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CONGRESSIONAL LIMITATIONS ON JUDICIAL REVIEW OF RULES*

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One of the persistent questions of judicial review is whether and when Congress may preclude or severely restrict access to the courts by those who seek to challenge the validity of administrative action. This issue invokes a rich but perplexing jurisprudence. In its larger context, the problem of legislative usurpation of judicial power is front page material,¹ and the Supreme Court has recently insisted that it and not Congress has the last word in interpreting article III.² The literature and

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1. See 128 Cong. Rec. § 1318 (daily ed. Mar. 2, 1982) (discussion of Helms-Johnston antibusing amendment). See generally Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

2. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2867 (1982) (declaring Congress' grant of bankruptcy jurisdiction to article I judges in violation of the judicial power under article III) (citing *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

decisions dealing with the broad issues overlook, however, the important question of how far Congress can go in regulating the timing or scope of judicial review of administrative rules of general applicability. This study is intended to build the necessary theoretical bridge between the jurisprudence of article III and the problem at hand.

THE PROBLEM POSED

This study begins with principles established and statutes enacted during the 1940s, but it focuses primarily upon regulatory activities in the 1970s. The case that triggered much of the recent activity is *Abbott Laboratories v. Gardner*.³ *Abbott* permitted nonstatutory preenforcement review of rules over objections that the exclusive method of review, intended by Congress, was an enforcement proceeding after a "final order" based on the rule was issued. As if in reaction to this functional expansion of jurisdiction by the Court over administrative rulemaking, Congress created in the 1970s a series of agency jurisdictional statutes that turned *Abbott* full circle by limiting judicial review to the preenforcement stage. Thus, Congress gave the Court what it appeared to want—early opportunity to review the validity of rules. But Congress, by making the early route exclusive, attempted once again to maintain its power to control the timing of access to the courts as it had successfully done in pre-*Abbott* days.⁴

The prototype statutes contain an explicit preenforcement review "statute of limitations" that restricts appeals from rules to sixty or ninety days after promulgation. This grant of preenforcement judicial review is followed by a section which states that "[a]ction of the Administrator with respect to which review could have been obtained [at the preenforcement stage] shall not be subject to judicial review in civil or criminal proceedings

3. 387 U.S. 136 (1967).

4. Justice Fortas, in his dissent in *Abbott* and *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967), emphasized that the Court had opened "Pandora's box" by permitting "free-wheeling" preenforcement nonstatutory review and suggested that Congress was clearly within its power to limit such review. *Id.* at 176-77. Though Congress gave no hint that it had based its subsequent limitation of enforcement review statutes on this dissent, much in the Fortas opinion certainly supports the course Congress subsequently followed.

for enforcement.”⁵ A larger group of statutes provides for time limited preenforcement review, but does not explicitly forbid review at the enforcement stage.⁶

Both the explicit and implied limitation of review situations have troubled the courts deeply and as a result have produced confused and often contradictory decisions.⁷ Moreover, other rulemaking review statutes, far less explicit in their treatment of preenforcement review, could be affected by the significance attached to the two principal statutory formulations under study.⁸ The Supreme Court has so far proceeded cautiously in evaluating the prototype statutes, but addressing the fundamental issues is likely to become necessary.⁹ The Administrative Conference of the United States has already stated in a general way its reservations about limiting review to the preenforcement stage.¹⁰ Continuing legislative activity warrants a further study focusing

5. The Federal Water Pollution Control Act, §§ 509(b)(1) & (2), 33 U.S.C. §§ 1369(b)(1) & (2) (1976) (90 days). Similar provisions are contained in the Clean Air Act, §§ 307(b)(1) & (2), 42 U.S.C. §§ 7607(b)(1) & (2) (1982) (60 days), and the Noise Control Act, § 16(a), 42 U.S.C. § 4915(a) (1976) (90 days). See *NRDC v. EPA*, 673 F.2d 400, 406 (D.C. Cir. 1982) (labeling the Clean Water Act provision a “ninety day ‘statute of limitations’”).

6. See, e.g., Occupational Safety and Health Act, § 6(f), 29 U.S.C. § 655(f) (1976), which provides that: “Any person who may be adversely affected by a standard . . . may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard.” Other examples are collected in Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 Duke L.J. 279, 300-05 [hereinafter cited as Davis, *Judicial Review*].

7. See, e.g., *Daniel Int’l Corp. v. OSHRC*, 656 F.2d 925 (4th Cir. 1981); *Chrysler Corp. v. EPA*, 600 F.2d 904 (D.C. Cir. 1979); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240 (2d. Cir. 1977).

8. These statutes either provide for review of rules without any time limits or are silent on the question of review. See *infra* notes 69-72 and accompanying text.

9. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), narrowly construing a provision of the Clean Air Act to avoid the preclusion of enforcement review (and for Justice Powell at least the due process issue such preclusion presented, *id.* at 291). Congress has amended the Clean Air Act to make more difficult the Court’s statutory construction avoidance scheme. See Clean Air Act, § 307(b)(1), 42 U.S.C. § 7607(b)(1) (Supp. I 1977). See 434 U.S. at 305 n.24 (Stevens, J., dissenting). See generally T. Schoenbaum, *Environmental Policy Law* 909-10 (1982).

10. See Administrative Conf. of the United States, *Recommendation on Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act* (codified at 1 C.F.R. § 305.76-4 (1976)) [hereinafter cited as ACUS Rec. 76-4], suggesting amendments to the Clean Air Act and the Federal Water Pollution Control Act to permit the “validity” of a regulation to be challenged on an enforcement proceeding. In preparing its recommendation, the Conference substantially relied upon the work of its consultant, Professor David Currie. See Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1254-61 (1977).

specifically upon the constitutional aspects of forestalling judicial determination of controversies about the validity of rules.

CONSTITUTIONAL CONSTRAINTS ON CONGRESSIONAL PRECLUSION OF JUDICIAL REVIEW

No clear guideposts establish the limits on congressional power to preclude review, or drastically to curtail its exercise.¹¹ A good attempt to set some constitutional "maximum" and "minimum" limits on judicial review was made by the 1941 Attorney General's Report on Administrative Procedure in Government Agencies.¹² The maximum limit prevented a court under article III from exercising legislative powers by substituting its judgment for that of an agency. The minimum limit, also under article III, prevented an agency or other non-article III court from adjudicating without active review by constitutional courts.¹³ But the Report conceded that "the exact location of these limits is subject to controversy" and that, between them, "there is a considerable area for legislative discretion in granting or withholding the right of judicial review."¹⁴

The constitutional source of objections to denial of judicial review comes not only from the judicial power described in article III, but also from the doctrine of separation of powers and the fifth amendment due process clause. These three provisions interrelate to form the limits upon Congress' power to restrict judicial review of agency decisionmaking. To measure them one has to look at some of the attempts to limit judicial review over

11. Henry Hart's classic formulation is that congressional exceptions to federal court jurisdiction must not "destroy the essential role of the Supreme Court in the constitutional plan." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1364-65 (1953). In the present context, the inquiry, phrased in Professor Hart's terms, is when is judicial review over federal administrative rules and their related enforcement proceeding part of the Court's essential role. This focus on the Court's essential role forces one to distill judicial review down to the part that is basic to constitutional review.

12. United States Attorney General's Comm. on Admin. Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), *reprinted in* Administrative Procedure in Government Agencies (U. Va. Press reprint 1968) [hereinafter cited as Admin. Proc. in Gov't Agencies].

13. *Id.* at 79-80. This minimum limit received dramatic illumination in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), when the Court held that the Bankruptcy Reform Act of 1978 unconstitutionally delegated article III judicial business to article I bankruptcy courts.

14. Admin. Proc. in Gov't Agencies, *supra* note 12, at 79-80.

the years.

Congressional Preclusion of Review

Congress and the Court have long played a cat and mouse game over preclusion of review of administrative action. Clearly the Court will retain the jurisdiction to decide whether a particular preclusion statute is effective,¹⁵ but equally clearly the Court will frequently accept the limitations on review Congress seeks to impose. The classic situations have been those involving the draft, exclusion of aliens, and the Veterans Administration,¹⁶ but statutory preclusion of review has been upheld in many other contexts.¹⁷ The proposition these situations pose is that judicial review may be severely circumscribed or terminated altogether when there are compelling countervailing interests in swift and final administrative resolution.

These statutes have been honored by the Court only to a point, however. When the issue sought to be foreclosed from judicial consideration is of constitutional magnitude, the Court has often strained to protect its fundamental reviewing role even while nodding in the direction of congressional power. To avoid a constitutional confrontation, the Court assumes that Congress did not intend a preclusion of review provision to deny the Court the power of constitutional review. In *Johnson v. Robinson*,¹⁸ for example, the Court held that an equal protection claim of a conscientious objector denied benefits was directed not at judicial review of the Veterans Administration, which would be barred by statute, but at constitutional review of Congress' power to enact discriminatory legislation, which Congress would

15. See Sager, *supra* note 1, at 26-27.

16. 50 U.S.C. app. § 460(b)(3) (1976) (selective service system classification review limited to no basis on fact); 8 U.S.C. § 1105a(b) (1976) (review of INS exclusion order limited to habeas corpus proceedings); 38 U.S.C. § 211(a) (1976) (VA determination nonreviewable).

17. See, e.g., Micronesian Claims Act of 1971, 50 U.S.C. app. § 2020 (1976). Forty examples of statutory preclusions of review are collected in Sedivic, *Congressional and Judicial Limitations on the Reviewability of Certain Administrative Decisions Taken Pursuant to Authority Delegated by Congress*, at Appendix (Oct., 1980) (unpublished ACUS paper).

18. 415 U.S. 361 (1974). *But see* *Weinberger v. Salfi*, 422 U.S. 749 (1975) (Court precluded even constitutional review under 42 U.S.C. § 405(h) on the grounds that, unlike the VA statute, other jurisdictional avenues were statutorily available under the Social Security Act).

not have meant to foreclose. Similarly, other courts have interpreted preclusion of review statutes as not aimed at preventing judicial consideration of claims asserted under the due process clause.¹⁹ As a result, due process has become a principal tool of constitutional review of administrative action, and it has been employed by the courts in a variety of ways to secure review in situations where statutes ostensibly preclude it.²⁰

By drawing a distinction between ordinary judicial review and review premised on the Constitution and by implying Congress' acquiescence in the distinction, the Court has preserved its role in the constitutional plan, allowed Congress some leeway to shape its priorities, and avoided confrontation with Congress over the scope of article III.²¹ A dual standard of review has emerged: the Court will respect Congress' decision to preclude judicial review so long as Congress has respected the Court's role in the constitutional plan. Indeed, once the Court is sure of its ground, it is even occasionally willing to imply congressional preclusion of review.²²

Assertion of a dual system of review, however, only begins the inquiry; obviously the more formidable task is to identify the parameters of ordinary judicial review and judicial review with constitutional overtones. As part of that analysis, however, it must be considered whether congressional alternatives to

19. In *Ralphy v. Bell*, 569 F.2d 607, 625-26 (D.C. Cir. 1977), the court held that the preclusion of review provision of the Micronesian Claims Act of 1971, 50 U.S.C. app. § 2020 (1976), "prohibits review in the usual case," but "does not forestall judicial cognizance of [com]plaints that the Commission has disregarded unambiguous statutory directives or . . . constitutional commands." A comparable due process approach has occurred in VA preclusion cases as well. See, e.g., *Plato v. Roudebush*, 397 F. Supp. 1295 (D.C. Md. 1975); *Holley v. United States*, 352 F. Supp. 175 (S.D. Ohio 1972), *aff'd*, 477 F.2d 600 (6th Cir. 1973).

20. The due process inquiry is usually related to procedures provided in administrative adjudication, but challenges to administrative action as *ultra vires*, usually thought to be of less than constitutional stature, recently have been held to be due process based. See *Wayne State Univ. v. Cleland*, 440 F. Supp. 806 (E.D. Mich. 1977), *aff'd in part*, 590 F.2d 627 (6th Cir. 1978); *infra* text accompanying notes 73-76.

21. Where constitutional review is not at stake, the Court has often been generous in honoring preclusion of judicial review statutes. See *Briscoe v. Bell*, 432 U.S. 404 (1977), *vacating* *Briscoe v. Levi*, 535 F.2d 1259 (D.C. Cir. 1976).

22. See *Morris v. Gressette*, 432 U.S. 491 (1977) (implying preclusion of review of a decision by the Attorney General under the Voting Rights Act); *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943) (NLRB and courts without jurisdiction to review mediation board's decision, because Congress wished to avoid "dragging out" the controversy).

strict preclusion of judicial review should or do make a difference in the Court's determination to assert its constitutional review role.

Congressional Limitations on Review

Congress is not unaware of the due process implications of its actions and therefore it has occasionally compromised between wide-open judicial review and absolute preclusion of judicial review by limiting review narrowly in time. This compromise is of course the situation with the Clean Air Act and related statutes that are the focus of this study.

This compromise is drawn from one of the classic congressional attempts to expedite review during World War II. Under the Emergency Price Control Act of 1942, Congress provided that wartime price regulations could be challenged only by an action in the Emergency Court of Appeals brought within sixty days after the regulations were promulgated.²³ *Yakus*, who failed to avail himself of the statutory review procedure, was charged in a criminal enforcement proceeding with violating the maximum price regulations, and he sought to challenge their issuance in that proceeding. In *Yakus v. United States*²⁴ his challenge was held barred by the limitation of review provision on the ground that it provided an "adequate" alternative to conventional judicial review.²⁵ The continued vitality of this decision has been questioned by commentators²⁶ and recently by a member of the Court itself²⁷ because of its wartime emergency context. Yet it is difficult to ignore the case, because it serves as the obvious model for the prototype statutes under study. One therefore is compelled to study *Yakus* carefully to see if it can be sustained in a broader context.

Admittedly, Justice Rutledge's emphatic dissent in *Yakus* makes one uneasy about unhesitatingly applying the case to the present controversy. He phrased the issue for decision as follows:

23. Emergency Price Control Act, § 204(d), 50 U.S.C. § 924 (1944) (repealed 1947).

24. 321 U.S. 414 (1944).

25. *Id.* at 446.

26. See Currie, *supra* note 10, at 1255-57 (noting that Congress repealed the controversial legislation in 1947).

27. See *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290-91 (1978) (Powell, J., concurring); *Harrison v. PPG Indus.*, 446 U.S. 578, 594 (1980) (Powell, J., concurring).

"The question narrows therefore to the inquiry, in what circumstances and under what conditions may Congress, by offering the individual a single chance to challenge a law or an order, foreclose for him all further opportunity to question it, though requiring the courts to enforce it by criminal processes?"²⁸ Two aspects of the case particularly troubled Justice Rutledge. Criminal proceedings and sanctions could be imposed while appeal of the regulation's validity was pending in the Emergency Court of Appeals. And as he read the majority opinion, it foreclosed review of constitutional claims in the criminal enforcement proceeding.²⁹ The majority opinion in *Yakus* was written by Chief Justice Stone. A close reading of his opinion shows that he expressed reservations for the Court that appeared to meet Justice Rutledge's objections. The Chief Justice stated:

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid.³⁰

Thus to some extent Justice Rutledge's concerns were addressed, albeit not to his satisfaction, in the majority opinion itself.

Moreover, in 1944 Congress amended the Emergency Price Control Act (EPCA) to permit appeals to the Emergency Court of Appeals from enforcement proceedings when findings showed a reasonable and substantial excuse for failing to file a protest against the underlying regulation.³¹ This "subsequent history" provides a greater assurance that *Yakus* would be accepted today.³²

28. 321 U.S. at 471.

29. *See id.* at 475-76, 478-79.

30. *Id.* at 446-47.

31. *See Hyman & Nathanson, Judicial Review of Price Control: The Battle of the Meat Regulations*, 42 Ill. L. Rev. 584, 623-24 (1947).

32. Consider Professor Sager's recent analysis of *Yakus*: "The Court avoided possible constitutional difficulties when it construed the Act to permit criminal defendants to challenge the validity of the Act itself. *Yakus*, 321 U.S. at 429-30. The worst of the Act's difficulties were thus avoided." Sager, *supra* note 1, at 19 n.6. This analysis leaves unaddressed, however, Justice Rutledge's dissenting point that "[c]learly Congress could not

Yakus, read with Chief Justice Stone's reservations and the 1944 amendment, should not be lightly dismissed. First, the reason the EPCA was repealed in 1947 was not, as some commentators have stressed,³³ that Congress believed it to be an aberrational and perhaps regrettable exercise. The primary and obvious reason was that the war was over and price control legislation was no longer needed. If Congress felt embarrassed by the EPCA solution it probably would not have added a sentence to the Administrative Procedure Act in 1946 (the year before it repealed the EPCA) that endorsed the same limitation of enforcement review scheme for agencies generally.³⁴

Second, the regulatory problem Congress sought to deal with in a special way by the EPCA solution is not limited solely to wartime price administration. There the difficulty was to achieve a fast, final, and uniform resolution of a national standard for price control: hence, the centralized court (Emergency Court of Appeals) and the short time for review of regulations. But conditions that require such limited review frequently occur in our society in non-wartime situations.³⁵

Thus, the narrow enforcement review provisions of the EPCA have been emulated by Congress in other contexts. In fact, if one takes the prototype statutes into account, it is a fair inference that Congress has regularly employed the technique of limited judicial review as a method of expediting important decisions. A good recent example is the Trans-Alaska Pipeline Authorization Act, which reads in relevant part:

[T]he actions of the Federal officers concerning the issuance of the necessary rights-of-way, permits, leases, and other authorizations for construction and initial operation at full capacity of

require judicial enforcement of an unconstitutional statute. The same is true of an unconstitutional regulation." 321 U.S. at 469 (Rutledge, J., dissenting). See J. Choper, *Judicial Review and the National Political Process* 390-92 (1980).

33. See Currie, *supra* note 10, at 1255-57.

34. Section 703 of the APA provides in its last sentence: "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." 5 U.S.C. § 703 (1976). The legislative history of the APA leaves little doubt that this sentence, which incorporates the "adequacy" standard of *Yakus*, was added to account for the possible reappearance of the EPCA judicial review solution in other statutes. See Attorney General's Manual on the Administrative Procedure Act 99 (1947).

35. See, e.g., *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

said pipeline system shall not be subject to judicial review under any law except that claims alleging the invalidity of this section may be brought within sixty days following November 16, 1973, and claims alleging that an action will deny rights under the Constitution of the United States, or that the action is beyond the scope of authority conferred by this chapter, may be brought within sixty days following the date of such action. A claim shall be barred unless a complaint is filed within the time specified.³⁶

This draconian provision for limiting judicial and constitutional review has so far gone unchallenged,³⁷ although one has to wonder what would happen if a serious constitutional claim were raised after the sixty days had expired.³⁸

These examples indicate that time limited exclusive review provisions, at least in circumstances where Congress has made findings of the need for expedition, uniformity, and finality, are acceptable methods for rationing access to the courts. Moreover, they are distinguishable from preclusion of review statutes precisely because of the limited opportunity for judicial review. Undoubtedly, in the total preclusion of review situation, the Court is at greater pains to preserve its constitutional role. Thus the Court will more readily defer to Congress even on constitutional matters where there is a statute limiting rather than precluding rulemaking review, although Chief Justice Stone's reservations in the *Yakus* case caution against a total denial of subsequent constitutional review.³⁹ Presumably, however, one is on safe ground in assuming that those issues on judicial review that may be subject to total preclusion should certainly be at least equally

36. 43 U.S.C. § 1652(d) (1976).

37. Cf. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 638-39 n.17 (1978) (construing preclusion of review of suspension orders so as to exclude challenges to ICC rulemaking authority).

38. See Note, *Congressional Power Over State and Federal Court Jurisdiction: The Hill-Burton and Trans-Alaska Pipeline Examples*, 49 N.Y.U. L. Rev. 131 (1974).

39. Consider *Califano v. Sanders*, 430 U.S. 99, 109 (1977), where the Court upheld a denial of jurisdiction to challenge an action of the Secretary because of the 60-day limitation of section 205(g) of the Social Security Act. The Court observed, however, that this was not one of those "rare instances" when "the claimants challenged the Secretary's decision on constitutional grounds." The Court restated the "well-established principle that when constitutional questions are at issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." (citing *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); quoting *Johnson v. Robison*, 415 U.S. 361, 366-67 (1974)).

subject to narrowly circumscribed review.

THE DIFFERENCES BETWEEN CONSTITUTIONAL REVIEW AND ORDINARY JUDICIAL REVIEW IN THE RULEMAKING CONTEXT

Isolating the constitutional content of judicial review of administrative action to determine whether and to what extent to give effect to preclusion or limitation of review statutes is no easy matter. Even the courts themselves occasionally take opposing views on what kind of review is or is not mandated by the Constitution. Indeed, the Chief Justice of the United States has taken the extraordinary step of recommending that Congress explicitly deny judicial review over a federal administrative action.⁴⁰ This action led the Court to introduce, in cryptic fashion, the distinction between review premised on the Constitution and ordinary judicial review.⁴¹ The distinction, especially as it relates to review of rulemaking, lies at the heart of this study.

If a substantive provision of the Constitution, such as the first amendment or the equal protection clause, has been violated, then review is commanded as an element of due process even in the face of congressional restrictions.⁴² In these circumstances the Court's primary role as interpreter of the Constitution is being challenged and the justices are unlikely to allow the challenge to remain unmet. As Justice Brandeis said: "[U]nder certain circumstances, the constitutional requirement of due process is a requirement of judicial process."⁴³

40. In the famous Three Sisters Bridge litigation, the District of Columbia lower federal courts kept enjoining construction of the bridge because of the failure of the Secretary of Transportation to comply with various procedural requirements even after Congress had passed a statute ostensibly precluding review. See 23 U.S.C. § 23(b) (1968); *D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970).

41. In a concurrence to the denial of certiorari in the Three Sisters Bridge case (in order not further to delay the project), Chief Justice Burger wrote (in part): "In these circumstances Congress may, of course, take any further legislative action it deems necessary to make unmistakably clear its intentions with respect to the project, even to the point of limiting or prohibiting judicial review of its directives in this respect." *Volpe v. D.C. Fed'n of Civic Ass'ns, Inc.*, 405 U.S. 1030, 1031 (1972). The last three words were added after the unofficial version was published (92 S. Ct. 1290, 1291 (1972)) (Burger, C.J., concurring) apparently to avoid any implication that the Court was suggesting that constitutional review might be eliminated. See Strong, *Three Little Words and What They Didn't Seem to Mean*, 59 A.B.A. J. 29 (1973).

42. This is the message of *Johnson v. Robison*, 415 U.S. 361 (1974). See also Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1250 (1982).

43. *Crowell v. Benson*, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).

The due process clause can also be invoked to mandate review of decisionmaking procedures. Here constitutional review encompasses the requirement of procedural regularity. Thus, for example, a criminal record totally devoid of evidentiary support would be upset on review because it violates the procedural minimum assured by due process.⁴⁴ But this standard of constitutional review is harder to apply in the administrative setting, especially where the subject of review is an administrative rule.

Constitutional Rights in Administrative Procedures

The due process clause ensures that some administrative decisions bearing on liberty and property are subject to constitutional review to assess whether the procedure that underlies them comports with due process.⁴⁵

The best known statement of the courts' role in procedural due process review is again that of Justice Brandeis:

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command.⁴⁶

44. See *Vachon v. New Hampshire*, 414 U.S. 478 (1974); *Harris v. United States*, 404 U.S. 1232 (1971); *Thompson v. Louisville*, 362 U.S. 199 (1960).

45. "[W]hen a person is the object of an administrative order which will be enforced by a writ levying upon his property or person, he is at some point entitled to a judicial test of legality." L. Jaffe, *Judicial Review of Administrative Action* 384 (1965) (emphasis omitted). The problem of deciding upon the content of due process procedures becomes more complicated when so-called "new property" rights are at stake both because of the difficulty in defining liberty and property and because of the balancing process engaged in by the court to define the nature of the procedures to be employed. See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977); *Stewart & Sunstein*, *supra* note 42, at 1266-67; see also L. Jaffe, *supra*, at 386-88.

46. *St. Joseph Stock Yards, Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). See also Force, *Administrative Adjudication of Traffic Violations Con-*

The crux of this formulation is that when an administrative proceeding adjudicates facts its procedural regularity must be reviewable under the due process clause. This review would encompass questions like adequacy of notice, hearing procedures, creation of a record for decision, and neutrality of the decisionmakers.

Conversely, when the agency is not adjudicating in the traditional sense, there are no comparable constitutional constraints on the regularity of procedures. This lack of traditional constraints has been the case with administrative rulemaking.⁴⁷ It is also the case with other administrative actions that do not jeopardize even broadly defined individual liberty or property interests, such as informal administrative decisions on the expenditure of funds.⁴⁸ In these contexts—particularly rulemaking—there is at present no constitutional right to review the procedures employed.⁴⁹ As a result, a participant dissatisfied with the procedures provided in an informal rulemaking proceeding will have only statutory forms of review to rely on and these forms of review may be precluded by Congress. If Congress does limit judicial review of rules, as it has done in the prototype statutes herein discussed, there is little of constitutional moment in that decision from the procedural perspective.

fronts the Doctrine of Separation of Powers, 49 Tul. L. Rev. 84, 97-99 (1974).

47. See *Opp Cotton Mills, Inc. v. Administrator of Wage & Hour Div.*, 312 U.S. 126 (1941); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). *But see infra* note 49 and accompanying text.

48. The kind of administrative action engaged in by Secretary Volpe in the Three Sisters Bridge project is of this nature. See *supra* notes 40-41. Other examples would include the kind of informal action engaged in by the Secretary of Transportation approving highway funds in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). *But see* *D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe*, 434 F.2d 436, 439-44 (D.C. Cir. 1970) (Judge Wright discussing whether any constitutional rights were at stake). It should be recalled that shortly after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), established the primacy of constitutional review, Congress legalized the construction of a bridge the Court had declared illegal under prior law. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32 (1856). See L. Tribe, *American Constitutional Law* § 3-5, at 39-40 (1978).

49. Some cases in the public housing context have raised procedural due process issues by blurring the distinction between rulemaking and adjudication, but the idea of a unitary procedure for informal adjudication has not been generally accepted. See *Thompson v. Washington*, 497 F.2d 626 (D.C. Cir. 1973); see also Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258, 291-92 (1978).

The Constitutional Content of Judicial Review of Rules

Assuming then that there is no need to worry about constitutional review of the procedural format of rulemaking, the question remains what, if any, constitutional rights are there to review the rationality of the rule itself, once it is promulgated. Although the days of the constitutional and jurisdictional fact doctrine of *Crowell v. Benson*⁵⁰ and related cases have passed, these cases are still the place to begin in attempting to identify the scope of review mandated by due process. By requiring *de novo* review of facts supporting jurisdiction and deprivations of liberty and property, *Crowell* came close to subjecting all administrative decisions to constitutional review, a point Justice Brandeis made in dissent.⁵¹ But *Crowell* is best explained in the context of its times: the substantive due process era.⁵² Constitutional fact review was a natural outcome for a Court that utilized substantive due process and the nondelegation doctrine as a means of controlling the growth of administrative agencies. Once that era ended, much of the strict constitutional scrutiny accorded administrative decisions ended with it.⁵³

Today the Court seems quite comfortable with the usual forms of review Congress provides under the APA or organic legislation, and no question arises over the adequacy of that review for constitutional purposes. Moreover, the APA sets limits on its scope of review formulae that distinguish between constitutional and judicial review in a useful way.⁵⁴ Thus section 706(2)(B) authorizes a reviewing court to set aside agency action found to be "contrary to constitutional right, power, privilege, or immunity,"⁵⁵ while the other sections deal with review of action that is

50. 285 U.S. 22 (1932). The present relevance of *Crowell* was emphasized recently in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), where the Court relied on *Crowell's* "recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution," *id.* at 2877-78, in deciding that Congress' establishment of expansive bankruptcy court jurisdiction over bankruptcy claims violated article III. The *Northern Pipeline* Court stated that *Crowell's* precise holding concerning constitutional and jurisdictional facts had been undermined, but not its general principles of constitutional review. *Id.* at 2877. See also Strong, *The Persistent Doctrine of Constitutional Fact*, 46 N.C.L. Rev. 223 (1968).

51. 285 U.S. at 86-87.

52. See *supra* note 50.

53. See *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

54. 5 U.S.C. § 706(2) (1976).

55. *Id.* § 706(2)(B).

arbitrary and capricious, in excess or short of statutory jurisdiction, without required procedure, or unsupported by substantial evidence.⁵⁶

Although under the APA plan each of these provisions may be rendered inapplicable,⁵⁷ the provisions create an effective way for differentiating between constitutional review and statutory review. The reviewing court's power under section 706(2)(B) is part of the APA's design to catalogue the standards of review existing at the time it was enacted.⁵⁸ Since section 706(2)(B) deals with constitutional review, it suggests that the other scope of review provisions (or most other variations created by the common law of judicial review⁵⁹) are beyond the level of review mandated by the Constitution.

This analysis further suggests that there may be a standard of constitutional review of the validity of rules that is separate from—and presumably narrower than—the arbitrary and capricious review provision usually applicable to rulemaking review. But the content of this constitutional review of rules, required in the event of a statutory nonreviewability provision nullifying the arbitrary and capricious standard, is not articulated in the APA. One must look elsewhere for the content of constitutional review. Such review may be much like the kind of review it most emulates: the constitutional review of statutes.⁶⁰ This would mean that rationality review, which upholds statutes if there is any reason that may be inferred from their issuance, is all that constitutional rulemaking review requires. Justice Brandeis

56. *Id.* §§ 706(2)(A)-(E). Subsection (F) limits *de novo* review to situations in which it is called for by statute, thereby impliedly rejecting the *Crowell* approach to constitutional review.

57. *Id.* Section 701 states that the judicial review chapter applies, except for statutes that preclude judicial review or agency action that is committed to agency discretion by law.

58. It is difficult to think of any scope of review formulation that was left out at the time the APA was drafted. In drafting § 706 (§ 10(e) of the original APA), Congress relied upon a careful outline of the judicial review alternatives that was provided in the influential 1941 Attorney General's Report. See Admin. Proc. in Gov't Agencies, *supra* note 12, at 83-92.

59. The "hard look" doctrine is one such common law doctrine of review. See W. Gellhorn, C. Byse & P. Strauss, *Administrative Law—Cases and Comments* 343-50 (1979); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. Pa. L. Rev. 509 (1974); Stewart & Sunstein, *supra* note 42, at 1253-55.

60. Justice Rutledge drew a similar conclusion in his *Yakus* dissent, 321 U.S. at 469 (Rutledge, J., dissenting), *quoted supra* at note 32.

phrased this standard of review for a unanimous Court in *Pacific States Box & Basket Co. v. White*, as follows: "Where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies."⁶¹ The fact that Brandeis' *Pacific States Box* formula for review has been rejected as too narrow in recent APA review cases only reinforces its appropriateness as the standard for constitutional review of rules.

One might ask what difference a substitution of verbal formulae for review of rules actually makes. The fact is, however, that the light form of constitutional review scrutiny has important consequences that distinguish it from the arbitrary and capricious standard.⁶² The critical difference is that it dispenses with the obligation to determine if there is factual support for the rule in the rulemaking file. As a result, this kind of review is significantly less demanding than arbitrary and capricious or substantial evidence review as these terms have come to be interpreted.⁶³

Another aspect of constitutional review of rules involves the determination whether they (like statutes) are properly applied to a respondent in an enforcement proceeding. In the statutory context, constitutional review will lie where there is no basis in fact for applying the statute to a particular respondent. The same kind of review should obtain over rules as a matter of due process protection.⁶⁴ There is no reason to accept misapplication

61. 296 U.S. 176, 186 (1935).

62. Professor Davis has recently stated that the Brandeis formulation in *Pacific States Box* may have been an accurate description of judicial review of rules until 1970. K. Davis, *Administrative Law Treatise* § 29.00-1, at 529 (2d ed. Supp. 1982). Since then, of course, the arbitrary and capricious standard has been read to impose a record requirement on rulemaking. But this still leaves *Pacific States Box* as an adequate description for constitutional review of rules, since it equates review of rules with review of statutes. See L. Tribe, *supra* note 48, § 8-7.

63. It may be difficult to accept that an arbitrary and capricious rule could still be constitutional, but it should be remembered that the arbitrary and capricious standard has become one that demands factual support, much like substantial evidence review. See *Associated Indus. v. Department of Labor*, 487 F.2d 342 (2d Cir. 1973) (Friendly, J.). Also it is possible conceptually for an arbitrary rule to be committed to agency discretion. See K. Davis, *supra* note 62, § 28.16.

64. See *Estep v. United States*, 327 U.S. 114 (1946) (permitting a defendant in a criminal prosecution to attack a "final" draft classification decision on the ground that there was "no basis in fact" for the decision and therefore it was outside the draft

of a rule to a respondent's conduct in circumstances where one would not accept comparable misapplication of a statute.

As a practical matter, however, this kind of "as applied" challenge in enforcement proceedings is rarely couched in constitutional terms. In most situations a court will simply refuse to apply a rule to a respondent if there is substantial doubt as to its intended reach.⁶⁵ Occasionally, a court will utilize this technique as a method for avoiding the application of a preclusion of review provision. In *Adamo Wrecking Co. v. United States*,⁶⁶ the Court found that the statutory enforcement preclusion provision reached only "emissions standards" but not "work practice standards" and that respondent's conduct in fact violated only the latter kind of standard.⁶⁷

Undeniably, the use of "as applied" challenges to rules opens up the widest avenue for challenge in enforcement proceedings and creates the greatest potential for disrupting the agency's enforcement strategy.⁶⁸ Nevertheless, as a jurisprudential matter, there is little doubt that such challenges, especially in criminal proceedings, but probably more generally, are constitutionally necessary.⁶⁹

If statutes preclude review of rules entirely there is a residuum of constitutional review that cannot be erased, despite lan-

board's jurisdiction).

65. For example, in *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n*, 681 F.2d 1189 (9th Cir. 1982), the court simply refused to apply a rule to respondent in an enforcement proceeding, because in the court's view the rule failed to give respondent "fair warning" that the challenged conduct was prohibited.

66. 434 U.S. 275 (1978).

67. *Id.* at 286-87.

68. See, e.g., *KCMC, Inc. v. FCC*, 600 F.2d 546 (D.C. Cir. 1979) (interpreting an FCC divestiture regulation to exclude, on its face, application to respondent). Justice Rehnquist in his *Adamo Wrecking* opinion acknowledged that "district courts will be importuned, under the guise of making a determination as to whether a regulation is [properly applied to the respondent] to engage in judicial review in a manner that is precluded by [the Clean Air] Act." His only response was: "This they may not do." 434 U.S. at 285.

69. In *Adamo Wrecking*, the Court emphasized the importance of construing the application of the enforcement review preclusion statute carefully because the proceedings were criminal in nature. See 434 U.S. at 283-84. It should be recalled that Justice Rutledge premised much of his dissent in *Yakus* upon the criminal nature of the enforcement proceedings. 321 U.S. at 468 (Rutledge, J., dissenting). He was much less concerned about the due process issues surrounding the EPCA when civil proceedings were involved. See *Bowles v. Willingham*, 321 U.S. 503, 525-26 (1944) (Rutledge, J., concurring).

guage in the APA or organic legislation. This is the message of *Johnson v. Robison* and related cases that interpret congressional enactments to imply substantive constitutional review despite what appears to be clear preclusion language. Moreover, the courts will continue to permit respondents to question the applicability of a rule to their conduct as an aspect of procedural due process, whether or not such challenges are phrased in due process terms.

When the situation shifts from absolute preclusion to limitation of review to the preenforcement stage, however, a strict reading of *Yakus* suggests that even the constitutional component of judicial review can be eliminated, so long as the opportunity to raise constitutional issues at the preenforcement stage is adequate. However, there is resistance—including reservations contained in *Yakus* itself and reflected in subsequent amendments to the EPCA—to the elimination of constitutional review as herein defined at the enforcement stage. But one must concede that Congress has on occasion successfully limited the time frame or the forum within which constitutional issues can be raised.⁷⁰ The most that can be said is that statutes that seek drastically to limit or channel constitutional review of rules in enforcement proceedings bear a heavy burden of justification before the Court.

What then has been gained by this exercise of delineating between constitutional review and ordinary judicial review? A good starting point is the following dictum by Justice Rehnquist in *Adamo Wrecking*:

The narrow inquiry to be addressed by the court in a criminal prosecution is not whether the Administrator has complied with appropriate procedures in promulgating the regulation in question, or whether the particular regulation is arbitrary, capricious, or supported by the administrative record. Nor is the court to pursue any of the other familiar inquiries which arise in the course of an administrative review proceeding. The question is only whether the regulation which the defendant is alleged to have violated is on its face an "emission standard"

70. See the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1976), reprinted *supra* at text accompanying note 36. See also *American Ass'n of Councils of Medical Staffs of Private Hosps., Inc. v. Califano*, 575 F.2d 1367 (5th Cir. 1978) (finding both statutory and constitutional claims foreclosed by § 405(h) of the Social Security Act), *cert. denied*, 439 U.S. 1114 (1979).

within the broad limits of the congressional meaning of that term.⁷¹

As this language suggests, limitation of judicial review of rules to the preenforcement stage will be effective to deny procedural review and substantive judicial review since, under the analysis suggested here, no constitutional claims are presented by those aspects of review. But challenges to a rule or statutory term "as applied" to a defendant will survive any attempt to preclude them for reasons that are due process based. *Adamo Wrecking* is not a constitutional review case, but Justice Rehnquist's analysis suggests that constitutional issues will remain in the background only so long as the Court has the flexibility to construe the scope and application of statutory terms so as to avoid direct confrontation with Congress over the scope of judicial power.

The Status of Ultra Vires and Other Legal Challenges to Rules

There remains a troubling middle ground relating to the survival of purely legal claims in the preclusion or limitation context. Certainly some legal claims are not of constitutional stature. The distinctions between fact and law and the application of fact to law are sufficiently elusive concepts that one would expect it to matter greatly how they were treated in the preclusion context.⁷² These claims would ordinarily be foreclosed by a preclusion or limitation of review provision. Other legal issues, however, though still strictly speaking not of constitutional magnitude, nonetheless have been construed by some courts to survive attempts to preclude them. This result is most notable with *ultra vires* challenges.

There is no question today that most courts would hold challenges to an administrator's statutory authority to promulgate regulations to be nonconstitutional.⁷³ But some courts have hinted that such challenges may have a constitutional base and they have held them to be outside the scope of preclusion statutes.⁷⁴ This approach can only be explained as a revival of the

71. 434 U.S. at 285.

72. See generally *NLRB v. Marcus Trucking Co.*, 286 F.2d 583 (2d Cir. 1961) (Friendly, J.); L. Jaffe, *supra* note 45, at 546-50.

73. See, e.g., *Kirkhuff v. Nimmo*, 683 F.2d 544 (D.C. Cir. 1982); *Carter v. Cleland*, 643 F.2d 1, 7 (D.C. Cir. 1980).

74. See, e.g., *Wayne State Univ. v. Cleland*, 590 F.2d 627 (6th Cir. 1978); *accord Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Md. v.*

now repudiated constitutional and jurisdictional fact doctrine of *Crowell v. Benson*.⁷⁵ If it occurs generally, Congress will be frustrated in its attempts to limit judicial review of rules. The line between legal and constitutional issues is a helpful one precisely because it gives Congress a say in allocating access to the courts. If it is ignored, then few if any legal issues may be foreclosed. This message has not been lost on some judges who have resisted a return to a constitutional and jurisdictional fact approach by usefully applying the distinction drawn here between constitutional and ordinary judicial review.⁷⁶

But the fact that some, perhaps many, legal issues involving rules ought not to be reviewable in the context of a preclusion or limitation of review statute does not fully allay concern about the complete elimination of such challenges. Since *ultra vires* challenges are not viewed as constitutional, they do not fit within the distinction proposed here between constitutional review and ordinary judicial review. Yet one senses that such legal challenges, which go directly to the agency's authority from Congress to enforce a rule against a particular respondent, ought not to be disregarded lightly in enforcement proceedings.

One way to preserve *ultra vires* challenges is to fit them into the constitutional side of the system here proposed. That is not an impossible task, but it requires some creative reasoning by analogy. The constitutional equivalent to *ultra vires* review of rulemaking authority is the nondelegation doctrine, which prohibits Congress from granting agencies unlimited legislative power. Separation of powers analysis asks the question whether Congress impermissibly gave away its legislative power when it transferred authority to an administrative agency.⁷⁷ The consti-

Cleland, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Educ.) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979).

75. See *supra* note 50.

76. See *Carter v. Cleland*, 643 F.2d 1, 5 (D.C. Cir. 1980) (Mikva, J.) (utilizing the term "constitutional review" as employed in this article).

77. In the legislative history to the APA, Congress phrased its nondelegation concerns in the following language:

It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.

S. Doc. No. 248, Legislative History to the Administrative Procedure Act, 79th Cong., 2d

tutionally equivalent question the Court asks in rulemaking is whether the administrator in promulgating a rule acted clearly outside the limits imposed by Congress.⁷⁸ This analysis amounts to a sub-nondelegation doctrine, which ensures that Congress' legislative power, presumably satisfactorily delegated initially, is not redelegated beyond its intended limits. Since rules have the effect of legislation,⁷⁹ the constitutional concern with the exercise of rulemaking power becomes a variant on the concern historically expressed over the exercise of legislative power.

This analysis only serves to suggest that *ultra vires* challenges, even if viewed as legal rather than constitutional, raise significant issues that may be worth preserving in the face of preclusion or limitation provisions. It may be wise, therefore, to leave such challenges open unless Congress takes the precise step of specifically declaring them closed in a particular preclusion or limitation of review provision. In that event it would be up to the court whether it wants to make the connection between the nondelegation doctrine and *ultra vires* so as to preserve such issues from statutory preclusion.

Summary

The residual constitutional content of review of rules should contain only these components: substantive rationality review and review as applied to the particular respondent. Other legal questions not rising to constitutional levels should be precluded if congressional intent is to be respected. *Ultra vires* issues, however, are of a magnitude close enough to constitutional levels that their foreclosure ought only to be accepted when Congress has specifically made that determination. These propositions can best be demonstrated by application to the prototype limitation of review statutes here under study.

APPLICATION OF CONSTITUTIONAL REVIEW PRINCIPLES TO STATUTES LIMITING ENFORCEMENT REVIEW

Four statutory formulations could be interpreted as limiting review and thereby raising the constitutional review issues ex-

Sess. 275 (1946).

78. As a practical matter this becomes an inquiry similar to the excess of statutory jurisdiction standard outlined in 5 U.S.C. § 706(2)(c) (1976).

79. See Admin. Proc. in Gov't Agencies, *supra* note 12, at 100.

plored above. Two of these possibilities are relatively remote ones; the other two are the subject of this article: time limited preenforcement review statutes with and without enforcement preclusion language. The less complicated situations are those in which Congress either grants an agency rulemaking power but makes no reference to judicial review or grants rulemaking power but provides for judicial review without any time or subject limitations.⁸⁰ In these cases, the broad presumption of judicial review expressed in the APA and cases like *Abbott Laboratories*⁸¹ would probably rebut any argument that limitation of review to the preenforcement stage should be implied.⁸² Courts would most likely hold that limitations on judicial review are the exception and they must be established by statutory provisions or clear expressions of congressional intent.⁸³

The two central formulations present problems of incorporating the constitutional limitations on preclusion of judicial review at the enforcement stage raised in the previous section. Since they differ significantly in design, they must be analyzed separately.

Statutes That Explicitly Deny Enforcement Review

Under the Clean Air Act, the Clean Water Act, and the

80. See Davis, *Judicial Review*, *supra* note 6, at 297-99 (collecting statutes with these characteristics). These kinds of statutes create knotty problems of judicial review if the rules are challenged for procedural flaws long after they were promulgated. The question raised is whether, assuming the now general availability of preenforcement review, such later review ought to be foreclosed or limited so as not to upset settled expectations about the rule's validity. See Allen, *Thoughts on the Jeopardy of Rules of Long Standing to Procedural Challenge*, 33 Ad. L. Rev. 203 (1981).

81. *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967); see also *Dunlop v. Bachowski*, 421 U.S. 560, 569-70 (1975); *Barlow v. Collins*, 397 U.S. 159, 165 (1970).

82. An argument in favor of equating these seemingly neutral formulations with denial of enforcement review is that the APA (in § 703) actually contemplates that *Yakus*-type enforcement limitations might exist where adequate opportunities for preenforcement review are present. See *supra* note 32. Arguably any judicial review provision that permits preenforcement review is an "adequate" alternative in the *Yakus* sense. It is doubtful, however, that a court would expand the implied preclusion doctrine to the enforcement stage on this evidence. In cases where implied preclusion has been found, the statutes involved gave some indication (such as a 60-day provision) that review was to be limited. See *Morris v. Gressette*, 432 U.S. 491, 501-02 (1977).

83. See generally Note, *Statutory Preclusion of Judicial Review Under the Administrative Procedure Act*, 1976 Duke L.J. 431. Of course, failure to use express preclusion language need not be fatal in all situations. The Court has recently acknowledged that "legislative silence is not always the result of a lack of prescience." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980).

Noise Control Act, Congress has clearly said that after the sixty or ninety day statute of limitations for review of rules has passed there will be no "judicial review" in civil or criminal enforcement proceedings. The critical question under these statutes is whether the presence of the limited pre-enforcement review provision is adequate to justify denial of all review of the rule at the enforcement stage, even that form of review couched in constitutional terms. Put another way, is preclusion of "judicial review" at the enforcement stage meant to include constitutional review as well?

Two points must be emphasized at the outset. In these *Yakus*-type situations the focus is on limitations upon review of rules, not orders that are the product of adjudication. Judicial review of adjudication raises more substantial due process issues.⁸⁴ Second, the focus is on situations in which there is a clear need for quick establishment of uniform standards to implement an important national interest.⁸⁵ This aspect of the inquiry becomes more central later when the conditions under which Congress should seek to preclude enforcement review are discussed.

Given the congressional design of the preclusionary enforcement review statutes, what should be the courts' response to ob-

84. See, e.g., *Thompson v. Louisville*, 362 U.S. 199 (1960) (invalidating under the due process clause conviction obtained without evidentiary support). Valid objections to the lack of judicial review may occur in enforcement proceedings that are themselves adjudications. No limit is meant to be placed upon procedures necessary to establish facts in those proceedings, just the kind of issues that can be raised there, i.e., judicial review of the underlying rules on which the enforcement proceeding is based. It is only the process of bifurcated judicial review that is being limited. See J. Choper, *supra* note 32, at 392.

85. See *Peabody Coal Co. v. Train*, 518 F.2d 940 (6th Cir. 1975); *Granite City Steel Co. v. EPA*, 501 F.2d 925 (7th Cir. 1974); *Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849 (D.C. Cir. 1972); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349, 355-60 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). See also ACUS Rec. 76-4, *supra* note 10 (William Frick of EPA, dissenting, 41 Fed. Reg. 56,767, 56,768-69 (1976)) [hereinafter cited as Dissent to ACUS Rec. 76-4]. Professor Currie has questioned whether the national emergency present in the need to achieve clean air or water is comparable to that in *Yakus* involving wartime price regulation. See Currie, *supra* note 10, at 1258-60. Although the degree of emergency may be debated, there is little doubt that important national interests requiring fast solutions are at stake in both situations. Indeed Congress almost certainly would not invoke the exceptional limitation of review provisions when there is no perception of national emergency. Congress has not generally been opposed to judicial review of administrative action and indeed has recently been eager to increase its intensity. Consider S. 1080, 97th Cong., 1st Sess. § 5 (1981) (Bumpers Amendment). See also *infra* note 155.

jections to a rule's validity raised in enforcement proceedings? If the statute had precluded review of the rule entirely, it has been shown that some residual constitutional review for irrationality or erroneous application would remain.⁸⁶ Should even this residuum be foreclosed when time limited preenforcement review was presented? This is the proposition that *Yakus* has come to represent. For a variety of reasons, however, insisting on that broad a reading of *Yakus* may be unnecessary in the present context.

One could take the position that Congress, by foreclosing "judicial review" in the provisions under study, meant not to foreclose review of "constitutional" issues. The argument would simply be that, because important interests are at stake, if Congress intends to cut off constitutional review it should say so in those words. It has after all done this occasionally, in statutes like the Trans-Alaska Pipeline Authorization Act.⁸⁷ It must then be asked what would be the consequences of this approach to Congress' overall plan of review. For one thing, the kinds of issues that most trouble the Environmental Protection Agency would remain foreclosed. These would be issues going to the procedures employed in the rulemaking and the factual support for the rule.⁸⁸ The argument against preserving these rulemaking process issues is that, if left open, they would require the EPA to retain "immense records indefinitely,"⁸⁹ to avoid running the

86. See *supra* notes 58-68 and accompanying text.

87. See the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652(d) (1976), reprinted *supra* at text accompanying note 36.

88. The respondent who is denied judicial review in enforcement proceedings on these issues will undoubtedly object on a variety of grounds. The objection most frequently to be anticipated is that the respondent was a small entity who did not appear because of financial constraints or, to take the strongest situation, was not even in existence at the time the rule was promulgated. See Currie, *supra* note 10, at 1258. The principal reason a reviewing court should not be persuaded by these individualized complaints of lack of notice or ability to appear is simply that rulemaking is not an individualized process. It is legislative in conception and one has no more right to preserve issues going to the rulemaking process than one has to appear (and preserve) issues of similar content before the legislature. The APA notice and comment procedures go beyond constitutional due process requirements. 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 do not appear.

89. See Dissent to ACUS Rec. 76-4, *supra* note 85. Presumably these records are

risk that the rule will be judged without adequate support at some unspecified time in the future. In addition, any purely legal issues that do not reach constitutional levels would also be foreclosed,⁹⁰ including under this analysis the question whether a particular rule was *ultra vires*.⁹¹

What review would remain and how disruptive would it be? The important difference between legislative rationality review of a rule and arbitrary and capricious review as currently defined is that the former would not require factual support in the rulemaking file. This means that support for the rule can be hypothesized from the statute and the agency's choice of subject matter. This kind of support should not require the indefinite maintenance of "immense records," but only the presence of good lawyers able to articulate a defense of the agency's legislative decision in the reviewing court.⁹² Moreover, it is likely that the rational basis for the rule will have been addressed in a preenforcement review proceeding, if one was brought within the statute of limitations period.⁹³ Although a district court in an

needed to defeat challenges based on lack of factual support or failure to permit adequate notice and comment procedures on crucial issues during the rulemaking.

90. Even before *Crowell* was repudiated, not all legal questions were jurisdictional. Now it can be opined that many legal questions might fall within the usual arbitrary and capricious standard and not be subject to independent constitutional review. See Justice Rehnquist's opinion in *Adamo Wrecking*, reprinted *supra* at text accompanying note 71.

91. See *supra* text accompanying notes 71-75.

92. In this situation, the "post hoc" rationalizations of counsel, condemned as inadequate to establish reasons for agency decisionmaking in ordinary judicial review, become entirely appropriate. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). One would expect court approval in the vast majority of these rulemaking defenses, but the actual percentage of affirmances is hard to predict, because there has been little experience with this approach. The most that can be said is that the rationality standard would probably be less deferential in the rule than in the legislation context, but more deferential than is the present substantive review of rules standard under either the substantial evidence or the arbitrary and capricious formulation. One should keep in mind that the Supreme Court has recently approved a "demonstrably irrational" test for review of an agency's legal determinations. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (reversing the court of appeals for setting aside a Federal Reserve Board interpretation of Truth in Lending Law regulations); accord *Horizon Mut. Sav. Bank v. FSLIC*, 674 F.2d 1312 (9th Cir. 1982); see also K. Davis, *Administrative Law Treatise* 555 (Supp. 1982) (questioning "whether the Supreme Court is systematically increasing the degree of deference reviewing courts must give to administrative interpretations of statutes and regulations").

93. In environmental rulemaking there is little danger that a rule will slip by without thorough preenforcement judicial review. Appellants are lined up at the conclusion of the rulemaking proceeding anxious to find a receptive circuit court. It is a situation

enforcement review proceeding would not have to honor a different circuit court's decision upholding the rule's validity (assuming no affirmance by the Supreme Court), such a decision would be influential and often persuasive authority. Thus, it may be that rationality (and along with it *ultra vires* and other legal questions) will have been resolved for all practical purposes before the enforcement proceeding is commenced.

This would not be true for the other form of constitutional review, validity of the rule as applied to the particular respondent in the enforcement proceeding. As the earlier discussion of *Adamo Wrecking* indicates,⁹⁴ the presence of "as applied" objections to rules opens a large area in which to maneuver for respondents in enforcement proceedings. But this is as it should be; the potential for reaching beyond a rule's intended scope to respondents who did not realize they were covered by the rule should not be overlooked.⁹⁵ Other than a denial by the respondent of any violation of the rule, this issue in effect is the one most crucial to a respondent in an enforcement action. Moreover, as adjudicatory proceedings, enforcement actions contain the due process assurance that one can be charged only with the violation of a previously articulated legal standard.

Another way to evaluate the bifurcation of issues proposed here is to ask what costs are imposed by permitting constitutional review in enforcement proceedings and what benefits are gained. One cost is the risk that constitutional review will become the camel's nose under the tent, expanding such review in assertive courts to equate with substantive and procedural review.⁹⁶ As Professor Rabin has pointed out in connection with

where one can be assured, in Assistant Attorney General William Baxter's phrase, that the matter will be "litigated to the eyeballs." Moreover, it is highly unlikely that any small entity with a particularly appealing story to relate will lack for corporate lawyer sponsors. In this connection one is reminded of that small butcher shop, owned by Mr. Schechter, which, with the background assistance of Bethlehem Steel's counsel, brought down the NIRA. See 2 R. Swaine, *The Cravath Firm and its Predecessors 1819-1948* at 557-58 (1948).

94. See *supra* text accompanying notes 67-68.

95. A variation on this problem is presented when the rule is promulgated in substantially different fashion than it was proposed, thereby causing serious notice problems for those against whom it will be enforced. See generally Note, *The Need for an Additional Notice and Comment Period When Final Rules Differ Substantially From Interim Rules*, 1981 Duke L.J. 377 [hereinafter cited as Duke Note].

96. See Justice Rehnquist's expression of concern in *Adamo Wrecking*, discussed *supra* at note 68.

Veterans Administration nonreviewability,⁹⁷ once the court permits constitutional inquiries most questions of review can be phrased in constitutional terms.⁹⁸ This prospect cannot be ignored, and to some degree Professor Rabin's prediction has been vindicated.⁹⁹ However, there are several reasons why it might not be as troublesome when transferred from the VA situation to the present context. First, the VA statute involves total preclusion, not time limited preenforcement review.¹⁰⁰ Second, it frequently involves adjudication, which triggers due process interests not so far present in rulemaking.¹⁰¹ Third, just because a constitutional claim is postulated does not mean a court must honor it.¹⁰² Hence, although there is some potential for "constitutionalizing" review of rules, and thereby inviting expanded judicial review, there are enough factors cutting in the other direction to make this a relatively unlikely prospect.

Moreover, there are some real benefits to resolving substantive and procedural judicial review at the preenforcement stage. This stage is where the action on review really lies, and if it can be successfully carved out of the enforcement proceeding there is much less to debate at that later stage.¹⁰³ Ultimately the clearest benefit is that this bifurcation creates a constitutional method for allocating the reviewing responsibilities in the limitation of review context that should help the courts generally to respect the affected agency's decisionmaking process.

97. See Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stan. L. Rev. 905, 908-11 (1975) (suggesting first amendment and due process challenges in addition to the equal protection challenge permitted in *Johnson v. Robison*, 416 U.S. 361 (1974)).

98. The most prolific source of constitutional rights is of course the due process clause. See generally K. Davis, *supra* note 62, § 13.0.

99. See *supra* text accompanying notes 74-76.

100. See 38 U.S.C. § 211(a) (1976).

101. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); L. Tribe, *supra* note 48, § 10-8, at 513-14.

102. The practice of phrasing claims for review in constitutional terms is not a new one and the courts have adequate techniques for summarily dispensing with the unjustified ones. Consider in this context the teacher dismissal and tenure denial cases which invariably seem to contain a claim of first amendment deprivation. See *Board of Regents v. Roth*, 408 U.S. 564 (1972); see also L. Tribe, *supra* note 48, § 10-8, at 510.

103. A respondent in an enforcement proceeding cannot make the same argument about the need to raise rulemaking process issues as he can jurisdictional or constitutional ones. The latter are personal to his situation; the former are raised as well by surrogates which appeared in the rulemaking proceeding (and perhaps appealed from it) even if the respondent did not. See *supra* note 88.

Statutes That Impliedly Deny Enforcement Review

Statutes that establish time limits for preenforcement review of rules but do not explicitly forbid review in enforcement proceedings raise similar issues to those that do. The principal difference, of course, is that Congress' intent to preclude enforcement review must be implied from the existence of the time limited review provision. Although it is certainly possible for relevant legislative history to overcome an implication against enforcement review, it should be obvious that in these kinds of cases the broad presumption of judicial review of *Abbott* is not adequate to do so by itself.¹⁰⁴ This inadequacy is especially true since the APA specifically recognizes in section 703 that enforcement review can be deemed precluded if an adequate opportunity for preenforcement review is presented.

The Occupational Safety and Health Act of 1970 offers a good framework for analyzing the problem more generally. When Congress enacted the OSHA it sought to ensure a safe and healthful workplace on a national basis by authorizing the Secretary of Labor to promulgate regulations setting national standards both on an expedited and on a notice and comment basis.¹⁰⁵ In order to expedite promulgation of and compliance with national standards, Congress provided that preenforcement review of rules should be sought within sixty days of the rule's promulgation.¹⁰⁶ At least one circuit court interpreted this provision as barring only later *procedural* challenges to the rule in enforcement proceedings,¹⁰⁷ but several other circuits have re-

104. The *Abbott* Court stated: "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. 136, 140 (1967). In *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979), however, the court found that the presence of a 60-day court of appeals preenforcement review provision overcame the general presumption of review expressed in *Abbott*. The *Bond* court stated (after nodding at *Abbott*): "If, however, there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review." *Id.*

105. 29 U.S.C. §§ 651(b), 655(a) & (b) (1976).

106. *Id.* § 655(f) (1976).

107. *National Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1052-53 (8th Cir. 1978). The court's rationale for barring later procedural challenges was as follows:

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

jected even this limited issue foreclosure in enforcement proceedings.¹⁰⁸ There is legislative history pointing away from a restriction on the scope of enforcement review,¹⁰⁹ and this has been read together with *Abbott* to reassert a presumption of judicial review at the enforcement stage.

The procedural-substantive distinction sought to be established in the OSHA implied limitation situation has some value, especially since the courts that did find jurisdiction to review rulemaking procedure in enforcement proceedings have been largely unpersuaded that any deficiencies occurred.¹¹⁰ This distinction represents a compromise with this article's proposal of preclusion of both substantive and procedural questions in enforcement review proceedings. So long as adequate preenforcement review is available, the only issue need be whether Congress intended to bar review, not whether that is a good idea.¹¹¹

This compromise approach has been found helpful in other implied limitation contexts, notably under the Hobbs Act,¹¹² which provides a sixty day limit on direct review of final orders, including rules. In *Natural Resources Defense Council v. Nu-*

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.

Id. at 1052.

108. See *Daniel Int'l Corp. v. OSHRC*, 656 F.2d 925 (4th Cir. 1981); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1099 (5th Cir. 1980); *Marshall v. Union Oil Co.*, 616 F.2d 1113, 1116-18 (9th Cir. 1980).

109. See S. Rep. No. 1282, 91st Cong., 2d Sess. 8 (1970): "While [§ 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." A full study of the legislative history to § 6(a) is outside the scope of this article.

110. In both *Daniel Int'l* and *Deering Milliken*, the courts ultimately held the procedural challenges to be unsuccessful.

111. One could argue that if Congress wanted to bar judicial review in enforcement proceedings it should have said so explicitly, as it did in the statutes discussed in the prior section. This is a stern inference to draw. Congress is often not as explicit as it means to be, even though it was explicit when it came to the 60 day preenforcement review provision (which has little meaning if it does not bar enforcement review). Moreover, so long as constitutional review is preserved, it is not as crucial for a court to imply that Congress intended not to grant enforcement review.

112. 28 U.S.C. § 2344 (1976).

clear Regulatory Commission,¹¹³ the court read that act to bar a delayed procedural challenge to a rule promulgated initially by the NRC without notice and comment procedures.¹¹⁴ The court stated:

The 60 day period for seeking judicial review set forth in the Hobbs Act is jurisdictional in nature, and may not be enlarged or altered by the courts. This time limit, like other similar limitations, 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.¹¹⁵

The court went on to recognize that its ruling was, as in the OSHA challenges, limited only to procedural matters relating to the rulemaking process brought by those who could have made such challenges within the prescribed time limits.¹¹⁶ Since the Hobbs Act is also an implied limitation situation, it presents another example of how Congress, with the courts' assistance, can use review provisions to channel the questions that may be raised on judicial review of rules.

A Synthesis: Distinguishing Between Rule Process and Rule Legality Challenges

While the procedural-substantive solution does not go as far as has been suggested here for the explicit limitation cases (which would also preclude enforcement review of the substance of the rule), it does begin to focus on the advantages of limiting review of the rulemaking process. The crux of the matter is distinguishing between those procedural (and substantive) complaints that relate to the rulemaking process and those that re-

113. 666 F.2d 595 (D.C. Cir. 1981).

114. *Id.* at 602. The posture of the case was that NRDC raised procedural objections to the initial rule in a petition for reconsideration some 17 months after the initial rule was promulgated. NRDC had not appealed from the initial rule within 60 days but argued that the denial of the petition for reconsideration was arbitrary and capricious because NRC refused to acknowledge its initial rule had been promulgated without proper notice and comment procedures. *Id.* at 601.

115. *Id.* at 602 (footnotes omitted). In making its jurisdictional ruling, the court relied upon its earlier decision in *Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979), denying a challenge to a rule some five years later because of a 60-day direct review provision.

116. 666 F.2d at 602-03. It should be noted that the later challenge was not made in an enforcement proceeding.

late to the ultimate legality of the rule itself.¹¹⁷ In the former situation there are two factors that favor limiting review to the preenforcement stage: (1) the rule process challenges should be heard before the events surrounding promulgation become stale and difficult to reconstruct; and (2) the rule process challenges should be heard early so that there is no doubt as to the rule's procedural regularity by those who must enforce or comply with the rule.

In effect the separation of rule process challenges from rule legality challenges 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 support for a rule, it should be revealed immediately so that the agency involved can revise the regulation promptly. This approach might sometimes mean that rules will go unchallenged on procedural or substantive grounds because no appeal is taken within sixty days. Although this is certainly a possibility, one should remember that it comes about only in situations in which Congress has made an explicit or implicit decision so to limit judicial review; and it only forecloses nonconstitutional challenges to the rule's validity.¹¹⁸

To some extent this analysis applies to constitutional challenges of a rule's legality as well. But one would be more reluctant to imply a time cutoff on constitutional challenges when the particular respondent has not had an opportunity to argue the points raised. Of course, if they have in fact been raised by others then there may be little to relitigate. But it is doubtful that constitutional challenges to the application of a rule to a particular respondent's conduct will have been previously determined.

117. It must be conceded that the distinction sought to be drawn here is to some degree a play on words. Both challenges to the procedures employed in rulemaking and to its factual support deal with a rule's "legality" in a technical sense as much as do later legal challenges that raise constitutional level issues. However, the distinction looks at the issues surrounding a rule in two different stages: one, when it is being formulated, the other after it becomes law. In the former stage the challenges are unique to the process of rulemaking; in the latter stage the challenges are the same as those to statutes enacted directly by Congress. This approach is really another way to express the earlier drawn distinction between judicial review and constitutional review.

118. The possibility of some form of "good cause" exception to rule process issue foreclosure is explored in the next section.

In the implied as well as express limitation of enforcement review situations then, Congress makes a choice to limit review by separating it in this fashion both in time and in subject matter. The weight of the argument here is that there is every reason for the courts to honor that choice so long as basic constitutional questions are preserved.

ADMINISTRATIVE RECONSIDERATION AS AN "ADEQUATE" ALTERNATIVE TO JUDICIAL REVIEW

If one accepts the distinction between constitutional and judicial review of rules and permits the latter inquiry to take place exclusively at the preenforcement stage (even in some situations where statutes do not specifically forbid judicial review in enforcement proceedings), then this article has gone far enough. However, there are undoubtedly those judges, legislators, and commentators who are skeptical about such a clean division of reviewing functions and who would be reassured by the presence of other alternatives that might ameliorate any unforeseen inequities.

Agency reconsideration of its own rules is a traditional method for doublechecking on the substantive (and procedural) support for its initial rules. It may be included as one of the "adequate" alternatives to enforcement review in the *Yakus* sense, especially when reconsideration itself is subject to judicial oversight.¹¹⁹

Moreover, there is the nagging feeling that some case will present a situation where substantive and procedural review of a rule would make sense even though it occurs long after the preenforcement stage. The textbook case is *United States v. Nova Scotia Food Products Corp.*,¹²⁰ in which the court permitted a respondent in an enforcement proceeding to challenge the procedures employed in a rulemaking proceeding conducted some five years earlier. In declaring the regulation invalid, the

119. In *Yakus* the adequate alternative was the presence of the time limited pre-enforcement review provision. It is not suggested here that agency reconsideration in lieu of time limited pre-enforcement review would be an adequate alternative to enforcement review, but it is possible that its presence might moderate some objections to statutes that preclude enforcement review of rules entirely and of course it is another means of mitigating any unforeseen difficulties caused by applying limitation of review to the pre-enforcement stage.

120. 568 F.2d 240 (2d Cir. 1977).

court focused on the fact that the Food and Drug Administration had refused to make available at the rulemaking proceeding the scientific data on which its rule relied.¹²¹ Under the approach advocated here, the court's solution would be disfavored.¹²² However, one is sympathetic to the respondent's plight, and it is worth asking whether the solution to *Nova Scotia* might not have rested with the agency itself through some form of reconsideration.¹²³

There are several kinds of agency reconsideration provided in the APA and organic legislation¹²⁴ that break down into two approaches: individual determinations in the form of waivers or exemptions from the operation of an otherwise valid rule and generic determinations that seek the amendment or repeal of a rule. Both situations offer special problems as well as opportunities. In addition both situations pose challenges to the reviewing court in terms of timing and scope of review. Each of these problems will be analyzed separately and then related to the theme of adequacy of alternatives to judicial review of enforcement proceedings.

Requests for Waivers and Exemptions from Rules

Since rules are by hypothesis abstract solutions to general problems, inevitably there will be occasions when the conduct proscribed and the individual affected thereby do not fit. If the

121. *Id.* at 251-52. The problem of insufficiency or absence of notice and comment procedures is likely to arise in the OSHA rulemaking situation with some regularity because Congress provided that industry standards could be adopted by the Secretary without notice and comment rulemaking. See 29 U.S.C. §§ 651(b), 655(a) & (b) (1976).

122. This case did not involve a statute explicitly foreclosing enforcement judicial review, which would be the strongest situation for denial of enforcement review.

123. Of course it is not so easy to recast this as a waiver or amendment situation if the agency has proceeded to enforce the rule against the respondent. Arguably the respondent did not know it would be subject to the rule, or did not want to attract attention by questioning it before the enforcement action was commenced. At that stage, there would have to be a judicially required referral to the agency for reconsideration while the enforcement proceeding was stayed. In this way the court could avoid declaring a rule invalid for procedural defects while the agency is given the opportunity to reconsider its rule. See *Batterton v. Marshall*, 648 F.2d 694, 711 (D.C. Cir. 1980) (holding a Department of Labor BLS statistical rule subject to notice and comment procedures in the future, but not declaring invalid the currently operative BLS rule).

124. See 5 U.S.C. § 553(e): "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule"; Magnuson-Moss Warranty-F.T.C. Improvement Act, 15 U.S.C. §§ 57a(g)(1) & (2) (1976) (petitions for exemptions from rule must be promulgated with APA § 553 procedures).

fit is totally lacking, there may be constitutional limits upon the application of the rule that could come into play at any time.¹²⁵ In the past the courts have encouraged agencies to engage in rulemaking in order to establish standards of conduct and illuminate often vague statutory mandates.¹²⁶ But at the same time the courts have looked upon the availability of a waiver or exemption process as a desirable if not necessary "safety valve" for those caught in the rulemaking process.¹²⁷ As a result, most agencies provide for petitions for waiver from the effect of rules, which may be granted upon a proper showing of hardship or lack of fit with the rules.

As a practical matter, however, waivers are seldom granted by an agency, and they are often denied without anything approaching an administrative hearing.¹²⁸ Moreover, there are some who rightly suggest¹²⁹ that the extensive use of waivers may have the adverse consequence of favoring some competitors over others in situations in which the waivers are granted on an *ad hoc* and often unpublicized basis.¹³⁰ Although there are ways to ensure against this disadvantage to the use of waivers,¹³¹ waivers are not sufficiently available to act as a functional alter-

125. See *supra* text accompanying note 64.

126. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202, 209 (1947); H. Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards* 141 (1962).

127. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-05 (1956). *But see FCC v. WNCN Listeners Guild*, 450 U.S. 582, 601 n.44 (1981) (holding that the FCC may adopt rules without the "safety valve" of a waiver provision).

128. For example, despite thousands of individual waiver requests, the FAA has never approved a waiver of its age 60 retirement rule for pilots. See, e.g., *Rombaugh v. FAA*, 594 F.2d 893, 897 (2d Cir. 1979); *Starr v. FAA*, 589 F.2d 307, 309 (7th Cir. 1978).

129. See Davis, *Judicial Review*, *supra* note 6, at 292.

130. The FTC Magnuson-Moss waiver provision is exceptional in actually specifying procedures (albeit informal rulemaking procedures) for the determination of waiver petitions. See 15 U.S.C. §§ 57a(g)(1) & (2) (1976).

131. Of course the problem of competitive advantage secured by private or preferential access to agency officials is not limited to formal waiver requests. See Wade, *Government by Nudge and Wink*, N.Y. Times, June 14, 1982, at A-18, col. 1 (documenting a meeting between a New Mexico refiner and Anne Burford, née Gorsuch, former EPA Administrator, over applications of the lead regulation on gasoline where she allegedly promised that, rather than grant a formal waiver, she would simply restrain the EPA from enforcing its lead regulations against the refiner). The problem of private lawmaking can be overcome by Federal Register notice of the waiver proceeding, which should in most cases reach the competitors of the individual seeking an exemption from the rule. There is no reason why waivers must be treated by the agency as the administrative equivalent of a private bill in Congress.

native to enforcement review.¹³² The most that can be said is that waivers or exemptions may on occasion provide a preferable alternative—both for the petitioner and the agency—to judicial review in enforcement proceedings.

Petitions for Amendment or Repeal of Rules

A hesitation similar to that expressed with regard to waivers surrounds the use of petitions to amend or repeal rules that might be the subject of judicial review in enforcement proceedings. Petitions to amend are desirable because they give an agency an opportunity to reconsider its own rule before subjecting it to judicial review in enforcement proceedings. If, as in the *Nova Scotia* case, there are real problems with the factual support for the rule, the reconsideration process invites the agency to place its rule on a more solid substantive footing before it is scrutinized in court and possibly declared invalid. This invitation is just that, however, and there are sound policy reasons why the courts would not want to make it a command to the agencies.

Given the need to set its policymaking docket in advance and the limited nature of its decision resources, an agency is often not in a position to turn to a rule reconsideration request simply because one of those regulated is so disposed. To impose this technique upon agencies is simply to set their rulemaking priorities for them. Of course, there is a special situation in which the court remands a rule for reconsideration during an enforcement review proceeding,¹³³ but even here the agency may prefer not to amend its rule and risk its being declared invalid.

On the other hand, amendment and repeal petitions have advantages over the waiver and exemption process to the degree

132. Presumably, the denial of judicial review (as opposed to constitutional review) should be on the ground that an adequate pre-enforcement review opportunity was presented. Moreover, when a respondent in an enforcement proceeding is charged with violating a rule, it is unlikely that the agency would be of a mind to grant him a waiver from the application of that rule. If the case against him were so questionable in the first place, then perhaps it raises constitutional review issues.

133. In this situation the agency is given a stern choice: either permit an amendment or repeal proceeding to go forward or have the underlying rule declared invalid. Cf. *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980) (finding agency rulemaking process insufficient due to lack of notice and comment opportunities and declaring that such opportunities must be given in future rulemaking, but holding present rule valid).

that the former are generic and public. While the waiver or exemption process is or can be an individualized and even private one,¹³⁴ the amendment or repeal process is like the rulemaking process itself. Thus it ensures public participation and a full airing of the issues. For these reasons it is seen by some commentators as preferable to direct judicial review for those frustrated by a rule's initial formulation.¹³⁵ It is also an approach that has been utilized by the courts when review of a rule is sought after the time limit on preenforcement review has passed.¹³⁶ Thus whether petitions to amend or repeal are satisfactory alternatives to enforcement review in all situations, they are obviously an increasingly useful technique for securing "review" of an agency's rule. However, before one would go so far as to endorse the practice unequivocally, the implications for judicial review should be considered.

The Scope of Judicial Review over Denials of Petitions for Reconsideration

If one assumes that an agency grants one of the various petitions for reconsideration discussed above, then there is likely to be a full administrative record that can be subjected to judicial review in the usual way by those dissatisfied with the outcome.¹³⁷ This is the best of all possible worlds for those who would advocate use of reconsideration techniques in lieu of enforcement review of existing rules. But it should be apparent that many more petitions to amend and requests for waiver will be denied than granted. The agency, after all, has usually promulgated its rule after extensive notice and comment in the first place, and it is unlikely to be impressed by reconsideration requests from those who were or could have been present during

134. See *supra* notes 130-31 and accompanying text.

135. See Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 Nw. U.L. Rev. 15, 61-68 (1977); Davis, *Judicial Review*, *supra* note 6, at 292-94.

136. See *Laminated Safety Glass Ass'n v. CPSC*, 578 F.2d 406 (D.C. Cir. 1978); *Investment Co. Inst. v. Board of Governors*, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977).

137. Presumably those who achieved the desired outcomes—whether by waivers or exemptions, or amendments or repeals—would not have much incentive to appeal. However, others who participated in the process could well object. Indeed, some of them may be the competitors who appeared in waiver proceedings or others who were satisfied with the rule as originally formulated.

that process.¹³⁸ Thus denials will be the rule and grants the exception. In this situation one must consider the scope of judicial review that the courts should impose on such denials and the kind of record they should expect denying agencies to produce.

Viewed in the abstract, denials of any type of informal agency action are bounded by only minimal procedures. No hearing need be had concerning the request, and the only "procedure" that need be provided (under the APA at least) is a "brief statement of the grounds for denial."¹³⁹ This statement of denial is usually subject to very narrow judicial review under cases like *Dunlop v. Bachowski*,¹⁴⁰ which look only to the four corners of the agency's denial statement to determine the grounds and the essential facts on which it is based.¹⁴¹ In *Investment Co. v. Board of Governors*,¹⁴² Judge McGowan determined that the arbitrary and capricious scope of review standard would be applied to any agency denying reconsideration.¹⁴³ This standard is malleable enough to deal with the limited issues likely to be presented on reconsideration review.¹⁴⁴

One difficulty, however, is in determining the kinds of reasons an agency should be permitted to use in denying a reconsideration petition. If a petition is directed at an amendment or repeal¹⁴⁵ of a recently promulgated rule the agency may well feel that any extended review of the petition is unnecessary or unduly burdensome from an allocation of resources point of view. It may be a sufficient answer, therefore, for the agency simply to

138. The *Nova Scotia* situation remains an exceptional one in that the rule was promulgated five years earlier (a long time by most standards) and the key scientific data were not produced for comment. For these reasons the *Nova Scotia* case remains a good candidate for reconsideration rather than enforcement judicial review.

139. 5 U.S.C. § 555(e) (1976).

140. 421 U.S. 560 (1975). See also *WWHT, Inc. v. FCC*, 656 F.2d 807 (D.C. Cir. 1981) ("very narrow" scope of review over agency decision to institute rulemaking).

141. 421 U.S. at 573-74.

142. 551 F.2d 1270 (D.C. Cir. 1977). See also *NRDC v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

143. 551 F.2d at 1281.

144. The court defined the record as follows: "The administrative record for review would include the information and affidavits submitted to the agency by the aggrieved party, the record of any hearings on the matter, and the Board's response (which might incorporate by reference the record of the original rulemaking proceedings)." *Id.* Accord *NRDC v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979).

145. If the petition involves a waiver or exemption there may be less reason to believe that the request would require a major rethinking of the agency's rule.

say in summary form that it has just completed its rulemaking on that subject and has seen no need to reopen the matter at the present time. There is no reason why such a response should not survive an arbitrary and capricious test. On the other hand, that kind of response in the *Nova Scotia* situation would likely have exhausted the credulity of the reviewing court.

The approach of the reviewing court on denial of reconsiderations will determine how effective such a technique is for avoiding the limitations on scope of review in enforcement proceedings. If what is sought on reconsideration is a substantial rethinking of the underlying rule, it is doubtful that such will occur in the vast majority of cases. For this reason an enforcement court ought not to treat reconsideration as an exhaustion of administrative remedies device.¹⁴⁶ But it is still possible that an agency on occasion can offer its views in a helpful way on reconsideration or, if it does not, that a court on review of *that* decision can offer the petitioner judicial relief that was desired in the enforcement proceeding.

Reconsideration is not under all these circumstances an entirely adequate response to the exceptional case like *Nova Scotia* where the temptation is to permit late challenges to the process of rulemaking in order to protect a respondent from the application of a scientifically unsupported rule in an enforcement proceeding. It may be that on rare occasions a declaration of a rule's substantive invalidity by a reviewing court would make sense even years after its promulgation.¹⁴⁷ But this long-shot possibility is not an adequate basis for upsetting the congressional plan for limiting judicial review of a rule to the pre-enforcement stage. The most that can be asked of any preclusion statute is that it be satisfactory in the vast run of cases; if it fails in the rare situation then reconsideration techniques should be

146. The exhaustion requirement would suggest that the reconsideration petition be a precondition to any decision to enforce the agency's rule. Thus this could force a stay in the enforcement proceeding and lead to unnecessary delays. Exhaustion in this situation should not be a mandatory requirement, but "a matter of sound judicial discretion." *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 970 (3d Cir. 1980).

147. Another situation in which late review might occasionally be proper is when the rule promulgated differs substantially from the rule proposed. In this situation many who were later to be affected might not have had any awareness of the rule's application to them. See *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1019-20 (3d Cir. 1972). See generally Duke Note, *supra* note 95.

available to help avoid any real difficulties. If a case slips through even that safety net, then the court's inherent powers will undoubtedly be called into play.¹⁴⁸

CONCLUSIONS AND RECOMMENDATIONS

The problem of accommodating Congress' interest in channeling and limiting judicial review of rules to the Courts' concern with protecting the judicial process under article III is not insoluble. Therefore, it is surprising that Congress and the courts have probed each other's territory for so long without achieving a clearer understanding. Recent congressional initiatives, spawned by an increasing demand for national environmental, health, and safety standards, heighten the need to clarify the necessary role of the courts in the reviewing process. This need invites a study that focuses upon the content of constitutional review as part of the overall scheme of judicial review.

The assumption is that Congress has historically welcomed the participation of the courts in the review of agency decisions to a degree that exceeds the amount of review that is constitutionally imperative. When Congress cuts back on judicial review it comes closer to the largely uncharted territory of constitutionally minimal review.

When faced with a statute that seeks to limit review of rules narrowly to the preenforcement stage, the courts must strain to avoid making the constitutional review determination.¹⁴⁹ But by avoiding a clear statement on the content of constitutional review the courts send confusing signals that can produce negative consequences. For one thing, Congress itself will often respond by patching only the statutory hole exposed, thereby failing to reexamine the constitutional seaworthiness of the underlying vessel.¹⁵⁰ Also, lower courts with expansive notions of the role of

148. Because these should be a statistically insignificant number of cases, there should be no need to formulate a "good cause" exception to the reconsideration alternative. If a court is approached to create such an exception, it should not place great weight on a respondent's particular circumstances such as a failure to appear at the original rulemaking proceeding or a failure to appear at the preenforcement stage. *See supra* note 88.

149. This is basically what the Supreme Court did in *Adamo Wrecking*. *See supra* notes 65-68 and accompanying text; *see also* *NRDC v. EPA*, 673 F.2d 400, 406 (D.C. Cir.), *cert. denied*, 103 S. Ct. 175 (1982).

150. This was the approach Congress tried to take with the Clean Air Act. *See*

constitutional review of agency behavior will continue to upset decisions that otherwise should be upheld.¹⁵¹ This action causes an unnecessary loss of time and a waste of decision resources for all three branches of government.¹⁵²

A general approach to constitutional review of agency rules can be achieved at low institutional cost. No statutes need be amended and no cases need be overruled. The rationale offered here can be superimposed upon the existing framework of review with little difficulty. The first step is theoretically to separate constitutional review from ordinary judicial review; the second step is to define its content; and the third is to apply it to the current group of preenforcement review statutes.

The case for constitutional review is contained in the jurisprudence of article III: Congress cannot turn over the judicial power to non-article III tribunals, such as agencies, unless the courts have a role to play in supervising that exercise of power. This principle immediately suggests that adjudication by agencies is a more sensitive grant of power constitutionally than is the grant of the legislative-like power to make rules. The constitutional concern in this kind of grant is tied to the courts' role in reviewing legislation and in that way protecting its role under article III. The constitutional standard for overseeing the exercise of rulemaking power is rationality review, which often implicates the equal protection and due process clauses as well as other specific substantive constitutional provisions, such as the first amendment.

Another source of constitutional review power over rules is raised not at the rule review stage but at the enforcement stage, when an otherwise unobjectionable rule is sought to be applied by an agency to a particular respondent. Here the concern is the more traditional one involving the judicial power, since a respondent, in what has now been transformed into an adjudication, must have the ability to challenge the application of a rule or

supra discussion of *Adamo Wrecking* at note 9, and Justice Stevens' comment in dissent that the Clean Air Act's "history indicates that Congress is patiently correcting judicial errors." 434 U.S. at 306 n.24 (Stevens, J., dissenting).

151. See *supra* discussion of the Three Sisters Bridge litigation at notes 40-41.

152. The executive branch, as well as the Court and Congress, has an interest in clarifying the role of constitutional review since executive agencies like the EPA implement policy emanating from the White House.

statute to his or her situation. This type of challenge will probably be the principal (and perhaps only) question that will be left open in an enforcement proceeding.¹⁵³ As a matter of due process, a respondent must have the opportunity to challenge the application of a statute or of a rule.

Beyond this minimal constitutional protection, however, Congress should be able to foreclose or narrowly limit judicial review of rules. A distinction drawn here is between challenges to the process of rulemaking, such as whether it was promulgated with proper statutory procedures and whether it has factual support in the rulemaking record, and those to the rule's overall legality from a constitutional perspective. The process challenges are usually those ensured through the APA or organic legislation, which participants become accustomed to assert unless Congress has explicitly or implicitly foreclosed them. Because Congress acts only occasionally so to foreclose, the presumption of judicial review of rules has taken on an exaggerated importance. When it is challenged by Congress itself in particular statutes, the presumption must give way since ordinary judicial review can only be asserted with legislative concurrence.¹⁵⁴

The prototype statutes under study here fit comfortably into this structure when they speak in terms of preclusion of "judicial review" in civil or criminal enforcement proceedings. Similarly, if the statute at issue establishes time limits for pre-enforcement review but does not expressly forbid enforcement judicial review, Congress may have nonetheless implied such a result. Here the inquiry should be directed at the question of congressional intent, and the general presumption of judicial review formulated by the courts should not bias the analysis unduly.¹⁵⁵ Of course, where Congress has not specified any

153. See *supra* note 93.

154. It should be recalled that article III sets both a minimum and maximum standard for the exercise of judicial power. See *supra* text accompanying notes 12-14. If a court refuses to honor a congressional preclusion of review statute, when no constitutional interests are present, it is reaching into the arena of legislative power under article I.

155. Once again, it is the congressional will that should be respected, not the courts' broad presumption of judicial review, which should be employed only when it is consistent with the congressional view (*i.e.*, where there is no apparent intent to preclude review). In reality the courts in the implied preclusion cases are in something of a conflict of interest situation; they must balance their desire to provide review against the congressional desire to deny it. See *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565

time limits on judicial review it is more difficult to conclude that it intended to reject the courts' presumption of judicial review over rules in enforcement proceedings.

This indeterminacy raises the question whether Congress should be encouraged to make its view on limitation or preclusion of review more explicit in future legislation. Certainly if Congress decides to preclude judicial review entirely (as it has done with the Veterans Administration), its cause would be aided if it stated explicitly that only constitutional issues remain open. The courts will then at least be less ready to presume review of nonconstitutional legal issues.¹⁵⁶ But preclusion of judicial review of rules is not likely to be as great a source of congressional interest as limitation of review.

If Congress decides to limit review of rules at the enforcement stage, it should follow certain guidelines. First it should feel free to do so in those special situations where review must be narrowed to provide fast, uniform, and final resolution of national rules.¹⁵⁷ Second, the legislation limiting review at the enforcement stage should explicitly so state, as in the Clean Air Act situation. Third, the explicit statement should include a provision that permits review of constitutional issues in enforcement proceedings, at least in criminal proceedings. Alternatively, if Congress wants to foreclose constitutional issues in noncriminal enforcement proceedings, it should state that position as well.¹⁵⁸ Finally, Congress should decide whether some legal issues of close to constitutional proportions, namely *ultra vires* challenges, should not be treated for purposes of this narrow re-

(1980), where, in a related context, the Court confirmed that "judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme."

156. See *supra* text accompanying notes 72-76.

157. Limitations on judicial review of rules or other administrative conduct have always been treated as exceptional situations by Congress (or state legislatures) and by the courts. This treatment does not mean that courts independently scrutinize the justifications for legislative decisions to narrow review, but it does suggest that a massive shift in that direction would require a major rethinking of the courts' long standing general presumption in favor of judicial review. As a practical matter, of course, the legislative branch would be unlikely to countenance a broad contraction of judicial review of administrative action. Indeed, Congress appears to be moving in the opposite direction with judicial review proposals like the Bumpers Amendment. See S. 1080, 97th Cong., 1st Sess. § 5 (1981).

158. See *supra* note 69.

view as if they were of constitutional stature.¹⁵⁹ Drafting precision in future legislation along these lines should make limitation of review of rules at the enforcement stage a more acceptable, and therefore a more useful, technique.

A small number of cases involving unusual circumstances may not fit well into situations denying enforcement judicial review.¹⁶⁰ In these exceptional situations the reviewing courts have traditionally found ways to engage in enforcement review of the process of rule promulgation. This action can be disruptive of the scheme for review suggested here. The courts have been experimenting with alternatives that are less disruptive of the relationship between agency and court. The opportunity for an agency to reconsider its rule (either through waiver or exemption, or amendment or repeal proceedings) can be of substantial utility, so long as the court's expectations of an agency's response to reconsideration requests are not too demanding. If these alternatives are available there will be few, if any, cases in which preclusion of enforcement judicial review is prejudicial to the individual respondent and many cases where its exercise will streamline and expedite the process of making rules final and effective.

The concept of constitutional review is something the courts have been utilizing since the beginning of the Republic, but little effort has been made to apply that concept to the review of agency rules. By so doing, the courts can usefully distinguish between that form of review Congress authorizes at its option and that form the courts impose as part of their judicial function. Once this distinction is drawn, statutes precluding or limiting judicial review of rules can be made to fit more comfortably into the overall constitutional plan.

159. As discussed earlier, *ultra vires* challenges do not fit neatly into the distinction between constitutional and ordinary judicial review drawn here. See *supra* text accompanying notes 72-76. The question whether an agency is acting beyond its delegated authority is such an important one that, even though it is thought of today as a legal, not a constitutional question, Congress may want to give it special treatment in limitation of enforcement review provisions. This would open up subsequent challenges considerably. If *ultra vires* review is not provided, courts may take some comfort from the fact that such challenges would likely have been made at the pre-enforcement review stage if judicial review occurred at that time.

160. See *supra* notes 120-23 and accompanying text.