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Regulatory Values and the Exceptions Process

Tension between demands for generalized rules and for individualized application of law is characteristic of any legal system. The generality inherent in rules promotes predictability, efficiency, and equal treatment. But even detailed rules often fail to take into account the full variety of situations to which they arguably apply. The Anglo-American legal tradition permits the judicial system considerable latitude to adjust rules to fit individual cases. The highly rigid and specific provisions that often characterize regulatory rules, however, allow little room for such individualized justice. The persistent occurrence of special cases, in which giving a rule its usual effect would conflict with important policies or legal principles, is an inevitable consequence of such rules.

Two principal procedural mechanisms are available to administrative agencies to tailor the application of statutory and administrative rules to special cases. Under “dispensatory” discretion, an agency addresses special cases on an ad hoc basis, often without statutory or regulatory authorization to do so. Under the other mechanism, an “exceptions process,” an agency considers applications for waivers, exemptions, or variances from a rule in a procedure that incorporates limited protections for applicants and other affected parties.

This Note analyzes the problem posed by special cases in light of the values underlying administrative legal norms. The Note argues that, to give the fullest effect to these values, administrators must exercise discretion in special cases, and can best do so through an exceptions process rather than through dispensatory discretion. The Note then briefly examines the actual operation of a particular exceptions process. In conclusion, the Note proposes that Congress and agencies should favor inclusion of an exceptions process in systems of rules, and that courts should construe regulatory statutes presumptively as providing for an exceptions process.

2. See R. Pound, supra note 1, at 64 (discussing, inter alia, equitable discretion, flexible legal standards such as duty of care and good faith, and range of sentencing under penal statutes); see also R. Dworkin, Taking Rights Seriously 28–29 (1977) (important aspect of common law decision-making is flexibility that results from judicial discretion to choose among broad legal principles).

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I. THE SPECIAL CASE IN ADMINISTRATIVE LAW

A. The Problem of the Special Case

The special case occurs persistently in administrative law because the rules that agencies administer frequently extend by their literal terms to circumstances which rulemakers failed to anticipate. Where these unforeseen circumstances generate a conflict between the explicit prescription of the rule and other important purposes implicit in the rule or embodied elsewhere, both the agency and the regulated party may find it inappropriate or unfair to apply the rule. Isolated hardships and conflicts among laws and policies may arise even when the uniform application of rules makes sense in the vast majority of cases. Attempts to tailor statutory or
administrative rules to fit every contingency by making them more detailed often precipitate additional anomalous situations. Making rules less precise to accommodate unanticipated circumstances detracts from their guiding force for regulators and private parties.

B. Methods for Addressing Special Cases

This Note divides the institutional mechanisms that agencies use to address exceptional cases into two categories. On the one hand, an agency may assume discretionary authority to act on an ad hoc basis to adjust the way rules apply in special cases. This form of adjustment, which this Note will call dispensatory discretion, most typically occurs when agency officials simply decide not to enforce a rule or a statutory provision in what they consider to be special circumstances. A general regulatory escape clause may in fact authorize such discretion, but if the clause is

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6. See Diver, The Optimal Precision of Administrative Rules, 93 YALE L.J. 65, 73 (1983) (greater definition in a rule increases the risk of unintended over- or under-inclusiveness); G. Gilmore, The Ages of American Law 96 (1977) ("[T]he more tightly a statute was drafted originally, the more difficult it becomes to adjust the statute to changing conditions without legislative revision.") (footnote omitted).

7. See Diver, supra note 6, at 72 (vague rules entail additional expense to determine their meaning); Erlich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257, 265-66 (1974) (discretionary "standards" generate confusion over interpretation in comparison with specific rules). Of course, small interpretative manipulations of specific elements of detailed rules may help an agency achieve its primary objectives. See E. Bardach & R. Kagan, supra note 3, at 123-51 (advocating concept of "good inspector," analogous to "good cop," who utilizes discretion in application of rules to further object of rules). But the more those interpreting specific rules distort them, the more the rules lose their function as guides for decisionmakers and for regulated parties. Cf. G. Calabresi, A Common Law for the Age of Statutes 41 (1982) (distorted interpretation of statutes by courts raises danger that "[t]he language of a statute would no longer serve as a limit" on the way courts apply it).

8. Administrative authority to employ this form of discretion is analogous to the royal dispensation power of early English law. This power allowed the king largely unbounded freedom to grant individual subjects permission to disobey a law. See M. Hale, Prerogatives of the King 176-78 (D. Yale ed. 1976); 6 W. Holdsworth, A History of English Law 217-25 (2d ed. 1937).

9. Dispensatory discretion is largely the same as prosecutorial discretion. Both involve unilateral decisions by governmental officials not to apply the literal terms of the law in an instance where the rights of a private party are affected. Dispensatory discretion is broader, however, in that it encompasses procedural and substantive rules as well as decisions outside the enforcement process. Although the details of dispensatory discretion often remain confidential, examples of this authority may be found at most levels of agencies. High officials at the Environmental Protection Agency have employed such discretion both to initiate settlements of lawsuits and to order forbearance from administrative enforcement proceedings in situations where they deem further enforcement too expensive. See Environmental Protection Agency Oversight: Hearing Before the Senate Comm. on Environment and Public Works, 97th Cong., 1st Sess. 33-34 (1981). Similarly, FDA inspectors "focus their investigations on . . . critical points [that the manufacturer has identified itself], as opposed to routinely checking compliance with the FDA's almost endless list of 'good manufacturing practice' regulations." E. Bardach & R. Kagan, supra note 3, at 150. IRS inspectors exercise similar discretion in applying federal tax regulations. See K. Davis, Discretionary Justice 43-44 (1969). See generally Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 633-42 (1974) (discussing ad hoc agency violations of procedural and substantive rules).

10. See infra p. 950.
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administered without clear standards or procedures, discretion under it remains essentially dispensatory.

On the other hand, an agency may utilize an explicit regulatory process that considers variances, waivers, or exceptions from rules. This mechanism, which this Note will refer to as an exceptions process, seeks explicit justification for treating special cases differently and attempts to classify those cases systematically. The exceptions process usually incorporates an opportunity for intervention or comment by interested parties, a written explanation of decisions, an informal record of proceedings, and explicit criteria to guide decisions. Criteria for exceptions are usually broad enough to allow administrators considerable, but not unlimited, flexibility in treating special cases. When a large number of exceptions decisions accumulate, adherence to precedent may further regularize an exceptions process.

C. Failure To Come to Terms with Special Cases

Recent developments in administrative law have underscored the need to treat the many special cases that arise under federal regulatory law. Congress has passed increasingly detailed regulatory statutes that increase


12. These are the most typical features of an exceptions process; a given process may include more or fewer procedural requirements. See, e.g., 29 C.F.R. §§ 1905.1-.51 (1983) (variance administered by Occupational Safety and Health Administration; notice to affected parties, Federal Register notice, opportunity for oral hearing, written statement of reasons for decision); 40 C.F.R. § 125.30(a) (1982) (variance administered by EPA under Federal Water Pollution Control Act; notice and comment for affected parties, written statement of reasons, decision criteria). The quasi-judicial requirements of "formal adjudication" under 5 U.S.C. §§ 555, 556-57 (1982), however, generally do not apply to exceptions processes. See Schuck, supra note 4, at appendices.

13. For example, criteria for adjustments under domestic crude oil price and allocation controls, discussed infra pp. 951-54, required an applicant to show "special hardship, inequity or unfair distribution of burdens." Department of Energy Organization Act § 504, 42 U.S.C. § 7194(a) (Supp. V 1981). The Civil Aeronautics Board long granted exemptions on the basis of the "public interest," 49 U.S.C. § 1386(b)(1) (1976), which the courts defined as the interest in providing more air service to the public. See Hughes Air Corp. v. CAB, 492 F.2d 567, 571-74 (D.C. Cir. 1973). The EPA grants variances from National Pollution Discharge Eliminations Standards to plants whose output of pollutants is determined by factors that are "fundamentally different from the factors considered by EPA in development of the national limits." 40 C.F.R. § 125.30(a) (1982).

14. See, e.g., UNITED STATES DEP'T OF LABOR, STANDARDS FOR EXEMPTIONS FROM ERISA PROHIBITED TRANSACTIONS PROVISIONS (1980) (discussing exemptions precedents); Applications for Exception Relating to Motor Gasoline Allocation Provisions, 9 DOE 1981-82] ENERGY MGMT. (CCH) T 80,054 (1979) (outlining system of exceptions precedents under motor gasoline allocation regulations). At some point, of course, criteria and precedents may become specific and far-reaching enough that they effectively establish a new rule, or an amendment to the old rule. See infra note 69 (discussing "Delta-Beacon" standards).
the likelihood of conflicting legislative policies in isolated cases.\textsuperscript{15} A shift by federal agencies from across-the-board adjudication to rulemaking\textsuperscript{16} has lessened the opportunities for administrators to adjust policies to fit individual circumstances. Congress and agencies, however, have often failed to utilize an exceptions process or dispensatory discretion to address special cases. In many cases this failure has led to strict application of statutory and administrative rules without regard for their purpose or for fair treatment of regulated parties.\textsuperscript{17}

Courts have also failed to appreciate fully the persistence of special cases. Two contradictory lines of cases concerning the exceptions process and dispensatory discretion have arisen. On the one hand, courts, in remanding administrative decisions on whether to apply rules in particular cases, have increasingly instructed agencies to employ the structured procedures of the exceptions process.\textsuperscript{18} On the other hand, the Supreme Court, in reviewing general facial challenges to rules, has deferred to re-

\textsuperscript{15} E. Bardach \& R. Kagan, supra note 3, at 46-49; Aman, supra note 3, at 291.


\textsuperscript{17} In TVA v. Hill, 437 U.S. 153 (1978), the Supreme Court found the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531, 1536 (1976 & Supp. V 1981)), to be such a statute. The text of the Act required every agency "to insure that actions authorized, funded, or carried out by it do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536 (1976). Under the Court's interpretation, the Act prohibited any construction project that would endanger the habitat of even the most insignificant rare species; thus, the potential destruction of the habitat of the snail darter was sufficient to require the TVA to suspend construction of the huge Tellico Dam project. The Social Security Administration promulgated regulations that established a "grid" of categories for considering disability appeals but failed to provide explicit leeway for special circumstances. See Note, Social Security Determinations: The Use and Abuse of the Grid System, 58 N.Y.U. L. Rev. 575, 619 (1983). But see Heckler v. Campbell, 103 S. Ct. 1952 (1983) (reversing remand that sought further specification by agency of reasons the applicant was placed in "grid" category defined as "able to do light work"). Enforcement officials of OSHA and the FDA have also evidenced reluctance to employ any form of discretion to treat special cases. See E. Bardach \& R. Kagan, supra note 3, at 71-77 (FDA and OSHA); S. Kelman, Regulating America, Regulating Sweden 195-220 (1981) (OSHA).

\textsuperscript{18} See, e.g., Dunlop v. Bachowski, 421 U.S. 560, 574 (1975) (remanding to Secretary of Labor decision not to set aside union election for statement of "grounds of decision and the essential facts upon which [his] inferences are based"); Environmental Defense Fund v. Ruckleshaus, 439 F.2d 584 (D.C. Cir. 1971) (remanding registration of pesticide for reconsideration, with published standards and written decisions, in public notice and comment proceeding); WATT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969) (remanding agency's refusal to consider waiver from rule for reasoned decision and suggesting on-record proceedings). This trend reverses the earlier tendency of courts to accept the agency's exercise of discretion as procedurally adequate. See, e.g., Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969) (deferring to agency's refusal to review termination of research grant by Veterans' Administration); United States v. Walker, 409 F.2d 477 (9th Cir. 1969) (deferring to agency's refusal to review denial of mining claim by Secretary of the Interior under Mining Claims Occupancy Act).
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false by the Environmental Protection Agency$^{19}$ and the Interstate Commerce Commission$^{20}$ to establish exceptions processes.$^{21}$

The current judicial indifference toward the exceptions process in review of rulemaking is ultimately irreconcilable with the judicial preference for more structured procedures in challenges to specific acts of dispensatory discretion. If special cases are a persistent problem, and if courts find an exceptions process superior to dispensatory discretion as a way to address such cases, then courts should favor exceptions processes in challenges to rulemakings as well as in actions contesting exercises of dispensatory discretion. To resolve this contradiction properly, a careful consideration of both the need for discretion in special cases and the relative merits of the exceptions process and dispensatory discretion is essential.

II. REGULATORY VALUES, DISPENSATORY DISCRETION, AND THE EXCEPTIONS PROCESS

Any analysis of the need to address special cases must start from a set of principles, or "regulatory values," that inform current administrative

19. In E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112 (1977), the Court addressed a challenge to two sets of Environmental Protection Agency regulations under the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 896 (1972) (codified at 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981)). One set of rules established "effluent limitation standards" for all existing industrial sources of pollution to be met by 1977; the other set out "national standards of performance" for new sources of industrial pollution. The statutory language prescribing each set of regulations was similarly strict. Compare 33 U.S.C. § 1316(e) (1976) ("It shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.") with 33 U.S.C. § 1311(e) (1976) ("Effluent limitations established pursuant to this section of section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter."). The conference version of the Water Pollution Control Act excluded "variances" for special cases under the respective provisions from the original House and Senate versions. Joint Conf. Rep. No. 1236, 92d Cong., 2d Sess. 22-23, 30-32, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 3776, 3797-98, 3804-06. The EPA had issued regulations that established a variance procedure under the 1977 standards, but established no such process under the new source standards. Train, 430 U.S. at 122-23. The Supreme Court unanimously affirmed this approach, essentially deferring to the agency's judgment. Under the 1977 standards, the Court asserted, the variance procedure was not only permissible but required. Id. at 128. The Court simultaneously maintained, however, that "[i]t was clear that Congress intended [the new source] standards to be absolute prohibitions." Id. at 138.

20. In United States v. Florida E.C. Ry., 410 U.S. 224 (1973), the Court upheld a broad rule established through informal rulemaking by the Interstate Commerce Commission over the objections of several railroads that they were entitled to different treatment. Although an exceptions process was missing from the regulations, the Court ignored the problem of special cases. This effectively delegated to the agency the authority to address such cases or disregard them as administrators saw fit.

21. These cases undercut previous ones in which an exceptions process for a rule helped to convince the Supreme Court that the rulemaking procedure which devised the rule had assured due process to the regulated parties. See United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755 (1972) (upholding rulemaking in presence of exceptions process and noting authority of agency to establish exceptions process); FPC v. Texaco, 377 U.S. 33, 40-41 (1964) (upholding FPC rule where exceptions process exists; failure of party challenging the regulations to apply to exceptions process weakens challenge to regulations); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956) (upholding rulemaking by FCC against demands for across-the-board individual hearings; existence of the exceptions process assured that regulations met "necessity for flexibility in the Rules").
procedural regulations, legislative enactments, and constitutional doctrines. These values generally support both the exercise of some form of administrative discretion to address special cases and a preference for the exceptions process over dispensatory discretion.

A. Equal Treatment

The first regulatory value embodies the basic precept that persons situated similarly should be treated similarly. On its face, this principle of equal treatment implies a preference for consistent application of rules over the haphazardness of ad hoc decisionmaking. Agency administrators have expressed such a preference in the shift from case-by-case adjudication to greater use of rulemaking.

Closer inspection of this principle, however, reveals a corollary: Different cases should be treated differently. Different cases arise when the literal terms of a rule clash with the underlying purposes of a rule or the purposes of other rules. At some point underlying or interdependent reg-

22. Other authors have attempted to set out values as a tool for evaluating the administration of agency rules. See, e.g., Cramton, A Comment on Trial-Type Hearings in Nuclear Power Plant Siting, 58 Va. L. Rev. 585, 592-93 (1972) (using "accuracy," "efficiency," and "acceptability"); Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 279 (1978) ("administrative procedure should be concerned with the overall fairness and accuracy of decisions, with their efficient and low-cost resolution, and, in a democratic society, with participant satisfaction with the process").

23. H.L.A. Hart argues that, in its simplest form, justice in the application of law "consists in no more than taking seriously the notion that what is to be applied to a multiplicity of different persons is the same general rule, undeflected by prejudice, interest, or caprice." H.L.A. HART, THE CONCEPT OF LAW 202 (1961). The Kantian, utilitarian, and entitlements-based theories of social justice all regard some form of equal treatment as an important value. See Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U.L. Rev. 885, 906-22 (1981).


25. See supra note 16.

26. See Aristotle, Nicomachean Ethics 315-17 (H. Rackman trans. 1926) ("[W]hen . . . the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right . . . to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion."); H.L.A. Hart, supra note 23, at 155 (counting need to "treat different cases differently"). The "irrebuttable presumption" cases of the 1970's demonstrate the emphasis the Supreme Court has placed on this principle of differential treatment. In these cases, the Supreme Court relied on the due process clause to invalidate overbroad statutory or administrative classifications ("irrebuttable presumptions") that did not permit individuals to contest their inclusion under a rule in light of its apparent purpose. See, e.g., Bell v. Burson, 402 U.S. 535 (1971) (presumption that person who had been involved in accident and had no liability insurance was at fault and therefore must lose driver's license); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (presumption that household with child over 18, who had been claimed as "dependent" for federal income tax purposes by taxpayers themselves ineligible for food stamp relief, was not needy and was therefore ineligible for food stamps).

27. See Note, supra note 9, at 643 ("[A] number of agencies which have waived requirements that
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ululatory purposes become so important and so contingent on differential treatment under the rule that they are impossible to disregard.\(^{28}\) Instances that require differential treatment may be so substantial or numerous that a general rule must be amended to accommodate them.\(^{29}\) They may, however, be so isolated and exceptional that treating them differently requires not a change in the general rule but only discretionary modification or annulment in a few special circumstances.\(^{30}\)

The value of equal treatment supports a preference for the exceptions process as a mechanism to exercise discretion in special cases in two ways. First, the exceptions process helps an agency identify special cases and treat them differently from others. The requirement of a written, reasoned decision assures that an agency will weigh more thoughtfully whether a rule should be applied to a particular case.\(^{31}\) In the exercise of dispensatory discretion without such a requirement, an administrator may well reach a less careful decision. The visibility fostered by the dissemination of written decisions, as well as the requirement of an informal record, mitigates the tendency toward favoritism that is endemic to dispensatory treatment of special cases.\(^{32}\)

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an applicant for a benefit submit certain information have based the waiver on the ground that the favored applicant met the substantive prerequisites for the benefit.\(^{44}\) (citations omitted). While Congress generally spares agencies responsibility for weighing an array of purposes by specifying regulatory objectives itself in authorizing statutes, these purposes are usually broad and vague. See, e.g., 15 U.S.C. § 753(b) (1982) (purposes of Emergency Petroleum Allocation Act range from “protection of public health . . . safety and welfare” to “equitable distribution” and “economic efficiency”); 29 U.S.C. § 651(b) (1976) (general purpose of OSHA Act is “to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources”). Similarly, purposes outside the regulatory framework may also be important. See Burlington Truck Lines v. United States, 371 U.S. 156 (1962) (ICC must consider requirements of National Labor Relations Act in evaluating request for motor common carrier certificate).

28. Since no two cases are identical, a principle of differential treatment, applied to the fullest possible extent, might call for individualized adjudication across the board to take into account even the slightest differences between situations. Such an absolute application of the principle of differential treatment would, however, fail to acknowledge values such as efficiency and predictability, which are inherent in more general rules. See infra pp. 949–50.

29. See, e.g., NLRB v. Wyman Gordon Co., 394 U.S. 759, 764 (1969) (rulemaking process necessary to formulate “rules of general application”); Ford Motor Co. v. FTC, 673 F.2d 1008, 1010 (9th Cir. 1981), cert. denied, 103 S. Ct. 358 (1982) (where recognition in adjudication of different circumstances than those provided for by rule “changes existing law, and has widespread application, . . . the matter should be addressed by rulemaking.”).

30. See Note, supra note 9, at 642–43. In practice, demands for a new rule and for discretion in special cases may be difficult to distinguish, since an individual departure from a rule may set a broad precedent or even exert significant influence on policy on its own. See Schuck, supra note 4, at 194–99; Comment, supra note 4, at 1138.

31. See Friendly, Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders, 1969 DUKE L.J. 199, 224 (“[R]eversals for inadequate . . . subsidiary findings will require the agency to rethink the problem and, if it adheres to the previous decision, to state its position in a manner that may provoke a ruling on an issue of law.”); Pedersen, Formal Records and Informal Rulemaking, 85 YALE L.J. 38, 73 (1975) (“single, comprehensive, detailed justification” for agency decision “would force the agency to choose between alternative data, theories and methodologies”).

32. See Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1669,
Second, an exceptions process promotes similar treatment of special cases. Equal treatment requires that similar special cases be treated similarly, and written decisions in the exceptions process encourage precedential treatment of such cases. If an agency fails to follow this principle of equal treatment in an exceptions process, courts reviewing the agency's decisions will generally require that they be consistent or that substantial inconsistencies be explained.\(^3\) Similarly, written criteria in many exceptions processes, however broad, provide guidance to decisionmakers that a purely dispensatory procedure lacks.

### B. Accountability

The essence of accountability is that administrators who apply rules should be responsible to some ultimate political authority.\(^3\) In the administrative process, this value implies that the bureaucracy be responsive to elected officials,\(^3\) especially to the legislators who established the agency’s mission.\(^3\)

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1756 (1975) (explaining “requirement of adequate consideration” of different views that underlies requirement of informal record).

33. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:9, at 198 (2d ed. 1979) (“dominant” law in agencies and courts “is that an agency must either follow its own precedents or explain why it departs from them”). But see Shapiro, The Choice of Rulemaking or Adjudication in the Development of Agency Policy, 78 HARV. L. REV. 921, 947–52 (1965) (precedents less binding than flat, preordained rules).

34. Many scholars have emphasized the tendency of regulatory bureaucracy to disregard its mission in favor of maintaining the status quo. See, e.g., A. DOWNS, INSIDE BUREAUCRACY 195 (1967) (“[B]ureaus have a powerful tendency to continue doing today whatever they did yesterday . . .”); Huntington, The Marasmus of the ICC, 61 YALE L.J. 467, 470 (1952) (describing failure of ICC to adapt to “felt needs” in regulated environment), or promoting the interest of regulated industry, see R. FELLMETH, THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC 311 (1970) (accusing ICC of failure to support public interest against that of regulated companies).

35. The Supreme Court has recognized the importance to the Constitutional framework of congressional oversight activities such as investigations. See McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (“power of inquiry—-with process to enforce it—is an essential and appropriate auxiliary to the legislative function”). On the value of oversight more generally, the classic reference is W. WILSON, CONGRESSIONAL GOVERNMENT 281 (1896) (“Congress is, and must be, . . . the nation’s voice” in securing faithful implementation of laws by the Executive). Recent commentators have often looked beyond Congress itself to the President to foster bureaucratic responsiveness. See, e.g., Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 453–63 (1979) (advocating presidential intervention in rulemaking); Cutler & Johnson, Regulation and the Political Process, 84 YALE L.J. 1395, 1414 (1975) (recommending that President be authorized “to modify or direct certain agency action”).

36. Congressional oversight is particularly important in guiding agency behavior when legislative delegations are broad, vague, or contradictory. Congressional appropriations, committee hearings, staff investigations and ombudsman work comprise the usual oversight activities by the legislative branch. For fuller accounts of these activities, see W. GELLHORN, C. BYSE & P. STRAUB, ADMINISTRATIVE LAW: CASES AND COMMENTS 103–16 (7th ed. 1979); 1976 Bicentennial Inst., Oversight and Review of Agency Decisionmaking, 28 AD. L. REV. 569 (1976). Recent attempts to reform the administrative process also manifest a deep-seated concern for the accountability of administrative agencies. These efforts include “sunset” legislation to curtail agency authorization after a certain period, more intensive judicial review, a mandatory legislated budget for regulatory agencies, and a legislated calendar of major regulatory actions. For descriptions of these reforms, see R. LITAN & W. NORDHAUS, RE-
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Concern for accountability provides an additional justification for treating special cases differently. Conflicting policies and purposes of Congress may be manifest in the enabling statute of an agency as well as in the relation of that statute to other laws. Even if Congress fails to authorize an exceptions process explicitly, an accountable agency must make sense of these conflicts and contradictions in part by exercising discretion in cases where such policies and purposes override the literal terms of a rule. To heighten accountability, agencies should exercise discretion in special cases in a way that promotes effective oversight. The informal record, written criteria, and written decisions of an exceptions process allow members of Congress and their staffs to assess the exercise of discretion in special cases. Dispensatory discretion, even if publicized, may offer no evidence of how decisions were made. Written records and criteria in exceptions proceedings also allow the press, the public, the regulated parties, and the courts to reinforce direct congressional oversight by monitoring the exercise of discretion.

C. Participation

Liberal democratic theory has long relied on popular participation in governmental decisionmaking as a central ideal. Those who participate in decisionmaking can better ensure that governmental actions further their interests. The “model of interest representation” associated with this principle prescribes that administrative policymakers and courts should seek to expand participation and to redress representational imbalances between well-organized and unorganized interests. In regulatory

37. See supra note 27.
39. See infra notes 71-72.
40. See Schuck, supra note 4, at G11 (discussing importance of trade publications and associations in monitoring exceptions processes in wide range of agencies).
42. See J.S. Mill, supra note 41, at 65 (“[T]he rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed to stand up for them.”). But see R. Dahl, Dilemmas of Pluralist Democracy 82 (1983) (“To the extent that access to organizations, and consequently [participation through them], is not equally distributed among citizens, then the criteria of the democratic process are not satisfied.”).
43. See Stewart, supra note 32, at 1722, 1760-61, 1805. The origins of this model can be traced in part to pluralist political theory, which stresses the dynamics of interest-group interaction as a way to further the overall interests of society. See, e.g., A. Bentley, The Process of Government

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proceedings, such elements as notice and comment for affected parties, published criteria for decisionmaking, and written decisions increase the level and effectiveness of participation.44

Any mechanism that allows parties to request regulatory relief may help officials determine where special cases exist and how to address them. But the more formalized exceptions process both promotes a higher level of participation and enables more effective participation than does dispensatory discretion. While an agency may ignore or discourage requests for dispensatory discretion as a matter of whim, favoritism, or unarticulated policy, an exceptions process ensures an ongoing opportunity to present arguments for special treatment that the agency must address.45 Representation of other parties besides the one requesting discretion may also further the value of participation by aiding the efforts of decisionmakers to discern special cases and treat such cases appropriately.46 While dispensatory discretion may or may not encourage participation by third parties, the requirement of notice and comment in an exceptions process consistently does.47


44. The APA requirements, such as notice and comment and a trial-type hearing, increase opportunities for participation. 5 U.S.C. §§ 553–554, 556–557 (1982). Recently courts have also cited the due process clause as a basis for mandating procedural elements that broaden participation where the APA does not. See Historic Green Springs v. Bergland, 497 F. Supp. 839, 851–56 (E.D. Va. 1980) (requiring publication of substantive standards and procedural rules for designation of national historic landmarks). Recent reforms liberalizing rules concerning standing to challenge agency decisions, private rights of action, rights of intervention in administrative proceedings, and rights to initiate prosecutions further reflect the importance of this value. For a general discussion of these requirements, see Mashaw, Rights in the Administrative State, 92 YALE L.J. (1983) (forthcoming); Stewart, supra note 32, at 1723–60.

45. While the exceptions process cannot guarantee that an agency will give full consideration to requests for special treatment, its requirements at least encourage decisionmakers to consider requests seriously. See supra note 31.

46. An adversary proceeding in the exceptions process generates a clash between different viewpoints through minimal notice and comment procedures, rather than through a full trial-type hearing. See Verkuil, A Study of Informal Adjudication Procedures, 43 U. CHI. L. REV. 739, 753–56 (1976).

47. Moreover, informal negotiation between the agency and interested parties—a recent focus of proponents of greater participation—may further participation by encouraging greater interaction and cooperation among regulated parties. On the value of negotiation in general, see Fuller, Mediation—Its Forms and Functions, 44 S. CAL. L. REV. 305 (1971); Schuck, Litigation, Bargaining, and Regulation, REGULATION, Jul.–Aug. 1979, at 26. The unstructured nature of dispensatory discretion might appear to capitalize best on this mode of representation. But “informal conferences,” which amount to negotiating sessions, are available in exceptions processes administered by the Department of Labor, 40 Fed. Reg. 18,471, 18,472–73 (1975), and by the Department of Energy, 10 C.F.R. § 205.55(a)(1) (1983). Similarly, OSHA allows regulated parties to initiate “informal settlement conferences” with area directors before the agency files suit. Informal Settlement and Conference with Area Director, [1981] O.S.H.A. COMPLIANCE GUIDE (CCH) ¶ 4041. Negotiated settlements with individual violators, to the extent that the safeguards of the exceptions process are present, may be equivalent to the granting of exceptions.
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D. Predictability

Predictability enables regulated parties to adjust their behavior to accord with legal requirements. This value, which originates both from notions of fairness and the desire to promote regulatory objectives, is furthered through clarity and publicity of rules, and through the constancy of rules over time.\(^4\) In current administrative law, requirements such as notice to the public and to specific parties, publication of criteria for decisions, and written records and explanations promote these ends.\(^5\)

At first blush, the most predictable rule would seem to be one applied strictly according to its own specific terms. But limited exercise of discretion in special cases, by adhering to the more general expectations inferred from the purposes of the rule or other rules, actually ensures that strict application of a rule will not upset the expectations of regulated parties.\(^5\) An explicit exceptions process, moreover, can clarify an agency's intention to address special cases without any effect on the vast majority of more typical cases.\(^5\) In fact, since an explicit mechanism spares rulemakers from addressing special cases in the rules themselves, it may permit rules that are clearer and easier to follow.\(^5\)

If an agency explicitly authorizes discretion in special cases but exercises that discretion in an otherwise dispensatory fashion, the difficulty of predicting what will be a special case persists. The safeguards that characterize an exceptions process mitigate this difficulty by better informing potential applicants to the exceptions process that they are eligible for relief. In addition, since courts are more likely to defer to reasoned, written decisions than to less formalized decisions,\(^5\) an exceptions process helps to

\(^4\) See, e.g., L. Fuller, The Morality of Law 51-65, 79-81 (1964) (describing clarity, prospectiveness, and constancy through time as ideals central to concept of law); J. Rawls, supra note 41, at 238 ("[T]he precept that there is no offense without a law ... demands that laws be known and expressly promulgated, that their meaning be clearly defined, that statutes be general both in statement and intent. . . .").

\(^5\) On the role of constancy, clarity, and publicity in administrative law, see generally S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 311-462 (1979); E. Gellhorn, C. Byse & P. Strauss, supra note 45, at 97-99, 393-419.
shield parties from the consequences of unpredictable shifts in policy preference.

E. Efficiency

The final regulatory value, efficiency, originates in the limits on resources available to an agency and to private parties. For the purposes of this argument, an efficient agency should seek to minimize the total expenses of administrative procedures and litigation as well as the costs of delay in such proceedings. The administrative cost of adjusting policies separately in every individual case is a principal basis for the recent shift by agencies from across-the-board adjudication to rulemaking, and for the continued reliance by agencies on forms of adjudication that lack the costly procedural elements of formal APA adjudication.

Exercise of discretion in special cases furthers efficiency by lowering the cost of administrative and judicial proceedings to devise and enforce a rule. Allowing some form of discretion in special cases saves the cost of attempting to foresee every conceivable contingency and of providing for them specifically in the rule. An agency that fails to exercise discretion in special cases invites litigation by parties that have reason to believe exceptional circumstances supply a basis for overturning application of the rule to them. In the same way, failure to exercise discretion also induces parties in special circumstances to contest application of rules in the administrative stages of enforcement.

By institutionalizing the exercise of discretion in special cases through an exceptions process, an agency will necessarily add to the administrative costs of treating such cases. An agency can nonetheless design an excep-

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Knight, 569 F.2d 124 (D.C. Cir. 1977) (refusing to require statement of reasons for denial of White House press pass where denial stemmed from largely unarticulated prior policy).

54. Other writers have interpreted this value as an overarching calculation of all relevant benefits and costs. See Diver, supra note 6, at 72-74; Erlich & Posner, supra note 7, at 257-58.

55. See, e.g., Robinson, supra note 24, at 516-17 (explaining FTC justification for use of rulemaking: "[I]n general, rulemaking is likely to be more efficient . . . than adjudication . . . ."); Verkuil, supra note 22, at 297 ("[T]he trend towards rulemaking reduces the time and expense of the ratemaking process . . . .").

56. Perhaps 90% of governmental actions that directly affect individuals take the form of informal adjudication beyond the reach of the APA. See 2 K. DAVIS, supra note 33, at 158; Gardner, The Procedures by Which Informal Action is Taken, 24 AD. L. REV. 155, 156 (1972).

57. See Diver, supra note 6, at 73 (cost of high level of specification in rulemaking tends to favor open-ended rules); Erlich & Posner, supra note 7, at 268 (cheaper to allow "ad hoc exceptions" in enforcement than to specify all possible exceptions in rule).

58. See cases cited supra note 50.

59. Preparing an exceptions application, particularly when the claim of special circumstances requires collection of highly technical data, may be more expensive and time-consuming than unstructured discretion. See E. BARDACH & R. KAGAN, supra note 3, at 76. The records in an exceptions process may render exceptions decisions more subject to costly judicial review. See supra note 53.

Furthermore, the cost of an exceptions process, unlike dispensatory discretion, includes expenses for submission and processing of many unsuccessful applications, since even relatively lenient exceptions
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tions process to impose a relatively small burden on the agency and regulated parties. The notice and comment, written decisions, and informal record of an exceptions process constitute perhaps the most efficient set of procedural safeguards acceptable in light of other regulatory values, and additional requirements may further reduce administrative expense and delay. Moreover, the exceptions process can ultimately lower overall costs of litigation. By indicating the agency's intent to exempt special circumstances through a regularized procedure, such a process encourages a court reviewing a rule to give less credence to any "parade of horribles" offered by challengers to the rule, and thus discourages facial challenges.

III. REGULATORY VALUES, SPECIAL CASES, AND OIL CONTROLS

The implications of these regulatory values for the treatment of special cases emerge more clearly in the context of a particular regulatory program. From 1973 to 1981, controls on the price and allocation of domestic crude oil and oil products imposed a vast network of intricately detailed processes may deny far more applications than they grant. See, e.g., Delta Air Lines v. United States, 490 F. Supp. 907, 912-13 (N.D. Ga. 1981) (35% rate of approval for medical exemptions for pilots taken as sign of excessive relief); Department of Energy Gasoline Allocation Program: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 96th Cong., 2d Sess. 166, 184 (1980) (27.5% rate of approval of exceptions for motor gasoline retailers from price and allocation regulations during 1979 gasoline shortage) [hereinafter cited as Gasoline Hearings].

60. See K. DAVis, ADMINISTRATIVE LAW TREATISE 235-39 (Supp. 1982); Verkuil, supra note 46, at 748-49, 780-81.

61. A mandatory threshold evidentiary showing subject to summary denial of exceptions relief, see, e.g., 29 C.F.R. § 1905.40-41 (1981) (administered by OSHA); 40 C.F.R. § 164.91 (1983) (administered by EPA), may reduce the cost of processing for the agency and discourage frivolous claims. See 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.7 (2d ed. 1980); Gellhorn & Robinson, Summary Judgment in Administrative Adjudication, 84 HARV. L. REV. 612 (1971). A strict burden of proof, as applied under the 1970 price freeze, see A. WEBER, supra note 5, at 82, or in the "fundamentally different factors" variance under the Federal Water Pollution Control Act, Interview with Bruce Diamond, attorney, EPA Office of General Counsel, in Washington, D.C. (June 14, 1982), may reinforce this effect. Informal conferences can further expedite proceedings. See 3 K. DAVis, supra, at § 14.8; 4 STAFF ON SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION, 41-53 (Comm. Print 1977).


63. It is possible to imagine circumstances in which an exceptions process would entail excessively high costs, and thus be undesirable despite the other values it promoted. For example, an exceptions process may generate such costly applications that processing expenses are prohibitive. Special circumstances may be extremely difficult to identify and may require collecting expensive scientific or technical data, see E. BARDACH & R. KAGAN, supra note 3, at 76, or regulated parties may find it too easy to subvert any requirements of a threshold showing by distorting initial submissions. A rule may fit so exactly that it generates virtually no special cases, making an exceptions process inefficient. In any of these instances, dispensatory discretion might be preferred. Barring such circumstances, however, a properly managed exceptions process will not significantly undermine the value of efficiency.
regulation on one of the most complicated industries in the world.64 Throughout the duration of controls, an exceptions office65 considered applications for regulatory relief in typical exceptions proceedings.66 Thousands of regulated parties applied for exceptions. Pleas for relief rested implicitly on a principle of equal treatment, in light of overriding regulatory or statutory purposes.67 An exception might entitle the applicant to full or partial adjustment of obligations under the regulations.68 Dispensatory discretion, of course, could have done the same, but the written decisions of the exceptions process enabled both reasoned treatment of individual cases and the development of lines of precedent to ensure more consistent treatment of similar special cases.69 Equal treatment thus was furthered in a two-fold manner: Special cases received special


65. This office, established in 1974, was known as the Office of Exceptions and Appeals until 1977 and is currently called the Office of Hearings and Appeals.

66. Congress authorized the exceptions process by providing for “the making of such adjustments, consistent with the other purposes of this chapter, as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens . . . .” 15 U.S.C. § 766(b) (1982). The statute mandates that procedures for the process be established by regulation, that written exceptions decisions be available to the public, and that further written criteria and guidelines for the process be established. Id. Procedural regulations for exceptions include provisions for notice and comment by interested parties, 10 C.F.R. § 205.53 (1983), for discovery, 10 C.F.R. § 205.66 (1983), for informal conferences, 10 C.F.R. § 205.67 (1983), for evidentiary hearings, 10 C.F.R. § 205.68 (1983), and for temporary exceptions, 10 C.F.R. § 205.128 (1983).

67. One applicant, for example, was a small refiner created by an antitrust consent decree in 1972. The decree had ordered the refiner to embark on a rapid capital expansion program. In 1974, a regulatory system of transfer payments among all refiners suddenly confronted the company with a burden that endangered not only the capital expansion program but the company’s very existence. See Pasco, Inc. [2 FEA 1975] ENERGY MGMT. (CCH) ¶ 83,021, at 83,052–55 (Jan. 20, 1975).

68. Pasco, for example, was relieved of 52% of its monetary obligation under the refiner transfer-payment program. In granting relief, the exceptions office looked beyond the specific regulations to the purposes embodied in the authorizing statute and in the antitrust laws. [2 FEA 1975] ENERGY MGMT. (CCH) at 83,056–57. The agency based its differential handling of this special case on the value of equal treatment with respect to these more important objectives. Id.

69. The degree of consistency provided by reliance on precedent varied greatly. Some cases established broad principles that the exceptions office could apply in a largely discretionary manner. One such principle, listed in the Exceptions Guidelines under the criterion of “serious hardship,” was that exception relief would be granted to a firm “experiencing severe and inordinate financial difficulties as a result of the FEA regulatory program.” Exceptions and Appeals Guidelines, [9 DOE 1981-1982] ENERGY MGMT. (CCH) ¶ 80,006, at 80,009. Precedents for this principle included Kerr-McGee Corp., [3 FEA 1975-1976] ENERGY MGMT (CCH) ¶ 83,179, at 83,706 (May 7, 1976), and Union Oil of California, id. ¶ 83,105, at 83,382 (Feb. 20, 1976). On the other hand, the “Delta-Beacon” standards for exception relief to small refiners established on the basis of the Pasco case and similar cases eventually relied on a strict accounting formula that amounted to a rule in itself. See Beacon Oil Co., id. ¶ 83,209 (June 8, 1976); Delta Refining Co., [2 FEA 1975] ENERGY MGMT. (CCH) ¶ 83,275 (Sept. 11, 1975). Other standards between these extremes established criteria but left considerable flexibility, as in the standard for assignment of a new supplier to an independent marketer of oil products, Exceptions and Appeal Guidelines [9 DOE 1981-82] ENERGY MGMT. (CCH) ¶ 80,012, at 80,011. For further discussion of the role of precedents in this exceptions process, see UNITED STATES TASK FORCE ON REFORM OF FED. ENERGY ADMIN., FEDERAL ENERGY ADMINISTRATION REGULATION 110-17 (1977) [hereinafter cited as TASK FORCE REPORT]; Schuck, supra note 4, at 154–55.
treatment, and similar special cases received similar treatment with respect to each other.

This exceptions process also fostered greater administrative accountability to Congress. The written decisions and informal records of exceptions proceedings aided congressional review of the process in committee hearings. The institutional identity that followed from an established exceptions process invited frequent calls from individual Congressmen and their staff, as well as persistent scrutiny by trade publications. The volume of exceptions cases indicated the level of participation the process encouraged, and the structured elements of the process made such participation more likely to aid proper treatment of special cases. In several instances, participation in individual exceptions proceedings helped to pinpoint more general problems in the regulations that were ultimately addressed by an amendment to a rule. The contribution of the exceptions process to the values associated with predictability in this instance is less clear. The statutory criteria were broad and vague, and the clarity and specificity of the guidelines describ-
ing lines of precedents varied greatly. In a few instances, however, as in the regulations that governed the allocation of motor gasoline between 1974 and 1979, reliance on the exceptions process enabled the agency to make simpler rules.

Efficiency was also only partly served. The procedural regulations allowed for more costly trial-type proceedings but were biased toward more informal ones. The vast majority of exceptions cases lasted less than two months and did not include a hearing; these cases consequently generated insubstantial administrative costs. A handful of cases entailed formal trial-type procedures, round after round of complex discovery requests, years of deliberation, and ultimately an exceedingly high price for individualized consideration.

On balance, however, despite the flaws in this exceptions process, it ultimately made an important contribution to the regulatory values of equal treatment, accountability, participation, predictability, and efficiency.

IV. IMPLEMENTING THE EXCEPTIONS PROCESS

A. The Role of the Agencies and Congress

To give the regulatory values discussed above their fullest effect, agencies should exercise discretion in special cases and do so through an exceptions process. In certain instances, however, other considerations might properly lead Congress and agencies either not to allow the exercise of discretion at all, or to allow discretion only through the mechanism of dispensatory discretion.

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77. See supra note 69.
78. After the 1973–74 gasoline shortage eased, a new rule provided simply that “adjustments will be granted only for the purpose of preventing or correcting a serious hardship or gross inequity,” and only through the exceptions process. 39 Fed. Reg. 36,854, 36,855 (Oct. 15, 1974). The weakness of the DOE’s rulemaking process, perhaps exacerbated by excessive reliance on the exceptions process, prevented administrators from exploiting this aspect of the exceptions process systematically to their advantage. See Schuck, supra note 4, at 188–91; General Accounting Office, Gasoline Allocation: A Chaotic Program in Need of Overhaul, Report No. EMD-80-34 (Apr. 23, 1980).
79. See supra note 75.
80. See Task Force Report, supra note 69, at 108–10. Schuck, supra note 4, at 178. A flood of applications resulting from the 1979 gasoline shortage pushed the average processing time back to four months, but in many cases grants of interim relief mitigated any problems resulting from delay. See FY 1981 Appropriations Hearings, supra note 71, at 1130.
81. Such proceedings tended consider exceptions with clear significance for general agency policy, such as those which might grant expensive remedies to one company to the detriment of others. An exceptions proceeding concerning relief to Ashland Oil Company, for example, lasted more than two-and-a-half years and entailed several trial-type hearings and discovery requests. See Schuck, supra note 4, at 109–15.
82. Most notably, the process came under criticism for improper coordination with rulemaking. See Task Force Report, supra note 69, at 123–36; Schuck, supra note 4, at 181–86.
83. For similar general assessments, see Task Force Report, supra note 69, at 109–10; Schuck, supra note 4, at 180.
Congress and agencies might choose not to allow any exercise of discretion where the nature of the rule or the regulated activity is such that providing for a waiver of the rule would seriously undermine the basic purpose of the regulation. This may occur when Congress and agencies cannot devise standards to define a class of special cases. Where, however, such standards can be devised to define a class of special cases, the purpose of a rule may simply be so important as to require a policy of uniform application. Having decided that discretion should be exercised, agencies and Congress should choose an exceptions process over exclusive dispensatory discretion unless the process would entail efficiency costs that clearly outweigh its contribution to the other values.

B. The Role of Courts

Courts, too, must give effect to these regulatory values. A judicial doctrine regarding exceptions should induce agencies to address the problems posed by special cases and, where appropriate, should impose exceptions processes on agencies. Such an exceptions doctrine, however, must take account not only of the regulatory values but also of the principle of judi-

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84. The Federal Aviation Administration, for example, has refused to grant exceptions to its age-60 limit for pilots on such grounds. See Starr v. FAA, 589 F.2d 307 (7th Cir. 1979) (upholding FAA's practice). According to the agency, no reliable criteria can separate those eligible for such exceptions from those ineligible. Id. at 309. Consequently, an exceptions process would probably lead to the licensing of unfit pilots and would thereby undermine the agency's mandate to promote air safety.

85. See, e.g., EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980) (legislative purpose supports EPA decision not to grant "best practicable technology" variances under Federal Water Pollution Control Act on basis of economic hardship); Industrial Broadcasting Co. v. FCC, 437 F.2d 680, 683 (D.C. Cir. 1970) (to grant waiver under FCC rule governing nighttime radio frequencies would undermine rulemaking). Overriding statutory purposes of this sort are most likely to be found in regulatory schemes that further important national objectives such as health and safety or civil rights. See Diver, Policymaking Paradigms, supra note 3, at 431-32.

86. An exceptions process might, for example, be an inefficient replacement for the dispensatory discretion exercised, in multitudinous instances and often for minor violations, by the auditors who apply the Internal Revenue Code and regulations under it. See K. Davis, supra note 9, at 43-44. Similarly, if an agency is already able to exercise discretion in applying rules through an adjudicatory process that incorporates the safeguards of an exceptions process, and if the rules allow sufficient discretion to treat special cases in this manner, the agency may find an exceptions process redundant. The NLRB, for example, has no exceptions process. See Schuck, supra note 4, at G3. The formal adjudicatory nature of the process by which this agency develops and applies rules may justify this arrangement. See A. Cox, D. Bok & R. Gorman, Cases and Materials on Labor Law 104-13 (1981) (describing NLRB's organization and procedures); Murphy, The National Labor Relations Board—An Appraisal, 52 Minn. L. Rev. 819 (1968) (reviewing various formal and discretionary aspects of NLRB's operation). In light of the many relevant contingencies, see supra p. 950, policymakers may well find it difficult to weigh the competing values in such a choice. But the availability of an exceptions process to treat special cases should not render impermissible such functions of prosecutorial discretion as apportioning scarce enforcement resources among cases. See Note, supra note 3, at 636 (limited prosecutorial resources may be justification for agency's violation of own rule); cf. Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1548-49 (1981) (discussing deployment of limited prosecutorial resources as justification for discretion in criminal law enforcement).
cial deference.\textsuperscript{87} To balance the regulatory values discussed above with the requirements of this principle, the exceptions doctrine should take the form of a principle of statutory interpretation of an agency's authorizing statute.\textsuperscript{88} The essence of the doctrine would be a presumption that Congress intended that an exceptions process be included in a rule or set of rules.\textsuperscript{89} The doctrine would emphasize strict regard for the specific system

\textsuperscript{87} Under this principle, courts recognize that an agency has greater technical expertise and experience in its particular field than a judge. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir.) (en banc) (Bazelon, C.J., concurring) ("[S]ubstantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable . . . ."), cert. denied, 426 U.S. 941 (1976); NLRB v. Stow Mfg. Co., 217 F.2d 900, 905 (2d Cir. 1954) (L. Hand, J.) (deferring to NLRB's "acquaintance with phenomena in this field"). For further explication of the rationale behind the principle of deference see Wright, The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 CORNELL L. REV. 375 (1974); Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345.

\textsuperscript{88} Alternative bases for an exceptions doctrine would give inadequate weight to the principle of deference. Courts might, for example, implement the exceptions doctrine as a constitutional requirement under the due process clause. The early cases upholding the constitutionality of administrative rules, especially United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), support such a constitutional doctrine, see supra note 21, as do the "irrebuttable presumption" cases, see supra note 26. Yet the irrebuttable presumption cases, like the required waiver decisions, lack support from recent decisions. See, e.g., Toll v. Moreno, 458 U.S. 1 (1982) (declining to apply irrebuttable presumption analysis to discrimination by university against aliens); Califano v. Boles, 443 U.S. 282 (1979) (declining to apply irrebuttable presumption analysis to Social Security Act classification denying "mother's insurance benefits" for widows and divorced wives of wage earners to mother of illegitimate child). As a result, no clearly valid precedent exists to sustain such a due process doctrine. The great weight accorded constitutional requirements could also lead courts applying a due process doctrine to disregard valid objections to the exceptions process on grounds of efficiency or legislative purpose.

As an alternative, the exceptions doctrine might be implemented as a principle of administrative common law. An across-the-board presumption that the exceptions process is necessary might be inferred from 5 U.S.C. § 553(e) (1982) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.") or directly from the regulatory values themselves. These values are "quasi-constitutional" in the sense that they reflect actual constitutional values such as equal protection and due process, and represent fundamental objectives in current administrative and legislative enactments. See Stewart, The Resource Allocation Role of Reviewing Courts, in COLLECTIVE DECISION MAKING: APPLICATIONS FROM PUBLIC CHOICE THEORY 205 (C. Russell ed. 1979) (discussing "quasi-constitutional values" and contending that they may serve as independent basis for judicial decisions). Yet such a presumption in favor of the exceptions process might still foster excessive disregard for the specialized aspects of a particular regulatory scheme or an agency's interpretation of its own mandate. See generally Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 549 (1978) ("The court should . . . not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good.").

\textsuperscript{89} Courts have traditionally interpreted regulatory statutes in a way that avoids problems raised by constitutional or "quasi-constitutional" values. Both WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), and EDF v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), see supra note 18, arguably result from "due process" concerns, though neither mentions due process explicitly. See 3 J. SUTHERLAND, STATUTORY CONSTRUCTION 171 (C. Sands 4th ed. 1974) ("requirements of notice and hearing may be inferred for the purpose of sustaining the constitutional validity of the grant of power, even where the enabling statute does not expressly provide for [them]"); 2 K. DAVIS, supra note 40, at 447 (discussing statutory interpretation to require a trial-type hearing, where "the probability is that due process is silently in the background"). The burden of proof proposed here thus represents an equilibrium between the regulatory values, which are basic if not constitutional, and the principle of judicial deference, which accords great weight to an agency's interpretation of its own statute. See supra note 87.

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of rules at issue. The failure of a regulatory statute to provide explicitly for an exceptions process, however, would be taken as an inadvertent omission rather than as a deliberate act. The burden of justifying the absence of an exceptions process would then pass to the agency or others defending the rules. Those parties would have to demonstrate that the purpose of the regulatory statute mandates exclusion of the exceptions process, or that the administrative cost of such a process justifies a conclusion that Congress did not intend to establish an exceptions process under the statute. Such a principle of statutory interpretation should prod both agencies and Congress to place greater emphasis on the exceptions process as a means to treat special cases under systems of rules.

—Jefferey M. Sellers


91. The principle of statutory interpretation could have produced a different result in several of the cases discussed above. The Fourth Circuit came close to applying such a doctrine explicitly in E.I. DuPont de Nemours & Co. v. Train, 541 F.2d 1018 (4th Cir. 1976), aff'd in part and rev'd in part, 430 U.S. 112 (1977). The circuit court, relying on the many variance and exemption provisions already explicit in the statutory scheme, noted that "provisions for variances, modifications, and exceptions are appropriate to the regulatory process." 541 F.2d at 1028. Consistent with this assumption, it held that "for all sources of pollutants, existing and new," congressional intent required that the regulations control only presumptively. Id. Whether the Fourth Circuit gave sufficient weight to the agency's defense of its decision not to establish an exceptions process for new sources is unclear, since this portion of its opinion did not explicitly address arguments by the agency. An effective rebuttal by EPA of the prima facie case for a new source "variance" would have produced precisely the result that the Supreme Court reached when it upheld the agency's decision not to establish the variance, 430 U.S. at 137-38. Such a principle of statutory interpretation, however, would have introduced a bias in favor of an exceptions process that is missing from the language of the high court's opinion. It would also have had the advantage of avoiding the arbitrary invocation of statutory language that the Supreme Court used to justify its decision. See supra note 19.