Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution

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HELP IS SOMETIMES CLOSE AT HAND: THE EXHAUSTION PROBLEM AND THE RIPENESS SOLUTION

Robert C. Power*

I. INTRODUCTION

The exhaustion doctrine—the principles governing whether a party must exhaust administrative remedies prior to obtaining judicial review—is incoherent. Commentators have characterized the doctrine as "too rigid," "too complex," "confusing," "antiquated," and "amorphous" and courts have been similarly critical. The most serious prob-

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1. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (1965). Professor Jaffe notes that the rule "sometimes has been applied almost mechanically." Id.

2. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 414 (2d ed. 1983) [hereinafter K. DAVIS, 1983 TREATISE]. Professor Davis places special emphasis on the Supreme Court's role in encouraging excessive judicial discretion and an "extraordinary judicial disregard for law." Id. at 416. He notes the "unreliability of the Supreme Court's verbiage," id. at xiii preface, and the existence of inconsistent generalizations about the operations of the doctrine. Id. at 414-16. In an earlier work, Professor Davis characterized the doctrine as "about as unprincipled as any subject on which judicial opinions are written can be." K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 466 (1976). Not all scholars agree. A recent student text states: "We interpret the Court's opinions in this difficult area more charitably. While the Court frequently does not explain its decisions on exhaustion in a comprehensive manner, it is possible to extract reasonably consistent principles from those cases." R. PIERCE, S. SHAPIRO & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 196 (1985).

3. Gelpe, Exhaustion of Administrative Remedies: Lessons from Environmental Cases, 53 GEO. WASH. L. REV. 1, 3 (1984-85). Professor Gelpe notes that the policies underlying the doctrine are vague, conclusory, and unpersuasive, id. at 11, 13, and that the doctrine burdens courts, agencies, and litigants, id. at 3-4. She favors adopting a strict rule with narrow exceptions. Id. at 64-66.

Another scholar uses Professor Gelpe's primary adjective, "confusing," and couples it with "Kafkaesque." Leedes, Understanding Judicial Review of Federal Agency Action: Kafkaesque and Langdellian, 12 U. RICH. L. REV. 469, 471 (1978). Professor Leedes sees each of the various judicial review doctrines as turning on a judicial evaluation of five factors. Id. at 474-75. He notes that the exhaustion cases can be analyzed in terms of these five factors and a parallel list compiled by Professors Walter Gellhorn and Clark Byse. Id. at 493-94.

4. Note, Judicial Review of Administrative Inaction, 83 COLUM. L. REV. 627, 627 (1983). This reference is to the justiciability doctrines in general, but later discussion of "finality," which the Note defines to incorporate the exhaustion doctrine, clarifies its pertinence to the exhaustion doctrine. Id. at 646 & n.126. The author implies that the doctrines are antiquated because they have too often been interpreted to bar review of administrative inaction and argues that they should be applied in accordance with their purposes, thereby subjecting more agency decisions to judicial scrutiny. Id. at 654-61.

lem presented by the exhaustion doctrine concerns its very nature. Should the exhaustion doctrine consist of a "rule" that plaintiffs must exhaust administrative remedies prior to judicial review, subject to a few specific exceptions? Alternatively, should the doctrine consist of a guiding principle that administrative remedies should be exhausted unless, on balance, the policies underlying the doctrine would be better served by excusing exhaustion in the particular case? Finally, should courts take a different approaches, perhaps one that weighs policies only in certain settings?

The United States Supreme Court has never clearly selected any one of these approach. Perhaps inevitably, the result has been unpredictable decision making by the Court, intense conflicts among the circuit courts of appeals,10 and, in all likelihood, unnecessary litigation.11 While the Supreme Court has often considered the exhaustion doctrine, its decisions, culminating in Bowen v. City of New York,12 alternate between ri-
rigidity and formlessness, suggesting a rule with few exceptions one time, but a more general balancing test the next. The uncertainty resulting from the absence of explanation in some cases is matched by the confusion resulting from the surfeit of explanation in others. Curiously, eight of the Court’s leading decisions fall naturally into four pairs, each consisting of arguably inconsistent opinions rendered on somewhat similar facts. These decisions, inevitably the source of much of the modern understanding of exhaustion, fully justify the many criticisms of the doctrine.

The exhaustion doctrine is only one of a group of closely related doctrines governing the timing and availability of judicial review. The Supreme Court’s treatment of the ripeness doctrine stands in sharp contrast to its shambler approach to exhaustion. In Abbott Laboratories v. Gardner, the Court developed a two-part inquiry premised on the fit-
ness of the issues for judicial review and the hardship to the parties of withholding review. 17 This pragmatic approach allows courts to weigh the interests of the courts, administrative agencies, and litigants, and to reach rational decisions in a structured and clear fashion. Of equal importance, the Court's framework for ripeness analysis has worked for twenty years. The Supreme Court has found it unnecessary to reconsider this approach; 18 lower courts find it relatively easy to apply; 19 and commentators find it an acceptable method of resolving ripeness problems. 20

At bottom, ripeness turns on whether the controversy between the parties is sufficiently concrete for judicial consideration. 21 This same inquiry underlies the determination whether to require a party to exhaust administrative remedies. The two doctrines' purposes are essentially identical 22 and attempts to distinguish the doctrines focus more on the form of the problem than on the method for resolution. The doctrines substantially overlap, as a court may deem a case unripe because an administrative remedy is available, and not require exhaustion where a case is ripe for review notwithstanding the plaintiff's failure to exhaust. 23

While differences between ripeness and exhaustion exist, the differences should not obscure the fact that the doctrines are in large part complementary.

Accordingly, this article proposes that courts reformulate the exhaustion doctrine to emulate the ripeness doctrine. Courts should determine whether to require exhaustion in a particular case by weighing the fitness of the issues for judicial review and the relative hardships to the parties. The process of weighing these factors would better serve the purposes of the doctrine and provide a more realistic structure for resolving exhaustion problems. This would, ironically, constitute a less drastic change from some past practices than it might seem, for many courts, including the Supreme Court, have either explicitly or implicitly engaged in similar weighing processes on occasion. 24 Thus, one effect of reformu-

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17. 387 U.S. at 148-49. The fitness of the issues for judicial review is largely determined with reference to whether the questions presented are factual or legal in nature and whether the agency's decision is pragmatically final. Despite some language difficulties, see infra note 231, the hardship to the parties turns on the impact on the plaintiff of denying review and the interference with the agency caused by permitting review. See infra notes 229-31 and accompanying text.
18. See infra notes 242-50 and accompanying text.
19. See infra notes 251-73 and accompanying text.
20. See infra note 254.
21. See infra notes 225-30 and accompanying text.
22. Compare infra notes 36-45 and accompanying text (exhaustion policies) with text accompanying note 225 (ripeness policies).
23. See infra notes 301-06 and 312-18 and accompanying text.
24. In McKart v. United States, 395 U.S. 185 (1969), rendered just two years after Abbott Laboratories, the Court largely based its analysis on such a weighing process. See Part II.B.2. McKart has not, however, had the same effect of remaking the exhaustion doctrine that Abbott Laboratories has had with respect to the ripeness doctrine. This may be the result of a number of factors. None of them, however, suggests that interest weighing is an inherently unsatisfactory method for resolving exhaustion issues. In addition, the results in exhaustion cases are often more satisfactory than the language explaining those results. Professor Davis writes: "When the factors are properly weighed, as they usually are, the exhaustion decision is properly made, no matter how
Part II of this article addresses the underlying purposes of the exhaustion doctrine and the various approaches the Supreme Court has used to apply the doctrine. The analysis establishes that these approaches are facially and functionally inconsistent, thereby weakening in several respects the policies the doctrine purports to serve. The article then focuses on "futility" and "irreparable injury," two factors that seem important under each of the Court's approaches. It concludes that neither factor provides a useful guide to resolving most exhaustion problems, however, for each has several shifting meanings and resolves only some of the issues arising in exhaustion cases. Part III turns to the ripeness doctrine. It begins with a discussion of *Abbott Laboratories* and then addresses the development of the methodology for determining ripeness set forth in that case. Part IV examines the relationship among exhaustion, ripeness, and their statutory sibling, finality, and concludes that the ripeness factors—fitness of the issues and hardship—provide a better framework for resolving exhaustion issues than any of the approaches that dominate the existing case law. The article therefore proposes that the exhaustion doctrine be restated to follow the simple, consistent, and clear methodology of the ripeness doctrine.

II. THE EXHAUSTION PROBLEM

A. The Requirement and Its Purposes

The exhaustion requirement is most commonly articulated as: "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." This language suggests a strict application, requiring exhaustion as a precondition for judicial review. Such an approach would make resolving exhaustion questions simple by reducing them to one question—has the plaintiff exhausted all administrative remedies? Courts have never in-

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26. To avoid confusion, this article uses the term "plaintiff" to refer to the party seeking judicial review except where the facts of a specific case being discussed require different terminology.
interpreted the doctrine in this fashion, however, and instead have created a complex and opaque facade of doctrine. That doctrine governs whether judicial review is appropriate when plaintiffs have not fully used pertinent administrative proceedings. Exhaustion is required in many cases. In many others, however, courts do not require exhaustion or, in simpler terms, exhaustion is excused. Some of the doctrine's complexity is due to the diversity of settings in which the exhaustion question arises. Such settings include attempts to enjoin ongoing administrative proceedings, attempts to raise in judicial proceedings issues never presented in related administrative proceedings, and attempts to obtain judicial review of administrative decisions subject to administrative appeal. Similarly, courts often employ exhaustion principles directly or by analogy in cases largely unrelated to judicial review of administrative action.

Exhaustion issues usually arise when a plaintiff files a complaint without exhausting administrative remedies and a defendant government agency moves to dismiss on that basis.

27. See, e.g., McGrath v. Weinberger, 541 F.2d 249, 251 (10th Cir. 1976) ("The clear language of the rule requiring exhaustion of administrative remedies . . . does not, however, render the rule simple in application."); American Gen. Ins. Co. v. FTC, 496 F.2d 197, 199 (5th Cir. 1974) (while the rule is "old and well-established," it may not be "as firm as the Myers Court would imply"); Pax Co. v. United States, 454 F.2d 93, 96 (10th Cir. 1972) ("The decision as to when, if at all, courts should interfere in the administrative process is itself a difficult one.").


29. This description applies to two very distinct situations. The first involves parties who participated in prior administrative proceedings but failed to present a particular issue or argument before the agency. E.g., United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 34-35 (1952); Etelson v. Office of Personnel Management, 684 F.2d 918, 923-26 (D.C. Cir. 1982). This setting raises issues similar to those presented when litigants attempt to argue on appeal claims they did not present to a trial court. The analogy between judicial review of administrative action and appeals of trial court rulings pervades exhaustion analysis. See infra notes 46-47 and accompanying text.


"Exhaustion of administrative remedies has skeins of various colors," Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 30 (1974) (Douglas, J., dissenting), and classification schemes in this regard are problematic. Professor Gelpe identifies six different administrative remedies, Gelpe, supra note 3, at 5, and notes that the remedies available in a particular case may affect whether exhaustion is required, id. at 57-62. Professor Fuchs sees two somewhat more general categories of administrative remedies, each resting on different policies, but with the same practical result in most instances. Fuchs, supra note 7, at 860. Judge Breyer and Professor Stewart see exhaustion problems as arising in three different settings. S. Breyer & R. Stewart, Administrative Law & Regulato ry Policy 1144 (2d ed. 1985). As these different theories suggest, drawing a clear line of demarcation among different exhaustion settings is not always possible. McKart v. United States, 395 U.S. 185 (1969), arguably involves both waiver and failure to appeal. Id. at 187-89; see K. Davis, 1983 Treatise, supra note 2, at 444. See also McGee v. United States, 402 U.S. 479, 481-82 & n.5 (1971) (waiver of one issue; failure to appeal on another). Moreover, courts have used the exhaustion doctrine in a number of cases that do not easily fit into any of these categories. E.g., Leedom v. Kyne, 358 U.S. 184, 186-87 (1958) (challenge to certification of collective bargaining unit); Natural Resources Defense Council v. Train, 510 F.2d 692, 697 (D.C. Cir. 1975) (demand that agency take action); United States v. Litton Indus., 462 F.2d 14, 15 (9th Cir. 1972) (defense to subpoena enforcement).

31. Courts routinely analyze the exhaustion doctrine in cases involving attempts to obtain judicial or administrative review prior to pursuing intra-union grievance procedures, e.g., NLRB v. In-
Another basic tenet of the exhaustion doctrine is that it concerns the timing, as opposed to the availability, of judicial review. In theory, requiring exhaustion only delays judicial review until administrative proceedings are concluded; the requirement should not, by itself, prevent any party from eventually obtaining judicial redress. Still, the exhaustion doctrine is no minor technicality with an insubstantial effect on the outcome of disputes between government agencies and private citizens. For example, in cases where the plaintiff failed to participate in or raise particular issues in now-concluded administrative proceedings, enforcing the exhaustion requirement means that judicial review will be denied. Even where only the timing of judicial review is at stake, requiring exhaustion can have a substantial impact. While the plaintiff may ultimately succeed in court, the delay in resolving the dispute may work a serious hardship. Moreover, a delay in judicial review may give the agency a strategic advantage. The longer a challenged agency ruling or practice remains in effect, the more people will acquiesce in it; the longer a dispute remains within an administrative forum, the more likely is some form of extrajudicial settlement.
Thus, the exhaustion doctrine stands as a potentially severe impediment to judicial review in a broad range of disputes. As a result, courts determining whether to require exhaustion in particular cases have focused attention on the policies underlying the doctrine. Those policies center on governmental interests relating to the administrative and judicial processes. The interests fall into four general categories: (1) furthering administrative autonomy; (2) permitting the agency to resolve factual issues, apply its expertise, and exercise delegated discretion; (3) aiding judicial review; and (4) promoting judicial economy.\textsuperscript{36} In the first two categories, the focus is on administrative interests; in the second two categories, the focus is on judicial interests. Despite the many different exhaustion policy formulations, few disagreements exist concerning their content.\textsuperscript{37}

The policies directed at administrative interests contain both structural and functional aspects. Agency autonomy is a structural interest, existing as an attribute of an agency’s jurisdiction and without regard to the specific facts of a dispute. In this respect, the exhaustion doctrine has been described as an “expression of executive and administrative autonomy.”\textsuperscript{38} Requiring plaintiffs to exhaust administrative remedies serves administrative autonomy by assuring that courts will not undercut the agency’s authority. Other interests are characterized as functional, as their application to a particular case largely depends on the nature of the dispute and the history of the proceeding.

In its litany of the purposes of the exhaustion requirement, the Supreme Court in \textit{McKart v. United States}\textsuperscript{39} discussed both structural and functional administrative interests. Its recognition that administrative agencies constitute autonomous governmental bodies led the Court to recognize the role of the exhaustion doctrine in allowing agencies to correct their own mistakes and discouraging plaintiffs from ignoring agency authority over a particular dispute.\textsuperscript{40} More prosaic if equally im-

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\item \textsuperscript{36} The Court of Appeals for the District of Columbia Circuit has described how the doctrine furthers its underlying policies as follows:
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  \item First, it carries out the congressional purpose in granting authority to the agency by discouraging the ‘frequent and deliberate flouting of administrative processes [that] could . . . encourage[e] people to ignore its procedures . . . . Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial fact finding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.\textsuperscript{41}
  \end{itemize}
\item \textsuperscript{37} Id.; see also \textit{Patsy v. Florida Int'l Univ.}, 634 F.2d 900, 903 (5th Cir. Jan. 1981), rev'd on other grounds sub nom. \textit{Patsy v. Florida Bd. of Regents}, 457 U.S. 496 (1982) (seven policies differing from those listed in \textit{Andrade} only in that they are more specific); \textit{West v. Bergland}, 611 F.2d 710, 715-17 (8th Cir. 1979) (analyzing four governmental interests largely duplicative of those listed in \textit{Andrade}), cert. denied, 449 U.S. 821 (1980).
\item \textsuperscript{38} L. JAFFE, supra note 1, at 425.
\item \textsuperscript{39} 395 U.S. 185, 193-95 (1969).
\item \textsuperscript{40} 395 U.S. at 195. The decision commonly paired with \textit{McKart}, \textit{McGee v. United States},
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Important pragmatic concerns complement these somewhat abstract interests in autonomy. Administrative agencies ordinarily serve as fact-finders, and the failure to exhaust may result in an incomplete factual record; decisions also frequently require administrative discretion or expertise, and the failure to exhaust may deprive the agency of the opportunity to exercise its discretion or expertise.

The judicial interests also have both structural and functional aspects. "Judicial economy" is always applicable because requiring exhaustion always takes the controversy away from the courts, if only temporarily in many cases, and "aiding judicial review" applies in cases in which requiring exhaustion should result in more informed judicial review at the conclusion of administrative proceedings. These interests, of course, cannot be wholly separated from the administrative interests. In most instances, the structural interests work in tandem—as long as the dispute is relegated to an agency authorized to resolve it, judicial involvement is postponed and potentially obviated. The functional interests are related in a similar fashion—judicial review is aided primarily

402 U.S. 479 (1971), offers another statement of the structural policies that the exhaustion requirement implicates: "The whole rationale of the exhaustion doctrine in the present context lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed." Id. at 483 n.6. See also Moore v. City of East Cleveland, 431 U.S. 494, 525 (1977) ("Consistent failure by courts to mandate utilization of administrative remedies . . . inevitably undermines administrative effectiveness and defeats fundamental public policy by encouraging 'end runs' around the administrative process.") (Burger, C.J., dissenting).

41. McKart, 395 U.S. at 194 (it is "normally desirable" for the agency to establish a factual premise). See also Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 907 (3d Cir. 1982) (exhaustion permits the agency to "develop the necessary factual background"); Grutka v. Barbour, 549 F.2d 5, 9 (7th Cir.) (noting that "developing a factual record in labor disputes is a task peculiarly within the competence of the [National Labor Relations] Board"); cert. denied, 431 U.S. 908 (1977); Lone Star Cement Corp. v. FTC, 339 F.2d 505, 512 (9th Cir. 1964) (the pertinent "facts can only be elicited in an administrative proceeding").

42. McKart, 395 U.S. at 194 (the exhaustion policies are particularly strong where the issues "involve exercise of discretionary powers granted the agency by Congress, or require the application of special expertise"). See also Hudson v. Farmers Home Admin., 654 F.2d 334, 338 (5th Cir. Unit A Aug. 1981) (noting that deference "is due the special competence" of agencies); Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981) ("specialized administrative understanding . . . promotes accurate results"); Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1980) (policies are particularly applicable to "functions within special competence"). A value indirectly served by these functional interests is uniformity of result, largely because requiring exhaustion means that one expert body finds facts and exercises discretion. See Fuchs, supra note 7, at 866.

43. Judicial economy is most clearly served because a party may entirely avoid judicial review if the party succeeds in the agency proceeding. McKart, 395 U.S. at 195 (the plaintiff may be successful in vindicating his rights in the administrative process and thus "the courts may never have to intervene"). See also West v. Bergland, 611 F.2d 710, 716 (8th Cir. 1979) (exhaustion "allow[s] agencies to correct their own errors, and in so doing, [to] moot controversies and obviate judicial review"); cert. denied, 449 U.S. 821 (1980); American Gen. Ins. Co. v. FTC, 496 F.2d 197, 200 (5th Cir. 1974) (if the agency does not issue an order against the plaintiff, the courts need not resolve the issue). Exhaustion also serves judicial economy in more subtle respects. Reasons other than a plaintiff's success within the agency may moot a case. See, e.g., California ex. rel. Christensen v. FTC, 549 F.2d 1321, 1324 (9th Cir. 1977) (noting the possibility of mootness due to voluntary compliance "or the passage of time"). Even in cases that appear likely to return to court after the agency concludes its proceedings, judicial economy is served when fewer parties seek to shortcut the process by going to court early. Cf. Gelpe, supra note 3, at 27 (one adverse effect of the uncertainty surrounding exhaustion is the increased litigation of exhaustion issues).
when the agency has completed its fact-finding, passed on all matters within its expertise, and exercised its discretion. Virtually all statements of the purposes behind the exhaustion requirement are consistent with one or more of these inter-related policies.

In applying these policies, courts often draw an analogy to the relationship between appellate and trial courts. The point is well taken, for even though appellate judges are capable of resolving the same issues that are presented at the trial level, the judicial system is premised on the notion that appellate review should rarely be permitted prior to the conclusion of trial court proceedings. This arrangement serves efficiency, provides trial courts with a form of autonomy over fact-finding, and constitutes a sensible guiding principle. Thus, in the ordinary course of things, requiring the exhaustion of administrative remedies "promotes a sensible division of tasks between" administrative agencies and the judiciary.

As exhaustion is not an absolute requirement, the weight of the policies can be a factor in determining whether to require exhaustion in a particular case. In a number of respects, the policies establish a presumption that plaintiffs should exhaust administrative remedies prior to judicial review. Because exhaustion furthers "agency autonomy" and

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44. The Supreme Court recognized the relationship between these benefits of requiring exhaustion when it noted: "Exhaustion is generally required . . . to afford the parties and the courts the benefit of [the agency's] experience and expertise and to compile a record which is adequate for judicial review." Weinberger v. Salfi, 422 U.S. 749, 765 (1975). See also McKart v. United States, 395 U.S. 185, 194 (1969) ("judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"); Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 29 (D.C. Cir. 1984) (administrative autonomy and judicial economy would be disserved by judicial resolution of a "factual question demanding the medical expertise that FDA possesses" but the court lacks).

45. Failing to raise an issue before the appropriate agency clearly implicates agency autonomy and judicial economy. In some cases this failure also prevents an expert agency from resolving facts and exercising discretion, thereby depriving the reviewing court of these benefits. See, e.g., United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952) (discussion of policies focusing on agency's opportunity to correct mistakes and "[simple fairness to [agency personnel] . . . and to litigants"); Unemployment Compensation Comm'n v. Aragon, 329 U.S. 143, 155 (1946) ("reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action."); Power Plant Div., Brown & Root, Inc. v. Occupational Safety & Health Review Comm'n, 673 F.2d 111, 113 (5th Cir. Unit B 1982) ("There are two sets of purposes [behind the waiver prong]: one that fosters the efficiency of the internal organization of the agency, the other that fosters efficiency at the appellate court review level and that promotes the integrity of the court-agency review relationship.").

46. The Supreme Court noted this analogy in McKart while discussing exhaustion policies and then stated: "The very same reasons lie behind judicial rules sharply limiting interlocutory appeals." 395 U.S. at 194. See also Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 907 (3d Cir. 1982) (characterizing the exhaustion requirement as "the counterpart of the rule limiting appeals from trial court rulings"); Pepsico, Inc. v. FTC, 472 F.2d 179, 186 (2d Cir. 1972) (suggesting an analogy between preliminary administrative orders and interlocutory judicial orders). Moreover, one approach to exhaustion analysis, the collateral question approach, is in part modeled on the collateral order doctrine used in determining the appealability of certain interlocutory judicial orders. See Mathews v. Eldridge, 424 U.S. 319, 330-31 & n.11 (1976), discussed in Part II.B.3.

“judicial economy” in all cases, courts should require exhaustion in the absence of adequate countervailing considerations. Where exhaustion also serves the largely complementary “agency functions” and “aid to judicial review” policies, the presumption in favor of exhaustion is strong. Where exhaustion does not serve the functional policies, or where there is serious doubt that they are served, the presumption loses force. The ultimate problem, then, is to determine whether and to what extent the policies require exhaustion in different circumstances. Judicial attempts to resolve this problem, however, have been unsatisfactory.

B. Approaches to Exhaustion Analysis

Properly resolving exhaustion questions demands a methodology that both serves the doctrine’s purposes and recognizes the various settings in which the doctrine applies. Unfortunately, case law establishes no consistent approach to resolving exhaustion questions. The Supreme Court has followed at least three different directions, each presenting theoretical and practical difficulties. This section of the article examines the various approaches to applying the exhaustion doctrine, the “rule” with “exceptions,” balancing, and the collateral question approaches. It concludes by discussing the Supreme Court’s two most recent decisions, which together shed only darkness on the problem.

1. A Rule with Exceptions

Although courts employ various approaches, the dominant view is

48. A substantial portion of Professor Gelpe’s article examines the policies behind the exhaustion rule. She identifies nine policies that have been suggested as reasons for making exhaustion mandatory. Gelpe, supra note 3, at 10-25. Despite the larger number, this list of policies is largely consistent with the four general policies discussed in the text. See supra text accompanying note 36. She creates the additional categories largely by separating different strands of the same underlying policy. For example, she distinguishes Administrative Autonomy from Separation of Powers. Gelpe, supra note 3, at 11-12. Professor Gelpe is largely critical of these policies, noting, for example, that autonomy is “vague and conclusory.” Id. at 11. In part, this criticism seems due to the artificial separation of concepts making up autonomy. Stripped of the separation of powers, discretionary authority, and limited judicial review components, agency autonomy is a vague and conclusory concept. Courts, however, use autonomy primarily as a shorthand reference for these and other concepts relating to the legislative assignment of decisional responsibilities to an administrative agency. Her criticisms of the functional policies, primarily error correction, accurate fact-finding, and the exercise of discretion, are more convincing, largely because the analysis recognizes that these policies differ in weight in different settings. In this respect, Professor Gelpe identifies a major problem of exhaustion analysis. While these functional policies are often furthered by requiring exhaustion, they are not furthered in all situations. Because their weight in any individual case depends upon too many factors to fit into readily definable “exceptions,” however, this article recommends that courts use an interest weighing approach to determine whether exhaustion should be required in any particular case rather than the strict rule with exceptions approach recommended by Professor Gelpe. Id. at 5, 64-66.

that the exhaustion requirement is a "rule" with "exceptions." This method of analysis can further the policies of the doctrine only if courts coherently identify categorical "exceptions" in which excusing exhaustion will not disserve the doctrine's policies to any great extent. Unfortunately, despite federal appellate courts' widespread use of this approach, serious differences among and within the various circuits indicate that they have been unable to identify a logically consistent set of exceptions to an exhaustion "rule." While all or most of the courts purport to recognize certain exceptions, such as "futility" and "irreparable injury," courts have also posited a number of different lists of exceptions. If the courts cannot agree as to the situations that justify excusing exhaustion, they cannot fashion categorical exceptions consistent with the doctrine's purposes. The limitations of the rule with exceptions approach are il-

50. Every circuit court of appeals has described the doctrine as involving a rule with exceptions. E.g., Etelson v. Office of Personnel Management, 684 F.2d 918, 925 (D.C. Cir. 1982); Shick v. Farmers Home Admin., 748 F.2d 35, 39 (1st Cir. 1984); Touche Ross & Co. v. SEC, 609 F.2d 570, 575 (2d Cir. 1979); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 696 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); Mullins Coal Co. v. Clark, 759 F.2d 1142, 1146 (4th Cir. 1985); Von Hofburg v. Alexander, 615 F.2d 633, 638 (5th Cir. 1980); Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981); Hunt v. Commodity Futures Trading Comm'n, 591 F.2d 1234, 1236 (7th Cir.), cert. denied, 442 U.S. 921 (1979); Seven-Up Co. v. FTC, 478 F.2d 755, 757 (8th Cir. 1973); Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1980); Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 744 (10th Cir. 1982); Porter v. Schweiker, 692 F.2d 740, 743 (11th Cir. 1982); Williams v. Secretary of Navy, 787 F.2d 552, 559-60 & n.10 (Fed. Cir. 1986); Hawthorne Oil & Gas Corp. v. Department of Energy, 647 F.2d 1107, 1114 (Temp. Emer. Ct. App. 1981).

Most commentators use the rule with exceptions terminology as well. See supra note 7. Professor Gelpe is a strong proponent of applying the doctrine through "clearly defined exceptions recognized only upon strong justification." Gelpe, supra note 3, at 31. She sees two varieties of exceptions. One applies where the doctrine's purposes would not be served; the other applies where "exhaustion would serve some value, but at too great a cost." Id.

51. Determining which exceptions different courts recognize is often difficult, as most decisions merely note that a particular exception is arguably pertinent and then analyze its application to that case. The following is representative of lists of exceptions in cases where courts apparently intended to catalog all or most of the exceptions to the exhaustion requirement:

1. Agency clearly in excess of statutory authority, "questions of significant national interest because of their international complexion," agency clearly violating constitutional rights, irreparable harm. Philip Morris, Inc. v. Block, 755 F.2d 368, 371 (4th Cir. 1985);

2. Administrative remedy does not exist, would not provide full relief, or would be "so unreasonably delayed as to create a serious risk of irreparable injury," futile because of certainty of agency denial or because agency would not resolve the merits. Deltona Corp. v. Alexander, 682 F.2d 888, 893 (11th Cir. 1982);

3. Administrative remedies "inadequate or not efficacious," futile, irreparable injury, "administrative proceeding would be void." Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1980);

4. No "genuine opportunity for adequate relief," irreparable injury, futility, presence of a substantial constitutional question. Von Hofburg v. Alexander, 615 F.2d 633, 638 (5th Cir. 1980);

5. Agency in excess of authority or contrary to statutory mandate, questions of "high national interest because of their international complexion," clear violation of constitutional rights. Seven-Up Co. v. FTC, 478 F.2d 755, 757 (8th Cir. 1973);

6. Agency clearly in excess of authority, contrary to a statutory or constitutional right, administrative procedures will foreclose judicial review or are inadequate. Fairchild, Arabatzis & Smith, Inc. v. Sackheim, 451 F. Supp. 1181, 1184 (S.D.N.Y. 1978).

Professor Gelpe proposes that courts follow six exceptions that differ substantially from those listed above. See supra note 30.

52. This statement applies even to those exceptions that seem to have received general accept-
illustrated by the Supreme Court's limited history with this approach, problems with a purported exception for cases presenting legal questions, and the difficulties one court of appeals has encountered in using the approach.

a. The Rule with Exceptions in the Supreme Court

The Supreme Court has never overtly espoused the rule with exceptions approach. Rather, such an approach can be inferred from Myers v. Bethlehem Shipbuilding Corp.\(^{53}\) and Leedom v. Kyne,\(^ {54}\) which involved challenges to National Labor Relations Board (NLRB) actions. Myers was a suit to enjoin an unfair labor practice proceeding and was premised on the claim that the factory at which the alleged violation occurred was not engaged in interstate commerce.\(^ {55}\) The Court refused to permit judicial intervention in the NLRB proceedings, asserting that courts were "without power"\(^ {56}\) to act prior to the company's exhaustion of administrative remedies.\(^ {57}\)

As a seminal decision on the application of the exhaustion doctrine, Myers suffers from several defects. One problem is that while the Court used language suggesting that exhaustion is a strict rule, it made ambiguous references to arguments the company was not making, such as challenges to the constitutionality of the NLRB's authority and its procedures.\(^ {58}\) Other defects concern the Court's overstatements\(^ {59}\) and

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53. 303 U.S. 41 (1938).
55. 303 U.S. at 46-47.
56. Id. at 47. The court reaffirmed this point twice. See id. at 48, 52.
57. The Court emphasized Congress's intent to give the NLRB exclusive jurisdiction of unfair labor practice proceedings. Id. at 48-50. This represents an unarticulated recognition of the "agency autonomy" purpose behind exhaustion. See supra note 40 and accompanying text.
58. The Court noted that Bethlehem did not raise these issues, 303 U.S. at 47, but then addressed the validity of the NLRB procedures and the availability of judicial review to show the adequacy of the administrative remedy, id. at 48-50. The Court then implied that the company could challenge the NLRB's jurisdiction in subpoena enforcement proceedings, id. at 49, a suggestion it later retracted, curiously relying on Myers. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 211-12 (1946). In thus joining a strong affirmation of the exhaustion requirement with ambiguous advisory dicta, the Court provided support for proponents and opponents of exhaustion in other settings.
59. Professor Davis is particularly critical of the Myers assertion that courts lack authority to enjoin unlawful agency action because of the NLRB's delegated authority to conduct unfair labor
totally unexplained assertions. Perhaps the overriding problem is that although Myers was an easy case to decide, the Court's language had an unusually hard edge. As a result, courts can either rely on the decision or distinguish it away with relative ease in more difficult cases.

In Leedom, the Court ignored rather than distinguished Myers and permitted judicial intervention in NLRB actions. There, a union sought to set aside a representation election, alleging that the Board had exceeded its statutory authority by including both professional and non-professional employees in the same bargaining unit. Despite clear precedent establishing that NLRB certification of a bargaining unit is subject to judicial review only after a completed unfair labor practice proceeding, the Court authorized judicial intervention "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the [National Labor Relations] Act." Thus, Leedom excused plaintiffs from even initiating the same adminis-

practice proceedings, terming this "a clear non-sequitur" based on "illogical and unsound" reasoning. (Note: Further citations are required for proper attribution.)

In addition, commentators have criticized the reliance on the litigation analogy to support a strict exhaustion requirement: "While the Court's analogy to lawsuits is apt, its flat statement that groundless lawsuits cannot be halted before their conclusion is an oversimplification of the complicated rules governing appeals from interlocutory rulings by trial judges." (Note: Further citations are required for proper attribution.)

Besides sharply dismissing irreparable harm as a result of litigation costs, see supra note 57, the Court responded to a number of other irreparable harm claims concerning industrial peace and contractual obligations. The Court's only treatment of these claims was to note that "these additional allegations furnish no reason why the Board should be prevented from exercising the exclusive initial jurisdiction conferred upon it by Congress." 303 U.S. at 53. Whether the Court concluded that these matters did not constitute irreparable harm or that they did constitute irreparable harm but were nevertheless insufficient to overcome the exhaustion requirement is unclear.

Arguably, plaintiffs can make Bethlehem's claim in every case in which the facts to be resolved in administrative proceedings are disputed. See L. JAFFE, supra note 1, at 438-39. Accordingly, excusing exhaustion in Myers would mean permitting parties to disrupt most administrative proceedings in order to resolve one element of the agency's case.

Various commentators have recognized the dichotomy between the facts and language of Myers. For example, Professors Mashaw and Merrill note that Myers presented a "paradigm case" for requiring exhaustion on various bases and that the language is stricter than later applications of the doctrine would suggest. J. MASHAW & R. MERRILL, ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM 777 (2d ed. 1985). Professor Jaffe, noting that Bethlehem's challenge "was an avowed part of the frontal attack on the [New Deal and administrative law]," suggests that the historical context explains the strong language. L. JAFFE, supra note 1, at 433.

American Fed'n of Labor v. Labor Bd., 308 U.S. 401 (1940). That decision held that the certification of a bargaining unit is not a "final order" subject to judicial review under § 10(f) of the National Labor Relations Act, now codified at 29 U.S.C. § 160(f) (1982). 308 U.S. at 407-11. A party desiring judicial review of a certification order could refuse to recognize the unit and challenge its validity in defending unfair labor practice proceedings before the Board and, if necessary, on judicial review of an adverse decision by the Board. 308 U.S. at 409-11; see also Grutka v. Barbour, 549 F.2d 5, 7 (7th Cir.) (applying this principle in denying review of a challenge to a union certification), cert. denied, 431 U.S. 908 (1977).

The Act provides that the Board may not certify a bargaining unit containing professional and non-professional employees without the agreement of a majority of the professional employees. NLRA § 9(b)(1), now codified at 29 U.S.C. § 159(b) (1982). The Board refused to conduct such a vote among the professional employees. 358 U.S. at 186.
Most judicial attempts to reconcile the holdings interpret Leedom as creating an exception to the exhaustion requirement applicable in cases in which an agency has committed a very clear violation of law. A narrow interpretation of Leedom is necessary, for if read broadly, the case would mean that any assertion that an agency had transgressed its authority would permit judicial review prior to the completion of administrative action. Such a reading would eviscerate the exhaustion requirement and leave Myers the narrow exception because judicial review is inevitably premised on some claim of administrative illegality. Other attempts to harmonize the cases have focused on the presence or absence of disputed facts. According to some commentators, where the plaintiff's argument depends on the resolution of disputed facts, a court should ordinarily require exhaustion if the agency will provide a forum to determine those facts. Still, while the presence of factual questions may have necessitated exhaustion in Myers, the absence of factual questions in Leedom does not alone justify deciding to excuse exhaustion. Moreover, the Court nowhere attempted to explain the limits of its holding or its relation to Myers. The obscure analysis of Leedom, added to the unnecessarily broad pronouncements in Myers, then, was instrument
tal in the development of a vague exhaustion rule with amorphous exceptions.

b. Legal Question Exception

Several courts have picked up on the law/fact distinction between Myers and Leedom 69 and recognize an exception where the plaintiff seeks determination of a legal issue. 70 This is a deceptively quick and easy answer to a complex problem. Even a purely legal question makes only some functional interests, such as administrative fact-finding and discretion, inapplicable; other interests remain applicable, if less weighty. For example, administrative expertise can be highly pertinent to some legal questions, especially those relating to statutory or regulatory construction. 71 Further, the structural interests still apply when plaintiffs present legal questions, and some courts have noted that the presence of constitutional issues is in itself a strong reason to require exhaustion, at least where the agency proceedings might moot the dispute without judicial review. 72 Other courts properly use the presence of legal questions as a tool for analyzing the exhaustion doctrine rather than as a sole determinant. 73 Administrative proceedings may offer no aid in resolving certain

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70. Decisions of the Tenth Circuit most clearly recognize the legal question exception. E.g., Rocky Mountain Oil & Gas Ass’n v. Watt, 696 F.2d 734, 744 (10th Cir. 1982); Frontier Airlines, Inc. v. Civil Aeronautics Bd., 621 F.2d 369, 371 (10th Cir. 1980); contra St. Regis Paper Co. v. Marshall, 591 F.2d 612, 614 (10th Cir. 1979). The Seventh Circuit applied the exception for several years but later abandoned it. See infra note 85.

71. Even though the Court excused exhaustion in McKart v. United States, 395 U.S. 185 (1969), two concurring opinions stressed the point that administrative expertise is relevant to legal questions. Justice Douglas noted that “questions of law are usually routed through the available administrative machinery.” Id. at 204 n. *. Justice White focused on agency expertise with respect to the interpretation of statutes administered by the agency. Id. at 205-06 (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). Numerous decisions recognize the importance of deferring to administrative expertise in statutory and regulatory interpretation. E.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984) (courts should defer to reasonable administrative interpretations of statutes and their underlying policies); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-66 (1980) (recognizing “traditional acquiescence” in administrative construction of statutes and regulations); Zenith Radio Corp. v. United States, 437 U.S. 443, 450-51 (1978) (deference to a long-standing Treasury Department interpretation of a statute); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945) (administrative interpretation of the agency’s own regulation is the “ultimate criterion”).

72. See, e.g., Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 772-73 (1947) (exhaustion allows courts to avoid constitutional questions as they may be mooted by agency rulings in plaintiff’s favor on other issues); see also infra notes 181-82 and accompanying text. That the most-cited “early modern” exhaustion cases are Myers and Leedom is unfortunate, for Aircraft & Diesel is clearer and more convincing. The Aircraft Court both explained the purposes of the exhaustion doctrine, id. at 767-72, and analyzed reasons to excuse exhaustion, id. at 773-78. While Myers exists mainly in boilerplate citations and Leedom stands for a very limited exception, Aircraft & Diesel still provides assistance in resolving exhaustion issues.

73. E.g., Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 501 (9th Cir. 1980) (agency interest in exhaustion is “not substantial” as the legal questions “are particularly within the judiciary’s competence” and fact-finding is of little importance); Touche Ross & Co. v. SEC, 609 F.2d 570, 577 (2d Cir. 1979) (no need for discretion or expertise); Consumers Union of United States v. Cost of Living Council, 491 F.2d 1396, 1399-1400 (Temp. Emer. Ct. App.) (the policies are not served by requiring
legal questions because their resolution is beyond the agency's authority, because the agency has fully considered the matter on prior occasions, or because the agency provides no forum to consider the questions.74 While courts may excuse exhaustion in such settings, they should consider additional factors.75 Those courts that assert a legal question as the basis for their exception, therefore, at best over-simplify by deciding on just one of a number of relevant factors.

c. Inconsistent Exceptions Within the Third Circuit

Even within particular circuits, cases substantially disagree as to proper exceptions to the exhaustion requirement. The Court of Appeals for the Third Circuit, for example, has largely adhered to a rule with exceptions approach in a substantial number of clear, if inconsistent, decisions. That court has developed a series of exceptions in decisions largely focused on the exhaustion policies.76 By the late 1970's, the court was confident enough to set out those exceptions in First Jersey Securities, Inc. v. Bergen, a decision refusing to enjoin a private administrative disciplinary proceeding: "In this Circuit, we have recognized two situations in which the exhaustion requirement will not be adhered to: 1) when the administrative procedure is clearly shown to be inadequate to prevent irreparable injury; or 2) when there is a clear and unambiguous statutory or constitutional violation."77 This list, however, omitted one previously recognized exception—futility—and several months later the court corrected its error.78 Of greater importance than this inventory discrepancy is that, by stating the principle that "exhaustion of administrative remedies has not been required when the administrative proce-

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74. See infra note 176 (constitutional challenges to statutes); notes 160-63 (various levels of futility); note 187 (inadequate administrative remedies).

75. Various commentators have discussed the legal question exception. Professor Gelpe severely criticizes the exception, stressing administrative expertise, the difficulty of separating legal from factual questions, and that factual issues "may illuminate the legal claims." Gelpe, supra note 3, at 42. See also Comment, supra note 5, at 465 (raising the same points and noting that the legal question exception is "in practice heavily interwoven with other exceptions"). Professor Fuchs favors a somewhat trimmed-down exception that would require exhaustion where "technical or specialized historical or policy considerations" are at issue but not where more general legal questions are at issue. Fuchs, supra note 7, at 899 (footnote omitted).


77. 605 F.2d 690, 696 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980). In light of the Third Circuit's later decisions, it should be noted that First Jersey raised constitutional challenges to both the legislation authorizing the disciplinary scheme and the disciplinary procedures the company was required to exhaust prior to judicial review. Id. at 697.

dure itself is alleged to violate a constitutional right,79 the court either added or reinterpreted an exception. The view that merely alleging that the administrative procedure is unconstitutional is sufficient to excuse exhaustion would have required the opposite result in First Jersey Securities, as the plaintiff in that case made the very same argument with respect to the private disciplinary proceeding.80

The manipulable character of the court's exceptions was underscored four months later in a case involving a challenge to the operation of a system for treatment of contaminated water at the Three Mile Island Nuclear Power Station.81 Although citing the same three exceptions to the exhaustion requirement, the Third Circuit fiddled with the content of the exceptions and concluded that an "allegation of irreparable harm to [plaintiff's] constitutional right to 'life and liberty' meets the irreparable harm standard."82 Thus, the court excused exhaustion on the basis of an assertion of a constitutional claim by concluding that the loss of constitutional rights amounts to irreparable harm. The court thus diluted and combined the "clearly shown irreparable harm" and "clear and unambiguous violation" standards strictly adhered to only a few months previously. Only a few weeks later, the court legitimized yet another line of analysis by viewing an exhaustion problem directly through applying the doctrine's underlying policies.83

The Third Circuit's treatment of its various exceptions has rendered them fundamentally useless. By definition, judicial review of administrative action requires a claim that the agency has acted unlawfully, and

79. Id. (emphasis added), relying on Finnerty v. Cowen, 508 F.2d 979, 982-83 (2d Cir. 1974) (exhaustion excused for constitutional challenges to agency procedures).
80. First Jersey, 605 F.2d at 695-96.
81. Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231 (3d Cir. 1980).
82. Id. at 245.
83. Cerro Metal Prod. v. Marshall, 620 F.2d 964, 970-71 (3d Cir. 1980). This case, like Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3d Cir. 1979), involved a challenge to OSHA's inspection authority. In an alternative holding, the court stated that an administration inspection in violation of statutory requirements could be challenged under the "irreparable injury" exception. 620 F.2d at 971 n.17. The court's analysis linked the exception to the standard for a preliminary injunction, id. at 973-75, thereby implying that exhaustion should automatically be excused whenever the plaintiff meets that standard. See infra text accompanying notes 188-89 for discussion of the relationship between irreparable injury as a precondition of injunctive relief and as an exhaustion exception.

The Third Circuit still lacks a consistent approach to exhaustion. In Bethlehem Steel Corp. v. EPA, 669 F.2d 903 (3d Cir. 1982), this court declined reviewing a challenged agency notice of violation despite plaintiff's claimed irreparable injury from unauthorized agency action. Id. at 906-11. The court described the exhaustion exceptions in more liberal terms than it had used in Susquehanna and Cerro Metal Products, id. at 907-08, but applied them more strictly. The Court required exhaustion because factual issues were involved, id. at 909, and because mounting daily penalties did not constitute irreparable injury, id. at 910-11. The irreparable injury conclusion was palpably inconsistent with that of Cerro Metal Products, in which the court deemed the inconvenience, lost employee time, and work disruptions resulting from government inspections irreparable.

The problem with these cases lies more in the court's approach than in its rulings. To channel all pertinent factors into three categorical exceptions is simply impossible. As a result, cases in which judicial review seemed appropriate were shoehorned into the closest exception even though other cases less fit for judicial review actually fit the particular exception more tightly.
standing to challenge administrative action depends on some injury. The court's error was not in misapplying any of its recognized exceptions, but rather in assuming that a rule with a handful of exceptions can adequately identify and integrate the many factors pertinent to an exhaustion decision. The result is that courts describe exceptions in language that is terse and potentially misleading, such as the "legal question" exception, or incapable of consistent application, as exemplified by the Third Circuit's fruitless year of grappling over the "clear violation" and "irreparable injury" exceptions. Sensibly applying the exhaustion doctrine requires more than the one-dimensional inquiry inherent in the rule with exceptions approach, as the Third Circuit may have implicitly recognized by linking the nature of the alleged violation


85. In its decisions, the Seventh Circuit has combined the problems of the legal question exception with the Third Circuit's inconsistency problems. In Jewel Cos. v. FTC, 432 F.2d 1155 (7th Cir. 1970), the court permitted judicial review of one of several issues raised in a challenge to an ongoing agency enforcement proceeding. The court did not require exhaustion because the issue—whether a commissioner had properly exercised his statutory discretion in voting to issue the complaint—was a purely legal question and not subject to judicial review after the enforcement proceeding had concluded. Id. at 1159. The court's reliance on the presence of a legal question caused future difficulty when other plaintiffs sought judicial review of legal questions while administrative proceedings were pending. The court first stood by the exception, Borden, Inc. v. FTC, 495 F.2d 785, 787 (7th Cir. 1974), but then retreated in a series of rulings that emphasized that even constitutional challenges should be exhausted unless the plaintiff proved a violation of a "clear right." See Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1064-67 (7th Cir. 1978) (stressing policies in denying review prior to agency ruling on legal question); Frey v. Commodity Exch. Auth., 547 F.2d 46, 49-50 (7th Cir. 1976) (denial of discovery does not clearly violate a statutory or constitutional right); Squillacote v. International Bhd. of Teamsters, 561 F.2d 31, 36-40 (7th Cir. 1977) (no showing of clear violation of a constitutional or statutory right or that plaintiff would be deprived of judicial review at conclusion of proceedings).

The Seventh Circuit has been both more and less rigorous than the Third Circuit in applying the exhaustion doctrine to cases challenging the legality of agency procedures. The Seventh Circuit has held, for example, that a court should review administrative proceedings challenged as due process violations, because having to exhaust unlawful procedures would be futile and constitute irreparable injury. Continental Can Co. v. Marshall, 603 F.2d 590, 596-97 (7th Cir. 1979) (challenge to enforcement proceedings as violative of collateral estoppel). Yet, the court has generally denied challenges based on claims that administrative proceedings would be unconstitutional. E.g., Grutka v. Barbour, 549 F.2d 5, 7-10 (7th Cir.) (claim that NLRB proceedings concerning lay teachers at Catholic schools violated the first amendment), cert. denied, 431 U.S. 908 (1977). If Continental Can and Grutka are different, the difference does not lie in the manner that courts apply the futility and irreparable injury exceptions. Rather, the cases differ in the application of the exhaustion policies, for proper resolution of Grutka depended on developing a factual record in administrative proceedings. Id. at 8.

Hunt v. Commodity Futures Trading Comm'n, 591 F.2d 1234 (7th Cir.), cert. denied, 442 U.S. 921 (1979), is even more clearly inconsistent with the language of Continental Can. In Hunt the plaintiffs raised the purely legal question of the agency's authority to commence administrative enforcement proceedings while parallel judicial proceedings were pending. 591 F.2d at 1235, 1237. Although the plaintiffs would suffer an injury identical to that in Continental Can and administrative redress was unimaginable, the court required exhaustion. Id. at 1237. The two cases, decided only six months apart, pass as uncommunicating and incompatible strangers.
with the injury to the plaintiff, an inquiry more usually associated with balancing.

2. Balancing Approaches

Perhaps in response to the conceptual difficulties and inherent contradictions of the rule with exceptions approach, a number of courts analyze exhaustion problems through some form of interest balancing. This strikingly different mode of analysis is usually traced to the Supreme Court's decisions in *McKart v. United States* and *McGee v. United States*, each of which involved a criminal conviction for refusing to accept military induction. The trial court had refused to allow McKart to raise the defense that he was exempt from military service as a sole surviving son because he had not appealed within the Selective Service System when it revoked his exemption. The Supreme Court determined that McKart was entitled to the exemption and that the exhaustion doctrine should not have prevented him from raising it as a defense at trial. Subtle but significant differences convinced the Court to enforce the exhaustion requirement against McGee.

*McKart* represents a clear break from *Myers* and *Leedom*. The Court emphasized the policies behind the doctrine and the need to apply them on a case-by-case basis. After a general discussion of those policies, the Court noted both the severe impact of enforcing the exhaus-

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87. 402 U.S. 479 (1971).
88. 395 U.S. at 187-89. McKart received a "sole surviving son" exemption after several skirmishes with his local draft board, but lost that exemption when the board learned of his mother's death. *Id.* at 188-89. He did not appeal the reclassification and was prosecuted for failing to report for induction after being declared a delinquent for not reporting for a pre-induction physical. *Id.*
89. 402 U.S. at 480-82. McGee was a war-protestor who at one time requested a deferment as a conscientious objector. *Id.* at 480-81. By the time he graduated from college and the Selective Service System considered his claim, however, he refused to cooperate with the agency. *Id.* at 481. The local board rejected the conscientious objector claim and reclassified McGee I-A. *Id.* He took no appeal, failed to appear for a physical examination, and refused to be inducted. *Id.* at 481-82. McGee was convicted of various selective service offenses and sentenced to two years in prison. *Id.* at 482. The lower courts refused to consider his incorrect classification defense because of the exhaustion doctrine. *Id.* See infra text accompanying notes 98-101 for further discussion of the differences between the two cases.
90. The Court's discussion of the exhaustion policies began by referring to the "avoidance of premature interruption of the administrative process." 395 U.S. at 193. The Court analogized agencies to trial courts, and noted the preference for agency fact-finding, expertise, and discretion, citing policy and efficiency reasons. *Id.* at 193-94. After recognizing the autonomy policy, which it termed a notion "peculiar to administrative law," *id.* at 194, the Court noted the difficulties of judicial review when there is an inadequate administrative record, *id.*, and the possibility that administrative relief might obviate the need for judicial review, *id.* at 195. Finally, the Court returned to agency autonomy with reference to self-correction of errors and concerns that agency effectiveness would be weakened if parties were free to ignore the agency's proceedings. *Id.*

While *McKart* is the Supreme Court's "most comprehensive discussion" of the exhaustion doctrine, R. Pierce, S. Shapiro & P. Verkuil, supra note 2, at 193, the decision did not restructure exhaustion law into an interest-balancing doctrine. One reason may be the *McKart* Court's list of exhaustion policies. The list is largely unstructured and virtually unannotated, suggesting that these are general concerns rather than specific interests to weigh against the hardship of denying judicial review in particular cases. Moreover, the list seems to limit some of the policies to cases involving
tion requirement against McKart and the absence of any explicit administrative appeal requirement in the Selective Service statutes. The Court then seemed to establish a general two-part inquiry for applying the exhaustion doctrine. The test was, first, "whether there is in this case a governmental interest compelling enough to outweigh the severe burden" to McKart and, second, whether excusing exhaustion in such situations would "seriously impair the Selective Service System's ability to perform its functions." Stripped of the verbiage directed at the particular facts of the case, the inquiry seems to amount to (1) a case-specific balancing of the hardship of denying judicial review against the extent to which the doctrine's functional policies would be served by requiring exhaustion, and (2) considering the effects of permitting review in such cases generally on the structural interests served by the exhaustion doctrine. The Court's analysis certainly reflects the use of such an approach. The only issue involved statutory interpretation, and the Court did not believe that the functional interests were seriously implicated. Nor was the Court particularly concerned about the structural interests, as it believed that few registrants would hazard avoiding the administrative process and risking jail if the courts disagreed with their claims of exemption.

When the Court revisited these issues three years later in McGee, it characterized McKart as directing that the exhaustion requirement "is not to be applied inflexibly in all situations," and as identifying "the salient interests that may be jeopardized by a registrant's failure to pursue administrative remedies." The opinion underscored the need to make an individual assessment in each case, weighing these interests

administrative proceedings that have already been concluded. 395 U.S. at 194-95. In reality, each of these policies applies in every exhaustion setting. For example, agency effectiveness is undermined when courts intervene in ongoing administrative proceedings no less than when courts review administrative determinations never appealed within an agency.

McKart faced a most extreme punishment for failing to exhaust—three years in prison. 395 U.S. at 187. Unlike the selective service laws, most agency procedures specifically require use of intra-agency appeals. See R. Pierce, S. Shapiro & P. Verkuil, supra note 2, at 196 n.210. By relying so heavily on these factors, the Court distinguished almost all other exhaustion settings. This too may have contributed to McKart's apparent weakness as precedent.

91. 395 U.S. at 197.
92. 395 U.S. at 197-99. The Court noted that resolving this issue required neither expertise nor discretion, id. at 198, and that "judicial review would not be significantly aided by an additional administrative decision" on the interpretation of the sole-surviving son exemption, id. at 199. Indeed, despite McKart's failure to appeal, the agency, at its highest levels, had considered applying the surviving son exemption to similarly situated registrants. Id. at 207 (White, J., concurring). Again, the Court lessened the general applicability of its analysis by suggesting that it might not resolve the matter in the same way where these factors were not present. Id. at 199.

93. 402 U.S. at 483.
94. Id. at 199-202. The Court concluded that "the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies," id. at 200, and that this natural incentive to exhaust could be enhanced by enforcing the duty to report for a physical examination, which could not be avoided by a statutory entitlement to a deferment, id. at 201. In these respects, of course, the Court further limited the application of its analysis to this unusual setting.
against the impact of requiring exhaustion. Applying this analysis, the Court noted that McGee claimed exemption from military service both as a student preparing for the ministry and as a conscientious objector. These claims, unlike McKart’s, raised substantial issues of fact and agency expertise that required administrative resolution. Moreover, the structural interests were more important than they had been in McKart, for Congress “conferred the primary responsibility to decide questions of fact relating to proper classification” on the Selective Service System. Accordingly, the hardship to McGee, although identical to the hardship to McKart, was outweighed by the interests supporting exhaustion, and the Court refused to countenance judicial consideration of his claims for exemption because he had failed to exhaust his administrative remedies.

The McKart and McGee opinions are well-reasoned and convincing, yet lower federal courts have largely ignored the two-part balancing approach. Still, a number of courts follow the spirit, if not the letter, of these cases. The Court of Appeals for the Ninth Circuit is a leading proponent of balancing; in Montgomery v. Rumsfeld, that court stated that it

has, on a case-by-case basis, employed a balancing analysis which considers both the interests of the agency in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances.

This statement is a rough restatement of McKart. It differs, however, in apparently considering the interests of only the agency in deferring re-

98. The Court restated the exhaustion interests and affirmed that they were to be weighed against the “harsh impact” of the doctrine. Id. The case-by-case nature of this balancing test was repeated by the admonition that:

[T]he contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of a discrete analysis of the particular default in question, to see whether there is “a governmental interest compelling enough” to justify the forfeiting of judicial review. Id. at 485, quoting from McKart, 395 U.S. at 197.

99. The Court characterized these exemptions as involving “the application of expertise . . . in resolving underlying issues of fact.” Id. at 486. Only “vagrant bits of information” in the administrative record related to the ministerial claim, id., and the nature of McGee’s studies did not make it self evident that he was entitled to the exemption, id. at 488 n.9. With respect to the conscientious objector claim, the Court noted that such claims often turn on slight factual distinctions and the evaluation of personal belief and sincerity. Id. at 490.

100. Id. at 487.

101. Id. at 486, 489, 491.

102. 572 F.2d 250 (9th Cir. 1978).

103. Id. at 253. See also Shelter Framing Corp. v. Pension Benefit Guar. Corp., 705 F.2d 1502, 1509 (9th Cir. 1983) (weighing these factors in refusing to require exhaustion in a challenge to the constitutionality of a statute); Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 500 (9th Cir. 1980) (weighing these factors in refusing to require exhaustion in a challenge to an agency’s interpretation of a statute); Wagle v. Murray, 546 F.2d 1329, 1332 (9th Cir. 1976) (weighing these factors in refusing to require exhaustion in a civil rights action).
view, and combines into one process the two-part, functional then structural, weighing used in the selective service cases.

The other appellate courts that most consistently employ a balancing approach are the Eighth and District of Columbia Circuits. The Eighth Circuit follows the Ninth Circuit in weighing governmental against private interests, but uses a more structured analysis and explicitly considers the interests of courts as well as of agencies. The District of Columbia Circuit purports to apply the exhaustion doctrine by weighing the policies behind the doctrine instead of balancing governmental and private interests. In theory, this latter approach requires exhaustion where the weight of the exhaustion policies passes some benchmark, regardless of the hardship to the plaintiff of denying review. This is arguably more a matter of style than substance, however, as the court appears to take note of the level of hardship that would result from requiring exhaustion. Other avowed uses of balancing modeled on McKart are sporadic.

104. The leading decision within the Eighth Circuit is West v. Bergland, 611 F.2d 710 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980). There the court defined the inquiry in terms similar to those used in Montgomery: "[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." Id. at 715. The court then separately analyzed those governmental interests, which can be restated into the administrative and judicial structural and functional interests, id. at 715-18, and West's interests, id. at 718-20. See also United States v. Newmann, 478 F.2d 829, 830-32 (8th Cir. 1973) (weighing interests in refusing to require exhaustion in challenge to selective service reclassification); Polaski v. Heckler, 751 F.2d 943, 951-54 (8th Cir. 1984) (using a similar approach in deciding to waive the final decision requirement of 42 U.S.C. § 405 (g)).

105. See, e.g., Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 781-82 (D.C. Cir. 1984) (exhaustion excused because policies favoring exhaustion could not possibly be achieved in the case); Andrade v. Lauer, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (listing exhaustion purposes and defining inquiry as whether exhaustion "would serve these purposes"); American Fed'n of Gov't Employees v. Acres, 475 F.2d 1289, 1292 (D.C. Cir. 1973) (exhaustion excused because "the customary rationales for the . . . doctrine . . . do not apply and the doctrine's application thus becomes pointless," citing McKart).

106. In Atlantic Richfield, the court analyzed the hardship to the plaintiff in its examination of ripeness. 769 F.2d at 783-84. In Andrade, the court analyzed the injury to the plaintiffs through its separate analysis of the irreparable harm exception. 729 F.2d 1475, 1489 (D.C. Cir. 1984).

107. A number of other courts that more regularly utilize the rule with exceptions approach have apparently used a balancing approach on occasion. For example, in Ezratty v. Puerto Rico, 648 F.2d 770 (1st Cir. 1981), the court analyzed the purposes behind the exhaustion requirement and weighed the countervailing interests before requiring exhaustion. Id. at 774-75. See also Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 702 (6th Cir. 1985) (excluding exhaustion after weighing exhaustion policies and harm to plaintiffs); Deltona Corp. v. Alexander, 682 F.2d 888, 894 n.8 (11th Cir. 1982) ("applying the exhaustion doctrine to a particular case requires a careful balancing of interests for and against exhaustion"); Ecology Center v. Coleman, 515 F.2d 860, 866-67 (5th Cir. 1975) (identifying factors courts should weigh in determining whether to mandate exhaustion); Diapulse Corp. of Am. v. FDA, 500 F.2d 75, 77-78 (2d Cir. 1974) (analyzing the purposes behind exhaustion and concluding that they did not apply to the essentially legal question before the court).

At a minimum, courts can use interest balancing as a vehicle for interpreting exceptions. Several courts apparently attempt to do so by discussing the underlying policies of the exhaustion doctrine and then applying arguably pertinent exceptions in light of those policies. See, e.g., New Jersey v. Department of Health & Human Servs., 670 F.2d 1262, 1277-78 (3d Cir. 1981) (court applies futility exception noting that none of the doctrine's policies supports requiring exhaustion); Touche Ross & Co. v. SEC, 609 F.2d 570, 576-77 (2d Cir. 1979) (expanding the clear violation exception to
One balancing approach that predates McKart consists of a three-part inquiry for determining whether exhaustion should be required when the plaintiff challenges the agency's jurisdiction. This approach, first proposed by Professor Davis, considers three factors: "extent of injury from pursuit of administrative remedy, degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction."108 This test is not simple to apply109 and can be restated in a manner that exacerbates some of the problems it was designed to avoid.110 Nevertheless, Professor Davis's proposal provides one solution to the disastrous "clear violation" exception that it largely replaces.

Any balancing test generates difficulties. Unless courts can clearly enunciate the relevant factors and readily identify these factors in individual cases, balancing is a vague and formless approach that is at best uncertain for all concerned, and at worst an invitation to unfettered judicial discretion.111 The three circuits that routinely use a balancing approach appear to have reached proper results, but the open-ended nature of their analysis creates opportunities for manipulation and necessarily limits the guidance their opinions provide to future litigants. Balancing need not be indiscriminate, however, and a clearly defined analytical

permit immediate judicial review based on an evaluation of exhaustion policies); Dooley v. Ploger, 491 F.2d 608, 613-14 (4th Cir. 1974) (exhaustion required for jurisdictional challenges in light of purposes of exhaustion doctrine).

108. K. DAVIS, 1958 TREATISE, supra note 6, at 69. The Ninth Circuit has used this approach on numerous occasions, see SEC v. G.C. George Sec., Inc., 637 F.2d 685, 688 n.4 (9th Cir. 1981) (listing cases). The Sixth Circuit applied a modified form of the approach in Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981), although Shawnee Coal used virtually every other recognized approach to exhaustion problems as well. Id. at 1092-95 (analyzing underlying policies, discussing congressional intent, identifying five exceptions, and using this three-part approach). A number of district courts have applied the approach as well. See K. DAVIS, 1983 TREATISE, supra note 2, at 434.


110. One decision has restated the inquiry to provide that excusing exhaustion "is appropriate only where: (1) there is clear evidence that exhaustion of administrative remedies will result in irreparable injury; (2) the agency's jurisdiction is plainly lacking; and (3) the agency's special expertise will be of no help on the question of its jurisdiction." Marshall v. Burlington N., Inc., 595 F.2d 511, 513 (9th Cir. 1979) (emphasis added). This changes a balancing test into a three-headed exception. Moreover, the "plainly lacking" requirement reverts to the "clear violation" exception that Professor Davis was trying to replace. Fortunately, the Ninth Circuit appears to have readopted Professor Davis's formulation of the test. SEC v. G.C. George Sec., Inc., 637 F.2d 685, 688 n.4 (9th Cir. 1981).

111. These are Professor Gelpe's major criticisms of both a balancing approach and a rule with exceptions approach that has more than several very specific exceptions. Gelpe, supra note 3, at 25-27. See also Comment, supra note 5, at 457 (noting a "fundamental tension" between the exhaustion policies and broad judicial discretion in fashioning exceptions). This analysis, however, has several problems. First, adhering to a few clearly delineated exceptions is simply impossible, if only because the exhaustion doctrine applies in too many settings for its policies to be served without using a flexible approach. Second, a balancing or factor approach need not result in undue judicial discretion. The ripeness doctrine proves that a careful delineation of pertinent factors can at the same time structure judicial analysis to achieve greater consistency and still avoid dismissing worthy cases simply because they do not fit precisely into a rigid exception. Third, at least some exceptions merely mask uncertainty. As shown below, the futility and irreparable injury exceptions are steeped in ambiguous meaning and inconsistent application. See Part II.C.
structure can provide sufficient guidance without the one-dimensional rigidity of the rule with exceptions approach.\textsuperscript{112} For whatever reason, McKart and McGee failed to redirect exhaustion analysis into an effective balancing inquiry. More recent Supreme Court decisions have only confused the matter further.

3. The Collateral Question Approach

Since 1975, the Supreme Court has analyzed exhaustion principles primarily in cases involving the judicial review provisions of the Social Security Act.\textsuperscript{113} Weinberger v. Salfi\textsuperscript{114} and Mathews v. Eldridge,\textsuperscript{115} the first two of these cases, provided a different analytical framework for examining exhaustion questions. Salfi presented a constitutional challenge to provisions of the Social Security Act that denied benefits to certain survivors of wage earners.\textsuperscript{116} A threshold question was whether judicial review was permissible even though there had been no “final decision of the Secretary made after a hearing,” as required by section 405(g) of the Social Security Act. After reviewing some of the policies underlying the exhaustion requirement, the Court concluded that these policies are served by requiring exhaustion where the only disputed issue is the constitutionality of a statute.\textsuperscript{117} Yet the Court questioned its authority to

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\textsuperscript{112} Perhaps the only problem with Professor Davis’s three-part inquiry for analyzing challenges to agency jurisdiction is that he never proposed it as a solution for other exhaustion problems. By recognizing that factors such as “injury” and “specialized administrative understanding” are not reducible to dispositive “yes or no” questions, Professor Davis laid the groundwork for McKart and other balancing approaches.

While his proposal for resolving challenges to agency jurisdiction is relatively specific, see supra notes 108-10 and accompanying text, Professor Davis’s views on the doctrine primarily call for a more general and less-structured approach. He identifies factors “[p]ulling away from” exhaustion (largely exceptions) and “[p]ulling toward” exhaustion (largely exhaustion policies). K. Davis, 1983 Treatise, supra note 2, at 414-15. See also Comment, The Exhaustion Doctrine and NEPA Claims, 79 Colum. L. Rev. 385, 395-99 (1979), proposing a flexible balancing approach to resolving exhaustion problems premised on the relative diligence of agencies and private parties. This approach would require “a minimum standard of meaningful participation” in administrative proceedings by persons raising environmental claims, id. at 396, but would weigh the agency’s conscientiousness in complying with its statutory duties in determining the extent of participation required to preserve claims on judicial review, id. at 397.

Dean Merrill and Professor Mashaw suggest use of a more general balancing approach. They propose that exhaustion problems be resolved by analyzing “(1) the burden imposed by the available administrative proceeding; (2) the appropriateness of the agency proceeding for resolving the issue raised; and (3) the dependence of the legal issue on the development of a factual record.” Mashaw & Merrill, supra note 61, at 777.

\textsuperscript{113} 42 U.S.C. § 405(g) (1982) provides in pertinent part that: “Any individual, after any final decision made after a hearing to which he was a party, . . . may obtain review of such decision by a civil action . . . .”

\textsuperscript{114} 422 U.S. 749 (1975).

\textsuperscript{115} 424 U.S. 319 (1976).

\textsuperscript{116} The Social Security Act denied benefits to surviving wives and stepchildren who had “had their respective relationships to a deceased wage earner for less than nine months prior to his death.” 422 U.S. at 754. These limitations were found in the Act’s definitions of “widow,” 42 U.S.C. § 416(e) (1970), and “child,” 42 U.S.C. § 416(e) (1970). After regional officials of the Social Security Administration denied his claim for benefits, Salfi brought a class action challenging these provisions and was successful in the district court. 373 F. Supp. 961 (N.D. Cal. 1974).

\textsuperscript{117} The Court identified both structural and functional interests served by exhaustion, citing
excuse exhaustion because the statutory limitation of judicial review amounted to "something more than a codification of the judicially developed doctrine of exhaustion." The Court was able to avoid that problem, however, as it found that the agency's failure to challenge Salfi's complaint on exhaustion grounds represented either a determination by the Secretary that the denial was "final" or a waiver of the exhaustion requirement.

_Eldridge_ arose from an action to terminate social security disability benefits. After receiving notification that his benefits were to be terminated, and instead of following specified administrative procedures for reconsideration, Eldridge filed an action challenging the constitutionality of the agency's termination procedures. The government expressly declined to waive the final decision requirement and urged the Court to dismiss Eldridge's complaint on that basis. The Court refused, concluding that the courts may waive the exhaustion requirement "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." Finding guidance for this inquiry in the collateral order doctrine, which permits appeals of certain interlocutory trial court rulings, the Court

McKart v. United States, 395 U.S. 185 (1969), and Parisi v. Davidson, 405 U.S. 34 (1972). _Salfi_, 422 U.S. at 765. In applying those exhaustion policies, the Court concluded that they were satisfied because the agency agreed that it could not resolve the constitutional issue and that no other issue could moot the controversy. Moreover, further administrative consideration would be "futile for the applicant . . . [and] a commitment of administrative resources unsupported by any administrative interest." _Id._ at 765-66.

118. 422 U.S. at 766. The Court found that the statutory basis of the exhaustion requirement made the case "significantly different from _McKart._" _Id._ This suggests that futility is not a sufficient reason to excuse statutory exhaustion requirements.

119. _Id._ at 766-67. The Court found the Secretary's power to define "final decision" in the general delegation of rulemaking power with respect to procedures governing social security claims. 42 U.S.C. § 405(a) (1982). While the _Salfi_ Court never used "waiver" language, the Court, in _Mathews v. Eldridge_, 424 U.S. 319, 328-30 (1976), subsequently characterized the holding as premised on waiver. Justice Brennan dissented from the _Salfi_ Court's decision upholding the challenged limitations on social security benefits. He disputed the Court's conclusion that the Secretary had waived the exhaustion requirement, noting that the government had moved to dismiss the case on that ground in the trial court. 422 U.S. at 801-02 (Brennan, J., dissenting). In any event, the Court was unable to stay with the agency-waiver theory in _Eldridge._ 424 U.S. at 331-32.

120. 424 U.S. at 324-25.

121. _Id._ at 328. The Court first drew a distinction between different aspects of § 405(g), determining that it includes both non-waivable and waivable components. The filing of a claim is non-waivable because the statute requires some agency decision and there can be no such decision without a claim. _Id._ at 328. Eldridge was deemed to have satisfied this requirement by corresponding with the agency and disputing its conclusion that he was no longer disabled. _Id._ at 328-29. The Court, however, found that the "final decision" requirement was a waivable exhaustion of remedies requirement. _Id._ at 328.

122. _Id._ at 330-31.

123. The collateral order doctrine permits appeal of those non-final court decisions that fall within the "small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." _Cohen v. Beneficial Indus. Loan Corp._, 337 U.S. 541, 546 (1949) (citations omitted). More recent decisions have re-emphasized the limited scope of the doctrine, noting particularly that the lower court order must finally resolve the collateral issue and that the appellant must be unable to secure effective
permitted judicial review because Eldridge's "constitutional challenge [was] entirely collateral"124 to the disability claim and he had made a "colorable" claim of irreparable injury.125

Together, these decisions both developed and confounded exhaustion analysis. By creatively interpreting the requirement that judicial review await a final decision after a hearing, the Supreme Court signaled that courts should use a pragmatic analysis in applying statutory as well as judicially-crafted exhaustion requirements. This is underscored by Salfi's emphasis on the policies underlying the exhaustion requirement and Eldridge's open willingness to authorize judicial waiver of the final decision requirement. Eldridge can also be seen as a simplified application of the McKart balancing test—the interest of the claimant in prompt judicial review weighed against the government's interests in requiring exhaustion. Eldridge had a strong interest in immediate judicial review; on the other side of the equation, he presented an issue entirely collateral to the agency proceedings. Judicial review would therefore not interfere with the functional purposes of the exhaustion requirement, such as fact-finding, expertise, and discretion. Nor would awaiting the conclusion of all administrative proceedings assist the courts in resolving the constitutional challenge.

Nevertheless, Salfi and Eldridge have complicated the exhaustion doctrine.126 One resulting problem relates to the term "waiver." That term may be appropriate to describe an agency's decision not to challenge litigation on exhaustion grounds, as in Salfi, but is inappropriate to describe a judicial determination to deny a motion to dismiss, as in Eldridge. Courts have usually viewed Eldridge as creating a separate exhaustion doctrine applicable in social security cases127 rather than as merely one application of a policy-based exhaustion inquiry. This view not only ignores the premises of Salfi and Eldridge but also limits their

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125. Id. at 331. Eldridge's constitutional challenge was inextricably tied to a claim of irreparable injury. As the Court noted, "[a] claim to a pre-deprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing." Id.
126. Professor Davis is particularly critical of Eldridge: "Anyone who understands the holding in the Eldridge case may regard it as a legal monstrosity." K. DAVIS, 1983 TREATISE, supra note 2, at 449. He notes five ways in which the decision departed from well-established exhaustion principles, id. at 446-49, and finds eight faulty premises in the Court's analysis, id. at 449-50. Professor Davis's suspicion is that the Court was determined to reach the merits in order "to stop the flood of litigation stemming from Goldberg v. Kelly," id. at 450. As such, it provides a good example of how courts exacerbate doctrinal problems by manipulating cases in order to reach or avoid certain issues.
127. E.g., Boettcher v. Secretary of Health & Human Servs., 759 F.2d 719, 721 (9th Cir. 1985); Polaski v. Heckler, 751 F.2d 943, 951-53 (8th Cir. 1984); Smith v. Schweiker, 709 F.2d 777, 780 (2d Cir. 1983).
influence on cases in other areas.\textsuperscript{128}

The most critical problem, however, is that there is no clear agreement on any single collateral question approach. The *Eldridge* analysis supports the notion that exhaustion should be excused only on a showing of both a collateral issue and irreparable injury.\textsuperscript{129} Reading the doctrine in this manner, however, replicates all of the problems generated by the rule with exceptions approach. Indeed, so interpreted, the inquiry arguably requires that plaintiffs satisfy two exceptions in order to excuse exhaustion, both some version of the poorly-reasoned legal question exception and the equally inapt irreparable injury exception.\textsuperscript{130} The *Eldridge* terminology, moreover, adds to the confusion because collateral questions are not readily identified and the phrase "colorable irreparable harm" is hopelessly vague.\textsuperscript{131} In any event, courts applying the approach have disagreed concerning its requirements. Some see it as a two-part test, others as a three-part test, and still others as a balancing test.\textsuperscript{132}

Common sense indicates that the Court never intended the phrases "collateral constitutional challenge" and "colorable claim of irreparable injury" to create rigid categories. Instead, these two terms suggest relevant factors in applying the exhaustion doctrine generally and should apply in settings other than those involving section 405(g) of the Social Security Act.\textsuperscript{133} Fortunately, some courts have applied the collateral

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\item \textsuperscript{128} The only real support for using a separate approach is the Court's recognition in *Salfi* that § 405(g)'s finality requirement is more than a codification of the exhaustion doctrine. 422 U.S. at 766. Still, no need exists to consider these cases under a different exhaustion rubric. The underlying policies are the same, as recognized in *Salfi*, 422 U.S. at 765, and *Eldridge*, 424 U.S. at 331 n.11. The non-waivable requirement that the plaintiff submit his or her claim to the agency before seeking review assures agency involvement. *See supra* note 121. Finally, other exhaustion approaches take cognizance "of the particular administrative scheme involved." *McKart* v. United States, 395 U.S. 185, 193 (1969).

\item \textsuperscript{129} The Court relied on the judicial collateral order doctrine, which plainly requires that both elements be satisfied in order to support an appeal. *See supra* note 123. Eldridge met the standard, for his claim that he would be unconstitutionally deprived of a necessary entitlement during the administrative process constituted an important collateral matter that the agency had effectively resolved against him through its regulations. 424 U.S. at 331-32.

\item \textsuperscript{130} *See* Part II.C.2.

\item \textsuperscript{131} The terminology is not static. "Colorable" was used in *Eldridge*, *see supra* text accompanying note 125, and *Heckler* v. *Ringer*, 466 U.S. 602, 618 (1984), but in *Bowen* v. City of New York, 106 S. Ct. 2022 (1986), the Court simply characterized the injuries in that case and *Eldridge* as irreparable. 106 S. Ct. at 2032. *See also* Mental Health Ass'n v. Heckler, 720 F.2d 965, 970 (8th Cir. 1983) (using the phrase "potentially irreparable harm"). Other courts have played mix and match with the *Eldridge* factors and require a "colorable constitutional question" in order to excuse exhaustion. *See* Boettcher v. Secretary of Health & Human Servs., 759 F.2d 719, 721-22 (9th Cir. 1985); Northlake Community Hosp. v. United States, 654 F.2d 1234, 1241 (7th Cir. 1981). Courts have no reason to pay undue homage to particular words used in these cases.

\item \textsuperscript{132} *See infra* notes 214-15 and accompanying text.

\item \textsuperscript{133} Some courts have begun using the *Eldridge* approach in analyzing exhaustion problems in different settings. *See*, e.g., Haitian Refugee Center v. Meese, 791 F.2d 1489, 1499 (11th Cir. 1986) (relying upon *Eldridge* in deportation setting); Southern Ohio Coal Co. v. Donovan, 774 F.2d 693, 701-02 (6th Cir. 1985) (use of approach in challenge to constitutionality of procedures of mine safety agency); Power Plant Div., Brown & Root, Inc. v. Occupational Safety & Health Review Comm'n, 673 F.2d 111, 112-14 & n.3 (5th Cir. Unit B 1982) (analysis of *Salfi* and *Eldridge* in challenge to order finding regulatory violation); Rosenthal & Co. v. Commodity Futures Trading Comm'n, 614
question approach with sensitivity to the exhaustion doctrine's purposes and an awareness that an approach weighing injury and the nature of the issue is likely to serve both the doctrine's purposes and the parties. This more flexible methodology may receive additional support in light of the Supreme Court's most recent pronouncements, but this benefit seems largely outweighed by the Court's reluctance to explain its reasoning.

4. The New Non-Explanation

While most early Supreme Court exhaustion decisions at least attempted to apply and explain general principles, the recent cases of *Heckler v. Ringer* and *Bowen v. City of New York* seem almost resolute in their unwillingness to provide guidance on exhaustion issues. *Ringer* involved a substantive and procedural challenge to a Department of Health and Human Services policy prohibiting Medicare payments for a particular surgical procedure. The plaintiffs had not pressed their claims through all levels of agency review, and the Supreme Court enforced the exhaustion requirement. Because three of the plaintiffs received their surgery before the policy became binding on administrative law judges, the Court declined to characterize the Department's policy as a "final decision" on their claims under section 405(g). Plaintiffs' challenge was not "collateral" to a claim for benefits, apparently because even their arguments concerning the Department's procedures were inseparable from their claims for Medicare benefits; plaintiffs had no colorable claim that they would be irreparably injured despite the automatic

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134. *E.g.*, Boettcher v. Secretary of Health & Human Servs., 759 F.2d 719, 721-22 (9th Cir. 1985) (focusing on the nature of the claim and weighing factors); Polaski v. Heckler, 751 F.2d 943, 951-53 (8th Cir. 1984) (using a flexible approach to weigh pertinent factors); McGrath v. Weinberger, 541 F.2d 249, 252-53 (10th Cir. 1976) (analyzing interests for and against exhaustion, citing *McKart*); but see Northlake Community Hosp. v. United States, 654 F.2d 1234, 1241 (7th Cir. 1981) (basing decision solely on the weakness of the constitutional claim).


137. The procedure is known as a bilateral carotid body resection. In 1979, the Department instructed fiscal intermediaries to deny payments for this operation except in very limited circumstances. 466 U.S. at 607. The basis for this policy was a determination that the operation was not "reasonable and necessary," a requirement of Medicare coverage. *Id.* Despite this policy, claimants appealing denials routinely obtained payment for the operation because administrative law judges were not bound by the instruction. 466 U.S. at 607-08. To stem the reversals, the Department republished the policy as an administrative ruling on October 28, 1980. 45 Fed. Reg. 71,426 (1980). This bound administrative law judges and effectively ended medicare payments for operations performed after that date.

138. The district court dismissed the complaint but the Ninth Circuit reversed, relying on *Salfi* and *Eldridge*. Ringer v. Schweiker, 697 F.2d 1291 (9th Cir. 1982). The Court of Appeals concluded that exhaustion would be futile considering the Department's commitment to denying payment and that the burden of litigating their claims could result in uncompensated injury to the claimants, 697 F.2d at 1295-96.

139. 466 U.S. at 613.

140. *Id.* at 613-14, 618. The Court did not clearly explain its conclusion that challenging the
denials prior to hearings before administrative law judges; the Secretary had not waived exhaustion; and exhaustion would not be futile. The Court never explained whether one, some, or all of these factors were required before it would waive exhaustion. The Court did not address the importance of the various elements in evaluating the challenge by the fourth plaintiff, who was bound by the ruling, because he had not satisfied the non-waivable requirement of filing a claim with the agency.

The Court's unanimous opinion two years later in City of New York constituted an apparent loosening of the exhaustion doctrine but did little to clarify how the doctrine operates. The case began as a class action challenging the Social Security Administration's internal policy of determining disability benefits based on a general "Listing of Impairments" instead of individual assessments. The district court declared the policy illegal, and the government appealed the court's determination to grant relief to claimants who had failed to exhaust administrative remedies. The Supreme Court divided the class into two groups, much as it had in Ringer. Relief for the first group, for whom administrative remedies were no longer available when the internal policy became public, was affirmed with little explanation other than noting that requiring exhaustion would be unfair because the claimants could not have chal-

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141. Id. at 618-19. The Court offered virtually no discussion of irreparable injury and the futility discussion was ambiguous. The Court noted that administrative law judges had granted payment for all claims filed for operations performed before the ruling became binding, id. at 619, that the claims of two of the three plaintiffs in this group had already been denied, id. at 619 n.12, and concluded that "exhaustion is in no sense futile," id. at 618.

142. Id. at 620-23. The fourth plaintiff was Ringer, who was bound by the ruling because he had not yet had the operation. Id. Unless and until he had the operation, he could not submit a claim and meet the non-waivable requirement of § 405(g). See supra note 121. Thus, despite the fact that exhausting his administrative remedies would be futile and arguably constitute irreparable injury, judicial review was unavailable because he could not initiate those administrative processes. A strident dissent disagreed with the majority's analysis concerning Ringer. Id. at 627-47. The dissent stressed that the purpose of the ruling was "to prevent claimants from litigating the reimbursability of" the operation before the agency and that exhaustion would be futile for the claimant and wasteful of administrative resources. Id. at 639-40.

143. 106 S. Ct. at 2026. The class included all persons denied disability benefits during the period that the policy was in effect whose denials were premised on a determination of capability and who had been found to have a severe mental impairment. Id. at 2027 n.6. The "Listing of Impairments" is referenced in the regulations concerning disability evaluations, see 20 C.F.R. §§ 404.1520(d), 416.920(d) (1986), and is set out in full in an appendix to the regulations, 20 C.F.R. Pt. 404, subpt. P, App. 1 (1986). A substantial element of the plaintiffs' challenge concerned the apparently secret reliance on the listings to determine whether a claimant was capable of substantial gainful employment, the statutory standard. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A) (1982).

144. City of New York v. Heckler, 578 F. Supp. 1109 (E.D.N.Y. 1984), aff'd, 742 F.2d 729 (2d Cir. 1984). The court of appeals characterized the Supreme Court's approach as permitting judicial, as opposed to administrative, waiver "where plaintiff's legal claims are collateral to the demand for benefits, where exhaustion would be futile, or where the harm suffered pending exhaustion would be irreparable." Id. at 736 (emphasis added). The court noted that the Supreme Court had never made clear "whether each of the individual factors . . . futility, collateralbliter, and irreparable harm—must be present before a court may dispense with exhaustion," but that the Second Circuit had "adopted a more general approach, balancing the competing considerations to arrive at a just result under the circumstances presented." Id.
lenged an unknown policy. The Court also excused exhaustion for the second group, for whom administrative remedies were still available when the action was filed. Despite its close resemblance to the claim presented in *Ringer*, the Court determined that the issue was collateral because it involved the Department's "failure to follow the applicable regulations." The Court also found that the burdens and medical hazards resulting from reentering the administrative process would constitute irreparable injury. Stressing the pragmatic basis of the exhaustion doctrine, the Court directed that the doctrine's application be governed by its underlying policies rather than "mechanical application of the Eldridge factors." The Court then found that exhaustion would have been futile and inconsistent with those policies and characterized the relief ordered, essentially reopening the claims, as showing "proper respect for the administrative process." The *City of New York* Court

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145. 106 S. Ct. at 2031. This analysis merged with the Court's conclusion that the 60-day period for seeking review of agency denials should be excused on equitable doctrines permitting courts to toll statutes of limitations. *Id.* at 2029-31. While the unique circumstances of this case should permit the Court to distinguish it in future decisions, the fact remains that the Court fashioned a new "exception" to the exhaustion requirement in a two-sentence discussion. Moreover, because the Court had excused exhaustion even for those plaintiffs who could have challenged the policy in administrative appeals, it had no need to address the issue.

146. *Id.* at 2031. Any distinction from *Ringer* on this point is artificial. The plaintiffs there challenged the Department's use of general rather than individualized criteria for decision. See 466 U.S. at 614. While they may have sought an inappropriate remedy in court-ordered medicare payments, *id.* at 610-11, nothing prevented the courts from invalidating the general ban on payment for the operation and remanding the cases for individual determinations. This, in essence, was what occurred in *City of New York*. See 106 S. Ct. at 2031-33. The Ninth Circuit recognized that the *Ringer* complaint sought an inappropriate remedy, but saw no difficulty in judicial consideration of the challenge to the agency's use of a general binding ruling. *Ringer* v. Schweiker, 697 F.2d 1291, 1294 (9th Cir. 1982). If, as *Salfi* and *Eldridge* suggest, courts define "collateral" largely through an analysis of the functional policies, the procedural challenges in both cases were collateral, even if the demand for benefits in *Ringer* was not.

147. The Court's analysis is unconvincing. The irreparable injury occurred when these people either lost or were denied appropriate benefits, as found by the district court. City of New York v. Heckler, 578 F. Supp. 1109, 1114-15, 1118 (E.D.N.Y. 1984). The remedy simply forced them back into the administrative process, some with interim benefits that the lower court found would not sufficiently protect them from continued injury. *Id.* It is incongruous at best to conclude that the burdens of the administrative process were so severe that the class did not have to use the administrative process in the past but that there was no problem in requiring use of the process in the present.

The appropriate inquiry is not whether the unused administrative review process would have caused irreparable harm any more than the question in *McKart* was whether McKart would have been injured had he appealed the termination of his exemption. Rather, the proper inquiry requires evaluating the hardship of requiring exhaustion. In *McKart*, the hardship was three years in prison because he would have lost his criminal defense. Here the hardship would be the loss of the claim for benefits because the time for an administrative appeal had long since passed.

148. 106 S. Ct. at 2032.

149. *Id.* The Court's policy analysis focused on the existence of a "system-wide, unrevealed policy" out of keeping with published regulations. *Id.* Stressing this unusual occurrence, the Court held that agency fact-finding and expertise were inapplicable. *Id.*

150. *Id.* This is an unarticulated application of the autonomy policy. The district court corrected the illegality by invalidating reliance on the listings, but properly allowed the agency to consider the eligibility of the claimants under the appropriate legal standards. 578 F. Supp. at 1124-25.

The Court's remaining discussion of exhaustion is, at best, obscure. Although conceding that some claimants might have obtained benefits despite the invalid policy and that others might have
concluded that "[w]hile 'hard' cases may arise, this is not one of them."\textsuperscript{151}

\textit{City of New York} may not have been a "hard" case, but it made "bad" law, not in its justifiable outcome, but in its unconvincing method. The decision presents a stark contrast to \textit{Ringer}, also a case largely bound by its facts, both in defining collateral issues and in applying the relevant exhaustion factors.\textsuperscript{152} Moreover, the opinion nowhere explains the relationship between the \textit{Eldridge} factors and \textit{McKart} balancing, other than admonishing that \textit{Eldridge} be applied flexibly. In \textit{City of New York} the Court came full circle to \textit{Myers}; the approach may sound less dogmatic, but the analysis is equally opaque. The result of the Supreme Court exhaustion decisions is that the doctrine is presented largely in ad hoc, result-oriented opinions.\textsuperscript{153} In this environment, the doctrine is understandably distinguished by complexity, inconsistency, and lack of clarity.

\section*{C. Two Recurring Exhaustion Issues}

\subsection*{1. Futility}

The futility of exhausting administrative remedies is plainly important in exhaustion analysis under each of the four approaches discussed above.\textsuperscript{154} Where further administrative proceedings will be futile, defer-

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\textsuperscript{151} 106 S. Ct. at 2033.

\textsuperscript{152} This contrast can be seen in a variety of respects, such as the different approaches to hardship, futility, and the relevancy of the possible outcomes of administrative litigation, compare \textit{supra} notes 140-41 and accompanying text with notes 147, 148, & 150. The irony is that the different outcomes are readily explainable under a coherent interest balancing approach. See infra note 344.

\textsuperscript{153} Professor Davis makes these same criticisms of the exhaustion doctrine: "Each decision tends to be ad hoc. Stare decisis is especially weak on problems of exhaustion." K. DAVIS, 1983 TREATISE, \textit{supra} note 2, at 415.

\textsuperscript{154} Lower federal courts often state that futility is an exception to the exhaustion requirement. See \textit{supra} note 51. While the Supreme Court has never explicitly adopted this view, its decisions under each of the four approaches discussed above rely to some extent on the notion of futility. Thus, under the rule with exceptions approach, the result in \textit{Leedom v. Kyne}, 358 U.S. 184 (1958), can be attributed in part to the futility of any administrative challenge in light of the NLRB's firm commitment to exceed its authority. Similarly \textit{McKart v. United States}, 395 U.S. 185 (1969) and \textit{McGee v. United States}, 402 U.S. 479 (1971), the leading cases decided under the balancing approach, can be reconciled by the Court's belief that the issues presented rendered \textit{McKart}'s but not \textit{McGee}'s selective service remedies futile. See \textit{supra} notes 94 & 99 and accompanying text. Under the non-explanation approach, \textit{Heckler v. Ringer}, 466 U.S. 602 (1984), and \textit{Bowen v. City of New York}, 106 S. Ct. 2022 (1986), also addressed futility obscurely. See 466 U.S. at 618 (requiring exhaustion in part because remedies are not futile); 106 S. Ct. at 2032 (exhaustion would be futile
ring judicial review until their completion seems inefficient.\textsuperscript{155} If courts should inevitably excuse exhaustion when further administrative proceedings would be futile, an exhaustion rule with an exception for futility can properly implement the exhaustion doctrine. In reality, however, no clear or generally applicable exception for futility exists or would be sensible, and none of the other approaches is capable of fully integrating futility into exhaustion analysis. Rather, futility is a shorthand reference for a variety of situations in which administrative relief is more or less unlikely. In some of those situations, the efficiency of immediate review is far more questionable than in others.\textsuperscript{156}

Definitional problems here, as elsewhere, are key. The dictionary meanings of "futile" center on "useless."\textsuperscript{157} If consistently used in that sense, futility would excuse exhaustion only when further administrative proceedings would be of no use. Such an approach would require courts

because challenged policy adhered to as a result of agency pressure). Finally, futility played a role in both Weinberger v. Salfi, 422 U.S. 749, 765-67 (1975) (administrative consideration would be wasteful for both parties) and Mathews v. Eldridge, 424 U.S. 319 (1976). Eldridge is the most significant Supreme Court precedent concerning futility. The Court quickly dismissed the argument that Eldridge should raise his challenges to the agency's procedural regulations in administrative proceedings, noting that it would be "unrealistic to expect" the agency to consider such issues in adjudicatory proceedings. 424 U.S. at 330. While the decision to excuse exhaustion was premised on other factors as well, \textit{id.} at 330-31, a number of courts have cited Eldridge as support for this watered-down futility requirement. \textit{E.g.}, Boettcher v. Secretary of Health & Human Servs., 759 F.2d 719, 721 n.3 (9th Cir. 1985) (Secretary will not decide to grant hearing limited to a single issue); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1034 (5th Cir. Unit B 1982) (INS will not consider challenges to its procedures in individual deportation cases). This "probably futile" strain of Eldridge has created more doctrinal dissonance than harmony. \textit{See infra} notes 161-71 and accompanying text.

While many courts have examined futility in cases involving a statutory exhaustion requirement, \textit{see e.g.}, Mullins Coal Co. v. Clark, 759 F.2d 1142, 1143 (4th Cir. 1985) (exhaustion requirement of 30 U.S.C. \S 1276 (1982)); Washington Ass'n for Television & Children v. FCC, 712 F.2d 677, 681-82 (D.C. Cir. 1983) (exhaustion requirement of 47 U.S.C. \S 405 (1982)), some courts further limit futility by refusing to recognize futility as a basis for excusing exhaustion under certain statutory provisions, \textit{e.g.}, Power Plant Div., Brown & Root, Inc. v. Occupational Safety & Health Review Comm'n, 773 F.2d 111, 115 (5th Cir. Unit B 1982) (futility not an exception under statute governing appeals from orders of the Commission); Association of Am. Medical Colleges v. Califano, 569 F.2d 101, 108 (D.C. Cir. 1977) (futility is an insufficient basis for challenge even if the agency lacks power to overturn its own regulation).

155. Requiring the exhaustion of futile administrative remedies conjures up the notion of deferring judicial resolution of a dispute until the completion of preliminary jousts that are expensive, time consuming, and utterly meaningless—the "Bleak House" vision of the legal process. In this sense, the futility exception is simply a response to this unsympathetic view of the legal system. As shown below, however, a weighing of several policies rather than a single conclusion concerning futility would better serve the legal system and litigants.

156. A classic situation in which excusing exhaustion usually serves efficiency is where a plaintiff's claim depends solely on the alleged unconstitutionality of a statute. Because that issue cannot be resolved favorably to the party within the agency, requiring exhaustion is likely to be wasteful. \textit{See infra} notes 178 \& 181-82 and accompanying text.

157. \textit{Webster's Third New International Dictionary of the English Language} (1981) defines "futile" as "serving no useful purpose" and gives "ineffective" and "fruitless" as synonyms. \textit{Id.} at 925. "Futility" is defined both as "the quality or state of being futile" and "an abortive attempt or useless gesture." \textit{Id.} \textit{The Oxford English Dictionary} (1933) is somewhat more descriptive, stating the following concerning "futile": "[i]ncapable of producing any result; failing utterly of the desired end through intrinsic defect; useless . . . ." \textit{4 The Oxford English Dictionary} 626 (1933).
to determine whether further administrative proceedings would have any potential value. If not, even a very slight hardship from deferring judicial review should automatically prevail because courts would have no countervailing reason to require exhaustion. Because structural exhaustion policies are almost always entitled to some weight, however, exhaustion would be totally useless in very few cases.

While some courts purport to take a restrictive view of futility consistent with its dictionary definition, the case law gives futility a variety of meanings. Courts have relied on futility to excuse exhaustion where administrative redress was highly unlikely, practically unlikely, or improbable. These various treatments further complicate the matter by focusing unduly on futility to the plaintiff. This erroneous concentration upon futility to the plaintiff implies that courts should excuse exhaustion whenever the plaintiff has an insufficient likelihood of success within the agency, and ignores the extent to which further ad-

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158. Where the exhaustion policies would not be served in any respect, the delay in final resolution constitutes a hardship sufficient to outweigh the policies and exhaustion is properly excused. This would occur no matter how insignificant the delay or other resulting hardship. Cf. Committee for GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975) (excusing exhaustion noting that it would serve "no significant interest" and "merely delay a decision by the federal courts."); United States ex rel. Marrero v. Warden, Lewisburg Penitentiary, 483 F.2d 656, 659 (3d Cir. 1973) (exhaustion would be futile, and "unnecessary delay" in resolving federal prisoner's challenge to incarceration "would be unconscionable"), rev'd on other grounds, 417 U.S. 653 (1974).

159. See supra text accompanying notes 38-48.

160. E.g., Williams v. Secretary of Navy, 787 F.2d 552, 559-60 (Fed. Cir. 1986) (construing futility strictly to avoid defeating the purpose of the exhaustion doctrine); Denberg v. United States R.R. Retirement Bd., 696 F.2d 1193, 1195 (7th Cir. 1983) (exhaustion is futile only because plaintiff "could not possibly" prevail within agency); United Farm Workers v. Arizona Agric. Employment Relations Bd., 669 F.2d 1249, 1253-54 (9th Cir. 1982) (no showing of futility because plaintiff did not establish "that an appeal would have been useless").

161. E.g., Athlone Indus. v. Consumer Prod. Safety Comm'n, 707 F.2d 1485, 1489 (D.C. Cir. 1983) (futile because "it is highly unlikely that the Commission would change its position"); Dameron v. Sinai Hosp., 626 F. Supp. 1012, 1015 (D. Md. 1986) (futile because it is "highly unlikely" that the agency would change its position during the administrative process).


163. E.g., New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 850-51 (10th Cir. 1982) (relying on and quoting from K. DAVIS, 1958 TREATISE, supra note 6, at 97); Diapulse Corp. of Am. v. FDA, 500 F.2d 75, 78 n.1 (2d Cir. 1974) (futile because success within agency is improbable).

In addition, a number of cases not explicitly using a "likelihood" approach suggest a variety of understandings concerning the meaning of futility. See, e.g., Sioux Valley Hosp. v. Bowen, 792 F.2d 715, 724 (8th Cir. 1986) ("The futility exception ... applies when there is nothing to be gained other than an agency decision adverse to the plaintiff."); Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 29 n.5 (D.C. Cir. 1984) (not futile because there is "no indication that the agency has closed its mind"); Hodges v. Callaway, 499 F.2d 417, 420, 422 n.13 (5th Cir. 1974) (futile where remedies do not "provide a real opportunity for adequate relief" but must be more than "very heavy" odds against success). See also L. JAFFE, supra note 1, at 434 (exhaustion may be excused if "there is little to be gained from an administrative hearing"); Fuchs, supra note 7, at 908-09 (appropriate to excuse where agency "has become rigidly precommitted against" relief).
administrative proceedings would serve the doctrine's policies. Instead, further administrative proceedings may be appropriate even where it is clear that the agency will ultimately deny relief if those proceedings would assist in determining facts or resolving other aspects of the controversy. Thus, despite the inherent attractiveness of a simple-sounding futility exception, the term is unsatisfactory because it has no fixed meaning and ignores important aspects of the exhaustion policies.

Most decisions applying a futility exception fall into one of several categories. The largest and least coherent category involves claims that an agency is committed to denying relief due to precedent, regulation, or some less-specific agency position. Remarkably little analysis or apparent agreement exists concerning how fixed an agency's views must be before a court will deem pursuit of an inconsistent decision from the agency futile. Courts may view challenges to regu-
lations as definitely futile or not futile, and the same court may seem to take a strict view in some cases and a lenient one in others. Many courts seem to prefer generalization to analysis and often limit their discussion of futility to a brief description of the claim and a statement that the agency is or is not sufficiently committed to a particular result.

Courts are on firmer, if still conceptually shaky, ground when they couple futility with an additional aspect of the case that makes judicial review more appropriate under the circumstances. Thus, courts are more likely to excuse a plaintiff for failing to raise an issue before an agency where another party raised that issue in administrative proceedings, thereby providing the agency with a full opportunity to rule on the matter. For different reasons, courts may properly excuse exhaustion where futility is tied to bias or some other agency malfeasance.

169. The cases discussed in supra note 166 split three to two in favor of futility.

170. Compare, e.g., Athline Indus. v. Consumer Prod. Safety Comm'n, 707 F.2d 1485, 1489 (D.C. Cir. 1983) (exhaustion excused if administrative relief "highly unlikely") with Spanish Int'l Broadcasting Co. v. FCC, 385 F.2d 615, 626 (D.C. Cir. 1967) (exhaustion required even if denial of relief is probable); Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 500 (9th Cir. 1980) (futile because agency has decided legal question) with Lone Star Cement Corp. v. FTC, 339 F.2d 505, 510 n.9 (9th Cir. 1964) (exhaustion required despite agency resolution of legal question in prior decisions); and Frontier Airlines, Inc. v. Civil Aeronautics Bd., 621 F.2d 369, 371 (10th Cir. 1980) (exhaustion excused because "very doubtful" agency would reverse previous practice) with St. Regis Paper Co. v. Marshall, 591 F.2d 612, 614 (10th Cir. 1979) (exhaustion required in part because opportunity to challenge regulation within agency "cannot be deemed 'futile'").

171. See, e.g., Sioux Valley Hosp. v. Bowen, 792 F.2d 715, 724 (8th Cir. 1986) (one sentence description of futility and a brief recitation indicating pattern of agency decisions); Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 29 n.5 (D.C. Cir. 1984) (three sentence footnote stating only a conclusion); Dooley v. Ploger, 491 F.2d 608, 614-15 (4th Cir. 1974) (three sentences on futility exception, none of which explains its meaning); Porter County Chapter of Izaak Walton League v. Costle, 571 F.2d 359, 363 (7th Cir. 1978) (although one of the most cited futility decisions, its only discussion of law governing the exception is: "A remedy need not be exhausted if to do so would be a futile gesture.").

172. In such cases, the focus is more clearly on "true" futility—nothing to be gained by exhaustion—because other parties fully exhausted and therefore served the policies underlying the exhaustion doctrine. See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993, 999 (1st Cir. 1983) (predecessor in interest used variance procedures); Buckeye Cablevision, Inc. v. United States, 438 F.2d 948, 951 (6th Cir. 1971) (issue raised by other party to administrative proceeding); Wolff v. Selective Serv. Local Bd. No. 16, 372 F.2d 817, 825 (2d Cir. 1967) (agency considered issues at all levels in companion cases); L. Jaffe, supra note 1, at 457-58 (the primary purpose of the waiver prong is to allow the agency the opportunity to resolve the issue, which is often met in this setting). While requiring exhaustion in settings where another party has fully litigated the issue before the agency does not strongly serve exhaustion policies, courts do not universally agree that exhaustion should be excused. As the Supreme Court noted in United States v. L.A. Tucker Truck Lines, 344 U.S. 33 (1952), exhaustion in such cases "might lead to a change in policy, or, if it did not, the Commission would at least be put on notice of the accumulating risk of wholesale reversals being incurred by its persistence." Id. at 37. See also Lone Star Cement Corp. v. FTC, 339 F.2d 505, 510 n.9 (9th Cir. 1964) (the agency may determine that it was in error in prior cases, distinguish those cases, or determine that no violation occurred despite adhering to previous views). Thus, even though courts may properly excuse exhaustion in many of these cases, more is required than simply noting that the agency resolved the same issue in other proceedings. As with other varieties of "futility," glib characterization should not be the end of the analysis.

173. Bias cases involve a particularly severe form of futility. Where an agency merely predetermines an issue in the normal course of its proceedings, a reviewing court's assumption that the agency may reverse or refine its position in further proceedings is reasonable. Where the predetermination results from bias, however, that assumption is no longer valid. Nevertheless, decisions ana-
other related futility category concerns challenges to agency procedures. Courts sometimes deem such challenges as involving futility because the plaintiff must submit to those procedures if exhaustion is required.\(^\text{175}\)

lyzing bias emphasize the limited scope of this version of futility, noting that a mere allegation of bias is insufficient or that a strong showing of bias is necessary. See, e.g., Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1156 (D.C. Cir. 1979) (excusing exhaustion but describing the exception as "extremely narrow" and noting that no administrative fact-finding was necessary), cert. denied, 447 U.S. 921 (1980); United States v. Litton Indus., 462 F.2d 14, 17 (9th Cir. 1972) (exception applicable "only in the 'exceptional' case where the court is presented with undisputed allegations of fundamental administrative prejudice"). Professor Davis concludes "that exhaustion is required except when the court forms a preliminary impression that the charge of bias has substantial support." K. Davis, 1983 TREATISE, supra note 2, at 422.

In general, the cases indicate that bias is a factor in applying the exhaustion doctrine rather than an independent exception. See, e.g., First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 697-700 (3d Cir. 1979) (analyzing bias in the context of the "clear violation" exception), cert. denied, 444 U.S. 1074 (1980); Touche Ross & Co. v. SEC, 609 F.2d 570, 575-77 (2d Cir. 1979) (analyzing bias in terms of "clear violation" exception and policies behind exhaustion doctrine); Association of Nat'l Advertisers, 627 F.2d at 1156-57 (analyzing bias in terms of policies behind exhaustion doctrine); cf. Gelpe, supra note 3, at 38 (noting that a "clear violation" is not likely to occur unless accompanied by bad faith).

All in all, the case law suggests that bias is not a simple concept but instead ranges in meaning and intensity. Accordingly, courts should evaluate bias on a case-by-case basis, weighing it with other factors rather than treating it as a single dispositive factor.

174. A number of cases seem premised more on "unclean hands" than on futility. Courts may excuse exhaustion where the agency refuses to permit the plaintiff to use an administrative remedy, Schatten v. United States, 419 F.2d 187, 192 (6th Cir. 1969) (refusal of military officer to hear appeal of disciplinary decision is itself a violation of law permitting judicial intervention), or erroneously advises a party that there is no administrative appeal of an agency decision, Athas v. United States, 597 F.2d 722, 725 (Cl. Ct. 1979). Another variety of misconduct concerns an agency's refusal to follow the court's view of the law. In Lopez v. Heckler, 725 F.2d 1489 (9th Cir.), vacated on other grounds, 469 U.S. 1082 (1984), the court refused to require class members to exhaust administrative remedies largely because the agency's nonacquiescence policy prevented administrative claimants from receiving disability benefits even when entitled to them under the law of the circuit. Id. at 1493-94, 1503. In such cases, requiring exhaustion helps agencies to avoid rather than to implement law and policy. A final category under malfeasance involves claims of agency harassment. Here futility exists for the same reason it does in some bias cases—a corrupt administrative process can in no way serve the purposes of the exhaustion doctrine. See, e.g., Continental Can Co. v. Marshall, 603 F.2d 590, 597 (7th Cir. 1979) (vexatious and harassing duplicative prosecutions cause an unconstitutional injury and render exhaustion futile); Fairchild, Arabatzis & Smith, Inc. v. Sackheim, 451 F. Supp. at 1185 (S.D.N.Y. 1978) (judicial review of allegations of illegal harassment allowed at least in absence of adequate agency grievance procedures). Here, as elsewhere, however, properly applying the exhaustion doctrine depends on evaluating the policies behind the doctrine and not on a blanket characterization of the case as involving malfeasance. Thus, in Lopez, 725 F.2d at 1500-01, Continental Can, 603 F.2d at 597, and Fairchild, 451 F. Supp. at 1186, the courts analyzed the policies behind exhaustion as part of their application of the "exception" applicable to the alleged malfeasance.

175. The governing theory is that the administrative process is futile as a remedy because its operation constitutes the injury. See, e.g., Barry v. Barchi, 443 U.S. 55, 63 n.10 (1979) (no need to exhaust procedures when action concerns the legality of those procedures); Touche Ross & Co. v. SEC, 609 F.2d 570, 577 (2d Cir. 1979) ("To require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking."). Some of the key decisions in this area focus on the need to exhaust procedures that are designed to obstruct and delay relief from unconstitutional governmental action. In Marsh v. County School Bd., 305 F.2d 94 (4th Cir. 1962), for example, the court excused the exhaustion of administrative challenges to school segregation because requiring that plaintiffs "first pass through the very procedures that are discriminatory would be to require an exercise in futility." Id. at 98; see also Lopez v. Heckler, 725 F.2d 1489, 1503 (9th Cir.) (exhaustion excused where unlawful agency procedures are used to delay relief), vacated on other grounds, 469 U.S. 1082 (1984).

Nevertheless, courts should not automatically excuse exhaustion for procedural challenges. As with the other categories of futility, this version is strongest when combined with other factors pull-
Procedural challenges premised on constitutional claims may also fall into a separate category. This variety of futility is premised on the notion that courts should excuse exhaustion because agencies are neither authorized nor competent to resolve constitutional questions.\(^{176}\) Exhaustion is allegedly futile because the plaintiff cannot prevail or even have the issue considered in administrative proceedings. This is a gross oversimplification in both theory and reality, and is simply untrue. Constitutional questions arise in a variety of settings and exhaustion is appropriate in at least some of them. Agencies routinely resolve constitutional issues in their normal functions and, at least to the extent persons with legal training supervise those functions, agencies are no less competent to decide constitutional issues than are non-Article III judges.\(^{177}\) What an agency may not do, apparently, is declare a statute unconstitutional.\(^{178}\) This disability, however, results from the nature of
the agency's mission to apply and enforce statutes as directed by Congress and not from any general inability to apply and enforce constitutional principles. At most, therefore, exhaustion is truly futile on issues involving the constitutionality of statutes administered by the agency and, even then, only in the sense that the plaintiff cannot prevail within the agency. Futility is not automatic with respect to other constitutional issues and courts take a variety of approaches in determining the effect of their presence in different settings. All too often, courts simply weigh the possibility of administrative redress and excuse exhaustion where an adverse decision is "sufficiently likely," a practice that defies uniformity and predictability.

Even where the nature of the constitutional issue makes administrative redress impossible, exhaustion may still be desirable, because completing the administrative process may serve other exhaustion doctrine purposes. Most cases raise a variety of issues, and adversely resolving one issue, even a constitutional one, does not necessarily justify immediate judicial review. The most obvious reason for requiring exhaustion in this setting is that the agency's resolution of other issues might moot the constitutional issue. If the plaintiff prevails within the agency on other grounds, this success serves agency autonomy and judicial economy because the agency finally disposes of the controversy and plaintiff has no need for judicial review. Disposing of the controversy and the need

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**The Authority of Administrative Agencies to Consider the Constitutionality of Statutes**, 90 Harv. L. Rev. 1682, 1694-97, 1702-06 (1977) (suggesting that in certain situations the benefits of allowing agencies to evaluate the constitutionality of statutes outweigh the harms).

179. Courts have viewed the presence of constitutional questions as a reason to require exhaustion in some cases, e.g., American Fed'n of Gov't Employees v. Nimmo, 711 F.2d 28, 31 (4th Cir. 1983) (the dispute may be resolved prior to judicial review), yet dispositive of an exception in others, e.g., Shick v. Farmers Home Admin., 748 F.2d 35, 39 (1st Cir. 1984) (as long as plaintiff provides more than conclusory allegations). Other positions range from seeing constitutional issues as a factor that cuts both ways, e.g., Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 772-73 (1947) (such issues may be a reason to require exhaustion but are also one factor in excusing exhaustion due to irreparable injury), to an exception in limited situations, e.g., Boettcher v. Secretary of Health & Human Servs., 759 F.2d 719, 721-22 (9th Cir. 1985) (describing Eldridge as creating an exception for "colorable" constitutional claims); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 696 (3d Cir. 1979) (analyzing an exception for "clear and unambiguous statutory or constitutional violation"), cert. denied, 444 U.S. 1074 (1980); McClendon v. Jackson Television, Inc., 603 F.2d 1174, 1177 (5th Cir. 1979) (analyzing an exception applicable upon a "substantial showing" of a constitutional violation).

180. In Lopez v. Heckler, 725 F.2d 1489 (9th Cir.), vacated on other grounds, 469 U.S. 1082 (1984), the court premised much of its exhaustion analysis on its view of the constitutional merits challenge. Id. at 1503. Any vestige of a clear and generally applicable rule disappears when courts determine whether to require exhaustion based on their view of the merits of the underlying claims. Professor Davis is especially critical of the doctrinal incoherence in this area: "The law is entirely clear that in some circumstances the constitutional issue may be decided first and in some circumstances it may not be decided first, but the law is less than clear as to when either result is reached.") K. Davis, 1983 TREATISE, supra note 2, at 435; see also id. at 437-38 (concluding that "no clear principle is discernible"); Fuchs, supra note 7, at 883 ("Judicial opinions ... disclose a number of pertinent considerations but yield no decisive principle."). Other commentators focus on the fact that the practice in this area tends to be "less rigid" than is implied by the judicial language, J. Mashaw & R. Merrill, supra note 61, at 779, and the problems created by the unduly broad discretion provided by an exception for constitutional questions, Comment, supra note 5, at 461-63.

181. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 765 (1975) (exhaustion is futile only if the
for judicial review in this context is especially important in light of the prudential doctrine that courts should not resolve constitutional issues unnecessarily. In addition, requiring exhaustion where resolution of the constitutional issue turns on disputed facts serves the functional policies. Allowing administrative fact-finding in such cases is more efficient for both the agency and the reviewing court even if courts must eventually resolve the legal issues. Requiring exhaustion in a substantial number of cases presenting constitutional issues, therefore, serves at least some interests.

The exhaustion policies do not require exhaustion in all constitutional cases. Constitutional questions often present legal issues that are central to the judicial function and are not within agency expertise or discretion. Courts, however, have some reasons to require exhaustion within agency expertise or discretion.

agency determines that a social security "claim is neither otherwise invalid nor cognizable under a different section of the Act"); Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 772 (1947) (resolution of non-constitutional issues may dispose of controversy); American Fed'n of Gov't Employees v. Nimmo, 711 F.2d 28, 31 (4th Cir. 1983) (requiring exhaustion may result in eliminating constitutional questions); Shelter Framing Corp. v. Pension Benefit Guar. Corp., 705 F.2d 1502, 1509 (9th Cir. 1983) (exhaustion excused in part because arbitration would not "eliminate the need to consider the constitutional challenge").

182. A leading statement of this principle is from Justice Brandeis's concurring opinion in Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936). That opinion states that courts should not decide constitutional questions "if there is also present some other ground upon which the case may be disposed of." Id. at 347. See also Moore v. City of East Cleveland, 431 U.S. 494, 526 (1977) (Burger, C.J., dissenting) ("few concepts have had more faithful adherence in this Court than the imperative of avoiding constitutional resolution of issues capable of being disposed of otherwise"); Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128, 1137 (3d Cir. 1979) (constitutional questions should not be resolved if the matter can be resolved on another issue, citing Ashwander). In criticizing the notion that the mere presence of a colorable constitutional claim excuses exhaustion, Professor Davis notes: "The longterm law that nonconstitutional questions must generally be decided before constitutional questions may be raised has enough merit that it may again become longterm law." K. DAVIS, 1983 TREATISE, supra note 2, at 441. This principle serves as a counterweight to the notion that the presence of constitutional issues makes a case particularly appropriate for judicial review. Using the terminology of the exhaustion policies, the presence of constitutional issues makes the agency's interests in exhaustion weaker, but makes the judiciary's interests in exhaustion stronger.

183. Courts as well as agencies benefit from this increased efficiency. The Seventh Circuit analyzed the problem in Grutka v. Barbour, 549 F.2d 5 (7th Cir.), cert. denied, 431 U.S. 908 (1977), a case involving a first amendment challenge to an NLRB representation election involving teachers in Catholic schools. The court noted that the key issue, the potential entanglement of the government in religious affairs, could "only be measured against a factual record" best determined through "the very operation of the exhaustion doctrine." Id. at 8. This aided the court because "developing a factual record in labor disputes is a task peculiarly within the competence of the [NLRB]." Id. at 9. See also DuBois Clubs of Am. v. Clark, 389 U.S. 309, 312 (1967) ("important and difficult constitutional issues would be decided devoid of factual context" if exhaustion were not required); Athlone Indus. v. Consumer Prod. Safety Comm'n, 707 F.2d 1485, 1489 (D.C. Cir. 1983) (exhaustion excused noting that "[n]o factual development ... will aid the court's decision"); Gelpe, supra note 3, at 44 ("[T]he agency's record might help bring the facts into focus so that eventual judicial resolution of the constitutional claim will be as well founded and narrow as possible."). Thus, even though constitutional issues are present, one of the primary purposes of the exhaustion doctrine, agency fact-finding, may be strong enough to mandate exhaustion.

184. In Andrade v. Lauer, 729 F.2d 1475 (D.C. Cir. 1984), the court noted that one reason for excusing exhaustion was that "resolution of constitutional questions is of course one of the traditional, core functions of the judicial system." Id. at 1491-92; cf. Lopez v. Heckler, 725 F.2d 1489, 1503 (9th Cir.) (executive is clearly subject to judicial primacy in interpreting law), vacated on other
unless the sole issue is the constitutionality of a statute, judicial review is inevitable, and no factual development would aid the court. While these criteria could be restated as one exception to the exhaustion requirement, such an approach seems both awkward and confusing. A more straightforward approach is to state what the criteria represent: a weighing of the policies supporting exhaustion against the hardship of denying review. Of equal importance, a weighing process provides one structure for resolving all exhaustion cases raising constitutional issues, while the shaved-down exception for certain constitutional challenges to statutes erroneously implies that exhaustion is required in all other cases.

In sum, while some courts appear to apply a broad exception for futility, others at least recognize that futility is a tool of exhaustion analysis rather than a dispositive factor. Futility seems most pertinent to gauging the pragmatic finality of agency action. That is, if further proceedings would be futile, the existing agency decision is “final” as a practical matter. Still, the preceding discussion establishes that various levels of futility exist and that the exhaustion policies are strong even in some cases that unquestionably involve futility. Insensitive use of the term “futility” can therefore result in opaque and erroneous decisions, while careful treatment of futility through interest weighing is likely to result in well-reasoned decisions that the exhaustion policies justify.

2. Irreparable Injury

Irreparable injury, another recurring issue in exhaustion analysis, has a status somewhat analogous to that of futility. Courts analyzing “irreparable injury” in exhaustion cases focus on the hardship of denying judicial review. Cases often state that exhaustion is excused where the plaintiff will suffer irreparable injury if review is denied, apparently regardless of the extent to which further administrative proceedings would...

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469 U.S. 1082 (1984). This is often contrasted with the lack of agency expertise in constitutional matters. E.g., Andrade, 729 F.2d at 1491 (administrative “decisionmakers . . . have neither the qualifications nor the expertise to articulate and develop [separation of powers] principles”); Shelter Framing Corp. v. Pension Benefit Guar. Corp., 705 F.2d 1502, 1509 (9th Cir. 1983) (agency expertise cannot assist in resolution of a “naked constitutional law issue”). Where constitutional issues co-exist with statutory issues or depend on particular facts, administrative expertise, discretion, or fact-finding, courts should accord these non-constitutional issues significant weight.

A number of well-reasoned decisions purporting to apply a constitutional issue exception engage in an explicit or implicit weighing of the pertinent exhaustion policies and the hardship of denying review. For example, in Andrade, the court described its reasoning as follows: “Once again, we analyze this issue in the light of the four purposes of the exhaustion doctrine.” Id. at 1491. See supra note 36 for the court’s statement of those purposes. The court then addressed and found irrelevant or insufficient agency autonomy, agency expertise, and judicial economy, and determined that the plaintiffs would suffer a significant hardship if review was denied. Id. at 1491-93. See also Boettcher v. Secretary of Health & Human Servs., 759 F.2d 719, 722 (9th Cir. 1985) (explicit balancing of exhaustion interests in defining “colorable” constitutional claim); McGrath v. Weinberger, 541 F.2d 249, 252-53 (10th Cir. 1976) (weighing of exhaustion interests against loss of due process challenge resulting from requiring exhaustion); Finnerty v. Cowen, 508 F.2d 979, 981-83 (2d Cir. 1974) (analyzing hardship and absence of factors justifying exhaustion).
serve the exhaustion policies.\textsuperscript{186} As a practical matter, however, irreparable injury is an abstract standard that is almost impossible to meet. Courts seldom apply this exception and even more rarely find that it excuses exhaustion except in cases in which other factors also militate against requiring exhaustion. The limited use of irreparable injury to excuse exhaustion is a consequence of two weaknesses of the rule with exceptions approach. First, because the irreparable injury exception evaluates only the hardship to the plaintiff, it is drawn in very narrow terms. This is necessary if courts are to avoid excusing exhaustion in situations in which the exhaustion policies strongly favor enforcing the requirement. Second, and perhaps redundantly, because courts are reluctant to excuse exhaustion in such situations, courts may characterize truly irreparable injuries as something less in order to deny judicial review. As with futility, courts can more rationally apply the doctrine by sensitively weighing the exhaustion policies against the relative hardships of the parties.

The irreparable injury concept has several peculiarities that render it weak and ambiguous as a tool of exhaustion analysis.\textsuperscript{187} One curious

\textsuperscript{186} See supra note 51. Professor Gelpe describes the irreparable injury exception as follows: "[E]ven if exhaustion would serve the values behind the doctrine, the cost to the plaintiff is so high that, on balance, it is best not to require exhaustion." Gelpe, supra note 3, at 48. Courts employing other approaches consider irreparable injury as well. Thus, the nature and extent of injury was crucial to the Supreme Court's balancing analysis in McKart v. United States, 395 U.S. 185 (1969), see supra text accompanying notes 90-95, and was analyzed in Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (irreparable injury from denial of pre-deprivation hearing), Heckler v. Ringer, 466 U.S. 602, 618 (1984) (noting absence of showing of colorable irremediable injury), and Bowen v. City of New York, 106 S. Ct. 2022, 2032 (1986) (various injuries, see supra note 147 and accompanying text).

\textsuperscript{187} A threshold problem concerns the relationship between irreparable injury and an exception for cases in which exhaustion would result in an inadequate remedy. One court of appeals has stated the distinction as follows:

[T]he litigant faces irreparable injury if judicial non-intervention results in harm of an extraordinary nature, and the litigant faces an inadequate remedy, even if his harm is not out of the ordinary, if the agency's limited power to grant relief or the agency's hostile attitude makes it impossible or highly improbable that the litigant will obtain the relief he seeks.

West v. Bergland, 611 F.2d 710, 719 n.11 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980). See also United States v. Anthony Grace & Sons, 384 U.S. 424, 429-30 (1966) (stating that plaintiffs have no need to exhaust if administrative remedies are inadequate or unavailable, such as where an agency is unwilling to act or appears to lack authority in a particular matter); Aleknagik Natives Ltd. v. Andrus, 648 F.2d 496, 499 (9th Cir. 1980) (recognizing exception "if administrative remedies are inadequate or not efficacious"). Professor Davis catalogs a number of situations that the inadequacy exception arguably encompasses: undue delay, agency stalemate, agency inability to resolve, statutory preclusion, uncertainty, and futility. K. DAVIS, 1983 TREATISE, supra note 2, at 464-66.

Davis's examples suggest that the inadequate remedy exception is essentially a variant of futility, as it emphasizes the general uselessness of the administrative process. Clearly, then, the inadequate remedy exception is premised not on the existence or magnitude of hardship, but rather on the relative weakness of the exhaustion policies. Indeed, courts generally require exhaustion even where administrative procedures or remedies are inadequate as long as the administrative process would still serve the exhaustion policies. Accordingly, despite a name that suggests a focus on hardship, applying the inadequate remedy exception turns on the purposes of the exhaustion doctrine.

Problems of distinguishing irreparable injury from inadequate remedy are not limited to the exhaustion doctrine. The problem arises most starkly in equity, which is traditionally limited to cases in which there is no adequate remedy at law. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 27 (1973) ("When the plaintiff seeks an equitable remedy, . . . the rule is that he may have the
aspect of the doctrine is that some authorities state that irreparable injury is always a prerequisite to judicial review. If irreparable injury were both an independent exception and a prerequisite to judicial review, courts would not need to apply other exhaustion analysis. Courts would excuse exhaustion where irreparable injury were shown, without analyzing other issues, because it would be an exception. Conversely, courts would always require exhaustion in the absence of irreparable injury, again without analyzing the issues, because irreparable injury would be a precondition of judicial involvement. Upon close examination, however, the “prerequisite theory” is more likely a facet of the traditional notion that plaintiffs must establish irreparable injury before a court of equity will grant an injunction, than a part of the exhaustion doctrine.

188. See, e.g., Renegotiation Bd. v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974) (“Without a clear showing of irreparable injury . . . failure to exhaust administrative remedies serves as a bar to judicial intervention in the agency process.”) (citations omitted); Hastings v. Judicial Conference of the United States, 770 F.2d 1093, 1102 (D.C. Cir. 1985) (court may not review ongoing administrative proceedings absent “serious and irreremediable injury”); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Ass’n of Sec. Dealers, 616 F.2d 1363, 1370 (5th Cir. 1980) (irreparable injury is required before the courts may interrupt administrative proceedings); Consolidated Gas Supply Corp. v. Federal Energy Regulatory Comm’n, 611 F.2d 951, 959 (4th Cir. 1979) (courts will review interlocutory orders in administrative proceedings only if the orders are definitive and threaten irreparable harm).

189. See supra note 187. See also Lewis v. Reagan, 660 F.2d 124, 128 (5th Cir. Oct. 1981) (“clear showing of irreparable injury” required to enjoin administrative proceedings); Baldwin Metals Co. v. Donovan, 642 F.2d 768, 775 & n.17 (5th Cir. Unit A Apr. 1981) (requiring exhaustion because “[a]n inadequate remedy at law and an irreparable injury should exist before a court grants injunctive relief,” citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959)); A.O. Smith Corp. v. FTC, 530 F.2d 515, 525-29 (3d Cir. 1976) (preliminary injunction reversed because of lack of showing of irreparable injury).

One possible ramification of requiring irreparable injury is that the setting of the exhaustion problem may determine whether a court will require irreparable injury. Where no agency proceedings are ongoing, as in McKart, showing irreparable injury is unnecessary because no injunction is
conceived, irreparable injury is at most a prerequisite only to judicial orders enjoining agency proceedings and not a precondition to other remedies. Courts have even questioned the strictness of requiring irreparable harm where ongoing agency action is under review. At most, where courts observe that traditional limitation on injunctive relief, irreparable injury is a necessary precondition. Where courts do not observe the limitation, the extent of injury may be pertinent to the exhaustion inquiry, but irreparable injury is not an absolute requirement.

Because irreparable injury is usually described as an exception to the exhaustion requirement, however, in theory irreparable injury is dispositive where it exists. Perhaps in recognition of the potential mischief of automatically excusing exhaustion solely on this basis, the exception is described in remarkably narrow terms. Courts routinely emphasis that plaintiffs have a heavy burden of persuasion and notions of irreparable injury carried over from equity jurisprudence severely limit the term's meaning. Arguably, only those injuries that are peculiar, if not unique,
and incapable of later redress fall within the exception.193 Thus, even where an interim agency order causes a substantial present injury, judicial review is not automatic.194 Rather, the injury must be both unusual\textsuperscript{195} and irreparable in the more common sense that it cannot be corrected through a later reversal of the interim action.196 Irreparable

193. Professor Gelpe states that exhaustion may be excused where a plaintiff shows “a unique injury,” Gelpe, supra note 3, at 56, and notes that irreparable injury is properly an exception to the exhaustion requirement upon a “clear showing that exhaustion would cause significant and irreparable injury peculiar to the plaintiff.” Id. In the related context of a stay of agency action, the Supreme Court defined “irreparable injury” as follows:

The key word in this consideration is irreparable. Mere injuries, however, substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1947). Typical examples of irreparable injuries include environmental harms, e.g., Amoco Prod. Co. v. Village of Gambell, 107 S. Ct. 1396, 1404 (1987) (effects of Alaskan oil and gas production), the loss of a specific parcel of real property, e.g., United Church of the Medical Center v. Medical Center Comm'n, 689 F.2d 693, 701 (7th Cir. 1982) (“a given piece of property is considered to be unique, and its loss is always an irreparable injury”), and damage to reputation, e.g., Greene v. Bowen, 639 F. Supp. 554, 563-64 (E.D. Cal. 1986) (physician’s suspension from medicare practice will irreparably harm his professional reputation).

Another common description is that equitable jurisdiction is appropriate “if the property involved is unique, so that it or its substantial equivalent could not be replaced with the damages recovered, or if the probable injury is irreparable, in such a nature that the damages cannot be ascertained with reasonable accuracy, . . . .” H. McClintock, supra note 187, at 105. The following is a quite different approach: “Concepts such as irreparable injury are incapable of precise definition and, by their nature, depend on the circumstances surrounding each case.” Dow Chem., USA v. Consumer Prod. Safety Comm'n, 459 F. Supp. 378, 394 (W.D. La. 1978).

194. Questions concerning the reviewability of interim agency orders of temporary duration can be seen as involving ripeness, exhaustion, or both doctrines. Ripeness is arguably at issue because the agency action has a present impact but the agency probably has not finally resolved the underlying issues. Exhaustion is arguably at issue because there are usually ongoing administrative proceedings capable of finally resolving the issues and remedying the effects of the interim order if the agency concludes that it was issued in error. Professor Fuchs, who sees the problem as ripeness, states that such actions are reviewable “if they have consequences that are not remediable later and that should be prevented if the orders are invalid.” Fuchs, supra note 7, at 838. Compare, e.g., Marathon Oil Co. v. Department of Energy, 642 F.2d 436, 438-39 (Temp. Emer. Ct. App. 1981) (temporary allocation of oil is not reviewable, as plaintiff can be compensated at conclusion of administrative proceedings) with Michigan Power Co. v. FPC, 494 F.2d 1140, 1142-43 (D.C. Cir. 1974) (interim order permitting the filing of a revised tariff is reviewable because of immediate impact and irreparable harm).

195. See supra note 193. McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982), suggests the sort of unusual injury traditionally cognizable in equity. The defendants in this civil rights action claimed immunity from suit. The court held that ordinarily trials should be stayed until immunity questions are resolved because failure to do so would irreparably injure the defendants by depriving them of their immunity. Id. at 317 & n.13. Other cases suggest the somewhat ephemeral nature of the requisite level of injury. Compare, e.g., Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 630 (4th Cir. 1979) (“A future injury of uncertain date and incalculable magnitude is irreparable harm”) with Aluminum Workers Int'l Union v. Consolidated Aluminum Corp., 696 F.2d 437, 443-44 (6th Cir. 1982) (even substantial and non-recoupable injuries caused by loss of employment are not considered irreparable, in part because they are speculative) and Cate v. Oldham, 707 F.2d 1176, 1188-89 (11th Cir. 1983) (loss of first amendment rights constitutes irreparable injury) with American Postal Workers Union v. United States Postal Serv., 766 F.2d 715, 721-22 (2d Cir. 1985) (only specific present injuries or threats resulting from first amendment violations are irreparable).

196. “The question is . . . whether an immediate appeal is necessary to give realistic protection to the claimed right.” L. Jaffe, supra note 1, at 429. Professor Jaffe notes that “[i]rreparable injury in its strictest sense is the probable loss, if exhaustion is required, of the value (monetary or moral) of an asserted right or defense . . . [and that] where relief from a wrong requires an immediate remedy
injury, then, turns on the particularity and finality of harm. While the magnitude of harm may be relevant, its permanence is far more important.

In accordance with these theoretical premises of irreparable injury, the cases stress the possibility of some future remedy and generally require exhaustion unless such a remedy is highly unlikely. Thus, business hardships rarely meet this requirement, if only because most such hardships translate into monetary losses that are recoverable in theory if not in fact.\textsuperscript{197} Less tangible business hardships present greater difficulties. Most courts are unsympathetic to claims that good will or credit will be damaged even though losses attributable to such problems may very well be permanent.\textsuperscript{198} Courts, however, are more likely to recognize as irreparable injuries some exceptionally severe business harms, such as the probable destruction of a particular business, as well as harms more traditionally cognizable in equity, such as the loss of trade secrets.\textsuperscript{199} Eco-

\textit{the wrong-creating action is ‘final . . . . ’}'' \textit{Id.} at 429-30. He argues that interlocutory orders may be reviewed if the denial of judicial review will cause "drastic and incalculable effects." \textit{Id.} at 443. His approach, therefore, mixes notions of futility, irretrievability, and level of hardship. As such, it reflects a broader understanding than the traditional concept of irreparable injury.

In contrast, perhaps, is the Third Circuit's analysis of irreparable injury in the injunctive setting. That court appears to adhere to the strict meaning, relying on the following definition of irreparable injury:

"The word means that which cannot be repaired, retrieved, put down again, atoned for . . . . Grass that is cut down cannot be made to grow again; but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that compensation in money cannot atone for it . . . ." \textit{Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728 (1857)}, quoted in \textit{A.O. Smith Corp. v. FTC, 530 F.2d 515, 525 (3d Cir. 1976)}.

\textsuperscript{197} Where monetary losses are realistically recoupable or will not occur until the end of administrative procedures, there is relatively little dispute among cases concerning irreparable injury. \textit{See, e.g., Smith v. Schweiker, 709 F.2d 777, 781 (2d Cir. 1983)} (no irreparable injury because disability benefits will be paid during administrative appeal); \textit{Marathon Oil Co. v. Department of Energy, 642 F.2d 436, 438-39 (Temp. Emer. Ct. App. 1981)} (erroneous allocation of crude oil can be remedied at the end of the proceedings). Some courts closely analyze the situation to determine whether recoupment is realistically probable. Thus, in \textit{Mobil Oil Corp. v. Department of Energy, 520 F. Supp. 420 (N.D.N.Y.), rev'd on other grounds, 659 F.2d 150 (Temp. Emer. Ct. App.), cert. denied, 454 U.S. 1110 (1981)}), the court enjoined agency action requiring Mobil to pay substantial sums to other refiners. The court relied in part on its conclusion that should the company eventually succeed in litigation, it would be unable to recoup those funds due to the poor financial status of some of those refiners. \textit{Id.} at 443, 455-58.

\textsuperscript{198} \textit{See, e.g., Allen v. Grand Central Aircraft Co., 347 U.S. 535, 540 (1954)} (exhaustion is not excused "merely because [administrative proceedings] might jeopardize . . . . bank credit or otherwise be inconvenient or embarrassing"); \textit{Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 777-78 n.42 (1947)} (dismissing numerous claims of business hardship including impaired credit, insolvency of customers, loss of use of funds, and reduction of working capital); \textit{First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 696-97 (3d Cir. 1979)} (potential publicity from disciplinary proceeding and "panic selling" of securities are insufficient to establish irreparable injury), \textit{cert. denied, 444 U.S. 1074 (1980)}; \textit{A.O. Smith Corp. v. FTC, 530 F.2d 515, 527-28 (3d Cir. 1976)} (loss of profits and cost of compliance are not sufficient to constitute irreparable injury for injunctive relief).

\textsuperscript{199} A number of Second Circuit cases hold or suggest that very substantial business hardships constitute irreparable injury. \textit{E.g., PepsiCo, Inc. v. FTC, 472 F.2d 179, 187 (2d Cir. 1972)} ("continuing threat of a complete restructuring of an industry"); \textit{Aquavella v. Richardson, 437 F.2d 397, 404 (2d Cir. 1971)} (company "forced out of business after substantially all of its revenues were suspended"); \textit{T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 621, 631-33 (N.D.N.Y. 1984)} (finding irreparable injury in substantial losses endanger-
nomic hardship to an individual presents a somewhat more convincing case for irreparable injury, but the cases still vary. Some cases apply strict rules, such as one that loss of employment is insufficient, while others use more sympathetic case-specific analyses of individual hardship.

Many hardship claims are characterized as normal incidents of administrative litigation. Courts usually dismiss such claims, often with little analysis and a brief reference to Myers. Where plaintiffs prove specific and unusual burdens of litigation, however, some courts more willingly find irreparable injury. Even there, however, courts are disinclined to excuse exhaustion, perhaps due to the difficulty of drawing a bright line between normal and abnormal hardships of undergoing administrative litigation (including continued existence of business and equating standard for exception and injunctive relief). See also Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549, 559-60 (2d Cir. 1978) and West v. Bergland, 611 F.2d 710, 718 (8th Cir. 1979) (listing a number of business and other injuries sufficient to justify review). One example in West is the destruction of confidentiality by agency publication of trade secret. Id. See also L. JAFFE, supra note 1, at 429 (confidential document); Fuchs, supra note 7, at 844-45 (disclosure of trade secrets).

200. One distinction between business hardship and personal harm is that business hardship, even unrecoupable financial loss, is to some extent merely a cost of doing business. While the loss of employment is a bridge between the two categories, the usual approach is to dismiss it much as business hardships are dismissed. See, e.g., Sampson v. Murray, 415 U.S. 61, 89-91 (1974) (loss of government employment does not constitute irreparable injury); Andrade v. Lauer, 729 F.2d 1475, 1489-90 (D.C. Cir. 1984) (loss of employment without more insufficient to constitute irreparable injury for purposes of making an exception to the exhaustion requirement); DiLiberti v. Brown, 583 F.2d 950, 951 n.1 (7th Cir. 1978) (discharge from government employment is not in itself irreparable injury). Courts closely analyzing the problem may find that the boilerplate doctrine does not always fit very well. In Greene v. Bowen, 639 F. Supp. 554, 563 (E.D. Cal. 1986), for example, the court refused to apply the general rule, noting that its validity depends on the availability of an action for damages or restitution.

201. Most of the social security cases involve individual economic harm. The hardship of losing benefits pending the conclusion of agency proceedings is technically reparable because back payments are available. Nevertheless, most cases characterize the temporary loss of funds as a sufficiently serious hardship to justify careful scrutiny. E.g., Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (excluding exhaustion in part because of claimant's physical condition and dependency upon the disability benefits). More recently, the Court has considered other claims of personal harm in determining whether to require exhaustion. E.g., Bowen v. City of New York, 106 S. Ct. 2022, 2032 (1986) (the claimants would suffer irreparable injury from medical problems caused by the loss of benefits). Mental Health Ass'n v. Heckler, 720 F.2d 965 (8th Cir. 1983), raised many of the same issues involved in the City of New York litigation. There the Eighth Circuit approved district court findings that denying or terminating benefits caused disability recipients irreparable "'harm such as deterioration of their medical conditions, disruption of physician-patient relationships, inability to pay for essential medications, and agitation and extreme anxiety,' " and particularly noted that the injuries could not be redressed "'through a retroactive award of benefits.'" 720 F.2d at 970, quoting from Mental Health Ass'n v. Schweiker, 554 F. Supp. 157, 166 (D. Minn. 1982). See also Polaski v. Heckler, 585 F. Supp. 1004, 1013 (D. Minn. 1984) ("Claimants who lose or are denied benefits face foreclosure proceedings on their homes, suffer utility cutoffs and find it difficult to purchase food. They go without medication and doctor's care; they lose their medical insurance. They become increasingly anxious, depressed, despairing—all of which aggravate their medical conditions.").

ministrative procedures. The judicial reluctance to deem such injuries irreparable is ironic, for even where they are neither unusual nor substantial, litigation burdens are among the most "irreparable," or non-recoupable, effects of the administrative process.

203. The cases indicate that few burdens of administrative procedures meet the irreparable injury standard. Some authorities suggest that extraordinary litigation expenses should be a factor, but their analysis seems tied to a balancing approach in which this is only part of the inquiry. See, e.g., West v. Bergland, 611 F.2d 710, 720 (8th Cir. 1979) (weighing litigation costs in light of the exhaustion policies), cert. denied, 449 U.S. 821 (1980); L. Jaffee, supra note 1, at 428-29 ("There are ... certain collateral risks of litigation which the law should seek to minimize"). Some authority supports the notion that exhaustion should be excused where the administrative process itself will cause a significant injury, but this seems unduly vague unless it relates to a specific problem of inadequacy or futility. Professor Jaffee's example of the loss of confidentiality of a document, see supra note 199, constitutes this sort of injury. Such a loss is both permanent and specific, and is unusual enough that it should not result in too many cases in which exhaustion is excused. A number of cases also discuss the hardship resulting from administrative delay. Here, however, courts seem unwilling to excuse exhaustion unless the delay causes significant harm to the public interest, e.g., Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549, 560 (2d Cir. 1978) (awaiting conclusion of administrative proceedings is likely to cause enormous waste of resources and failure to meet congressionally mandated deadlines), or to non-economic personal interests, e.g., New Mexico Ass'n for Retarded Children v. New Mexico, 678 F.2d 847, 850-51 (10th Cir. 1982) (delay in resolving rights of handicapped children to educational services); but see Gelpe, supra note 3, at 57 (arguing that the appropriate remedy for undue delay is to order the agency to act by a specific date).

204. One unusual decision permits judicial review of an interlocutory FTC decision ordering the major oil companies to retain virtually all documents in their possession pending the conclusion of administrative proceedings. Exxon Corp. v. FTC, 411 F. Supp. 1362, 1365-66 (D. Del. 1976). The court did not specifically characterize the injury as irreparable, id. at 1373 & n.43, but weighed the hardship imposed by the order and the fact that judicial review at the conclusion of the case would not redress the hardship. Id. at 1373-75. Other decisions addressing particular litigation burdens deny irreparable injury to claims of improper agency hearing procedures, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Ass'n of Sec. Dealers, 616 F.2d 1363, 1368-70 (5th Cir. 1980) (argument that Association gave unfair advantages to plaintiff's adversary), that necessary information is being withheld, e.g., Lewis v. Reagan, 660 F.2d 124, 128-29 (5th Cir. Oct. 1981) (denial of access to information on missing-in-action status of plaintiff's spouse), that denial of judicial review will result in a multiplicity of actions, e.g., Rosenthal & Co. v. Bagley, 581 F.2d 1258, 1262 (7th Cir. 1978) (numerous administrative reparations proceedings), and that denial of judicial review will result in increased liability for statutory penalties, Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 909-11 (3d Cir. 1982) (penalties mounting daily under Clean Air Act).

205. See, e.g., Hunt v. Commodity Futures Trading Comm'n, 591 F.2d 1234, 1239 n.4 (7th Cir.) (Markey, C.J., dissenting) ("[I]t is idle to pretend that unwarranted waste of time and money by appellants ... is 'reparable' in a second appeal. Regulatory agencies are essentially immune from responding in damages for even the most flagrantly arbitrary and capricious action."), cert. denied, 442 U.S. 921 (1979). The problem is not that such injuries are "reparable" but that they are inevitable. To a regulated company, at least, such hardships are a part of the cost of doing business. This appears to be the rationale for requiring exhaustion despite unrecoupable costs and burdens of administrative litigation. E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. National Ass'n of Sec. Dealers, 616 F.2d 1363, 1368-70 (5th Cir. 1980) (public access to hearings and records of disciplinary proceeding are a part of the Association's disciplinary process); Texaco, Inc. v. Department of Energy, 490 F. Supp. 874, 891-92 (D. Del. 1980) (the hardship of participating in enforcement proceedings "is indistinguishable in principle from the hardship countless other targets of administrative compliance actions have suffered"). If courts treated such hardships as irreparable injuries sufficient to excuse exhaustion, exhaustion would be excused more often than required. A number of courts have raised this version of the "floodgates" argument in dismissing claims of irreparable injury from hardships not sufficiently distinguished from those present in many other cases. See, e.g., Andrade v. Lauer, 729 F.2d 1475, 1490 (D.C. Cir. 1984) (alleged programmatic injuries from governmental reduction in force would occur in all cases of large scale personnel actions); Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 910 (3d Cir. 1982) (allowing interlocutory review of EPA notices of non-compliance due to hardship of mounting fines "would permit the exception to swallow the rule").
seem far more willing to characterize potential injuries to non-procedural constitutional rights or safety as irreparable. Successful claims of irreparable injury, then, usually relate to hardships that are unusual, severe, and sufficiently collateral to the administrative litigation to avoid creating an unduly broad exception.

These stringent limitations on irreparability work several kinds of mischief. Conceptually, the approach requires courts to characterize every purported injury as either irreparable or ordinary. Irreparable injuries justify excusing exhaustion; ordinary injuries are disregarded. Because injuries vary widely, however, these formalistic characterizations present obstacles to meaningful analysis. What is a realistic and expected non-recoverable business cost to a large corporation may be a devastating burden for a smaller business or an individual. Moreover, the same injury can have substantially different effects in different exhaustion settings. Where the effect of requiring exhaustion is merely to defer judicial review until the conclusion of agency proceedings, most injuries are inherent in the legal process.

205. The potential chilling effects on first amendment rights may constitute irreparable injury, at least in certain settings. For example, in Reader's Digest Ass'n v. Federal Election Comm'n, 509 F. Supp. 1210 (S.D.N.Y. 1981), the court considered a challenge to an ongoing investigation by the Commission largely because of the potential effect on freedom of the press if there was no opportunity for judicial review until the completion of the investigation and any resulting administrative proceedings. Id. at 1214. See also West v. Bergland, 611 F.2d 710, 718 (8th Cir. 1979) (recognizing "loss of first amendment freedoms" as irreparable injury), cert. denied, 449 U.S. 821 (1980); Wolf v. Selective Serv. Local Bd. No. 16, 372 F.2d 817 (2d Cir. 1967) (student activists may challenge Selective Service reclassifications because of threat to first amendment rights). In the area of fourth amendment rights, Baldwin Metals Co. v. Donovan, 642 F.2d 710 (5th Cir. Unit A Apr. 1981), required exhaustion of a challenge to agency inspections but indicated that it would excuse exhaustion if favorable judicial review would prevent a fourth amendment injury. Id. at 771-73. Cases identifying public safety aspects of irreparable injury include Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F.2d 231, 245 (3d Cir. 1980) (potential danger constitutes irreparable injury to "constitutional right to 'life and liberty'"); Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 713 (8th Cir. 1979) (concerns about violence and civil unrest on reservation would excuse exhaustion); Jaffee v. United States, 592 F.2d 712, 720 (3d Cir. 1979) (plaintiff need not petition the government to warn soldiers exposed to 1953 nuclear test prior to judicial action because "each day of delay can reasonably be assumed to bring irreversible and perhaps fatal consequences" to soldiers). In addition, the analysis of the impact of losing social security benefits pending administrative action, see supra note 201, is, in essence, an examination of direct personal injury, often with safety overtones.

206. For example, the major oil companies could not reasonably expect to avoid administrative litigation before federal regulatory agencies. Such litigation routinely causes injuries that are not fully recoupable at the conclusion of administration litigation. FTC v. Standard Oil Co., 449 U.S. 232 (1980) and Exxon Corp. v. FTC, 411 F. Supp. 1362 (D. Del. 1976), involved such injuries. In Standard Oil, the injury was the burden of defending arguably baseless allegations, 449 U.S. at 244; in Exxon, it was the cost and inconvenience of retaining business records throughout the administrative process, 411 F. Supp. at 1373. While the Supreme Court and the District Court of Delaware relied on different standards and came to different conclusions, the injuries in each case were normal incidents of large scale business activity in the modern era. In contrast, economic injuries to smaller companies, such as in T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 621, 631-32 (N.D.N.Y. 1984) (withdrawal liability claims may put company out of business), or to individuals, such as in the various social security cases, may constitute far graver and unexpected hardships even if damages or back payment of withheld benefits would accompany success at the end of litigation.

207. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51-52 (1938) ("Lawsuits also
to deny judicial review, however, every injury is irreparable in the sense that it is permanent. 208 Unfortunately, cases do not strictly categorize injuries or make more case-specific evaluations with much consistency. 209 As a result, courts inconsistently apply the irreparable injury exception. The exception potentially obstructs judicial evaluation of most hardships caused by denying judicial review, and does so without providing the clarity and predictability that should accompany strict rules.

In contrast to the rule with exceptions approach, by considering irreparable harm along with other factors in determining whether to require exhaustion, the balancing, collateral question, and “non-explanation” approaches constitute a positive development. Considering irreparable harm in this fashion is hardly an innovation, as its roots appear in the Supreme Court’s 1947 assertion that “the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury [justifies excusing exhaustion].” 210 Generally, these three approaches require plaintiffs to establish a good reason for immediate

often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.”). Because a party must bear the costs and burdens of defending baseless judicial litigation, it must do so in administrative litigation as well. Just as the hardship of lengthy and burdensome trial court proceedings is not in and of itself a ground for appeal, it is not a basis for excusing exhaustion. The analogy breaks down, however, if the irreparable injury exception means what it says, for irreparable injury is not in and of itself a basis for appeal. Instead, under the judicial collateral order doctrine, irreparable harm is only one of several preconditions to review. See supra note 123. The other elements seem designed to ensure that the issue is fit for appellate review, which suggests another link to the ripeness doctrine. See infra text accompanying note 225.

208. Denial of judicial review constitutes an irreparable injury because plaintiffs have no remedy for the allegedly unlawful agency action. Plaintiffs necessarily suffer an injury, or else they would lack standing, and neither the agency nor the courts consider the plaintiff’s claims any further. Thus, where a court dismisses a complaint because the plaintiff failed to take an administrative appeal that is no longer available or improperly failed to raise an issue before the agency, the injury is irreparable in a very real sense. If courts gave irreparability its natural meaning and excused exhaustion whenever this occurred, however, they would eviscerate the exhaustion doctrine. For example, there would have been no need to evaluate other factors in McKart v. United States, for McKart’s imminent injury—a three year prison term—was irreparable. Similarly, exhaustion should have been excused in McGee v. United States, because a judicial reversal of McGee’s classification was his only way to avoid prison. See generally supra notes 89 & 91. Other cases involving similarly “irreparable” injuries in which judicial review was denied include United States v. California Care Corp., 709 F.2d 1241, 1249 (9th Cir. 1983) (the failure to use administrative remedies of the Medicare program resulted in the denial of judicial review); Washington Asa’n for Television & Children v. FCC, 712 F.2d 677, 683 (D.C. Cir. 1983) (court declined to address an issue never presented to the agency); McClendon v. Jackson Television, Inc., 603 F.2d 1174, 1177 (5th Cir. 1979) (no judicial review permitted even if administrative remedy is no longer “viable”).

209. Despite the apparently clear principle that the expenses and burdens of administrative litigation do not constitute irreparable injury, numerous courts and authorities consider these hardships when they so choose. E.g., Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 784 (D.C. Cir. 1984) (weighing litigation burdens because accompanied by other hardships); West v. Bergland, 611 F.2d 710, 720 (8th Cir. 1979) (weighing litigation cost and deeming it “not a burden we should impose too blithely”), cert. denied, 449 U.S. 821 (1980); Central Hudson Gas & Elec. Co. v. EPA, 587 F.2d 549, 559-60 (2d Cir. 1978) (weighing litigation burdens because other factors are also present).

judicial resolution of the dispute in addition to their injury.211 A constitutional question is one such reason because it involves judicial rather than administrative expertise, thereby making the exhaustion policies at least partially inapplicable.212 The cases using the collateral question approach follow this methodology most clearly, as they define the statutory "final decision" requirement largely by reference to the presence of a collateral question and a sufficient showing of injury.213 Although the test in such cases can be restated as "a collateral question plus irreparable injury,"214 the analysis is usually somewhat less rigid. Courts have described the appropriate inquiry as focused on a pragmatic evaluation of the plaintiff's interest in judicial review weighed against the resulting harm to the administrative process, with no single factor being dispositive.215 Irreparable injury is thus an important factor in resolving exhaustion questions; its primary significance, however, is in how it interacts with other factors.216

211. McGee v. United States, 402 U.S. 479 (1971), establishes that irreparable injury is not in itself a sufficient reason to justify excusing exhaustion under balancing. See supra note 208. The Court in McGee distinguished McKart v. United States, 395 U.S. 185 (1969), and enforced the exhaustion requirement because all "non-injury" issues militated in favor of requiring exhaustion. 402 U.S. at 485-86. See infra notes 213-15 and accompanying text for an explanation of this principle under the collateral question and "non-explanation" approaches.

212. See supra text accompanying notes 184-85.

213. See, e.g., Bowen v. City of New York, 106 S. Ct. 2022, 2031 (1986) (describing Eldridge as "influenced" by the existence of a collateral question and the injury resulting from denial of review); Heckler v. Ringer, 466 U.S. 602, 618 (1984) (characterizing the Eldridge approach as premised on the existence of a collateral question and an irreparable injury); Mathews v. Eldridge, 424 U.S. 319, 330-31 & n.11 (1976) (citing both factors and relying on the judicial collateral order doctrine); see also Mental Health Ass'n v. Heckler, 720 F.2d 965, 969 (8th Cir. 1983) ("The prevailing rule of construction is that crucial collateral claims should not be lost and that irreparable harm should be avoided," citing Eldridge). See generally supra notes 123-31 and accompanying text.

214. See supra note 129 and accompanying text. The usual reading of Mathews v. Eldridge imposed a collateral injury plus irreparability test, 424 U.S. 319 (1976). While the Court did not state that this was a two-part test, the Court's separate analysis of the issue presented, which it deemed to be collateral to a claim for benefits, and the hardship of denying review, which it characterized as a colorable or potential irreparable injury, suggests this two part nature. Id. at 330-31 & n.11. Courts sometimes characterize "futility" as a third element of the test. See, e.g., Kuehner v. Schweiker, 717 F.2d 813, 822-23 (3d Cir. 1983); Smith v. Schweiker, 709 F.2d 777, 780 (2d Cir. 1983).

215. For example, in Mental Health Ass'n v. Heckler, 720 F.2d 965 (8th Cir. 1983), the court excused exhaustion after first finding "potentially irreparable harm" and then analyzing the exhaustion policies and the public interest. Id. at 970-71. The court later described that decision as "based upon a pragmatic analysis of the claimants' interest in judicial review at that point in the proceedings and the relative harm to the agency's administrative process." Polaski v. Heckler, 751 F.2d 943, 952 (8th Cir. 1984). See also City of New York v. Heckler, 742 F.2d 729, 736 (2d Cir. 1984) (interpreting Eldridge and Ringer as identifying irreparable injury, a collateral question, and futility as elements of a balancing test rather than as separate preconditions to excusing exhaustion). The Supreme Court seems to have joined these courts by calling for interest balancing rather than a "mechanical application of the Eldridge factors." Bowen v. City of New York, 106 S. Ct. 2022, 2032 (1986). The weighing of injury is also obviously a part of the various balancing approaches. See Part II.B.2.

216. In Touche Ross & Co. v. SEC, 609 F.2d 570 (2d Cir. 1979), the court analyzed the various exhaustion policies in determining whether any exceptions applied, id. at 575-77, and concluded that "[t]he nature of the injury should be one of several factors taken into account in considering whether to require exhaustion," id. at 577 n.11. See also Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549, 559 (2d Cir. 1978) (the hardship of undergoing administrative procedures was sufficient to
Because irreparable injury is thus only one factor that courts should consider in exhaustion analysis, courts may consider more than the few injuries traditionally recognized as irreparable. "Irreparable injury" is an artificial and misleading concept. Hardship cannot be separated into neat categories of irreparable and lesser injuries. At most, the term stands for those hardships severe enough to excuse exhaustion even where the doctrine's policies strongly favor enforcing the requirement. Whether such hardships truly exist is problematic, given the hardships courts have allowed in many cases. Even if such hardships do exist, the terminology does not further exhaustion analysis because other factors are always relevant. A lesser injury accompanied by factors favoring judicial review should excuse exhaustion at least as readily as a traditional irreparable injury accompanied by factors strongly supporting further administrative proceedings. Irreparable injury analysis, then, should be replaced by an interest-weighing process that considers the level of injury along with the weight of the exhaustion policies.

III. THE RIPENESS INQUIRY

A. The Abbott Laboratories Inquiry

In Abbott Laboratories v. Gardner, the Supreme Court established a method for evaluating the ripeness of administrative action. Curiously, while the exhaustion doctrine is easy to define but hard to apply, the ripeness doctrine that emerges from Abbott Laboratories is its mirror image, a doctrine easy to apply but hard to define. Professor Jaffe avoids defining the doctrine by referring to ripeness as "not so much a definable doctrine as a compendious portmanteau, a group of related doctrines arising in diverse but analogically similar situations." Professor Davis focuses on the doctrine's fundamental purpose, which is "to conserve judicial machinery for problems which are real and present or imminent," excuse exhaustion only because it was accompanied by other factors, some relating to the general public interest); T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 621, 633 (N.D.N.Y. 1984) (finding irreparable injury and, "[e]ven more importantly," an issue of statutory interpretation better addressed by a court than by an arbitrator).

Conversely, a strong public or governmental interest in denying immediate judicial review can outweigh irreparable injury and result in a strict application of the exhaustion requirement. See, e.g., Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1095 (6th Cir. 1981) (exhaustion required even if plaintiff establishes irreparable injury because of the congressional decision to "place greater weight on environmental protection" than on interests of mine operator); Nor-Am Agric. Prod., Inc. v. Hardin, 435 F.2d 1151, 1160 (7th Cir. 1970) (en banc) (public health and safety concerns outweigh plaintiff's unrecoverable business losses). It is also implicit in the Model State Administrative Procedure Act, which provides for an exception to the exhaustion requirement for irreparable injury disproportionate to the public benefit derived from the postponement of judicial review. MODEL STATE ADMIN. PROCEDURE ACT § 5-107 (1981), 14 U.L.A. 70, 149 (Supp. 1987).

217. Because courts have often enforced the exhaustion requirement where there will be no judicial review and have sometimes enforced it where the litigant faces prison, see supra note 208, it is hard to imagine any injuries so severe that exhaustion would be excused where all other pertinent factors strongly support requiring it.


219. L. JAFFE, supra note 1, at 395.
not to squander it on abstract or hypothetical or remote problems."  
Professor Fuchs describes the doctrine as follows: "Ripeness depends on the legal finality and force, particularly in relation to the procedural stage which has been reached, and on the practical consequences, of the action sought to be reviewed . . . ."  
Judicial approaches to the question are equally elliptical. In Abbott Laboratories, the Supreme Court never defined ripeness, but cogently resolved most questions concerning its application to judicial review of administrative action.

Abbott Laboratories involved a challenge to Food and Drug Administration regulations that imposed labeling requirements on both prescription drug packaging and advertising. Writing for the Court, Justice Harlan first established that the amended Federal Food, Drug and Cosmetic Act did not prohibit pre-enforcement review. Then, noting the discretionary nature of the equitable remedies sought in that case, he turned to the ripeness inquiry:

Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies.

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221. Fuchs, supra note 7, at 818.
222. For many years, ripeness decisions seemed to turn solely on the form of administration action. A common and still-cited statement disapproved of judicial review of agency actions unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 112-13 (1948). A similar, if inverted, analysis is found in United States v. Los Angeles & S.L.R.R., 273 U.S. 299 (1927), in which the Court describes an unripe order by reference to what it does not do, such as "command" certain conduct, or "grant or withhold any authority, privilege or license . . . ." Id. at 309-10. Some decisions focus on the nature of the controversy before the court, generally using conclusory language. E.g., Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26 (2d Cir. 1984) (requiring "justiciable case or controversy"); United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1232 (3d Cir. 1977) (requiring "legal issue . . . sufficiently concrete for decision"). Most courts, however, use a descriptive approach and discuss ripeness in terms of both the definitiveness of the agency's action and the injury to the party seeking judicial review. E.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985) (doctrine "concerned with whether the ill-advised decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"); Exxon Corp. v. FTC, 411 F. Supp. 1362, 1372 (D. Del. 1976) (ripeness of order depends on "genuine controversy," "sufficient finality to . . . make its terms and application definite," and adequacy of later review).
223. Id. at 137. A number of drug manufacturers sought declaratory and injunctive relief, arguing that the agency had acted in excess of its statutory authority in adopting the regulations. While the district court reached the merits and granted relief, Abbott Laboratories v. Celebrezze, 228 F. Supp. 855 (D. Del. 1964), the court of appeals reversed, holding that pre-enforcement review of the regulations was not available, 352 F.2d 286, 288-91 (3d Cir. 1965).
224. 387 U.S. at 139-48. The Court, relying largely on Professor Jaffe's analysis in the then-recent Judicial Control of Administrative Action (1965), observed that "only upon a showing of 'clear and unconvincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 387 U.S. at 141. The Court found that neither the statute nor its legislative history provided such evidence and, therefore, that the statute did not preclude pre-enforcement review. This test remains viable today, although the Court appears to be more willing to find such evidence and limit judicial review. See, e.g., Block v. Community Nutrition Inst., 467 U.S. 340, 348 (1984) (presumption in favor of judicial review can be overcome; clear and convincing test not a "rigid evidentiary test but a useful reminder").
and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.\textsuperscript{225}

The first sentence reveals that the policies underlying the ripeness doctrine are wholly consistent with those of the exhaustion doctrine; ripeness, like exhaustion, attempts to allocate authority between courts and agencies in a fair and efficient manner. The second sentence describes the two-part inquiry the Court believed would serve these policies.

Applying that test, the Court first concluded that the case presented a purely legal question of statutory construction that only required a determination of congressional intent.\textsuperscript{226} Then, emphasizing the Court's history of treating "the 'finality' element in a pragmatic way,"\textsuperscript{227} Justice Harlan determined that the regulations constituted "final agency action" within the meaning of section 704 of the Administrative Procedure Act.\textsuperscript{228} By implication, the issues were fit for judicial review because they met both of these criteria. Turning to the hardship aspect, Justice Harlan emphasized the practical effect of the agency action. Because the regulations governed the business affairs of the affected industry, they had a "direct effect on the day-to-day business of all prescription drug companies."\textsuperscript{229} This, in essence, placed the companies in a dilemma if the Court dismissed their challenge to the regulations—they could comply with the regulations and incur substantial costs, or violate the regulations, thereby risking criminal and civil sanctions for trafficking in misbranded drugs.\textsuperscript{230} The government, moreover, had no countervailing

\textsuperscript{225} 387 U.S. at 149 (footnote omitted). Ripeness opinions almost invariably cite, and often quote in full, this language from Abbott Laboratories. \textit{E.g.}, Kennevett v. EPA, 780 F.2d 445, 457-58 (4th Cir. 1983); Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26 (2d Cir. 1984); Air New Zealand Ltd. v. Civil Aeronautics Bd., 726 F.2d 832, 835 (D.C. Cir. 1984); Standard Oil Co. v. Department of Energy, 596 F.2d 1029, 1039 (Temp. Emer. Ct. App. 1979); Pence v. Andrus, 586 F.2d 733, 737 & n.10 (9th Cir. 1978); A.O. Smith Corp. v. FTC, 530 F.2d 515, 521 (3d Cir. 1976).

\textsuperscript{226} 387 U.S. at 149.

\textsuperscript{227} \textit{Id.} The Court in treating its ripeness precedents, \textit{id.} at 149-52, tried to end the tension between pragmatic and formalistic approaches to determining finality. \textit{See}, \textit{e.g.}, L. JAFFE, supra note 1, at 398-410, and K. DAVIS, 1983 TREATISE, supra note 2, §§ 25.3-25.5. While the Court largely succeeded, \textit{see infra} text accompanying notes 243-55, confusion occasionally reemerges. For example, \textit{see infra} note 294, discussing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

\textsuperscript{228} \textit{See supra} note 15. The Court concluded that the regulations were "agency action" because they fell within the APA's definition of "rule," 5 U.S.C. § 551(4) (1982), and "agency action" includes "rules," 5 U.S.C. § 551(13) (1982). 387 U.S. at 149. The APA does not specifically define "final agency action." The ripeness doctrine, then, serves to determine whether "agency action" is sufficiently final for judicial review. \textit{See infra} text accompanying notes 304-15 for a discussion of the relationship between "finality" and "ripeness."

\textsuperscript{229} 387 U.S. at 152.

\textsuperscript{230} \textit{Id.} at 152-54. If pre-enforcement review were denied, compliance with the regulations would deprive the industry of any judicial review because there would be no enforcement proceedings subject to judicial review. The Court also noted the sensitive nature of the drug industry, sug-
interest in denying judicial review. The Court recognized the dangers of judicial interference with enforcement efforts, but concluded that resolution of this case would facilitate enforcement by producing a binding judgment that would finally resolve the validity of the challenged regulations. Because the fitness of the issues and hardship analyses both militated in favor of immediate judicial disposition, then, the regulations were ripe for review.

In a companion case, *Toilet Goods Association v. Gardner*, the Court employed the same approach but found the challenged regulation not ripe for review. The regulation authorized the agency to take enforcement action against businesses that denied agency employees free access to certain information and facilities. While the Court recognized that the case presented a legal question and that the regulation constituted "final agency action," it concluded that pre-enforcement review would be inappropriate. The permissive rather than mandatory

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231. *Id.* at 154. The Court identified a number of ways in which courts could eliminate hardship to the government. These included consolidating cases through changes of venue, staying or dismissing duplicative actions, and applying various equitable defenses, such as laches. *Id.* at 155. The Court also stressed that regulations could remain in effect during such litigation, especially upon a showing of a public health or safety interest in continued effectiveness. *Id.* at 155-56.

232. *Id.* at 153. Justice Fortas authored a biting dissent to the Court's willingness to entertain pre-enforcement challenges. *Id.* at 174-201. He believed that regulatory enforcement would be seriously damaged because "[x]perience dictates . . . that it can hardly be hoped that some federal judge somewhere will not be moved as the Court is here, by the cries of anguish and distress of those regulated, to grant a disruptive injunction." *Id.* at 176. While the majority's recitation of judicial remedies, see *supra* note 231, may not have fully responded to these concerns, legislative remedies have also been propounded. Perhaps the most common remedy is a short statute of limitations, which allows agency regulations to be challenged only for a certain period after their adoption. See R. Pierce, S. Shapiro & P. Verkuil, *supra* note 2, § 5.2.1 (noting that such statutes have been adopted in various settings); cf. Davis, *Judicial Review of Rulemaking: New Patterns and New Problems*, 1981 Duke L.J. 279 (discussing issues raised by five varieties of statutory limitation provisions).


234. The third case in the *Abbott Laboratories* trilogy, *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), presented a situation similar to that of *Abbott Laboratories*—a "straightforward legal" issue concerning "self-executing" regulations with an "immediate and substantial impact" on the plaintiffs. *Id.* at 170-71. The case was deemed ripe because the plaintiffs challenged the extent of the agency's regulatory authority and were in a "quandary" between costly compliance and risky non-compliance. *Id.* at 172-73. *Gardner* and *Toilet Goods* both upheld a Second Circuit decision, *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677 (2d Cir. 1966).

235. 387 U.S. at 161.

236. *Id.* at 162-63.
nature of the regulation cautioned against review in several respects. The agency promulgated the rule under a congressional statute delegating authority to adopt regulations "for the efficient enforcement"237 of the regulatory program. The Court concluded that its evaluation of the regulation under this standard would be more effective in the context of a specific enforcement proceeding.238 The Court also found hardship lacking, largely because the regulation would have no impact239 unless and until the agency attempted to enforce it by taking punitive measures, and such measures would be subject to procedural protections and judicial review.240 The Court's rationale for denying judicial review suggests a link to the exhaustion doctrine: "[W]e think it wiser to require [the plaintiffs] to exhaust this administrative process through which the factual basis of the inspection order will certainly be aired and where more light may be thrown on the Commissioner's statutory and practical justifications for the regulation."241

Despite numerous opportunities, the Supreme Court has never questioned, let alone restricted, the overall thrust of Abbott Laboratories.242 On two occasions, however, the Court has developed the ripeness doctrine in cases turning on "finality." In Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic,243 the Court seemed to restate the same two-fold inquiry in different terms while describing the

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238. The Court determined that proper resolution of the question depended on a number of factors, only one of which, congressional intent, could be resolved prior to enforcement. 387 U.S. at 163. Other factors included the "types of enforcement problems . . . encountered by the [agency], the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets." Id. at 163-64.
239. "This is not a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested or substituted, or special records compiled." Id. at 164. In addition, the Court saw no "irremediable adverse consequences" from delaying judicial review until after the completion of enforcement proceedings. Id.
240. Id. at 165. The Court concluded that enforcement proceedings would provide an "adequate forum" for challenging the regulation even if the agency would not consider the validity of the regulation in those proceedings. Id. at 165-66. Rather, the fact-finding during the administrative proceedings would help to inform the court on judicial review resulting from those proceedings. Id. at 166 & n.4. This aspect of the ripeness doctrine is directly applicable to exhaustion cases turning on futility. See Part II.C.1. In essence, the Court required the exhaustion of an administrative process that would not resolve the issue favorably to the plaintiff because the controversy was not sufficiently ripe for judicial review.
241. Id. at 166. In other words, the Court found that the regulation would not be ripe for review prior to exhaustion. See infra notes 289-90 and 301-03 for similar examples of this relationship. The Toilet Goods Court seemed to recognize that judicial review would not be appropriate until the agency concluded its fact-finding and exercised its expertise and discretion. This represents an application of the exhaustion policies, see supra notes 36-45 and accompanying text, to a ripeness problem.
242. Professor Davis discusses a number of recent Supreme Court decisions, noting their fidelity to Abbott Laboratories. K. DAVIS, 1983 TREATISE, supra note 2, §§ 25:7-25:10. In discussing FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981), a case in which the Court did not even question the ripeness of a general policy statement, Professor Davis stated: "The change is quite complete. And it is likely to be permanent." Id. at 384.
finality requirement: "[T]he relevant considerations in determining finality are whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action."244 In Federal Trade Commission v. Standard Oil Co.,245 the Court determined that allegations contained in an administrative complaint were not subject to judicial review prior to the completion of the agency’s enforcement proceedings.246 The Court concluded that the complaint was not sufficiently definitive to constitute "final agency action" because its only effect was to set in motion the agency’s adjudicative procedures,247 and it had "no legal force comparable" to the regulations reviewed in Abbott Laboratories.248 The Court also examined the potential impact of immediate judicial review, concluding that review would likely "interfere[] with the proper functioning of the agency and [be] a burden for the courts."249 Standard Oil thus established that the Abbott Laboratories inquiry provides a methodology for resolving the ripeness of agency actions other than regulations, but that the inquiry’s requirements are substantial enough to prevent judicial review of many interlocutory agency actions.250

244. Id. at 71.
246. Standard Oil arose out of an FTC investigation that resulted in an administrative complaint stating that the Commission had “reason to believe” that several oil companies had engaged in unfair methods of competition. 449 U.S. at 234 & n.3. Standard Oil claimed that the FTC did not have sufficient evidence to issue the complaint and sought declaratory and injunctive relief terminating the administrative proceedings. Id. at 235 & n.5.
247. 449 U.S. at 239-42. The Court reaffirmed the pragmatic meaning of “final agency action,” id. at 239-40, but concluded that an agency complaint is merely “a threshold determination that further inquiry is warranted.” Id. at 241. “Final agency action” apparently would not occur unless and until the FTC determined that the company had violated the law and entered an order imposing sanctions. Id.
248. Id. at 242. The Court recognized that while “the burden of responding to the charges ... certainly is substantial, it is different in kind and legal effect from the burdens attending” final agency action. Id. Thus, the Court distinguished between the hardships imposed on a regulated party’s outside activities, such as in Abbott Laboratories, and those inherent in litigation, such as in Standard Oil. One author has suggested that the Court wanted “to prevent intervention into those agency actions having effects internal to the administrative process—such as procedural decisions—while reserving intervention for those occasions when the action impacts upon matters external to the process.” Comment, supra note 5, at 478.
250. Standard Oil supports this article’s proposal to merge ripeness and exhaustion analysis. Standard Oil cited three exhaustion cases, Weinberger v. Salfi, 422 U.S. 749, 765 (1975), McGee v. United States, 402 U.S. 479, 484 (1971), and McKart v. United States, 395 U.S. 185, 195 (1969), with respect to the policies undercut by premature review. 449 U.S. at 242. Despite a rather unconvincing attempt to distinguish exhaustion from ripeness, 449 U.S. at 243, the Court’s treatment of injury and the adverse effects of premature judicial intervention clearly reveal some of the connections between these doctrines. Significantly, a number of courts have analyzed cases arising in the Standard Oil setting under the exhaustion doctrine. See, e.g., Lewis v. Reagan, 660 F.2d 124, 126, 127 (5th Cir. Oct. 1981) (attempt to enjoin military hearing to review missing-in-action status); West v. Bergland, 611 F.2d 710, 714-15 (8th Cir. 1979) (attempt to enjoin Agriculture Department proceeding to withdraw services), cert. denied, 449 U.S. 821 (1980); First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 695 (3d Cir. 1979) (attempt to enjoin private disciplinary proceeding), cert. denied, 444 U.S. 1074 (1980).
B. The Refinement of the Ripeness Inquiry

The Abbott Laboratories approach has proven to be versatile and efficient. Courts have used the two-part analysis of fitness and hardship to test the appropriateness of judicial review of actions as diverse as administrative interpretations,251 jawboning,252 and even agency "non-action."253 Courts often make a point of praising this approach,254 frequently with emphasis on its pragmatic nature. When engaging in the fitness inquiry, judges examine the practical finality of agency action and treat as final those agency actions that are final in effect, regardless of form.255 The same realism pervades the hardship inquiry.256


252. See, e.g., Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1376 (9th Cir. 1983) (warning and request to correct misbranding of drugs); Air California v. Department of Transp., 654 F.2d 616, 618 (9th Cir. 1981) (warning and request to enter into negotiations).

253. See, e.g., Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 25 (D.C. Cir. 1984) (failure to require warning labels on aspirin); Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 22 (2d Cir. 1984) (claim Coast Guard not enforcing maritime laws).

254. See, e.g., Air New Zealand Ltd. v. Civil Aeronautics Bd., 726 F.2d 832, 835 (D.C. Cir. 1984) ("Abbott Laboratories and its two companions set forth with considerable clarity the criteria for application of the doctrine of ripeness to the review of agency action."); Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26 (2d Cir. 1984) (describing ripeness as "now very much a matter of common sense"). Professor Davis describes Abbott Laboratories as both "thorough and painstaking" and "a solid foundation for satisfactory ripeness law." K. DAVIS, 1983 TREATISE, supra note 2, at 370; see also R. PIERCE, S. SHAPIRO & P. VERKUIL, supra note 2, at 196-204 (noting that Abbott Laboratories has simplified and clarified the law); B. SCHWARTZ, supra note 7, at 522-25, 534 (generally positive description of the Abbott Laboratories inquiry); but see Note, Pre-Enforcement Review of Administrative Agency Action: Developments in the Ripeness Doctrine, 53 NOTRE DAME LAW. 346, 349 (1977) (suggesting that the inquiry left open questions concerning the ripeness of informal agency action). These generally favorable comments are occasionally coupled with criticisms of the doctrine replaced by Abbott Laboratories. See, e.g., Port of Boston, 400 U.S. 62, 71 (1970) (previous doctrine "has the hollow ring of another era"); Continental Air Lines v. Civil Aeronautics Bd., 522 F.2d 107, 124 (D.C. Cir. 1974) (describing the previous law as "a tangle of special rules and legalistic distinctions"); see also K. DAVIS, 1983 TREATISE, supra note 2, at 351 (describing the prior ripeness doctrine as "some of the worst law the Court has ever created").

255. For example, in Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771 (D.C. Cir. 1984), the plaintiff challenged the Department's authority to conduct adjudicatory proceedings and impose sanctions for refusing to comply with discovery orders. Id. at 783. Even though the Department had not yet imposed sanctions on the company, the court found the issues to be fit for judicial review because the Department's ongoing use of adjudicatory procedures and adoption of a regulation concerning discovery sanctions was, as a practical matter, a final agency determination of its authority, a purely legal question. Id. See also Carter/Mondale Presidential Comm. v. Federal Election Comm'n, 711 F.2d 279, 285-87 (D.C. Cir. 1983) (emphasizing the "pragmatic" and "flexible" approach to finality).
ness test thus enables courts to determine reviewability based largely on their own assessments of the finality and impact of agency action, rather than in accordance with the agency's labels or assertions.²⁵⁷

Cases applying the Abbott Laboratories inquiry have identified two indicia of fitness for judicial review: the absence of a factual dispute and the nature of the agency action. A primary factor in Abbott Laboratories and subsequent cases is the absence of a factual dispute.²⁵⁸ This factor is obviously relevant to the "legal question" prong of the fitness inquiry, but it also pertains to finality, largely because a factual dispute turns the controversy's focus away from the legal questions and toward resolving a broader dispute primarily within agency jurisdiction. For example, even where a plaintiff challenges the legal validity of a "final" agency interpretation, the case is not fit for judicial review if a factual controversy concerning regulatory compliance would continue after a judicial ruling.²⁵⁹ While the interpretation may constitute the agency's final legal opinion, the dispute between the parties will continue and judicial review would constitute an inappropriate interference in a continuing administrative process.

The other significant factor in determining finality is whether an agency action is authoritative. Agency rulings that are tentative or advisory are rarely ripe for review because they inherently lack finality.²⁶⁰ A

²⁵⁶. In Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 783-84 (D.C. Cir. 1981), the court also took a flexible view of hardship. Because the company was in a quandary between compliance with allegedly unlawful orders and the risks of non-compliance, the court found the burdens of litigation cognizable under ripeness analysis and viewed the general uncertainty concerning the Department's authority as indicating that judicial review would serve the public interest. Id. at 783-84. As the Atlantic Richfield court apparently recognized, id. at 784 n.86, this was Abbott Laboratories but for the fact that administrative enforcement proceedings had already begun. See also Rosenthal & Co. v. Commodity Futures Trading Comm'n, 614 F.2d 1121, 1127 (7th Cir. 1980) (seeing the impact of agency action as part of finality); United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1132 (3d Cir. 1977) (finding case ripe because action by prison had a "practical impact" on constitutional rights).

²⁵⁷. E.g., Continental Air Lines v. Civil Aeronautics Bd., 522 F.2d 107, 124 (D.C. Cir. 1974) (noting that agency labels are not determinative and that agency action without "formal, legal effect" may be reviewable); Aquavella v. Richardson, 437 F.2d 397, 404-05 (2d Cir. 1971) (finality "should not depend on semantic characterizations but rather on a careful evaluation" of various factors).


²⁵⁹. Two cases involving administrative interpretations of crude oil price controls illustrate the role of factual disputes in defeating ripeness. In Pennzoil Co. v. Department of Energy, 466 F. Supp. 238 (D. Del. 1979), a company challenged an agency ruling on substantive and procedural grounds. Id. at 241. The court concluded that the case was ripe, largely because the company raised only legal challenges to the ruling and did not dispute its application if upheld. Id. at 241-42. A similar challenge in Cities Serv. Co. v. Department of Energy, 520 F. Supp. 1132 (D. Del. 1981), failed because the company sought a judicial declaration of the law applicable to unresolved facts. Id. at 1141. The court did not treat the regulations and interpretations as "final agency action" in that controversy because judicial review of those actions would not terminate the controversy. Id. The conflict over the regulations and interpretations was just one skirmish in an ongoing war and judicial intervention at that stage was inappropriate.

²⁶⁰. E.g., Stauffer Chem. Co. v. FDA, 670 F.2d 106, 108 (9th Cir. 1982) (opinion letter by subordinate not ripe for review); Air California v. Department of Transp., 654 F.2d 616, 620-21 (9th
ruling by an agency head or a legal opinion by its chief legal officer, however, is more likely a final action. These aspects of finality indicate the common-sense nature of the ripeness inquiry. A court should intervene only if it reasonably decides that the administrative process is effectively concluded on issues that determine the ultimate outcome of the controversy between the parties.

Applying the hardship aspect consists of evaluating the nature and extent of injuries caused by administrative action. As Standard Oil suggests, to avoid basing review solely on the burdens of the litigation inherent in disputes with government agencies, a court must examine hardship carefully. Perhaps for this reason, the cases are not wholly consistent. Some decisions treat expenses and inconvenience relating to administrative litigation as weak hardship at best. Others are more willing to consider such injuries, at least when they involve more than routine litigation costs. The latter decisions tend to emphasize an unusual aspect of the case or the existence of additional burdens that amount to substantial hardships when they are coupled with litigation costs. In general, courts weigh the burdens of administrative litigation and do not simply lump them all into one category of irrelevant hardships.

The other major hardship issue concerns whether the impact of the agency action is sufficiently "direct and immediate" to support judicial review. While some cases continue to rely on formalistic distinctions,
most attempt to apply the hardship aspect pragmatically, consistent with their approach to resolving fitness. Following Abbott Laboratories, one significant question is whether the agency action requires a plaintiff to choose between costly compliance and risky non-compliance in the conduct of its business or other non-litigation activities. A number of courts, in answering this question, have weighed the severity of business hardships resulting from delaying judicial review. For example, where a new agency policy is very likely to cause financial losses to or adversely affect an entire industry prior to judicial review, the hardship is probably sufficient for ripeness purposes. This broader yet more focused notion of relevant hardship permits courts to consider a wide range of adminis-

sizing that the agency statement was informal and directed at entities other than plaintiffs). Another formalistic requirement that occasionally appears is that irreparable injury is a precondition of ripeness, at least where there are ongoing administrative proceedings. E.g., Andrade v. Lauer, 729 F.2d 1475, 1481 n.9 (D.C. Cir. 1984) (suggesting that irreparable injury is "the second half of the Abbott test"); Association of Nat'l Advertisers v. FTC, 565 F.2d 237, 240 (2d Cir. 1977) ("substantial expense . . . does not constitute irreparable injury justifying judicial review."). Abbott Laboratories did not use that phrase, but instead relied on terms such as "hardship" and "impact." 387 U.S. at 149, 152. Irreparable injury is a remedial issue, see supra notes 189-90 and accompanying text, and confounds ripeness analysis no less than it complicates exhaustion analysis.

267. Texaco, Inc. v. Department of Energy, 490 F. Supp. 874 (D. Del. 1980), contains a particularly clear explanation of the problem. Texaco challenged the validity of agency rulings on crude oil price controls but also denied violating them. Id. at 882. The court concluded that Texaco might be in a pricing dilemma if it were to violate the challenged agency rulings but, in the absence of such a claim, it could not show that compliance imposed "any costs . . . let alone . . . an ongoing pricing dilemma." Id.

Hardship and fitness are often complementary in this setting. In cases in which the plaintiff has a fallback defense, such as Texaco, the action is non-final because judicial review will not end the controversy, see supra note 259, and hardship is speculative because the fallback defense may succeed. The hardships to the court and agency, on the other hand, are magnified because piecemeal appeals are more likely and the public interest in a prompt and final resolution of the controversy is disserved. Other settings present different versions of the fitness/hardship relationship. See, e.g., Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 28 (2d Cir. 1984) (denial of judicial review causes little hardship as agency has not finally denied plaintiff's requests to enforce its regulations); Air California v. Department of Transp., 654 F.2d 616, 620-21 (9th Cir. 1981) (tentative agency views were not final as they had no direct impact on plaintiff); Bituminous Coal Operators' Ass'n v. Secretary of Interior, 547 F.2d 240, 244 (4th Cir. 1977) (agency order final because binding, plaintiff suffers hardship because it must comply with a binding policy).

268. In weighing the severity of business hardships, courts cannot simply place a price tag on the potential cost to the plaintiff of losing the dispute, for that approach would focus on the wrong injury and often be speculative. Such an approach would probably mean that the magnitude of potential liability for past acts would become the lodestar because the greater the potential liability, the greater the present impact on business planning. In cases in which the facts of compliance are at issue, the court would be compelled to have a trial on penalties or choose from among a worst-case scenario, a best-case scenario, or something in between in order to evaluate the hardship.

This was, in essence, the argument the court refused to accept in Texaco, Inc. v. Department of Energy, 490 F. Supp. 874 (D. Del. 1980), discussed supra note 267. Texaco asserted that it had a potential liability of nearly a billion dollars and that this had a significant effect on its present operations. Id. at 889. The court concluded that the hardship resulted from concerns about the outcome of ongoing enforcement proceedings rather than from the impact of the challenged agency rulings: "If steps taken, amounts expended, or other burdens shouldered by regulated companies because of anticipated future agency action justified judicial review, the objectives of the ripeness doctrine would . . . be frustrated." Id.

269. See, e.g., Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 741-43 (10th Cir. 1982) (agency legal opinion had effect of halting oil and gas exploration); A.O. Smith Corp. v. FTC, 530 F.2d 515, 524 (3d Cir. 1976) (high cost of compliance with FTC reporting requirements).
trative action. This occurs because many agency actions impose burdens sufficient enough to present a ripe controversy.\textsuperscript{270} Numerous agency actions have "ripple" effects on businesses or individuals, and even an abstract opinion as to the meaning of a statutory or regulatory provision can in some circumstances impose enormous burdens.\textsuperscript{271} The hardship aspect of the ripeness inquiry provides a means for pragmatically weighing those burdens, and judicial review is appropriate where the burdens are direct and immediate and the issues presented are sufficiently fit for judicial consideration, regardless of the form of the agency action.

One lasting benefit of the structure of the \textit{Abbott Laboratories} inquiry is that it clearly delineates factors relevant to ripeness analysis. Most opinions refer to the two-part inquiry and then address those parts in order.\textsuperscript{272} This relatively simple approach aids courts and litigants by allowing focused briefing and arguments and by minimizing confusion concerning the meaning of prior decisions.\textsuperscript{273} With little variation, therefore, most ripeness decisions follow the \textit{Abbott Laboratories} structure: courts first examine the fitness of the issues for judicial review, looking at both whether the case presents legal questions and whether the agency action is final; and second, address hardship, evaluating both the plaintiff's hardship from denying review and any countervailing hardship to the government from allowing review.


\textsuperscript{271} National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) and Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (Temp. Emer. Ct. App. 1978) provide good examples. In \textit{Shultz}, the agency advised the Council that its members had recently become subject to minimum wage requirements. 443 F.2d at 691-92. This placed the businesses, for the most part small laundries, in the difficult position of complying with the advice and suffering "adverse financial consequences," or risking penalties as well as back-pay orders if they refused to heed the agency's advice. \textit{Id.} at 696-97.

In \textit{Standard Oil}, the court found challenges to agency interpretations of price regulations ripe for review because of the impact on "budgeting and planning ... ; the exposure to multiple [lawsuits] ... ; burdensome expense and discovery ... ; and ... damage to ... reputations and good will ... " \textit{Id.} at 1039. The difference from \textit{Texaco}, see supra notes 267-68, is subtle but convincing. The \textit{Standard Oil} plaintiffs faced the hardship of complying with the Department's interpretation in the future; \textit{Texaco} faced only the possibility of being ordered to make restitution for past violations.

\textsuperscript{272} \textit{E.g.}, Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26-29 (2d Cir. 1984); Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 741-43 (10th Cir. 1982); Bituminous Coal Operators' Ass'n v. Secretary of Interior, 547 F.2d 240, 244 (4th Cir. 1977); Continental Air Lines v. Civil Aeronautics Bd., 522 F.2d 107, 124-28 (D.C. Cir. 1975) (en banc).

\textsuperscript{273} Simplicity seems to be one factor behind the widespread praise of ripeness analysis. Ripeness has evolved into a "stable and satisfactory" area of law, K. \textit{Davis}, 1958 \textit{Treatise}, supra note 6, at 143 (Supp. 1980), largely because the \textit{Abbott Laboratories} formulation makes good sense and is easy to apply. When opinions are well-reasoned and understandable, they provide better guidance in later litigation. In discussing \textit{Abbott Laboratories}, Professor Davis notes that its treatment of the hardship aspect is "[e]specially significant as a guide for later ripeness problems." K. \textit{Davis}, 1983 \textit{Treatise}, supra note 2, at 369.
C. Ripeness as Interest-Weighing

In one important respect, however, the lower federal courts have expanded on the Abbott Laboratories inquiry by treating it as a vehicle for interest weighing. Abbott Laboratories nowhere states that courts should weigh interests; rather the case may simply establish two preconditions to finding ripeness—fitness and hardship. Nevertheless, in a series of decisions, courts have identified and weighed the pertinent factors in determining whether a case is ripe for review. The District of Columbia Circuit has described the approach as follows:

What is required is that the interests of the court and agency in postponing review until the question arises in some more concrete and final form, be outweighed by the interest of those who seek relief from the challenged action's "immediate and practical impact" upon them. The former interests are encompassed within the first half of the Abbott Laboratories "two-fold aspect" the "fitness of the issues for judicial decision," while the latter interests are expressed in the second part, the "hardship to the parties of withholding court consideration."274

In operation, then, the ripeness inquiry identifies factors recommending for and against review, and determines whether review is appropriate on the basis of their relative weights. The elements identified in Abbott Laboratories and its progeny—the nature of the question, finality, the impact on the plaintiff, and administrative disruption—impose some structure on the ripeness inquiry. Thus, where a factual issue is involved, and the agency has made only a tentative determination adverse to the party seeking review, courts have strong reasons to deny judicial review and only the most severe hardship can outweigh those reasons.275 Similarly, where hardship is minimal or non-existent, "only a minimum showing of countervailing judicial or administrative interest is needed, if any, to tip the balance against review."276 A substantial hardship cou-

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274. Continental Air Lines v. Civil Aeronautics Bd., 522 F.2d 107, 124-25 (D.C. Cir. 1975) (en banc) (footnote omitted) (analyzing the ripeness of agency policy statements). See also Rosenthal & Co. v. Commodity Futures Trading Comm'n, 614 F.2d 1121, 1127 (7th Cir. 1980) ("weighing the nature of the claim being asserted and the consequences of deferment of judicial review," "quoting Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976)); Aquavella v. Richardson, 437 F.2d 397, 403 (2d Cir. 1971) (ripeness requires "careful balancing" of interests for and against review). Professor Jaffe presaged the use of balancing to resolve ripeness problems. L. JAFFE, supra note 1, at 411 ("The more completely formed the administrative action is, the more it approaches a considered judgment, the less need there should be for a realistic showing of irreparable injury.").

275. In Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21 (D.C. Cir. 1984), the court concluded that the hardship was insufficient to outweigh the interests in denying review. Id. at 31. The discussion revealed one way in which "fitness" and "hardship" are implicitly weighed in evaluating ripeness. When the agency has adopted a final "standard of conduct" and a regulated party faces a dilemma between compliance and non-compliance, "judicial review is both possible—because a definitive agency position susceptible of review exists—and appropriate—because a delay in review causes hardship to the regulated entity." Id. Where the agency has not taken any final position, on the other hand, the harm is different in kind, if not in gravity, and the agency's "position will not generally be in a form susceptible of review." Id.

276. Diamond Shamrock Corp. v. Costle, 580 F.2d 670, 674 (D.C. Cir. 1978). Here the court
pled with an issue that does not require further administrative consideration, however, is likely to result in finding ripeness.\textsuperscript{277}

Even if lower courts had not expounded the ripeness inquiry so as to require balancing, a weighing process is inevitable where the requisite analysis involves pragmatic evaluations of relevant factors. The hardship aspect necessarily involves balancing. Unless the plaintiff is injured in some respect by the agency’s action, he or she has no standing\textsuperscript{278} and the court has no need to consider ripeness. Once the standing threshold is crossed, the hardship of denying review is not a simple “yes or no” question, but is necessarily a question of “how much” hardship will result. Similarly, the governmental hardship from permitting review ranges from the petty, such as where judicial review merely requires the agency to defend its conduct before it wishes to do so,\textsuperscript{279} to the substantial, such as where judicial intervention impedes ongoing administrative litigation.\textsuperscript{280} Courts should and do consider the varying levels of hardship in different cases in evaluating whether to permit judicial review. “Fitness of the issues” cannot be readily reduced to a “yes or no” inquiry either. As Professor Davis notes, “issues cannot be classified as either fit or unfit for review, because . . . fitness and hardship are variables that must be considered together.”\textsuperscript{281} Deferring judicial consideration of even a
denied judicial review of agency regulations even though they constituted final agency action and presented purely legal issues. \textit{Id.} at 673-74. Because the regulations had no “immediate and practical effect on the plaintiff,” \textit{id.} at 673, the court found that administrative and judicial interests would be served by deferring judicial review because the agency might change its policy or clarify the meaning of the regulations through their application. \textit{Id.} at 674.

\textsuperscript{277} In Aquavella v. Richardson, 437 F.2d 397 (2d Cir. 1971), the court used this approach in concluding that medicare reimbursement denials were “final agency action” subject to judicial review. \textit{Id.} at 403-04. The court saw the inquiry as requiring a balancing of the interests for and against judicial review and described \textit{Abbott Laboratories} as providing the guidelines and principles in this regard. \textit{Id.} at 403. After analyzing the application of the \textit{Abbott Laboratories’} guidelines and principles in the case, the court concluded that “the slight disruption of administrative routine that may result from finding jurisdiction in this case is clearly outweighed by the immediate injury to plaintiffs.” \textit{Id.} at 404.

\textsuperscript{278} See \textit{supra} note 84.

\textsuperscript{279} \textit{Abbott Laboratories} essentially involved the situation where the Court required the agency to defend its actions earlier than the agency had desired. The Court found that judicial review would in fact serve the enforcement interests and thus refused to permit the agency’s concerns to defeat judicial review. \textit{Abbott Laboratories} v. Gardner, 387 U.S. 136, 154 (1967). The agency believed that pre-enforcement review could potentially obstruct agency action, \textit{id.} at 154-55, and three justices believed that these concerns were serious enough to warrant denying review, \textit{id.} at 176-77, 183-87, 199-201 (Fortas, J., joined by Warren, C.J., and Clark, J., concurring in \textit{Toilet Goods Ass’n}, 387 U.S. 158 (1967) and dissenting in \textit{Abbott Laboratories} and Gardner v. \textit{Toilet Goods Ass’n}, 387 U.S. 167 (1967), \textit{see supra} note 234.).

\textsuperscript{280} In contrast to \textit{Abbott Laboratories}, the setting in \textit{Standard Oil}, 449 U.S. 232 (1980), involved interference with ongoing agency action. The Court found that judicial review of the FTC’s allegations would “interfere[] with the proper functioning of the agency, . . . den[y] the agency an opportunity to correct its mistakes and apply its expertise . . ., [result in] piecemeal review which at the least is inefficient and . . . [potentially unnecessary] . . ., [and] would delay resolution of the ultimate question[,]” \textit{Federal Trade Comm’n v. Standard Oil Co.}, 449 U.S. 232, 242 (1980). As shown below, that the Court here applied the ripeness test through the language of the exhaustion policies is no coincidence.

\textsuperscript{281} \textit{K. Davis, 1983 Treatise, supra} note 2, at 405.
"purely legal question" until the agency acts is sometimes appropriate, and because of the interest in allowing agencies to correct their mistakes, courts should not hastily label as final those decisions subject to administrative appeal or reconsideration.

Each of the two aspects of ripeness, fitness and hardship, exists on a broad spectrum and courts cannot resolve their relative weight in particular cases through simple categorization. The ripeness inquiry, then, necessarily consists of a case-by-case evaluative process that weighs the interests in avoiding review—"non-fitness" and governmental hardship—against the hardship to the plaintiff of denying review.

IV. SOLVING THE EXHAUSTION PROBLEM

A. Exhaustion, Ripeness, and the Finality Link

Careful scrutiny of the exhaustion and ripeness doctrines reveals that they are two facets of one inquiry and that "finality" represents the key to joint analysis. The ripeness doctrine developed in and after *Abbott Laboratories* certainly resembles the exhaustion doctrine. Examining how the two doctrines relate suggests that the purposes of ripeness and exhaustion are virtually identical and that the conceptual differences between the doctrines do not mandate separate methods of analysis. Rather, each doctrine complements the other. The question in all cases is whether administrative activity has reached a stage at which judicial intervention is appropriate. Finality, either as a separate doctrine or as the focus of both ripeness and exhaustion, is the link that provides one rational method for resolving that question.

282. See supra notes 70-74 and accompanying text.

283. Courts have recognized the policy of permitting agencies to correct their own mistakes in numerous ripeness and exhaustion cases. See, e.g., United States v. California Care Corp., 709 F.2d 1241, 1246 (9th Cir. 1983) (emphasizing willingness of Blue Cross to consider claims and arguments); Von Hoffburg v. Alexander, 615 F.2d 633, 637, 639 (5th Cir. 1980) (enforcing policy and recognizing a "viable possibility" that the plaintiff would prevail before the agency); St. Regis Paper Co. v. Marshall, 591 F.2d 612, 613, 614 (10th Cir. 1979) (noting the policy and stating that agency adjudicatory proceedings provide an "opportunity for the agency to correct an ill-conceived regulation"); Diamond Shamrock Corp. v. Costle, 580 F.2d 670, 674 (D.C. Cir. 1978) (recognizing the possibility of policy modification or revocation). Moreover, common sense dictates that an agency is least apt to change its mind about a decision after being called upon to defend the decision. It still happens, however. See, e.g., Texaco, Inc. v. Department of Energy, 795 F.2d 1021, 1023-24 & n.6 (Temp. Emer. Ct. App. 1986) (lead plaintiff and agency switched positions on legal and policy aspects of terminating oil price and allocation controls).

284. Professor Davis states: The key to ripeness law is now a weighing of the private party's hardship against possible harm to the judicial function from providing relief. . . . A line is drawn between casual and nonfinal answers by an agency's staff and deliberative and final determinations by top officers; the line is not a fixed one but varies somewhat with other factors entering into the reckoning, such as the degree of hardship from the uncertainty and the degree of fitness of the issues for judicial determination.

K. DAVIS, 1983 TREATISE, supra note 2, at 411.

285. See infra notes 304-15 and accompanying text. Finality is often analyzed in cases in which ripeness turns primarily on the existence of ongoing or anticipated administrative proceedings that are capable of resolving the matter. See, e.g., Federal Trade Comm'n v. Standard Oil Co., 449 U.S.
As discussed previously, the exhaustion doctrine serves several structural and functional policies relating to both the administrative and judicial processes. In *Abbott Laboratories*, the Supreme Court declared that essentially the same policies underlie the ripeness doctrine. Both doctrines serve agency autonomy and judicial economy by allowing most administrative proceedings to conclude prior to judicial intervention and, by deferring intervention in this manner, courts allow agencies to perform their functions and assist their own later review of the agency's action. The shorthand description of the ripeness policies—"the interests of the court and agency in postponing review until the question arises in some more concrete and final form"—differs in no significant respect from the more detailed recitation of exhaustion policies. Courts applying one doctrine often find policy guidance in the other or emphasize the unity of purpose behind ripeness and exhaustion. In short, the doctrines have the same objectives and any differences in methodology must be justified by other factors.

Despite their similarities, identifying the differences between the two doctrines is necessary. Numerous cases state that exhaustion and ripeness are distinct doctrines, but attempts to explain the perceived differ-

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286. See supra notes 36-45 and accompanying text.

287. The Court in *Abbott Laboratories* did not set out the policies behind the ripeness doctrine in great detail. 387 U.S. at 148. It did, however, state that the doctrine's "basic rationale" is to prevent courts from becoming involved in "abstract disagreements over administrative policies" and to allow agencies to complete decision making and have those decisions affect the public "in a concrete way prior to judicial review." Id. Each of the policies discussed in *McKart* can be found in these very simple principles. *McKart* v. United States, 395 U.S. 185, 193-95 (1969). By permitting agencies to conclude decision making and by staying out of "abstract disagreements," courts serve the exhaustion interests in administrative fact-finding, discretion, expertise, and autonomy. *Id.* at 194. By only reviewing cases in which agency action is final and effective, courts serve the exhaustion interests in more informed judicial review and judicial economy. *Id.* at 194-95.


289. For example, the Supreme Court recited exhaustion precedents in analyzing the hardship to the agency of permitting judicial review in *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 242-43 (1980), see supra note 250. See also *Seafarers Int'l Union v. United States Coast Guard*, 736 F.2d 19, 28 (2d Cir. 1984) (failure to exhaust administrative remedies implicates *Abbott Laboratories* policies); *Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 782 (D. Del. 1980) (the "proper test of finality . . . [is] whether granting review will frustrate the aims of the doctrine of exhaustion of administrative remedies").

290. E.g., *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903, 908 (3d Cir. 1982) ("finality and exhaustion serve the same interests"); *American Dairy, Inc. v. Bergland*, 627 F.2d 1252, 1260-61 (D.C. Cir. 1980) (both doctrines "are designed to avoid premature disruption of agency proceedings"); *Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 614 F.2d 1121, 1128 (7th Cir. 1980) ("underlying considerations [of both doctrines] are the same"); see also *Fuchs, supra* note 7, at 818 ("Exhaustion of administrative remedies for completed agency action may be a pre-requisite to judicial review for the same reasons as delay ripeness for judicial review to uncompleted agency action still lacking legal effect."); *Note, supra* note 4, at 645 (describing the various justiciability doctrines as "unified behind a single generalized goal: the need for focus").

291. Usually, cases making this statement either assert that the doctrines are distinct, e.g., *Association of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1177 (D.C. Cir. 1979) (finality and exhaustion
enances are less common and less satisfactory. The Supreme Court has recently suggested that the exhaustion doctrine applies only to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy" and that ripeness turns on "whether the initial decision-maker has arrived at a definitive position on [an] issue that inflicts an actual, concrete injury." These descriptions, however, artificially limit exhaustion to procedures in the nature of administrative appeals and erroneously suggest too clear a

are "analytically distinct") (Leventhal, J., concurring), cert. denied, 447 U.S. 921 (1980); United States ex rel. Ricketts v. Lightcap, 567 F.2d 1226, 1232 (3d Cir. 1977) (doctrines "are distinct and not interchangeable"); Aquavella v. Richardson, 437 F.2d 397, 403 (2d Cir. 1971) ("each doctrine has its own nuances"); 2 C. KOCH, ADMINISTRATIVE LAW & PRACTICE 194 (1985) ("ripeness and exhaustion are fundamentally different concepts"); or imply such by using different approaches, e.g., Pepsico, Inc. v. FTC, 472 F.2d 179, 186 n.7 (2d Cir. 1972) (implying exhaustion satisfied but not ripeness, applying test from United States v. Los Angeles & S.L.R.R., 273 U.S. 299, 309-10 (1927), see supra note 219); Nor-Am Agric. Prod., Inc. v. Hardin, 435 F.2d 1151, 1156-57 (7th Cir. 1970) (Abbott Laboratories analysis distinguished from exhaustion issues involved in judicial review or interim suspension order); Boise Cascade Corp. v. FTC, 498 F. Supp. 772, 777-82 (D. Del. 1980) (exhaustion and ripeness analyzed separately). Curiously, these decisions often set ripeness or exhaustion against finality, rather than against one another. As shown below, see infra notes 304-16 and accompanying text, this is not a significant factor, except to the extent that it indicates the confusion courts have in dealing with these concepts.


293. Id.

294. Williamson County is a complex decision made more difficult by the Court's terminology, which seems applicable only to the peculiar setting of the case. The plaintiff claimed that the application of zoning laws and regulations constituted a taking of private property for public use and sought just compensation in a civil rights action in federal district court. Id. at 175, 192. The Supreme Court found the action unripe because there had been no final determination that the plaintiff had been denied all beneficial use of the property, id. at 186-94, and the plaintiff had not sought compensation through state procedures, id. at 194-97.

The conclusion that an action for just compensation is not ripe at this stage constitutes fundamental common sense. Where there are adequate administrative variance and judicial compensation procedures available, id. at 193-97, a plaintiff should not be able to bring an action predicated on a claim that the state has unconstitutionally denied just compensation. The Court arguably had boxed itself in, however, in previous decisions holding that a plaintiff need not exhaust administrative remedies prior to bringing a civil rights action. See, e.g., Patsy v. Florida Bd. of Regents, 457 U.S. 496, 516 (1982) (civil rights challenge to hiring practices as discriminatory); Gibson v. Berryhill, 411 U.S. 564, 565 (1975) (civil rights challenge to state optometry licensing laws).

In an attempt to establish that the problem in the case was ripeness rather than exhaustion, the Williamson County Court unnecessarily and confusingly added the word "initial" before "decision-maker" in its description of ripeness and attempted to limit the exhaustion doctrine to administrative appeals. 473 U.S. at 193. To limit exhaustion in this manner, however, ignores many other applications of the exhaustion doctrine. See supra notes 28-29. The doctrine concerns whether judicial review is appropriate in cases in which pertinent administrative proceedings, remedial or not, have not been concluded or fully used. See, e.g., Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1156 (D.C. Cir. 1979) ("as a general matter, . . . the exhaustion doctrine provides that challenges to agency action should not be heard until relevant administrative proceedings have been concluded"), cert. denied, 447 U.S. 921 (1980); Comment, supra note 5, at 456 ("the courts should refrain in most cases from intervening in administrative proceedings"); Fuchs, supra note 7, at 859 (the exhaustion doctrine applies to "available corrective steps at the administrative level, whether preventive or remedial"). In short, the word "remedy" is essentially interpreted to mean "proceedings.

The irony is that the Court did not need to engage in this strained analysis in order to deny jurisdiction without overruling its precedents. First, unlike most other civil rights claims, no violation of the Constitution's takings clause occurs until all state compensation proceedings are concluded, because the clause is not violated by a taking, only by a taking without just compensation.
distinction between the doctrines by highlighting the ripeness of "initial" action. Only rarely does such action present a ripe controversy, and when it does, the same reasons should justify excusing exhaustion. Professor Davis provides a more accurate explanation of the difference between the doctrines: "[T]he ripeness focus is on the types of functions that courts should perform, and the exhaustion focus is on the narrow question of how far a party must pursue an administrative remedy before going to court . . . ." This approach is more consistent with the weight of authority and presents a better starting point for determining whether a particular issue is properly characterized as "exhaustion" or "ripeness."

On one level, Professor Davis's distinction seems overly simplistic. If the only difference between the doctrines is whether premature judicial review will gore judicial or administrative oxen, characterizing the issue as ripeness or exhaustion might turn solely on whether "judicial" or "administrative" interests are more strongly implicated in a particular case. In reality, the distinction is more subtle. Exhaustion is an issue only where some further administrative proceeding is or was contemplated and the exhaustion doctrine determines whether judicial review may occur prior to or in the absence of that proceeding. The ripeness doctrine, however, applies regardless of whether the parties contemplate a further administrative proceeding, and determines whether the administrative action that has already occurred is appropriate for judicial review. Ripe­ness, thus, evaluates the suitability for review of existing agency action from a judicial viewpoint, while exhaustion examines the need for further administrative procedures from the viewpoints of both agencies and courts.

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 297 n.40 (1981). Thus, in this peculiar setting, no constitutional violation occurs until administrative proceedings are concluded. 295. See infra notes 303 & 318. 296. K. DAVIS, 1983 TREATISE, supra note 2, at 350. 297. The Supreme Court's analysis of finality in Standard Oil supports this view. There the Court opined that the company "may well have exhausted its administrative remedy" when it did all it could to have the FTC withdraw its complaint. Federal Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 243 (1980). Perhaps the clearest judicial statement of this distinction was by the Third Circuit in Bethlehem Steel Corp. v. EPA, 669 F.2d 903 (3d Cir. 1982): "In general, exhaustion refers to the steps which the litigant must take, whereas finality refers to the conclusion of activity by the agency." Id. at 908. The court used Standard Oil to explain the distinction, noting that in some cases administrative action may not be sufficiently final for judicial review even if the plaintiff has done all that it can to obtain administrative relief, but that in other cases the action may be final "even though the party has not pursued his administrative remedies to the end." Id. The somewhat limited importance of this distinction is underscored by the court's recognition that the doctrines "serve the same interests," and involve, "[t]o some extent," the same factors. Id. at 908 & n.3. See also Geyen v. Marsh, 775 F.2d 1303, 1308 n.6 (5th Cir. 1985) (exhaustion is concerned with when review is appropriate, ripeness is concerned with what agency decisions may be reviewed); Gulf Oil Corp. v. Department of Energy, 663 F.2d 296, 310 (D.C. Cir. 1981) (contrasting the exhaustion doctrine's "focus[] on the agency's primary responsibility to decide controversies" and the ripeness emphasis on fitness for judicial review). 298. The policies of both doctrines, however, recognize administrative and judicial interests. See, e.g., Port of Boston, 400 U.S. 62, 71 (1970) (one criterion of finality is that "judicial review will not disrupt the orderly process of [administrative] adjudication"); Mullins Coal Co. v. Clark, 759
A second aspect of Professor Davis's distinction between ripeness and exhaustion focuses on the role of finality in each doctrine: while finality is only one of the premises of ripeness, finality sounds as if it is the only question involved in exhaustion. If further administrative procedures are or were available, the agency action to be reviewed is not truly final and the exhaustion doctrine determines whether completing those procedures is a precondition of judicial review. Ongoing administrative proceedings clearly militate against the finality of agency action for ripeness purposes, but pragmatic finality is sufficient, and even that is only one element of the ripeness inquiry. Ripeness is therefore broader than exhaustion in two respects. Exhaustion represents only one prong—finality—of only one aspect of the ripeness inquiry—fitness for judicial review. This distinction, however, is the common thread linking the doctrines.

Courts often remark on the relationship between the ripeness and exhaustion doctrines but, as with judicial comments regarding the doctrines' differences, assertion and implication frequently replace explanation. The most convincing judicial and scholarly commentary 

F.2d 1142, 1145 (4th Cir. 1985) (noting that exhaustion "creates a reasonable division of labor between agency and court"); Power Plant Div., Brown & Root, Inc. v. Occupational Safety & Health Review Comm'n, 673 F.2d 111, 113 (5th Cir. Unit B Apr. 1982) (noting that the exhaustion policies serve administrative and judicial interests); West v. Bergland, 611 F.2d 710, 715-16 (8th Cir. 1979) (same), cert. denied, 449 U.S. 821 (1980).

299. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), is a perfect example of where ongoing proceedings weigh against finding finality. The case was not ripe because the plaintiff's exhaustion of administrative variance procedures might eliminate the "taking," id. at 186-94, and exhaustion of state compensation procedures might result in "just compensation," id. at 194-97. In his concurring opinion, Justice Stevens recognized that the majority's insistence that exhaustion was not involved in this case was unrealistic: "As the Court demonstrates, until all available remedies have been exhausted, all we can say with any certainty is that petitioners may be required to abandon some of their restrictions ... unless they are prepared to compensate respondent ... ". Id. at 202 (Stevens, J., concurring). See also Peter Kiewit Sons' Co. v. Army Corps of Eng'rs, 714 F.2d 163, 168 (D.C. Cir. 1983) (action not ripe where party seeks review of proposed debarment without exhausting remedies); Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1378 (9th Cir. 1983) ("availability of relief within the agency refutes the argument that the agency determination is final").

300. Professor Davis, in the text accompanying supra note 296, implies that the ripeness inquiry is broader than exhaustion. This also appears to underlie the court's theory in Gulf Oil Corp. v. Department of Energy, 663 F.2d 296 (D.C. Cir. 1981), which considered the exhaustion doctrine, id. at 307-09, and then the ripeness doctrine, id. at 309-13, characterizing the conclusion of agency proceedings as a "weighty" but not "indispensable" element in the ripeness inquiry, id. at 310. See also Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 467 (S.D. Fla. 1980) (quoting from Professor Davis and discussing "the more narrow question of exhaustion" before engaging in ripeness analysis), aff'd as modified sub nom. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. Unit B May 1982); Note, supra note 254, at 347 (exhaustion "is a more limited, procedurally oriented concept").

301. Courts have asserted that ripeness and exhaustion are related and have described the relationship in a variety of ways. E.g., Peter Kiewit Sons' Co. v. Army Corps of Eng'rs, 714 F.2d 163, 167 (D.C. Cir. 1983) (referring to the "twin requirements of exhaustion and finality"); Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 908 (3d Cir. 1982) (the doctrines "often ... converge"); American Dairy, Inc. v. Bergland, 627 F.2d 1252, 1260 (D.C. Cir. 1980) ("the requirements of finality and exhaustion are inextricably intertwined"); Dresser Indus. v. United States, 596 F.2d 1231, 1238 (5th Cir. 1979) (exhaustion "performs a function similar to" ripeness); National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689, 700 (D.C. Cir. 1983) (the doctrines as applied are "not
describes the ripeness and exhaustion doctrines as overlapping.\textsuperscript{302} Doctrines founded on the same policies and governing the same subject matter should indeed produce a common pattern of decisions. All cases must be ripe, and ripeness depends in large part on the finality of agency action. The failure to exhaust detracts from finality, thus it detracts from the fitness of the issues for judicial resolution.\textsuperscript{303} Where an unexhausted administrative remedy exists, courts should generally reach the same result—excuse exhaustion and find the action ripe, or require exhaustion and find the action unripe.\textsuperscript{304} Where a plaintiff has exhausted administrative remedy issues, e.g., Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 909-11 (3d Cir. 1982) (use of Abbott Laboratories to interpret the irreparable injury exception); Riley v. Ambach, 668 F.2d 635, 641-42 (2d Cir. 1981) (requiring exhaustion because unwilling to review regulation in the abstract, relying on Toilet Goods); Exxon Corp. v. FTC, 411 F. Supp. 1362, 1372, 1374-75 (D. Del. 1976) (evaluating exhaustion issues in its discussion of ripeness), or their exhaustion analysis to help resolve exhaustion issues, e.g., Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26, 27, 28 (2d Cir. 1984) (ripeness depends on exhaustion to extent of compiling sufficient record; court repeatedly notes the failure to exhaust as an impediment to ripeness); Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1378 (9th Cir. 1983) (availability of unexhausted remedies establishes that regulatory letters are not final); St. Regis Paper Co. v. Marshall, 591 F.2d 612, 615 (10th Cir. 1979) (case not ripe because of unexhausted administrative remedies).

302. Professor Davis's explanation of the distinction between the doctrines, see supra text accompanying note 296, concludes that the exhaustion and ripeness doctrines "often overlap." K. DAVIS, 1983 Treatise, supra note 2, at 350. Cases adopting this characterization include Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26 n.11 (2d Cir. 1984), Association of Nat'l Advertisers v. FTC, 627 F.2d 1151, 1177 (D.C. Cir. 1979) (Leventhal, J., concurring), cert. denied, 447 U.S. 921 (1980), and Aquavella v. Richardson, 437 F.2d 397, 403 (2d Cir. 1971).

303. This article ultimately concludes that courts should require exhaustion if the existing agency action is unripe and excuse exhaustion if the existing agency action is ripe. Courts have accepted this principle in cases where they excuse exhaustion because the policies would not be served by requiring exhaustion and the case is found to be ripe for the same or similar reasons. In Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771 (D.C. Cir. 1984), for example, the court used pragmatic interest weighing to resolve both exhaustion and ripeness in an interdictory challenge to the Department's authority to conduct administrative proceedings and impose discovery sanctions. Id. at 780-84. See also Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 740-44 (10th Cir. 1982) (similar weighing for ripeness and exhaustion, emphasizing the legal nature of the question presented); S. BREYER & R. STEWART, supra note 30, at 1152 (noting a growing trend of courts excusing exhaustion by "refer[ring] to factors similar to those relevant to the conclusion that a case is 'ripe' for review"). Dual analysis is less common when a court declines jurisdiction because enforcement of one doctrine usually is sufficient. Where it occurs, however, the policy analysis under each doctrine is complementary. See, e.g., Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26 n.11 (2d Cir. 1984) (suggesting that the case could be dismissed on either ripeness or exhaustion grounds due to undeveloped factual record); Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 907-11 (3d Cir. 1982) (denying review of notice of non-compliance, relying on both exhaustion and ripeness policies and precedents); cf. Boise Cascade Corp. v. FTC, 498 F. Supp. 772, 777-82 (D. Del. 1980) (dismissing action due to failure to exhaust and lack of final agency action).

304. Thus, in referring to the Supreme Court's restatement of the ripeness definition in Port of Boston, see supra text accompanying note 244, Professor Schwartz concludes that the first portion of the definition—"whether the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication . . ."—400 U.S. at 71—is basically "whether there has been exhaustion." B. SCHWARTZ, supra note 7, at 522-23. Professor Jaffe takes a slightly different view of the overlap. He notes that determining whether agency action is subject to judicial review "raises questions which are sometimes discussed under the rubric 'ripeness,' sometimes 'exhaustion of remedies,' sometimes 'standing.' Discussion under any of these rubrics may suffice, but in certain other cases the issue is faced more squarely under one than under another." L.
trative remedies or no such remedy exists, the agency action most likely is sufficiently final to satisfy that element of the ripeness doctrine. Where a plaintiff has improperly failed to exhaust administrative remedies, however, the agency action is unlikely to satisfy the finality prong of the ripeness test. In general, then, a determination under the exhaustion doctrine partially resolves the ripeness question.

This effect of an exhaustion determination on the issue of ripeness appears to be the most common understanding of the overlap between the doctrines. Ripeness and exhaustion converge most clearly where the critical issue concerns the finality of the agency action. This relationship explains one of the problems in characterizing the justiciability doctrines, which is that finality is sometimes seen as a separate requirement. The Administrative Procedure Act mentions neither ripeness nor exhaustion, but section 704 provides that courts may review only final agency action.

Moreover, section 405(g) of the Social Security Act, which is

JAFFE, supra note 1, at 395. Professor Jaffe’s point most clearly relates to which party is responsible for initiating further agency action. If it is the plaintiff, exhaustion seems more apt; if it is the agency, ripeness seems more apt. See supra note 297.

305. Thus, in American Dairy, Inc. v. Bergland, 627 F.2d 1252 (D.C. Cir. 1980), the court concluded that an agency order “in the nature of remand” was subject to judicial review even though it was not “truly” final: “We think that once the prescribed [administrative remedy] has been followed, the exhaustion mandate should be regarded as met, and the resulting decision as sufficiently final for purposes of review by the courts.” Id. at 1261. The “no remedy” situation is exemplified by Aquavella v. Richardson, 437 F.2d 397 (2d Cir. 1971), in which the court found the absence of procedures to obtain an administrative decision constituted final agency action. Id. at 404.

306. For example, in Williamson County the case was insufficiently ripe for review because exhaustion of the procedures in that case would clarify the record and might eliminate or lessen the plaintiff’s injury. See supra note 299. See also Toilet Goods Ass’n v. Gardner, 387 U.S. 158, 165-66 (1967) (exhaustion needed to render the case fit for review), see supra text accompanying notes 239-41; Seafarers Int’l Union v. United States Coast Guard, 736 F.2d 19, 25-29 (2d Cir. 1984) (failure to exhaust makes case unripe); cf. Rosenthal & Co. v. Commodity Futures Trading Comm’n, 614 F.2d 1121, 1127-28 (7th Cir. 1980) (case not sufficiently final for judicial review, reliance on exhaustion precedents). This relationship is not inevitably true, however; where an available agency proceeding no longer exists, the action is likely to be ripe whether or not exhaustion is required. This was true in both McKart v. United States, 395 U.S. 185 (1969), and McGee v. United States, 402 U.S. 479 (1971), in which selective service classifications became “final” because no agency appeals were taken. See supra notes 88 & 89 and accompanying text. The relationship between the doctrines still holds, however, if the question relates to the fitness of the agency action when administrative remedies were still available. At that earlier stage, the statutory interpretation issue of McKart made that case fit for judicial review, while the fact-finding and administrative expertise required in McGee rendered that case unfit for judicial review.

307. See supra note 15. Section 704 should not be interpreted as a statutory precondition to judicial review. Instead § 704 is generally recognized as codifying judicially-crafted principles of judicial review. See Carter/Mondale Presidential Comm. v. Federal Election Comm’n, 711 F.2d 279, 284 n.9 (D.C. Cir. 1983) (lengthy analysis of legislative history of APA § 704 supporting codification view); Dresser Indus. v. United States, 596 F.2d 1231, 1238 (5th Cir. 1979) (describing APA § 704 as an exhaustion requirement and not a jurisdictional provision); cf. Boise Cascade Corp. v. FTC, 498 F. Supp. 772, 782 (D. Del. 1980) (interpreting § 704 in accordance with exhaustion doctrine’s purposes is consonant with the congressional intent to codify the doctrine). Moreover, the APA is not a trustworthy guide: “If one tracks through the APA for its response to [questions concerning the availability of judicial review], one emerges with a handful of ambiguities.” Vining, supra note 191, at 1452. Professor Vining notes in particular that APA § 704 fails to define “finality.” Id. at 1453. See also Levinson, Judicial Review as a Means of Preventing the Completion or Enforcement of Administrative Action, 30 AM. J. COMP. L. SUPP. 439, 449-50 (1982) (noting that APA § 704 provides little assistance).
always treated as imposing an exhaustion requirement.\textsuperscript{308} refers to a "final decision."\textsuperscript{309} Professor Davis states: "Problems of finality are in the area where the law of exhaustion joins or overlaps with the law of ripeness. . . . Finality may be a part of exhaustion, a part of ripeness, or a third subject; courts do not clarify the classification for they need not."\textsuperscript{310} While judicial clarification may be unnecessary, courts have perpetuated the confusion by failing to indicate the category in which finality belongs. That finality is less a separate requirement than an element common to both exhaustion and ripeness, however, is clear. Cases focusing on "finality" rather than other aspects of exhaustion or ripeness do so because deciding whether the agency's action is sufficiently final to justify judicial review disposes of the issue under either rubric. That question, however, occurs within an overall context that is more accurately characterized as ripeness or exhaustion.\textsuperscript{311}

One can see the relationship among ripeness, exhaustion, and finality most easily where exhaustion is required in order to produce final agency action ripe for judicial review. Where a tentative or interlocutory agency decision is deemed unfit for review, judicial review may be denied under any one of the three principles. The relationship among ripeness, exhaustion, and finality remains valid, but is slightly more complicated, where courts excuse exhaustion. While failing to exhaust detracts from finality, this does not necessarily destroy ripeness. If it did, exhaustion would become an absolute requirement through the backdoor of the ripeness requirement.\textsuperscript{312} Instead, each doctrine permits judicial review in

\textsuperscript{308} The Supreme Court's decisions on \S\ 405(g) use the terminology of exhaustion. Bowen v. City of New York, 106 S. Ct. 2022, 2031-33 (1986); Heckler v. Ringer, 466 U.S. 602, 617-19 (1984); Matthews v. Eldridge, 424 U.S. 319, 328, 330-32 (1976); Weinberger v. Salfi, 422 U.S. 749, 764-67 (1975). Professor Davis analyzes this requirement in his chapter on exhaustion. K. DAVIS, 1983 TREATISE, supra note 2, § 26:8. See also S. Breyer & R. Stewart, supra note 30, at 1150 (describing Eldridge in terms of an exception to the exhaustion requirement); Mashaw & Merrill, supra note 61, at 778-79 (analyzing Eldridge and Salfi in a description of the exhaustion doctrine).

\textsuperscript{309} See supra note 113.

\textsuperscript{310} K. Davis, 1983 TREATISE, supra note 2, at 458.

\textsuperscript{311} Statutes tend to use "final decision" or similar terminology to refer to the overall issue, while "ripeness" and "exhaustion" refer to its judicially-crafted components. Still, the Supreme Court's recent cases have added to the confusion by using "finality" as a synonym for ripeness. E.g., Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-94 (1985) (referring to both finality and ripeness, but defining finality in terms of the two aspects of the ripeness inquiry); Federal Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 239-43 (1980) (defining "final agency action" in terms of definitiveness and impact); see also Gelpe, supra note 3, at 9 n.25 (referring to "ripeness, which is also called 'finality' "); Vining, supra note 191, at 1515 (noting that ripeness and finality have been used interchangeably). See generally text accompanying notes 243-49.

\textsuperscript{312} Each approach to exhaustion analysis recognizes that the exhaustion doctrine does not impose an absolute requirement of exhaustion. See Part II.B. Since ripeness is always required, however, courts may not accept jurisdiction where the plaintiff has failed to exhaust administrative remedies unless the action is ripe despite that failure. Thus, whenever a court decides to excuse exhaustion, it either finds the case to be ripe as well, e.g., Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 780-84 (D.C. Cir. 1984); Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 740-44 (10th Cir. 1982) (both discussed in supra note 303), or assumes ripeness, e.g., McKart v. United States, 395 U.S. 185 (1969). The assumption is appropriate in cases in which all agency action has concluded, such as McKart.
certain circumstances. A case is ripe if, notwithstanding the lack of true finality, the fitness of the issues and plaintiff hardship outweigh the government's interests in denying review. Exhaustion can and should be resolved similarly, and excused where the failure to exhaust—the lack of true finality—is outweighed by other factors supporting judicial review.

B. Resolving Exhaustion Problems Through the Ripeness Method

Restating the exhaustion doctrine using the terminology and structure of the ripeness doctrine is relatively simple and provides a rational method of resolving exhaustion problems. Courts should determine whether to require exhaustion in a particular case by weighing the fitness of the issues and the relative hardships to the parties. This means, in essence, that courts should reaffirm the underlying premises of McKart, but replace its unwieldy balancing approach with the "two-fold" aspect of Abbott Laboratories.313

Courts should apply exhaustion according to the doctrine's underlying policies.314 Where an agency action is pragmatically final notwithstanding the plaintiff's failure to exhaust, at least some of the functional purposes of the exhaustion doctrine will be satisfied whether or not the court requires exhaustion.315 This relates well with the fitness aspect of the ripeness inquiry, as suggested in the previous section. Courts judge fitness not by official administrative designations of finality, but rather by the nature of the issues presented and the pragmatic finality of the administrative action.316 Under the ripeness doctrine, decisions that are

314. See Part II.A. This is most clearly the reasoning of courts using a balancing approach. See generally supra notes 102-07 and accompanying text. The theory, if not always the application, of an exceptions approach is consistent with the position as well. Exceptions are designed to represent settings in which the purposes of the exhaustion doctrine are better served by excusing exhaustion than by requiring it. See, e.g., Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 744 (10th Cir. 1982) (question of law exception is rooted in the exhaustion policies); Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1093 (6th Cir. 1981) ("Where pursuit of administrative remedies does not serve the purposes behind the exhaustion doctrine, the courts have allowed a number of exceptions."); cf. Gelpe, supra note 3, at 31 (dividing exceptions into two categories, one of which applies where "exhaustion would not serve the values that underlie the doctrine").
315. If an administrative decision is pragmatically final, the agency in all likelihood has concluded all fact-finding, exercised its discretion, and resolved all matters within its expertise and further administrative consideration will not aid judicial review. These are the functional policies underlying the exhaustion doctrine. See supra notes 36-45 and accompanying text.
316. Pragmatic finality is a fundamental aspect of the ripeness inquiry. Although the Abbott Laboratories Court found the fact that the regulations were "final agency action" under APA § 704 to be important in evaluating fitness, it was not the technical requirements of that statute but the definitiveness of the agency's position and the presence of a strictly legal question that ultimately resolved the fitness determination. Abbott Laboratories v. Gardner, 387 U.S. 136, 149-52 (1967). Moreover, in Toilet Goods, the Court declined to find the issues fit for judicial review despite the fact that the regulation constituted "final agency action." Toilet Goods Assoc. v. Gardner, 387 U.S. 158, 162-63 (1967). In that setting, the Court could not address the issues properly until the regulation had been applied in a specific factual setting. Id. at 163-64. This insistence on pragmatic finality is repeatedly stressed in the cases. E.g., Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26 (2d Cir. 1984) (fitness of issues determined through "consideration of a variety of pragmatic
practically or effectively final and present legal rather than factual issues are fit for judicial review even if there are unexhausted remedies. Such decisions are fit largely because requiring exhaustion will not serve the functional policies of exhaustion—administrative fact-finding, discretion, and expertise, and their judicial analogue, aiding judicial review—and therefore these policies do not justify denying review.\(^{317}\) Thus, courts should excuse exhaustion only where the issues are sufficiently fit for review notwithstanding the plaintiff’s failure to exhaust.\(^{318}\)

Equally important, if less immediately clear, is that hardship should play essentially the same role in each doctrine. Some versions of the exhaustion doctrine purport not to consider the hardship of denying review.\(^{319}\) If no “exception” applies, courts require exhaustion notwithstanding an extreme hardship; conversely, if an exception does apply, courts excuse exhaustion notwithstanding a trifling hardship.\(^{320}\)

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**Footnotes:**

317. Professor Davis’s distinction between exhaustion and ripeness, see supra note 244, is consistent with this statement. The difference between the doctrines is largely one of viewpoint. Ripeness looks at the case from the viewpoint of the courts—is the issue in a good posture for judicial resolution? Exhaustion looks at it from the viewpoint of the agency—what would additional administrative proceedings add to the efficacy of the decision-making process? The same inquiry can and should answer both questions.

318. See, e.g., Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 781-84 (D.C. Cir. 1984) (exhaustion excused for essentially the same reasons that the court found the issues ripe for review); Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549, 558-59, 562-63 (2d Cir. 1978) (majority and concurring opinions disagree on whether the issue is ripeness or exhaustion but approve judicial review for essentially the same reasons). The analogy seems largely applicable in the opposite situation as well. That is, the lack of practical finality defeats ripeness and requires exhaustion. See, e.g., Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 31 (D.C. Cir. 1984) (where “tentative agency positions” are to be considered in further administrative proceedings, judicial intervention “severely compromises the interests that ripeness and finality notions protect”); Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 26 n.11 (2d Cir. 1984) (plaintiff’s failure to exhaust “has left the factual record so undeveloped that the case is not ripe for judicial review, and . . . is relevant to a weighing of the unfairness to the parties of withholding judicial determination”).

319. See supra note 314. Some cases using a balancing approach purport to weigh only the exhaustion purposes. See supra note 105 and accompanying text. An approach not weighing hardship is artificial in that it fails to recognize that at least a residuum of the structural policies applies whenever a party has failed to exhaust administrative remedies.

320. The exhaustion doctrine could conceivably operate solely by reference to the hardship of denying review. The quantum of hardship would be the only question and courts would have no occasion to examine the exhaustion policies. Such an approach would appear to be even less justified than the “policies alone” approach discussed in the text. A “hardship alone” approach is, however, the rationale of the irreparable injury exception to the exhaustion requirement.

Under either one-dimensional examination, the doctrine is applied without fully considering pertinent factors. As shown above, see supra Part II.B.1, this is essentially what is wrong with the rule with exceptions approach. That approach inevitably focuses attention on the existence of only one among a number of pertinent factors, which results in unduly strict standards and confusing case law. The standards are too strict because they are designed to excuse exhaustion regardless of the weight of the other factors. The case law is confusing because courts are naturally inclined to weigh
Nevertheless, all modern Supreme Court cases seem to agree that hardship is an appropriate element of exhaustion analysis. In *McKart*, for example, the Court weighed the burden of denying review against the governmental interests in requiring exhaustion. The collateral question approach similarly converges on the same elements—hardship to the plaintiff and a lack of need for further agency consideration. These formulations already closely resemble the second aspect of ripeness—the hardship of withholding review.

When deciding whether to require or to excuse exhaustion, courts should examine both the policies militating against review and the hardship of denying review, although the language describing these concepts may differ. While naked balancing of these factors may be at once both unduly simplistic and amorphous, dividing the policies into their components restores sufficient rigor to the analysis. In any given case, the policies consist essentially of reasons that a controversy is not fit for judicial review plus the hardship to the government of permitting review. The functional policies represent “fitness for review”—the pragmatic finality of the existing agency action and the nature of the question presented. The structural policies represent the “hardship to the government”—the presumption against judicial review of interlocutory agency action. Together they constitute the governmental interests served by denying review. So restated, the exhaustion inquiry is virtually identical to the ripeness inquiry. The relationship is hidden by the difference between the exhaustion formulation—“governmental interests weighed against hardship”—and the ripeness formulation—“fitness and hardship.” But this is a meaningless distinction, as courts have often reformulated the ripeness inquiry to require balancing governmental interests in denying review (non-fitness plus governmental hardship) against the hardship to the plaintiff.

Thus, where the plaintiff seeks judicial review prior to the natural conclusion of agency proceedings, or despite the plaintiff’s failure to ex-
haust now-terminated administrative proceedings, a court should excuse exhaustion only after concluding that the plaintiff’s hardship from denying review outweighs the governmental interests served by denying review.327 The exhaustion inquiry would be stated as follows:

Non-fitness + Governmental Hardship > Plaintiff’s Hardship = Exhaustion Required
Non-fitness + Governmental Hardship < Plaintiff’s Hardship = Exhaustion Excused

Cases combining exhaustion and ripeness analysis reveal an implicit understanding that the doctrines work together in this manner. That understanding underlies the judicial recognition that the unexcused failure to exhaust administrative remedies undercuts finality, and, therefore, undercuts ripeness as well.328 The courts’ use of precedent decided under one doctrine to explain cases decided under the other doctrine is a subtle indication that the doctrines work together. While such use occurs most often in cases turning on finality,329 it is also evident in cases addressing hardship.330 Judges often either disagree concerning which doctrine applies to particular facts or use the language of one doctrine in discussing another.331 Whether the latter is by accident or design, it usually passes

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327. The same inquiry would be used in each of the various exhaustion settings, but unlike a rule with exceptions approach, the decision process would vary because the hardship of denying review changes from setting to setting. For example, where the only hardship would be undergoing administrative procedures prior to obtaining full judicial review, denying review would cause little hardship in most cases. At the other end of the spectrum would be criminal liability that could have been avoided if the defendant had used administrative procedures that are no longer available. The extent of hardship in any given case necessarily varies depending on the setting and the impact.

328. Where plaintiffs should exhaust administrative remedies prior to judicial review, the controversy is also unripe. See, e.g., Seafarers Int’l Union v. United States Coast Guard, 736 F.2d 19, 27 (2d Cir. 1984) (the failure to exhaust made the claim unripe); Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1378 (9th Cir. 1983) (“availability of relief within the agency refutes the argument that the agency determination is final”); St. Regis Paper Co. v. Marshall, 591 F.2d 612, 615 (10th Cir. 1979) (the case is unripe because “further and adequate administrative relief has been requested but not exhausted”).

329. As might be expected, cases depending upon finality usually arise where the court focuses on APA § 704, which contains elements of both exhaustion and ripeness. See supra notes 160 & 307. Examples include three leading decisions analyzing the finality of interlocutory orders of the Federal Trade Commission: Federal Trade Comm’n v. Standard Oil Co., 449 U.S. 232, 239, 242-43 (1980) (analyzing ripeness precedents and then exhaustion precedents); Association of Nat’l Advertisers v. FTC, 627 F.2d 1151, 1177-78 (D.C. Cir. 1979) (Leventhal, J., concurring) (stating that the issue is finality rather than exhaustion but then reviewing exhaustion precedents), cert. denied, 447 U.S. 921 (1980); Pepsico, Inc. v. FTC, 472 F.2d 179, 186-87 & n.7 (2d Cir. 1972) (seeing the problem as finality rather than exhaustion but basing analysis on exhaustion precedents).

330. Two Second Circuit decisions provide particularly clear examples. In Central Hudson Gas & Elec. Corp. v. EPA, 587 F.2d 549, 558 (2d Cir. 1978) and Association of Nat’l Advertisers v. FTC, 565 F.2d 237, 239 (2d Cir. 1977), the court concluded that ripeness was the dispositive issue. Citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), see supra note 57, and other exhaustion precedents, the court in each case asserted that the hardship of undergoing administrative proceedings was insufficient to justify immediate judicial review. 587 F.2d at 559; 565 F.2d at 240.

331. Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987), is particularly instructive in this regard. The entire panel agreed that this constitutional challenge to the Federal Trade Commission should be dismissed. Id. at 732. Circuit Judge Edwards based his decision on the exhaustion doctrine, id. at 738-43; Circuit Judge Williams based his decision on finality, id. at 745-50; District
unnnoticed in subsequent decisions. The ability of one doctrine’s terminol­
yogy to work in the other’s analysis, especially where courts have no
apparent intention to merge the two doctrines, is strong evidence of their
underlying relationship.

The pragmatic unity of the doctrines becomes even more apparent
where courts use the same analysis to resolve both ripeness and exhaus­
tion issues. This occurs where courts go through separate but essentially
identical inquiries. For example, a court may excuse exhaustion because
the issue presented does not require further administrative consideration
and then find the case to be ripe for essentially the same reasons.332
Courts are often more direct and use joint analysis to explain their con­
clusions under both doctrines. This occurs, logically enough, in opinions

Judge Green based her decision on the ripeness doctrine, id. at 750-56. In Fort Sumter Tours, Inc. v.
Andrus, 440 F. Supp. 914 (D.S.C.), aff'd, 564 F.2d 1119 (4th Cir. 1977), the district and circuit
courts used almost identical reasoning and reached the same result, but while the district court
analyzed exhaustion, the circuit court analyzed ripeness. 440 F. Supp. at 919-20, 564 F.2d at 1123-
24. See also Ezratty v. Puerto Rico, 648 F.2d 770, 774 n.4 (1st Cir. 1981) (challenge to denial of
educational assistance; district court applied primary jurisdiction, court of appeals applied exhaus­	ion).

Less obvious inconsistencies also exist. Some cases refer to "exceptions" to ripeness in a fashion
that suggests that they mean that agency action is ripe notwithstanding the plaintiff's failure to
exhaust. E.g., Gulf Oil Corp. v. Department of Energy, 663 F.2d 296, 313 (D.C. Cir. 1981) (creating
"exception to the normal exhaustion, finality, and ripeness rules"); Texas Energy Reserve Corp. v.
(disagreeing with holding that judicial review should await conclusion of administrative enforcement
proceedings). Another problem of terminology is found in Central Hudson Gas & Elec. Corp. v.
EPA, 587 F.2d 549 (2d Cir. 1978). The court recognized that it was not asked to review "a 'final'
agency action," id. at 555, but later asserted that the decision under review was "'final agency'
action," id. at 558. This apparent inconsistency stems from the difference between actual and prag­
matic finality. The agency action in Central Hudson was not truly final, but it was sufficiently final
to satisfy both the ripeness inquiry, id. at 558-60, and the exhaustion inquiry, id. at 562-63 (Feinberg,
J., concurring). Finally, a classic example involves three challenges to the same interlocutory order
issued in the course of an FTC enforcement proceeding. Compare Pepsico, Inc. v. FTC, 472 F.2d
179, 186-87 & n.7 (2d Cir. 1972) (applying finality) with Seven-Up Co. v. FTC, 478 F.2d 755, 756-57
(8th Cir. 1973) and Coca-Cola Co. v. FTC, 475 F.2d 299, 302-05 (5th Cir. 1973) (applying
exhaustion).

332. Three cases that permitted judicial review after applying somewhat different approaches to
similar problems illustrate this point well. In Department of Energy v. Louisiana, 690 F.2d 180
(Temp. Emer. Ct. App. 1982), cert. denied, 460 U.S. 1069 (1983), the court first analyzed exhaustion,
concluding that exceptions apply "where the issues sought to be litigated are purely legal and where
the agency has either taken a final position with respect to such issues or will not address them
during the compliance proceeding." Id. at 186. After apparently concluding that these exceptions
were applicable, id., the court discussed ripeness. Its sole analysis of the fitness aspect consisted of
the following: "Having determined that there has been 'final agency action,' this court need not
further discuss the first two elements [legal question and finality] of the test." Id. In Rocky Moun­
tain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982), on the other hand, the court first
analyzed ripeness in the typical two-part fashion. Id. at 740-43. Turning to the exhaustion issue, the
court examined the exhaustion policies and concluded that they were satisfied because there was a
sufficiently final decision of the agency on a legal question, and therefore the case fell within an
exception to the exhaustion rule. Id. at 744. Finally, in Atlantic Richfield Co. v. Department of
Energy, 769 F.2d 771 (D.C. Cir. 1984), the court excused exhaustion through a balancing process
that focused on (1) the fact that the issue presented was a purely legal question and (2) that there was
no doubt concerning the agency's position. Id. at 781-82. The court then examined ripeness, focus­
ing for a second time on the nature of the issue and the finality of the Department's position. Id. at
782-84.
that emphasize the policies underlying the doctrines. Because both doctrines serve the same policies, it is not surprising for a court to summarize its analysis by stating: "We hold that in this case the principle of respect for the integrity of the administrative process—as embodied in the exhaustion, finality, and ripeness doctrines—precludes judicial review, prior to a definitive agency resolution . . .".

C. Futility and Irreparable Injury Under the Reformulated Exhaustion Inquiry

The interest-weighing approach to exhaustion analysis provides an opportunity to reconsider the role of the commonly cited exhaustion factors of futility and irreparable injury. While reformulating the exhaustion doctrine to require balancing non-fitness and governmental hardship against hardship to the plaintiff appears consistent with the doctrine's policies and the implicit practice of some courts, the acid test is whether the proposed exhaustion test resolves difficult exhaustion problems satisfactorily. The previous discussion of futility and irreparable injury revealed that the existing approaches to exhaustion analysis fail to consistently resolve those problems rationally, and that some form of interest-weighing is required. Re-examining futility and irreparable injury, now through the reformulated exhaustion test, reveals that the reformulated doctrine constitutes a substantial improvement over the prevailing modes of exhaustion analysis.

Futility is logically linked to finality. If the outcome within an agency is certain, the agency decision is clearly final under the interest-weighing test. If the outcome is only probable, the agency decision may still be pragmatically final. In both cases, whether judicial review is appropriate will turn on the weight of the other factors. According to the dominant rule with exceptions approach, courts must identify some line between futile and non-futile and follow it in all cases. At least in theory, courts relying solely on futility to resolve exhaustion problems place in the same category cases with very fit issues and significant hardship, such as McKart, and cases with unfit issues and a far more tolerable inconven-

333. See, e.g., Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 29-35 (D.C. Cir. 1984) (policy analysis of both doctrines, judicial review denied under each); Seafarers Int'l Union v. United States Coast Guard, 736 F.2d 19, 25-29 (2d Cir. 1984) (policy analysis of both doctrines, case resolved under ripeness); Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 907-11 (3d Cir. 1982) (policy analysis of exhaustion, court requires exhaustion relying in part on the failure of the agency action to satisfy the Abbott Laboratories inquiry).

334. Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21, 35 (D.C. Cir. 1984). Where the various factors add up to a contrary conclusion, the exhaustion, finality, and ripeness doctrines permit judicial review. Thus, in Gulf Oil Corp. v. Department of Energy, 663 F.2d 296 (D.C. Cir. 1981), the same court analyzed the various doctrines and summed up by stating: "The totality of these circumstances in our view permitted the district court to make an exception to the normal exhaustion, finality, and ripeness rules . . ."  id. at 313. The emphasis on the particular facts of each case is consistent with the use of a case-by-case interest weighing approach.

335. See supra Part II.C.
ience, such as *Standard Oil.* In a weighing process, however, courts consider differing levels of futility—or pragmatic finality—in light of other pertinent considerations.

Futility may relate to those considerations as well in certain settings. For example, the futility of challenging a statute's constitutionality within an agency proceeding relates to the nature of the issue more than the finality of the agency's decision. Futility may also dissipate a claim of governmental hardship from immediate judicial review, at least where futility is premised on an agency's bias, misconduct, or hostility to the plaintiff's claims. Where all these occur together, few, if any, governmental interests in denying review exist and a minimal hardship to the plaintiff would excuse exhaustion.

In the usual case, however, the issues are not that one-sided. After evaluating the pragmatic finality of the agency's action, courts should examine the remaining factors. Where agency fact-finding, expertise, or discretion are important, the issues may be unfit for judicial review notwithstanding absolute futility. As a practical matter, however, the two elements of the fitness aspect—the nature of the issues presented and the finality of agency action—tend to work in tandem. Clearly futile agency proceedings are unlikely to increase the fitness of the issues for judicial review, if only because the agency is unlikely to devote much attention to matters on which it has a closed mind. The same is not true of cases where futility is premised only on the plaintiff's pessimistic assessment of previous agency decisions. The agency might change its position, resolve facts necessary for full judicial relief, or exercise its expertise on a technical matter or with respect to statutory or regulatory interpretation. Further, even where the issues are fit for review, judicial involvement may burden courts and agencies through its impact on the structural policies. These factors, which necessarily differ in weight from case to case notwithstanding some level of futility, all belong on one side of the reformulated exhaustion inquiry.

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336. *Standard Oil*’s claim was absolutely futile as it had already been denied by the Commissioners. Federal Trade Comm'n v. Standard Oil Co., 449 U.S. 232, 237 (1980). The Court avoided applying the exhaustion doctrine by characterizing the issue as finality, but nevertheless reached the correct result by then engaging in the *Abbott Laboratories* interest weighing inquiry under the finality rubric. As noted, however, the *Standard Oil* situation has often been seen as involving exhaustion rather than finality or ripeness. *See supra* note 250.

337. In cases where the agency may resolve the controversy on other—"non-futile"—grounds, allowing the agency an opportunity to do so clearly serves judicial economy and agency autonomy. Even in other situations, "allowing all similarly situated [plaintiffs] to bypass administrative . . . procedures [might] seriously impair the [agency's function],” *McKart v. United States,* 395 U.S. 185, 197 (1969). The various factors, all cutting against review, exist at different strengths in different situations.

338. Various themes in the cases suggest ways in which these factors inter-relate in different "futility" settings. For example, in *In re Steele,* 799 F.2d 461 (9th Cir. 1986), the court required exhaustion notwithstanding absolute futility. Steele sought a variety of documents relating to a criminal investigation. *Id.* at 462-63. The court required him to use the administrative procedures of the Freedom of Information Act, even though the government had already made clear it intended to deny the request. *Id.* at 465-66. The purposes of the exhaustion doctrine required him to exhaust
The other side is equally important. Just as ripeness waxes and wanes according to the impact of denying review, so too does the appropriateness of requiring exhaustion. As shown above, once courts recognize that injury is one factor of exhaustion analysis and not by itself a reason to excuse exhaustion, they can jettison "irreparable injury" from the exhaustion doctrine's terminology. Courts should instead weigh all plaintiff hardships against the governmental interests in denying review. The ripeness and exhaustion versions of hardship are essentially identical. In place of the stringent yet ambiguous irreparable injury requirement, the appropriate concern is the more expansive "burden of denying judicial review," a simple word-play on the Abbott Laboratories evaluation of "the hardship to the parties of withholding court consideration." Cases using a balancing approach to examine ripeness, exhaustion, or both doctrines find that the pertinent considerations are the same—the practical hardships caused by denying review, weighed in the context of the fitness of the issues for immediate judicial review and the governmental hardships from permitting review. Courts, in determining whether to excuse exhaustion, can and should consider injuries

the Act's procedures because the agency could properly establish an exemption under that Act only through the administrative process. Id. at 466. Agency autonomy and the functional policies, therefore, outweigh the hardship of absolute futility in certain cases. West v. Bergland, 611 F.2d 710 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980), presents a more common situation. The court deemed that an administrative challenge to an agency regulation was probably futile in light of the Agriculture Department's long-term support of it and similar regulations. 611 F.2d at 716-17 & n.9. As a result, the court gave little weight to "the interest in agency self-correction," id. at 717, gave extra weight to the burdens of administrative litigation, id. at 719-20, and ultimately excused exhaustion. The different results in these two cases necessarily reflect the importance of factors other than the mere likelihood of the plaintiff's success within the agency, for Steele was more futile than West in that sense.

In sum, the futility exception is "subject to abuse" and courts have applied it inconsistently. Etelson v. Office of Personnel Management, 684 F.2d 918, 925 (D.C. Cir. 1982). Consistent and reasonable treatment of futility is possible only when it is carefully weighed and considered in conjunction with other pertinent factors.

339. See supra text accompanying notes 267-71 and 278-81.
340. See supra notes 210-17 and accompanying text.
342. See, e.g., Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 781-84 (D.C. Cir. 1984) (excusing exhaustion and finding ripeness for essentially the same reasons—the legal nature of the questions, the pragmatic finality of the Department's views, and the hardship to the plaintiff and the public interest from denying review); Bethlehem Steel Corp. v. EPA, 669 F.2d 903, 909-10 (3d Cir. 1982) (although analyzing the "undue hardship" exception, the court discusses the Abbott Laboratories factors and requires exhaustion because factual issues and non-final agency action are involved and judicial review will delay final resolution); West v. Bergland, 611 F.2d 710, 715-20 (8th Cir. 1979) (excusing exhaustion after weighing interests on both sides and concluding with a paragraph that catalogs the Abbott Laboratories factors), cert. denied, 449 U.S. 821 (1980); A.O. Smith Corp. v. FTC, 530 F.2d 515, 521-29 (3d Cir. 1976) (analyzing ripeness and injunctive relief, viewing the hardship standards as "jurisprudential cousins, not identical twins"); Aquavella v. Richardson, 437 F.2d 397, 403-04 (2d Cir. 1971) (analyzing ripeness, finality, and exhaustion, permitting judicial review because "the slight disruption of administrative routine . . . is clearly outweighed by the immediate injury to plaintiffs"); Dow Chem., USA v. Consumer Prod. Safety Comm'n, 459 F. Supp. 378, 387, 389 (W.D. La. 1978) (applying ripeness and exhaustion, exhaustion hardship analysis essentially relies on hardships discussed under ripeness). See also supra note 289.
not meeting the strict classical meaning of "irreparable," as the test still provides a sufficient impediment to inappropriate judicial review.\textsuperscript{343} The interest-weighing process thus allows courts to evaluate all hardships of denying review, even "mere" litigation burdens, but requires exhaustion in all cases in which the interests of the court and agency in denying review outweigh these hardships. In short, the Abbott Laboratories hardship inquiry neatly replaces the formalistic and unsatisfactory concept of "irreparable injury" with a pragmatic and effective analytical inquiry.

The exhaustion and ripeness doctrines are too similar to justify the significantly different analytical approaches that courts have taken. The ripeness inquiry provides a better framework for resolving even the most difficult exhaustion problems, and common sense suggests that courts can use its pragmatic interest-weighing to reconcile the facially inconsistent approaches in the exhaustion cases.\textsuperscript{344} Restating the exhaustion doctrine

\textsuperscript{343} Thus, in Texaco, Inc. v. Department of Energy, 490 F. Supp. 874 (D. Del. 1980), the court considered business hardships that might not be considered under an irreparable injury standard, but still required that the hardship be "concrete" and indicated that many substantial harms, such as to reputation or financial planning, are not sufficient to warrant immediate judicial review under the ripeness doctrine. \textit{Id.} at 888-89. Similarly, the effects of even massive potential liability are not by themselves sufficient to constitute the direct and immediate hardship necessary to support judicial review under the ripeness doctrine. Texas Energy Reserve Corp. v. Department of Energy, 710 F.2d 814, 818-19 (Temp. Emer. Ct. App. 1983). Simply stated, unless hardships are significant and exhaustion policies largely inapplicable, they will be "outweighed by the danger of disrupting ongoing administrative proceedings by piecemeal review." Rosenthal & Co. v. Commodity Futures Trading Comm'n, 614 F.2d 1121, 1128 (7th Cir. 1980).

\textsuperscript{344} McKart v. United States, 395 U.S. 185 (1969), and McGee v. United States, 402 U.S. 479 (1971), are clearly consistent with this approach. In these cases, the Supreme Court used different terms and tests, but ultimately excused exhaustion in \textit{McKart} and required exhaustion in \textit{McGee} because of the differing weights of the governmental interests in denying review; this interest weighing largely centered on the relative fitness of the issues for judicial resolution.

One can also view the ringing assertions in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), and Leedom v. Kyne, 358 U.S. 184 (1958), as masking the application of this interest weighing approach. The legal question presented in \textit{Myers} turned on fact-finding within the agency's jurisdiction; the agency had not reached a final conclusion on the issues before the Court, and judicial review would largely destroy agency autonomy because such issues arise in many administrative adjudications. \textit{Leedom}, on the other hand, presented an issue clearly fit for judicial resolution and greater hardship. The issue was a purely legal question, with no apparent opportunity for the agency to reverse its determination in further administrative proceedings. The unusual nature of the case meant that judicial review would not open any floodgates.

The § 405(g) cases can be similarly analyzed. Weinberger v. Salfi, 422 U.S. 749 (1975), and Mathews v. Eldridge, 424 U.S. 319 (1976), presented purely legal questions and judicial review would serve overall efficiency. With respect to finality, \textit{Salfi} involved a question that the agency was not authorized to resolve—the constitutionality of a statutory provision—and \textit{Eldridge} involved a matter that the Court concluded, rightly or wrongly, would not be reconsidered by the agency. The hardships, in contrast, were severe. Finally, the confusing and fact-bound decisions in Heckler v. Ringer, 466 U.S. 602 (1984) and Bowen v. New York, 106 S. Ct. 2022 (1986), can be reconciled only through such an approach. Judicial review in \textit{Ringer} would require the Court to evaluate in the abstract a question that was likely to turn on factual questions within the agency's expertise. Moreover, the hardship to the agency would be substantial if social security claimants could totally avoid congressionally mandated administrative processes and receive an advisory opinion on their right to recoupment prior to obtaining medical services. As the hardship of denying review was also substantial, \textit{Ringer} is the only leading exhaustion decision in which the Supreme Court was closely split. In \textit{City of New York}, a unanimous Court excused exhaustion, largely focusing on the equities of the case. As in \textit{Leedom}, the agency's admission of error undercut its claims to hardship and nonfinality. More subtly, the issues were subject to judicial review in any event and the exhaustion decision
doctrine to track the ripeness doctrine allows one uniform and well-defined analytical structure to resolve the technically distinct problems of exhaustion and ripeness and the intractable problems of futility and irreparable injury.

V. Conclusion

The exhaustion “doctrine” is an illusion. Although embodying several different doctrines, the case law does not fully resolve all exhaustion problems. The rule with exceptions approach seeks unsuccessfully to resolve many-faceted problems with a one-dimensional methodology. The general balancing approach is an improvement, but is too amorphous to provide the requisite guidance on any consistent basis. The collateral question approach borrows the wrong elements from each of the other two. Together the three approaches make a mockery of the term “doctrine” and perpetually invite courts to manipulate results.

The exhaustion doctrine lacks coherence largely because courts too often lose sight of underlying policies and instead build on responses to policies that may have worked in particular cases but are unworkable as general principles. The Supreme Court, when developing the ripeness doctrine in Abbott Laboratories, returned to the policies underlying ripeness and developed an analytic framework that consistently serves those same policies. Courts should therefore apply the same analysis that they use for ripeness in deciding whether to require exhaustion. In determining whether to enforce the exhaustion requirement where plaintiffs fail to pursue all pertinent administrative remedies, courts should weigh the fitness of the issues for judicial review and the relative hardships to the parties. When non-fitness of issues and governmental hardship exceed the plaintiff’s hardship, courts should require exhaustion; when the opposite occurs, courts should excuse exhaustion. Only this approach permits courts sufficient flexibility to consider all relevant factors properly, yet assures that the exhaustion policies remain the center of analysis.

resolved only which plaintiffs would be eligible to receive benefits under the judgment. As a result, requiring exhaustion would have served none of the exhaustion policies. Denying eligibility to the members of the class who had failed to exhaust would help the government only in the pocketbook, and the outcome was certain when this minor burden was weighed against the extreme hardships suffered by mentally disabled persons erroneously denied social security benefits.