

The Invisible Barrier: Issue Exhaustion as a Threat to Pluralism in Administrative Rulemaking*

The modern administrative state is largely based on the rules promulgated by administrative agencies pursuant to their statutory authority. Theoretically, these rules are intended to serve both private parties and the public interest as a whole. However, for effective rules to be promulgated, a diverse, pluralistic array of private parties must participate in the rulemaking process. Unfortunately, studies have shown that such participation is lacking in many rulemakings and that regulated industries often dominate the process. This Note argues that “issue exhaustion” exacerbates this trend of insufficient participation by serving as an unjustifiable procedural barrier to judicial review. Issue exhaustion, part of the larger doctrine of exhaustion of remedies, is the traditional procedural doctrine that requires parties to submit detailed comments on a proposed rule as a prerequisite to challenging that rule in court. Because many poorly financed groups—particularly public interest organizations and small businesses—are unable to bear the expense of submitting meaningful comments on most proposed rules, issue exhaustion serves to bar these groups from later challenging those rules in court. This not only precludes court challenges, but it also removes the leverage that the threat of judicial review provides in rulemaking settlement negotiations. Notably, issue exhaustion’s negative effects may be largely invisible. The vast majority of those whose petitions would be barred by the doctrine likely recognize the futility of seeking judicial review and thus refrain from filing suit in the first place, removing themselves from the rulemaking process without ever appearing in the case law.

This Note proposes that the doctrine be modified by changing the way it is applied. Issue exhaustion is currently a blanket rule: if sufficient comments have not been submitted, the party may not seek judicial review. This Note proposes applying the doctrine according to a participation-based standard. Courts would only apply issue exhaustion to bar judicial review in those cases where participation in the rulemaking for the challenged rule had been sufficiently diverse and pluralistic. This standard would reduce the

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negative effects of issue exhaustion by allowing more participation in the rulemaking process but would still allow the doctrine to be applied in order to bar frivolous litigation in cases with sufficient participation.

This Note proceeds in five parts. Part I discusses the pluralistic basis of administrative law and summarizes the empirical literature on rulemaking. Part II describes the exhaustion requirement, its historical development, and its current application. Part III seeks to add practical context to the doctrinal analysis by conducting a survey of cases from the United States Court of Appeals for the District of Columbia Circuit wherein issue exhaustion was raised as a defense to parties seeking review of Clean Air Act rulemakings. Part IV discusses the results of this survey and states this Note's thesis: issue exhaustion serves as an unjustifiable barrier to participation in certain administrative rulemakings. Part IV by notes the doctrinal flaws in applying issue exhaustion to rulemakings. Part V concludes by proposing a modest yet significant change to the doctrine, one intended to reduce its negative effects without eliminating it completely.

I. Pluralism in Rulemaking

If federal administrative law were a building, its foundation would be pluralism. The Administrative Procedure Act (APA), and the administrative state more broadly, operates on the assumption that a diverse array of interested private parties will participate in agency proceedings.¹ Even prior to the APA's enactment, the United States Attorney General's Report on the then-proposed legislation stated that "[p]articipation by these [economic and other community] groups in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests."² While there is a longstanding normative debate over whether the pluralistic model is the optimal or even a desirable model for running the modern administrative state, there is little doubt that it is the model followed by the APA.³

1. See Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 100-01 (2011) (noting that there are "few disagreements" that interest-group pluralism is the dominant method of administrative law); see also Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 101 (2003) ("[T]he structure of the APA itself reveals that the statute is essentially a one-trick pony. All of its basic provisions rely on a single method for controlling the actions of administrative agencies, namely, participation by private parties.").

2. ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, U.S. DEP'T OF JUSTICE, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 103 (1941), available at <http://www.law.fsu.edu/library/admin/pdfdownload/1941chapter7.pdf>.

3. Compare Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1802 (1975) (describing the reformation of administrative law towards increased participation but ultimately concluding that "[a] system of interest representation . . . is not an acceptable general solution to the problem of delegated legislative power exercised by administrative agencies"), and Rubin, *supra* note 1, at 96-98, 146-47 (asserting that the pluralistic

Nowhere is the pluralistic process more important than in rulemaking. Rules are “agency statement[s] of general or particular applicability and future effect,”⁴ which have the force of law and, effectively, set public policy.⁵ Administrative agencies carry out their statutory mandates through rulemakings. Unlike adjudicatory proceedings, which generally have a more limited effect because of their focus on individual parties, rulemakings affect both private parties and the general public interest.⁶ To promulgate rules that protect the interests of both private parties and the general public, the agencies’ proposals must be forged in the pluralistic fires of diverse interest-group participation.⁷

The congressionally prescribed, traditional method by which a private party may participate in a rulemaking is by commenting on proposed rules; the APA generally requires that agencies give interested parties an opportunity to submit such comments.⁸ However, participation in rulemakings is not limited to simply submitting comments once a rule has been proposed. There are many opportunities for parties to participate in confidential settlement agreements with agencies after the notice-and-comment periods have run and even after the proposed rules have been finalized.⁹ Significant changes can be made to content and interpretation of the rule at the settlement stage.¹⁰ Finally, of course, judicial review offers parties a last-ditch

model embraced by the APA is fatally flawed and suggesting reforms to align the statute with a model based on Weberian instrumental rationality), with Sidney Shapiro, *Pragmatic Administrative Law*, ISSUES LEGAL SCHOLARSHIP, 2005, at 1, 4, 6–7, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1057&context=ils> (arguing that the reformation of administrative law has been “more successful than Professor Stewart’s analysis suggests” and noting “dozens of examples” where public interest groups held agencies accountable for failing to perform their statutory missions).

4. 5 U.S.C. § 551(4) (2006).

5. See Rubin, *supra* note 1, at 162 (“Rulemaking is the most direct, and perhaps the most important, modality by which administrative agencies make public policy.”).

6. See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390–91 (2004) (describing the procedural differences between rulemaking and adjudication). But see Rubin, *supra* note 1, at 162 (noting some overlap between rulemaking and adjudication in application).

7. See Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010) (“[T]he pluralistic engine [is] considered . . . fundamental to the administrative process.”).

8. See 5 U.S.C. § 553(c) (“After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”).

9. See Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L.J. 1241, 1243–48 (1985) (describing scheduling, process, and substantive-rulemaking settlement agreements).

10. A full discussion of rulemaking settlements, of which much is still murky, is beyond the scope of this Note. For a further discussion on the importance of rulemaking settlements, see generally Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC’Y REV. 735, 758 (1996) and Jim Rossi, *Bargaining in the*

method of making their voices heard in the administrative process. Indeed, judicial review is one of the most important tools available, as it gives the party that can threaten it a great deal of leverage during the entire rulemaking process.¹¹

While participation in rulemaking is theoretically open to all parties, in practice it is often severely constrained by resource and information limitations. It is true that it costs little for parties to track proposed rules and to submit basic, insubstantial comments.¹² However, comments that do not raise detailed, substantial concerns often have virtually no effect on agency decisions; established Supreme Court precedent allows agencies to ignore comments that are not “significant enough to step over a threshold requirement of materiality.”¹³ Most of the comments that are inexpensive to submit, particularly the duplicative comments submitted by ordinary citizens as part of online advocacy campaigns organized by public interest groups, can easily be dismissed as irrelevant, as they do not raise substantive legal issues.¹⁴ Thus, “[i]t is reasonable to argue that duplicative comments, perhaps except for some acknowledgement of the number of them, do not cross the materiality threshold” and are subject to being ignored by agencies.¹⁵

By contrast, submitting the kind of technical, complicated comments that are required to have an effect on complicated rulemakings can be very expensive.¹⁶ Indeed, Professor Cramton estimated in 1972 that the cost of a

Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement, 51 DUKE L.J. 1015 (2001).

11. Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 126 (1998).

12. See BRIDGET C.E. DOOLING, LEGAL ISSUES IN E-RULEMAKING: A REPORT TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 6 (2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/03/Legal-Issues-and-e-Rulemaking-3-17-11.pdf> (noting the prevalence of online advocacy campaigns that generate hundreds of thousands of comments in certain rulemakings); Croley, *supra* note 11, at 120–21 (remarking that notices of rulemakings are easily accessible in the *Federal Register* and that there are no legal barriers to submitting comments). *But see* Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 965–66 (2006) (noting that finding regulatory information online can be very difficult for even highly educated individuals and that “it . . . remain[s] costly for a citizen to take the time to learn about a rulemaking proceeding and submit a comment, at least one with any meaningful substance”).

13. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978) (citation omitted).

14. See Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 417 (2011) (referring to these comments as “hundreds of thousands of duplicate and near-duplicate e-‘postcards’ that express passionate support or opposition, and not much more”); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 EMORY L.J. 433, 441 (2004) (referring to such comments as “notice and spam”).

15. DOOLING, *supra* note 12, at 7.

16. See Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 526 (1972) (“Effective participation in the administrative process, it is all too evident, is an enormously expensive undertaking.”); Croley, *supra* note 11, at 121 (noting that “[m]eaningful, ongoing participation in especially complicated rulemakings is very likely to be more expensive” because participants must often evaluate technical information and

public interest group's full participation in a single Food and Drug Administration rulemaking proceeding was around \$30,000–\$40,000,¹⁷ or, in today's dollars, approximately \$160,000–\$215,000.¹⁸ While he noted that public interest groups had the opportunity to scale back their participation to reduce costs, Professor Cramton concluded that “[t]o make an *effective* impact on agency decisionmaking, public interest groups must be prepared to affect materially the record on which the agency decision will be based,” a course of action that requires significant expenditures.¹⁹

In practice, effective, substantive comments are usually submitted by well-financed industry groups and other regulated parties.²⁰ As many scholars have noted, the problem of resource limitations opens the rulemaking process to the threat of imbalanced participation;²¹ Professor Croley, in particular, has postulated that “one might reasonably suspect that parties with greater economic resources will participate disproportionately in agency decisionmaking processes.”²²

While a prominent, alternative view of public-interest-group participation insists that, despite their financial disadvantages, public interest groups and small businesses are successfully able to enter the arena to do battle with regulated interests and industries,²³ the empirical data support

supply their own data in response and because there are often repeated rounds of notice-and-comment periods throughout which the participant must continue to stay involved and respond).

17. Cramton, *supra* note 16, at 538.

18. The author completed this calculation using the Bureau of Labor Statistics' Inflation Calculator based on the Consumer Price Index. *CPI Inflation Calculator*, BUREAU LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm.

19. Cramton, *supra* note 16, at 539 (emphasis added).

20. THOMAS L. BRUCE ET AL., *FACILITATING ISSUE CATEGORIZATION & ANALYSIS IN RULEMAKING 1–2* (2008), available at <http://www.lawschool.cornell.edu/research/cei/upload/Facilitating-Issue-Categorization.pdf> (noting that for agency officials, a “task common to all notice-and-comment rulemaking is identifying *substantive* claims and arguments” and that such substantive comments are typically submitted by industry groups (emphasis added)); see also *infra* notes 24–34 and accompanying text.

21. See, e.g., Cramton, *supra* note 16, at 529 (describing the high costs placed on public interest groups seeking to participate in agency rulemaking); Wagner, *supra* note 7, at 1378–79 (noting that the combination of limited resources and a broad range of stakes in Environmental Protection Agency rulemaking proceedings places public interest groups at a disadvantage in environmental rulemaking as compared to industries that have more to spend on fewer rulemakings).

22. See Croley, *supra* note 11, at 122.

23. See, e.g., CHRISTOPHER J. BOSSO, *PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE* 252 (1987) (“Environmental policies, by their nature, prompt acrid disputes among equally determined and almost permanently mobilized sets of claimants . . .”); STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 292 (2008) (“[F]ew agency decisions with significant stakes escape public attention or participation completely. Regulatory decisionmaking is seldom done in the dark anymore.”); Burdett A. Loomis & Allan J. Cigler, *Introduction: The Changing Nature of Interest Group Politics*, in *INTEREST GROUP POLITICS* 1, 11 (Allan J. Cigler & Burdett A. Loomis eds., 1983) (concluding that a “participation revolution” of citizens and public interest groups had arisen by the mid-1980s); James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 385 (James Q.

Professor Croley's suspicions. These data show that the pluralistic process has become seriously compromised in at least some technical, low-salience rulemakings. In one recent study, Professors Yackee and Yackee examined forty rulemakings undertaken by four different agencies between 1994 and 2001.²⁴ They found that of the 1,693 public comments submitted during notice-and-comment rulemaking, 966 (over 57%) were submitted by business interests; in contrast, only 95 comments (6%) were submitted by public interest groups.²⁵ While admitting that their study was only of low-salience rulemakings, rather than of heavily publicized, controversial rulemakings, Professors Yackee and Yackee concluded that their analysis "largely confirms . . . that broad participation rights do not, by any means, ensure that all relevant interests will be represented before the agencies."²⁶ Similarly, Professor Golden found, in her study of eight Environmental Protection Agency (EPA) and National Highway Traffic Safety Administration (NHTSA) rulemakings, that business and related groups submitted between 67.7% and 100% of the total comments.²⁷ Public interest groups only submitted comments on three of the eight rulemakings and never exceeded 11% of the total comments.²⁸

More recently, Professor Wagner conducted a detailed study of interest group participation over the life spans of ninety Hazardous Air Pollutants (HAP) rules promulgated by the EPA under the Clean Air Act (CAA).²⁹ Professor Wagner found that regulated interests dominated participation at every stage of the rulemaking process.³⁰ Prior to the official notice-and-comment period, the EPA had an average of 178 contacts with interest groups on each proposed rule in development, of which over half were informal contacts.³¹ Industry accounted for the vast majority of these informal communications and, on average, had 170 times more informal communications with the EPA than did public interest groups and over ten

Wilson ed., 1980) (observing that the EPA had to deal with an equal number of complaints from environmental interests and business interests).

24. These agencies were the Occupational Safety and Health Administration, the Employment Standards Administration, the Federal Railroad Administration, and the Federal Highway Administration. Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 131 (2006).

25. *Id.* at 133.

26. *Id.* at 137 (citation omitted) (internal quotation marks omitted).

27. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 252-53 (1998).

28. *Id.* at 253.

29. Wagner et al., *supra* note 1, at 119.

30. *See id.* at 123 ("[O]nce one looks at the entire life cycle of rulemakings[,] . . . one observes systematic evidence of imbalance in interest group engagement and influence These imbalances tilt strongly in favor of regulated industry").

31. *Id.* at 124.

times more informal communications than did state regulators.³² Industry groups comprised over 81% of total comments and participated in all rulemakings, whereas public interest groups submitted 4% of total comments and participated in less than half of all rulemakings.³³ The empirical data thus show that pluralistic interest group participation does not exist in at least some technical, low-salience rulemakings. Indeed, those rulemakings are dominated by regulated industries. The implications of such imbalanced participation are stark. As Professor Stewart argued, “[i]t has become widely accepted . . . that the comparative overrepresentation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.”³⁴ If the pluralistic process is as compromised as these data show, then the foremost concern of the administrative law system should be removing unnecessary barriers to pluralistic participation.

The doctrine of “exhaustion of remedies” thus becomes relevant. Exhaustion denies judicial review to those parties who have not participated in the notice-and-comment period.³⁵ Because, as Professor Wagner has noted, only parties with the ability to seek judicial review hold the negotiation leverage that the threat of judicial review provides, parties who were unable to comment up front lose the ability to engage at the later stages of the rulemaking process.³⁶ While there is, of course, no guarantee that potential participants who could not afford to comment on a given rule will later participate in settlement negotiations or judicial review, preserving their ability to do so is crucial; as long as they can threaten to intervene, their concerns will not be entirely ignored.³⁷ This holds especially true for many public interest groups—many of which have donation-funding models that rely heavily on positive press from litigation. Because these groups are required to “reserve their fire power” for judicial review,³⁸ it is certainly possible that these groups would prefer to participate more at the litigation

32. *Id.* at 125.

33. *Id.* at 128–29.

34. Stewart, *supra* note 3, at 1713.

35. *See infra* Part II.

36. *See* Wagner, *supra* note 7, at 1365 (“[W]hen a participant fails to lodge comments and preserve its right to judicial review, the agency discounts and in some cases completely ignores their concerns.”).

37. Parties that can participate but choose not to do so are similarly affected. In one EPA rulemaking on wood preserving, two prominent environmental public interest groups participated extensively in the rulemaking but failed to join in the subsequent judicial-review litigation. Coglianese, *supra* note 10, at 757. Because those groups failed to participate in the litigation, “the positions these environmental groups successfully advanced in the wood-preserving rulemaking were later directly undercut in the litigation process.” *Id.*

38. Wagner, *supra* note 7, at 1387.

phase of rulemaking but are prevented from doing so by the need to expend resources to avoid the exhaustion doctrine.³⁹

This Note hypothesizes that the doctrine of exhaustion of remedies—specifically, issue exhaustion—serves as an unjustifiable barrier that further exacerbates trends toward imbalanced participation at the later stages of the rulemaking process. However, to reach this conclusion, this Note must first explore the exhaustion doctrine and its practical application, and explain why its traditional justifications are misguided.

II. The Development and Application of the Exhaustion Doctrine

A. *Doctrinal Categorization and Policy*

The doctrine of exhaustion of remedies can be subdivided into two categories that are closely related but distinct in application: appeal exhaustion and issue exhaustion. Appeal exhaustion, often simply referred to as exhaustion of remedies, requires a petitioner to raise and expend all possible appeals at the agency level before seeking judicial review.⁴⁰ Appeal exhaustion thus delays judicial review but does not deny it entirely, as the petitioner is able to seek judicial review once it has unsuccessfully pursued its remaining administrative appeals.⁴¹ By contrast, issue exhaustion—the focus of this Note—is, with few exceptions, an absolute bar to judicial review for those issues or objections that petitioners fail to raise at the agency level.⁴² It is “an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.”⁴³ Petitioners who fail to raise issues in agency proceedings, whether those be adjudicatory hearings or notice-and-comment rulemakings, will be unable to obtain merits review on those issues. Potentially meritorious arguments may be dismissed, and

39. See Coglianese, *supra* note 10, at 757 (noting that environmental public interest groups have “a generally higher litigation rate than other groups”). Moreover, there is some reason to believe that the costs of seeking judicial review of rulemakings are less than those of typical litigation, at least in the early stages. Judicial review of rulemaking—which by definition is a form of appellate litigation—begins with a simple petition for review and, because the record has been developed at the agency level, requires no expensive pretrial motion practice or discovery. See *id.* at 755–56 (discussing these examples and other contrasts between the judicial review of rulemakings and traditional civil litigation). To the agencies themselves, at least, “the costs of judicial review litigation are relatively low.” *Id.* at 761.

40. William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1, 1 (2000).

41. See David Douglas Spencer, Note, *The Duty to Participate in Agency Rulemaking*, 54 GEO. WASH. L. REV. 628, 629 (1986) (“The effect of requiring exhaustion is, at worst, a delay in obtaining judicial review.”); see also *Touche Ross & Co. v. SEC.*, 609 F.2d 570, 574 (2d Cir. 1979) (“The doctrine of exhaustion of administrative remedies is concerned mainly with the timing of judicial review.”).

42. See Funk, *supra* note 40, at 11 (“‘Issue exhaustion’ is a term that refers to the need to raise an issue with an administrative agency before raising it on judicial review.”).

43. *Sims v. Apfel*, 530 U.S. 103, 108–09 (2000).

petitioners that did not raise any issues at the agency level will be completely barred from seeking judicial review.⁴⁴

The practical difference between appeal exhaustion and issue exhaustion cannot be overstated. The delay caused by appeal exhaustion may cause great harm to certain petitioners with time-sensitive complaints, but it will cause mere delay in ordinary cases. In rulemakings especially, a delay in judicial review will likely have minimal effect, as rulemakings often take years to complete in the best of circumstances.⁴⁵ Issue exhaustion has a much greater practical effect than appeal exhaustion, and for this reason it is the focus of this Note. However, to understand issue exhaustion, the history of both categories of exhaustion must be understood. The exhaustion doctrine has rarely been explained clearly, and the courts have often used multiple or even conflicting terms to describe it.⁴⁶

By contrast, though the concepts behind the doctrine have been muddled, the underlying policies have been clearly and repeatedly stated. Exhaustion is justified on grounds of deference to agencies' autonomy and expertise, of administrative efficiency, and of judicial economy. In *United States v. L.A. Tucker Truck Lines, Inc.*,⁴⁷ the Supreme Court stated that "[s]imple fairness to those who are engaged in the tasks of administration . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."⁴⁸ In *McCarthy v. Madigan*,⁴⁹ the Supreme Court stated that "the exhaustion doctrine recognizes the notion, grounded in deference to Congress'[s] delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer."⁵⁰ The court further stated that exhaustion

promotes judicial efficiency in at least two ways. When an agency has the opportunity to correct its own errors, a judicial controversy may

44. See Spencer, *supra* note 41, at 629–30 (noting that issue exhaustion or "review preclusion" was "distinct" from the normal exhaustion doctrine because of the "outright denial of judicial review").

45. See Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEXAS L. REV. 1701, 1705 (2008) (noting that "it has become a virtual article of faith" that notice-and-comment rulemaking has become slow and inefficient (footnote omitted) (internal quotation marks omitted)).

46. See, e.g., *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1149–50 (D.C. Cir. 2005) ("The distinction between 'issue exhaustion' and 'issue waiver' is illusive, to say the least. Indeed, both terms appear in the case law without apparent distinction, and they are sometimes treated as if synonymous.").

47. 344 U.S. 33 (1952).

48. *Id.* at 37.

49. 503 U.S. 140 (1992).

50. *Id.* at 145.

well be mooted [E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration, especially in a complex or technical factual context.⁵¹

B. *Historical Development*

Exhaustion arose from the federal common law of equity during the dawn of the administrative era—the first few decades of the twentieth century.⁵² It originated from a “discretionary rule adopted by courts of equity to the effect that a petitioner will be denied equitable relief when he has failed to pursue an available administrative remedy by which he might obtain the same relief.”⁵³ The Supreme Court formally adopted the exhaustion doctrine in the late 1930s, in *Myers v. Bethlehem Shipbuilding Corp.*⁵⁴ In *Myers*, the petitioner had failed to complete its agency appeals, and the Court refused its request for an injunction, holding that “no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”⁵⁵ According to the *Myers* Court, the exhaustion rule was “one of judicial administration . . . applicable to proceedings at law as well as suits in equity.”⁵⁶ After *Myers*, the lower federal courts expanded exhaustion drastically, and the doctrine “roamed free, ready to be imported into any common law or statutory system of remedies, including the statutory system [of administrative law] that Congress in 1938 was beginning to formulate.”⁵⁷

This system, which became the APA, was enacted in 1946 and contains no reference to exhaustion.⁵⁸ Curiously, common law exhaustion survived in APA cases, even though the APA contains a provision that in large part conflicts with the doctrine.⁵⁹ Section 704 provides that, unless a statute or rule specifically says otherwise, a final agency action is considered final for purposes of seeking review even if a petition for reconsideration or another

51. *Id.* (citations omitted).

52. See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEXAS L. REV. 113, 154–55 nn.201–03 (1998) (describing early twentieth century Supreme Court decisions in equity, which laid the groundwork for the modern exhaustion doctrine).

53. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965) (quoting *Smith v. United States*, 199 F.2d 377, 381 (1st Cir. 1952)).

54. 303 U.S. 41 (1938).

55. *Id.* at 50–51.

56. *Id.* at 51 n.9; see also Duffy, *supra* note 52, at 155 (noting that the operative words of *Myers* occurred in dicta and were unsupported by precedent).

57. Duffy, *supra* note 52, at 156.

58. *Id.*

59. See 5 U.S.C. § 704 (2006) (“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 . . . for an appeal to superior agency authority.”).

agency-level remedy is available.⁶⁰ The text of § 704 makes clear that pursuing an intra-agency appeal of a final judgment is optional unless prescribed by statute or federal rule.⁶¹ From a textual reading, it would seem that the APA precludes the exhaustion doctrine, at least insofar as it applies to appeal exhaustion. However, the courts did not read § 704 this way. In fact, “for nearly a half century after 1946, the APA rule was overshadowed by the judge-made doctrine. In the first decade after the enactment of the APA, courts ignored the provision entirely.”⁶²

During this period, the courts extended the exhaustion doctrine to cases of issue exhaustion. In one of the seminal cases, *McKart v. United States*,⁶³ the Supreme Court analyzed the case of a petitioner who sought judicial review of a determination by the Selective Service that he was eligible to be drafted.⁶⁴ However, the petitioner failed to use his right of administrative appeal and was criminally convicted for failing to submit to the draft.⁶⁵ On appeal of his conviction, he attempted to assert the defense that he was exempt from the draft.⁶⁶ The prosecution invoked issue exhaustion, arguing that the petitioner’s failure to make his argument on administrative appeal barred his right to seek judicial review of the claimed exemption.⁶⁷ The Court used the exhaustion doctrine to analyze this question.⁶⁸ The Court ultimately held that the *McKart* petitioner was not precluded from raising the exemption defense but confirmed that the exhaustion doctrine of *Myers* did indeed include issue exhaustion.⁶⁹

The two forms of exhaustion—appeal exhaustion and issue exhaustion—were both so established in federal common law by the 1980s that one court was able to state confidently that the policies of the exhaustion doctrine

have been commonly applied in two quite different contexts. The more familiar . . . involves the question of whether a party is *prematurely* resorting to the judiciary The other context, applicable in the case now before us, involves the question of whether a party, by failing to timely contest its rights in an available administrative forum, has forfeited its right to judicial review.⁷⁰

60. *Id.*

61. *See* Duffy, *supra* note 52, at 157.

62. *Id.*

63. 395 U.S. 185 (1969).

64. *Id.* at 186–87.

65. *Id.*

66. *Id.* at 192–93.

67. *Id.*

68. *See id.* at 193–95 (applying the exhaustion doctrine developed by *Myers*).

69. *Id.* at 193–97.

70. *Energy Coop., Inc. v. U.S. Dep’t of Energy*, 659 F.2d 146, 149 (Temp. Emer. Ct. App. 1981) (citations omitted).

Common law exhaustion doctrine changed dramatically in 1993, when the Supreme Court decided *Darby v. Cisneros*.⁷¹ In *Darby*, the Court held that the plain language of the previously ignored § 704 governed all APA cases and that the statute “by its very terms, has limited the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates.”⁷² However, since *Darby* was decided, “the courts [have been] hopelessly confused on the subject.”⁷³ Even in 1998, Professor Duffy was able to write that “some lower courts are foolishly trying to merge *Darby* with the common law exhaustion doctrine, resulting in predictably enigmatic decisions.”⁷⁴ Moreover, on its face, *Darby* only applied to appeal exhaustion—what the *Energy Cooperative* court referred to as “the question of whether a party is *prematurely* resorting to the judiciary.”⁷⁵ *Darby* did not address issue exhaustion.

Since *Darby* was decided, the courts have split on whether or not a common law issue-exhaustion doctrine survives. The Court of Appeals for the District of Columbia Circuit—which is so central to administrative practice that it has been referred to as the “*de facto* leading administrative law circuit”⁷⁶—has repeatedly held common law issue exhaustion to be good law, even in the context of rulemakings.⁷⁷ By contrast, both prior to and after *Darby*, the Fifth Circuit has held there to be no common law issue-exhaustion doctrine in rulemakings.⁷⁸ The Supreme Court has addressed issue exhaustion but only in the narrow context of Social Security disability cases, where it held the doctrine inapplicable while noting both that it was the “general rule [that] is usually appropriate” and that “the desirability of a court imposing . . . issue exhaustion depends on the degree to which the

71. 509 U.S. 137 (1993).

72. *Id.* at 146.

73. Funk, *supra* note 40, at 18.

74. Duffy, *supra* note 52, at 161.

75. *Energy Coop.*, 659 F.2d at 149.

76. Toni M. Fine, *Appellate Practice on Review of Agency Action: A Guide for Practitioners*, 28 U. TOL. L. REV. 1, 1 (1996).

77. See *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (following *Darby* in holding that there could be no common law appeal exhaustion but distinguishing it from issue exhaustion, which the court referred to as “the well-established doctrine of issue waiver, which permits courts to decline to hear arguments not raised before the agency”); *Nat’l Ass’n of Mfrs. v. U.S. Dep’t of the Interior*, 134 F.3d 1095, 1111 (D.C. Cir. 1998) (dismissing a challenge to a rulemaking where the petitioner had failed to raise its arguments during the comment period).

78. See *Am. Forest & Paper Ass’n v. EPA*, 137 F.3d 291, 295 (5th Cir. 1998) (“[W]e have never held that failure to raise an objection during the public notice and comment period estops a petitioner from raising it on appeal.”); *City of Seabrook, Tex. v. EPA*, 659 F.2d 1349, 1360 n.17 (Former 5th Cir. 1981) (“The EPA has cited no authority for the proposition that an argument not raised during the comment period may not be raised on review.”).

analogy to normal adversarial litigation applies in a particular administrative proceeding.”⁷⁹

The common law doctrine remains unsettled. However, as *Darby* indicated, § 704 allows Congress and the agencies to implement exhaustion requirements by statute and by rule.⁸⁰ For agencies that have codified an exhaustion requirement, exhaustion will be applied regardless of the courts’ common law approaches.⁸¹ Most agencies now have statutes or rules that satisfy § 704.⁸² Exhaustion thus stands as a widely codified, important rule, though one based on an unclear common law doctrine. This Note will now address the question of how issue exhaustion works in practice.

III. Case Law Survey of Issue Exhaustion in Post-*Darby* Clean Air Act Rulemakings

A. *Survey Methodology*

This Note hypothesizes that issue exhaustion is a highly effective procedural defense and thus serves as a significant barrier to pluralistic participation in rulemakings. To derive support for this hypothesis, I conducted a limited but comprehensive case-law survey of certain EPA rulemakings promulgated under the Clean Air Act (CAA) in order to determine how effective issue exhaustion is in practice. This survey was limited for two reasons. First, a more extensive study—one from which statistically significant results could have been derived—was outside the scope of this Note. As one legal scholar has noted, “[C]ollecting evidence is a difficult task. The researcher must make justifiable decisions about where to look, what to include and what to exclude”⁸³ Second, because issue exhaustion has not previously been the subject of empirical analysis, even the limited type of survey undertaken is likely to provide novel insight on the effects of issue exhaustion. The results of the survey bear out this intuition. This is not to say that the results are conclusive; rather, as discussed briefly below, there is much to be explored in future research. What the results do provide is initial evidence suggesting that issue exhaustion may be a significant barrier to judicial review in at least some rulemakings.

79. *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (citations omitted) (internal quotation marks omitted).

80. *See supra* note 72 and accompanying text.

81. *See supra* note 72 and accompanying text.

82. *E.g.*, 42 U.S.C. § 7607(d)(7)(B) (2006) (Clean Air Act exhaustion provision); 33 C.F.R. § 331.12 (2010) (Core of Engineers exhaustion provision); 36 C.F.R. § 215.20 (2011) (Forest Service exhaustion provision); 43 C.F.R. § 4.21(c) (2007) (Department of Interior exhaustion provision).

83. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L.J. 141, 151 (2006).

This Note surveys all cases wherein the D.C. Circuit invoked issue exhaustion on review of EPA rulemakings pursuant to the CAA in the post-*Darby* era. Rules promulgated pursuant to the CAA are subject to a statutory issue-exhaustion requirement. This requirement is contained in 42 U.S.C. § 7607(d)(7)(B), which, with certain exceptions, provides that “[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review.”⁸⁴

The survey’s methodology was simple but comprehensive. I used the WestlawNext (Westlaw) database to generate a list of all citing references to 42 U.S.C. § 7607. I chose to limit the survey to CAA rulemakings for reasons of practicality and familiarity. Given the diversity in the different agencies’ respective exhaustion provisions, and given the confusion in the common law doctrine, limiting the survey to one exhaustion provision allowed for the procurement of easily comparable results. Moreover, as already described, many EPA rules are complex and technical and have been shown to suffer from a lack of pluralistic participation.⁸⁵

At the time this survey was conducted in May 2011, Westlaw reported 4,061 citing references to § 7067, of which 681 were cases. I then further filtered the results to exclude all cases but those from the D.C. Circuit, which yielded a list of 224 cases. I chose to survey only the cases of the D.C. Circuit for several reasons. First, the D.C. Circuit occupies a prominent position in the field of administrative law.⁸⁶ Second, limiting the survey to one circuit allowed me to avoid the potential problem of circuit splits.⁸⁷ I then excluded all cases that were issued before the Supreme Court’s 1993 decision in *Darby*. I chose to use the *Darby* decision as a convenient dividing line because, while *Darby* did not itself have a direct effect on the application of § 7067, it has special import as the beginning of modern exhaustion jurisprudence.

Of the D.C. Circuit cases, 122—slightly more than half—had been decided following *Darby*. I examined each case to find every instance involving a CAA rulemaking in which the EPA raised the issue-exhaustion bar of § 7067(d)(7)(B) as a defense to a petitioner. As most cases were large and involved many parties, I noted the identity of each party that contested issue exhaustion and whether that party was successful. To avoid false

84. 42 U.S.C. § 7607(d)(7)(B).

85. See Wagner et al., *supra* note 1, at 123 (describing the technical nature of EPA HAP rules and the lack of participation found in those rulemakings).

86. See *supra* note 76 and accompanying text. Furthermore, the number of citing references from the D.C. Circuit constituted nearly half—224 of 508—of the total number of references citing to § 7607 from the federal courts of appeals and was over three times as great as the circuit with the next highest number of references (the Ninth Circuit).

87. See, e.g., *supra* notes 76–79 and accompanying text (describing the split on issue exhaustion between the D.C. Circuit and the Fifth Circuit).

positives, I only counted an objection as successfully surviving § 7067(d)(7)(B) in those cases where the court explicitly held it to do so. Instances where the court considered an objection on the merits without explicit reference to issue exhaustion were not counted, as it was not obvious whether the EPA had contested issue exhaustion with respect to that objection. I considered a party to have successfully overcome the issue-exhaustion defense in any case where the court explicitly held at least one of the party's objections to pass muster under § 7067(d)(7)(B). The petitioners' ultimate success on the merits, whether through objections that survived the issue-exhaustion defense or through objections against which the defense was not raised, was not considered.

B. Results

During the period surveyed, the D.C. Circuit delivered twenty-one opinions that addressed issue exhaustion in the context of CAA rulemakings. In these twenty-one opinions, the EPA raised issue exhaustion as a defense against a total of thirty different parties or groups of parties submitting an objection in concert. The results present two notable patterns. First, the courts resolved the issue-exhaustion question against the petitioner in the great majority of instances, and public interest groups were affected by issue exhaustion at a slightly higher rate than were industry groups. Second, in nearly every case, the petitioners were sophisticated litigants—usually, national environmental groups or industry trade groups.

Overall, the EPA successfully used issue exhaustion as a defense in twenty-four of the thirty instances in which the defense was raised. There were seven instances in which the EPA raised issue exhaustion as a defense against public interest groups and other petitioners advocating for stricter environmental regulations. In only one of these instances was the petitioner able to overcome the defense.⁸⁸ In the other six instances, the petitioner was denied review as barred by the issue-exhaustion defense.⁸⁹ By contrast, there

88. *See* *Env'tl. Def., Inc. v. EPA*, 509 F.3d 553, 561 (D.C. Cir. 2007) (deeming issue exhaustion inapplicable where the EPA had only made § 7607(d)(7)(B) applicable after promulgating the final rule).

89. *See* *NRDC v. EPA (NRDC II)*, 571 F.3d 1245, 1259 (D.C. Cir. 2009) (per curiam) (denying an environmental group review on several objections to the EPA's suspension of certain contingency measures because the environmental group failed to raise the arguments at the agency level); *NRDC v. EPA (NRDC I)*, 559 F.3d 561, 563–64 (D.C. Cir. 2009) (denying an environmental group review on the proposed definition of *natural event* where its comment was deemed insufficient to put the EPA on notice); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 538 (D.C. Cir. 2009) (per curiam) (denying an environmental group review for failing to raise arguments about annual ozone standards at the agency level); *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1231–32 (D.C. Cir. 2007) (denying review for a trade association in favor of strict nitrogen-oxide emissions standards for failure to raise the objections at the agency level); *Mossville Env'tl. Action Now v. EPA*, 370 F.3d 1232, 1238–40 (D.C. Cir. 2004) (denying an environmental group review of objections to vinyl-chloride emissions standards for failing to raise those objections

were twenty-three instances in which the EPA raised issue exhaustion as a defense against industry groups and other parties favoring less stringent or delayed regulation. These groups were successful in overcoming the defense in five instances, although it is worth noting that even in these five instances there were several individual objections that were barred by the defense.⁹⁰ In the other eighteen instances, the petitioners' objections were denied review as barred by the issue-exhaustion defense.⁹¹

A prototypical case where the petitioner was denied review was *National Ass'n of Clean Air Agencies v. EPA*.⁹² In *Clean Air Agencies*, the petitioner was a trade association representing a large number of state and

at the agency level); *Sierra Club v. EPA*, 353 F.3d 976, 991 (D.C. Cir. 2004) (denying an environmental group review of its objection to certain monitoring standards because the environmental group failed to raise that objection at the agency level).

90. See *North Carolina v. EPA*, 531 F.3d 896, 927 (D.C. Cir. 2008) (per curiam) (finding that an industry group submitted comments sufficient to preserve its objection for review); *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam) (allowing an industry group's procedural challenge to municipal waste combustion-unit-emissions standards to survive issue exhaustion when sufficient comments were provided at the agency level); *Appalachian Power Co. v. EPA (Appalachian II)*, 249 F.3d 1032, 1063 (D.C. Cir. 2001) (per curiam) (finding that a corporation's comments were sufficient to preserve its objection for merits review); *Appalachian Power Co. v. EPA (Appalachian I)*, 135 F.3d 791, 814, 817–18 (D.C. Cir. 1998) (per curiam) (finding that a corporation's comments were sufficient to preserve its objection on one issue although not on another); *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1120 n.1 (D.C. Cir. 1995) (finding that an industry group's objection to reformulated gasoline regulations was adequately raised at the agency level and thus was preserved for review).

91. See *NRDC II*, 571 F.3d at 1275 (denying a local chamber of commerce review for failing to raise certain arguments against stricter gasoline standards); *North Carolina*, 531 F.3d at 923–26 (denying two industry groups review for failing to preserve objections); *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006) (denying the State of Ohio review of its objection to new ozone standards); *Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1141–42 (D.C. Cir. 2002) (per curiam) (denying a manufacturer review for failing to raise its argument about the feasibility of complying with emissions standards at the agency level); *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 860 (D.C. Cir. 2001) (per curiam) (denying an industry group review on its challenge to hazardous waste combustion standards where it failed to raise its objection at the agency level); *Appalachian Power Co. v. EPA (Appalachian III)*, 2001 WL 802551, at *1 (D.C. Cir. 2001) (per curiam) (denying a corporation's petition for failure to participate in the comment period); *Appalachian II*, 249 F.3d at 1055, 1061, 1064–66 (denying five industry groups and corporations review for failing to raise objections during the comment period); *George E. Warren Corp. v. EPA*, 159 F.3d 616, 629 (D.C. Cir. 1998) (denying an industry group review for failing to raise its objection at the agency level); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998) (denying industry groups review for failing to raise an objection to automotive-emissions diagnostic-device standards at the agency level); *Tex. Mun. Power Agency v. EPA*, 89 F.3d 858, 871, 876 (D.C. Cir. 1996) (per curiam) (denying two industry groups review for failing to make their objections at the agency level); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1097 (D.C. Cir. 1996) (denying a mining association review for failing to raise its objection to the classification of certain large engines at the agency level); *Edison Elec. Inst. v. EPA*, 2 F.3d 438, 449 (D.C. Cir. 1993) (per curiam) (finding that an industry group's endorsement of an alternative model for calculating biodegradation rates was not raised in any comment and thus was not preserved for review). While multiple industry groups were denied review in *Nichols*, I count this denial as one instance because the *Nichols* court resolved that issue identically for all of the petitioners.

92. 489 F.3d 1221 (D.C. Cir. 2007).

local agencies in favor of strict emissions regulations.⁹³ It sought review of a final CAA rule setting nitrogen-oxide emissions standards for commercial aircraft gas turbine engines, arguing that the standards should have been stricter.⁹⁴ The petitioner raised five objections. The court considered two of these on the merits without explicit reference to issue exhaustion and held the other three to be barred by the petitioner's failure to present them to the agency.⁹⁵ In contrast, a typical case wherein the petitioner successfully avoided the issue-exhaustion defense was *Appalachian Power Co. v. EPA*⁹⁶ (*Appalachian I*). In *Appalachian I*, the petitioner, an electrical power company, raised numerous objections to nitrogen-oxide emissions standards for electric-utility boilers.⁹⁷ The EPA raised issue exhaustion as a defense to two specific objections raised by the petitioner.⁹⁸ The court held that the first, an objection to the EPA's calculation of a gas reburn rate, was barred as not raised during the rulemaking.⁹⁹ However, the court held that the second, an objection to a compliance deadline, was properly raised before the agency; the court proceeded to consider this second objection on its merits.¹⁰⁰

A notable factor is that in nearly every instance, the petitioners against whom issue exhaustion was raised were "repeat players": sophisticated litigants who would be expected to be the best suited to deal with procedural barriers. The seven cases where issue exhaustion was raised against groups favoring strict environmental regulations exemplify this pattern. In six of these cases, the petitioner was a prominent national nonprofit organization. These organizations were Environmental Defense, the Sierra Club, and the Natural Resources Defense Council.¹⁰¹

IV. Issue Exhaustion as a Barrier to Rulemaking Participation

A. *The Direct Effects of Issue Exhaustion*

The results of the case-law survey indicate that issue exhaustion may be a very effective defense against judicial review in certain rulemakings. The

93. *Id.* at 1224.

94. *Id.* at 1223–24.

95. *Id.* at 1229–32.

96. 135 F.3d 791 (D.C. Cir. 1998).

97. *Id.* at 797.

98. *Id.* at 814, 817–18.

99. *Id.* at 814.

100. *Id.* at 817–18.

101. Environmental Defense was the petitioner in *American Farm Bureau Federation v. EPA*, 559 F.3d 512, 518 (D.C. Cir. 2009) (per curiam). The Sierra Club was the petitioner in *Mossville Environmental Action Now v. EPA*, 370 F.3d 1232, 1234 (D.C. Cir. 2004), and *Sierra Club v. EPA*, 353 F.3d 976, 978 (D.C. Cir. 2004). The Natural Resources Defense Council was the petitioner in *NRDC I*, 559 F.3d 561, 562 (D.C. Cir. 2009) and *NRDC II*, 571 F.3d 1245, 1251 (D.C. Cir. 2009) (per curiam). All three organizations petitioned in *Environmental Defense, Inc. v. EPA*, 509 F.3d 553, 555 (D.C. Cir. 2007).

D.C. Circuit held for the EPA in 80%—twenty-four out of thirty—of the specific instances in which the defense was raised to petitions for review of CAA rulemakings.¹⁰² The results also show that issue exhaustion affected both those groups advocating for stricter regulations and those advocating for less strict or delayed regulations. Issue exhaustion barred groups advocating for stricter regulations in six out of seven (86%) of the specific instances in which the defense was raised against them,¹⁰³ while it barred groups advocating for less strict or delayed regulations in eighteen out of twenty-three (78%) of the specific instances in which the defense was raised against those groups.¹⁰⁴

The survey results are admittedly limited in scope, and the efficacy of issue exhaustion as a defense will have to be confirmed by future research.¹⁰⁵ However, these results do provide reason to believe that the operating premise of this Note—the assertion that issue exhaustion is a highly effective procedural barrier—is correct.

Assuming that issue exhaustion is indeed a strong defense against judicial review, we can draw additional, more far-reaching conclusions. Nearly every party that contested issue exhaustion was a highly sophisticated litigant—usually a large company, trade association, or environmental group. This suggests that less sophisticated and less well-financed groups may not even attempt to contest issue exhaustion, for if they did, they would be listed in the reported cases. Thus, as with other procedural barriers, the true effects of issue exhaustion are likely to be invisible.¹⁰⁶ If, as the survey results suggest, issue exhaustion is such an effective defense, potential petitioners who did not comment or who submitted only generalized, insufficient comments know that issue exhaustion would make it futile for them to file suit.¹⁰⁷ It is reasonable to assume that in the vast majority of these cases, potential petitioners simply choose not to file suit because it would be impossible to surmount the issue-exhaustion defense. In this vein, it is notable that issue exhaustion was used to bar objections from groups like the National Resources Defense Council and the Sierra Club, which are among the largest, most sophisticated environmental public interest groups in the United

102. See *supra* subpart III(B).

103. See *supra* notes 88–89 and accompanying text.

104. See *supra* notes 90–91 and accompanying text.

105. Such research could take different forms, but ideally it would catalog and run statistical analyses on the use and success of issue exhaustion across agencies, by the subject matter of the challenged rules, and by the identities of the petitioning parties.

106. See Magill, *supra* note 6, at 1435–36 (discussing, *inter alia*, the judicially constructed doctrines of standing, ripeness, and exhaustion, each of which determine whether a party will be allowed to bring suit against an agency).

107. Parties who do not file any comments will be dismissed offhand. *E.g.*, *Appalachian III*, 2001 WL 802551, at *1 (D.C. Cir. 2001) (denying a corporation's petition in a one-paragraph opinion for failure to participate during the comment period).

States.¹⁰⁸ Where these “big boys” of public interest fail, it is logical to assume that smaller groups confronted with the possibility of issue exhaustion are not even attempting to seek judicial review.

Moreover, because industry and trade groups comment far more often than public interest groups and small businesses,¹⁰⁹ it is likely that most of the foregone challenges are from these latter groups, as they are most likely to realize the futility of filing suit. Thus, the most important direct effect of issue exhaustion is not in those few dozen cases that are actually adjudicated and barred by the doctrine; it is in the hundreds of cases that are likely never filed because the parties know that they *would* be barred by the doctrine because they were unable to file comments earlier in the rulemaking process.

B. *The Indirect Effects of Issue Exhaustion*

Ultimately, issue exhaustion is crucially important because it diminishes the potential for truly pluralistic participation in the later stages of the rulemaking process. While the ultimate effects of a successful petition for judicial review—the potential for winning a court order for the rule in question to be vacated or remanded to the agency for further consideration—are great, there is reason to believe that the simple ability to seek judicial review may be even more significant.¹¹⁰ A party who has made specific comments and petitions for judicial review—or at least can make a credible threat of doing so—has great leverage with the promulgating agency.¹¹¹ This leverage may be used in negotiations for rulemaking settlements—proceedings that have significant impact on the substance of the final rule and the timing and procedures by which it is applied—or may otherwise be used to pressure agencies to make changes to the final rule.¹¹² As Professor Coglianese memorably quoted one anonymous individual as stating,

108. See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 72–73 (1992) (discussing the substantial influence that major environmental public interest groups, especially the Sierra Club and the National Resources Defense Council, exert in shaping judicial decisions and agency action).

109. See Wagner et al., *supra* note 1, at 128–29 (finding in a study of ninety rulemakings promulgating CAA rules regulating hazardous air pollutants that industry participated in all notice-and-comment periods and dominated participation throughout the rulemakings, while public interest groups participated in less than half of the notice-and-comment periods and were rarely involved in pre- and post-comment rulemakings).

110. See Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEXAS L. REV. 331, 391–92 (2011) (“The availability of direct judicial review at the behest of those outside the industry levels the playing field by enabling these stakeholders . . . to threaten to make implementation difficult by availing themselves of such review.”).

111. Croley, *supra* note 11, at 126.

112. See Gaba, *supra* note 9, at 1243–48 (describing scheduling, process, and substantive-rulemaking settlement agreements); see also Seidenfeld, *supra* note 110, at 391–92 (noting that industry stakeholders sometimes threaten judicial review when an agency is preparing to release an unfavorable guidance document or interpretive rule).

I see [judicial-review] litigation as just a continuation and a narrowing of the regulatory process, and I think most of the players do too. . . . Once it's all over at the official stage, you start the second stage and you start it by filing litigation so that you can be at the table and work it out with only those people who are really interested. You've narrowed the universe from the general public down to those who really care, and you can get down to business. Litigation just happens to be the way you do it.¹¹³

The reason that negotiation leverage is so important in rulemaking settlements is simple. As public choice theory (not to mention common sense) tells us, agencies will attempt to avoid the possibility of an unfavorable court decision if they can do so without unduly compromising their goals.¹¹⁴ Individual agency administrators and civil servants may also have their own motives for avoiding unfavorable court decisions, as reversals and the resulting delay in issuing new rules may have negative effects on their careers.¹¹⁵ Agencies, for reasons both good and bad, are thus incentivized to negotiate with parties who seek judicial review of promulgated rules or can threaten to do so.

Because rulemaking settlements have such important impacts on the rules ultimately promulgated,¹¹⁶ it is vital to have a diverse, pluralistic array of parties represented within these proceedings.¹¹⁷ Agencies, however, have no incentive to negotiate with parties who cannot seek judicial review, and issue exhaustion bars judicial review to those who were unable to participate in the notice-and-comment periods that occurred prior to settlement negotiations. It is this—the invisible barrier of issue exhaustion—which condemns the doctrine most thoroughly. No matter how many parties are interested in a proposed rule or how their interests would be affected by that rule, they will be unable to participate in the latter stages of the rulemaking

113. Coglianese, *supra* note 10, at 758 (second alteration in original).

114. See Magill, *supra* note 6, at 1442–43 (noting that agencies' decisions on how to pursue their agendas will be affected by the expected judicial response); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 352–58 (1999) (postulating that agencies will choose between rulemaking, adjudication, and other means of advancing their agenda based on the perceived gain to be derived and the likelihood of being reversed by the courts).

115. See WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 38 (1971) (“Among the several variables that may enter the bureaucrat’s utility function are the following: salary, perquisites of the office, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau.”); see also Mary K. Olson, *Managing Delegation in the FDA: Reducing Delay in New-Drug Review*, 29 J. HEALTH POL. POL’Y & L. 397, 401 (2004) (“FDA regulators care about their own professional reputations and the reputation of the agency because these reputations may influence their career prospects in and out of government.”).

116. For further discussion on the importance of rulemaking settlements, see generally Coglianese, *supra* note 10, at 755–58 and Rossi, *supra* note 10.

117. See *supra* notes 1–7 and accompanying text.

process if they failed to submit comments during the notice-and-comment period.¹¹⁸ Issue exhaustion, a tool of *judicial* procedure, effectively removes the leverage necessary for negotiating with agencies at the *administrative* level. It slams shut the door of the smoke-filled room on those most vulnerable to being excluded—public interest groups, small businesses, and other poorly financed organizations.

C. Doctrinal Problems

Issue exhaustion in rulemakings not only raises the practical problems described above; it is theoretically flawed as well, as it fits poorly in the rulemaking process. As Professor Rubin put it, “[t]he problem . . . is that rulemaking is not an adjudicatory process, and any effort to treat it as one is bound to produce an unusable monstrosity.”¹¹⁹ Issue exhaustion is at its core a litigation concept based on the general rule that litigants must preserve their issues for appeal.¹²⁰ In administrative adjudication, by contrast, exhaustion is right at home. Adjudications are analogous to trials in a traditional court, as hearings are usually conducted, parties may enter evidence into the record, and, crucially, parties are generally limited to those who have specific stakes in the outcome.¹²¹ Parties who appear at adjudications—like parties who appear before trial courts—should be expected to raise all meritorious arguments at that hearing. In adjudication, issue exhaustion is a sensible principle, and the rationales of deference to agency autonomy, administrative efficiency, and judicial efficiency apply in full force.¹²²

The logic behind issue exhaustion does not apply in every situation. Indeed, the Supreme Court has held that whether common law issue exhaustion should be imposed “depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.”¹²³ Where the adversarial analogy fails to hold, “the reasons for a court to require issue exhaustion are much weaker.”¹²⁴ In *Sims v. Apfel*,¹²⁵ the Court addressed an asserted defense of issue exhaustion in the context of an applicant for Social Security disability benefits who had failed to preserve her objections on appeal to the Social Security Appeals Council.¹²⁶ The *Sims* Court held that the adversarial analogy did not apply because Social Security

118. Wagner, *supra* note 7, at 1365.

119. Rubin, *supra* note 1, at 108–09.

120. *Sims v. Apfel*, 530 U.S. 103, 108–09 (2000).

121. Magill, *supra* note 6, at 1391.

122. See *supra* notes 47–51 and accompanying text.

123. *Sims*, 530 U.S. at 109.

124. *Id.* at 110.

125. 530 U.S. 103 (2000).

126. *Id.* at 104–05.

hearings are “inquisitorial rather than adversarial.”¹²⁷ In Social Security cases, the presiding administrative law judge must investigate facts and develop arguments for both the petitioner and the government, and petitioners are usually not represented by legal counsel.¹²⁸

Rulemaking may not be analogous to the inquisitorial model of Social Security proceedings, but it also does not fit neatly within the adversarial model. Rulemakings do not involve the rights of a few parties; the rules ultimately promulgated affect the physical and economic health and well-being of the entire United States and may have international effects as well. Thus, when a meritorious argument is procedurally barred, it is society at large who suffers for it—not only the individual petitioner. Further, unlike in adjudicatory proceedings, where the parties are contesting their specific interests, there is no guarantee that the parties that participate in rulemakings will be representative of the general interests at stake—a possibility supported by the empirical evidence of imbalanced participation.¹²⁹ When combined with the negative practical effects discussed above, the theoretical analysis shows that issue exhaustion is an unjustifiable requirement in rulemakings.

V. The Way Forward: A Participation-Dependent Rebuttable Presumption Against Issue Exhaustion

A. Overview

As described above, issue exhaustion may have severe negative effects on the pluralistic participation necessary for effective rulemaking. To alleviate these effects, I propose that the procedure for invoking issue exhaustion be changed. With narrow exceptions, issue exhaustion is a simple, binary rule; if sufficient comments were submitted, the doctrine does not apply, and if they were not, it does.¹³⁰ In this part, I propose that if the procedure for invoking the doctrine is modified, its negative effects can be ameliorated without need to resort to the extreme step of doing away with the doctrine entirely. Because participation is at the heart of the issue exhaustion problem, this Note proposes that the decision to apply issue exhaustion should operate on a participation-based standard of review. Put simply, a reviewing court should only enforce issue exhaustion in rulemakings where participation had been sufficiently pluralistic.¹³¹

127. *Id.* at 111.

128. *Id.* at 111–12.

129. *See supra* notes 20–34 and accompanying text.

130. *See supra* subpart II(A).

131. My proposal is similar to a participation-based standard that Professor Wendy Wagner has proposed for use in determining the standard of judicial review to be used in rulemaking appeals.

This goal would be achieved by instituting a new, participation-based standard of review where the default presumption would be that issue exhaustion would not apply. Agencies could still invoke issue exhaustion as a defense, but they would have to meet a burden of proof to overcome the default presumption against invoking the doctrine. Generally, in determining whether participation had been sufficiently pluralistic, the courts would focus on whether alternative or competing points of view had been raised in the comments submitted to the agency. Because the absolute number of comments does not necessarily correlate with the number of different viewpoints presented, the courts would examine the substance of the comments themselves in order to determine whether competing viewpoints on the proposed rule had been offered.¹³²

The advantages of the standard proposed in this Note are twofold. First, the default presumption against issue exhaustion would allow parties to seek judicial review even when they had not participated in the rulemaking proceedings and would thus avoid the negative practical effects of issue exhaustion.¹³³ Most notably, the potentially significant number of participants who do not bother filing suit under the current regime for fear of issue exhaustion would be able to do so, or could threaten to do so to obtain negotiation leverage.¹³⁴ Second, the rebuttable nature of the presumption would let issue exhaustion continue to be employed against truly frivolous litigation. In cases where participation had already been expansive and pluralistic, and where little benefit would be derived by allowing further participation, the agencies would invoke issue exhaustion by referring the court to the voluminous record, thus fulfilling their burden of proof to show sufficient participation. In cases like *Appalachian Power Co. v. EPA*¹³⁵ (*Appalachian II*), for instance, which involved multiple states, industry groups, and public interest groups, the presumption of insufficient pluralism would easily be rebutted, and issue exhaustion would apply.¹³⁶

B. Specific Operations and Details

Of course, this proposal raises the question of how, exactly, a court is supposed to determine whether participation in a rulemaking was sufficiently pluralistic. I have already mentioned that the determination would have to be qualitative rather than strictly quantitative, since the number of comments

See Wagner, supra note 7, at 1406–13 (proposing that the standard of review in rulemaking appeals be determined by the amount of interest-group participation in the rulemaking).

132. This would not present a significant additional burden to the courts, as the courts must already review the substance of the comments to ensure that the agency has appropriately responded as it is obligated to do.

133. *See supra* subparts IV(A)–(B).

134. *See supra* subparts IV(A)–(B).

135. 249 F.3d 1032 (D.C. Cir. 2001) (per curiam).

136. *Id.* at 1034–35 (listing the numerous parties to the case).

submitted often does not bear any relation to their quality or substance.¹³⁷ However, this still leaves the question of which factors should be considered by the courts in determining whether participation had been sufficiently pluralistic. I propose that three factors should be included as an essential part of the proposed participation-based standard.

First, the courts should take note of what *types* of parties commented in the rulemaking. If the party seeking judicial review is of a type that has previously not participated in the rulemaking, that fact would be a strong indication that participation had not been sufficiently pluralistic. A prototypical example would be a case where a public interest group challenges a rule that had only been commented upon by industry groups. A more complex example—one showing the particular value of the type-of-party factor—might be a rulemaking where both industry and public interest groups had commented on the proposed rule but state or local governments had not. If a state or local government then attempted to seek judicial review, a court should tend to believe that participation had been insufficiently pluralistic, as neither the industry groups nor the public interest groups would necessarily share the state or local government's concerns.

Second, the courts should examine *how many* parties of each type commented in the rulemaking and how many substantive comments those parties submitted. This factor could cut different ways. If a rulemaking had been commented on by two industry groups and one public interest group and each group had submitted several comments, those facts would weigh in favor of a determination of sufficiently pluralistic participation. The standard of sufficiently pluralistic participation would not require that participation be *equal* but merely that it obtain a minimum level of pluralism. By contrast, if a rulemaking had been commented on by a dozen industry groups, each of which submitted ten comments, and by one public interest group, which only submitted two or three comments, those facts would weigh in favor of a determination of insufficiently pluralistic participation.

Third, the courts should take note of the *specific issue* advanced by the party seeking judicial review and compare that issue to the substance of the comments raised below. Ultimately, while this factor would admittedly involve a more time-intensive analysis, it would be the most accurate factor in determining whether participation had been sufficiently pluralistic. If the appealing party's viewpoint on the issue raised was very different from those raised below, or if the issue itself was entirely novel, then that would be a strong indication that the debate below had been insufficiently pluralistic. This factor would also be the most useful in weeding out frivolous appeals

137. The most glaring example of comment quantity and quality being unrelated is the deluge of short, duplicative comments organized by online action campaigns. See Farina et al., *supra* note 14, at 417 (referring to the "hundreds of thousands of duplicate and near-duplicate e-'postcards' that express passionate support or opposition, and not much more").

and would help address the “astroturfing” and “sandbagging” concerns discussed below.

While these three proposed factors are crucial to the determination of sufficiently pluralistic participation, they do not constitute an all-inclusive list. The exact factors to be analyzed should be left to the courts themselves to determine. A standard that depends on a judgment of sufficiently pluralistic participation will necessarily involve some degree of arbitrary line-drawing, an exercise that is best undertaken by the courts that must apply the standard in practice. While it is certainly possible for the administrative agencies themselves to set the standard of review for issue exhaustion by rule, this Note takes the side of the academic debate that celebrates, rather than disparages, the role of the courts in administrative law.¹³⁸ While agencies possess technical expertise and are deferred to on matters of substance, issue exhaustion is a *procedural* barrier to judicial review, and it should be left to the courts to determine the factors to be considered in the new, participation-based standard for issue exhaustion.

Finally, the practicality of making changes to issue exhaustion must also be addressed. Most agencies have their own, individualized exhaustion requirements. As already discussed, the CAA itself has a specialized exhaustion requirement, codified at 42 U.S.C. § 7607(d)(7)(B), while many other agencies require exhaustion by rule. Changing such requirements will itself require agency rulemaking or even congressional action—prospects that are highly uncertain, to say the least. Modifying issue-exhaustion doctrine will not be easy. However, the potential reward—increased pluralistic participation in rulemakings that affect the entire nation—is great, and the fragmented nature of the doctrine itself may allow for piecemeal changes, agency by agency. For instance, for those agencies where exhaustion is required merely by rule and not by statute, it would be possible to modify the doctrine without resorting to congressional action.

C. *Potential Concerns*

This Note would not be complete without a discussion of possible concerns that could be raised in response to the proposal. How, one might ask, could issue-exhaustion doctrine be modified without exposing the administrative process to abuse by interested parties? Indeed, for all of the doctrine’s practical and theoretical problems, there is some merit to its

138. This debate is very long running and is well-known in the literature. For two competing views on the role of courts in administrative law compare Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243 (1999) (arguing that judicial review of rulemaking is unjustified) with Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646 (1988) (arguing in favor of robust judicial review of agency decisions).

traditional justifications of administrative efficiency and judicial economy.¹³⁹ Because issue exhaustion is a strict rule, it provides certainty. This certainty prevents interested parties from seeking to exploit the leeway that a flexible standard entails.

There are two potential means of abusing the proposed standard that must be addressed. Fortunately, both of these potential flaws are easily resolved. First, it is possible that in rulemakings with insufficiently pluralistic participation, well-financed parties such as industry groups might wish to artificially invoke issue exhaustion to exclude their ideological opponents. They could attempt to do this by, for example, submitting large numbers of comments or by “astroturfing”—that is, supporting shell groups that would give the appearance of pluralistic participation. However, such efforts would almost certainly be unsuccessful. Under the proposed standard, the party attempting to invoke issue exhaustion artificially through the use of shell groups would bear the burden of proving to the court’s satisfaction that participation had been truly pluralistic. Courts would be able to reject offhand such attempts to abuse the process, and other parties would not be greatly inconvenienced since only the invoking party would bear the burden of proof. However, it is crucial to note that even if issue exhaustion was wrongfully invoked in some cases, it would still be a step forward from the current regime, where issue exhaustion applies in all cases in which sufficient comments have not been submitted.

Second, it is possible that parties might attempt to “sandbag” the agencies by strategically refraining from participating in the notice-and-comment period and then seeking judicial review in an attempt to surprise the agency. This is not an entirely idle concern. For example, in one prominent case, *Nader v. Nuclear Regulatory Commission*,¹⁴⁰ the petitioner, an environmental advocacy group, likely chose not to participate in a rulemaking on safety standards for nuclear reactor emergency cooling systems.¹⁴¹ The petitioner then filed a petition with the agency to shut down multiple nuclear reactors on the ground that the safety of the cooling systems had not been established.¹⁴² After being denied by the agency, the petitioner sought judicial review and was denied review on grounds of issue exhaustion.¹⁴³

Professor Gelpe, writing in the 1980s, considered the problem raised by *Nader* severe enough to justify the blanket application of issue exhaustion to

139. See *supra* notes 47–51 and accompanying text.

140. 513 F.2d 1045 (D.C. Cir. 1975).

141. *Id.* at 1049; see also Spencer, *supra* note 41, at 644 & n.109 (“[O]ne can fairly infer that the *Nader* court believed that petitioners had been aware of the agency proceedings, had chosen not to participate, and had no excuse for their failure to do so.” (footnote omitted)).

142. *Nader*, 513 F.2d at 1047.

143. *Id.* at 1054–55.

rulemakings, even though she did not otherwise consider administrative efficiency to be an effective justification for the doctrine.¹⁴⁴ Others, however, have disagreed. David Spencer, writing during the same period, raised some of the same conceptual criticisms discussed in this Note¹⁴⁵ and argued that issue exhaustion should not be generally applied to rulemakings.¹⁴⁶ Spencer proposed that issue exhaustion should be restricted to cases like *Nader*, where the petitioner demonstrated bad faith through a willful failure to participate in the agency's rulemaking proceedings.¹⁴⁷

Given the opportunity for influencing the substance and execution of a rule that parties typically gain from participating before seeking judicial review, it is questionable that such abuse would occur in any but the rarest of circumstances. However, to guard against this possibility, it might be necessary to include a good-faith standard, as Spencer proposed, in addition to the participation-based standard.¹⁴⁸ A good-faith standard would give courts the ability to deny appeals where parties appear to be attempting to exploit the process.

One final concern that should be addressed is the issue of rulemaking ossification.¹⁴⁹ A criticism that could be leveled at the proposed participation-based standard for issue exhaustion is that it would encourage litigation and would slow down the rulemaking process, thus contributing to ossification. I do not consider the possibility that the proposal would contribute to ossification to be a very credible one. Firstly, the proposed standard has enough flexibility that judges should be able to quickly dismiss frivolous appeals where participation had been sufficiently pluralistic. Secondly, and more elementally, I consider that any delays in the rulemaking process caused by meritorious appeals would be well worth the benefits accrued by allowing parties to present meritorious issues for judicial review. Encouraging pluralism in the rulemaking process is not merely a lofty goal. It is a crucial building block of the American system of administrative law

144. Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 13–15 (1985).

145. See Spencer, *supra* note 41, at 651–54 (contending that there are “fundamental differences between agency rulemaking and adjudication” and that review preclusion doctrine would require a petitioner to continually read the *Federal Register* as well as deal with the “onerous burden . . . [of] submit[ting] comments on every conceivable issue”).

146. *Id.* at 660.

147. See *id.* (arguing that the *Nader* petitioner was “sufficiently aware of the agency’s proposed rules,” that the court correctly precluded review, and that courts should preclude review for any petitioner who “intentionally circumvents agency proceedings”).

148. See *id.* (“If the party was aware of the proposed rule, the court should preclude review unless the party can offer a reasonable excuse for failing to comment.”).

149. A full description of the ossification phenomenon and the debate over it is beyond the scope of this Note. For one of the seminal pieces describing the phenomenon, see generally Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

and the American form of democracy generally. “Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens”¹⁵⁰ While Madison was addressing pluralism in a very different context, the same concepts hold true in administrative rulemaking, where increased pluralism protects the administrative process by making it less likely that a majority of the participants will warp proposed rules to their own, narrow interests. Pluralism in administrative rulemaking will be nurtured if the doctrine of issue exhaustion is modified as this Note proposes. While it may not be easy to make these modifications, opportunities to do so should be taken. There is much work to be done.

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150. THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).