

MAKING SENSE OF ISSUE EXHAUSTION IN RULEMAKING

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When reviewing the validity of a rule, should a court consider issues that were not presented to the agency during the underlying rulemaking proceeding? In 2015, the Administrative Conference of the United States explored this question, drawing upon a consultant's report prepared by Professor Jeffrey Lubbers, but did not reach a consensus on how to answer it. This essay, written to accompany the publication of the Lubbers report, proposes some answers. The thrust of the analysis is that judicially imposed requirements for issue exhaustion in rulemaking are, in general, legitimate, even in the absence of legislation that specifically authorizes such requirements. However, an exception should be recognized with respect to key assumptions of the rule and of the procedure that gave rise to it. These principles should apply both to judicial review litigants who previously participated in the rulemaking and to defendants who first encounter a rule when the government commences enforcement proceedings against them.

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INTRODUCTION

Issue exhaustion—the concept that an appellate court should not consider issues that were not raised below—is frequently an important factor in judicial review of rulemaking. Yet the academic literature on it is exceedingly scanty. I expect, therefore, that Professor Jeffrey Lubbers’s article on the subject,¹ published in this issue of the *Administrative Law Review*, will inevitably command attention for its comprehensive compilation of the relevant case law and scholarship and its critical analysis of many policy issues raised by the issue exhaustion doctrine. The article is based on a report that he prepared as a consultant for the Administrative Conference of the United States (ACUS). The Conference’s subsequent pronouncement on the subject—ACUS Statement #19²—is a brief synthesis of many of Professor Lubbers’s themes, with adaptations growing out of deliberations within the Conference’s Committee on Judicial Review and the Conference membership as a whole. Both documents will likely be sources of guidance for litigants and courts in future cases.

In my capacity as chair of the Committee on Judicial Review at that time, I participated actively in the development of this body of work. Why, then, am I writing this essay to accompany the publication of the Lubbers report? The answer lies in the somewhat inconclusive nature of the Conference’s deliberations on the issue exhaustion project. My committee proposed what I thought was a middle-of-the-road draft recommendation for action by the Assembly of the Conference,³ but the proposal was blocked through a successful objection to the absence of a quorum. The underlying reason for that objection was that several government members disagreed with the proposed recommendation.

After further deliberations by an ad hoc committee, the Conference

1. Jeffrey S. Lubbers, *Fail to Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109 (2018).

2. Statement #19, Issue Exhaustion in Preenforcement Judicial Review of Administrative Rulemaking, 80 Fed. Reg. 60,611 (Oct. 7, 2015) [hereinafter ACUS Statement #19].

3. ADMIN. CONFERENCE OF THE UNITED STATES, PROPOSED RECOMMENDATION ON ISSUE EXHAUSTION IN JUDICIAL REVIEW OF ADMINISTRATIVE RULEMAKING (2015), https://www.acus.gov/sites/default/files/documents/COJR%20_%20Issue%20Exhaustion%20_%20Proposed%20Recommendation.pdf [hereinafter PROPOSED RECOMMENDATION].

settled for a more noncommittal “Statement” in lieu of the usual “recommendation.”⁴ Indeed, the Statement is pervasively ambivalent on the subject of issue exhaustion in rulemaking. It identifies arguments pro and con and “invites” courts to consider various factors that may be relevant to the use of issue exhaustion in a given case,⁵ but it does not say that courts *should* follow any of them. In short, although the able and thoughtful members and staff of the Administrative Conference worked hard and created a valuable product, the usual aspirations for a consensus recommendation were not fulfilled.⁶

This set of events has prompted me to write this essay to draw together and synthesize some theories and arguments that I formulated during the course of the ACUS project. This discussion does not profess to be the last word on the subject, but it does undertake to offer a coherent model that some may wish to endorse, and others might use as a point of departure in devising alternative approaches.

The essay has many continuities with Professor Lubbers’s article, but readers will notice at least a difference in emphasis. His discussion is marked by skepticism about whether issue exhaustion has a place in rulemaking at all, at least in the absence of statutory provisions for it. That doubt appears right in the title of his article—“Does Issue Exhaustion Have a Place in Judicial Review of Rules?”—as well as in the body of the article.⁷ In contrast, my essay takes an essentially sympathetic view of this phenomenon. In my view, the emergence of issue exhaustion requirements in rulemaking is, on the whole, a legitimate response to broad trends in administrative law during the past generation. Thus, the main question should be *how* to apply it. The impetus here is not to detract from the

4. According to the Conference website, “On occasion, the Conference membership has acted to adopt a ‘Statement’ to express its views on a particular matter without making a formal recommendation on the subject. [It] may set forth issues, conclusions from a study, or comments, rather than recommendations.” *Recommendations*, ADMIN. CONFERENCE OF U.S., <https://www.acus.gov/recommendations> (last visited Feb. 2, 2018). One can infer that “Statements” will generally be less ambitious than “recommendations.”

5. ACUS Statement #19, *supra* note 2, at 60,612–13.

6. ACUS is not the only entity that has failed to arrive at a consensus on this subject. Although the 1981 version of the Model State Administrative Procedure Act, adopted prior to most of the case law developments discussed in the Lubbers article, had a provision on issue exhaustion in rulemaking, the 2010 revision is completely silent on the subject. *Compare* MODEL STATE ADMIN. PROCEDURE ACT § 5-112(3) (UNIF. LAW COMM’N 1981) (rejecting any issue exhaustion requirement in rulemaking, except as to a litigant who has “been a party in adjudicative proceedings which provided an adequate opportunity to raise the issue”), *with* MODEL STATE ADMIN. PROCEDURE ACT § 506 (UNIF. LAW COMM’N 2010) (addressing remedy exhaustion only).

7. Lubbers, *supra* note 1, at 134, 155–60.

contribution of Professor Lubbers, who is well recognized as an administrative law expert (and is also, as of 2017, my coauthor).⁸ In addition to its formidable research base, his article raises excellent questions that the legal system must somehow confront. Nevertheless, I believe that, as lawyers and judges seek to sort out their answers to his challenges, they may benefit from exposure to a presentation that accepts the extant regime largely as it exists and proposes refinements from within that frame of reference.

Part I of this essay directly addresses questions about the legitimacy of court-created issue exhaustion principles and their compatibility with judicial review provisions of the Administrative Procedure Act (APA).⁹ Part II evaluates the pros and cons of this body of case law from a policy perspective. Part III draws upon that theoretical foundation in order to identify circumstances that are most conducive to issue exhaustion as well as circumstances that most invite a limitation on the doctrine. These recommendations are, it turns out, largely consistent with criteria that ACUS Statement #19 suggested for consideration. In particular, the essay suggests that the issue exhaustion requirement need not be enforced when a litigant challenges fundamental assumptions underlying the rulemaking. Finally, Part IV takes up a question that ACUS deliberately did not address: the applicability of issue exhaustion when rules are challenged by persons who did not participate in the rulemaking proceeding, including persons who challenge a rule during an enforcement proceeding. The essay argues that these litigants should be subject to essentially the same requirements as other litigants.

I. THE LEGITIMACY OF ISSUE EXHAUSTION IN RULEMAKING

A factor that contributed to making the issue exhaustion project difficult for the Administrative Conference was that, like Professor Lubbers, some participants had serious doubts about whether judicially created issue exhaustion requirements in rulemaking should exist at all. I will begin my discussion with a critical analysis of those reservations.

Is it problematic that so much of the case law on issue exhaustion in rulemaking has developed without an explicit statutory foundation? Such was the thrust of an objection that Professor William Funk lodged in a brief but pointed article published in 2000.¹⁰ He acknowledged that some

8. RONALD M. LEVIN & JEFFREY S. LUBBERS, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* (6th ed. 2017).

9. 5 U.S.C. §§ 701–706 (2012).

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

statutes do provide for such exhaustion, such as the Communications Act.¹¹ This provision, he said, is “fairly easy to apply.” But, he lamented, “some courts have ignored the specific statutory origin for this requirement and have applied a similar exhaustion requirement in cases totally unrelated to that statute.”¹² He considered this gap in the cases’ reasoning “[u]nfortunate.”¹³ ACUS Statement #19 cites directly to this statement.¹⁴

The courts, however, have paid no heed to this line of reasoning. As best I can discover, not a single case has addressed—let alone endorsed—the proposition that the absence of statutory support is an obstacle in this area. The courts appear to assume that administrative issue exhaustion falls within their inherent powers in both the adjudication and rulemaking contexts. In the most apposite Supreme Court case, *Sims v. Apfel*,¹⁵ the Court observed that “requirements of administrative issue exhaustion are largely creatures of statute,” but also noted that at times “we have imposed an issue-exhaustion requirement even in the absence of a statute or regulation.”¹⁶

Probable reasons behind the courts’ assumption can be inferred from the Supreme Court cases quoted in the early pages of Professor Lubbers’s article. In civil and criminal cases, after all, appellate courts routinely declare that they will not consider a particular argument because it was not raised below.¹⁷ It is not surprising that they would conclude that they can legitimately do the same thing in appeals from agency decisions. *Hormel v. Helvering*¹⁸ made this connection explicit:

Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence. And the basic

11. 47 U.S.C. § 405(a) (2012).

12. Funk, *supra* note 10, at 17.

13. *Id.*

14. ACUS Statement #19, *supra* note 2, at 60,612 n.20.

15. 530 U.S. 103 (2000).

16. *Id.* at 107. Professor Funk is, of course, well aware of this language, having cited to it in a different context. Funk, *supra* note 10, at 13. I interpret him as saying that the Court’s assertion of this authority in the rulemaking context has not been adequately defended.

17. 9B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2472 (3d ed. 2008); 2A FEDERAL PROCEDURE, LAWYERS’ ED. § 3:712 (1994) [hereinafter 2A FED. PROC. L. ED.].

18. 312 U.S. 552 (1941).

reasons which support this general principle applicable to trial courts make it equally desirable that parties should have an opportunity to offer evidence on the general issues involved in the less formal proceedings before administrative agencies entrusted with the responsibility of fact finding.¹⁹

And in *United States v. L.A. Tucker Truck Lines, Inc.*,²⁰ the Court identified some of the policies that issue exhaustion serves in all of these contexts, including the public's interest in "[o]rderly procedure and good administration," as well as "[s]imple fairness to litigants."²¹ Of course, those decisions involved administrative adjudication, but the potential for applying them to rulemaking appeals as well is evident.²² In practice, therefore, the courts simply take for granted their power to require issue exhaustion in rulemaking, and the debate has revolved entirely about when they should use that power.²³

A related criticism raised during the ACUS deliberations was that issue exhaustion in rulemaking, even if not categorically suspect in the absence of legislative direction, seems to be in tension with our legal system's longstanding tradition of allowing liberal access to the courts to redress unlawful or arbitrary administrative action. As a doctrinal matter, that tradition is most concretely reflected in the familiar presumption in favor of reviewability of agency action.²⁴

One way of coming to grips with that critique is to consider the relationship between issue exhaustion and the standard doctrine of exhaustion of administrative remedies, which the ACUS Statement calls "remedy exhaustion."²⁵ That relationship is ill-defined, to put it mildly.²⁶

19. *Id.* at 556.

20. 344 U.S. 33 (1952).

21. *Id.* at 37.

22. See, for example, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), discussed in Lubbers, *supra* note 1, at 127.

23. I would go further and endorse Judge Wald's suggestion in *Wash. Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681-82 & n.6 (D.C. Cir. 1983), that existing statutes providing for issue exhaustion should, where possible, be construed to harmonize with the criteria that judges have devised in the absence of statutory support. As she argued, the differences among these statutes are so haphazard as to invite the inference that Congress has simply intended for these provisions to codify judicial doctrine. However, one need not agree with this line of reasoning in order to accept the legitimacy of judicial doctrine on issue exhaustion in regulatory schemes in which Congress has not addressed the subject at all.

24. *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 298 (2001); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967).

25. ACUS Statement #19, *supra* note 2, at 60,611.

26. The ambiguity of that relationship was on display in an adjudicative context in *Sims v. Apfel*, 530 U.S. 103 (2000). In *Sims*, the Court declined to invoke the issue exhaustion

Certainly, the usual assumption is that the two doctrines are closely related. Casebooks (including my own)²⁷ and treatises²⁸ regularly discuss issue exhaustion in conjunction with remedy exhaustion, apparently with few or no qualms about the validity of that association. Indeed, the two kinds of exhaustion rest to some degree on similar policies, such as ensuring that the court can get the benefit of agency expertise.

In other respects, however, the two doctrines do diverge, because issue exhaustion is not exactly a doctrine about access to judicial review in the same sense that remedy exhaustion is. If a petitioner raises nine arguments in the court of appeals, eight of which were raised during the rulemaking proceeding (by her, or by anybody else, or by the agency itself), she will get review of at least those eight arguments. It is logically possible to say that she might be “denied access to the courts” with respect to the ninth (if no exception applies), but this is a rather strained use of language. Indeed, a court that discusses issue exhaustion in either the rulemaking or adjudication context will normally do so in the section of its opinion devoted to the merits, not the section that discusses whether the plaintiff has a right to be in court.²⁹ Moreover, as I discussed above, some of the

requirement in a Social Security disability benefits appeal, maintaining that the proceedings were so informal that they bore little resemblance to adversarial adjudication in the courts. The dissenters claimed that an issue exhaustion requirement would have served administrative law values such as taking advantage of the agency’s expertise, but the majority was unmoved. As Professor Funk insightfully observed, the dissent saw issue exhaustion as “merely a lesser included aspect of the doctrine of exhausting administrative remedies,” while the majority treated issue exhaustion as “its own *sui generis* common law doctrine.” Funk, *supra* note 10, at 15.

27. MICHAEL ASIMOW & RONALD M. LEVIN, STATE AND FEDERAL ADMINISTRATIVE LAW 778–80 (4th ed. 2014); STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 926 (6th ed. 2006); WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE AND PRACTICE 525–26 (5th ed. 2014).

28. 4 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12:21[5] (3d ed. 2010); 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.8 (5th ed. 2010).

29. In *Fed. Power Comm’n v. Colo. Interstate Gas Co.*, 348 U.S. 492 (1955), the Court faulted a court of appeals for bypassing the issue exhaustion required by the Natural Gas Act. It added that the Administrative Procedure Act (APA) did not require any different result, because § 10(e) of that Act (now codified at 5 U.S.C. § 706) “applies only to situations in which the question at issue has been properly ‘presented.’” *Id.* at 500 & n.5. This was a reference to the APA language that provides, in its current form: “To the extent relevant to decision and *when presented*, the reviewing court shall decide all questions of law” 5 U.S.C. § 706 (2012) (emphasis added). Professor Lubbers makes some good arguments as to why this remark is too slight to support broad inferences about the Court’s views on issue exhaustion. Lubbers, *supra* note 1, at 118–19. The fact remains, however, that on the only occasion on which the Court has tried to relate issue exhaustion to the APA, it looked to the

justifications for issue exhaustion in regulatory proceedings are based on factors that those proceedings share with other varieties of litigation in the civil and criminal spheres, not on considerations distinctive to administrative law.

If we think about issue exhaustion as an aspect of a court's consideration of the merits of a dispute, rather than about access to judicial review, the APA's presumption of reviewability immediately looks less relevant to the debate about its legitimacy, if relevant at all. That reasoning may help to explain why the courts have apparently never discussed the presumption as potentially pertinent to that debate. Indeed, any notion that the APA forbids courts from imposing an issue exhaustion requirement would prove too much, because it would imply that they also lack authority to require issue exhaustion in judicial review of agency adjudication—a requirement that is much more longstanding.

A similar analysis can shed light on the question of whether issue exhaustion in rulemaking is in tension with *Darby v. Cisneros*.³⁰ In *Darby*, the Supreme Court construed the last sentence of § 704 of the APA, which provides:

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.³¹

By its language, that provision merely allows a dispensation from the requirement of finality (normally a prerequisite to judicial review), but the Court held that it also provides a dispensation from exhaustion under like circumstances.³² Professor Funk argues that, because § 704 applies equally to adjudication and rulemaking, the logic of *Darby* should foreclose any “exhaustion required as a precondition of judicial review of rulemaking,” including issue exhaustion, unless that precondition is spelled out in a statute or an appropriate regulation. He maintains that the courts' failure to confront this possibility indicates that they are “hopelessly confused.”³³

I, however, do not discern such confusion (hopeless or otherwise). The Court's specific point in *Darby* was that Congress's goal of relaxing the finality requirement in APA cases would be frustrated if § 704 were not construed to apply to exhaustion: “If courts were able to impose additional exhaustion requirements beyond those provided by Congress or the agency,

Act's scope of review section, not to earlier sections governing access to the courts.

30. 509 U.S. 137 (1993).

31. 5 U.S.C. § 704.

32. *Darby*, 509 U.S. at 153–54.

33. Funk, *supra* note 10, at 18.

the last sentence of [§ 704] would make no sense.”³⁴ Logically, this must refer to remedy exhaustion, which is functionally equivalent to finality. At most, therefore, *Darby* means that remedy exhaustion should also be unavailable in an APA case—a point that has little or no practical significance in a rulemaking context.³⁵ The Court’s logic simply doesn’t apply to issue exhaustion, which is by no means equivalent to the “final agency action” principle. The Court’s broad statements that Congress meant to negate “exhaustion” should be read in that light. More fundamentally, if I am correct in my contention that issue exhaustion is ultimately not concerned with access to judicial review, one should not expect § 704 to address it in the first place.

II. PROS AND CONS OF ISSUE EXHAUSTION IN RULEMAKING

If, as the previous section suggested, judicially created requirements for issue exhaustion in rulemaking are not illegitimate as such, debate should focus on questions about *when* they should come into play. ACUS Statement #19 speaks to that subject in two long paragraphs that summarized nearly a dozen potential advantages and disadvantages of the requirement.³⁶ Such a listing could not, by its nature, tell the reader very much about how the various factors net out, let alone how they should apply to specific cases—but the Conference did not expect it to fulfill those goals. Rather, it was designed to provide raw material that readers could use in forming their own conclusions. Accordingly, the following discussion attempts to carry the inquiry a few steps further with a more definite set of normative premises.

A. Benefits

I will begin with some factors that militate in favor of a relatively robust

34. *Darby*, 509 U.S. at 146–47.

35. See Lubbers, *supra* note 1, at 121–22 (discussing this issue). A *proposed* rule is not reviewable, because it is not a final agency action. *In re* Murphy Energy Corp., 788 F.3d 330, 334 (D.C. Cir. 2015). Moreover, apart from the notice of proposed rulemaking, an agency that is engaged in rulemaking would normally not render any interim decision from which an appeal could potentially be taken. Thus, the question of whether remedy exhaustion would also negate review during the proceeding is a moot point. After the issuance of the rule, a final agency action does exist, but courts do not hold that an individual litigant is barred from challenging it if he or she did not participate in the rulemaking proceeding. As one court has observed, such a principle would mean that the vast majority of potential litigants could not sue; and if no one filed comments on a rule, no one could challenge it. *Dobbs v. Train*, 409 F. Supp. 432, 445 (N.D. Ga. 1975), *aff’d sub nom.* *Dobbs v. Costle*, 559 F.2d 946, 947 (5th Cir. 1977).

36. ACUS Statement #19, *supra* note 2, at 60,612.

requirement of issue exhaustion in rulemaking. One traditional argument for issue exhaustion that does seem applicable to rulemaking is that, at least some of the time, it is unfair to fault an agency for not offering a good answer to a question that no one asked it to address.

Sims v. Apfel offers a good reference point for this discussion.³⁷ In that case, as Professor Lubbers describes in some detail,³⁸ a claimant had sought judicial review of a denial of disability benefits by the Social Security Administration. The claimant had failed to raise her objection before the Social Security Appeals Council, but the Court declined to apply issue exhaustion, principally because the proceedings were highly informal and inquisitorial rather than adversarial in nature.³⁹ Generalizing, the Court wrote that “the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding.”⁴⁰ To Professor Lubbers, this principle invites doubt about whether courts should create issue exhaustion requirements in the context of rulemaking. Similarly, the ACUS Statement asserts that courts have imposed issue exhaustion in rulemaking “[d]espite *Sims*’ focus.”⁴¹

My view is somewhat different. Of course, a rulemaking proceeding does not have parties. Nevertheless, I would maintain that in important respects modern rulemaking *has* evolved into a somewhat adversarial process, and some of the expectations that courts routinely bring to their own decisionmaking about the propriety of raising an issue for the first time on appeal can, therefore, appropriately carry over to the rulemaking context. Let us consider some arguments favoring that view.

In the first place, there are some issues that an agency is expected to address *because* a party brought them up. For example, one obligation of a rulemaking agency is to respond to significant comments tendered during the comment period.⁴² Obviously, this obligation implies that the agency might not have had to respond to the substance of the comment if no one had made it. Similarly, an agency is expected to explore alternatives to its

37. 530 U.S. 103 (2000).

38. Lubbers, *supra* note 1, at 120–21, 140–41.

39. *Sims*, 530 U.S. at 110–12. Justice O’Connor concurred in the result on the narrower basis that the claimant did not have adequate notice of the issue exhaustion requirement, but she did join in the general observation quoted in the text. *Id.* at 112–14 (O’Connor, J., concurring in part and concurring in the judgment).

40. *Id.* at 109.

41. ACUS Statement #19, *supra* note 2, at 60,612.

42. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015); *La. Fed. Land Bank Ass’n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003); *Safari Aviation, Inc. v. Garvey*, 300 F.3d 1144, 1151 (9th Cir. 2002).

proposed rule if the alternatives were obvious *or* if they were suggested by commenters.⁴³ This necessarily means that some alternatives must be considered *if and only if* someone asks the agency to adopt them. Additionally, a court would find that a rule is arbitrary and capricious if an agency “offered an explanation for its decision that runs counter to the evidence before the agency.”⁴⁴ The presence or absence of such evidence in the record may well turn on whether a commenter chose to submit it.

The *Blackletter Statement of Federal Administrative Law*⁴⁵ published by the Section of Administrative Law and Regulatory Process of the American Bar Association (ABA) makes a similar point:

Even where courts do not apply the issue-exhaustion doctrine, because the review of agency action under the “arbitrary and capricious” standard of § 706(2)(A) is limited to the record before the agency at the time of its decision, the agency’s action may well be deemed reasonable in the absence of an argument that was not presented to the agency. Thus, the absence of an argument at the administrative level may affect the substance, if not the availability, of review.⁴⁶

As the language of the quotation shows, the Section did not characterize the dynamic it was describing as “issue exhaustion.” I would be less reluctant to use that term, because, as explained above, I tend to think of issue exhaustion as closely related to a court’s consideration of the merits of a dispute, rather than as an aspect of the “availability of review.” The verbal similarity between the name of the doctrine and the traditional requirement of exhaustion of administrative remedies—or remedy exhaustion, as ACUS calls it—tends to obscure that connection. Regardless of how one comes out on this terminological question, however, the reality of the underlying relationship between the contents of public comments and the breadth of the reviewing court’s role is clear.

To frame the matter in structural terms, the adversarial—or at least

43. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65 (2004) (“[T]his case does *not* involve . . . any challenge to the [environmental assessment] due to [the agency’s] failure properly to consider possible alternatives to the proposed action Because respondents did not raise these particular objections to the [environmental assessment], [the agency] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available”). On the other hand, “an [environmental assessment’s or environmental impact statement’s] flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.” *Id.* at 765.

44. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

45. ABA SECTION OF ADMIN. L. & REG. PRACTICE, A BLACKLETTER STATEMENT OF FEDERAL ADMINISTRATIVE LAW 53–54 (2d ed. 2013).

46. *Id.* at 54.

dialogic—nature of the comment process serves to put reasonable boundaries on the scope of a rulemaking agency’s responsibilities. A rulemaking proceeding typically implicates many issues that the agency knows perfectly well it has a duty to address, regardless of whether any commenter brings them up, such as the basics of the statutory authority under which it acts, as well as the basics of rulemaking procedure as prescribed in the APA, Regulatory Flexibility Act, National Environmental Policy Act, and so forth. As will be seen, I do not argue that issue exhaustion should prevent a court from addressing those issues, even if they were not raised in the underlying rulemaking proceeding.⁴⁷ Yet not every logically relevant statutory or procedural question will be so obvious. Some will be quite obscure or strained, and in my view an agency should be able to argue successfully on appeal that it was not required to address those questions if no one who participated in the rulemaking proceeding asked it to do so.⁴⁸

The dialogic role of the comment process also has an affirmative side. This proposition was indirectly reflected in a comment letter that the ABA Administrative Law Section submitted in 2011 to the House Judiciary Committee.⁴⁹ The letter questioned provisions of the proposed Regulatory Accountability Act that would require a rulemaking agency to address a lengthy list of specified “considerations” in every notice-and-comment proceeding.⁵⁰ The Section argued that these duties were unnecessary:

[W]here particular considerations are important and relevant, they will almost always emerge simply as a result of the dynamics of the rulemaking process Stakeholders have every incentive to raise the issues that most need attention, and rulemaking agencies have a recognized duty to respond to material and significant comments This is a fundamental point. The rulemaking process is to a large extent self-regulating. Commenters can be relied on to raise important issues. Knowing this, agencies anticipate the comments. And comments not anticipated must be grappled with.⁵¹

My suggestion here is that the affirmative side of this “self-regulating” process is inseparable from the negative side, which the issue exhaustion doctrine embodies. Their interaction is a reminder that the choices

47. For analysis and authority supporting this limitation, see *infra* notes 79–83 and accompanying text.

48. See *Koretov v. Vilsack*, 707 F.3d 394, 398 (D.C. Cir. 2013) (“[A]gencies have no obligation to anticipate every conceivable argument as to why they might lack . . . statutory authority.”).

49. ABA Sec. of Admin. L. & Reg. Prac., *Comments on H.R. 3010, the Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619 (2012) [hereinafter *H.R. 3010 Comments*].

50. H.R. 3010, 112th Cong. § 3(b) (2011) (proposed § 553(b)).

51. *H.R. 3010 Comments*, *supra* note 49, at 633–34.

commenters make about issues to raise play a crucial role in keeping the scope of a rulemaking proceeding within manageable bounds. That is what I meant when I said that rulemaking has evolved into something of an adversary process. The dialogic process only works because courts do not expect agencies to take up points that parties do not raise, unless those issues are obviously material, or some other basis for waiving issue exhaustion exists.

Seen in light of the above analysis, the rulemaking process seems readily distinguishable from the “informal” procedures at issue in *Sims*.⁵² That decision turned on the premise that “the [Social Security Appeals] Council, not the claimant, has primary responsibility for identifying and developing the issues;”⁵³ indeed, the written form by which a claimant could file for Council review “strongly suggest[ed] that the Council [did] not depend much, if at all, on claimants to identify issues for review.”⁵⁴ Under these circumstances, the Court reasoned, claimants could not be expected to foresee that their failure to raise an issue before the Council could foreclose them from pursuing that issue in court. In contrast, rulemaking paradigmatically contemplates that the agency depends on commenters to offer information and insights that it would not have discerned on its own. The very essence of this decisional model is that it “give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,” with an assurance that those submissions will lead to “consideration of the relevant matter presented.”⁵⁵

Serious concerns about the potential for impediments or “ossification” of the rulemaking process would arise if courts expected agencies to address every substantive or procedural issue that a given proposed rule *could* implicate. Administrative lawyers are familiar with the Supreme Court’s warning in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁵⁶ that uncertainties about the circumstances in which a court might object to an agency’s choice of procedures would tend to induce risk-averse agencies to plan for the worst-case scenario, by resorting to whatever procedures a reviewing court *might* think necessary.⁵⁷ An analogous concern would seem squarely applicable to such a regime. And, in any event, “simple fairness” to the agency, as a litigant, militates against allowing a party to ambush it on appeal with arguments that the agency

52. *Sims v. Apfel*, 530 U.S. 103 (2000).

53. *Id.* at 112.

54. *Id.*

55. 5 U.S.C. § 553(c) (2012).

56. 435 U.S. 519 (1978).

57. *Id.* at 539–40.

had no reason or duty to anticipate at a time when it was in the best position to formulate an effective answer to them.

The reader may object that I have overstated the adversarial aspect of rulemaking proceedings. It is true that the primary focus of my discussion has been on actively contested rules. Those are the ones that are most likely to lead to judicial review and as to which, therefore, issue exhaustion principles are most likely to make a difference. I acknowledge, however, that whatever principles the courts adopt must also be credible when applied to rulemaking proceedings that are not very vigorously challenged but somehow result in judicial review anyway. I do not believe the differences between the two situations are crucial, because my arguments for issue exhaustion are based on the structured opportunities that the rulemaking process affords for raising issues at the administrative level, not on the extent to which they are actually used in a given case. In either situation, a litigant seeking judicial review should be able to challenge the validity of the rule on some grounds—the basic determinations that the agency could be expected to address on its own initiative—but not on as many grounds as would have been available if the agency had been presented with a fuller range of arguments during the administrative proceeding.

B. Possible Disadvantages

Having staked out a position that is generally sympathetic to at least some issue exhaustion in rulemaking, I will respond to some policy arguments that Professor Lubbers and others have offered to cast doubt on its desirability. One of his principal concerns seems to be that issue exhaustion might operate to prevent judicial review at the behest of people who did not comment in the proceeding, were not adequately represented by anyone who did participate, and perhaps were unaware of the rule before the agency took steps to apply it to them.⁵⁸ I agree with this concern, but, as I will develop, my concept of issue exhaustion would not give them any fewer rights than are enjoyed by people who did participate.

Another of Professor Lubbers's concerns is that issue exhaustion may contribute to ossification in rulemaking, because it may have the effect of "inducing people to comment on every possible issue they might potentially want to raise in court."⁵⁹ He would not "want commenters to feel they have to file 'shotgun' comments in an effort to inoculate themselves from later issue-exhaustion defenses."⁶⁰ He relies on work on "information

58. Lubbers, *supra* note 1, at 155–56, 157–59.

59. *Id.* at 96.

60. *Id.*

capture” by Professor Wendy Wagner.⁶¹ According to her, administrative law has traditionally taken the view that the more informational input an agency receives, the better; but, in practice, agencies receive such a barrage of filings, at least in complex rulemaking proceedings, that they have to struggle to handle it.⁶² She argues that this phenomenon, fostered in part by issue exhaustion,⁶³ allows the interest groups that deploy it to exercise a kind of “information capture” of the affected agency.

Although one can debate the extent to which issue exhaustion contributes to information capture,⁶⁴ the doctrine should primarily be seen as a constructive response to adversarial tendencies that exist anyway. It induces challengers to bring their issues to the agency first, so that administrators will have a fair opportunity to respond to them.⁶⁵ I have no doubt that agencies would prefer to have a chance to rebut litigants’ contentions at the administrative level, instead of encountering them for the first time on appeal. This was the point of a quip of mine that Professor Lubbers quoted in his report: “I think they would prefer the shotgun to the sandbag any day.”⁶⁶ Indeed, during the Conference’s deliberations, agency members proved to be among the strongest defenders of issue exhaustion in rulemaking, and the strength of their commitment contributed to the Conference’s difficulty in arriving at a collective position in this project.

At least from the standpoint of their own interests, the agency members’ support for strong issue exhaustion requirements was, I believe, reasonable. Among other reasons, a cogent reply to a negative comment at the agency level may deter the litigant from pressing that comment on appeal. That is

61. *Id.*; see Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

62. Wagner, *supra* note 61, at 1329–34.

63. *Id.* at 1363–64.

64. Among Professor Wagner’s principal themes is that information capture takes numerous forms. See *id.* at 1351–72. Presumably, many of the voluminous comments that some participants file are intended to influence the agency itself—either by persuading it of the correctness of the commenters’ views or by convincing it that a contrary position might not stand up on appeal. By hypothesis, these comments would likely be filed even if issue exhaustion were not a factor. It could be hard to sort out, as an empirical matter, what proportion of the comments are, instead, filed in order to preserve points for appeal, with no hope of influencing the agency.

65. I do not interpret Professor Wagner’s article as actually expressing disapproval of the issue exhaustion requirement in rulemaking. She does say that issue exhaustion amplifies the effects of what she calls information capture, but she seems to take the requirement for granted as part of the background architecture of administrative law. Ultimately, her article proposes for consideration a variety of reforms in administrative law, but relaxation of the issue exhaustion requirement is not one of them. See *id.* at 1403–30.

66. Lubbers, *supra* note 1, at 157 (quoting e-mail message from author).

exactly the way exhaustion is supposed to work. Moreover, an abandonment of issue exhaustion would turn the “post hoc rationalization” doctrine on its head.⁶⁷ That doctrine rests on the idea that, where possible, we want issues to be resolved within the regular bureaucratic process, rather than addressed for the first time by agencies’ appellate counsel (whether in-house or at the Department of Justice). The various exceptions to issue exhaustion, which I will discuss in the next section, are reasons to *forgive* failure to raise an issue at the administrative level, but in my view, we surely don’t want to *encourage* such bypasses.

If anything, as I argued in the previous section, elimination of issue exhaustion requirements might *promote* ossification, because agencies would feel obliged to spend a great deal of time anticipatorily responding to what they *imagine* the objections raised in court will be (and how they will be couched). Issue exhaustion serves to reduce the need for such speculation.

A third area of concern for Professor Lubbers is that “issue exhaustion may benefit well-resourced commenters at the expense of groups that cannot afford to monitor every rulemaking that might affect them.”⁶⁸ Here he extrapolates from comments by Judge Stephen Williams, who had suggested that the adverse consequences of issue exhaustion may be especially severe for “firms that have interests that are not well aligned with the weight of industry viewpoints.” Such persons might be disadvantaged not only by resource limitations, but also by the fact that they would not be well represented by dominant firms that do have the wherewithal to engage in continuous monitoring. Judge Williams also recognized that beneficiaries of regulation could be even less likely to have interests that are “aligned” with dominant firms in an industry, so they might well have a similar complaint. Unlike the ossification argument, which arguably is anomalous in its effort to shield agencies from a judicial doctrine that they strongly support, this reservation about issue exhaustion appears to be entirely straightforward and rational from the standpoint of the persons whom it is intended to benefit.

Even so, I have some doubts about the argument insofar as it focuses on distributive consequences. I normally take as a general premise that administrative law principles should not be determined on the basis of which particular social or economic groups would most benefit or suffer from them. Moreover, it is by no means clear that relaxation of issue

67. See *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–69 (1962) (“[C]ourts may not accept appellate counsel’s post hoc rationalizations for agency action.”); see also *Inv. Co. Inst. v. Camp*, 401 U.S. 607, 628 (1971) (“It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress.”).

68. Lubbers, *supra* note 1, at 158.

exhaustion would go very far to ameliorate the phenomenon of regulatory capture by “well-resourced” interest groups. That phenomenon has manifold manifestations and manifold causes.⁶⁹

Perhaps, therefore, the better way to regard the “burden on commenters” factor is to focus less on its distributional implications than on the fact that a strong issue exhaustion regime can be a burden for all non-agency participants.⁷⁰ That burden can entail not only the costs of monitoring to find out about a rulemaking proceeding in the first place, but also the costs of analyzing, researching, and drafting comments with enough specificity to put the agency on notice of the issue in question.⁷¹ I do think that these burdens, so conceived, are entitled to weight in the issue exhaustion calculus, but they have to be weighed against the advantages summarized in the preceding section. Moreover, recognition of the interests of stakeholders must be accompanied by critical analysis of specific proposals for limiting the issue exhaustion requirement. As will be seen below, I have doubts about the solutions that Judge Williams offered as protections for the stakeholder interests that he identified.

Finally, Professor Lubbers observes that it can be difficult for courts to determine whether a given contention was, in fact, tendered to the agency during the rulemaking proceeding.⁷² I doubt, however, that this task is overly taxing. Petitioners can be asked to point out where in the rulemaking record they raised the point in question, and agency counsel can speak to whether that mention was too obscure. The courts do have to

69. For a series of sixteen essays on various aspects of this topic, see *Rooting Out Regulatory Capture*, REG. REV., (June 13, 2016), <https://www.theregreview.org/2016/06/13/rooting-out-regulatory-capture/>.

70. Even “well-resourced” participants may experience these burdens. During the ACUS deliberations, a lawyer who regularly litigates appeals from regulations on behalf of “dominant” industry groups noted that issue exhaustion can be a problem for his clients, because the drafting of rulemaking comments is often handled by in-house counsel at trade associations. When these associations retain outside counsel like his law firm to appeal from the rule, the outside lawyers sometimes spot problems with the rule that were not raised below, but these issues might be foreclosed if the court applies issue exhaustion in a restrictive manner.

71. Insofar as the commenter intends to raise a given issue on judicial review ultimately anyway, the obligation to do the work earlier and bring it to the agency’s attention, so that the agency will be able to respond to it, may not involve much additional burden. Nevertheless, issue exhaustion requires potential appellants to work out their position on an issue—which can entail not only the task of writing, but also internal discussions to hammer out a consensus stance—before they know whether they will be sufficiently aggrieved by a rule to make an appeal worthwhile at all, and before they know whether and how the agency’s final decision will in fact implicate the issue in question.

72. Lubbers, *supra* note 1, at 160.

make judgment calls, but they are accustomed to making that inquiry in every kind of civil and criminal litigation in which issue exhaustion can be a factor. Moreover, the courts' enforcement of the rulemaking agency's obligation to respond to significant comments necessarily involves the same sort of inquiry into whether, and how clearly, commenters lodged a given objection.⁷³ They have performed that function for years, regardless of whether one chooses to describe it as part of issue exhaustion, as distinguished from ruling on the merits.

III. ISSUE EXHAUSTION CRITERIA

For the reasons discussed above, I believe that courts that hear challenges to agency rules should approach issue exhaustion in a receptive spirit, without any background assumption that it should be generically disfavored. This is not an endorsement of across-the-board issue exhaustion, however. Many of the exceptions and qualifications that have emerged in the case law make sense as articulations of situations in which the internal logic of issue exhaustion does not apply or in which countervailing factors justify overriding the default requirement. ACUS Statement #19 does a fairly good job of identifying several of these situations, although it refrains from actually *recommending* them to the courts. In this section, I will offer a quick overview of these factors, although I do not attempt coverage that is nearly as broad as Professor Lubbers's article contains.

In the preceding paragraph, I referred to issue exhaustion as a default requirement, and this characterization requires some elaboration. The ACUS Statement does not use that language, an omission that might look significant—especially in light of the fact that the earlier proposed recommendation, which ran into opposition on the floor of the ACUS Assembly, did call it a “general principle.”⁷⁴ I think a term such as “general rule” is helpful, because, at a minimum, the dynamics of litigation justify assigning to the challenger a burden of going forward. In the typical sequence of events, the challenger alleges some error with the rule, and the government pleads that the challenger failed to raise the issue below. At that point, the challenger needs to explain when and how, if at all, the issue under discussion did arise during the rulemaking, or, alternatively, which exception(s) to issue exhaustion may apply. It is impractical to expect the government to demonstrate the nonexistence of each and every exception.

73. See, e.g., *Nat'l Ass'n of Mfrs. v. EPA*, 750 F.3d 921, 924–25 (D.C. Cir. 2014) (following *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1519–21 (D.C. Cir. 1988)).

74. See PROPOSED RECOMMENDATION, *supra* note 3, at 9.

However, this analytical framework, does not, in itself, say much about whether the exceptions should be stingy or generous.

Some of the circumstances in which the Lubbers article and the ACUS Statement suggest that issue exhaustion should not apply are straightforward. It seems easy to conclude that a challenger's claim should not be barred if it was raised in the rulemaking proceeding by a participant other than the challenger or by the agency itself.⁷⁵ In these situations, the purposes of the issue exhaustion requirement will have been satisfied, because the agency will have had a fair chance to examine the matter, even if the challenger did not personally trigger that examination.⁷⁶ It would also be unfair to apply issue exhaustion if the agency did not solicit comments at all (such as in a proceeding that is exempt from notice-and-comment requirements) or if the error that the challenger asserts did not exist at the time of the rulemaking proceeding, such as an allegedly excessive variance between the proposed rule and the final rule.⁷⁷

A more consequential issue to examine is suggested by language in the ACUS Statement that "invites" courts to consider whether "[t]he agency failed to address an issue that was so fundamental to the rulemaking or to the rule's basis and purpose that the agency had an affirmative responsibility to address it."⁷⁸ The implication is that a reviewing court should allow a challenger to litigate an issue of that kind even if it has not

75. See ACUS Statement #19, *supra* note 2, at 60,613; Lubbers, *supra* note 1, at 121, 132–33, 139; see also *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 948 n.12 (D.C. Cir. 2004); *Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 295–96 (5th Cir. 1998) (alternative holding).

76. Of course, if the challenger itself raised the issue, the exhaustion requirement would by definition be satisfied.

77. See ACUS Statement #19, *supra* note 2, at 60,613; Lubbers, *supra* note 1, at 148–49. If an issue that arises after the conclusion of the rulemaking proceeding is one that the court should not resolve without getting the agency's perspective, issue exhaustion as such may not be a bar to the court's consideration, but one might expect the court to remand for further proceedings instead of attempting to proceed on its own. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

78. ACUS Statement #19, *supra* note 2, at 60,613. The unsuccessful draft recommendation proposed by the Committee on Judicial Review had elaborated on this criterion:

This narrow exception may include: (i) basic obligations of rulemaking procedure, such as well-recognized requirements of the Administrative Procedure Act or other government-wide procedural statutes, governing statutes, or regulations; or (ii) unambiguous limitations on the agency's statutory authority; or (iii) explicit or well established substantive criteria or requirements prescribed by applicable statutes or regulations.

PROPOSED RECOMMENDATION, *supra* note 3, para. 4(b).

been raised before the agency. This proposition was a premise of my earlier discussion, and I believe it provides a necessary limit on the generally favorable assessment of issue exhaustion that this essay sets forth.⁷⁹

My argument for this limitation grows out of the fact that, in a rulemaking proceeding, the agency is the moving party.⁸⁰ The proceeding begins with a notice of proposed rulemaking that sets forth a tentative version of the rule as well as the reasons that, in the agency's provisional view, justify it. Indeed, one can barely conceive of a rulemaking proceeding in which the agency did not make an initial judgment about the purposes of the proposed rule and how the measure might implement the statutory provisions on which the agency intends to rely.⁸¹ A comment period will follow the issuance of the notice, and I have already explained how public comments play a critical role in calibrating the breadth of issues that an agency needs to address. Nevertheless, the issues raised in the comment period are in a sense ancillary or supplementary to the issues that the agency is expected to raise on its own initiative.⁸² Therefore, the argument runs, the agency should not be allowed to rely on issue exhaustion as an excuse for not addressing those latter issues. It would be absurd for an agency to say, in a judicial review proceeding, "nobody asked

79. For authority supporting this proposition, see, for example, *Nat. Res. Def. Council, Inc. v. EPA*, 755 F.3d 1010, 1023 (D.C. Cir. 2014) (declining to apply issue exhaustion to "key assumptions"), discussed in Lubbers, *supra* note 1, at 148; *Nc. Md. Waste Disposal Auth.*, 358 F.3d at 948; *infra* note 91. The idea has some similarities to the "plain error" limitation on issue exhaustion in non-administrative areas. See 2A FED. PROC. L. ED., *supra* note 17, § 3:715.

80. In a sense, the government is also the moving party in many administrative adjudications, such as enforcement actions. But that fact is somewhat beside the point. The central goal of issue exhaustion is to respect the autonomy of the administrative decisionmaker and to get that decisionmaker's perspective on an issue that might come before the reviewing court. Thus, issues raised by government counsel supporting a complaint, or even by agency heads in their capacity as prosecutor, should not matter unless they are also raised or considered at the decisionmaking stage.

81. *Cf. Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1176 (D.C. Cir. 1979) (Leventhal, J., concurring) ("It would be the height of absurdity, even a kind of abuse of administrative process, for an agency to embroil interested parties in a rulemaking proceeding, without some initial concern that there was an abuse that needed remedying, a concern that would be set forth in the accompanying statement of the purpose of the proposed rule.").

82. If the public comments did persuade the agency to head off in a fundamentally new direction, the agency would probably need to start over, in order to comply with the principle that a final rule must be a "logical outgrowth" of the agency's proposed rule. See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

us to apply the factors codified in our enabling statute and to comply with the APA, so it is too late now for the petitioner to get into those issues.”⁸³

It may be objected that the suggested exclusion of “fundamental” or “key” matters from the issue exhaustion requirement is too vague to be manageable.⁸⁴ That is possible, but I can see some grounds for optimism. The range of uncertainty that it would foster at the administrative level would be less than if issue exhaustion in rulemaking were abandoned altogether—a possibility that I criticized above as placing too much of a burden on risk-averse agencies. The exclusion would apply only to matters that the court finds to be so obviously appropriate for consideration in the particular proceeding that the agency should have raised and resolved the point on its own initiative. In a judicial review proceeding, the parties could meaningfully present competing arguments about whether that criterion was satisfied. As for *ex ante* effects on the participants during a rulemaking proceeding, it seems reasonable to think that the uncertainty inherent in the test might well send approximately the right signals to both the agency and the commenters: The agency would have an incentive to address all issues that a reviewing court *might* consider “fundamental” in the sense under discussion, and commenters would have an incentive to raise—or else forego—any issues that a court might think do *not* satisfy that test.

I will conclude this section with a few comments on provisions in the ACUS Statement that diverge from what one might have expected it to say. The Statement invites courts to consider applying a categorical principle that an issue need not be exhausted if it “involves an objection that the rule violates the U.S. Constitution.”⁸⁵ The Conference’s ambivalence on this point can be inferred from its comment in a footnote that, “regardless of whether the issue exhaustion doctrine would apply, participants in a rulemaking *should* raise constitutional issues during the rulemaking proceeding to give the agency an opportunity to adjust its rule to eliminate

83. I do not take a position in this essay as to whether an adjudicating agency should likewise be foreclosed from relying on issue exhaustion to prevent a court from reaching “fundamental” issues that were not raised at the administrative level. In an adjudicative situation, the agency does have a comparable duty to fulfill its statutory mission and observe relevant procedural requirements, but the traditions of the adversary system run deeper in that context than in rulemaking. Those traditions are less entrenched in “inquisitorial” adjudicative proceedings, at least in the view of the Supreme Court in *Sims*. See *supra* notes 37–40 and accompanying text. However, the range of proceedings that fall within the holding of *Sims* is probably quite narrow. See Funk, *supra* note 10, at 15 (“Outside the Social Security context, it is unlikely that [*Sims*] has any force.”).

84. In this regard, the somewhat more concrete language proposed by the Committee on Judicial Review would merit consideration. See *supra* note 78.

85. ACUS Statement #19, *supra* note 2, at 60,613.

the constitutional objection or at least to explain in the administrative record why its rule does not raise constitutional concerns.”⁸⁶ That the Conference chose, despite that practical consideration, to suggest a flat no-exhaustion principle seems to bespeak a striking aversion to the possibility that a deprivation of a constitutional right might go without a remedy. While that attitude may seem unduly inflexible, it is not unlike the approach that our legal system often takes to related problems, including exhaustion problems, where constitutional issues are involved.⁸⁷

Finally, the Statement’s approach to the issue of futility bears comment. In the sphere of administrative adjudication, there is some authority for the proposition that a litigant need not exhaust administrative remedies—nor raise issues—if that step would be demonstrably futile.⁸⁸ The bar is high, but in principle the proposition is probably sound. The possibility of recognizing such a limitation for rulemaking cases led to vigorous debate in the ACUS deliberations. The upshot was that Statement #19 invites consideration of that factor only in narrow circumstances: Exhaustion might be excused if “[i]t would have been futile to raise the issues during the rulemaking proceeding because the agency clearly indicated that it would not entertain comments on or objections regarding that issue.”⁸⁹ The reasoning that led to that relatively narrow approach was this: In most litigation contexts, the futility exception rests on the idea that an agency may have a settled policy or body of precedent that it has shown no intention of reexamining; thus, the reviewing court might see no purpose in delaying resolution of the plaintiff’s claim because of the outside chance of a reappraisal. However, a rulemaking proceeding exists for the very purpose of changing existing policy. The agency has announced that its future directions may differ from its past ones. Thus, the argument ran, as long as the issue is germane to the rulemaking, a court should not jump to the conclusion that the agency would not have heeded a request for a new direction if it had been set forth in comments, unless the agency actually

86. *Id.* at 60,613 n.26 (emphasis added).

87. See *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (holding that plaintiffs who bring constitutional claims under 42 U.S.C. § 1983 need not exhaust administrative remedies); Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338, 342 (2016) (noting, in the contexts of scope of review and statutory preclusion of review, that “courts (or at least federal courts) tend to resist incursions on their prerogatives as guardians of the Constitution”). For a potential extension of this reasoning, see *infra* notes 115–117 and accompanying text.

88. See *Wash. Ass’n for Television & Children v. FCC*, 712 F.2d 677, 682 & n.9 (D.C. Cir. 1983); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 346–49 (1965).

89. ACUS Statement #19, *supra* note 2, at 60,613.

said it would not be receptive to that request. I suspect, however, that questions about the breadth of the futility exception will be a point of contention in future cases.

IV. COMMENTERS AND NON-COMMENTERS

In this section, I take up the question of whether issue exhaustion principles should play out differently depending on whether the challenger in the judicial review proceeding participated at all in the underlying rulemaking proceeding. The ACUS Statement did not address this question, but I will suggest some answers here.

Concerns about the potential plight of persons who did not participate in the rulemaking process have long energized the debate over issue exhaustion in rulemaking. A focal point for those concerns has been the language of the Fifth Circuit in *City of Seabrook v. EPA*,⁹⁰ warning against a doctrine that

would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the Federal Register, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated.⁹¹

Certainly, that argument is intuitively appealing. At least it supports the courts' longstanding unwillingness to apply *remedy* exhaustion to nonparticipants who seek judicial review of rules.⁹² But *Seabrook* applied the same logic to *issue* exhaustion, and the implications of this concern in that context are somewhat more difficult to tease out.

As Professor Lubbers explains in his article,⁹³ Judge Williams used his concurring opinion in *Koretov v. Vilsack*⁹⁴ to consider possible justifications for maintaining different rules for commenters and non-commenters. He recognized that *Seabrook* has met with a mixed reception in the Fifth Circuit and elsewhere,⁹⁵ but he suggested that much of the language of past case law applying issue exhaustion to rulemaking has been overbroad. He

90. 659 F.2d 1349 (5th Cir. 1981).

91. *Id.* at 1360–61. The Court in *Seabrook* could have resolved the issue exhaustion dispute in the petitioners' favor without relying on their failure to file comments in the rulemaking proceeding. The Court specifically found that the petitioners were making an objection that the agency would have been required to reach on its own initiative. *Id.* at 1361 & n.20 (noting that, “[s]ince the EPA is required by statute to make these determinations . . . [t]he statute gave it sufficient notice that it must make reasoned determinations”; thus, issue exhaustion was “particularly inappropriate”).

92. *See supra* note 35 and accompanying text.

93. Lubbers, *supra* note 1, at 152–55.

94. 707 F.3d 394, 399–402 (D.C. Cir. 2013) (Williams, J., concurring).

95. *See id.* at 399 n.1.

proposed a new perspective. Under his model, courts would continue to adhere to extant issue exhaustion principles with respect to persons who have commented in the proceeding.⁹⁶ But, he said, this view should perhaps not apply to persons who seek facial review after *not* having commented in the proceeding,⁹⁷ and it would in any event not apply to litigants against whom the agency proposes to apply the rule in a separate proceeding.⁹⁸ He developed this argument by reviewing the analysis that the D.C. Circuit had set forth in its two opinions in an earlier case, *Murphy Exploration & Production Co. v. U.S. Department of Interior*.⁹⁹ I will, therefore, highlight those two opinions in presenting my critique of this line of argument.

A. Direct Review

In *Murphy I* the panel propounded the theory that issue exhaustion might be applied against persons who participated in a prior rulemaking, but not against persons who failed to participate.¹⁰⁰ The idea seems to be that the former might be said to have waived their right to rely on arguments that they did not present to the agency, but the latter could not have be said to have “waived” anything. As Judge Williams noted, this aspect of *Murphy I* was later vacated, because it turned out that Murphy actually *had* participated in the rulemaking, but the panel’s reasoning “remains available to future panels.”¹⁰¹

The reliance on “waiver” in the *Murphy I* opinion is unsatisfying. That concept is drawn from the context of review of agency adjudication. Although courts sometimes invoke it in the context of rulemaking as well,¹⁰² it seems much less apt in the latter context. A rulemaking proceeding, after all, has no parties. The process is indeed adversarial in some respects, as I discussed above, but the adversary dialogue takes on a more abstract and impersonal form than the Court’s argument contemplates. The agency’s responsibility is to the public as a whole. Specifically, its job is to generate a reasoned explanation for its rule, including its responses to data, views, and arguments set forth in the public comments. But the persons who bring up those items are not entitled as individuals to such responses. Frequently,

96. *See id.* at 400–01.

97. *See id.* at 401–02.

98. *See id.* at 400.

99. 252 F.3d 473 (D.C. Cir. 2001) (*Murphy I*), *rehearing denied*, 270 F.3d 957 (D.C. Cir. 2001) (*Murphy II*).

100. 252 F.3d at 478.

101. *Koretzoff*, 707 F.3d at 401 (Williams, J., concurring).

102. Professor Lubbers cites to a number of these cases. *See* Lubbers, *supra* note 1, at 138–39, 145.

the agency's statement of basis and purpose does not even mention commenters by name. It simply rebuts their arguments (or not). Concomitantly, the criteria for issue exhaustion that courts normally use—which Part III of this essay has attempted to synthesize and refine—are not party-based. They generally focus on whether the *agency* had a fair opportunity to consider the contested issue, or, if not, whether some extenuating or countervailing consideration justifies allowing the court to reach the merits of that issue anyway. The interests of the particular litigant who filed the judicial review petition are seldom, if ever, mentioned in the equation.

Consistently with that focus, as already mentioned, a litigant who participated in a rulemaking proceeding but did not raise a particular issue is allowed to press that issue on appeal if some other commenter did raise it, or if the agency raised it on its own initiative.¹⁰³ In either of these circumstances, the plaintiff would, according to the ordinary use of language, have “waived” the right to argue that issue, but no waiver is enforced. In short, the topic of issue exhaustion in rulemaking does not offer very propitious terrain for a doctrine that revolves around notions of waiver.

In internal deliberations during the ACUS project, I objected to the *Murphy I* distinction on a less conceptual level:

To me, it is counterintuitive to give a person who diligently participated in a rulemaking proceeding *fewer* rights than a person who sat on the sidelines. The former would rightly regard this situation as unfair. We should seek to encourage potentially affected persons to file comments—thus, courts would be sending the wrong message if they were to adopt an exhaustion rule that made commenters worse off than non-commenters. The practical implications of the proposal are also troubling. Do we want to give a disgruntled commenter an incentive to recruit a non-commenter straw plaintiff to bring a judicial review proceeding to litigate contentions that the commenter is not permitted to litigate directly? If appeals by a commenter and a non-commenter are consolidated, should there be issues that only the latter is permitted to brief?¹⁰⁴

Professor Lubbers has incorporated this analysis into his article and apparently endorses my conclusion that “the goal should be to make the non-commenter *no worse off* than the person who commented—not to make him better off.”¹⁰⁵ The approach that I have advocated above would, more or less, fulfill that objective. It envisions that there will be some issues that must be examined because somebody (not necessarily the litigant) raised them, some key issues that the agency must examine regardless of whether

103. See *supra* notes 75–76 and accompanying text.

104. See Lubbers, *supra* note 1, at 155 (quoting letter from author).

105. *Id.*

anyone raises them, and some more marginal issues that the agency does not need to consider because nobody raised them (unless some other exception applies). In my proposed scheme, either the commenter or the non-commenter should be allowed to litigate the first two kinds of issues in court, but neither should be allowed to litigate the third kind.

Although some may be uneasy about the idea that a failure by commenters to raise particular issues can operate subsequently as a constraint on non-commenter litigants, I do not think the idea should be disturbing. It is comparable to—and in some respects actually overlaps—the axiomatic principle that judicial review of a rule is normally confined to the administrative record.¹⁰⁶ I have never heard anyone suggest that judicial review litigants who did not participate in a rulemaking proceeding are, for that reason, exempt from this principle.

B. Collateral Review¹⁰⁷

In *Murphy II*, which Judge Williams also discusses in his *Koretzoff* concurrence, the panel withdrew its prior holding on issue exhaustion and offered a different distinction: Issue exhaustion might be enforced against a person who files a direct challenge to a rule when it is promulgated, but not against a person who challenges the rule when it is applied.¹⁰⁸ A seemingly attractive aspect of this distinction is that it would serve to benefit a regulated person who seeks to challenge the validity of a rule in an enforcement proceeding in which the government charges that the person

106. See ACUS Recommendation 2013-4, The Administrative Record in Informal Rulemaking, 78 Fed. Reg. 41,358, 41,358–59 (June 14, 2013); *supra* note 46 and accompanying text.

107. This section discusses “as applied” relief, but that term can have a variety of meanings, so I will explain with precision what I mean by it here. The discussion in this section relates to litigants whose argument that a rule is unlawful is raised in a proceeding in which the agency seeks to apply the rule to them, most notably in an enforcement action. However, whatever relief such litigants might obtain would probably *not* be narrower than the relief that would have been granted in a direct review proceeding. “[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.” Nat’l Mining Ass’n v. U.S. Army Corps of Eng’rs, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989)). Moreover, the present discussion is not concerned with “as applied” arguments in the sense of contentions that an agency incorrectly or unreasonably applied its rule to the party that has resorted to judicial review. Such contentions do not implicate the *validity* of the rule. Thus, the reviewing court would have no occasion to consider what issues were or were not raised during the rulemaking proceeding.

108. *Murphy II*, 270 F.3d 957, 958–59 (D.C. Cir. 2001).

violated the rule—although this was not exactly the situation in *Murphy* itself.¹⁰⁹ Enforcement defendants seem, at least at first blush, to have particularly strong equities in their favor. Unlike litigants who file comments and then bring actions to contest a rule directly, enforcement defendants might never have engaged with the rule at all until the government showed up to assert that they were in violation of it. Under these circumstances, the notion that they should not be able to contest the rule on grounds that they did not raise during the rulemaking proceeding seems decidedly unfair.

A surprising result of the research for the ACUS project is that there are apparently no reported cases that have squarely involved issue exhaustion in the context of an action to enforce a rule.¹¹⁰ The members of the Committee on Judicial Review, having no judicial authority to which they could react, and no examples from their own experience on which to draw, decided that the committee's draft recommendation—the precursor of the ultimate Statement—should be limited to pre-enforcement review. They never looked back from that decision. That was probably the right choice, but of course the topic invites academic exploration, which I will provide here.

The court's treatment of the distinction between cases of direct review and cases in which a rule is applied was quite brief, and its thrust can probably be best appreciated in light of the way in which Judge Williams elaborated on it in his *Koretov* concurrence.¹¹¹ Both opinions based the distinction on case law dealing with statutory time limits on judicial review of rules. As Judge Williams noted, these cases allow persons to advance broader arguments in enforcement proceedings than would be allowed to a person who filed a direct challenge after the statutory deadline. This is a body of precedents that I have previously examined in my own scholarship,¹¹² and I agree in substance with Judge Williams's exposition of

109. In *Murphy*, the plaintiff company brought suit for judicial review of the Interior Department's computation of royalties that Murphy owed by virtue of its lease of federal lands. The department contended that the suit was premature, relying on one of its own regulations. Murphy contended that the regulation misinterpreted the statute on timeliness that it purported to implement. Murphy had not raised that theory when it participated in the agency's rulemaking proceedings. *See id.* at 958; *Murphy I*, 252 F.3d 473, 475–77 (D.C. Cir. 2001). Nevertheless, the Court held that issue exhaustion did not bar the company from relying on the theory in court, because Murphy was invoking it in a proceeding in which the rule was being applied, rather than in a direct review proceeding.

110. *See* ACUS Statement #19, *supra* note 2, at 60,612 n.13; Lubbers, *supra* note 1, at 158–59.

111. *Koretov v. Vilsack*, 707 F.3d 394, 400 (D.C. Cir. 2013) (Williams, J., concurring).

112. Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32

it. The cases interpret statutory provisions that, on their face, require that any challenges to a rule must be brought within a short period after the rule's issuance. Despite the wording of these preclusion statutes, the cases tend not to apply them expansively, if at all, to defendants in enforcement actions. The purpose of these holdings is to be very solicitous of regulated persons who may have paid no attention to the rule, and perhaps had no reason to be aware of it, until it is enforced against them.¹¹³

Although I have no quarrel with this preclusion case law on its own terms, the manner in which the court in *Murphy II* extrapolated from it to the context of issue exhaustion, with Judge Williams's subsequent endorsement, strikes me as quite problematic. It implies that the defendant in an enforcement proceeding should be able to advance contentions that could not have been invoked by a petitioner who files a *timely* direct challenge to a rule. Why should that be allowed? I do not think the courts can justify making the enforcement defendant *better off* than a direct review petitioner who complied with the statutory deadline.

Indeed, this disparity would invite problems of its own. At an early stage of the ACUS issue exhaustion project—prior to the committee decision to limit any recommendation to pre-enforcement proceedings—the staff circulated a discussion draft that would have excused a lack of issue exhaustion if “[t]he issue is presented in the context of an enforcement proceeding that the agency has brought against the challenging party, rather than in a direct review proceeding initiated by that party.”¹¹⁴ Professor Jonathan Siegel responded with a cogent criticism of that provision. He argued that it

creates a strange situation in which an agency's rule may be invalid, but the invalidity cannot be established until the agency attempts to enforce the rule. What is the point of such a scheme? Ever since *Abbott Labs*, the presumption has been that it's usually better to allow challenges to be resolved in a pre-enforcement context. Should we really recommend that a pre-enforcement challenge to an agency's rule be dismissed, if the same challenge could lead to striking down the rule as soon as the rule is enforced? What would be gained by such a scheme?¹¹⁵

Ultimately, the distinction between the status of the enforcement defendant and that of the regulated person who brings a direct challenge to

CARDOZO L. REV. 2203 (2011).

113. Other variables may complicate the question of whether the challenge to the rule is precluded, such as the basis on which the litigant contends that the rule is unlawful, but for present purposes those qualifications are not important. *See id.* at 2220–21, 2225.

114. E-mail from Stephanie Tatham, ACUS Staff Counsel, to Committee on Judicial Review (Mar. 31, 2015) (on file with author).

115. E-mail from Professor Jonathan Siegel to Stephanie Tatham, ACUS Staff Counsel et al., (Mar. 31, 2015) (on file with author).

a rule does not seem to hold water. After all, the latter type of challenge might well be filed years after a rule is issued—i.e., where no short limitations period applies. In both instances, the litigants might have had valid reasons to be unconcerned about the rule at the time of its issuance. They should each be allowed to contest the rule on the same grounds as would be available to a person who filed comments on the rule. In addition, if a statutory limitations period might be involved, the enforcement defendant should get whatever dispensation from that limitations period is afforded by the statute and case law dealing with that subject. For both of these litigants, however, the range of issues that they are free to raise should be circumscribed by the general principles of issue exhaustion applicable to other situations.

Whether the D.C. Circuit will be able to get beyond its troubling *Murphy II* holding¹¹⁶—quite literally a post hoc rationalization of the panel’s prior ruling in *Murphy I*—may depend on whether a subsequent panel would be willing to limit the breadth of the holding. On the precise facts of the case, the Court’s failure to apply issue exhaustion in *Murphy* was probably correct for a reason the panel did not give in either of its opinions. The substantive issue in the litigation (the meaning of a statute of limitations provision in oil and gas royalty legislation) was one as to which the court said it owed no deference to the government, because “‘interpreting statutes granting jurisdiction to Article III courts is exclusively the province of the courts,’” and “‘jurisdiction of the federal courts is outside agencies’ expertise.”¹¹⁷ The Court simply had no interest in the agency’s views on this question. Under these circumstances, I doubt that the court should have, or actually would have, applied issue exhaustion even if the petitioner had sought *direct* review of the rule. Such reasoning would have been a modest but plausible extension of the principle that issue exhaustion should not apply to constitutional challenges to a rule.¹¹⁸ If, however, the underlying

116. The court’s rationale was even more questionable than a corresponding holding in a hypothetical suit brought against an enforcement defendant would have been, because *Murphy* did not have the equities that one would usually associate with such a defendant. The company had itself initiated the litigation in which issue exhaustion was pleaded, and it had actually participated in the rulemaking proceeding. *See supra* notes 101, 108 and accompanying text. The court’s characterization of *Murphy* as “pursuing its claim in a second forum,” *Murphy II*, 270 F.3d 957, 958 (D.C. Cir. 2001), although literally true, had the effect of allowing the company to free-ride on the special dispensation that enforcement defendants receive in a statute of limitations context. However, this shade of difference does not matter for purposes of my analysis, which asserts that even an enforcement defendant should be subject to the same issue exhaustion principles as other litigants.

117. *Murphy I*, 252 F.3d 473, 478–79 (D.C. Cir. 2001).

118. *See supra* notes 85–87 and accompanying text.

substantive issue had been one on which the agency's expertise would have been important, enforcement of issue exhaustion would have been proper, either on direct review or in an application context.

One other factor to consider is the suggestion in ACUS Statement #19 that issue exhaustion requirements might be relaxed if "[t]he basis for the objection did not exist at a time when rulemaking participants could raise it in a timely comment."¹¹⁹ In context, as noted above, the example mentioned to support this remark was a situation in which an agency adopts a final rule that allegedly was not a "logical outgrowth" of the agency's proposed rule.¹²⁰ In principle, however, a defendant in an enforcement action might rely on the same idea by arguing that a rule should be rejected on the basis of circumstances that have changed after the rule was promulgated. That theory would have antecedents in the case law on issue exhaustion in review of agency adjudication,¹²¹ as well as in cases that decline to enforce a statutory time limit because the issue was unripe for review in a timely direct challenge.¹²² As a practical matter, judicial support for this theory could leave *some* enforcement defendants in a better position to resist an issue exhaustion defense than would have been possible for a litigant who had filed for review of a rulemaking proceeding as soon as the rule was issued. But a broad principle that issue exhaustion does not apply to enforcement defendants would also reach questions that *were* discernible at the time of the rulemaking, and in my view that principle goes too far.

CONCLUSION

Although most of this essay probably sounds as though it assumes that issue exhaustion should ideally be reduced to orderly principles, that objective is probably unrealistic and perhaps not even desirable. Part I of this essay quoted at length from *Hormel v. Helvering*, in which the Court traced the practice of issue exhaustion in judicial review of administrative proceedings (in that context, agency adjudication) to the familiar practices

119. ACUS Statement #19, *supra* note 2, at 60,613.

120. *Id.* at 60,613 n.29.

121. *See* Wash. Ass'n for Television & Children v. FCC, 712 F.2d 677, 682 (D.C. Cir. 1983) (indicating that issue exhaustion should not apply "where issues by their nature could not have been raised before the agency," such as because of "a material change in circumstances").

122. Judge Williams referred to the latter proposition in *Koretzoff v. Vilsack*, 707 F.3d 394, 400 n.2 (D.C. Cir. 2013) (Williams, J., concurring). For other authorities suggesting that such time limits need not apply if the issues were unripe for immediate review, see Levin, *supra* note 112, at 2214–15, 2215 nn.59–61, 2218 n.80. The same may be true if the defendant lacked fair notice of the agency's position. *Id.* at 2234–35.

of the courts in civil and criminal appeals.¹²³ But Justice Black's opinion for a unanimous Court went on to acknowledge an irreducible role for judicial discretion, which entailed exceptions in the service of the larger public interest:

There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below. [Our decisions], while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice.¹²⁴

We should expect to find a similar degree of flexibility in the courts' implementation of issue exhaustion in their review of agency rules.¹²⁵ We should not be surprised if they waive exhaustion regarding issues that they wish to address on the merits, while showing greater stringency with respect to issues that they prefer to sidestep, even if these latter proceedings seem hard to distinguish on administrative law grounds from cases in the first group.

Over time, however, the accretion of case law on an issue of this nature tends to shrink the de facto sphere of discretion, as precedents give rise to generalizations and then to default principles. Such default principles can be important even if courts do not always adhere to them. When judges follow them most of the time, they add predictability, stability, and legitimacy to the law. And when a court departs from these principles, it should expect to have to explain why it did so.

Professor Lubbers's article and the ACUS Statement have done much to advance the process of defining the proper occasions for issue exhaustion in rulemaking, and I hope that this essay will assist in the continuing process of refinement.

123. 312 U.S. 552 (1941).

124. *Id.* at 557–58.

125. A good example of willingness to acknowledge the role of such discretion is then-Judge Alito's opinion in *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 112 (3d Cir. 1997), discussed in Lubbers, *supra* note 1, at 144. See also *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). In that case, the Court declined to enforce a Clean Air Act provision under which “[o]nly an objection to a rule . . . raised with reasonable specificity during the period for public comment . . . may be raised during judicial review.” *Id.* at 1602. The Court stated that, even if the respondents had not complied with that provision, the lapse was not jurisdictional, the agency had not pressed this point vigorously below, and the Court was “mindful of the importance of the issues respondents raise to the ongoing implementation of the [Act].” *Id.* at 1602–03.

