants that attempt to overcome time limit statutes by bringing pre-enforcement challenges directly to court, without filing a rulemaking petition, regularly find their cases dismissed.\(^\text{99}\) A narrow exception to this generalization is the “reopenner” doctrine. If the agency actually reopens its consideration of an otherwise time-barred issue in the course of a subsequent proceeding, its disposition of the issue is treated as reviewable,\(^\text{100}\) but the matter


\(^{95}\) \text{834 F.2d 191 (D.C. Cir. 1987).}

\(^{96}\) \text{Id. at 196 (emphasis altered) (quoting Prof’l Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1217 n.2 (D.C. Cir. 1983)).}

\(^{97}\) \text{\textit{Cf.} Auer v. Robbins, 519 U.S. 452, 458-59 (1997) (holding, outside the context of time limits, that an agency’s failure to conduct amendatory rulemaking to rectify an allegedly obsolete regulation should not be reviewed for arbitrariness in a collateral challenge raised in a private lawsuit; rather, the objecting party should petition the agency for rulemaking and appeal the denial to the courts if necessary).}

\(^{98}\) \text{Among the few exceptions are \textit{Professional Drivers Council v. Bureau of Motor Carrier Safety}, 706 F.2d 1216 (D.C. Cir. 1983), and \textit{Geller v. FCC}, 610 F.2d 973, 977 (D.C. Cir. 1979). Note that, in both of these cases, the basis of the challenge was post-promulgation information and arguments submitted to the agency. They did not involve claims that the rule was unsupported by the record underlying the original promulgation.}

\(^{99}\) \text{Charter Commc’ns, Inc. v. FCC, 460 F.3d 31, 38 (D.C. Cir. 2006); Cellular Telecommns. & Internet Ass’n v. FCC, 330 F.3d 502, 508-09 (D.C. Cir. 2003); Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv., 112 F.3d 1283 (5th Cir. 1997).}

\(^{100}\) \text{PanAmSat Corp. v. FCC, 198 F.3d 890, 893-94 (D.C. Cir. 1999); Pub. Citizen v. Nuclear Regulatory Comm’n, 901 F.2d 147, 152-53 (D.C. Cir. 1990) (finding that reopening occurred).}
essentially remains within the agency’s control. Litigants sometimes attempt to demonstrate that an agency’s oblique subsequent references to an otherwise time-barred issue, or a statement declining to revisit it, was tantamount to a reconsideration, but this line of argument seldom succeeds.\textsuperscript{101}

The petition requirement does not seem to be an undue intrusion on the principles underlying the presumption of reviewability. It not only achieves nominal compliance with the time limit statute (by inducing the agency to issue a new and appealable administrative action), but also comports with standard principles rooted in the doctrine of exhaustion of administrative remedies. The agency’s current view on the substantive question might be different from the one it held when the rule was promulgated, due to changed circumstances or simple turnover in the identities of the decisionmakers. Courts understandably prefer to ascertain the agency’s perspective before proceeding to the merits.\textsuperscript{102} In any event, despite the courts’ willingness to dismiss petitions for review of rules where the requirement of a prior petition to the agency has been bypassed, the sting inherent in such dismissals is ameliorated by the fact that the rule will, as discussed above, be susceptible to substantive challenge in the event of an enforcement proceeding.

D. Substantive Claims and Express Preclusion Statutes

We now turn our attention to substantive claims arising under statutes that not only specify a deadline for judicial review, but also explicitly provide that review is impermissible if a challenger seeks it after the deadline. As one would expect, belated judicial review in this


\textsuperscript{101} Charter Comm’ns, 460 F.3d at 38-39; Nat’l Ass’n of Reversionary Prop. Owners, 158 F.3d at 143-46; see also infra note 108 (citing more case law in the context of time limit statutes that expressly foreclose judicial review).

\textsuperscript{102} But see Dunn-McCampbell, 112 F.3d at 1289-90 (Jones, J., dissenting) (“[I]t is a waste of time to require [plaintiff] to manufacture ‘agency action’ by petitioning the Park Service to revoke its regulations and suffering—at some time in the possibly remote future—the inevitable rebuff.”). Judge Jones found support for her protest in Public Citizen, 901 F.2d 147. See Dunn-McCampbell, 112 F.3d at 1290 n.5. In Public Citizen, however, the situation was different. In the very proceedings under review, the agency had ruled on the plaintiff’s issue in the course of rejecting a motion for reconsideration; there was no doubt what the agency would say if a rulemaking petition were pursued. See 901 F.2d at 152-53. The opinions in Dunn-McCampbell do not reveal any obvious reason to assume that resort to the agency would be a mere formality. Perhaps Judge Jones was right to predict that denial was “inevitable,” but in the exhaustion context the threshold for demonstrating futility is normally high.
context is just as limited, and sometimes more limited, than in the context of implicit preclusion statutes, but not completely unavailable.

In the first place, we saw in the preceding subpart that on the rare occasions when a litigant has attempted to use factual or discretionary grounds to contest a rule after the expiration of a statutory deadline, the courts have been unwilling to entertain the challenge.**\textsuperscript{103}** Not surprisingly, the “common law of preclusion” has operated in the same way when the foreclosure of judicial review is explicit rather than implicit. One such case, *RSR Corp. v. EPA*,\textsuperscript{104} involved the Hazard Ranking System, a mathematical model that the EPA had issued under CERCLA to help determine which hazardous waste sites should be listed as dangerous to public health or the environment. In the context of a proposed listing of its site, which would result in expensive cleanup obligations, RSR submitted “new studies” that, it claimed, demonstrated errors in the model. The agency rejected this submission as untimely, and the court held that the factual premises of the model could not be attacked collaterally in court at the implementation stage.\textsuperscript{105}

When the untimely challenger’s theory is that a rule exceeds the agency’s statutory authority, differences between the implicit and explicit preclusion statutes begin to emerge. The most conspicuous difference is that the courts have not, in the context of explicit preclusion statutes, allowed pre-enforcement review of a rule after the statutory period, even where the challenger seeks it by petitioning the agency to revise or revoke the rule.\textsuperscript{106} Judges argue that it is one thing to read that option into a statute when the foreclosure of review is itself only implicit, and another thing to invoke that option when Congress has directly ordained that review should be confined to the period immediately following issuance of the rule. In the latter instance, courts are more inclined to take the legislature at its word.

One can, of course, ask the agency to reexamine its rule; if it voluntarily does so, a new rulemaking proceeding will commence, with its own judicial review deadlines. But the courts have not allowed

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\textsuperscript{103} See *supra* notes 96-98 and accompanying text.

\textsuperscript{104} 102 F.3d 1266 (D.C. Cir. 1997).

\textsuperscript{105} Id. at 1269. But cf. U.S. Magnesium, LLC v. EPA, 630 F.3d 188 (D.C. Cir. 2011) (suggestions that *RSR Corp.* leaves some room for judicial review). In *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1267 (D.C. Cir. 2003), the court similarly applied the RCRA time limit provision to shield a regulation from a belated challenge raised by environmentalists who had resorted to a citizen suit authorized by RCRA. This case did not precisely arise in an enforcement context. Indeed, the plaintiff’s argument was that the rule was too weak. However, it was analogous to an enforcement case in the sense that the environmentalists who were turned away would probably not have any subsequent opportunity to obtain judicial consideration of their position.

\textsuperscript{106} Am. Rd. & Transp. Builders Ass’n v. EPA, 588 F.3d 1109, 1113 (D.C. Cir. 2009); Nat’l Mining Ass’n v. U.S. Dep’t of Interior, 70 F.3d 1345, 1350-51 (D.C. Cir. 1995).
litigants to use this device as a disguised method of circumventing the time limitation on review of the extant rule. Moreover, although the reopener doctrine is available under these time limit statutes, the courts tend to be just as resistant to finding a reopening in this context as they have been in the cases arising under statutes that impliedly foreclose judicial review after the deadline.108

These holdings seem reasonable as a matter of deference to the legislative directive, and not particularly problematic so long as the opportunity to challenge the rule on substantive grounds at the application or enforcement stage will be available. Indeed, in declining to permit pre-enforcement review, the D.C. Circuit has noted in dicta that its holdings do not necessarily mean that the foreclosure of judicial review would extend to the enforcement or application stage.109

However, the question of whether the time limit statutes would indeed allow judicial review at that stage, despite literal language indicating otherwise, does not have a simple answer. An occasional case enforces the preclusion110 or directly overrides it.111 But neither of

107 See Ohio v. EPA, 838 F.2d 1325 (D.C. Cir. 1988).
108 Am. Rd., 588 F.3d at 1114-16 (Clean Air Act); P & V Enters. v. U.S. Army Corps of Eng’rs, 516 F.3d 1021 (D.C. Cir. 2008) (Clean Air Act); Safe Food & Fertilizer, 350 F.3d at 1267 (RCRA); Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996) (CERCLA); Nat’l Mining, 70 F.3d at 1351-52 (Surface Mining Control and Reclamation Act); Am. Iron & Steel Inst. v. EPA, 886 F.2d 390, 397-98 (D.C. Cir. 1989) (RCRA).
109 See Am. Rd., 588 F.3d at 1113 (“National Mining did not, so far as we can discern, suggest that [the preclusive language of the relevant time limit statute] implied any sort of limitation on the recognized ability of a party against whom a regulation is enforced to contest its validity in the enforcement context.”); see also Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Reserve, 195 F.3d 28, 34-35 (D.C. Cir. 1999) (reaffirming this general principle, but also acknowledging that a different result has been reached under a statute that explicitly prohibited all review after the prescribed period). The mere fact that an agency intends to apply the rule does not trigger the availability of direct review; the challenge must be sought in the proceeding in which the rule is to be applied. See Cerro Copper Prods. Co. v. Ruckelshaus, 766 F.2d 1060, 1069 (7th Cir. 1985) (dismissing a petition for direct review that was filed soon after agency initiated enforcement proceeding against respondent).
110 See United States v. Walsh, 8 F.3d 659, 664 (9th Cir. 1993). The facts of this case were quite similar to those of Adamo Wrecking v. United States, 434 U.S. 275 (1978), but Congress had by this time amended the Clean Air Act to close off the escape routes that the Court had employed in that case.
111 See Wind River Mining Corp. v. United States, 946 F.2d 710 (9th Cir. 1991). This case involved a mining company’s effort to litigate the validity of a wilderness preservation decision (technically a rule) after the expiration of the six-year statute of limitations in 28 U.S.C. § 2401 (2006). The court argued that the company would have had no reason to contest the issue at the time when the area was designated as wilderness, because it did not then own the land in question. Wind River, 946 F.2d at 715. However, the court’s rationale is not limited by that factor and apparently means that a litigant may obtain out-of-time consideration of any claim that a rule is ultra vires. The challenger must first petition the agency for reconsideration, but the agency cannot derail the challenge by rejecting the petition as time-barred. Id. at 714-16. The court phrased its holding on the technical ground that the rejection of the petition causes a new cause of action to accrue. Id. at 716. However, functional considerations manifestly played a role in this conclusion, because the court made clear that it would not accept the same logic if the
these polar positions is the norm. Here it is worth recalling Verkuil’s view that, in such a situation, the courts would have to find the foreclosure of judicial review to be constitutionally valid, but also that they should make every effort to avoid being drawn into such a situation. By and large, avoidance has indeed been the primary strategy by which courts have extricated themselves from this acutely uncomfortable dilemma.

This was surely true in *Adamo Wrecking*.112 As noted earlier, the Supreme Court disposed of this case on narrow statutory grounds by holding that the rule Mr. Adamo had violated—a “work practice standard”—was not an “emission standard” within the meaning of the relevant time limit statute, section 307(b) of the Clean Air Act.113 The Court offered no general theory to explain why the emissions standard issue should be treated differently from other issues that section 307(b) did shield from judicial review.114

In its most recent encounter with section 307(b), the Court demonstrated that it was still not prepared to articulate a clear concept as to how, if at all, that provision prevents a court from deciding in an enforcement case whether an EPA regulation violates the Clean Air Act. The substantive dispute in *Environmental Defense v. Duke Energy Corp.*115 grew out of the Prevention of Significant Deterioration (PSD) scheme in the Clean Air Act. Under that regime, an electric utility (among other entities) is often required to apply to the EPA for a permit if it wishes to build a new facility or make a “modification” of an existing facility. Duke engaged in renovations at some of its coal-fired power plants, but it did not apply for a permit, and EPA brought an enforcement action against Duke for violating its PSD regulations. The issue was whether Duke’s upgrades had been “modifications.” On their face, the PSD regulations defined “modification” to include a physical change that caused an increase in annual emissions, and Duke conceded that its upgrades fit that description.

challenger’s objection to the original rule were procedural rather than substantive. *Id.* at 714-15; see supra note 82 and accompanying text. The dissenting opinion in *Wind River* maintained that the company’s objection was not really an ultra vires claim, but rather an argument that the agency had misapplied an uncontroversial statutory framework. *Wind River*, 946 F.2d at 716-17 (Nelson, J., dissenting). This critique presents another dimension of the as yet unresolved problem of whether, and if so how, to distinguish in the preclusion context between ultra vires claims and arbitrariness claims. See supra notes 88-90 and accompanying text.

113 *Id.* at 278-85; see supra notes 33-34 and accompanying text.
114 See *Adamo*, 434 U.S. at 292-93 (Stewart, J., dissenting) (lamenting that “the Court provides no real guidance as to which aspects of an emission standard are so critical that they fall outside the scope of the exclusive judicial review procedure provided by Congress”).
Duke argued, however, that Congress had made the Act’s definition of “modification” for PSD purposes dependent on the corresponding definition applicable to a separate program, the New Source Performance Standards (NSPS). That linkage, according to Duke, meant that the EPA had to give the term “modification” the same meaning in both programs. Under the NSPS, EPA regulations defined “modification” as an increase in the facility’s hourly rate of emissions. By that definition, Duke would be in the clear, because its renovations enabled it to operate its power plants for more hours in a day, but they did not lead to any increase in the hourly rate. The Fourth Circuit ruled in Duke’s favor, but the Supreme Court reversed in an opinion by Justice Souter.

In Part III.A of his opinion, Justice Souter analyzed various precedents on statutory construction and determined that the Act did not require EPA’s two definitions of “modification” in the PSD and NSPS programs to be the same. Then, in Part III.B, he spent several pages arguing that the Fourth Circuit’s attempt to read an hourly rate criterion into the PSD definition was so strained that this interpretation had to be seen as a claim that the regulations would otherwise be invalid. That was an impermissible line of argument, he said, because section 307(b) of the Act foreclosed challenges to the validity of an EPA regulation that could have been litigated within sixty days after the rule was promulgated.

A problem with the Court’s analysis, however, is that if the “implicit invalidation” critique was relevant at all, the Court should have deployed it in Part III.A, not Part III.B. To prevail on the NSPS issue, Duke would have had to show not only that the PSD regulation could be construed to contain an hourly rate test, but also that it must be so construed to avoid a conflict with a congressional mandate. The latter proposition certainly comes close to implicating a question regarding the validity of the regulation. Perhaps the Court could say—as had the Fourth Circuit below—that it was merely rejecting...
an interpretation of the rule, not rejecting the rule as so interpreted. Even if one accepts that uneasy distinction, however, the Court does seem to have gone astray in Part III.B. The gist of that section of the opinion was that the Fourth Circuit’s interpretation of the PSD regulation was unconvincing. Yet misinterpreting a rule is by no means the same as implicitly invalidating it. In short, either Justice Souter got his application of section 307(b) backwards, or he did not need to mention that provision at all.

Indeed, Justice Souter concluded this discussion by stating that “[w]e have no occasion at this point to consider the significance of § 307(b) ourselves.” That remark was puzzling, inasmuch as it came at the end of a paragraph in which he did, in fact, suggest that section 307(b) justified rejecting some of the lower court’s views. In short, the Duke Energy opinion reflects no clear theory, perhaps not even an intelligible one, as to the circumstances in which section 307(b) does or does not apply.121

Adamo and Duke Energy appear to indicate that the Court has found no satisfying basis for disagreeing with Verkuil’s view that Congress can, if it wishes, foreclose ultra vires challenges to a regulation in an enforcement case—yet neither can it quite reconcile itself to that conclusion. Avoidance techniques, including strained statutory construction as well as mere obscurity, have thus emerged as the strategy of choice. That same attitude has manifested itself in the lower courts. In a number of cases, judges have stated that a time limit statute appears to foreclose them from reaching the merits of an argument that a rule exceeds the agency’s authority—but then they have gone on to decide the merits of that argument anyway.122 This is a

121 The Court could potentially have solved its section 307(b) problem in Part III.A. on other grounds. Another of Duke’s objections was that EPA had changed its interpretation of the PSD regulation over time. Surely, the company argued, it could not be faulted for failing to challenge the regulation when it was promulgated, because EPA was construing the rule favorably to the company at that time. See Initial Brief for Appellee-Respondent at 28-29, Duke Energy Corp., 549 U.S. 561 (No. 05-848). The factual premises of this claim were contested, but if the Court had agreed with Duke on this score, it could have avoided making any ultimate decision about the broad question of whether ultra vires claims should be available at the enforcement stage under statutes like section 307(b). See infra note 151 and accompanying text.

122 See United States v. S. Union Co., 630 F.3d 17 (1st Cir. 2010) (RCRA); Cenergy Corp., 458 F.3d at 709-10 (discussed supra note 119); Eagle-Picher Indus., Inc. v. EPA, 759 F.2d 905, 919 (D.C. Cir. 1985) (deciding merits because court’s reasons for finding preclusion had been “largely uncharted” prior to this opinion); United States v. Borden, Inc., 572 F. Supp. 684 (D. Mass. 1983) (distinguishing Adamo and finding section 307(b)(2) applicable, but also holding in the alternative that the rules challenged by the defendant were enforceable emission standards); cf. United States v. Ethyl Corp., 761 F.2d 1153, 1157 n.9 (5th Cir. 1985) (finding under Adamo that the regulations that petitioner had violated were emission standards rather than work practice standards, but also recognizing that this inquiry resulted in “the somewhat paradoxical endeavor of considering the merits of a dispute . . . in order to ascertain whether jurisdiction over the dispute exists in the first place”).
curious way of treating a threshold issue that courts often describe as jurisdictional.  

Presumably, the courts that have engaged in this pattern of avoidance have been motivated by a feeling that the values embodied in the traditional presumption of reviewability are important ones. They feel that judicial oversight to ensure that an agency respects congressional limitations is integral to their role (even if that role is somewhat circumscribed by *Chevron* and other deference doctrines). As I have noted, the case law is not uniform. Even so, it is noteworthy that so much of the case law has, as a practical matter, converged toward the position commonly seen in the constitutional arena, in which the presumption against preclusion is all but irrebuttable. The latter doctrine, however, rests on explicit Supreme Court precedent. That bulwark does not exist where the issue is statutory and the foreclosure of judicial review is not absolute but only limited to a stated time period. One has to wonder, therefore, how long the avoidance tactic can last. For many judges, however, it has so far proved quite durable. 

**E. As-Applied Challenges**

Now I want to look at a type of defense that Verkuil and ACUS said *should* be available at the enforcement stage, but which has not in fact been prominent in the cases, at least not in those terms. Recommendation 82-7 said that “issues relating to . . . the application of the rule to a particular respondent” should remain open in an enforcement proceeding, and Verkuil suggested that this is actually constitutionally required.

Before getting down to business, I want to dispose of one body of doctrine that, at first blush, seems to be implicated in this issue but on closer analysis is not. The distinction between facial and as-applied challenges has received lavish attention in recent years, particularly in constitutional litigation. Dozens of law review articles devoted to this distinction have been published in recent years. Much of the debate

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124 See supra note 110 and accompanying text.
126 See supra notes 34, 48 and accompanying text.
revolves around United States v. Salerno, a 1987 case that says, at least if read at face value, that a facial challenge to a legislative act cannot succeed unless the challenger establishes “that no set of circumstances exists under which the Act would be valid.” Because this doctrine can be deployed to beat back facial challenges to statutes in ideologically charged, hot-button areas such as abortion and voting rights, it is hardly surprising that the Salerno doctrine has been hugely controversial. Although this doctrinal controversy may seem far afield from our own humbler domain of administrative law, it is not. The Court said in a 1993 case, Reno v. Flores, that Salerno principles also apply to statutory challenges to the validity of regulations. The rule stands unless it would violate the statute in all of its possible applications.

Salerno and Flores have elicited several serious criticisms, which I will mention only briefly. First, Salerno has been criticized as overstated even on its own terms, especially since the Court appears more prone to deploy its resistance to facial claims in subject areas in which it seems unenthusiastic about the underlying constitutional rights. Second, the Flores extension of this doctrine to administrative law has been strongly questioned. The Flores test for facial invalidation of a regulation seems in tension with the familiar Chevron test, and surely the Court could not have meant to overrule Chevron. Thirdly, as an important opinion by Judge Randolph in the D.C. Circuit points out, the Flores doctrine is especially troubling in the context of statutes that have preclusion provisions like the ones analyzed in this Article. If a regulated party’s argument against the facial validity of a regulation can be thrown out of court at the time of promulgation under Flores, and then thrown out again at the time of implementation because of the preclusion statute, the result could be that he cannot have his argument heard in court at any stage of the process, which seems patently unacceptable.


129 Id. at 745.
132 Id. at 301.
133 See Metzger, supra note 127, at 798-800.
I will not explore the merits of these arguments in any detail here, because it appears, upon further analysis, that the doctrine of Salerno and Flores is not germane to the present Article—except in the sense mentioned by Judge Randolph, which is not unimportant. Even where they do apply, Salerno and Flores speak to situations in which a challenger may be prevented from bringing a facial challenge on a pre-enforcement basis. But the question that Verkuil and ACUS put on the table was whether a challenger should be allowed to pursue an as-applied argument in an enforcement case, and the Salerno line of cases does not speak to that question.136

I turn, then, to the core issue. As I have shown, courts have, over time, worked out exceptions to the time limit statutes in enforcement cases, in some ways more generously than Verkuil recommended. Yet the process is still under way, and the courts have at times relied on an avoidance strategy that may not work indefinitely. The question then is whether special solicitude for “as-applied” challenges is in order. Here I understand such a challenge to be one in which the court will consider whether the rule is invalid in relation to the challenger, even if it is not (or may not be) invalid in relation to all of the persons to whom it is addressed. A challenge is not “as-applied” merely because it is adjudicated at the time the agency applies it to that challenger; even at that point, the challenger might be lodging a “facial” attack in the sense that its arguments would, if accepted, necessarily render the rule invalid with respect to all of the other addressees.137

In recommending that a time limit statute, even one that explicitly precludes judicial review, should allow a court to consider in an enforcement case whether a rule is “properly applied to a respondent,” Verkuil elaborated: A court must remain able to hold that there is “no basis in fact for applying the [rule] to a particular respondent,” or at least to “refuse to apply a rule to a respondent if there is substantial doubt as to its intended reach.”138 To a certain extent, this point is self-evident. Obviously a defendant in an enforcement case should be able to argue that a rule does not apply to him or her at all. By definition, the argument that “I did not violate the rule” is not a question that the

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136 To be sure, I have also discussed the role of the time limit statutes in pre-enforcement review situations. In addition, Salerno and Flores have potential relevance to the kind of relief that might be available if a statute or rule were held to be unlawful in a given enforcement case. In both these contexts, however, the Salerno doctrine would presumably apply in the same way regardless of whether a time limit statute is involved.

137 This distinction is sometimes overlooked. See Dunn-McCampbell Royalty Interest, Inc. v. Nat’l Park Serv., 112 F.3d 1283, 1287-88 (5th Cir. 1997) (mistakenly equating a facial attack with a pre-enforcement attack).

138 Verkuil, supra note 2, at 748-49.
defendant could have litigated when the rule was promulgated, and it does not turn on the validity of the rule. The time limit statutes do not purport to foreclose such a defense and could not be construed as doing so.

Harder questions would arise, however, if the defendant were to claim that the rule should be read narrowly because a broader reading would violate the underlying statute. Indeed, the defendant may claim that the court should hold the rule to be ultra vires, at least in part. Logically, this latter line of argument may force a court to come to terms with the preclusion statute (although the Duke Energy controversy shows that this conflict may not be inevitable). To the extent that Verkuil was suggesting a need to preserve this type of argument, his concerns may have been rooted in a concern for fair notice, an objective with evident due process overtones. After all, some persons who might advance the argument could make a plausible case that at the time of promulgation they did not know they would have a regulatory problem, or did not expect the agency to interpret the rule as it eventually did (or indeed the agency may in fact have interpreted it favorably to the defendant at the outset, only to change its mind later). Treating these situations as not barred by the time limit statute could be understood as a means of avoiding a situation in which a person is forced to come forward to litigate before it is fair to impose that expectation.

I suspect that one reason why the facial versus as-applied distinction has not caught on, as Verkuil envisioned it should, is that the courts do not think that it does a very precise job of giving effect to the equitable factors just mentioned. What difference should it make whether a given objection to a regulation on statutory grounds could potentially be asserted by one hundred percent of regulated persons, or seventy percent, or twenty percent, or five percent? Some “facial” objections to a regulation may have been quite difficult to foresee, and some “as-applied” objections may have been quite easy to foresee. The distinction could well prove elusive in practice. Adamo Wrecking, which Verkuil cited in support of his “as-applied” concept, is illustrative. It did entail a limiting construction of the Clean Air Act, but it cannot very well be described as involving an “as-applied” challenge to the regulation. It will be recalled that the rule in question required demolition companies to spray water on asbestos-contaminated

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139 At the immediate post-promulgation stage, the regulated party would likely have to bring a declaratory judgment action to establish non-coverage, as distinguished from seeking direct review of the validity of the rule, although the two could be combined if the review action were filed in district court.

140 See supra note 120 and accompanying text.

141 This last scenario was alleged in Environmental Defense v. Duke Energy Corp., 549 U.S. 561 (2007). See supra note 121.
materials in buildings before removing them. The theory by which the Court decided that the rule was invalid as to Mr. Adamo necessarily rendered it invalid as to all other demolition practitioners to whom it was addressed. Thus, his challenge would seem to have been “facial” in the most relevant sense.\textsuperscript{142}

However, even if an as-applied exception to the time limit statutes has not proved acceptable on its own terms, the fair-notice concerns that it presumably was intended to embody can be accommodated in other ways. First, as mentioned, the time limit statutes surely do not prevent a respondent from arguing that its conduct did not violate the relevant regulation in the first place.\textsuperscript{143} In many cases, that defense can give the court latitude to avoid imposing liability, with or without a limiting construction of the regulation. Second, a substantial body of modern court of appeals precedents has established that a respondent in an enforcement proceeding has a due process right not to be subjected to sanctions under a rule that was not sufficiently clear to put it on notice of its potential liability.\textsuperscript{144} Under this doctrine, a respondent can escape

\textsuperscript{142} A possible separate rationale for giving special status to as-applied challenges is that they typically raise issues that are not likely to have been raised by others during the rulemaking process, nor litigated by others during the allowed statutory period. Verkuil may have been hinting at this theory when he suggested that procedural challenges (perhaps in contrast to as-applied statutory challenges) are characteristically likely to have been raised by somebody, even if not by the litigant who wants to contest them after the statutory deadline. The theory of a legislative or rulemaking process is that even if a particular individual was unable to attend and raise objections, others similarly situated will have objected on behalf of those unable to attend as surrogates in interest. Procedural rights in the rulemaking process are not individual, they are general and can be asserted by any persons who appear in the interests of themselves and of those who did not appear. Verkuil, supra note 2, at 756 n.88; see also ACUS Recommendation 82-7, supra note 3, pmbl. (“[Procedural objections] do not ordinarily turn on the situation of a particular individual or entity or on a particular interpretation of the rule and can be raised as well by one party as by another.”). However, the Supreme Court has taken a decidedly skeptical attitude toward assertions that an individual can be “virtually represented” by someone else who has no duty to act in his interests. See Taylor v. Sturgell, 553 U.S. 880 (2008); Richards v. Jefferson Cnty., 517 U.S. 793 (1996). In these civil procedure cases, the Court rejected the idea that a litigant had been virtually represented by someone who had actually litigated the point at issue. It would be even bolder to argue that a defendant in an enforcement action should be foreclosed because of an assumption that his objection would have been raised by a person with similar interests if it had been meritorious.

In any event, the notion that a litigant should be able to overcome a preclusive bar by arguing that few others would have been likely to raise the same issue suffers from the same conceptual problem as does Adamo. Such a notion would not really turn on whether the litigant’s challenge is “facial” as opposed to “as-applied.” Rather, it would turn on whether the litigant is raising a narrow statutory issue as opposed to a broad one. It would be extremely difficult to turn that distinction into a workable test for deciding which issues a time limit statute forecloses.

\textsuperscript{143} See supra note 139 and accompanying text.

\textsuperscript{144} See, e.g., United States v. AMC Entm’t, Inc., 549 F.3d 760, 768-70 (9th Cir. 2008); United States v. Chrysler Corp., 158 F.3d 1350 (D.C. Cir. 1998); United States v. Hoechst Celanese Corp., 128 F.3d 216, 222 (4th Cir. 1997); Upton v. SEC, 75 F.3d 92, 97-98 (2d Cir. 1996); Gen. Elec. Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995).
liability when an agency gives a rule an unexpectedly broad reading, but the rule remains enforceable against subsequent respondents who do not have timely notice of the agency’s interpretation. Finally, as Verkuil explained, a party that is otherwise covered by a rule has the right to petition the agency for a waiver or an amendment of the rule. This proceeding will not necessarily spare the respondent from sanctions for past or continuing conduct, but the court or agency has the option of staying the enforcement action while these parallel agency proceedings are under way.

Should courts conclude that these escape routes still do not provide enough protection to regulated parties who may face liability due to unforeseen and unforeseeable interpretations of regulations, there is room for further doctrinal development. The language in some of the time limit statutes exempting challenges “based solely on grounds arising after” the statutory period could be applied to accord some additional flexibility. Professor Jaffe suggests that this would have been the best solution to the problem in the Yakus case mentioned above.

A generally phrased price control regulation turned out to be a disaster for cattle dealers because of a post-issuance rise in market prices that might not have been foreseeable when the rule was issued. Thus, in his view, an as-applied challenge should have been deemed timely because of the statutory exception. Moreover, even apart from the express statutory language, a number of cases have read an implied exemption into the time limit statutes for respondents that did not have adequate notice of the agency’s interpretation. This line of authority

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145 See, e.g., AMC Entm’t, 549 F.3d at 767; Trinity Broad. of Fla., Inc. v. FCC, 211 F.3d 618, 628 (D.C. Cir. 2000).
146 Verkuil, supra note 2, at 764-71.
148 See supra note 57 and accompanying text.
149 See supra notes 26-27 and accompanying text.
150 LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 450-51 (1965).
151 NextWave Pers. Commc’ns, Inc. v. FCC, 254 F.3d 130, 142 (D.C. Cir. 2001) (“[W]hen an agency leaves room for genuine and reasonable doubt as to the applicability of its orders or regulations, the statutory period for filing a petition for review is tolled until that doubt is eliminated.” (quoting Recreation Vehicle Indus. Ass’n v. EPA, 653 F.2d 562, 569 (D.C. Cir. 1981))); Nw. Tissue Ctr. v. Shalala, 1 F.3d 522, 530-32 (7th Cir. 1993); RCA Global Commc’ns, Inc. v. FCC, 758 F.2d 722, 730 (D.C. Cir. 1985) (“[I]tself-evidently the calendar does not run until the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the rule’s content.”). But see Chevron U.S.A., Inc. v. EPA, 908 F.2d 468 (9th Cir. 1990). This case held that an agency’s initiation of an enforcement action is not itself a changed circumstance that restarts the clock after the statutory appeal period expires. The court also suggested that when such a changed circumstance does exist, the new appeal period should be subject to a new time limit drawn from the most analogous statute of limitations.
IV. AN ASSESSMENT

We have seen that a “common law of preclusion” has indeed grown up around the various statutes that set time limits on efforts to obtain judicial review of rules. The cases have applied a reasonably consistent set of principles to these provisions; decisions reached under one statute are freely cited as persuasive authority on questions arising under another. For any reader who has not already abandoned ship as this Article has plunged through a sea of details in the preceding pages, I will now try to put the array of developments into a broader perspective. This assessment encompasses both the contents of the principles that have emerged and the manner in which the courts have arrived at them.

The principles themselves are not deeply theorized. They reflect a variety of pragmatic judgments and tradeoffs. The lack of elegance, and perhaps even coherence, in the structure of these principles may give rise to concern, but one has to ask what the alternative could have been.

Verkuil’s “constitutional review” paradigm, under which the time limit statutes would be construed to allow the degree of judicial review at the enforcement stage that the Constitution demands, but no more (or only a little more), has not gained traction. One reason may be that there was never a compelling reason to assume that Congress intended for this constitutional minimum to serve as a ceiling on the types of review available under the time limit statutes (although it obviously would serve as a floor). Verkuil himself treated that premise as a kind of presumption about legislative intent, which he defended largely in prudential or functional terms. In that light, the courts seem to have decided that they did not need to resort to the “constitutional review” concept as an organizing paradigm for the operative principles. They could simply endorse those principles on their own terms, using functional rather than conceptual justifications. This was, in effect, what ACUS had endorsed. The presumption approach was especially inviting as applied to those time limit provisions in which the legislative intention to foreclose some judicial review was itself only inferred rather than explicit.

Had the courts wanted to connect their interpretations of these statutes with an ambitious theory of preclusion in the secondary literature, it is not clear where they could have turned. The literature on preclusion is less extensive than what one can find in many other areas of administrative law. More to the point, it typically treats the
presumption of reviewability as a unitary phenomenon. For example, in a prominent article on preclusion in administrative law, Professor Daniel Rodriguez expresses ambivalence about the presumption of reviewability. His reservations are grounded in what he takes to be the judiciary’s limited institutional competence in reading meanings into statutes, as well as the potentially perverse incentive effects of such creativity on the lawmaking process.152 Whatever one thinks about his account on its own terms,153 it is not designed to address the issue of whether the presumption has greater normative force in some regulatory contexts than in others, nor whether some types of issues should be deemed precluded more readily than others. And, of critical importance to this Article, it does not address the distinctive questions raised by a legislative scheme in which full judicial review is available to those persons who seek it immediately after a rule is promulgated, yet withheld from those who seek review later.

In the cognate area of constitutional adjudication, one can find more elaborate academic reflections. The “jurisdiction-stripping” problem has led to a rich debate.154 Within this literature, Professor Richard Fallon has made what may be the most sustained effort to devise a nuanced account that might justify preclusion in some settings but not others.155 In particular, he explores the extent to which Congress is constitutionally obliged to provide for some judicial review of administrative actions, primarily regarding claims of unconstitutional action. To him, that issue is related to a doctrinal trend toward “managerial due process,” whereby the Court has tried to adapt due process principles in a manner that will result in adequate control over the bureaucracy, but not more than that.156 His exegesis incorporates functional arguments that resemble, and in some respects are even drawn from, my own past suggestions regarding a “hierarchy” of issues that may potentially be precluded, with constitutional issues at one end of a spectrum, factual issues at the other end, and questions of the agency’s statutory compliance somewhere in the middle.157 The question is, however, how well this framework could illuminate the precise issues raised by the time limit statutes.

152 Rodriguez, supra note 9, at 751-54, 765-77.
153 For a critique of Rodriguez’s contention that judicial enforcement of the presumption of reviewability may impede legislatures from reaching agreement about, and therefore enacting, regulatory legislation, see Robert K. Rasmussen, Coalition Formation and the Presumption of Reviewability: A Response to Rodriguez, 45 VAND. L. REV. 779 (1992).
154 See supra note 8 and accompanying text.
155 Fallon, Jurisdiction-Stripping, supra note 8.
157 Fallon, Some Confusions, supra note 156, at 333-37, 369.
By Fallon’s lights, the Court’s objective is to employ judicial oversight to evaluate broad policy questions and ensure the basic integrity of an administrative program, while leaving details to the responsible administrators.\textsuperscript{158} By this logic, any statute that would serve to limit judicial review of rules should elicit judicial skepticism, because rules by definition operate at a general level.\textsuperscript{159} In the present context, however, the premise proves too much, because it would allow the time limit statutes to have little if any effect and would thus undercut the fulfillment of congressional objectives that do not seem unreasonable.

On a more specific level, Fallon’s analysis is in harmony with the courts’ tendency to decide that constitutional questions about a rule should escape preclusion and that fact issues should be among the most susceptible of preclusion.\textsuperscript{160} However, he admits that extrapolating from his theories to statutory violations is quite difficult and not well marked by helpful precedent.\textsuperscript{161} Moreover, Fallon’s theories are, once again, designed to consider circumstances in which complete preclusion of review is at issue. They do not readily lend themselves to analysis of statutes that do allow some review, although not necessarily at times when a particular litigant was willing and able to mount a challenge.\textsuperscript{162}

In this unique setting, with strong social values impinging on each side, the emergence of a fairly complex body of pragmatic distinctions should not be surprising. On the whole, these principles have understandable functional justifications, even if they do not cohere into a single model. They strike me as reasonably successful on their own terms.


\textsuperscript{159} Fallon agrees that rules themselves can be shielded from direct review if the regulated person will have a chance to test their legality later. Fallon, Jurisdiction-Stripping, supra note 8, at 1127. But, of course, the very question raised by the time limit statutes is what the minimum dimensions of that opportunity must be.

\textsuperscript{160} In the case of factual issues, the reason to allow preclusion will usually not be that the factual dispute is a low-stakes matter. Many factual questions in, say, environmental rulemaking are momentous and would elicit considerable judicial attention in an appeal commenced within the allowable time limit. The reasons to support preclusion after the time limit will generally have more to do with the potential staleness of the record and the practical problem of requiring the agency to retain it indefinitely.

\textsuperscript{161} Fallon, Jurisdiction-Stripping, supra note 8, at 1132; Fallon, Some Confusions, supra note 156, at 372.

\textsuperscript{162} See supra notes 18-19 and accompanying text (discussing, outside of time limit context, cases in which constitutional challenges to agency actions were “channeled” to an alternative judicial forum).
CONCLUSION

I will conclude with some reflections about underlying theoretical issues. How much of an oxymoron is the “common law of preclusion”? Do courts have any business superimposing a body of background principles of interpretation upon statutes that place time limits on judicial review, when these principles may have very little to do with demonstrable legislative intent?

The approach that the courts have developed in this area fits together fairly easily with statutory interpretation methodologies that emphasize the creation of canons or background norms that serve as default principles of construction. The most prominent recent exposition in this vein is Justice Stephen Breyer’s book, Making Our Democracy Work. Breyer sets forth a purposivist approach that asks what assumptions a reasonable legislator would want ascribed to a statute that needs interpretation. The familiar presumption of reviewability lends itself to this method.

In the case of time limit statutes, that presumption plays a prominent role, but it coexists with countervailing presumptions that give effect to the significant social policies reflected in the congressionally prescribed deadlines. The net result is a “common law” that incorporates both legislative signals (as with the distinction between explicit and implicit preclusion statutes) and functional arguments (as with the distinctions drawn among various types of issues).

The evolution of an orderly approach to preclusion statutes promises a social benefit—that judicial review may be allocated in such a way as to reconcile society’s competing goals of restraining government abuses and expediting the implementation of pressing regulatory programs.

See, e.g., Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 147-59 (1990) (arguing in favor of “interpretive principles for the regulatory state”). Sunstein endorses the presumption of reviewability as one appropriate principle, but only as a general rule. Id. at 218-19.


Time limits may have broader application, even in constitutional litigation. For example, many state constitutions contain excessively detailed requirements for the process by which legislatures enact statutes. Judicial enforcement of these provisions has often led to invalidation of otherwise legitimate statutes for relatively trivial reasons. Almost a century ago, Ernst Freund suggested that this pattern could be ameliorated by imposing time limits on judicial challenges to statutes based on enactment errors. Ernst Freund, Standards of American Legislation
What alternatives do the courts have? One option would be to read congressional time limit provisions completely at face value and impose as little interpretive gloss as possible. That alternative, however, gives little weight to the courts’ tradition of furnishing an independent check on the political branches, a role that has obvious constitutional roots. Yet the latter consideration may also prove too much, because courts’ self-interest may tempt them to overlook some of their own institutional limitations. As between these poles, the intermediate solution implicit in distinctions of the kind offered by Verkuil and ACUS Recommendation 82-7 suggests an appealing method of “making our democracy work.”

In evaluating the potentialities of this methodology, the courts should be wary of allowing the perfect to become the enemy of the good. It might be illuminating to contrast this body of principles with administrative law’s far more fiercely contested doctrines governing standing to sue. The standing doctrines that our tradition has bequeathed to us do not have a strong reputation for conferring the right to sue upon the most qualified challengers or those who file the most socially beneficial lawsuits. The common law of preclusion does not do this perfectly either, but at least it makes a relatively sustained effort to develop criteria that can be defended in functional terms.

Still, the courts should not have to go it alone. On the occasion of the present Festschrift, we should contemplate the possibility that the Administrative Conference might enter the fray again, either recommending further guidelines for congressional action or principles of interpretation. The Conference and its consultant did a good job last time around. If it were to revisit this terrain once more, I am optimistic about what it might accomplish.

152-57 (Univ. of Chi. Press 1965) (1917). This is an area in which “jurisdiction stripping” might look attractive, not just bearable.