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This article discusses a provision of the Administrative Procedure Act (APA) that the federal courts have failed to apply—the third sentence of section 703, which states: "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."[1] The provision means, in essence, that when one is accused of violating an agency regulation, one may challenge its validity. Section 703's third sentence also supplies criteria to determine when the right to challenge may be denied: when the law provides a pre-enforcement challenge that is "adequate" and "exclusive."

Instead of applying those criteria, however, the federal courts have developed their own. This is unfortunate. First, the results they have reached have been mixed and inconsistent with section 703. Yet, "[t]he APA was meant to bring uniformity to a field full of variation and diversity."[2] Second, and more important, statutes are not supposed to be ignored. Yet, no court of appeals has ever considered section 703 in its discussions of whether a pre-enforcement challenge provision is exclusive.

This article describes the cases on the exclusivity of pre-enforcement challenge provisions under one representative statute and shows that many of these decisions are inconsistent with section 703. It also suggests some reasons why courts have applied judge-made law instead of the APA provision, and recommends that the Supreme Court take a step to rectify the problem.

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1. 5 U.S.C. § 703 (2018).
2. Dickinson v. Zurko, 527 U.S. 150, 155 (1999).

I. Background: The Judge-Made Law on the Exclusivity of Pre-Enforcement Challenge Provisions

At one time, case law generally stated that one may raise the validity of a federal regulation when it was enforced.[3] In fact, "the courts typically reviewed the lawfulness of an agency's rule, not when it was promulgated, but when it was enforced."[4] It was not until 1967, in *Abbott Laboratories v. Gardner*, that the Supreme Court broadly held that adversely affected persons may also obtain pre-enforcement review of the validity of a regulation even if a statute does not expressly provide for it.[5]

Suppose a statute does expressly provide for pre-enforcement review of the validity of a regulation but is silent on whether such review is the exclusive way that one may challenge the regulation's validity. There are several such pre-enforcement review provisions, such as those in the Administrative Orders Review Act (sometimes known as the Hobbs Act),[6] the Occupational Safety and Health Act ("OSH Act"),[7] and the Food, Drug and Cosmetics Act.[8] They provide for fifty-nine- or sixty-day periods for such review but do not state that they are exclusive. Are they exclusive?

The United States Court of Appeals for the District of Columbia Circuit has several times addressed the question, most notably in *JEM Broadcasting Co. v. FCC*. There, it held that where a statute provides a limited period for pre-enforcement review of a regulation's validity, and that opportunity for review is adequate, that period is exclusive as to so-called "procedural" invalidity arguments, but not exclusive as to so-called "substantive" invalidity arguments.[9] According to that court:

3. *E.g.*, United Gas Pipe Line Co. v. Fed. Power Comm'n, 181 F.2d 796, 800 (D.C. Cir. 1950) ("Even if petitioner is unable to prove the irreparable injury necessary in a suit for injunction, he may raise the invalidity of the Commission's action as a defense to an enforcement proceeding instituted against him for violation of the rule in question."); s*ee also* Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 185 (1967) (Fortas, J., dissenting) ("[E]xcept for [certain] instances . . . , the avenue for attack upon the statute and regulations has been by defense to specific enforcement actions by the agency."); Abbott Lab'ys v. Celebrezze, 352 F.2d 286, 291 (3d Cir. 1965) ("[I]f enforcement should be attempted . . . there are provisions for administrative hearing and review by the Court of Appeals."), *rev'd on other grounds*, 387 U.S. 136 (1967).

4. STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1136 (2d ed. 1985).

5. 387 U.S. 136 (1967).

6. 28 U.S.C. § 2344 (2018).

7. 29 U.S.C. § 655(f) (2018).

8. 21 U.S.C. § 371(f) (2018).

9. 22 F.3d 320, 324–25 (D.C. Cir. 1994) (concerning the Hobbs Act) (citing Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1035, 1040 (D.C. Cir. 1991); NLRB Union v. FLRA, 834 F.2d 191, 195–97 (D.C. Cir. 1987) (summarizing circuit law with respect to various types of challenges); Nat. Res. Defense Council v. NRC, 666 F.2d 595 (D.C. Cir. 1981); Geller v. FCC, 610 F.2d 973, 977–78

A substantive defense is one based on an argument that a regulation is not authorized by a statute or the Constitution, as opposed to a claim under the APA regarding the method used in promulgating the regulation, such as that it was issued without adequate notice, or that the government inadequately responded to comments.[10]

For defendants to properly raise a procedural invalidity defense, they must have sued the agency within the pre-enforcement review period (often sixty but sometimes as short as thirty days).[11] This bar applies even to entities that did not exist during the pre-enforcement challenge period.[12] Under the D.C. Circuit's line of cases, exclusivity depends on adequacy alone, without an independent showing that Congress intended exclusivity.[13]

Some other circuits have followed *JEM Broadcasting.*[14] Some have done so even when the issue was not technically presented.[15] The Supreme

(D.C. Cir. 1979) (*per curiam*); Functional Music, Inc. v. FCC, 274 F.2d 543, 546–47 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)). A careful reading of *Functional Music* fails to uncover any basis for that court's later reliance on it to distinguish between substantive and procedural challenges. Although the legal theory underlying the challenge there was what *JEM Broadcasting* would later characterize as "substantive" (a challenge to the statutory authority for the regulations), *Functional Music* drew no such distinction. It never used the words "procedural" or "substantive," and its language was unqualifiedly broad, permitting challenges to "validity" generally. 274 F.2d at 546–47.

10. Coal River Energy, LLC v. Jewell, 751 F.3d 659, 664 (D.C. Cir. 2014).

11. *But see* Adamo Wrecking Co. v. United States, 434 U.S. 275, 290 (1978) (Powell, J., concurring) ("The 30-day limitation on judicial review imposed by the Clean Air Act would afford precariously little time for many affected persons even if some adequate method of notice were afforded. It also is totally unrealistic to assume that more than a fraction of the persons and entities affected by a regulation—especially small contractors scattered across the country—would have knowledge of its promulgation or familiarity with or access to the Federal Register.").

12. *Coal River Energy*, 751 F.3d at 663.

13. *See JEM Broad.*, 22 F.3d at 326. Since *JEM Broadcasting* was issued, the D.C. Circuit also issued opinions on the issue in *Coal River Energy*, 751 F.3d 659 (D.C. Cir. 2014) (Reclamation Act), and in *Independent Community Bankers of America v. Board of Governors of the Federal Reserve System*, 195 F.3d 28 (D.C. Cir. 1999) (Bank Holding Company Act).

14. Perez-Guzman v. Lynch, 835 F.3d 1066, 1078–79 (9th Cir. 2016); Arctic Express, Inc. v. Dep't of Transp., 194 F.3d 767, 770 (6th Cir. 1999); Florilli Corp. v. Pena, 118 F.3d 1212, 1214 (8th Cir. 1997). For pre-*JEM Broadcasting* cases outside the D.C. Circuit but following the D.C. Circuit's analysis in pre-*JEM Broadcasting* cases, see, e.g., Legal Env't Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1473 (11th Cir. 1997) and Advance Transp. Co. v. United States, 884 F.2d 303, 305 (7th Cir. 1989).

15. *See* Sai Kwan Wong v. Doar, 571 F.3d 247, 263 (2d Cir. 2009) (applying *JEM Broadcasting*, seemingly unnecessarily, to 28 U.S.C. § 2401(a)); Commonwealth of Pa. Dep't of Pub. Welfare v. HHS, 101 F.3d 939, 947 (3d Cir. 1996) (also applying *JEM Broadcasting*, seemingly unnecessarily, to 28 U.S.C. § 2401(a)). If the statute of limitations at 28 U.S.C. § 2401(a) applies, then there would appear no reason to invoke *JEM Broadcasting.* Section 2401(a) does not, however, apply to the timeliness of invalidity defenses when the Government enforces a regulation. First, it applies by its terms only to suits *against* the Government, not *by* the Government. Steffen v. United States, 213 F.2d 266, 269 (6th Cir. 1954) ("That section is limited to actions *against* the United States. We cannot by analogy make it apply to actions brought by the United States.") (emphasis in the original); Phila.

Court has cited *JEM Broadcasting*, albeit in dicta, for the proposition that "a party might be foreclosed in some instances from challenging the procedures used to promulgate a given rule"[16]—a statement that could equally describe the intended result of applying section 703.

II. The Wages of Ignoring APA § 703

Not once in the development of this line of judge-made law, under any statutory scheme, did any circuit mention, let alone apply, section 703. The result is a checkered pattern of holdings and disagreements among the circuits. An illustration of this can be gleaned from case law developments under the OSH Act. That statute has a fifty-nine-day pre-enforcement challenge period that, as with the Hobbs Act and other statutes mentioned above, is silent on whether it is exclusive.[17]

A. An Example: Case Law under the Occupational Safety and Health Act

In summary, four circuits have permitted at least some substantive and procedural challenges to OSHA standards (the Third, Fifth, Ninth, and D.C.), with some question about the Third Circuit. The Fifth Circuit agreed that challenges are permitted unless an employer participated in both a rulemaking and a pre-enforcement suit. The D.C. Circuit recently equivocated on one point, as discussed below. In contrast, two circuits (the Eighth Circuit and perhaps the Sixth Circuit) permit substantive but not procedural challenges. The picture in the Fourth Circuit is unclear.

Indem. Ins. Co. v. Chi. Title Ins. Co., 771 F.3d 391, 401 & n.7 (7th Cir. 2014) ("An affirmative defense is not a 'claim'" or "cause of action."). Second, statutes of limitation by their nature do not foreclose defensive arguments. United States v. W. Pac. R.R., 352 U.S. 59, 72 (1956) (the limitations period has "no relevance to" defensive arguments. "They are aimed at lawsuits, not at the consideration of particular issues in lawsuits."); TD Bank N.A. v. Hill, 928 F.3d 259, 271 (3d Cir. 2019) (citing *W. Pac. R.R.*, 352 U.S. 59 at 72); Luckenbach S.S. Co. v. United States, 312 F.2d 545, 549 n.3 (2d Cir. 1963) ("[L]imitations do not normally run against a defense.").

16. Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016).

17. 29 U.S.C. § 655(f) (2018). Also referred to as OSH Act § 6(f), the first sentence of which reads as follows: "Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard."

1. Third Circuit

The Third Circuit, in *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, was the first court to consider whether the OSH Act's pre-enforcement challenge provision is exclusive.[18] The court did not start its discussion with the general rule, embodied in prior case law and section 703, that validity may be challenged during enforcement. Instead, the court asked whether Congress intended to "*authoriz[e]* review of a standard's validity at the enforcement stage."[19] The court concluded that a House bill and report showed that Congress intended to permit such challenges,[20] and that "policy considerations" indicated that they should be admitted.[21] The Third Circuit thus concluded, at first, that adjudicators could "deny enforcement to a standard determined by it to have been issued in violation of the Act's substantive or procedural requirements."[22]

Later, the opinion provided an alternative reason for this conclusion, one resting on administrative law principles—that judicial review of validity is ordinarily permitted during enforcement; that the mere existence of a pre-enforcement challenge provision did not suffice to show that Congress intended that provision to be exclusive; and that a contrary result required "an explicit withdrawal of jurisdiction."[23] And had the court stopped here, its analysis would have paralleled the analysis required by section 703.

Unfortunately, the Third Circuit then set out an unsupported, confused, and policy-laden dictum on a question not before it based on reasoning inconsistent with section 703. It stated that a prosecuted employer "cannot defend solely on the ground that . . . procedural [rulemaking] requirements . . . have been ignored by the Secretary. To carry its burden the [employer] must produce evidence showing why the standard under review, as applied to it, is arbitrary, capricious,

18. 534 F.2d 541, 548–49 (3d Cir. 1976).

19. *Id.* at 549 n.10 (emphasis added).

20. *Id*. at 548–49, citing H.R. 16785, 91st Cong § 11(b) (1970) and H.R.REP. NO. 91-1291, at 24, 41 (1970).

21. *Id*. at 549–50.

22. *Id*. at 550.

23. *Id.* at 551. The Third Circuit stated: "We do not find, from the availability of limited pre-enforcement judicial review permitted under § 6(f) [29 U.S.C. § 655(f)] and the silence with respect to legal issues in § 11(a) [29 U.S.C. § 660(a), the provision for judicial review of the outcome of an enforcement proceeding], an intention to limit the scope of judicial review in the enforcement proceeding. Judicial review at that stage is, after all, the ordinarily preferred method. *See* Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 163–64 (1967). Absent an explicit withdrawal of jurisdiction, we will entertain affirmative defenses attacking the validity of an administrative regulation that is brought to us for enforcement."

unreasonable or contrary to law."[24] The court failed to explain why an agency that seeks to enforce a regulation adopted in violation of APA rulemaking requirements would not thereby be acting "contrary to law." After all, an invalid regulation is a nullity.[25] Worse, the reason that the court gave for this dictum—that a contrary holding "would effectively nullify the congressional circumscription of the right to petition for review of an OSHA standard"—was inconsistent with the court's own reading of the legislative history, which showed Congress intended to permit validity challenges during enforcement.[26] In sum, the opinion was an internally inconsistent muddle.

2. Fourth Circuit

In *Daniel International Corp. v. OSHRC*, the Fourth Circuit noted a split that had by then developed in the circuits but avoided a ruling, rejecting the validity challenge there on a harmless error ground.[27]

3. Fifth Circuit

In *Deering Milliken, Inc. v. OSHRC*, the Fifth Circuit relied on Supreme Court case law requiring "a clear command before limiting judicial review"[28] and the OSH Act's legislative history, particularly a Senate report stating that section 655(f) "does not foreclose an employer from challenging the validity of a standard during an enforcement proceeding."[29] It then turned to an unusual situation presented by the OSH Act: In 1971, OSHA had under a special grant of statutory authority summarily adopted hundreds of standards, without notice-and-comment rulemaking. The court held that employers could not have had an adequate opportunity to challenge those hundreds of standards during the fifty-nine-day challenge period provided by OSH Act section 6(f).[30]

24. *Id.* at 551–52.

25. Functional Music, Inc. v. FCC, 274 F.2d 543, 547–48 ("[I]f the rules were invalid, they are a nullity . . . ."); *see also* Paulsen v. Daniels, 413 F.3d 999, 1008 (9th Cir. 2005); MCI Telecomms. Corp. v. FCC, 57 F.3d 1136, 1142–43 (D.C. Cir. 1995) (invalidating rule for inadequate notice); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1405 (9th Cir. 1995) ("Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.").

26. *Atl. & Gulf Stevedores*, 534 F.2d at 548–49; see *supra* note 20.

27. 656 F.2d 925, 930 (4th Cir. 1981).

28. 630 F.2d 1094, 1099 (5th Cir. 1980) (citing Barlow v. Collins, 397 U.S. 159, 167 (1970)).

29. *Id.* at 1099 (quoting S. REP. NO. 91–1282, 91st Cong., 2d Sess. 8, *reprinted in* 1970 U.S.C.C.A.N. 5177, 5184).

30. *Id.* OSH Act § 6(a), 29 U.S.C. § 655(a), required the Labor Department to, within two years (that is, between 1971 and 1973), adopt so-called "established Federal standards" (standards

In *RSR Corp. v. Donovan*, the Fifth Circuit held that:

> [W]hen an employer has participated in [an OSHA notice-and-comment] rulemaking and [a] pre-enforcement review of an OSHA regulation and could have then asserted either a substantive or procedural challenge to its validity, but did not, and has no excuse for its failure to do so, we will not entertain the challenge in an enforcement proceeding.[31]

4. Sixth Circuit

The Sixth Circuit's discussion in *Advance Bronze, Inc. v. Dole* is unclear, veering between the merits and the court's authority to consider the issue.[32] At first, the court seemed to say that the challenge there—a protest against the absence of notice-and-comment rulemaking—lacked merit because a special provision of the OSH Act permitted summary adoption.[33] But it then cited with favor the Eighth Circuit's holding in *National Industrial Constructors Inc. v. OSHRC*,[34] and stated that "this court will not allow Advance to escape liability by raising a procedural attack upon" the standard.[35]

5. Eighth Circuit

At first, the Eighth Circuit broadly held that employers could challenge the validity of OSHA standards during enforcement. In *Arkansas-Best Freight Systems, Inc. v. OSHRC*, the employer challenged a standard's validity, arguing that it was infeasible as applied.[36] The court stated that "[i]t is clear from the legislative history . . . that judicial review

adopted under other federal statutes) and "national consensus standards" (private standards adopted by industry) as standards enforceable under the OSH Act. OSHA was required to act summarily—that is, without notice-and-comment rulemaking or findings (such as feasibility) that it would otherwise have been required to make. OSHA adopted the vast bulk of such standards within a few weeks after the Act's April 28, 1971, effective date and nearly all at once. *See* 36 Fed. Reg. 10466 (May 29, 1971), adopting hundreds of provisions. The provision under which nearly all subsequent standards were adopted is OSH Act § 6(b), 29 U.S.C. § 655(b).

31. 747 F.2d 294, 302 (5th Cir. 1984). In Kiewit Pwr. Constr. Co. v. Sec'y of Lab., 959 F.3d 381, 392 (D.C. Cir. 2020) (discussed *infra* note 47 and accompanying text), the D.C. Circuit distinguished *RSR* from the usual challenge to a standard during enforcement on the ground that, "[RSR] participated not only in the notice-and-comment process mandated by section 6(b), but also in pre-enforcement judicial review under section 6(f)."

32. 917 F.2d 944, 951–52 (6th Cir. 1990).

33. *Id. See supra* note 30.

34. 583 F.2d 1048, 1052 (8th Cir. 1978).

35. *Advance Bronze*, 917 F.2d at 952.

36. 529 F.2d 649 (8th Cir. 1976).

during the enforcement stage is intended," citing the Senate report.[37] The court also stated that "such review is consistent with the rule that judicial review is to be presumed."[38]

In *National Industrial Constructors, Inc. v. OSHRC*, however, the Eighth Circuit retreated from the broad language in *Arkansas-Best*.[39] It held that "a challenge to the validity of an OSHA regulation, based solely upon [OSHA's] failure to comply with the procedural requirements of the APA, OSHA, or any other applicable statute, may only be raised in a pre-enforcement proceeding instituted pursuant to" OSH Act section 6(f).[40] "Such attacks may not be raised in an enforcement proceeding."[41] It held that substantive challenges, however, may always be mounted.[42]

6. Ninth Circuit

The Ninth Circuit held that it would not "foreclose a challenge to the procedural validity of an OSHA regulation in the absence of express authorization from Congress," and that the Senate report's "language . . . is clear."[43]

7. D.C. Circuit

In *Simplex Time Recorder Co. v. Secretary of Labor*, the D.C. Circuit noted the circuit split but stated:

> We have considered the evidence of congressional intent put forward in these cases, and we agree with the majority view that Congress intended review of the validity of [OSHA] standards to be available in enforcement proceedings before the Commission, and that Congress drew no distinction between procedural and substantive challenges in this regard.[44]

The opinion added, "[W]e are doing no more than interpreting congressional intent as to the preclusive effects of OSHA's provision for

37. *Id.* at 653 (citing S. Rep. No. 91–1282).

38. *Id.*

39. 583 F.2d at 1052–53 (8th Cir. 1978).

40. 29 U.S.C. § 655(f) (2018); *id.* at 1052.

41. *Nat'l Indus. Constructors, Inc.*, 583 F.2d at 1053.

42. *Id*. at 1052.

43. Marshall v. Union Oil Co., 616 F.2d 1113, 1118 (9th Cir. 1980); *see also* Noblecraft Indus., Inc. v. Sec'y of Lab., 614 F.2d 199, 201–02 (9th Cir. 1980) ("[V]alidity of the standard can be challenged in this review of the enforcement order.").

44. 766 F.2d 575, 582 n.2 (D.C. Cir. 1985).

pre-enforcement review."[45] In *General Carbon Co. v. OSHRC*, the court characterized *Simplex* as "clearly" holding that validity challenges during enforcement are permitted.[46]

While this article was in preparation, events occurred in the D.C. Circuit that shed light on the article's thesis. In *Kiewit Power Construction Co. v. Secretary of Labor*, an employer challenged the validity of a 1971 amendment, without notice-and-comment rulemaking or statutorily required findings, of an OSHA standard adopted under OSH Act section 6(a).[47] That provision permitted OSHA, for the two-year period between 1971 and 1973 and without regard to the APA and the OSH Act's regular rulemaking provision (OSH Act section 6(b)), to adopt certain workplace safety standards.[48] The court requested supplemental briefs on whether *JEM Broadcasting* had, despite *Simplex*, foreclosed the challenge.[49]

In response, the employer argued that *JEM Broadcasting* had no such effect, citing unusually detailed evidence in the OSH Act's legislative history that Congress specifically intended non-exclusivity.[50] The employer also argued that APA section 703 "directly addresses this issue" and that, unlike the *JEM Broadcasting* line of cases, the mere adequacy of a pre-enforcement challenge provision "cannot alone prove that it is 'exclusive' [under APA section 703]—or 'exclusive' would . . . be effectively read out of the statute."[51] The employer acknowledged that its argument "treads a different path than the doctrine developed" in circuit precedents but observed that they had "not indicate[d] . . . that this Court [had] examined this matter in light of APA section 703."[52] The employer stated that "[w]hile re-examination in light of § 703 would ordinarily be appropriate" (citing two Supreme Court cases discarding judge-made law in favor of APA provisions (discussed *infra* in Parts III A and B)), the clarity of the legislative history made re-examination unnecessary.[53]

45. *Id.*

46. 860 F.2d 479, 483–84 (D.C. Cir. 1988).

47. 29 U.S.C. § 665(a) (2018); 959 F.3d 381 (D.C. Cir. 2020). This writer was counsel for the employer there.

48. *See supra* note 30.

49. *Kiewit Power*, 959 F.3d at 391.

50. Supplemental Brief of Kiewit Power, 2019 WL 5677848 at *5–10 (No. 11-2395) in *Kiewit Power*.

51. *Id.* at *10–11.

52. *Id.* at *12.

53. *Id.*

The court's decision did not mention APA section 703, even though it had been prominently briefed; the court stated that it "d[id] not reach" the employer's other arguments.[54] Instead, based on the OSH Act's legislative history, the court reaffirmed *Simplex*'s holding that the OSH Act "allows for a procedural challenge in an enforcement proceeding, at least for section 6(a) standards."[55] That last phrase could, however, be read to imply that exclusivity *might* apply to procedural challenges to standards adopted under the OSH Act's regular rulemaking provision, section 6(b).[56] If so, the phrase is inconsistent with the OSH Act's legislative history (on which the court purported to rely) and with APA section 703 (which it purported not to reach), neither of which draws or suggests that distinction. The phrase is also inconsistent with D.C. Circuit precedent, for in *General Carbon* the court had permitted a challenge to a standard adopted under OSH Act section 6(b).[57]

B. The Judge-Made Law is Inconsistent with APA § 703

The problem with the judge-made law exemplified by *JEM Broadcasting* is that it is inconsistent with APA section 703's third sentence.

First, APA section 703 states a general rule permitting all validity challenges during enforcement proceedings. It states that "agency action *is* subject to judicial review in civil . . . proceedings for judicial enforcement."[58] By contrast, the general rule of *JEM Broadcasting* and its progeny is that "procedural attacks on a rule's adoption are barred."[59]

Second, APA section 703's text provides only a narrow exception to its general rule: the prior opportunity for judicial review must be "adequate" *and* "exclusive." The exception treats adequacy and exclusiveness as separate elements that must both be independently

54. *Kiewit Power*, 959 F.3d at 392.

55. *Id.*

56. 29 U.S.C. § 655(b) (2018); *id.* at 391. The *Kiewit Power* court stated: "[T]hat generalized principles of finality may bar untimely procedural attacks under other statutes says nothing about the viability of such a challenge under the OSH Act. . . . Indicia of congressional intent can vary from one statute to another and we must take care to conduct an individualized inquiry. . . . We see no reason to disregard *Simplex*'s determination that the OSH Act allows for a procedural challenge in an enforcement proceeding, at least for section 6(a) standards."

57. Gen. Carbon Co. v. OSHRC, 860 F.2d 479 (D.C. Cir. 1988). *General Carbon* concerned 29 C.F.R. § 1910.1200, adopted in 1983 under OSH Act § 6(b). 48 Fed. Reg. 53280, 53320 (1983) (stating authority for standard).

58. 5 U.S.C. § 703 (2018) (emphasis added).

59. Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys., 195 F.3d 28 (D.C. Cir. 1999) (summarizing JEM Broadcasting Co. v. FCC 22 F.3d at 325).

proved. By contrast, *JEM Broadcasting* infers exclusiveness from adequacy alone.[60]

Third, the use of the word "[e]xcept" by APA section 703 means that the burden of proving exclusivity should fall on the agency asserting it, not the private party resisting it.[61] By contrast, *JEM Broadcasting* placed the burden of establishing non-exclusivity on the private party.[62]

Fourth, APA section 703 draws no distinction between procedural and substantive challenges, or between regulations adopted under one provision but not another. By contrast, *JEM Broadcasting* distinguishes between procedural and substantive challenges, and the D.C. Circuit in *Kiewit* suggested a possible distinction between standards adopted under OSH Act sections 6(a) and 6(b).[63]

Putting these differences together, APA section 703 creates a regime strikingly inconsistent with that created by the *JEM Broadcasting* line of cases.

What evidence would suffice to show exclusivity within the meaning of section 703? It should presumably suffice for exclusivity to be stated expressly, to be clearly implied by other language of the statute, or perhaps to be clearly stated in its legislative history. For example, a provision of the Federal Mine Safety and Health Act states that a post-promulgation petition is "the exclusive means of challenging the validity of" mine safety standards.[64]

What cannot logically suffice, however, is silence, the existence of a merely adequate pre-enforcement provision, or a judge's idea of good policy. The exception in APA section 703 is so worded that a court must affirmatively conclude that a pre-enforcement challenge provision is exclusive. It is difficult to see how such a conclusion could be drawn if the pre-enforcement provision and its legislative history are both silent on the point. And inasmuch as APA section 703 expressly requires courts to find *both* adequacy and exclusivity, inferring exclusivity from mere adequacy

60. *JEM Broad.*, 22 F.3d at 326 (looking to adequacy alone); *see infra* quotation at note 62.

61. Action on Smoking & Health v. CAB, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983); *see also* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 92 (D.C. Cir. 2012) ("exception").

62. *JEM Broad.*, 22 F.3d at 326 ("[U]nder our established law, the result might differ *if it could be shown* that no party ever had adequate opportunity to challenge a particular agency action." (emphasis added)). The court emphasized that non-exclusivity, rather than exclusivity, would be an "exception." *Id*. ("Thus, we have recognized exceptions to the limitations period when agency action fails to put aggrieved parties on reasonable notice of the rule's content, or when such action remains unripe for judicial review throughout the statutory review period.").

63. *See supra* the court's statement quoted at note 56.

64. 30 U.S.C. § 811(d) (2018).

(as *JEM Broadcasting* does) would fail to give independent meaning to the key word "exclusive" and would effectively read it out of the statute.

As to a judge's idea of good policy, "[j]udicial action must be governed by standard, by rule, and [it] must be principled, rational, and based upon reasoned distinctions found in the . . . laws."[65] A finding of exclusivity not drawn from tangible evidence of congressional intent would violate that principle.

The above approach to APA section 703's exception was evident in the recent separate opinion by Justice Kavanaugh, speaking for himself and three other justices in *PDR Network, LLC v. Carlton & Harris Chiropractic*.[66] The statute there was the Hobbs Act, the pre-enforcement provision of which is silent on whether it is exclusive.[67] Justice Kavanaugh reasoned that "elementary principles of administrative law establish that the proper default rule is to allow review" of the agency's position unless exclusivity is stated "expressly" and hence that the "silence" of the Hobbs Act on exclusivity was insufficient.[68]

Justice Kavanaugh's view was soon endorsed by Judges Newsom and Branch of the Eleventh Circuit in their concurring opinion in *Gorss Motels, Inc. v. Safemark Systems, LP*.[69] Quoting Justice Kavanaugh, they wrote that "'elementary principles of administrative law establish that the proper default rule is to allow [judicial] review' unless Congress says otherwise," and that judicial review during enforcement must be "expressly preclude[d]."[70]

III. An Unfortunate Pattern of Ignoring the APA

Section 703's third sentence is not the only APA provision that courts have ignored. Some examples follow.

65. Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

66. 139 S. Ct. 2051, 2057 (2019) (Kavanaugh, J., concurring in the judgment).

67. 28 U.S.C. § 2344 (2018).

68. *PDR Network*, 139 S. Ct. at 2058–62.

69. 931 F.3d 1094, 1105–12 (11th Cir. 2019).

70. *Id.* at 1109. They also wrote: "At least in the ordinary case, our precedents task *all* persons with both the foreknowledge—some would say the clairvoyance—to identify any agency orders that *might* concern them in future litigation and the resources to bring an immediate challenge against each of those orders. 'Requiring all those potentially affected parties to bring a facial, pre-enforcement challenge within 60 days or otherwise forfeit their right to challenge an agency's interpretation of a statute borders on the absurd.'" *Id.* at 1110 (quoting *PDR Network*, 139 S. Ct. 2051, 2062 (2019) (Kavanaugh, J., concurring in the judgment)). Judges Newsom and Branch also quoted with approval Justice Powell's concurrence in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 290 (1978). *See* quotation *supra* note 11.

A. Exhaustion of Administrative Appeals

Before 1993, several federal appellate courts followed a judicially created doctrine of exhaustion of administrative remedies.[71] In *Darby v. Cisneros*, however, the Supreme Court held that in many cases APA section 704 "plainly" does not require exhaustion when the judge-made doctrine would have required it.[72] The Court noted, with an air of exasperation, that Professor Kenneth Culp Davis had stated in his 1958 treatise[73] that this provision "had been almost completely ignored in judicial opinions," and that Professor Davis had "reiterated that observation 25 years later" in his treatise's later edition.[74] In putting aside the judge-made rule, the Court stated: "Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under" the APA.[75]

B. Non-APA Scope of Review of Agency Factual Findings

For many years, the Federal Circuit reviewed findings of fact by the Patent and Trademark Office under a judge-made "clear error" standard rather than the "substantial evidence" standard in APA section 706(2)(E). In *Dickinson v. Zurko*, the Supreme Court held that the Federal Circuit was required to apply the APA test.[76] It emphasized that "[t]he APA was meant to bring uniformity to a field full of variation and diversity."[77]

C. Non-APA Ripeness Doctrine to Limit Judicial Review

APA sections 702 and 704 together state that one "suffering legal wrong" or "adversely affected or aggrieved by" "final agency action for

71. Darby v. Kemp, 957 F.2d 145 (4th Cir. 1992), *rev'd sub nom*. Darby v. Cisneros, 509 U.S. 137 (1993); Missouri v. Bowen, 813 F.2d 864 (8th Cir. 1987); Montgomery v. Rumsfeld, 572 F.2d 250, 253–54 (9th Cir. 1978). *But see* Gulf Oil Corp. v. DOE, 663 F.2d 296, 308 & n.73 (D.C. Cir. 1981); New Eng. Coal. on Nuclear Pollution v. NRC, 582 F.2d 87, 99 (1st Cir. 1978); United States v. Consol. Mines & Smelting Co., 455 F.2d 432, 439–40 (9th Cir. 1971).

72. 509 U.S. 137 (1993). APA § 704 states: "Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704 (2018).

73. KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 101 (1st ed. 1958).

74. *Darby*, 509 U.S. at 145; KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 468–69 (2d ed. 1983) ("The provision is relevant in hundreds of cases and is customarily overlooked.").

75. *Darby*, 509 U.S. at 143.

76. 527 U.S. 150 (1999).

77. *Id.* at 155.

which there is no adequate remedy in a court" is entitled to judicial review.[78] Despite this, the Supreme Court has interposed the doctrine of "prudential ripeness" to balance "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[79] As Professor John Duffy has demonstrated, however, "ripeness doctrine has no place in the APA" because it "does not authorize balancing."[80]

D. Judicial Deference to Federal Agency Interpretations

The most spectacular examples of judges ignoring the APA are *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[81] and *Auer v. Robbins*.[82] They respectively held, in effect, that federal courts must uphold federal agencies' reasonable interpretations of ambiguous statutes and regulations. Neither case considered the APA's provisions on judicial review, even though the APA's language and legislative history at least suggest (if not outright prove) that Congress intended that judicial interpretation be *de novo*.[83]

In the recent *Kisor v. Wilkie*, the Court attempted to reconcile *Auer* with the APA.[84] The attempt fell short, however, for the Court failed to discuss what Professor Kenneth Culp Davis (a drafter of the APA[85]) had,

78. Administrative Procedure Act, 5 U.S.C. § 702 (2018) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); 5 U.S.C. § 704 (2018) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

79. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967).

80. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 162, 177 (1998).

81. 467 U.S. 837 (1984).

82. 519 U.S. 452 (1997).

83. Principal APA drafter and House report author Rep. Francis Walter stated that section 706 "requires courts to determine *independently* all relevant questions of law, including the interpretation of constitutional or statutory provisions." STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT—LEGISLATIVE HISTORY 1944-46, S. Doc. No. 248, at 370 (1946) ("APA-Leg.Hist.") (emphasis added). Both H.R. Rep. 79-1980, at 278 (1946), APA-Leg.Hist. 278, and S. Rep. 79-752, at 214 (1945), APA-Leg.Hist. 214, stated that "questions of law are for the courts rather than agencies to decide in the last analysis . . . ." For academic comment, *see, e.g.*, Duffy, *Administrative Common Law*, *supra* note 80, 77 TEX. L. REV. at 194 (§ 706's "plain language alone suggests *de novo* review."); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995 (1992) ("[A]ll" in § 706 "suggests that Congress contemplated courts would always apply independent judgment on questions of law.").

84. 139 S. Ct. 2400 (2019).

85. Jeffrey S. Lubbers, *Approaches to Regulatory Reform in the United States: A Response to the Remarks of Professors Levin and Freeman*, 83 WASH. U. L.Q. 1893, 1893 (2005) ("[Kenneth Culp Davis] helped draft [the] APA."); Paul Verkuil, *Present at the Creation: Regulatory Reform Before*

soon after *Chevron*'s issuance, identified as the most pertinent part of the APA on the deference issue—the word "all" in APA section 706.[86] That provision, entitled "Scope of review," states: "To the extent necessary to decision and when presented, the reviewing court shall decide *all* relevant questions of law . . . ."[87] Professor Davis argued that *Chevron* is contrary to "all" in section 706 and is "the opposite of what Congress had legislated."[88] The word "all" never appeared in *Kisor*.

The Court's failure to come to grips with the issue is unfortunate, for a moment's reflection would have revealed the inconsistency of deference with section 706. Under *Chevron* and *Auer*, courts decide two questions—whether the statute or regulation is ambiguous; and, if so, whether the agency's interpretation is reasonable. The court does not decide the key question—how the ambiguous statute or regulation is to be construed. Instead, the agency decides it.[89] And that omission is contrary to the word "all," which the Court failed to apply. For this reason, *Kisor* will not be the last word on the consistency of deference with the APA.

IV. How Did We Get Here?

A. Counsel and Courts

Nearly all the blame for courts overlooking the APA lies with counsel, who frequently fail to cite APA provisions. But much blame must also be shouldered by the courts, who often fail to consult the APA for a rule of decision on administrative law questions. Judges raised in the common law tradition naturally gravitate to judge-made law. Judge-made law is also apt to be more finely grained, more attuned to the equities in a

1946, 38 ADMIN. L. REV. 509, 509–511 (1986).

86. KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES § 29:16-1, p. 509, § 29:16-2, p. 510 (1989).

87. Administrative Procedure Act, 5 U.S.C. § 706 (2018) (emphasis added).

88. *E.g.*, DAVIS, *supra* note 86, at 509–510 ("[T]he Court . . . ignored and violated the entirely clear provision of . . . [APA] § 706 . . . that 'the reviewing court shall decide all relevant questions of law.' The contrast between the statutory words and the Court's words could hardly be stronger . . . . The Court directly violated the clear statute.").

89. Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."); *id.* at 983 ("*Chevron* teaches that a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative . . . the agency remains the authoritative interpreter (within the limits of reason) of such statutes.") (alteration to the original); *see also* Negusie v. Holder, 555 U.S. 511, 528 (2009) (Scalia, J., concurring) ("It is to agency officials, not to the Members of this Court, that Congress has given discretion to choose among permissible interpretations of the statute.").

particular case, and more likely to reflect a judge's nuanced knowledge of legal administration. But in a democracy, none of these reasons can suffice. Unlike judge-made law, the APA is the consensus of the people's representatives and must be applied even if not cited.

Aside from political illegitimacy, the judge-made law of exclusivity can be criticized for other reasons. As the case law under the OSH Act illustrates, the courts' exclusivity holdings have been complex, inconsistent, and unstable. Distinctions have been drawn between substantive and procedural challenges. One court has distinguished between employers who previously participated in rulemaking and pre-enforcement challenge proceedings, and those who did not.[90] Another court has hinted at a distinction between challenges to standards adopted under one rulemaking provision and another.[91] None of these distinctions, however, rest on anything in the OSH Act's language or legislative history. On the contrary, the OSH Act's legislative history states with unusual clarity and without qualification that employers may challenge standards during enforcement.[92] Worse, these distinctions have been drawn or suggested even when the court had been made *aware* of the OSH Act's unqualified legislative history, and in one case even when APA section 703 was cited to the court.[93] Not only do the distinctions rest solely on the judges' ideas of good policy, but they also suffer from the lack of clarity typical of distinctions being hammered out in case law. For example, is an agency's failure to make a statutorily required rulemaking finding that a regulation is "feasible" a procedural or a substantive defect? Worse, opinions have been internally inconsistent, and opinions within the same circuit have vacillated, sometimes with a panel appearing to be unaware of its own precedent.

By contrast, the third sentence of APA section 703 is simple, clear, and provides an easily administered rule—one that draws none of the above distinctions. The situation brings to mind an observation by Professor Kenneth Culp Davis: "Altogether, the law made by judges seems

90. RSR Corp. v. Donovan, 747 F.2d 294, 302 (5th Cir. 1984); *see* quotation in the text accompanying *supra* note 31.

91. Kiewit Pwr. Constr. Co. v. Sec'y of Labor, 959 F.3d 381, 392 (D.C. Cir. 2020); *see supra* text accompanying notes 55–57.

92. *See* quotation from the legislative history in the text accompanying *supra* note 29.

93. *See* citations *supra* notes 50–53 to the employer's supplemental brief in *Kiewit Power*, 959 F.3d at 392, which specifically cited APA § 703 to the court. Despite this, the court did not cite the statute.

to me clearly inferior to statutes and administrative rules in clarity, reliability, and freedom from conflict."[94]

B. Academia

Part of the problem may also be that academic scholarship on exclusivity has ignored the third sentence of APA section 703.

In 1982, the Administrative Conference of the United States (ACUS) received a report on the exclusivity of pre-enforcement challenges by Paul Verkuil, a professor of administrative law at Tulane Law School.[95] ACUS soon adopted a recommendation to Congress on the subject.[96] The ACUS recommendation did not mention APA section 703's third sentence.

Professor Verkuil's study mentioned APA section 703's third sentence briefly but inaccurately. It stated that APA section 703 "specifically recognizes . . . that enforcement review can be deemed precluded if an *adequate* opportunity for preenforcement review is presented."[97] The statement is inaccurate because it ignores section 703's other key criterion—exclusivity.

In 2011, Professor Verkuil's study was celebrated in a festschrift by Ronald Levin, professor of administrative law at Washington University in St. Louis.[98] Professor Levin's paper is in much the same vein as Professor Verkuil's. It too emphasized the word "adequate" but ignored section 703's use of "exclusive."[99]

One might speculate that both scholars did not mention the word "exclusive" (or treated it as meaningless) because the judge-made doctrine followed by the courts had often implied exclusivity from adequacy alone. But the judge-made doctrine had been built without consideration of APA section 703. Professors Verkuil and Levin also failed to consider that to imply exclusivity from adequacy alone would not give exclusivity the independent status that its parallel use in section 703 signifies.

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94. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 4 (1986).

95. Paul R. Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733 (1983).

96. Conference Recommendation 82-7, 47 Fed. Reg. 58,208 (Dec. 30, 1982) (formerly codified at 1 C.F.R. § 305.82-7 (1993)) (now available at www.acus.gov/recommendation/judicial-review-rules-enforcement-proceedings (last visited Sept. 21, 2020)).

97. Verkuil, *supra* note 95, at 760 (emphasis added). Nearly the same statement occurs at 754 n.82 (Section 703 "contemplates that *Yakus*-type enforcement limitations might exist where adequate opportunities for pre-enforcement review are present.").

98. Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2217 (2011).

99. *See id.* at 2208.

The Verkuil paper illustrates another way in which scholarship has fallen short on this subject. An early Supreme Court case often mentioned is *Yakus v. United States*.[100] There, the Court upheld the constitutionality of section 204(d) of the Emergency Price Control Act of 1942, which had expressly made a short pre-enforcement challenge period exclusive.[101] The Court held that the provision was constitutional because it provided an "adequate" opportunity for pre-enforcement review. Professor Verkuil characterized APA section 703 as having been passed to "incorporate[] the 'adequacy' standard of *Yakus*."[102] That may be so, but it again ignores that section 703 *also* expressly incorporated the statutory exclusivity criterion featured by the statute in *Yakus*.[103]

V. Recommendations: What the Courts Need to Do

First, the Supreme Court should state plainly that, on administrative law questions, it is the duty of federal judges to consult the APA to determine whether it supplies a rule of decision and, if it does, to follow it, regardless of any previous judge-made law and regardless of any failure by the parties to have cited it. If needed to ensure fairness, courts should invite supplemental briefs.

Although federal judges cannot be reasonably expected to know every corner of every statutory scheme, they can be reasonably expected to recognize when the APA applies to a question, just as they can be reasonably expected to know and apply the Federal Rules of Civil Procedure. This is especially true of the D.C. Circuit, which has been assigned a heavy load of administrative agency appeals.

Second, courts must resist old habits and give primacy to statutes, not judge-made law. They should not try to shoe-horn APA provisions into judge-made law. Failing to treat the APA as the fount from which case law should freely develop on its own terms would be nearly as undemocratic

100. 321 U.S. 414 (1944).

101. *Id.*; Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204(d), 56 Stat. 23, 33 ("Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule.").

102. Verkuil, *supra* note 95, at 741 n.34 ("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.").

103. A student paper posted on the internet in draft form and apparently slated for publication by the George Washington Law Review, John Hindley, "Timing is Not the Enemy," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504338 (last visited Oct. 14, 2020), is also in the same vein as the articles by Professors Verkuil and Levin. The thirty-eight-page-long typescript does not discuss APA section 703 until page 34, nearly entirely ignores the statute's use of the word "exclusive," and focuses on case law nearly to the exclusion of the statute.

and faithless to the constitutional roles of Congress and courts as outright ignoring the APA. Statutes should not be warped by case law that did not consider the congressional intent behind them.