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Unrules

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Abstract. At the center of contemporary debates over public law lies administrative agencies' discretion to impose rules. Yet for every one of these rules, there are also *unrules* nearby. Often overlooked and sometimes barely visible, unrules are the decisions that regulators make to lift or limit the scope of a regulatory obligation through, for instance, waivers, exemptions, or exceptions. In some cases, unrules enable regulators to reduce burdens on regulated entities or to conserve valuable government resources in ways that make law more efficient. However, too much discretion to create unrules can facilitate undue business influence over the law, weaken regulatory schemes, and even undermine the rule of law. In this Article, we conduct the first systematic empirical investigation of the hidden world of unrules. Using a computational-linguistic approach to identify unrules across the *Federal Register*, the *Code of Federal Regulations*, and the *United States Code*,

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We benefitted greatly from feedback received in seminars at the University of Michigan Law School, Penn State Law School, the University of California Berkeley School of Law, and the University of Pennsylvania Law School, as well as at workshops sponsored by the Law and Society Association and the AALS Sections on Administrative Law, Environmental Law, and Natural Resources & Energy Law. For especially helpful comments, we thank Sarah Beller, Lavi M. Ben Dor, Maggie Blackhawk, John Cooney, Daniel Deacon, Jill Fisch, Victor Flatt, Michael Froomkin, Jean Galbraith, Andrew Hammond, Paul Heaton, Christina Ho, Allison Hoffman, Ben Johnson, Seema Kakade, Leo Katz, Michael Knoll, Barbara Koremenos, Alicia Lai, Ronald Levin, Neysun Mahboubi, Jud Mathews, Nina Mendelson, Julian Davis Mortenson, Adam Muchmore, Aaron Nielson, Richard J. Pierce, Jr., Nicholson Price, Adam Pritchard, Todd Rakoff, Steve Rashin, Richard Revesz, Dorothy Roberts, Steve Ross, Fred Schauer, Peter Schuck, Sidney Shapiro, Peter Strauss, Stephen Sugarman, Thomas Stanton, Nina Varsava, Paul Verkuil, Shoba Wadhia, Wendy Wagner, Megan Wright, Christopher Yoo, and David Zaring. The article would not have been possible without the diligent research assistance of Olivia Gibbs, Harry Gunn, and Zihan Xiong. Steve Rashin provided assistance with data analysis, and Urooba Abid, Marcus Holtzman, Emma Ronzetti, William Walters, and the editorial team at the *Stanford Law Review* offered excellent help in preparing the manuscript. We offer special thanks to Timothy von Dulm, whose help in securing for us a digital source of regulatory texts was invaluable. Finally, we gratefully acknowledge William S. Hein & Co., Inc. for its willingness to provide data from the *Federal Register*.

Unrules

73 STAN. L. REV. 885 (2021)

we show that unrules are an integral and substantial feature of the federal regulatory system. Our analysis shows that, by several conservative measures, there exists one obligation-alleviating word for approximately every five to six obligation-imposing words in federal law. We also show that unrules are surprisingly unrestrained by administrative law. In stark contrast to administrative law's treatment of obligation-imposing rules, regulators enjoy greater discretion when deploying unrules to alleviate regulatory obligations. As a result, a major form of agency power remains hidden from view and relatively unencumbered by law. Recognizing the central role that unrules play in our regulatory system reveals the need to reorient administrative law and incorporate unrules more explicitly into its assumptions, doctrines, and procedures.

Table of Contents

Introduction	888
I. The Hidden World of Unrules	894
A. A Unified Taxonomy of Unrules	896
1. Carveouts	900
2. Dispensations	903
B. The Risks of Unrules	908
1. Negating regulatory benefits	911
2. Regulatory favoritism	913
3. The unrule of law	915
II. The Ubiquity of Unrules	918
A. Uncovering Unrules: Methods	920
B. Unrules in the <i>Federal Register</i>	923
C. Unrules in the <i>Code of Federal Regulations</i>	927
D. Unrules in Economically Significant Regulations	931
E. Unrules in the <i>United States Code</i>	932
F. Summary and Implications	933
III. Reorienting Administrative Law	935
A. Administrative Law's Preoccupation with Obligation Imposition	938
B. Procedural Manifestations of Administrative Law's Blind Spot	941
1. Making rules versus unrules	942
2. Tilted transparency	947
3. The lack of self-reinforcing incentives	950
C. Lopsidedness in Judicial Oversight	952
1. Barriers to legal mobilization	952
2. Barriers to getting into court	955
3. Less searching judicial review	957
D. Steps Toward Reorienting Administrative Law	959
Conclusion	964
Appendix	966

Introduction

Rules, as we all know, impose obligations. Federal law, for example, imposes an obligation on manufacturers of new drugs and medical devices to complete a rigorous safety and efficacy review process in accordance with requirements established by the U.S. Food and Drug Administration (FDA).¹ Yet nearly three-quarters of all new drugs approved by the FDA and introduced into the market never go through the full review process.² Likewise, the vast majority of new medical devices that have entered the marketplace in recent years have bypassed the FDA’s premarket-approval process.³ In a similar manner, although Federal Aviation Administration (FAA) regulations obligate commercial aircraft manufacturers to test every key component of any new line of airplanes, when the Boeing Company developed the initial, tragic version of its now-infamous 737 MAX airplanes, it followed only an abbreviated certification process that allowed the company to sell its planes to customers years earlier than usual.⁴

How could regulatory obligations on matters as vital as public health and safety be bypassed? Sociologists of law have long noted that rules on the books do not mirror rules in action.⁵ Yet a key mechanism helping to explain such slippage—a mechanism we call an *unrule*—has so far escaped systematic empirical study. Government possesses a ubiquitous yet often hidden power to

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1. See, e.g., 21 C.F.R. § 314.126 (2020) (imposing a duty on manufacturers of new drugs to provide “adequate and well-controlled” clinical studies); *id.* § 860.7 (imposing rules for determinations of the safety and effectiveness of medical devices); see also *FDA’s Drug Review Process: Continued*, U.S. FDA, <https://perma.cc/Z4FU-JJHR> (last updated Aug. 24, 2015); *Overview of Device Regulation*, U.S. FDA, <https://perma.cc/BSY8-GQ6W> (last updated Sept. 4, 2020).
 2. Peter Loftus, *Fast-Track Drug Approval, Designed for Emergencies, Is Now Routine*, WALL ST. J. (July 5, 2019, 10:45 AM ET), <https://perma.cc/L3Q6-FMTR> (to locate, click “View the live page”) (stating that the FDA “approved a record 43 new drugs [in 2018] through fast-track programs that skip or shorten major steps other drugs must pass, or 73% of total new drugs”).
 3. INST. OF MED., NAT’L ACAD. OF SCIS., *MEDICAL DEVICES AND THE PUBLIC’S HEALTH: THE FDA 510(k) CLEARANCE PROCESS AT 35 YEARS* 4 (2011) (stating that only 1% of medical devices enter the market through the premarket-approval process); see also JEANNE LENZER, *THE DANGER WITHIN US: AMERICA’S UNTESTED, UNREGULATED MEDICAL DEVICE INDUSTRY AND ONE MAN’S BATTLE TO SURVIVE IT* 7, 63, 120-22 (2017) (noting that most high-risk medical devices escape full regulatory review).
 4. See *Airworthiness Certification*, FED. AVIATION ADMIN., <https://perma.cc/CGH8-YXE8> (last updated Dec. 18, 2020, 9:10 AM EST) (noting that the 737 MAX was approved under an “Amended Type Certificate,” which can “typically take 3-5 years to complete,” whereas “the certification of a new aircraft type can take between 5 and 9 years”).
 5. See, e.g., Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 14-15 (1910); see also STEWART MACAULAY, LAWRENCE M. FRIEDMAN & ELIZABETH MERTZ, *LAW IN ACTION: A SOCIO-LEGAL READER* 14 (2007).

limit or alleviate otherwise applicable regulatory obligations. Sometimes this power to alleviate obligations leads regulatory agencies to grant individual waivers, exemptions, or variances—a type of unrule that we call *dispensations*.⁶ At other times, unrules comprise what we call *carveouts*—exceptions and other limitations embedded within rules themselves, such as when a new regulation “grandfathers” existing businesses and exempts them from the coverage of its obligations.⁷ Both types of unrules—carveouts and dispensations—can be found within every source and domain of law, including regulations governing health care,⁸ securities,⁹ environmental protection,¹⁰ transportation,¹¹ and campaign finance.¹²

Unrules can be highly consequential. With medical devices linked to an estimated 1.7 million injuries and 80,000 deaths over the past decade,¹³ it matters, for example, that 70% of all recalls of high-risk medical devices from 2005 to 2009 involved products approved through the FDA’s special, fast-track approval process called the 510(k) program.¹⁴ Ostensibly designed as an exception for devices deemed “substantially equivalent” to an already-approved device,¹⁵ this 510(k) program helps explain why today most medical devices do not go through a government review process intended to demonstrate safety and effectiveness.¹⁶ These devices escape review even though every year hundreds of them, including surgical mesh and joint replacements, are approved for implantation into patients’ bodies and can lead to devastating health consequences if they malfunction.¹⁷ Former FDA Commissioner David

6. See *infra* Part I.A.2.

7. See *infra* Part I.A.1.

8. See, e.g., *infra* notes 61-62, 93, 136-40 and accompanying text.

9. See, e.g., *infra* notes 79, 149 and accompanying text.

10. See, e.g., *infra* notes 19-23, 48-49, 56-58, 94 and accompanying text.

11. See, e.g., *infra* notes 84, 191 and accompanying text.

12. See, e.g., *infra* note 147 and accompanying text.

13. *Implant Files*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://perma.cc/37N6-5UMR> (archived Dec. 30, 2020) (to locate, click the “Key findings” tab).

14. See ELISABETH ROSENTHAL, AN AMERICAN SICKNESS: HOW HEALTHCARE BECAME BIG BUSINESS AND HOW YOU CAN TAKE IT BACK 135 (2017).

15. 21 C.F.R. § 807.100(a)(1) (2020); see also ROSENTHAL, *supra* note 14, at 132-35; LENZER, *supra* note 3, at 120-22.

16. See INST. OF MED., NAT’L ACAD. OF SCIS., *supra* note 3, at 4.

17. See Diana Zuckerman, Paul Brown & Aditi Das, *Lack of Publicly Available Scientific Evidence on the Safety and Effectiveness of Implanted Medical Devices*, 174 JAMA INTERNAL MED. 1781, 1782, 1786 (2014); see also Jeanne Lenzer & Shannon Brownlee, *The FDA Is Still Letting Doctors Implant Untested Devices into Our Bodies*, WASH. POST (Jan. 4, 2019, 9:42 AM CST), <https://perma.cc/R4Y4T-E6PD>.

Kessler has characterized the 510(k) unrule as “an exception, in essence a little loophole, that . . . became the rule.”¹⁸

Or consider another example: a loophole established by the U.S. Environmental Protection Agency (EPA) allowing international tankers and other ships to escape from complying with otherwise applicable water-pollution requirements when they enter the Great Lakes and other major inland bodies of water.¹⁹ According to one EPA official, the agency adopted a regulatory exemption for ships in 1973 simply because “[a]t the time we thought that was not an important area to deal with.”²⁰ But as a result of the agency’s unrule, ships coming from the Saint Lawrence Seaway discharged ballast water into the Great Lakes for decades, creating a runaway invasion of zebra mussels and other nonnative species.²¹ The invasive mussels clog municipal drainage pipes throughout the Great Lakes and cause millions of dollars in annual property damage.²² Similar problems from contaminated-water discharges from ships have plagued other rivers and lakes throughout the United States, damaging fisheries and creating up to an estimated \$17 billion in annual economic costs as of 1995—not to mention an unquantified risk to human health from the pathogens and other pollutants contained in such discharges.²³

Yet today, debate over government regulation too often overlooks the consequences of government’s power to alleviate obligations and instead focuses almost exclusively on a single dimension of regulatory power: the power to *impose* obligations.²⁴ Prominent members of the academy,

18. THE BLEEDING EDGE, at 18:30 (Kirby Dirck dir. 2018).

19. See 38 Fed. Reg. 13,528, 13,528, 13,530 (May 22, 1973).

20. *Nw. Env’t Advocs. v. U.S. EPA*, 537 F.3d 1006, 1011 (9th Cir. 2008) (quoting EPA official Craig Vogt).

21. Joel Brammeier & Thom Cmar, *Pathways Toward a Policy of Preventing New Great Lakes Invasions*, in *INVASIVE SPECIES IN A GLOBALIZED WORLD: ECOLOGICAL, SOCIAL, AND LEGAL PERSPECTIVES ON POLICY* 356, 358-60 (Reuben P. Keller, Marc W. Cadotte & Glenn Sandiford eds., 2015).

22. U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-1026T, *INVASIVE SPECIES: PROGRESS AND CHALLENGES IN PREVENTING INTRODUCTION INTO U.S. WATERS VIA THE BALLAST WATER IN SHIPS 4* (2005), <https://perma.cc/3RT6-VQCD>.

23. OFF. OF WASTEWATER MGMT., U.S. EPA, *ECONOMIC AND BENEFITS ANALYSIS OF THE PROPOSED 2013 VESSEL GENERAL PERMIT (VGP) 129-30, 134* (2011), <https://perma.cc/M5QN-WZXS>.

24. The core assumption underlying debates over the modern administrative state is that agency power is the power to impose obligations. For a recent exchange over the status of the administrative state, see Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux—The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (noting a resurgence of “anti-administrativist[.]” voices calling for a retrenchment of administrative power to impose obligations on business, but arguing that this movement is unlikely to unravel the administrative state); Aaron L. Nielson, *Response, Confessions of an “Anti-Administrativist,”* 131 HARV. L. REV. F. 1, 10-12 (2017) (defending anti-administrativism as a sensible response to agency excesses); Mila Sohoni, *footnote continued on next page*

government, and the courts routinely rail against crippling overregulation and clamor that a tangle of red tape is suffocating private enterprise and hindering economic growth.²⁵ Critics frequently cite the sheer volume of agency regulations as evidence that regulatory burdens have run amok.²⁶ These concerns have contributed to both a political dialogue and a set of administrative law principles that today disproportionately aim to protect individuals and businesses from the imposition of regulatory obligations.²⁷

We seek with this Article to correct the prevailing, myopic understanding of regulatory power and discretion in the United States. Obligation imposition is only one side of the coin. Governmental authorities also exert significant power to alleviate obligations—power that can also be misused and create dramatic consequences for public welfare. A failure to appreciate the significance of unrules thus contributes both to an inflated sense of the onerousness of the U.S. regulatory system and to a cramped view of the kind of government discretion that administrative law has long sought to govern.

In this Article, we offer a unified framework for understanding governmental power to alleviate obligations. We also offer, for the first time, systematic evidence of this less visible aspect of power and show how our findings call into question prevailing accounts that have relied exclusively on the quantification of regulatory obligations.²⁸ Our analysis implies that government regulation is far less onerous—and far more flexible—than previously imagined. By showing the ubiquity of government’s power to

Response, *A Bureaucracy—If You Can Keep It*, 131 HARV. L. REV. F. 13, 18–24 (2017) (suggesting that anti-administrativism may be more successful than Metzger predicts).

25. See Mila Sohoni, *The Idea of “Too Much Law,”* 80 FORDHAM L. REV. 1585, 1587 (2012) (“It is impossible to open a newspaper without seeing some such version of the claim that America suffers from ‘hyperlexis,’ or the existence of ‘too much law.’”); see also PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 26 (rev. ed. 2011) (arguing that a proliferation of rules hampers business activity and the overall exercise of common sense); Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767–70 (1977). For additional sources offering this criticism, see note 152 and accompanying text below.
26. See, e.g., CLYDE WAYNE CREWS, JR., *COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE* 44–46 (2020), <https://perma.cc/3AEV-W996>. Even some scholars who recognize the benefits of regulation have emphasized the importance of reducing regulatory burdens. See, e.g., CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* 1–2 (2013).
27. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 398 (2015).
28. E.g., CREWS, *supra* note 26, at 4 (“employ[ing] a placeholder estimate for regulatory compliance and economic effects of federal intervention of \$1.9 trillion annually”); Omar Al-Ubaydli & Patrick A. McLaughlin, *RegData: A Numerical Database on Industry-Specific Regulations for All United States Industries and Federal Regulations, 1997–2012*, 11 REGUL. & GOVERNANCE 109, 110 (2017) (“provid[ing] a novel measure that quantifies regulatory demands”).

alleviate obligations, we reveal how previous critiques of regulatory burdens overstate the true size, scope, and intrusiveness of regulation. We demonstrate through empirical analysis that an “unrulemaking” authority is omnipresent in the federal regulatory corpus.²⁹ Our empirical analysis leads to a simple but powerful truth: A regulatory system can be understood only as the net effects of both its rules and its unrules.

That understanding also makes apparent that administrative law can never fully ensure the responsible, public-interested use of governmental power if it neglects one side of that power. Through its requirements for transparency, benefit–cost analysis, and judicial review of new agency regulations, for example, current administrative law tends to impose greater constraints on government agencies’ ability to impose obligations than on their ability to alleviate them.³⁰ Swaths of administrative discretion to alleviate or eliminate obligations remain effectively unchecked. This bias inhibits administrative law’s ability to ensure that agencies make well-considered alleviating decisions. When it comes to doling out waivers, for example, the absence of sufficient process and transparency requirements opens the door to a type of “unregulatory” capture. The comparative lack of judicial oversight of many unrules risks leaving certain alleviating decisions untested and poorly justified.³¹ The result is a regulatory ship with a pronounced list.

Our goal here is to bring unrules to the fore and to reorient debate over the U.S. regulatory state. To be sure, we are not the first ones to call attention to the existence of actions that governments can take to alleviate obligations, such as by issuing waivers and exemptions. Previous scholarship has identified and discussed certain types of unrules, and we acknowledge and build on this work in the Parts that follow.³² Yet the predominant focus of the work of

29. See *infra* Part II.

30. See *infra* Part III.

31. Such a bias in oversight should concern even those with libertarian commitments, as agencies can sometimes wield unrulemaking power in ways that enhance their power to impose obligations—such as by offering alleviation of some obligations in exchange for the acceptance of others the agency could not impose. See *infra* Part I.B.3.

32. See, e.g., Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 280-81 (developing the concept of “administrative equity”); Jim Rossi, Comment, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359 (1997); Sidney A. Shapiro & Robert L. Glicksman, *The APA and the Back-End of Regulation: Procedures for Informal Adjudication*, 56 ADMIN. L. REV. 1159, 1160 (2004) (differentiating between what they call “front-end” and “back-end” adjustments); Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163, 167 (examining “the pursuit of regulatory equity through an administrative ‘exceptions process’”). Of course, other important work on waivers focuses on private individuals’ willingness to consent to giving up their legal rights, but private waivers of rights are
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regulatory and administrative law scholars has been on agency discretion to *impose* legal obligations, too often overlooking the pervasive power that government possesses to *alleviate* obligations.³³

In Part I, we present a unified taxonomy of unrules comprising the two main types of unrules: *carveouts* and *dispensations*. Although, as we explain below, important differences exist between carveouts and dispensations, both share the effect of limiting or alleviating obligations. Only by considering both types of unrules together, under a unified framework, is it possible to see the full extent to which the U.S. regulatory system comprises the alleviation of obligations as well as their imposition.³⁴ Indeed, we know of no previous work that has developed a common framework to link together the two main types of unrules.³⁵ We go on in Part I to show why greater recognition of obligation alleviation is necessary. Although we acknowledge that unrules, if used in a responsible manner, can render regulations less burdensome, more fair, and more efficient, we also emphasize how the use of unrules can undermine important health and safety protections, enable regulatory capture, and threaten the rule of law.

In Part II, we show that unrules are ubiquitous. We report the results of computer-assisted content analyses of the *Federal Register*, the *Code of Federal Regulations* (CFR), and the *United States Code* indicating that unrules are a substantial and widespread feature of federal regulatory law in the United States. Our analysis documents that, across the various sources, there exists one obligation-alleviating word for approximately every five to six obligation-

not unrules. See Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 480 (1981) (offering “a general theory for waiver of rights by private persons”).

33. See AARON L. NIELSON, WAIVERS, EXEMPTIONS, AND PROSECUTORIAL DISCRETION: AN EXAMINATION OF AGENCY NONENFORCEMENT PRACTICES 1 (2017), <https://perma.cc/HSR4-2MYJ> (noting that “agency nonenforcement of legal duties—through means such as waivers, exemptions, and prosecutorial discretion—has received less attention than agency efforts to see that legal duties are complied with”). In this respect, administrative law scholars appear to be not unlike other legal scholars. See Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 871-72 (1991) (observing that many see exceptions as being “to law what electric windows are to automobiles—useful accessories but hardly central to the enterprise” and that “the exception is an invisible topic in legal theory”). For further discussion, see Part III below.

34. See *infra* Part III.

35. The literature does recognize some types of carveouts, such as grandfather clauses. See, e.g., Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1681-705 (2007) (providing a comprehensive history of the EPA’s grandfathering of existing sources under the Clean Air Act’s New Source Performance Standards). But probably the most work on unrules among administrative law scholars has centered on what we call dispensations. See generally Aman, *supra* note 32; Rossi, *supra* note 32. To our knowledge, no one has linked these two together to show how pervasive obligation alleviation is in the U.S. regulatory state.

imposing words in federal law.³⁶ We also explain why, for reasons related to data availability and the methodology we use, this ratio almost certainly understates substantially the prevalence of unrules. The analysis of dispensations in Part II, for example, almost exclusively focuses on language *authorizing* government agencies to grant dispensations. It is relatively rare for agencies to publish actual dispensations in the sources of law we analyze.

Finally, in Part III, we show that, despite the importance and ubiquity of unrules, agencies are less constrained by administrative law doctrine when they exercise their power to reduce the application, scope, or stringency of obligations than when they assert their power to impose obligations. Although the precise nature of procedural and other legal constraints varies across different unrules, in general the law requires the government to proceed through more stringent procedural steps when imposing regulatory obligations than when alleviating them.³⁷ Consequently, a major form of governmental discretion remains not only relatively hidden from view but also less encumbered by legal constraints designed to ensure public-interested exercise of government power. Recognizing the ubiquity of unrules highlights the need to reorient both doctrine and scholarship so as to bring agencies' power to alleviate obligations more squarely into the center of prevailing debates over the regulatory state.

I. The Hidden World of Unrules

When any governmental authority, whether a legislature or an administrative agency, creates new law, it imposes a new legal obligation—or, simply put, it creates a rule.³⁸ A rule consists of multiple components. One

36. *See infra* Part II.

37. Although Parts I and II of this Article make clear that rules and unrules can be adopted by Congress or by administrative agencies, given the salience of agencies in imposing and alleviating obligations as part of their implementation of statutory schemes, our focus in Part III is on administrative agencies' use of unrules—the domain of administrative law. *Cf.* Susan Webb Yackee, *The Politics of Rulemaking in the United States*, 22 ANN. REV. POL. SCI. 37, 39 (2019) (“Given the pervasiveness of rulemaking, US public policymaking may be better conceived of as chiefly regulatory, rather than chiefly legislative.”).

38. Although we use the term *rule* in this Article to refer to legal obligations, our focus and terminology should be distinguished from those that may be found in at least two other contexts. First, our use of the term *rule* is not limited to those obligations imposed by administrative agencies, even though the word “rule” is used in the Administrative Procedure Act to refer to such agency-imposed obligations. *See* 5 U.S.C. § 551(4). We mean *rule* to refer to any prescriptive or proscriptive statement imposing a legal obligation. Many such obligations are indeed imposed by administrative agencies—and when we do mean to limit our meaning just to agency rules we generally use the term “regulations.” But rules are also adopted and imposed by legislatures and courts. Second, we do not mean to limit our use of the word “rule” to its meaning in
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component defines the rule's targets or obligatees—that is, the class of individuals or entities upon which an obligation is imposed. The regulatory target itself can be defined by multiple criteria, such as the line of business or activities in which targeted entities engage, the size of the entities, and their age or the duration of their relevant activities.³⁹ Another component—the rule's command—articulates what the target must do or refrain from doing or what outcome it must achieve or avoid. Commands or legal duties themselves can comprise multiple facets and prove at times quite complex.⁴⁰ That complexity can increase further due to other rule components that provide conditions under which a legal command will apply—or under which distinct, alternative commands will apply.

Each of a rule's components—its defined scope, command, and conditions⁴¹—affords the rule's creator the opportunity to calibrate the rule to fit particular problems and circumstances.⁴² But these components also mean that a regulator—either when designing a rule or in seeking to apply or enforce it—has an opportunity to leave some entities or individuals outside the scope of the rule, to lessen its commands, or to modify its conditions. Such a decision to circumscribe or lighten legal obligations, or to exempt some individuals, businesses, or other relevant private or public entities from a rule's application, would constitute what we refer to as an obligation alleviation—or an unrule. Unrules can be thought of as akin to the holes in a block of regulatory Swiss

legal scholars' rules-versus-standards debate. See generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985). Legal obligations can be tightly or loosely specified, but they are still obligations—and hence both rules and standards are *rules* in the sense we mean here.

39. Although many rules target businesses and other private actors, such as individuals and nonprofit organizations, rules target governmental entities as well. Statutory or regulatory provisions that obligate administrative agencies to follow specified procedures or to provide certain public benefits to qualified applicants are also rules.
40. For further discussion of different types of legal commands and how they affect the design of rules, see TRANSP. RSCH. BD., NAT'L ACADS. OF SCIS., ENG'G & MED., SPECIAL REPORT 324, DESIGNING SAFETY REGULATIONS FOR HIGH-HAZARD INDUSTRIES, at ch. 2 (2018), <https://perma.cc/7EWH-9KNV>.
41. Other components include the nature of the command—that is, mandate or prohibition—that the rule imposes on its target as well as the potential consequences for violating that command. See Cary Coglianese, Analysis, *Regulation's Four Core Components*, REGUL. REV. (Sept. 17, 2012), <https://perma.cc/J4L9-BUGS>; see also FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 23 (1991) (analyzing prescriptive rules by “disassembling such rules to observe their characteristic structure and component parts”). An appreciation of the components of legal rules can be traced back to the early legal-lexiconic work of Wesley Hohfeld. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-30 (1913).
42. Of course, rule creators have to make all of these calibration decisions under conditions of uncertainty, which greatly complicates the degree to which rules can be precisely fitted to particular problems and circumstances. See Adam I. Muchmore, *Uncertainty, Complexity, and Regulatory Design*, 53 HOUS. L. REV. 1321, 1327 (2016).

cheese. Just as with Swiss cheese, the rules have real substance, as they are backed with the force of the state. But the holes are also constitutive of what a regulatory system means for business and society—and how effective, costly, and fair that system can be.⁴³

In this Part, we present a taxonomy of two types of unrules—carveouts and dispensations—and we illustrate each with examples from existing law. We then discuss the purposes that can be served by both types of unrules, as well as the risks that they pose in terms of regulatory ineffectiveness, unfairness, and the undermining of the rule of law.

A. A Unified Taxonomy of Unrules

At the outset, it is helpful to make three additional points to clarify what we mean by unrules. First, unrules can be found in any source of law—that is, in statutes as well as agency regulations. Although the latter sources are also referred to as agency “rules,” we generally reserve the term *rule* in this Article to refer to any kind of legal instrument that imposes a legal obligation. Unless otherwise indicated, we refer to agency-adopted rules as regulations.⁴⁴ That said, while we are interested in obligation alleviation as a general feature of government, we are particularly interested in it as a feature of the administrative arm of government. Given that agencies impose many more rules than does Congress, they also possess greater opportunity to deploy unrules—and thus administrative law should be more attentive to how agencies exercise their discretion to issue unrules.

43. Some legal theorists have suggested that these “holes” in rules are inevitable. *See, e.g.,* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1103-04 (2009) (drawing on Carl Schmitt’s theory of the “exception” to argue that underspecification in administrative law is inevitable); Schauer, *supra* note 33, at 873-75 (arguing that the limits of language make exceptions to rules inevitable); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 962 (1995) (noting that it is “familiar to find rules that have explicit or implicit exceptions for cases of necessity or emergency” and “unfamiliar to find rules without any such exceptions”). Even so, to state that unrules are inevitable is not to commit to a position on whether they are intrinsic (or internal) to the rule itself in a philosophical sense. *See, e.g.,* Claire Oakes Finkelstein, *When the Rule Swallows the Exception*, 19 QUINNIPIAC L. REV. 505, 508-09 (2000) (distinguishing internal “qualifications” from “exceptions,” the latter of which are external to the rule). Nor does it mean that every limitation on a rule should be thought of as an unrule. Limitations on a rule’s scope or applicability that have nothing to do with the underlying purpose of the rule are inevitable, but they would not reasonably be considered unrules. For instance, a rule that imposes obligations on automobile manufacturers to build cars that meet brake-safety standards necessarily does not also contain the obligation that banks retain adequate capital reserves. Such irrelevant limitations are not unrules, as we define them.

44. *See supra* note 38.

Second, unrules are the opposite of rules in that they lift, limit, or dispense with obligations rather than impose them. Unrules are not the opposite of rules merely because they do not bind, but instead because they actually alleviate. We mention this because much has been written by scholars over the years about nonbinding norms, whether called guidance or soft law.⁴⁵ In a certain sense, these soft legal tools could plausibly be thought of as the opposite of rules as well, simply because they are nonbinding. And, indeed, there may even be some overlap between unrules and guidance, at least where guidance constructively alleviates obligations, as it might with no-action letters and other forms of soft law that promise the nonenforcement of legal obligations. What has made guidance a controversial tool in the administrative arsenal, though, is not its potential to clarify the alleviation of obligations, but rather its use by agencies to circumvent the normal processes for issuing rules or orders and to pursue regulatory goals by using guidance to impose what in practice become constructive obligations.⁴⁶ That practice is not our concern here. When we focus on unrules, we mean to refer to the actual lifting of otherwise applicable obligations—not the establishment of nonbinding norms.

Finally, just like rules, unrules can apply to public as well as private actors or entities. Federal efforts undertaken during the Trump Administration to expand a border wall between the United States and Mexico, for example, benefited from an unrule that alleviated obligations that would ordinarily have been imposed on government construction projects.⁴⁷ The Secretary of Homeland Security waived more than two dozen otherwise applicable laws, including those that would have normally demanded thorough environmental reviews of the new construction projects.⁴⁸ Just as unrules alleviating private

45. See, e.g., Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 167–69 (2019); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 574–77 (2008).

46. See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1372 (1992); Parrillo, *supra* note 45, at 168–69, 174.

47. See Proclamation No. 9,844, 3 C.F.R. 12 (2020), reprinted in 50 U.S.C. § 1621 note (Supp. I 2020) (declaring a national emergency at the southern border); 10 U.S.C. § 2808(a) (giving the Secretary of Defense broad authority over military construction during a national emergency).

48. The REAL ID Act of 2005 authorizes the Secretary of Homeland Security to “waive all legal requirements . . . [as] necessary to ensure expeditious construction” of a border wall. See Pub. L. No. 109-13, § 102, 119 Stat. 231, 306 (codified as amended at 8 U.S.C. § 1103 note (Improvement of Barriers at Border)). In a series of decisions, the Secretary of Homeland Security has invoked this authority to waive the application of the National Environmental Policy Act and other laws in order to facilitate the construction of sections of new or improved border wall without environmental reviews. See, e.g., Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 83 Fed. Reg. 3,012, *footnote continued on next page*

entities' obligations can be consequential, so too can unrules vis-à-vis governmental entities. In the absence of the environmental reviews normally required for government construction projects, for example, some of the Trump Administration's border-wall sections exacerbated serious water-runoff problems during the desert "monsoon season," prompting officials to leave certain gates open to allow water to pass through—but in doing so undermining whatever function these walls served in deterring illegal entry into the United States.⁴⁹

Having clarified further what we mean by unrules, we now turn to classifying them. In the two Subparts to follow, we elaborate on the two types of unrules: carveouts and dispensations. Understanding these types of unrules is essential for both seeing the extent of unrules in regulatory law (the aim of Part II of this Article) and understanding how administrative law currently tends to provide less oversight of unrules (the aim of Part III).

Yet as we distinguish carveouts from dispensations in the following Subparts, it is important not to lose sight of what they share in common: They both alleviate obligations. Obligation alleviation is the sine qua non of unrules, and it is why we treat these two types of regulatory decisions as part of the same phenomenon. What distinguishes carveouts and dispensations from each other concerns their scope and timing. These differences are summarized in Table 1 below.

Carveouts apply on a categorical basis to any eligible person or entity meeting the criteria or conditions for obligation alleviation, while dispensations are granted on a case-by-case basis. By and large, this difference between the two types of unrules tracks the distinction between the two types of agency actions in administrative law: rules and orders.⁵⁰ A rule, in the sense of an agency regulation,

3,013-14 (Jan. 22, 2018). Several of these waivers have been upheld by the Ninth Circuit. See, e.g., *In re Border Infrastructure Env't Litig.*, 915 F.3d 1213, 1217-18 (9th Cir. 2019) (upholding DHS's authority to waive the environmental laws).

49. See Nick Miroff, *Trump's Border Wall, Vulnerable to Flash Floods, Needs Large Storm Gates Left Open for Months*, WASH. POST (Jan. 30, 2020, 4:37 PM CST), <https://perma.cc/WU7P-8V8E>.

50. See 5 U.S.C. § 551(4), (6). The APA's distinction between rules and orders is widely understood by administrative law scholars to hinge on the generalized effect of a rule on more than just specified individuals or entities, which contrasts with an order's express targeting of particular individuals or entities. This is not to deny that the APA's definitions of rules and orders have generated some confusion because the statute's definition of a rule makes reference to the "whole or a part of an agency statement of general or particular applicability and future effect." *Id.* § 551(4) (emphasis added); see also Ronald M. Levin, *The Case for (Finally) Fixing the APA's Definition of "Rule"*, 56 ADMIN. L. REV. 1077, 1077-80 (2004). The conventional scholarly emphasis on the distinction between general and particular action contrasts with the occasional judicial intimation that what distinguishes a rule from an order is the "future effect" of the former. See, e.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216 (1988) (Scalia, J., concurring). But this judicial view overlooks that orders can and often do have future effect as well. The
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Table 1
Taxonomy of Unrules

	Carveouts	Dispensations
Application	Categorical	Case-by-case
Timing	<i>At the time of</i> the imposition of an obligation (e.g., adoption or amendment of a regulation)	<i>After</i> the imposition of an obligation (e.g., after the adoption or amendment of a regulation)

imposes obligations generally on any individuals or entities falling into the category covered by the rule and its conditions.⁵¹ An order, by contrast, follows an adjudicatory process and can then result in the imposition of an obligation on only a specified set of individuals or entities.⁵² Carveouts and dispensations have a parallel scope: Carveouts apply generally, while dispensations apply specifically—but instead of imposing obligations, they each avoid or alleviate obligations.

Carveouts and dispensations can also be distinguished based on their timing. Carveouts are put in place at the time a rule is written or amended. They appear within or are created by the very same textual source that also imposes an obligation. By contrast, dispensations arise later, after the creation of a rule or its amendment. A dispensation grants a special status to an individual or entity whereby an otherwise applicable, previously established obligation no longer applies.

To illustrate our unrules taxonomy, we provide examples of both carveouts and dispensations in the two Subparts to follow. Some of these examples are explicit, as when carveouts are stated as express exemptions in statutes and regulations or when dispensations are memorialized in waivers or

emphasis on the generality of rules not only comports better with the scholarly consensus; it also tracks how the Supreme Court has long distinguished rulemaking from adjudication for due process purposes. *See* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915). Although our distinction between carveouts and dispensations does have certain features of both generality and temporality, it tends to mirror, at a conceptual level, the widely accepted administrative law distinction between rules and orders that is based on the generality of the former. Of course, we make the comparison between carveouts and dispensations and between rules and orders purely for heuristic reasons. Agencies must use one or the other action defined in § 551—that is, a rule or an order—to alleviate obligations as much as to impose them. An agency-created carveout will be part of a § 551 rule, while a dispensation will be executed as a § 551 order.

51. *See Bi-Metallic Inv. Co.*, 239 U.S. at 445-46.

52. *See* *Londoner v. City & County of Denver*, 210 U.S. 373, 385-86 (1908); *S. Ry. Co. v. Virginia*, 290 U.S. 190, 197-99 (1933).

no-action letters. But obligation alleviation can also take place implicitly or constructively, such as when an agency uses its discretion not to enforce a regulation against a specific entity (a constructive dispensation) or when an agency leaves a natural target for an obligation out of the scope of a regulation without drawing attention to that decision in the regulatory text (a constructive carveout).⁵³ Of course, as with many legal distinctions, it may be possible to find a few examples that could straddle the boundary between carveouts and dispensations. In this respect, the two types of unrules also share another characteristic in common with the two types of agency actions used to impose obligations (namely, rules and orders): The differences between them can sometimes prove vexing. Notwithstanding the possibility of an occasional example challenging the distinction between the two types of unrules, our unified taxonomy helps reveal the extent to which the power of obligation alleviation runs through the regulatory state and the ways in which administrative law governs the exercise of that power.

1. Carveouts

Carveouts, as noted above, are explicit or implicit exceptions to regulatory obligations—for certain groups of individuals, types of firms, time periods, or classes of activities—that are baked into the sources of rules themselves. They serve to limit the scope or applicability of obligations that otherwise would have applied to entities or activities falling within the coverage of a rule.⁵⁴ Sometimes regulatory targets are exempted entirely from a rule; other times they are subject to less onerous obligations. In either case, because carveouts are embedded within

53. These kinds of constructive unrules present a special challenge for administrative law, which generally is triggered when an agency formalizes an action by publishing it in a source of binding law. See *infra* Part III.B.

54. Carveouts are thus deregulatory in the sense that, like all unrules, they alleviate obligations. Yet carveouts still keep the underlying regulatory obligation intact for at least some entities or under some circumstances. By contrast, what is commonly referred to as “deregulation” usually refers to the wholesale repeal or reconfiguration of existing obligations. See generally MARTHA DERTHICK & PAUL J. QUIRK, *THE POLITICS OF DEREGULATION* (1985) (chronicling the economic deregulation of the air-transport, trucking, and telecommunications sectors in the 1970s); ALFRED E. KAHN, *LESSONS FROM DEREGULATION: TELECOMMUNICATIONS AND AIRLINES AFTER THE CRUNCH* (2004) (reviewing the deregulation of the airline and telecommunications industries). A British commentator has used the term “unregulation” to refer to a softer form of deregulation represented by various regulatory-simplification and burden-reduction efforts around the world. See ROBIN ELLISON, *RED TAPE: MANAGING EXCESS IN LAW, REGULATION AND THE COURTS* 280-349 (2018) (describing various efforts to try to simplify laws and reduce their overall burdens). Although obligation alleviation may form part of any particular regulatory simplification project, the existence of carveouts may actually increase the complexity of regulation and thus could impede simplification.

a rule, all entities whose characteristics or activities fall within the domain of a carveout can be assured that their obligations have been alleviated.

On some level, every rule necessarily contains what could be thought of as a carveout. The definition of a rule's various components must demarcate the boundaries of the rule, which determine to whom (and what and when) the rule applies—and, by extension, to whom (and what and when) it does *not* apply.⁵⁵ But at times carveouts can limit the scope of the rule in ways that are not constitutive of or intrinsic to the motivating purpose of the rule—and thus they may even serve to undermine that purpose. For instance, a variety of statutory provisions expressly exempt harmful waste fluids produced during hydraulic fracturing for natural gas from obligations that would otherwise be imposed on the handling of these pollutants under the Clean Water Act, the Safe Drinking Water Act, and federal hazardous waste laws.⁵⁶ One such carveout—widely referred to as the Halliburton loophole⁵⁷—came into existence when the Energy Policy Act of 2005 added an exemption to the Safe Drinking Water Act of 1974. The Halliburton loophole did not come into existence because hydraulic fracturing fluids had been found to be safe in drinking water. Instead, it resulted from lobbying pressure by producers of natural gas.⁵⁸

The Halliburton loophole also illustrates how carveouts can arise after a rule is initially put into place. Although carveouts can be embedded within the original source of a rule (for example, a statute or regulation), they can also be added later through amendments that narrow a rule's scope or coverage.⁵⁹ Many of the regulatory obligations imposed by the 2010 Dodd–Frank Act and its resulting regulations initially applied to all banks, but in 2018 Congress

55. See *supra* notes 38–43 and accompanying text. The boundaries contained in the rule are distinct from justified reasons for departing from the strict meaning of the rule. See generally Finkelstein, *supra* note 43.

56. See, e.g., 42 U.S.C. § 300h(d)(1)(B). See generally William J. Brady & James P. Crannell, *Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations*, 14 VT. J. ENV'T L. 39, 43–52 (2012) (chronicling the series of exemptions for hydraulic fracturing from federal environmental requirements).

57. See Editorial, *The Halliburton Loophole*, N.Y. TIMES (Nov. 2, 2009), <https://perma.cc/PR8V-LTDP>.

58. See Charles Davis, *The Politics of “Fracking”: Regulating Natural Gas Drilling Practices in Colorado and Texas*, 29 REV. POL'Y RSCH. 177, 182 (2012); Hannah Wiseman, *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 FORDHAM ENV'T L. REV. 115, 144–45 (2009).

59. For examples of amendments in the context of administrative rulemaking, see generally Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U. L. REV. 183 (2017) (demonstrating that agencies frequently revisit existing regulations to adapt them to changing circumstances and at times to dole out regulatory relief—or what we call obligation alleviation).

amended the Act to carve out smaller community banks from some of its capital reserve requirements.⁶⁰

Carveouts can take myriad different forms. For instance, when various state public-health orders during the COVID-19 crisis obligated many businesses to shut down their operations, they explicitly contained carveouts for those businesses that provided “essential services.”⁶¹ When the Affordable Care Act (ACA) imposed a mandate that businesses with fifty or more full-time employees provide health insurance for their employees, it necessarily carved businesses with fewer than fifty employees out of the statute’s obligation.⁶² Likewise, when Congress passed the Clean Air Act in 1970, it aimed to clean up the pollution that factories had been spewing into the air at will, but the Act provided that certain pollution-reduction obligations imposed under the law would apply only to new or significantly modified industrial operations, not to existing facilities.⁶³

Lawmakers can adopt carveouts not merely with respect to regulatory targets but also with respect to the applicable time periods covered by a rule. Many rules will include phase-in periods when they are first adopted, and the length of these periods is an important component in defining, as well as alleviating, the rules’ obligations. For example, in 2018 the Trump Administration issued a regulation that extended the original compliance deadlines of an EPA coal-ash-disposal regulation adopted in the wake of the 2008 TVA Kingston coal disaster.⁶⁴

60. Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 201, 132 Stat. 1296, 1306-07 (2018) (codified at 12 U.S.C. § 5371 note (Capital Simplification for Qualifying Community Banks)).

61. *See, e.g.*, Fla. Exec. Order No. 20-89 (Mar. 30, 2020), <https://perma.cc/UB75-MCY9>; Memorandum from Jared Moskowitz, State Coordinating Officer, to Florida Div. of Emergency Mgmt. (Apr. 9, 2020), <https://perma.cc/4CY3-PQZ6>. For a related discussion, see Cary Coglianese, Opinion, *Obligation Alleviation During the COVID-19 Crisis*, REGUL. REV. (Apr. 20, 2020), <https://perma.cc/6WFZ-AJVQ>.

62. *See* 26 U.S.C. § 4980H. On small-business exemptions more generally, see SUSAN M. GATES & KRISTIN J. LEUSCHNER, RAND CORP., RESEARCH BRIEF: IS SPECIAL REGULATORY TREATMENT FOR SMALL BUSINESSES WORKING AS INTENDED? 1 (2007), <https://perma.cc/KD5E-QWPM> (“[S]mall businesses often receive special regulatory treatment, such as exemptions from legislation or extended deadlines for compliance.”).

63. *See* Clean Air Act of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1683-84 (codified as amended at 42 U.S.C. § 7411). *See generally* Nash & Revesz, *supra* note 35, at 1681-96 (providing a comprehensive history of the EPA’s grandfathering of existing sources under the Clean Air Act’s New Source Performance Standards).

64. Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Amendments to the National Minimum Criteria (Phase One, Part One), 83 Fed. Reg. 36,435, 36,440-43 (July 30, 2018) (to be codified at 40 C.F.R. pt. 257); *see also* *Coal Ash Rule*, HARV. L. SCH. ENV’T & ENERGY L. PROGRAM (Dec. 15, 2017), <https://perma.cc/G2LA-TEUA>.

Carveouts are often explicitly stated in a statute or regulation, as with each of the examples we have just presented. But they can also be inferred from a rule’s language or context.⁶⁵ For example, an EPA regulation prohibiting hospital employees from disposing of unused medicines by flushing them down a toilet or drain—a practice that raises concern about contaminating drinking-water supplies—is written so that it applies only to those drugs considered “hazardous waste.”⁶⁶ Someone reading that rule might not appreciate that, in reality, drugs classified as hazardous waste are a minority of all drugs. But the carveout is still there, even though the rule is not expressly written as granting an exemption for the disposal of the vast majority of drugs. In practice, hospital workers continue to flush most drugs down the drain, just as the carveout permits.⁶⁷

To summarize, a carveout can be implicit or explicit, as well as be present within a rule at its adoption or created at a later time. If created at a later time, it can be embodied in an amendment to the earlier rule or established by a separate nonenforcement policy that broadly covers one or more categories of regulated targets, activities, or time periods. Regardless of the form it takes, a carveout categorically alleviates obligations for the targets or activities falling outside the scope of the rule or into an exempted category.

2. Dispensations

Dispensations, by contrast, involve the case-by-case suspension of otherwise applicable and preexisting obligations for particular individuals or entities.⁶⁸ Dispensations may grant individualized extensions of compliance

65. Schauer, *supra* note 33, at 874 (“Where the language in which the rule is written contains a word or a familiar phrase that itself excludes what the drafters wish to exclude from the scope of the rule, no exception is necessary.”). We also recognize the possibility that, in any hard case, what might otherwise be thought to be the force of a rule might give way to unwritten principles or entirely separate sets of values not explicitly accounted for in the rule’s text. For related philosophical and jurisprudential discussions of the defeasibility of rules, see generally LUÍS DUARTE D’ALMEIDA, *ALLOWING FOR EXCEPTIONS: A THEORY OF DEFENCES AND DEFEASIBILITY IN LAW* (2015), and *THE LOGIC OF LEGAL REQUIREMENTS: ESSAYS ON DEFEASIBILITY* (Jordi Ferrer Beltrán & Giovanni Battista Ratti eds., 2012).

66. Management Standards for Hazardous Waste Pharmaceuticals and Amendment to the P075 Listing for Nicotine, 84 Fed. Reg. 5,816, 5,860 (Feb. 22, 2019) (to be codified in scattered sections of 40 C.F.R.).

67. Susan Scutti, *When Hospitals Pour Drugs Down the Drain*, CNN (Dec. 28, 2018, 7:14 AM EST), <https://perma.cc/6RJ5-5P7T>.

68. Although here we mainly focus on unrules applicable to private individuals and businesses, we note that dispensations awarded to states and localities can still have indirect—but no less significant—ramifications for private individuals and businesses. An important wrinkle to acknowledge is that sometimes unrules applied to states may allow them to impose *more* stringent burdens on private entities. This was the case when the
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deadlines or even waive the application of obligations entirely. They do not alter the underlying rule itself, but rather affect whether or how the rule's obligation applies to a discrete regulatory target.⁶⁹

For the particular individual or entity covered by a dispensation, the need to comply with an otherwise applicable obligation disappears, although the obligation continues on for all other individuals or entities subject to it. Dispensations come under numerous labels, such as “waivers,”⁷⁰ “exceptions,”⁷¹ “exemptions,”⁷² “variances,”⁷³ “licenses,”⁷⁴ or “no-action letters,”⁷⁵ but the label

EPA granted California a waiver from the ban on state-imposed motor-vehicle-emissions standards more stringent than federal Clean Air Act standards. *See* California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32,744 (July 8, 2009). Similarly, the Centers for Medicare and Medicaid Services has attempted to use its authority under section 1115 of the Social Security Act to grant states waivers to impose employment conditions and other eligibility burdens on Medicaid beneficiaries. *See, e.g.*, U.S. Dep't of Health & Hum. Servs., Ctr. for Medicaid & CHIP Servs., Opinion Letter on Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries (Jan. 11, 2018), <https://perma.cc/77KR-W2KR>.

69. We recognize, of course, that carveouts can be highly particularized too—at times excluding from a rule's coverage just a single entity. *E.g.*, LON L. FULLER, *THE MORALITY OF LAW* 47 n.4 (rev. ed. 1969) (providing an example of a state law containing a highly particularized exemption for “all” cities with a population “of more than 165,000 and less than 166,000”). But we differentiate here that kind of carveout from a dispensation because the former is embedded in or becomes part of the source of the rule itself. Moreover, unless a particularized carveout expressly names a specific individual or entity, it may be possible that in the future other entities may come to fit within the seemingly particularized carveout, making it a generalized carveout over time. Still, the very possibility of a highly particularized carveout that looks virtually identical to a dispensation, save for the fact that the former is contained in the original authoritative source of the rule (or its amendment), reinforces our point that both carveouts and dispensations are doing the same thing—alleviating obligations—and should be considered under a unified framework.
70. *E.g.*, 47 C.F.R. § 1.925(a) (2019) (providing that the Federal Communications Commission “may waive specific requirements of the rules on its own motion or upon request”).
71. *E.g.*, 7 C.F.R. § 767.251 (2020) (allowing the Department of Agriculture's Farm Service Agency to grant “an exception to any regulatory requirement or policy of this part” on an “individual case basis”).
72. *E.g.*, 50 C.F.R. § 660.14(d)(4) (2019) (providing that a fishing vessel may be “exempt[.]” from operating a “mobile transceiver unit” under certain conditions).
73. *E.g.*, 21 C.F.R. § 1010.4(a) (2020) (providing that the Director for the Center for Devices and Radiological Health in the FDA “may grant a variance from one or more provisions of any performance standard” for radiological devices).
74. *E.g.*, 31 C.F.R. § 501.801(b) (2020) (providing that “[t]ransactions subject to the prohibitions contained in this chapter, or to prohibitions the implementation and administration of which have been otherwise delegated to the [Office of Foreign Assets Control] Director, that are not authorized by general license may be effected only under specific license”).
75. *E.g.*, Turnkey Jet, Inc., SEC Staff No-Action Letter, 2019 WL 1471132 (Apr. 3, 2019).

is less important than the function of relieving a specific individual's or entity's duty to comply with an existing regulation.

Examples of dispensations abound across every domain of regulatory law, frequently in response to unusual circumstances, emergency situations, changed conditions, or new technologies.⁷⁶ To address the widespread outbreak of a novel coronavirus in 2020, for example, the FDA issued a variety of “emergency use authorizations” related to viral testing, treatments, and vaccines.⁷⁷ The FAA has granted waivers from its drone regulations when the agency has found that a drone operator has proposed an alternative means of operation just as safe as the ones specified in the rules.⁷⁸ The Securities and Exchange Commission (SEC) has issued a no-action letter for a digital-coin offering under the Securities Act of 1933 and the Securities Exchange Act of 1934, promising nonenforcement of securities laws to a company seeking to offer a new cryptocurrency.⁷⁹

In many policy domains, the same statute that delegates to an administrative agency the authority to impose regulatory obligations will also grant it the authority to waive obligations in appropriate circumstances.⁸⁰ Although

76. See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 272 (2013) (“Waiver is a long-standing administrative power—and not only when the requirement that is being waived is a regulation of the agency’s own making.”). Waivers, or what we call dispensations (including exercises of regulatory discretion), can alleviate statutory requirements, see generally *id.*; Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016), or they can alleviate regulatory requirements previously imposed by an agency through rulemaking, see generally NIELSON, *supra* note 33. This Article does not draw any fundamental distinction based on the object of the dispensation, although agency dispensations of statutory requirements may raise constitutional concerns that dispensations of regulations do not raise.

77. E.g., Letter from Denise M. Hinton, Chief Scientist, FDA, to Robert R. Redfield, Dir., CDC (July 2, 2020), <https://perma.cc/DM7M-SU9N> (granting a request for emergency use of a “multiplexed nucleic acid test intended for simultaneous qualitative detection and differentiation of SARS-CoV-2” and other viral nucleic acids under 21 U.S.C. § 360bbb-3).

78. See 14 C.F.R. § 107.200(a) (2020) (allowing for the grant of a waiver when drone operation “can safely be conducted under the terms of that certificate of waiver”); see also *Part 107 Waivers*, FAA, <https://perma.cc/RP8P-6U8U> (last updated Aug. 1, 2019, 2:14:22 PM EDT) (“These waivers allow drone pilots to deviate from certain rules under part 107 by demonstrating they can still fly safely using alternative methods.”).

79. Turnkey Jet, Inc., *supra* note 75, 2019 WL 1471132, at *1. For general background on the issues presented by blockchain and digital-coin offerings under the Securities Act and Exchange Act, see generally Shaanan Cohney, David Hoffman, Jeremy Sklaroff & David Wishnick, *Coin-Operated Capitalism*, 119 COLUM. L. REV. 591 (2019).

80. E.g., 20 U.S.C. § 7861(a)(3) (“Except as provided in subsection (b)(4) or (c), the Secretary [of Education] may waive any statutory or regulatory requirement of this chapter for which a waiver request is submitted to the Secretary pursuant to this subsection.”); 47 U.S.C. § 613(c)(2)(C) (“The [Federal Communications] Commission may delay or waive the regulation promulgated under subparagraph (A) to the extent the Commission finds that the application of the regulation to live video programming delivered using Internet protocol with captions after the effective date of such regulations would be

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delegations of obligation-imposition power are supposed to be cabined by an “intelligible principle” under the nondelegation doctrine,⁸¹ statutory provisions authorizing dispensations often lack any meaningful principle at all. Sometimes authorizations of dispensation authority sweep so broadly that they, at least theoretically, allow agencies to waive *any* regulatory provision. For example, federal statutes directing the Secretary of Health and Human Services to develop demonstration projects for opioid-disorder treatment provide that “[t]he Secretary may waive any provision of this subchapter as may be necessary to carry out the Program under this section.”⁸² Such is also the case with the Federal Communications Commission (FCC), which has decreed that “[a]ny” provision in the Commission’s regulations “may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”⁸³

In exercising their dispensation authority, agencies sometimes expect recipients of dispensations to have applied or petitioned for obligation alleviation.⁸⁴ Yet it is also possible for an agency to act of its own accord to dispense with a requirement for a specific entity by simply not enforcing it.⁸⁵ Agencies need no special statutory authorization for decisions not to enforce obligations against specific individuals or entities, as the Supreme Court has treated that authority as an inherently discretionary administrative power.⁸⁶

economically burdensome to providers of video programming or program owners.”); 49 U.S.C. § 31315(b)(1) (“Upon receipt of a request pursuant to this subsection, the Secretary of Transportation may grant to a person or class of persons an exemption from a regulation prescribed under this chapter or section 31136 if the Secretary finds such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption.”).

81. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

82. 42 U.S.C. § 1395cc-6(i).

83. 47 C.F.R. § 1.3 (2019); see also *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. However, . . . those waivers must be founded upon an ‘appropriate general standard’ . . . ‘best expressed in a rule that obviates discriminatory approaches.’” (citation omitted) (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969))).

84. For instance, oil and gas pipeline operators can apply for “special permits” from the Pipeline and Hazardous Materials Safety Administration that waive or modify the usual pipeline safety requirements. *Special Permits and State Waivers Overview*, PIPELINE & HAZARDOUS MATERIALS SAFETY ADMIN., U.S. DEP’T OF TRANSP., <https://perma.cc/YE5H-SN5F> (last updated Nov. 6, 2020). Likewise, firms that make small public offerings of stock can be exempt from normal SEC registration requirements. See 17 C.F.R. § 230.251 (2020); see also, e.g., *Waivers of Disqualification Under Regulation A and Rules 505 and 506 of Regulation D*, DIV. OF CORP. FIN., SEC., <https://perma.cc/CPD7-GPUP> (last updated Mar. 13, 2015) (granting waivers of disqualification from certain exemptions).

85. NIELSON, *supra* note 33, at 5.

86. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

Dispensations thus take the form of individualized nonenforcement decisions that agency officials make every day in the exercise of their prosecutorial discretion.⁸⁷ The exercise of such discretion fails to provide regulated targets with any written assurance that the government will continue to turn a blind eye to noncompliance. But as a practical matter, it may be enough to function just as any other kind of dispensation. Such dispensations can work to relieve particular individuals or entities of their felt obligations to behave in compliance with otherwise applicable law.⁸⁸

When government agencies affirmatively announce that they will forgo enforcement of rules on an across-the-board basis against certain classes of regulated targets or for certain periods of time, rather than on a case-by-case basis, their decisions begin to blur the boundary between dispensations and carveouts.⁸⁹ The Obama Administration, for instance, heavily publicized its across-the-board decision to refrain from enforcing the Controlled Substances Act and associated regulations when states decriminalized or legalized recreational cannabis.⁹⁰ Through the Deferred Action for Childhood Arrivals program, that same administration also declined to enforce immigration laws against noncitizens who were brought to the United States as children.⁹¹ Similar across-the-board nonenforcement policies were announced during the Trump Administration.⁹² For instance, after failing to win congressional support to repeal the Affordable Care Act, the Trump Administration simply abandoned its enforcement of the law's mandate that individuals purchase

87. See Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1923 (2016) ("There are literally hundreds, if not thousands, of nonenforcement decisions of one kind or another made by executive officials and line agents every single day."). See generally KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (discussing the extensive adjudicatory discretion exercised by administrative agencies).

88. For the now-canonical discussion of regulators' strategic deployment of such enforcement discretion, see generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

89. Elsewhere, one of us has characterized such nonenforcement policies as an executive power to defer—or the use of “inaction as a lever to achieve policy outcomes.” Cary Coglianese & Christopher S. Yoo, Symposium Introduction, *The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1594 (2016).

90. Bradley E. Markano, Note, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 291 (2015).

91. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783, 791 (2013).

92. See Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump's Deregulatory Binge*, 12 HARV. L. & POL'Y REV. 13, 14 (2018) (“[A]gencies across the federal government have delayed the effective dates, and in some cases the compliance dates, of dozens of final rules.” (footnote omitted)).

health insurance.⁹³ In the opening months of the COVID-19 crisis and its concomitant economic disruption, the Administration announced that it was temporarily suspending enforcement across the board for a range of environmental regulatory obligations.⁹⁴

The announcement of policies like these, which grant a general pass from enforcement, even if only for a specific group of regulated entities or for a limited time period, are similar to carveouts in that they apply categorically rather than on a case-by-case basis. At the same time, these nonenforcement policies are like dispensations in that they apply *after* a rule's adoption and do not explicitly amend it. Despite not expressly and formally lifting a legal obligation, as most carveouts do, they do effectively alleviate the obligation, putting regulated targets in the same basic position as if the rule itself had been officially changed. As one observer of regulatory policy has commented, “[y]ou can make a rule, but if you don’t enforce the rule, it’s almost like the rule doesn’t exist.”⁹⁵

B. The Risks of Unrules

Whatever their particular manifestations, carveouts and dispensations both serve to alleviate obligations—and both are often needed to make rules more effective, efficient, and fair. Rules, after all, are generalizations, and the assumptions and preconditions underlying these generalizations do not always fit the complex and dynamic world to which rules are applied.⁹⁶ Unrules thus help rules accommodate the world in ways that can help the law better fulfill the underlying purposes that motivate the imposition of obligations in the first place.

In addition, because rules often aim to serve multiple purposes, it can be necessary to tailor them in ways that balance different values. Sometimes this means that rules must be fine-tuned or adjusted—such as when the federal

93. Haeyoun Park & Margot Sanger-Katz, *4 Ways Trump Is Weakening Obamacare, Even After Repeal Plan's Failure*, N.Y. TIMES (updated Sept. 27, 2017), <https://perma.cc/Z8XY-Y6EF> (“While Mr. Trump cannot eliminate the mandate, as Republicans in Congress sought to do, the Internal Revenue Service has said it will continue accepting tax returns that do not say whether a filer has been uninsured, weakening its enforcement of the provision.”).

94. Memorandum from Susan Parker Bodine, Assistant Adm’r for Enf’t & Compliance Assurance, EPA, to All Governmental & Private Sector Partners (Mar. 26, 2020), <https://perma.cc/7CRJ-QD48>.

95. See Brittany Knotts, Grace Tatter & Anthony Brooks, *Environmental Regulations Are Being Rolled Back. In a Pandemic, What Does That Mean for Public Health?*, WBUR: ON POINT (updated July 1, 2020), <https://perma.cc/9DLU-UDPH> (quoting reporter Kendra Pierre-Louis).

96. See generally Frederick Schauer & Richard Zeckhauser, *Regulation by Generalization*, 1 REGUL. & GOVERNANCE 68 (2007); Muchmore, *supra* note 42.

government amended child-resistant-packaging rules to make sure that bottles of medicine and household cleaners designed to meet these rules could still be opened by adults.⁹⁷ Unrules can help in balancing different objectives. When the FCC granted Google a waiver allowing a radar-based motion sensor to operate at higher power levels than normally allowed by rules designed to protect against interference to other users of radio spectrum, it did so in part to “help people with mobility, speech, or tactile impairments” by enabling them to control devices such as smart phones remotely through “touchless hand gesture[.]” technology.⁹⁸

Carveouts or dispensations can also play a role in reconciling competing policy preferences. They can make operational what Cass Sunstein has called the incompletely theorized agreements that often underlie the law’s response to contentious issues.⁹⁹ To pick a stark example, laws restricting access to abortions have usually contained various exceptions for when a woman’s life or health is at risk or when pregnancy results from sexual assault—carveouts that recognize a broad societal consensus around the alleviation of legal restrictions on abortions.¹⁰⁰ The use of unrules to effectuate compromises in values can also be found in other, less controversial laws.

In these various ways, unrules can be essential for any system of rules to implement value tradeoffs as well as to fit varied and changing political, social, and economic circumstances.¹⁰¹ Unrules can provide much-needed flexibility

97. See Cary Coglianese, *The Limits of Performance-Based Regulation*, 50 U. MICH. J.L. REFORM 525, 555-56 (2017).

98. Rita Liao, *FCC Greenlights Soli, Google’s Radar-Based Gesture Tech*, TECHCRUNCH (Jan. 2, 2019, 7:30 AM CST), <https://perma.cc/F8LW-DL95> (quoting the FCC). The FCC granted Google this waiver only after determining that the Soli sensors would pose “minimal potential of causing harmful interference to other spectrum users.” *Id.* (quoting the FCC).

99. See Cass R. Sunstein, *Commentary, Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995). The flexibility provided by unrules may in some cases render it less necessary for agencies to promulgate new regulations. Perhaps the ubiquity of unrules that we document in Part II below helps to explain why regulatory provisions are not amended more frequently. See DANIEL BYLER, BETH FLORES & JASON LEWRIS, DELOITTE CTR. FOR GOV’T INSIGHTS, *USING ADVANCED ANALYTICS TO DRIVE REGULATORY REFORM: UNDERSTANDING PRESIDENTIAL ORDERS ON REGULATION REFORM 6* (2017), <https://perma.cc/DK3V-4ZWQ> (finding that around two-thirds of sections of the CFR have never been updated). *But see* Wagner et al., *supra* note 59, at 202 (noting that nearly three-quarters of the rules examined by the authors “were revised by the agency at least once and typically multiple times”).

100. See *States with Laws Still on the Books That Would Ban Abortion*, ASSOCIATED PRESS (July 12, 2018), <https://perma.cc/7XVM-M7KP>; *Law and Policy Guide: Rape and Incest Exceptions*, CTR. FOR REPROD. RTS., <https://perma.cc/R3TG-VSDD> (archived Dec. 30, 2020).

101. See Rossi, *supra* note 32, at 1363 (noting that the possibility of waiving requirements “allows agencies to adapt regulation to contemporary technological and financial circumstances”); Aaron L. Nielson & Jennifer Nou, *Opinion, How Agencies Should Use* *footnote continued on next page*

to minimize unnecessary burdens on regulated entities and undesirable side effects,¹⁰² to encourage and manage technological innovation,¹⁰³ and to enable regulators to conserve their limited resources.¹⁰⁴ They may also at times render regulation fairer and more equitable. Sometimes full compliance with a rule would be infeasible or disproportionately costly for certain regulated parties.¹⁰⁵ If a rule is imposed rigidly and uniformly under all circumstances in which it applies, even when the regulated parties attempt in good faith to comply with the rule but are unable to do so fully, it may undermine the regulation's legitimacy¹⁰⁶ and thereby impede compliance.¹⁰⁷

But unrules can also be misused. Perhaps it is because of the positive role that unrules can play in reducing costs and avoiding counterproductive effects that their risks have not received more attention by legal scholars. Yet we should have no illusions about unrules; they are not an unalloyed good. On the contrary, if used unthinkingly or injudiciously, unrules can undermine the purpose of a regulation or advantage special interests over the broader public good. They can even introduce into a regulatory system a source of arbitrariness that is antithetical to the rule of law. We highlight below three major risks posed by unrules and offer prominent examples to illustrate each.

Waivers and Exemptions, REGUL. REV. (Mar. 9, 2018), <https://perma.cc/V8T8-PZ3M> (noting that “agencies often need to grant flexibility when circumstances require,” such as in emergencies or in connection with new technologies).

102. See Aman, *supra* note 32, at 294-313 (describing several different types of “hardship exceptions” and “fairness exceptions”); see also Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017) (“The authority to waive or exempt regulated parties from specific legal requirements affords agencies much-needed flexibility to respond to situations in which generally applicable laws are a poor fit for a given situation.”).
103. See, e.g., W. Nicholson Price II, *Regulating Black-Box Medicine*, 116 MICH. L. REV. 421, 447 (2017) (explaining how the FDA’s decision to exempt laboratory-developed tests from its medical-device regime “demonstrates the rapid innovation—but also the quality problems—that can result from such a policy”). But see Hilary J. Allen, *Regulatory Sandboxes*, 87 GEO. WASH. L. REV. 579, 581 (2019) (expressing skepticism about the promotion of innovation as a regulatory goal and arguing that the best reason to advance a regulatory sandbox is to cope with—rather than promote—financial innovation).
104. NIELSON, *supra* note 33, at 2.
105. See Aman, *supra* note 32, at 303; Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017).
106. See generally EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982) (warning of backlash by regulated firms when rules are applied unwaveringly by the book).
107. Rodney L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179, 1186 (2004) (“[A] rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis.” (quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969))).

1. Negating regulatory benefits

Although unrules can sometimes reduce regulatory costs,¹⁰⁸ in doing so they also may diminish regulatory benefits.¹⁰⁹ This prospect may be more likely than we realize, as policymakers rarely realize unrules' full consequences at the time they are created.¹¹⁰ Indeed, such consequences may not materialize until years later, after regulated entities figure out how to restructure their activities to fall into a category that escapes a rule's obligations. Human decisionmaking, after all, tends to be myopic.¹¹¹ When regulators are faced with a seemingly sympathetic case for a dispensation or for carving out a particular line of business from a rule, the short-term payoffs of such obligation alleviation will tend to loom larger than the long-term consequences.

This myopic tendency can be exacerbated by a political economy that ensures that individuals or businesses petitioning for obligation alleviation will be better mobilized than those who lose from such alleviation.¹¹² This political economy helps explain the common practice of grandfathering existing businesses out of regulatory obligations. Yet the long-term negative consequences of carving out exceptions for existing firms can be substantial. For example, the Clean Air Act's pollution carveout for existing plants has encouraged owners to focus on extending their plants' lives rather than building new plants that would be inherently cleaner.¹¹³

108. See, e.g., Richard Seig, Retail Compliance Ctr., *Little-Known Hazardous Waste Exceptions Can Significantly Reduce Regulatory Burdens*, MEDIUM (updated Jan. 2, 2018), <https://perma.cc/J6XA-XDAX>.

109. See, e.g., Adoption of Recommendations, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017) (noting that waiving or exempting parties from compliance with regulations may impact the "protection of the public"); Glicksman & Shapiro, *supra* note 107, at 1222 ("Excessive reliance on back-end adjustments can water down a rule to the point that it is far less effective in protecting the public or the environment than it would be if implemented as designed and without adjustments.").

110. One example of unforeseen consequences is the invasion of zebra mussels in the Great Lakes that resulted after EPA regulators carved out inland bodies of water from pollution requirements, leading to discharges of ballast water containing the mussels. See *supra* notes 19-23 and accompanying text.

111. See ROBERT MEYER & HOWARD KUNREUTHER, *THE OSTRICH PARADOX: WHY WE UNDERPREPARE FOR DISASTERS* 13-19 (2017); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 137-38 (2011).

112. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 369 (James Q. Wilson ed., 1980) ("When the benefits of a prospective policy are concentrated but the costs widely distributed, *client politics* is likely to result. Some small, easily organized group will benefit and thus has a powerful incentive to organize and lobby; the costs of the benefit are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition—if, indeed, they even hear of the policy."); see also *infra* Part III.C.

113. RICHARD L. REVESZ & JACK LIENKE, *STRUGGLING FOR AIR: POWER PLANTS AND THE "WAR ON COAL"* 3-4 (2016).

One need not look far to find other instances where unrules have substantially undermined regulatory benefits. The Mine Safety and Health Administration (MSHA), for example, has long carved out silica dust from direct regulation in its rules designed to control inhalation of harmful substances in mining operations, even though exposure to silica has been linked to progressive massive fibrosis among coal miners.¹¹⁴ Under the Obama Administration, MSHA tried to close other mine-dust loopholes,¹¹⁵ but it still failed to issue any separate standard to address exposure to respirable silica, leaving workers still exposed to hazards from breathing silica dust.¹¹⁶

Consider further that exemptions from rules governing blowout preventers on deepwater oil rigs appear to have contributed to the 2007 Deepwater Horizon explosion and oil spill in the Gulf of Mexico. One postaccident report noted that “it had become routine for [federal agency officials] to grant certain specific exemptions from regulatory requirements, mostly related to blowout preventer (BOP) testing, in order to accommodate the needs of deepwater operations.”¹¹⁷ Indeed, just days before the accident, the Minerals Management Service had approved exemptions from otherwise required protocols.¹¹⁸ Notwithstanding major legal and institutional reforms implemented after the oil spill to prevent a future catastrophe, a decade later

114. See Lowering Miners’ Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 79 Fed. Reg. 24,814, 24,817 (May 1, 2014) (to be codified at 30 C.F.R. pts. 70-72, 75, 90) (noting that although there has been a respirable dust standard on the books since 1980, “[t]here is no separate standard for respirable silica”); Kirsten S. Almborg, Cara N. Halldin, David J. Blackley, A. Scott Laney, Eileen Storey, Cecile S. Rose, Leonard H.T. Go & Robert A. Cohen, *Progressive Massive Fibrosis Resurgence Identified in U.S. Coal Miners Filing for Black Lung Benefits, 1970-2016*, 15 ANNALS AM. THORACIC SOC’Y 1420, 1424-25 (2018) (showing the consequences of worker exposure to silica dust); Howard Berkes, Huo Jingnan & Robert Benincasa, Investigation, *An Epidemic Is Killing Thousands of Coal Miners. Regulators Could Have Stopped It*, NPR: ALL THINGS CONSIDERED (Dec. 18, 2018, 5:00 AM ET), <https://perma.cc/7LBA-N79P>. An estimated 100 workers in the United States die from silicosis every year. See Michael Sainato, *“It’s Really Tragic”: Why Are Coalminers Still Dying from Black Lung Disease?*, GUARDIAN (Jan. 24, 2020, 3:00 AM EST), <https://perma.cc/SX69-98WP>.

115. For example, the old rules required air sampling for only an eight-hour period—even if workers had longer than an eight-hour shift. Mine Safety & Health Admin., U.S. Dep’t of Labor, Fact Sheet: MSHA’s Final Rule to Lower Miners’ Exposure to Respirable Coal Mine Dust (2014), <https://perma.cc/NL4U-8WGS>. In addition, companies could apparently conduct certain dust samples on days when production was at low levels (and thus dust levels were low too)—whereas the Respirable Dust Rule requires the samples “when mines are operating at 80 percent of production or more.” *Id.*

116. See *id.*

117. NAT’L COMM’N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, MACONDO: THE GULF OIL DISASTER—CHIEF COUNSEL’S REPORT 253 (2011), <https://perma.cc/W8RB-MAXC>.

118. *Id.* at 258-59.

the Trump Administration resumed the practice of issuing exemptions for deepwater-drilling-safety rules, reportedly issuing nearly 1,700 waivers from key requirements (including blowout-preventer rules).¹¹⁹

2. Regulatory favoritism

When regulatory agencies dole out dispensations or carve out firms from the scope of important rules, they might be acting at the behest of interest groups seeking undue favors and at the expense of the general public.¹²⁰ From a firm's perspective, the ideal situation is often to have a general rule put in place that obligates its competitors but that exempts it from those requirements. We know, for example, that industry lobbyists will at times try to persuade regulators to write rules that disadvantage their competitors while leaving their own firms subject to fewer or less stringent obligations.¹²¹ Carveouts and dispensations provide an excellent vehicle for ensuring favorable treatment. As we discuss more fully in Part III, unrules in general tend to receive less stringent oversight by the courts, and some dispensations escape altogether the open procedures and reporting requirements that apply to the rulemaking process.

Undue business influence appears to have played a key role, for example, in the issuance of dispensations to refineries during the first few years of the Trump Administration. In 2018, the EPA granted a "financial hardship waiver" to a large oil refinery owned by the billionaire investor Carl Icahn, who had served as an early advisor to President Trump on regulatory matters.¹²² In that capacity, Icahn had reportedly tried—but failed—to see that the EPA amend a Renewable Fuel Standard (RFS) requirement that his company CVR Energy purchase renewable fuel credits, which were costing the firm hundreds of millions of dollars.¹²³ From Icahn's perspective, getting a waiver from the RFS may have represented a similarly attractive option: From August 2017, when he

119. Ben Lefebvre, *Exclusive: Interior Hands Out Hundreds of Offshore Drilling Safety Rule Waivers*, POLITICO (Feb. 25, 2019, 2:55 PM EST), <https://perma.cc/3MTP-6ARH>.

120. See generally PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014) (reviewing the literature on regulatory capture); Christopher Carrigan & Cary Coglianese, *George J. Stigler, "The Theory of Economic Regulation,"* in THE OXFORD HANDBOOK OF CLASSICS IN PUBLIC POLICY AND ADMINISTRATION 287 (Steven J. Balla, Martin Lodge & Edward C. Page eds., 2015) (same).

121. Recent empirical research indicates that businesses can influence the design of regulations. See generally Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128 (2006).

122. Jarrett Renshaw & Chris Prentice, *Exclusive: U.S. EPA Grants Biofuels Waiver to Billionaire Icahn's Oil Refinery—Sources*, REUTERS (Apr. 30, 2018, 6:03 AM), <https://perma.cc/2M36-DLYA>.

123. See Patrick Radden Keefe, *Carl Icahn's Failed Raid on Washington*, NEW YORKER (Aug. 21, 2017), <https://perma.cc/U7ZP-6QV2>.

resigned from his special advisor position, to May 2018, shortly after news surfaced that CVR Energy had received a hardship waiver, his firm's stock price more than doubled, resulting in a reported \$1.4 billion gain for Icahn.¹²⁴ Notably, the EPA took its action under a statutory provision giving it authority to grant waivers to "small refiner[ies]" that demonstrate that they would otherwise suffer "disproportionate economic hardship."¹²⁵ The EPA gave a dispensation to Icahn's refinery and to those of other companies even though their size was anything but small.¹²⁶

Such undue business influence over regulatory decisions during the Trump Administration may have also been enabled by a different kind of dispensation: waivers of government ethics rules. Erik Baptist, a lawyer who worked in the Trump Administration in the same EPA program office responsible for the RFS, previously served as a lobbyist and lawyer for a trade association for the oil and gas industry. In that capacity, Baptist had lobbied Congress to repeal the RFS. In 2017, before the EPA had issued a waiver to Icahn, White House counsel Don McGahn reportedly gave Baptist an ethics waiver that allowed him to work on renewable-fuel regulatory issues for the EPA.¹²⁷ According to a 2018 news report, at least thirty-seven Trump Administration officials—including several former industry lobbyists—received official ethics waivers from the White House Counsel in the early years of the Administration, allowing those former lobbyists to work on issues that directly affected their previous employers in the private sector.¹²⁸

124. Tom DiChristopher, *Carl Icahn's Refinery Investment Has Rebounded by \$1.4 Billion, Boosted by Trump Energy Policy*, CNBC (May 4, 2018, 12:10 PM EDT), <https://perma.cc/X9HU-72HE>.

125. 42 U.S.C. § 7545(o)(9)(B)(i); see also Renshaw & Prentice, *supra* note 122.

126. See DiChristopher, *supra* note 124 (noting that CVR Refining, the entity that manages CVR Energy's refining assets, posted nearly \$147 million in profits in the first quarter of 2018). For a related concern that in the financial sector the SEC tends to waive various disqualification rules for large firms, see Kara M. Stein, *Dissenting Statement in the Matter of the Royal Bank of Scotland Group, plc, Regarding Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver from Being an Ineligible Issuer*, SEC (Apr. 28, 2014), <https://perma.cc/39EX-B3GT> (dissenting from Royal Bank of Scotland Group, plc, Securities Act Release No. 9578, Exchange Act Release No. 72032 (Apr. 25, 2014), <https://perma.cc/83JQ-Q229>) ("[T]he Commission routinely waives [disqualification rules]. . . . Are [such waivers] being fairly applied to all firms and individuals? Large institutions should be treated no differently, neither better nor worse, than small and medium-sized issuers.").

127. Michael Biesecker, Juliet Linderman & Richard Lardner, *What Swamp? Lobbyists Get Ethics Waivers to Work for Trump*, AP NEWS (Mar. 8, 2018), <https://perma.cc/8D46-PBBE>; Laura Peterson, *Ryan Zinke's Interior Department Gives Law-Breaking Coal Company a Pass*, DAILY BEAST (June 25, 2018, 5:04 AM ET), <https://perma.cc/CVA3-X3AP> (chronicling insider meetings that led to the Department of the Interior granting an enforcement dispensation to a mining company charged with regulatory violations).

128. Biesecker et al., *supra* note 127.

Undue business influence over dispensations has not been limited to the EPA. When defense contractor Raytheon saw sales of its missile systems to Saudi Arabia stymied by congressional opposition, it found a lobbyist with close ties to Secretary of State Mike Pompeo.¹²⁹ That lobbyist was able to arrange a meeting between Raytheon officials and Secretary Pompeo—and, a few weeks later, the State Department took the highly unusual step of invoking a waiver provision in the Arms Export Control Act that allowed the Raytheon missile sale to proceed without the normal lag period that would have allowed Congress to block the sale.¹³⁰ The waiver was granted under a provision in the Act that authorizes departures from normal procedures when “an emergency exists which requires [an arms] sale in the national security interests of the United States”¹³¹—but, of course, nothing evincing any real emergency had ever been shown.

These are but a few examples illustrating the basic incentives behind the politics of unrules. Just as regulatory capture can arise when highly motivated, powerful businesses pressure government decisionmakers to adopt rules that create barriers of entry to competitors, businesses also have incentives to seek to use unrules to get out from under regulations and avoid the compliance costs that other firms must bear. This is a kind of unregulatory capture.

3. The unrule of law

When unrules “swallow the rule,”¹³² they can completely subvert the laws on the books.¹³³ In addition, if carveouts are indiscriminate and dispensations

129. Kenneth P. Vogel, Michael LaForgia & Hailey Fuchs, *Trump Vowed to “Drain the Swamp,” but Lobbyists Are Helping Run His Campaign*, N.Y. TIMES (updated July 9, 2020), <https://perma.cc/ZKN6-T36D>.

130. Press Statement, Michael R. Pompeo, Sec’y of State, U.S. Dep’t of State, Emergency Notification of Arms Sales to Jordan, the United Arab Emirates, and Saudi Arabia (May 24, 2019), <https://perma.cc/8TP4-6VB6>; see also Edward Wong, Catie Edmondson & Eric Schmitt, *Trump Officials Prepare to Bypass Congress to Sell Weapons to Gulf Nations*, N.Y. TIMES (May 23, 2019), <https://perma.cc/C6P2-ZYGR>.

131. 22 U.S.C. § 2776(b)(1) (flush language); see also Wong et al., *supra* note 130.

132. See, e.g., *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 577 (E.D. Pa. 2017) (characterizing the Trump Administration’s proposed exemptions from the ACA’s contraceptive coverage mandate as “the proverbial exception that swallows the rule”), *aff’d sub nom. Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019), *rev’d sub nom. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); see also Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 958 (2018) (“In crafting religious accommodations, legislatures and courts take as a fundamental premise that accommodation does not defeat the purpose of the law.”).

133. See FULLER, *supra* note 69, at 39. Others have recognized this risk with regulatory exemptions—or what we call dispensations. Aman, *supra* note 32, at 292 (“[I]f exceptions to rules are freely and easily granted, with little or no regard for principle, the ‘inner morality of law’ may be jeopardized. . . . [A]n arbitrary exceptions regime would be characterized not by too much law, but by no law at all.” (quoting FULLER, *supra* note 69, footnote continued on next page

frequent and undisclosed, the law may no longer come to provide the predictability, notice, and fairness that it needs to operate effectively. When abused, unrules can turn regulation into little more than politics by other means.¹³⁴ In some cases, unrules might even become tools of “administrative sabotage” for opponents of regulatory programs.¹³⁵

During the Trump Administration, the potential threats to the rule of law posed by unrules grew particularly salient. For example, shortly after taking office, President Trump signed Executive Order 13,765, which directed relevant agencies to “waive, defer, grant exemptions from, or delay the implementation of any provision or requirement” contained in the ACA.¹³⁶ President Trump’s order urged administrators to use unrules in an effort to undermine a statute that the President wanted to repeal in Congress but could not. One result of that and subsequent Trump executive orders was the widening of an ACA carveout that allows short-term health insurance plans to exclude people with preexisting conditions or charge them higher premiums based on their health status.¹³⁷ By redefining short-term health plans to allow more plans to qualify for exemption from otherwise applicable prohibitions, the Trump Administration’s actions risked that healthier individuals would

passim); Sean D. Croston, Recent Development, *An Important Member of the Family: The Role of Regulatory Exemptions in Administrative Procedure*, 64 ADMIN. L. REV. 295, 310 (2012) (“[I]f a child is allowed to stay up late past bedtime on most nights, it is not a special permission anymore—it is a new bedtime. . . . [T]he ‘parent’ agency should announce the new bedtime as a new rule rather than simply granting permission each night.”); Glicksman & Shapiro, *supra* note 107, at 1222 (arguing that “once the exceptions swallow a rule, regulatory policy becomes incoherent,” as regulated entities will not comply with the rule when there are widespread dispensations). For a helpful discussion of rule-of-law issues related to dispensations, see Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 250-57, 262-65 (2016).

134. Even those who are otherwise no great fans of regulation recognize the threat that unrules can pose to the rule of law if regulators have too much discretion over how to use them. See Richard A. Epstein, *Government by Waiver*, NAT’L AFFS., Spring 2011, at 39, 39-41. Under some circumstances, the prospect of unrules may even increase regulatory burdens. Aaron Nielson has written about how waivers can be dangled in front of private parties and used to extract concessions that regulators may not have had the authority to compel. See generally Aaron L. Nielson, Essay, *Nonenforcement and the Danger of Leveraging*, LOY. U. CHI. J. REGUL. COMPLIANCE, Fall 2018, at 19.
135. See David L. Noll, *Administrative Sabotage* 34-40 (July 29, 2020) (unpublished manuscript) (on file with authors) (arguing that agency leaders can use basic tools of administrative law—including nonenforcement policies and waivers—to engage in “programmatically sabotage” to “undermine implementation of statutory policy goals”).
136. Exec. Order No. 13,765, 3 C.F.R. 260, 260-61 (2018), *reprinted in* 42 U.S.C. § 18001 note.
137. Exec. Order No. 13,813, 3 C.F.R. 387 (2018), *reprinted in* 42 U.S.C. § 18001 note; 29 C.F.R. § 2590.701-2 (2020) (defining “short-term, limited-duration insurance”); see also Katie Keith, *Administration Moves to Liberalize Rules on Short-Term, Non-ACA-Compliant Coverage*, HEALTH AFFS.: BLOG (Feb. 20, 2018), <https://perma.cc/NWL3-KFTN>.

opt for the cheaper, short-term plans and leave sicker patients stuck in the fully compliant insurance market, thus driving up premiums in contravention of the statute's purpose.¹³⁸ City officials across the United States charged that "[t]he Trump Administration's actions are . . . an affront to the rule of law."¹³⁹ Nicholas Bagley and Abbe Gluck accused the President of "an unconstitutional usurpation of power," arguing that "[n]ever in modern American history has a president so transparently aimed to destroy a piece of major legislation."¹⁴⁰

Efforts to alleviate obligations imposed on government officials pose their own risks to the rule of law. One of the most controversial unrules of President Trump's first two years in office came in the aftermath of the longest government shutdown in U.S. history: The President invoked the National Emergencies Act to justify redirecting military appropriations to fund the construction of a wall along the U.S. border with Mexico.¹⁴¹ Under the National Emergencies Act, a presidential emergency declaration triggers up to 136 "special or extraordinary" statutory unrules,¹⁴² including one that allows the government to "undertake military construction projects . . . not otherwise authorized by law."¹⁴³ Because of the number and breadth of dispensations triggered by the President's emergency declaration, and because he used this provision to get around a congressional rejection of a border wall, a number of leading legal scholars argued that President Trump's action amounted to an unlawful abuse of presidential power.¹⁴⁴ One conservative magazine headline

138. See Keith, *supra* note 137; Memorandum from Paul Spitalnic, Chief Actuary, Ctrs. for Medicare & Medicaid Servs., Estimated Financial Effects of the Short-Term, Limited-Duration Policy Proposed Rule (Apr. 6, 2018), <https://perma.cc/53AX-ZCHF>.

139. Amended Complaint for Declaratory and Injunctive Relief at 3, City of Columbus v. Trump, 453 F. Supp. 3d 770 (D. Md. 2020) (No. 18-cv-2364), 2019 WL 2118179, ECF No. 44.

140. Nicholas Bagley & Abbe R. Gluck, Opinion, *Trump's Sabotage of Obamacare Is Illegal*, N.Y. TIMES (Aug. 14, 2018), <https://perma.cc/98VJ-4QKV>.

141. Proclamation No. 9,844, 3 C.F.R. 12, 13 (2020), *reprinted in* 50 U.S.C. § 1621 note (Supp. I 2020).

142. 50 U.S.C. § 1621(a); *A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST., <https://perma.cc/5XD8-FTQW> (last updated Apr. 24, 2020) (identifying 136 statutory powers that "may become available to the president upon declaration of a national emergency"); see also Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan./Feb. 2019), <https://perma.cc/M5C8-SSDM>. In July 2019, the Supreme Court granted the Trump Administration's request for a stay of a district court's permanent injunction against the government's action to redirect funds under the President's emergency declaration, allowing construction of the border wall to move forward pending appeal. See *Trump v. Sierra Club*, 140 S. Ct. 1 (2019) (mem.), *motion to lift stay denied mem.*, 140 S. Ct. 2620 (2020).

143. 10 U.S.C. § 2808(a). These are unrules directed at the government: They waive certain obligations with which the government would otherwise have had to comply.

144. See, e.g., Bruce Ackerman, *No, Trump Cannot Declare an "Emergency" to Build His Wall*, N.Y. TIMES (Jan. 5, 2019), <https://perma.cc/245N-MABV>. But see Samuel Estreicher & David Moosmann, *President Trump's Emergency Wall Declaration: A Guide to the Legal* *footnote continued on next page*

declared the President’s emergency declaration to be simply “contemptuous of the rule of law.”¹⁴⁵

* * *

In sum, although the responsible use of unrules can play a positive—even necessary—role in regulatory law, the misuse of unrules can also undermine the rule of law, create incentives for undue influence by interest groups, and reduce the benefits that regulations have been created to produce. These concerns might be easy to overlook if unrules were only an exceptional or infrequent part of the regulatory system, or if administrative discretion to use unrules were sufficiently constrained by adequate procedures and oversight. But, as we show in the next Part of this Article, unrules are ubiquitous. This ubiquity, combined with the distinctive risks that unrules pose, make all the more troubling what we show in Part III—that current law tends to leave agencies’ power to alleviate obligations less constrained than their power to impose them.

II. The Ubiquity of Unrules

Once we become alert to them, important unrules can be found lurking behind nearly every major issue affecting law and society as well as in the mundane details of everyday life: President Trump’s so-called Muslim travel ban,¹⁴⁶ the viral spread of political propaganda on social media,¹⁴⁷ access to insurance coverage for contraceptive care,¹⁴⁸ investment funds in securities

Issues, JUSTIA: VERDICT (Mar. 4, 2019), <https://perma.cc/9CV2-RB5P> (arguing that “the president appears, at minimum, to have a credible statutory argument both on the authorization of the construction projects and on some of the identified sources of funding”).

145. David French, *Trump’s Emergency Declaration Is Contemptuous of the Rule of Law*, NAT’L REV. (Feb. 15, 2019, 6:29 PM), <https://perma.cc/WN3A-NG5X> (capitalization altered).

146. The Supreme Court relied in part on the existence of “case-by-case waivers when a foreign national demonstrates undue hardship” in upholding the Trump Administration’s travel ban. *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

147. In 2006, the Federal Election Commission created carveouts in the definitions of “contribution” and “expenditure” that eliminated campaign-finance regulation of Internet political activity. *See* Internet Communications, 71 Fed. Reg. 18,589, 18,590 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114).

148. The Trump Administration issued rules dramatically expanding moral and religious exemptions from the ACA’s requirement to cover contraceptive care. *See* Religious Exemptions, 83 Fed. Reg. 57,536 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147); Moral Exemptions, 83 Fed. Reg. 57,592 (Nov. 15, 2018) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147). The Supreme Court upheld these exemptions in July 2020. *See infra* notes 208-11.

markets,¹⁴⁹ and even visits to the Grand Canyon¹⁵⁰—to offer just a few examples beyond those we have already mentioned.

That it becomes easy to identify examples of unrules itself testifies to their ubiquity. But to demonstrate more systematically the prevalence of unrules, in this Part we report the results of the first empirical research measuring indicia of unrules in federal regulatory law. Employing widely accepted quantitative methods to analyze the text of several major legal sources, we find evidence that unrules are virtually omnipresent in regulatory law, even growing apace with indicia of rules in recent years. The importance of these findings is difficult to overstate.

As we will discuss further in Part III, our findings indicate that the U.S. regulatory system has much more play in the joints than has been previously understood. Both public discourse and academic analysis relating to regulation tend to treat the imposition of obligations as the defining feature of the administrative state.¹⁵¹ It is easy to get the impression that regulatory law is burdensome and inflexible when one focuses only on the obligations the law imposes. We are able to demonstrate systematically that, in reality, the regulatory system in the United States has a tremendous amount of wiggle room too. If scholars and practitioners are to understand the regulatory system in its entirety, they must appreciate how much it is a system of both rules and unrules.

To be sure, language indicative of unrules—that is, obligation-alleviating words such as *may*, *waive*, and *exempt*—are still outnumbered in sources of regulatory law by words indicative of the imposition of obligations, such as *shall*, *must*, and *prohibit*. But, as we explain further below, the evidence we find for the existence of unrules almost certainly represents a lower bound on the total obligation alleviation in regulatory law and practice. The language we identify for potential unrules can be invoked either repeatedly to alleviate many obligations or all at once to alleviate broad swaths of obligations with a single stroke. Furthermore, our measures do not capture the myriad informal ways that administrative agencies use their enforcement discretion to provide relief from regulatory obligations.

149. Press Release, SEC, SEC Proposes New Approval Process for Certain Exchange-Traded Funds, (June 28, 2018), <https://perma.cc/ELS4-UZSX> (acknowledging that exchange-traded funds (ETFs) are “hybrid investment products not originally provided for by the U.S. securities laws,” but proposing a carveout so that “ETFs that satisfy certain conditions would be able to operate within the scope of the Investment Company Act of 1940 and to come to market without applying for individual exemptive orders”).

150. The FAA granted the Hualapai Tribe a hardship exemption from the cap on the number of helicopter flights it can run through the Grand Canyon, leading to concerns about excessive exhaust and noise pollution. Nick Paumgarten, Cultural Comment, *The Grand Canyon Needs to Be Saved by Every Generation*, NEW YORKER (Sept. 26, 2018), <https://perma.cc/H7LC-4GSS>.

151. See *supra* notes 24-27 and accompanying text.

Taken together, the evidence from our computer-assisted quantitative methods and the many examples we have assembled show not only that unrules are ubiquitous but that, by extension, so too is the considerable authority agencies possess to alleviate obligations. Given the risks that obligation alleviation can pose by negating regulatory benefits, fostering favoritism, and undercutting the rule of law, the power to alleviate obligations deserves much the same kind of transparency and oversight that attend agencies' exercise of their power to impose obligations. Yet as we explain in Part III, core features of administrative law have tended to give obligation alleviation more of a pass than is prudent, given the ubiquity of unrules demonstrated here.

A. Uncovering Unrules: Methods

For decades, when lawyers, politicians, and scholars have expressed consternation over federal regulatory burdens, they have typically pointed to the number of documents or pages in the *Federal Register* and other sources of law.¹⁵² In 1946, when Congress enacted the Administrative Procedure Act (APA), a total of 14,736 pages appeared in the *Federal Register*.¹⁵³ By 2016, the annual number of pages had grown to 97,069—an increase of 560% over seventy years.¹⁵⁴ But despite the occasional claim that “the number of pages in the *Federal Register* is a reasonably good proxy for overall regulatory output,”¹⁵⁵ page counts cannot indicate anything about the content of pages or their substantive impact, especially the extent to which they impose obligations or alleviate them.¹⁵⁶ For

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152. See, e.g., Manning, *supra* note 25, at 767 (“Measured by any and every index, our law is exploding. New statutes, regulations, and ordinances are increasing at geometric rates at all levels of government.”); HERBERT KAUFMAN, RED TAPE: ITS ORIGINS, USES, AND ABUSES 2 (reprt. 2015) (1977) (“Today, you can hardly turn around without bumping into some federal restraint or requirement.”); MICHAEL MANDEL & DIANA G. CAREW, PROGRESSIVE POL’Y INST., REGULATORY IMPROVEMENT COMMISSION: A POLITICALLY-VIABLE APPROACH TO U.S. REGULATORY REFORM 3 (2013), <https://perma.cc/9P74-E2RZ> (pointing to growth in the pages in the CFR and noting that “[n]ew regulations are constantly being added from just about every federal agency . . . [and] [n]ew regulations simply accumulate on top of old ones”); Susan E. Dudley, Essay, *Can Fiscal Budget Concepts Improve Regulation?*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 259, 264-65 (2016) (“Despite central oversight and requirements for public input and [benefit–cost analysis], the growth in new regulations continues, and with it concerns that we have reached a point of diminishing returns.” (citation omitted)).
153. Off. of the Fed. Reg., *Federal Register Pages Published, 1936-2019* (n.d.), <https://perma.cc/RXM7-KW8Q>.
154. *Id.* The annual number of pages has dropped since 2016. See *id.*
155. Jack M. Beermann, *Midnight Rules: A Reform Agenda*, 2 MICH. J. ENV’T & ADMIN. L. 285, 290 (2013).
156. Jodi L. Short, *The Trouble with Counting: Cutting Through the Rhetoric of Red Tape Cutting*, 103 MINN. L. REV. 93, 97 (2018) (“[T]here are no good reasons to believe that counting the number of regulations is a useful proxy for the costs or burdens of regulation.”).

this reason, we dissect sources of regulatory law at the level of the words that actually appear on the page.

Specifically, our main empirical methodology in this Part follows an approach employed in recent years by other researchers who analyze linguistic patterns in large bodies of legal text.¹⁵⁷ Researchers at George Mason University’s Mercatus Center, for example, have used similar techniques to estimate what they call regulatory “restrictions”—or, more precisely, obligations—by counting key words in regulatory texts.¹⁵⁸ The Mercatus Center researchers have developed a quantitative dataset they call *RegData*, which essentially contains the results of computerized word searches that quantify the number of obligation-related terms used in regulations: *shall*, *must*, *may not*, *prohibited*, and *required*.¹⁵⁹ They have used their results, which show a nearly 20% increase in obligation-related words since 1997, to caution against adding further regulation, claiming that “regulatory accumulation will continue to stifle economic growth.”¹⁶⁰

But the Mercatus Center data do not account for unrules. We have thus replicated the methods underlying *RegData* and also adapted and expanded

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157. Methods of quantitative text analysis have emerged as a central analytical tool in the social sciences. See Justin Grimmer & Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 POL. ANALYSIS 267 (2013); Kenneth Benoit, Michael Laver & Slava Mikhaylov, Workshop, *Treating Words as Data with Error: Uncertainty in Text Statements of Policy Positions*, 53 AM. J. POL. SCI. 495 (2009). For examples of legal scholarship employing these methods, see LAW AS DATA: COMPUTATION, TEXT, AND THE FUTURE OF LEGAL ANALYSIS (Michael A. Livermore & Daniel N. Rockmore eds., 2019); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference’s Effects on Agency Rules*, 119 COLUM. L. REV. 85 (2019); Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529 (2018); David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153 (2016); and Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788 (2018).
158. See Al-Ubaydli & McLaughlin, *supra* note 28, at 112; see also Bentley Coffey, Patrick A. McLaughlin & Pietro Peretto, *The Cumulative Cost of Regulations*, 38 REV. ECON. DYNAMICS 1, 4 (2020). We will use the more clinical word “obligations” because that is what these words impose. Whether they in fact restrict anyone’s behavior will be contingent on what obligatees separately wish to do. For example, a person may well have a legal obligation to shovel the walkway in front of her house in the winter, but if she would already shovel it anyway for her own convenience or just because she wishes to be neighborly, she will not be in any way restricted.
159. *RegData US Technical Documentation*, QUANTGOV, <https://perma.cc/DJP2-56QS> (last updated Mar. 23, 2020) (measuring the number of occurrences of these words and phrases in each Part of the CFR from 1970 to 2019); Al-Ubaydli & McLaughlin, *supra* note 28, at 112. In addition, the authors use machine-learning text-classification algorithms to predict which industry is primarily affected by each obligation-imposing term. Al-Ubaydli & McLaughlin, *supra* note 28, at 114-17 (describing the methodology used to generate “industry relevance” measures).
160. PATRICK A. MCLAUGHLIN, NITA GHEI & MICHAEL WILT, MERCATUS CTR., POLICY BRIEF: REGULATORY ACCUMULATION AND ITS COSTS—AN OVERVIEW 1 (2018), <https://perma.cc/G5HQ-WK87>.

them to the task of measuring unrules based on a dictionary of five comparable obligation-alleviating terms: *waive*, *exclude*, *except*, *exempt*, and *variance*.¹⁶¹ We used computerized computational techniques to search for both obligation-imposing and obligation-alleviating terms throughout the *Federal Register* and the CFR, as well as in the *United States Code*. In our searches, we used both inflected and derived forms of the ten dictionary search terms. For instance, for the word *waive*, we searched for *waive(s)*, *waiving*, *waived*, and *waiver(s)*. We did the same for all of the obligation-alleviating and obligation-imposing words and phrases in our dictionaries.¹⁶² We also separately conducted validation testing based on a random sample of our dictionary words in context, in which two law-trained coders confirmed that the words were actually being used in a manner consistent with expectations—namely, to impose or alleviate legal obligations.¹⁶³

The Appendix provides examples of regulatory provisions in the CFR that feature one or more of the obligation-alleviating terms used in our analysis. These examples show how the terms in our unrule dictionary are commonly used to limit, lessen, or eliminate regulatory obligations, either by carving out

161. These were, of course, not the only words that might be used to alleviate regulatory obligations—just as the five words in the Mercatus Center dictionary are not the only ones that could be used to impose obligations. Indeed, we brainstormed nineteen possible obligation-alleviating terms before settling on the five terms we used. We wanted a dictionary comparable in size and character to the *RegData* dictionary and settled on the five terms we did because they seemed the most intuitively related to the lifting of obligations. Other words and phrases we considered were *grandfather*, *not apply*, *not include*, *applies only to*, *limited to*, *shall not apply*, *except small business*, *need not comply*, *forbearance*, *only if*, *permission*, *suspend*, *permit*, and *allow*. Our choices about which words to use in the unrules dictionary were not based on the frequency with which they appear in regulatory texts. Indeed, we were surprised that one word in our unrule dictionary—*variance*—is relatively infrequently used in federal regulatory texts. Rather, we aimed for words that we thought would be cleaner and more precise in their meaning. For example, we did not use *permit* because even though its verb form could connote obligation alleviation, its noun form seemed more associated with the imposition of obligations. For a description of our efforts to validate empirically that the words chosen capture the distinction between obligation alleviation and obligation imposition, see note 163 below.

162. The Appendix shows, with added italics, the inflected and derived forms of the words in our unrules dictionary. Our obligation-imposing dictionary included similar sets of variants.

163. We randomly sampled 75 examples of obligation-imposing words and 75 examples of obligation-alleviating words from the CFR, then captured 500 words before and after each sampled word. The coders found that 95% of the words used in context matched the expected meaning. When asked about the clarity of meaning, the coders agreed that 115 out of the 150 words were either “clear” or “very clear” from the context. Of these 115 instances, the coders agreed on the regulatory effect of the words in 112 of the instances, which in those instances lined up exactly as expected. In short, we were able to validate that the words contained in our dictionary do meaningfully capture obligation imposition and alleviation.

specified activities or actors from the scope of a general rule or by authorizing or establishing procedures for regulated entities to obtain dispensations. With our dictionary of unrule-related terms thus defined, we then used a package in the statistical software R called *quanteda*¹⁶⁴ to compute summary statistics about the frequency of each term in our dictionary in a variety of sources of regulatory text: the *Federal Register*, the CFR, and the *United States Code*.

B. Unrules in the *Federal Register*

We begin with the *Federal Register* because it has been the source most widely cited to support conventional wisdom about the growth of obligation imposition in the United States. Agencies are required to publish each new regulation in the *Federal Register* before it can go into effect.¹⁶⁵ Yet unrules can also be embedded in these agency regulations. For instance, in a document labeled as a “final rule,” the Pension Benefit Guaranty Corporation (PBGC) in 2015 established “public company waivers” that would “exempt about 94 percent of plans and sponsors from many reporting requirements and result in a net reduction in reporting to PBGC,” all in an explicit effort to “reduce unnecessary reporting requirements, while at the same time better targeting PBGC’s resources to plans that pose the greatest risks to the pension insurance system.”¹⁶⁶

Figure 1.A presents annual counts for our five obligation-alleviating terms in the *Federal Register* from 1936 to 2016. The number has been trending upward since 1990 (after a steep decline in the 1980s) and has seen sharper upticks since 2010. To put these alleviating terms into some further context, we can look at the most recent year in the data, 2016, where there were 146,894 occurrences of alleviating terms. By comparison, in that same year there were 746,742 occurrences of obligation-imposing terms. Clearly, obligation-imposing terms do outnumber obligation-alleviating terms in the *Federal Register*. But the ratio of one obligation-alleviating term to every 5.1 obligation-imposing terms suggests that unrule-related terms are a substantial, if not integral, part of the corpus of regulation. Indeed, as Figure 1.B shows, the ratio of alleviating to imposing terms has been increasing over time, at times spiking to one alleviating term per 3.5 imposing terms.

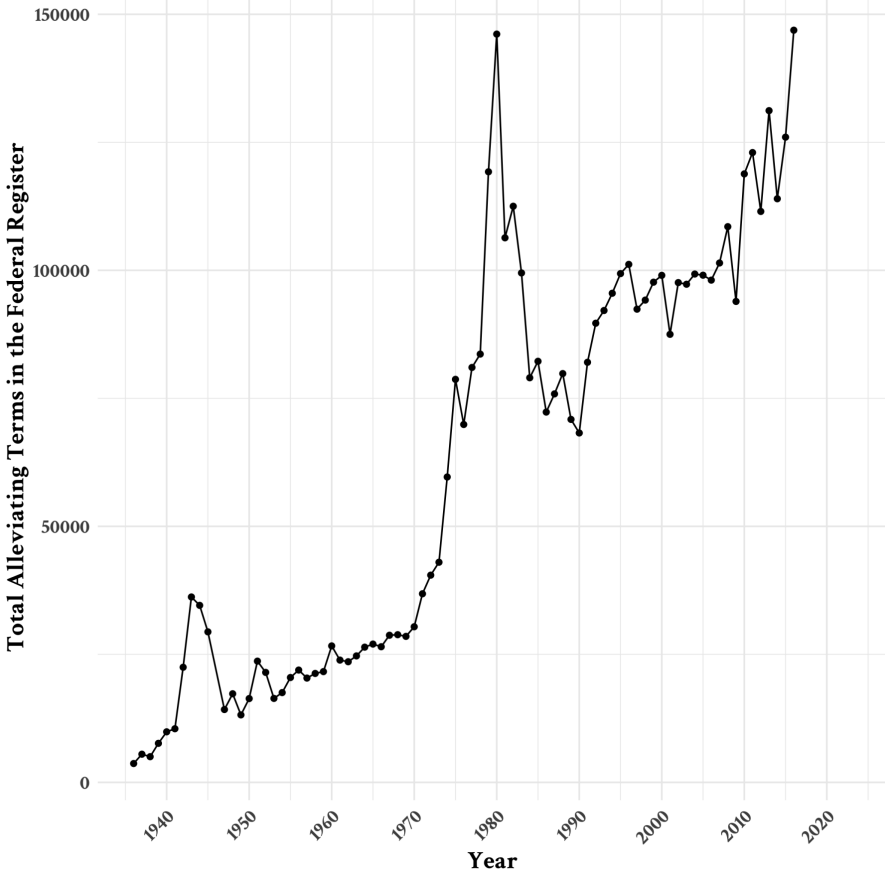
To compare obligation imposition and alleviation further using the *Federal Register*, we used Lexis’s comprehensive *Federal Register* library to search only

164. QUANTEDA, <https://perma.cc/ZRZ6-3VD6> (archived Dec. 30, 2020).

165. See 5 U.S.C. § 553(b), (d); see also MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 14 (2013), <https://perma.cc/TZD7-LHYU>.

166. Reportable Events and Certain Other Notification Requirements, 80 Fed. Reg. 54,980, 54,980 (Sept. 11, 2015) (to be codified in scattered parts of 29 C.F.R.).

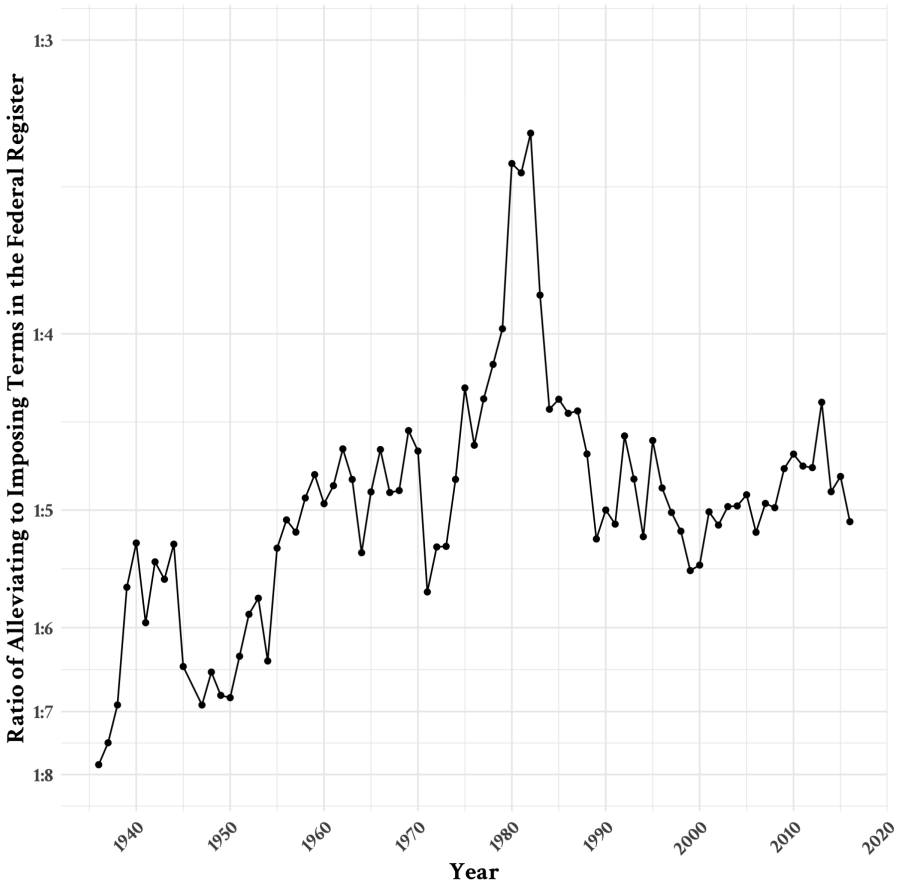
Figure 1.A
Obligation-Alleviating Terms in the Federal Register (1936-2016)



in the “action” field within each document—a field that agencies use to designate the kind of action they are taking. For the period from 1979 to 2016, we conducted a simple search looking for documents with one of two obligation-alleviating words—*waiver* or *exemption*—in this field.¹⁶⁷ Much as agencies use the labels “proposed rule” and “final rule” when promulgating regulations in the *Federal Register*, they also sometimes publish notices of waivers and exemptions with corresponding labels when issuing dispensations. For instance, the Employee Benefits Security Administration in the Department of Labor entered

167. Specifically, our search terms were *action(exempt! or waiw!)* and *date([year])*. We also searched for final-rule and proposed-rule documents in order to assess the relative balance of these different types of actions.

Figure 1.B
Ratio of Obligation-Alleviating Terms to
Obligation-Imposing Terms in the *Federal Register* (1936-2016)



“Grant of individual exemptions” in the action field of a *Federal Register* document that granted a Deutsche Bank subsidiary a dispensation from certain obligations under the Employee Retirement Income Security Act of 1974.¹⁶⁸ Even though agencies are seldom required to publish notices of dispensations in the *Federal Register*,¹⁶⁹ we found an average of 567 waivers or exemptions per year designated as such in the action field of the *Federal Register*. Comparing these

168. Exemptions from Certain Prohibited Transaction Restrictions, 81 Fed. Reg. 94,028, 94,028 (Dec. 22, 2016).

169. See *infra* Table 3.

notices of unrules to notices of final rules, we found one reported dispensation for every six published rules—keeping in mind, as the PBGC example above indicates, that what an agency issues as a final rule can also contain unrules.

To gain additional perspective on the extent to which final rule documents in the *Federal Register* create or authorize unrules, we also examined the document titles that agencies gave to their entries in the *Federal Register*. As with the PBGC example, some documents designated as “final rule” in the action field nevertheless principally created exemptions or established procedures for agencies to grant dispensations. For instance, a 2018 FAA document designated as a “final rule” was entitled “Updates to Rulemaking and Waiver Procedures and Expansion of the Equivalent Level of Safety Option.”¹⁷⁰ This “rule” gave commercial space carriers the opportunity to request waivers if they showed they could meet levels of safety equivalent to those that compliance with the rules would provide.¹⁷¹ As a rough gauge of the extent of final rule documents like these examples from the PBGC and FAA that have at least as much to do with obligation alleviation as with obligation imposition, we used another source of *Federal Register* data to search the titles of each final rule from 1996 to 2017.¹⁷² Strikingly, given the common perception that agencies’ final rules primarily or even exclusively impose obligations, the term *exempt* made up a slightly higher proportion of all words in final rule titles during that period than did *require*.¹⁷³ Indeed, obligation-alleviating terms were somewhat more frequent overall than obligation-imposing terms in the titles of agencies’ rule documents.¹⁷⁴

By now, it should be clear that the *Federal Register* contains more than just regulatory obligations. Of course, as others have pointed out in the past, the *Federal Register* contains a variety of nonbinding notices and other materials too.¹⁷⁵ Even final rule documents themselves contain lengthy preambles that are not technically binding law.¹⁷⁶ But to date, no one has uncovered the hidden

170. 83 Fed. Reg. 28,528, 28,528-29 (June 20, 2018) (to be codified in scattered parts of 14 C.F.R.).

171. *Id.* at 94,028-29.

172. Lexis does not permit searching by title, so we used the Mercatus Center’s QuantGov data. See QUANTGOV, <https://perma.cc/37D2-UTQW> (archived Jan. 9, 2021).

173. *Exempt* constituted 0.86% of all words in final-rule titles during that time period, while *require* constituted 0.81%.

174. Overall, the titles for final-rule documents in the *Federal Register* from 1996 to 2017 contained 13,312 obligation-alleviating words and 12,703 obligation-imposing words.

175. See CAREY, *supra* note 165, at 14-16 (explaining why page counts in the *Federal Register* are likely to give “only a rough approximation of regulatory activity each year”).

176. For instance, the Clinton-era ergonomics rule was 608 pages long when printed in the *Federal Register*, but only eight of these pages contained actual rule text. See CINDY SKRZYCKI, THE REGULATORS: ANONYMOUS POWER BROKERS IN AMERICAN POLITICS 27-28 (2003) (discussing Ergonomics Program, 65 Fed. Reg. 68,262, 68,846-54 (Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910)).

world of unrules within the pages of the *Federal Register*. We have found significant indicia of unrules, quantifying how ubiquitous they are. Even documents expressly labeled by agencies as “final rules” are sometimes really just unrules.

C. Unrules in the *Code of Federal Regulations*

If we turn to the source of regulatory law that comprises solely binding text—the CFR—we still find evidence of the ubiquity of unrules. The U.S. Government Publishing Office (GPO) makes the entire CFR available in machine-readable format, allowing us to perform the same term frequency analysis on the CFR from 2005 to 2017 as we did on the *Federal Register* text.¹⁷⁷

In 2017, the latest year available when we conducted our analysis, the CFR contained 241,225 individual occurrences of obligation-alleviating terms. As one might expect, the CFR contained many more individual occurrences of obligation-imposing terms: 1,429,897.¹⁷⁸ But the ratio of obligation-alleviating words to obligation-imposing words in the CFR was 1.0 for every 5.9—only a slightly higher rate of obligation-imposing language than what we found in the *Federal Register*. By far the most prominent word indicative of obligation alleviation was *except*, with 119,618 occurrences in the 2017 edition of the CFR. To put that number in perspective, *except* appeared about 3.5 times more frequently than two of the five obligation-imposing terms: *prohibit* (34,417) and *may not* (31,544) in that same year. To be sure, the other obligation-alleviating terms were less common. In 2017, the term *exempt* appeared 56,119 times; the term *exclude* appeared 33,015 times; the term *waive* appeared 29,617 times; and the term *variance* occurred only 2,856 times. Yet as a group, obligation-alleviating terms are far from negligible.

Because the CFR text is available on an annual basis from 2005 to 2017, we were also able to trace the overall trend in the growth of unrules in the CFR. As Figure 2.A shows, the use of obligation-alleviating terms appears to be on an upwards trajectory, with the total volume of alleviating terms growing by approximately 20% since 2005.¹⁷⁹ And Figure 2.B, which shows how

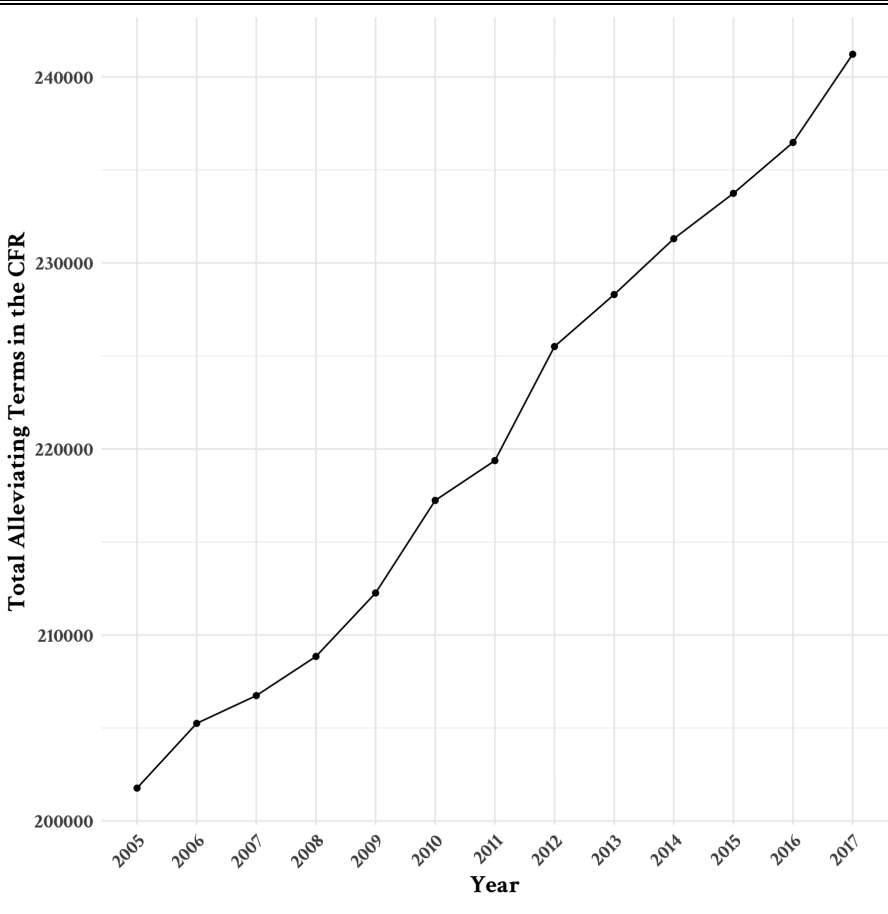
177. U.S. GPO, *Bulk Data Repository*, GOVINFO, <https://perma.cc/6UAX-A9QN> (archived Dec. 30, 2020) (to locate, click “View the live page”). These data are in principle available from 1996 to the present, although we discovered irregularities in how data were entered in the earlier years that led us to limit our analysis to the years that we report above.

178. Note that our counts of obligation-imposing terms are slightly higher than those reported through 2012 from *RegData*. Al-Ubaydli & McLaughlin, *supra* note 28, at 115 fig.2. This is because we included inflected and derived forms of *RegData*’s base obligation-imposing dictionary in order to match our approach to obligation-alleviating terms.

179. It is notable that this increase is quite similar to the rate of increase in our data during the same time period for obligation-imposing terms (23%). Although we do not know what Al-Ubaydli and McLaughlin would find in their data with respect to obligation-

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Figure 2.A
Obligation-Alleviating Terms in the CFR (2005-2017)

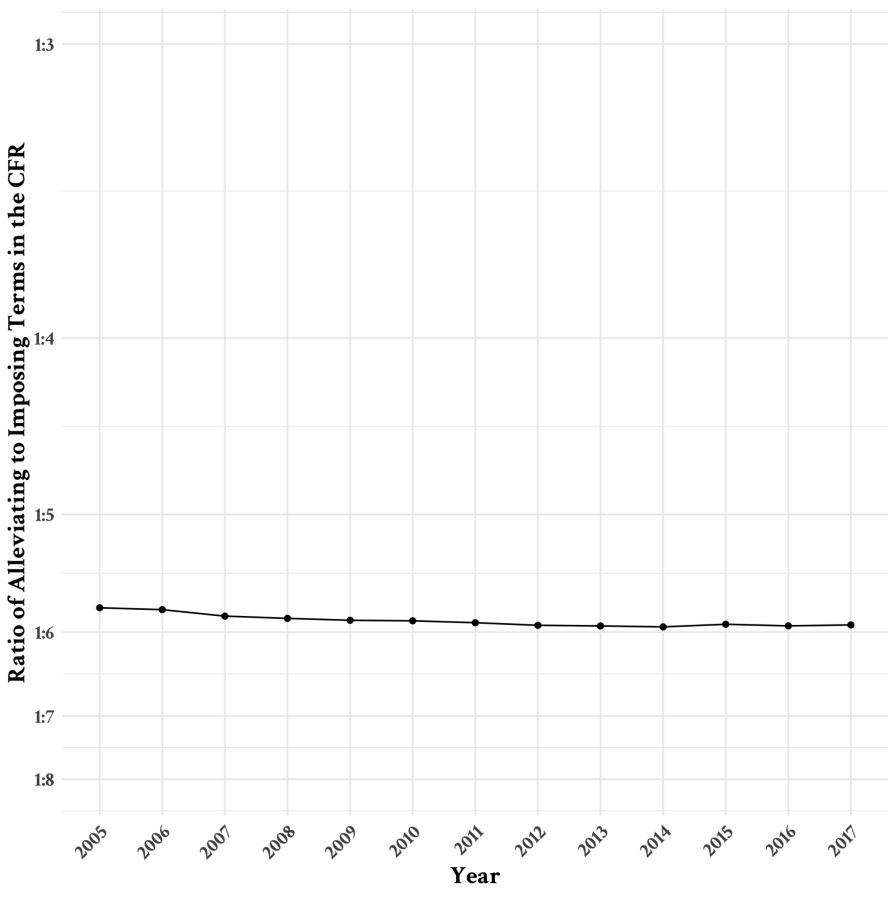


the ratio of alleviating to imposing terms has changed over the period of observation, suggests that there is a stable balance between rules and unrules—neither has grown at a significantly higher rate than the other over this time period.¹⁸⁰

alleviating terms (because their research focused only on obligation-imposing words), it is also notable that our finding for the increase in obligation-imposing terms is similar to Al-Ubaydli and McLaughlin’s finding that such terms increased by 20.4% from 1997 to 2012. *See id.* at 112.

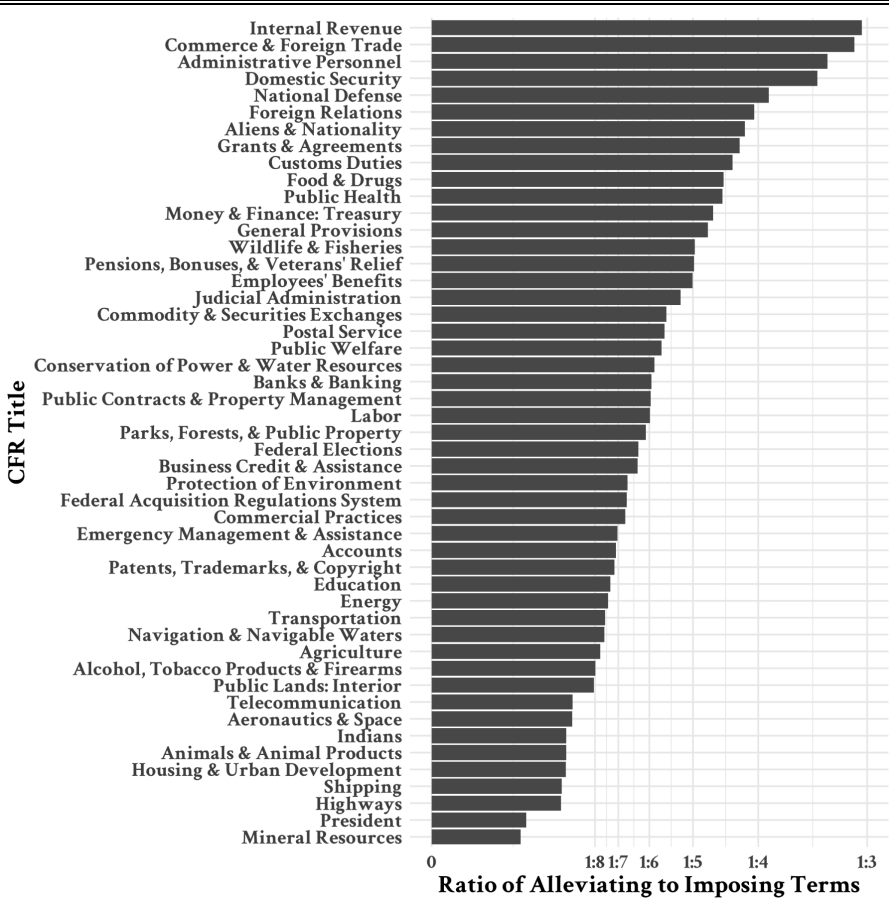
180. The ratio of alleviating to imposing terms remains between 1:5.8 and 1:6 for the thirteen-year period.

Figure 2.B
Ratio of Obligation-Alleviating Terms to
Obligation-Imposing Terms in the CFR (2005-2017)



Each title of the CFR contains regulatory text organized by topical areas. For example, Title 40 contains regulations governing environmental protection, and Title 47 contains regulations governing telecommunications. Figure 3 shows how the overall ratio of obligation-alleviating terms to obligation-imposing terms varies across CFR titles. In Figure 3, a longer bar means that the title contains more alleviating words relative to obligation-imposing words; the shorter bars reveal areas of federal regulation that are relatively obligation imposing. The title for Labor falls roughly at average for the overall CFR, so titles higher than Labor in Figure 3 are above average in their ratio of alleviating to imposing terms. There are some surprises here. Tax regulations, for example, are the part of the CFR most rich in unrule language, with about one obligation-alleviating

Figure 3
Ratio of Obligation-Alleviating to Obligation-Imposing Terms by CFR Title



word for every three obligation-imposing words—a finding at odds with common perceptions of tax regulations as exceedingly burdensome (although perhaps more consistent with perceptions that they are complex). By contrast, some topical areas that might be associated with a heavy presence of lobbyists seeking exemptions and waivers—namely, agriculture and mineral resources—fall more on the obligation-imposition end of the spectrum.¹⁸¹

181. This may not be as surprising if one considers the public-choice argument that incumbent firms often seek regulation as a means of discouraging new entrants and eliminating competition in their industry. For a recent statement of this argument, see BRINK LINDSEY & STEVEN M. TELES, *THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY* 34 (2017)
footnote continued on next page

D. Unrules in Economically Significant Regulations

Next, to see whether unrules make regular appearances in the most economically significant regulations, we made use of designations drawn from Executive Order 12,866.¹⁸² Out of the several thousand final rules published each year in the *Federal Register*, only a few hundred are typically categorized as “significant rules” under the executive order. Only an even more select subset—usually a few dozen per year—are further categorized as “economically significant,” a designation limited to regulations that are “likely to have an annual effect on the economy of \$100 million or more.”¹⁸³ Economically significant regulations receive close scrutiny from the White House Office of Information and Regulatory Affairs (OIRA), as agencies are required to prepare comprehensive estimates of the costs and benefits of both the proposed and final versions of these rules.¹⁸⁴ Critics of regulation often focus on this subset of regulations because of its outsized economic impact.¹⁸⁵

We analyzed the binding language contained in all economically significant federal regulations issued between 1982 and 2016, which amounted to a total of 1,210 rules.¹⁸⁶ Drawing on our dictionary of obligation-imposing and obligation-alleviating words, we again found evidence of unrules’ ubiquity. Across all agencies’ economically significant rules, one alleviating word appeared for about every 6.0 obligation-imposing words, with a mean of 32 alleviating terms per rule (median of 10) and a mean of 186 obligation-imposing terms per rule (median of 61). There were, of course, substantial outliers: One rule, for example, contained 761 individual occurrences of alleviating terms.¹⁸⁷ Overall, it was not

(arguing that, in a variety of contexts, “regulation . . . shields businesses as diverse as auto dealers, funeral directors, and hospitals from competition”).

182. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 note.

183. Off. of Info. & Regul. Affs., Exec. Off. of the President, *Regulations and the Rulemaking Process*, REGINFO.GOV, <https://perma.cc/ZYY6-GHW7> (archived Dec. 30, 2020).

184. CAREY, *supra* note 165, at 1, 4.

185. See, e.g., Clyde Wayne Crews, *Here Are All 205 “Economically Significant” Rules in the Spring 2015 Unified Agenda of Federal Regulations*, COMPETITIVE ENTER. INST.: BLOG (June 2, 2015), <https://perma.cc/LMR9-84UZ>.

186. Prior to the adoption of Executive Order 12,866, rules surpassing the same \$100 million threshold were classified as “major” under Executive Order 12,291, see 3 C.F.R. 127 (1982), and those rules are also included here.

187. See Control of Emissions from Nonroad Spark-Ignition Engines and Equipment, 73 Fed. Reg. 59,034 (Oct. 8, 2008) (to be codified in scattered parts of 40 C.F.R.). This economically significant rule contained passages chock-full of unrule language, such as the following:

We are extending our basic nonroad exemptions to the . . . engines and vessels covered by this rule. These include the testing exemption, the manufacturer-owned exemption, the display exemption, and the national-security exemption. If the conditions for an exemption are met, then the engine is not subject to the exhaust emission standards.

Id. at 59,050.

surprising that almost every economically significant rule contained at least one obligation-imposing word (97%), but the vast majority (84%) also included at least one obligation-alleviating word.

E. Unrules in the *United States Code*

Although our main focus here has been on documenting administrative agencies' use of unrules, the words that agencies use in their regulations must ultimately find authority in statutes passed by Congress. Federal statutes often create carveouts that agencies simply parrot in regulatory text. Furthermore, statutes also authorize agencies to issue dispensations, either from statutory obligations or from obligations contained in agency regulations. We thus looked to statutory law to gauge how frequently Congress introduces obligation alleviation into the legislative corpus, and we found that the *United States Code* exhibits a comparable level of obligation-alleviating language. Across the entire legislative corpus, we found 80,566 alleviating terms, which translates to about one alleviating term for every 6.5 obligation-imposing terms.¹⁸⁸ The sections of the *Code* governing taxation, bankruptcy, and copyrights exhibited some of the most frequent instances of alleviating terms as well as the lowest ratios of obligation-imposing words to obligation-alleviating words—that is, they appear to be the most unrule-laden.

We should note, of course, that obligation-imposing and obligation-alleviating language in statutes is not always aimed at private actors. An obligation-imposing term such as *shall* might well bind a business, but it could just as easily obligate an agency or a state to issue a regulation¹⁸⁹—or even require an agency to issue a waiver.¹⁹⁰ Likewise, an obligation-alleviating term might be used to permit an agency flexibility to alter its program, perhaps even

188. The Code contained a total of 524,647 obligation-imposing terms as of June 2019.

189. See generally Jason Webb Yackee & Susan Webb Yackee, *From Legislation to Regulation: An Empirical Examination of Agency Responsiveness to Congressional Delegations of Regulatory Authority*, 68 ADMIN. L. REV. 395 (2016) (discussing Congress's ability to impose mandates for rulemaking). For instance, portions of the Toxic Substances Control Act provide that the EPA Administrator "shall promulgate regulations which prescribe procedures . . . for determining whether asbestos-containing material is present in a school building under the authority of a local educational agency," and require the Administrator to do so within 360 days of the passage of the statute. 15 U.S.C. § 2643(a)-(b).

190. E.g., 7 U.S.C. § 1531(d)(5)(C) ("[T]he Secretary [of Agriculture] shall waive subparagraph (A) if the eligible livestock producer pays a fee in an amount equal to the applicable noninsured crop assistance program fee or catastrophic risk protection plan fee required under subparagraph (A) . . ."); 33 U.S.C. § 2310(a) ("The Secretary [of the Interior] shall waive local cost-sharing requirements up to \$200,000 for all studies and projects—(1) in American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, Puerto Rico, and the Trust Territory of the Pacific Islands; and (2) for any Indian tribe or tribal organization . . .").

by imposing new obligations on private actors.¹⁹¹ Probably more so than with the agency-level sources of regulatory law, data on federal statutes are bound to have some noise to them. Nevertheless, it is interesting that the ratio of obligation-alleviating to obligation-imposing terms in the *United States Code* is similar to the ratios in agency sources of regulatory law.

F. Summary and Implications

Across the board, we identify strikingly consistent patterns that reveal an extensive role for obligation alleviation in the regulatory state.¹⁹² Drawing upon a variety of sources of regulatory law, we find one obligation-alleviating word for approximately every six obligation-imposing words in federal law. The titles of *Federal Register* documents—representing the agencies’ own descriptions of what they are doing—even contain more obligation-alleviating words than obligation-imposing words.¹⁹³

These findings are all the more powerful because our analysis understates the prevalence and significance of unrules in the regulatory state. First, some dispensation-authorizing provisions sweep extremely broadly: For example, “[t]he Administrator *may waive the provisions of this subpart* for a manufacturer or a specific engine family.”¹⁹⁴ As a result, a single obligation-alleviating word can authorize an agency to alleviate the obligations imposed by dozens, if not hundreds or thousands, of obligation-imposing words. Restrictions rarely have such a multiplicative, omnibus quality, because the imposition of an obligation must be reasonably defined to have any meaningful communicative and behavioral effect. Second, some obligation alleviation occurs without the use of any of the five words in our dictionary. In fact, as we discussed in Part I, some unrules are never explicitly spelled out, or they derive from agencies’ discretion over enforcement.¹⁹⁵ Finally, our analysis of regulatory texts does not capture all of the dispensations that agencies issue. We did find and measure some instances

191. See, e.g., 49 U.S.C. § 60118(c)(1)(A) (“On application of an owner or operator of a pipeline facility, the Secretary [of Transportation] by order *may waive* compliance with any part of an applicable standard prescribed under this chapter with respect to such facility on terms the Secretary considers appropriate if the Secretary determines that the waiver is not inconsistent with pipeline safety.” (emphasis added)).

192. See *infra* Table 2. The ratios listed in Table 2 for the *Federal Register*, the CFR, and the *United States Code* are for the latest years available for each, as indicated in the text. The ratio shown in Table 2 for economically significant rules is for all such rules issued between 1982 and 2016.

193. See *supra* notes 170-74 and accompanying text.

194. 40 C.F.R. § 91.501(b) (2020) (emphasis added).

195. See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (discussing agencies’ broad discretion to decide not to enforce the law, analogizing to the “decision of a prosecutor in the Executive Branch not to indict”).

Table 2
**Ratios Between Obligation-Alleviating and
Obligation-Imposing Terms**

Source	Ratio
<i>Federal Register</i>	1:5.1
CFR	1:5.9
Economically significant regulations	1:6.0
<i>United States Code</i>	1:6.5

of dispensations in our analysis of *Federal Register* documents.¹⁹⁶ But few agencies are obligated to publish their dispensations in the *Federal Register*.¹⁹⁷ And the CFR and the *United States Code* do not contain any dispensations at all—they contain carveouts and language *authorizing* agencies to issue dispensations. A full accounting of actual dispensations granted by agencies would be an enormous, even impossible, project due to the lack of public transparency of obligation alleviation.¹⁹⁸

Our analysis of unrules demonstrates a need to reorient thinking about administrative power and discretion. For one thing, it is clearly misleading for critics of regulation to continue to suggest that the growth in the number of pages in the *Federal Register* or the CFR reveals an administrative state bent on imposing obligations. Our empirical findings raise questions about how truly restrictive and burdensome federal regulation is in practice. They also raise serious concerns about the potential dangers associated with a ubiquitous source of agency discretion. The risks of unrules outlined in Part I are real—and they become all the more disquieting once it is clear how pervasive unrules truly are.

The purpose of this Part has been to demonstrate that unrules are an omnipresent and essential feature of regulatory law. We recognize, of course, that the foregoing analysis, in simply aiming to assess the extent of unrules in the regulatory canon, has only scratched the surface of the research questions that could be asked about unrules. Future empirical research with these data could include studies relating changes in the frequency of unrules to patterns in the amount of delegation from Congress to agencies; studies analyzing unrule trends by presidential administration, political party control of government, or time; and studies testing whether unrules enable greater aggregate levels of regulation by creating escape hatches and flexibility. The

196. See *supra* notes 167–69 and accompanying text.

197. See *infra* Table 3.

198. See *infra* Part III.B.2.

significance of such future inquiries should be more than evident, given our findings that show how ubiquitous unrules are within the administrative state.

III. Reorienting Administrative Law

We now turn to what unrules' ubiquity means for administrative law.¹⁹⁹ Administrative law aims to ensure that agency discretion is channeled in ways that can ensure fair decisionmaking and desirable outcomes. With such an important mission, it would seem that administrative law should be just as concerned about agency discretion in alleviating obligations as in imposing them, given that discretion in both directions can be abused or otherwise lead to problems.²⁰⁰ Yet when it comes to unrules, administrative law practice and scholarship have remained out of balance.²⁰¹

Consider one of the Supreme Court's most widely discussed administrative law cases of all time: the *Benzene Case*. In resolving a dispute over a federal health standard, the Court sharply constrained the power of the Occupational Safety and Health Administration (OSHA) to obligate employers to protect their workers from exposure to harmful toxic chemicals in the workplace.²⁰² In lowering its standard for air concentrations of benzene, OSHA had argued that because benzene was a carcinogen, the agency could assume that any level of exposure to the chemical put workers at risk. Worried that OSHA's approach to carcinogens would give the agency "sweeping" regulatory power, the Court interpreted the underlying statute to demand that, before adopting

199. As we discussed in Part II, statutes contain unrules, but our discussion here, in Part III, focuses on agencies' power to alleviate obligations. Unlike agencies, which are subject to administrative law, the only practical constraints on Congress's exercise of its constitutionally delegated discretion are political, with courts traditionally imposing only a weak form of rational basis review on congressional action. JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 3 (2018) ("American law has in crucial ways given up on the project of rationality as applied to legislative action."). Granted, questions have arisen under the guise of the nondelegation doctrine about constitutional limits on congressional delegations, even in the context of giving so-called "big waiver" authority to agencies. See Barron & Rakoff, *supra* note 76, at 267-69; Deacon, *supra* note 76, at 1551-52, 1605. But the nondelegation doctrine leaves little room for constraining Congress's delegation in general, whether with respect to imposing or alleviating obligations. See generally Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849 (2019) (showing how the nondelegation doctrine constrains Congress only in a limited space).

200. See *supra* Part I.B.

201. See *infra* Part III.A.

202. See *Indus. Union Dep't v. Am. Petrol. Inst. (Benzene Case)*, 448 U.S. 607, 644-45 (1980) (plurality opinion).

or revising workplace health standards, OSHA demonstrate with “substantial evidence” a “significant risk” of harm.²⁰³

This core ruling in the *Benzene Case*, constraining the agency’s ability to set regulatory standards, epitomizes administrative law’s central concern with obligation imposition. At the same time that the Court fixated on OSHA’s power to impose health-related standards, though, it did absolutely nothing about a stunning carveout in OSHA’s benzene decision. The agency had tightened its applicable health standard only for workers at refineries and other petrochemical facilities, excluding entirely from the coverage of its more protective standard the most numerous category of employees exposed to benzene: gas station attendants. To its credit, the Court at least acknowledged that this exclusion of service station workers was “particularly significant”²⁰⁴—but the exclusion was not at all *legally* significant to the Court. The Justices said nothing disapproving of OSHA’s decision to leave 800,000 workers outside the rule’s coverage and exposed to heightened levels of benzene.²⁰⁵ Instead, they quickly turned to enumerating the hundreds of millions of dollars in economic costs that OSHA’s new benzene standard would impose on those industries to which it did apply.²⁰⁶ In its holding, the Court sharply rebuked OSHA for asserting power to impose standards at nearly any level of workplace risk, agreeing with the court of appeals that OSHA’s underlying statute did not give the agency “unbridled discretion” in setting workplace health standards.²⁰⁷

Contrast the Court’s rebuke of broad discretion over obligation imposition in *Benzene* with the Court’s ready embrace of an agency’s “virtually unbridled discretion” over obligation alleviation in a subsequent case, *Little Sisters of the*

203. *Id.* at 646, 653.

204. *Id.* at 628.

205. *Id.* We do not contend that the Court necessarily should have disapproved OSHA’s carveout, at least not under prevailing legal principles. After all, the litigants themselves had not objected to OSHA’s carveout. But it is not unheard of for the Supreme Court to use opinions to focus public attention on problematic features in the law that are not, strictly speaking, at issue in the case before the Court. It is also not clear who would have objected, especially as service-station workers were presumably not highly unionized and thus not well organized to mount a legal challenge that could have sought to protect their interests. That very fact, though, helps to illustrate the overall bias in the regulatory state that we discuss in this Part. Those entities upon whom an agency imposes obligations will always be able to seek judicial review, while it is far less clear who can or will seek such review when agencies alleviate obligations. Some of this bias in judicial oversight stems from the law, such as standing doctrine, and some from a political economy that, when combined with law, leaves agencies less constrained when alleviating obligation than when imposing them. *See infra* Parts III.B-C.

206. *Benzene Case*, 448 U.S. at 628-29 (plurality opinion).

207. *Id.* at 614-15 (quoting *Am. Petrol. Inst. v. OSHA*, 581 F.2d 493, 502 (5th Cir. 1978), *aff’d sub nom. Indus. Union Dep’t v. Am. Petrol. Inst.* (*Benzene Case*), 448 U.S. 607 (1980)).

Poor Saints Peter & Paul Home v. Pennsylvania.²⁰⁸ As in the *Benzene Case*, the Court in *Little Sisters of the Poor* confronted a statute that authorized an agency to set standards; in the latter case, the standards centered on the type of “preventive care and screenings” for women’s health that insurance plans under the ACA needed to provide.²⁰⁹ The ACA did not expressly authorize the agency to make any exceptions in who must provide insurance coverage with such preventive care—and arguably the statute even precluded any such exceptions due to its unqualified command that insurance plans under the ACA “shall” provide such care specified by the agency.²¹⁰ But the Court readily concluded that “the same capacious grant of authority that empowers [the agency] to make . . . determinations [of covered care] leaves its discretion equally unchecked in other areas, including the ability to identify and create exemptions.”²¹¹

In this Part, we draw out further the contrast exemplified by *Little Sisters of the Poor* and the *Benzene Case*. We show how administrative law—whether viewed from the standpoint of its motivating purposes, its procedures, or its prospects for meaningful judicial review—imposes less oversight and fewer constraints on agencies when they alleviate obligations than when they impose obligations. Of course, we do not mean to suggest that unrules escape scrutiny entirely. Different procedural requirements will apply to carveouts than to dispensations, in many instances constraining the former more than the latter. Moreover, courts can and do at times review certain unrules.²¹² Nevertheless, it remains clear that administrative law is more readily responsive to the concerns of potential obligatees and more focused on protecting private

208. 140 S. Ct. 2367, 2380 (2020).

209. *Id.* at 2373 (quoting 42 U.S.C. § 300gg-13(a)(4)).

210. *See Pennsylvania v. President U.S.*, 930 F.3d 543, 570-71 (3d Cir. 2019), *rev’d sub nom. Little Sisters of the Poor*, 140 S. Ct. 2367.

211. *Little Sisters of the Poor*, 140 S. Ct. at 2380.

212. A number of Supreme Court decisions have involved the review of carveouts, and, unlike with *Little Sisters of the Poor*, they *sometimes* have resulted in vacatur of the carveout. *See, e.g., Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (holding that a carveout for small sources of greenhouse-gas emissions was invalid because it could not be reconciled with the text of the Clean Air Act). Although judicial challenges to dispensations arise less frequently, they still sometimes occur, as with the EPA renewable fuel waivers discussed in Part I. *See, e.g., Petition for a Writ of Certiorari at i, HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass’n*, No. 20-472 (U.S. Sept. 4, 2020), 2020 WL 6064084 (presenting a question about whether EPA erred in granting a hardship exemption when the recipient had not continuously received an extension of such an exemption for each year since 2011). Furthermore, although administrative law scholars had not previously created a unified framework for the study of unrules, as we have here, they had, as we noted earlier, produced important work separately on either dispensations or carveouts. *See supra* notes 32, 35 and accompanying text.

rights against the government's power to impose obligations.²¹³ In pointing to this imbalance, we suggest ways that administrative law can and should be reoriented in a direction that would more fully account for the risks of unrules.

A. Administrative Law's Preoccupation with Obligation Imposition

Nearly a hundred years ago, Felix Frankfurter emphasized that administrative law's central concern lay with the power of "legal control" exercised by administrative agencies.²¹⁴ Throughout the last century, administrative law's *raison d'être* has been protecting individual and economic liberty from state intrusion.²¹⁵ Such an understanding of administrative law permeates much of the APA, which, since its enactment in 1946, has operated as a kind of mini-constitution for the modern administrative state.²¹⁶ The APA sets

213. As a very rough indicator of administrative law's emphasis on obligation imposition, we conducted searches in Lexis for law review article titles in the administrative law topical areas for the period from January 1, 1980, to January 1, 2020. We conducted these searches in two different topical databases for administrative law, one for articles published in all journals that Lexis designates as in the administrative law practice area, and another for articles that Lexis designates as being in the area of administrative law but that appear in any journal. For both databases, one of our searches centered on agency actions typically associated with obligation imposition: *title(rule or rulemaking or order)*. The other search used the five words in our obligation-alleviating dictionary: *title(waiv# or exempt# or variance or except# or excl#)*. Even though the latter search included more words, as well as their cognates and inflections, we found in the two databases 3.8 and 5.4 times as many article titles containing the search words "rules," "rulemaking," or "order." We recognize, of course, that these words are not a perfect proxy for obligation imposition, even though they are widely used in such a manner.

214. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614-15 (1927).

215. See, e.g., STEPHEN BREYER, REGULATION AND ITS REFORM 378 (1982) (describing administrative law's "original objective" as one of "control[ling] government incursions upon private liberty and property interests"); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202-03 (1982) ("Under the traditional model of administrative law, . . . the system limits the power of government, maintains a well-ordered sphere of private liberty, and preserves the system of market exchange."); Richard B. Stewart, Essay, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 438-39 (2003) ("The traditional core of administrative law has focused on securing the rule of law and protecting liberty Here the function of administrative law is primarily negative: to prevent unlawful or arbitrary administrative exercise of coercive power against private persons.").

216. See Christopher J. Walker, Essay, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 630 (2017) ("Over the decades, the APA has assumed quasi-constitutional status."); Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015) (arguing that the APA is the "fundamental charter" of the "Fourth Branch" of government" (first quoting Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 874 (2007))).

out the basic framework governing rulemaking and adjudication,²¹⁷ but strikingly it makes at most passing reference in a few provisions to agencies' authority to grant dispensations.²¹⁸ The bulk of the statute addresses procedures for, and judicial oversight of, agencies' exercise of their discretion to impose obligations.

The APA came into existence largely in response to concerns of conservative Republicans and Southern Democrats who worried about the intervention of New Deal agencies in private markets.²¹⁹ For over a decade before 1946, these politicians allied with the American Bar Association and the American Liberty League to push back against the growing power of the administrative state.²²⁰ These conservative forces "sought 'individual rights,' which were individuals' and businesses' rights to prevent an agency from implementing New Deal programs unless the agency both jumped through numerous procedural hoops and received the blessing of a conservative federal judge."²²¹

To be sure, contemporary scholarly accounts of the APA's postenactment history claim that liberal New Dealers largely succeeded in convincing courts that provisions in the APA merely restated existing principles of administrative law and did not fundamentally alter the balance between governmental power and individual rights.²²² But even if, in the end, the New Dealers beat back the conservative efforts to stop the New Deal, the contestation over the APA before and after its passage was largely about constraining governmental power to impose obligations, not its power to *alleviate* obligations.

217. 5 U.S.C. § 553 (establishing procedures governing informal rulemaking); *id.* § 554 (establishing procedures governing adjudication); *id.* § 706 (setting out standards governing judicial review of agency action).

218. Mostly these provisions are found in the definitions section of the APA. *See, e.g., id.* § 551(6) (providing that "orders" may be "affirmative" or "negative"); *id.* § 551(8) (defining "license" to include "statutory exemption or other form of permission"); *id.* § 551(11) (defining "relief" to include "exemption[s]" and "exception[s]"); *id.* § 551(13) (defining "agency action" to include the "failure to act"). In one procedural provision, the APA expressly gives unrules a pass, providing that agencies do not need to wait the normal thirty days after finalizing a rule for it to take effect if it is "a substantive rule which grants or recognizes an exemption or relieves a restriction." *Id.* § 553(d)(1).

219. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1560 (1996); *see also* JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 59-108 (2012) (providing a detailed historical account of the passage of the Administrative Procedure Act). To some degree, the political fight predated the New Deal era, *see* Metzger, *supra* note 24, at 51 ("Building out the national state was a constant and contested process from the Founding through the nineteenth century."), but never before the APA had the construction of administrative law been so explicitly undertaken.

220. *See* Shepherd, *supra* note 219, at 1570-75; Metzger, *supra* note 24, at 52-53.

221. Shepherd, *supra* note 219, at 1680.

222. *See, e.g.,* Kovacs, *supra* note 216, at 1208; Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 453 (1986).

New Deal administrative lawyers, such as James Landis, were not much interested in legal constraint of any kind on the growing administrative state, believing instead that agencies should be imbued with far-ranging discretion and constrained only by professional norms of expertise.²²³ These lawyers prized agency “efficiency” and saw the APA’s modest constraints on obligation imposition as largely a token concession to conservatives and business interests who were primarily concerned with the effects of regulation on economic liberty.²²⁴ The APA’s relative silence about legal constraints on obligation alleviation most likely was understood as a virtue, not a vice, if it was even noticed at all.

The APA’s motivating purpose of constraining obligation imposition continues to underpin contemporary thinking about administrative law. Since at least the early 1990s, one school of thought has lamented what is perceived as the undue constraints that administrative law has placed on obligation imposition—constraints that supposedly have “ossified” agencies’ ability to adopt new mandates.²²⁵ In this widely accepted account, concern about the ossification of rulemaking has resulted from both judicial review under the APA²²⁶ and the layering of additional legal procedures on agencies’ obligation-imposition discretion, including White House oversight of rulemaking.²²⁷

Another contemporary school of thought embraces more of an outright disdain for obligation imposition. Drawing attention to a series of decisions by the D.C. Circuit, Cass Sunstein and Adrian Vermeule have described as administrative law *libertarianism* a judicial and scholarly movement that seeks to protect individual rights and an open market against government intervention.²²⁸ Although Sunstein and Vermeule argue against administrative

223. See Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 426 (1996).

224. See Shepherd, *supra* note 219, at 1680-81 (noting that the “APA was the armistice of a fierce political battle over administrative reform” between New Dealers, who sought to allow agencies “to implement New Deal programs quickly,” and individuals and businesses who sought to limit those programs).

225. See, e.g., Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992) (lamenting the accretion of constraints on rulemaking that have made it harder for agencies to impose new obligations).

226. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 225 (1990) (asserting that the threat of judicial review led the National Highway Traffic Safety Administration to all but abandon automotive-safety rulemaking); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 DUKE L.J. 300, 313 (suggesting that, due to the burdens and uncertainties created by judicial review, “rulemaking as a vehicle for making policy decisions may soon be relegated to a chapter in a legal history book”).

227. See, e.g., McGarity, *supra* note 225, at 1431-34.

228. Sunstein & Vermeule, *supra* note 27, at 398-99.

law exhibiting a strong tilt toward any political theory, let alone making libertarianism its “master principle,”²²⁹ they still do acknowledge that administrative law “does have libertarian features”²³⁰ and argue that “the movement toward libertarian principles and outcomes is unmistakable.”²³¹

Today’s debates over administrative law—its libertarian as well as its progressive elements—tend to reflect much of the debate surrounding the APA’s adoption in the 1940s.²³² Even concern over “ossification” had its antecedents in that earlier period.²³³ Yet what should be evident is how little of the debate then, or now, has revolved around agency power to lift or alleviate obligations. Overall, unrules have remained largely in the background—hiding in what we refer to as administrative law’s “blind spot.” Administrative law’s relative preoccupation with obligation imposition has obscured in consequential ways the extent and importance of agencies’ power to alleviate obligations.²³⁴

B. Procedural Manifestations of Administrative Law’s Blind Spot

Administrative law’s blind spot has manifested itself in a variety of procedures that tend to give agencies greater discretion when alleviating obligations than when imposing them. When it comes to imposing obligations, agencies must follow a variety of steps that aim to promote sound decision-making, ensure transparency and opportunities for public participation, and minimize the risk of regulatory capture.²³⁵ Although some of these requirements

229. *Id.* at 467.

230. *Id.* at 464.

231. *Id.* at 472-73.

232. *E.g.*, Metzger, *supra* note 24, at 61-62 (linking the passage of the APA to the efforts of the conservative ABA Special Committee in the 1930s).

233. *See* Cary Coglianese, Essay, *The Rhetoric and Reality of Regulatory Reform*, 25 YALE J. ON REGUL. 85, 90 (2008).

234. *See supra* Part I.

235. Much administrative law scholarship focuses on these procedures. *See, e.g.*, MASHAW, *supra* note 199, at 44 (“American administrative agencies are awash in statutory requirements for reason-giving, analysis, and explanation.”); STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 73-74 (2008) (explaining how administrative procedures aim to reduce the risk of capture); Michael Sant’Ambrogio & Glen Staszewski, Opinion, *Public Engagement in Rulemaking*, REGUL. REV. (June 3, 2019), <https://perma.cc/X9ZL-REAC> (discussing various procedures for enhancing public participation in rulemaking). Of course, we recognize that just because procedures aim to promote participation in rulemaking, this does not mean that vast swaths of the public do in practice get involved in most rulemakings. *See* Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA’s Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 125 (2011) (finding that the prenotice of proposed rulemaking period was “almost completely monopolized by regulated parties”); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 964-67 (2006)

footnote continued on next page

are stated neutrally enough that at first glance they might appear to apply to carveouts and even some kinds of dispensations, in point of fact they do not always apply, or apply with equal vigor, to unrules as they do to rules.

1. Making rules versus unrules

Under the APA, the basic procedure for creating new obligations calls for agencies to publish a notice of a proposed regulation—one that states the actual obligations the agency plans to put into law—and then to provide an opportunity for members of the public to submit comments on the proposal.²³⁶ An agency’s final regulation must be published in the *Federal Register*. It must also constitute a “logical outgrowth” of the proposed regulation, meaning that agencies cannot tack on new obligations that were not part of, or closely connected to, the proposed ones.²³⁷ Any such new obligations would necessitate an additional round of notice and comment.²³⁸

A variety of additional statutes and executive orders layer other requirements on top of these APA procedures.²³⁹ For example, under Executive Order 12,866, any proposed regulation deemed economically significant—based on the expected economic impact of its new obligations—must be accompanied

(discussing the failure of public participation methods to induce widespread participation of non-elites).

236. 5 U.S.C. § 553(b)-(c). Additional requirements apply if agencies are to impose obligations through so-called formal rulemaking or adjudication. *See id.* §§ 556-557. When agencies show good cause, they can bypass this comment process and publish a final rule without any advance notice. *See id.* § 553(b)(3)(B). Note that this is a carveout for the procedural rules for making rules. Empirical research suggests the significance of this unrule, as a large proportion of all agency rules make use of the good cause exemption. *See Connor Raso, Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 68-69 (2015) (finding that agencies “exempted approximately 50% of rules from the APA notice-and-comment process” between 1995 and 2012).
237. *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (quoting *Covad Commc’ns Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006)). The court also noted that the logical-outgrowth test protects the public from having to “divine the agency’s unspoken thoughts” in commenting on a proposed rule. *Id.* at 1080 (alteration omitted) (quoting *Int’l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005)).
238. *See Am. Water Works Ass’n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) (“We apply that standard functionally by asking whether ‘the purposes of notice and comment have been adequately served,’ that is, whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.” (citation omitted) (quoting *Fertilizer Inst. v. U.S. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991))).
239. A few examples include the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612); the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in scattered sections of 2 U.S.C.); and Executive Order 13,132, 3 C.F.R. 206 (2000), *reprinted in* 5 U.S.C. § 601 note.

by a regulatory impact analysis.²⁴⁰ That agency-developed analysis must then be reviewed by OIRA before the agency publishes its proposed regulation and then again before the agency makes the regulation final.²⁴¹

By contrast, when it comes to obligation alleviation, the required procedures that agencies must follow are not as demanding. Of course, the precise procedural steps vary depending on the type of unrule. For dispensations, the procedures are virtually nonexistent. Let us start, though, with carveouts.

The procedures for carveouts would seem to follow those for regulations, simply because these unrules are, by definition, effectively embedded in a rule.²⁴² To be sure, carveouts that are expressly stated in a proposed regulation will be subject to normal notice and public-comment requirements. But there is in fact no requirement that carveouts always be stated, let alone stated clearly enough to provide notice of the existence of the carveout. OSHA might, for instance, propose a regulation that tightens standards for one class of workplaces without ever saying that similar hazards at other workplaces are not encompassed by the proposed rule. Sometimes, a carveout is visible only through a kind of *expressio unius* implication—the coverage of one expressly covered category of actors or activities implies the exclusion of all others.²⁴³ Presumably experts or industry insiders would understand the significance of what the agency left out, and the agency would certainly need to respond if comments drew attention to an unstated carveout. But unlike when they are imposing new obligations, agencies have no inherent procedural duty when creating carveouts to state the facilities or industries that have been left out of a regulation’s coverage. For the lay public, the carveout will be essentially undiscoverable unless third-party intermediaries interpret for them what the agency has not said.

Carveouts added at the end of the rulemaking process would also be less likely to trigger the need for supplemental notice to satisfy the logical-outgrowth test. An agency satisfies the logical-outgrowth test if “interested parties ‘should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-

240. Exec. Order No. 12,866, 3 C.F.R. 638, 645-46 (1994), *reprinted as amended* in 5 U.S.C. § 601 note.

241. *Id.* at 646-48.

242. *See supra* Part I.A.1.

243. *See* NLRB v. Sw. Gen., Inc., 137 S. Ct. 929, 940 (2017) (discussing the *expressio unius* canon of construction—namely, “expressing one item of [an] associated group or series excludes another left unmentioned”—and noting that the “force of any negative implication . . . depends on context” (first alteration in original) (first quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002); and then quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013))).

and-comment period.”²⁴⁴ Almost by necessity, a subtraction in a regulatory obligation contained in a proposed rule will be reasonably foreseeable, so the logical-outgrowth test presumably never (or at most rarely) bars the alleviation of proposed obligations.²⁴⁵ In fact, Supreme Court precedents approve the wholesale withdrawal of proposed regulations,²⁴⁶ even though the opposite of that—the proposal of an entirely new obligation—would be the paradigmatic case that flunks the logical-outgrowth test. Given this asymmetry, empirical researchers have unsurprisingly found that changes during the notice-and-comment process “are often subtractive rather than innovative or additive.”²⁴⁷

When it comes to the White House regulatory review process, the procedural asymmetry persists. If an agency proposes an amendment to a regulation that would impose obligations creating an additional \$100 million in annual costs, it will trigger Executive Order 12,866’s analysis requirement.²⁴⁸ But

244. *Int’l Union, United Mine Workers v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (quoting *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)).

245. *See Idaho Conservation League v. Wheeler*, 930 F.3d 494, 508 (D.C. Cir. 2019) (“Under Circuit and Supreme Court precedent, the EPA’s Final Action not to adopt financial responsibility requirements for the hardrock mining industry constitutes a logical outgrowth of the Proposed Rule because ‘[o]ne logical outgrowth of a proposal is surely . . . to refrain from taking the proposed step.’” (alterations in original) (quoting *New York v. U.S. EPA*, 413 F.3d 3, 44 (D.C. Cir. 2005) (per curiam))).

246. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007) (“Since the proposed rule was simply a proposal, its presence meant that the Department was *considering* the matter; after that consideration the Department might choose to adopt the proposal or to withdraw it. As it turned out, the Department did withdraw the proposal We do not understand why such a possibility was not reasonably foreseeable.”). *Long Island Care at Home* presents an interesting twist on an unrule: The Department of Labor proposed changing its longstanding unrule excluding certain companionship workers from the Fair Labor Standards Act’s “domestic service” employee exemption, and therefore including these workers in wage-and-hour regulations that otherwise apply to workers. *Id.* at 174. But after the comment period, the Department withdrew the rule, restoring the unrule. *Id.* at 175. The Court refused to see any role for the logical-outgrowth doctrine, noting that the “proposed rule was simply a proposal” and that complete abandonment of the effort to close the carveout was foreseeable given any lack of commitment on the part of the Department. *Id.* Much the same logic applies to other efforts at obligation alleviation.

247. William F. West, *Formal Procedures, Informal Processes, Accountability, and Responsiveness in Bureaucratic Policy Making: An Institutional Policy Analysis*, 64 PUB. ADMIN. REV. 66, 67 (2004); *see also* William F. West, *Inside the Black Box: The Development of Proposed Rules and the Limits of Procedural Controls*, 41 ADMIN. & SOC’Y 576, 581 (2009) (“One possible implication of the need to provide adequate notice is a bias in favor of subtractive changes in proposed rules.”); Wagner et al., *supra* note 235, at 132 (finding that “comments to strengthen the rule were not only fewer in number, but were less successful as compared with their counterparts striving to weaken the rule”).

248. The executive order calls for analyses of rules expected to have an annual economic impact of \$100 million or more, by which OIRA means costs. *See* Exec. Order No. 12,866, 3 C.F.R. 638, 641, 645-46 (1994), *reprinted as amended* in 5 U.S.C. § 601 note. Similar statutory

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a proposed amendment that would add a carveout and reduce regulated entities' costs by \$100 million would simply not appear on OIRA's radar.²⁴⁹ It is widely understood that OIRA scrutinizes obligation imposition much more than it worries about the alleviation of needed obligations.²⁵⁰ OIRA is even said to let agency decisions that lighten regulatory burdens "get a pass."²⁵¹

OIRA's tendency toward lighter scrutiny of carveouts was only exacerbated by then-President Trump's Executive Order 13,771 (the so-called 1-in-2-out order).²⁵² This order imposed a regulatory-budgeting regime based

requirements are also triggered by obligation imposition. Regulatory Flexibility Act, 5 U.S.C. § 602(a)(1) (requiring advance notice of the "significant economic impact on a substantial number of small entities"); Unfunded Mandates Reform Act, 2 U.S.C. § 1532(a) ("[T]he expenditure . . . by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year . . .").

249. The way Executive Order 12,866 is written, to call for analysis when new regulations would "[h]ave an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy," *should* demand review even if cost savings (that is, benefits) are of sufficient magnitude to push a proposed regulation over the threshold. 3 C.F.R. at 641, 645-46. But we have been told by former OIRA personnel that the only impacts that matter for this threshold are costs.

250. *See, e.g.*, Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1377-91 (2013) (arguing that OIRA should look to rulemaking petitions to identify areas where agencies should regulate but are not and to subject these areas to regulatory review of inaction). For a short time under the leadership of Administrator John Graham, OIRA would issue occasional "prompt letters" to encourage agencies to look into the possibility of imposing obligations to address new risks or neglected problems, but the number of such prompt letters was but a small fraction of OIRA's reviews of new rules, and agencies had no obligation to accept OIRA's suggestion that it impose new regulations. *See* John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 460-63 (2008). Furthermore, while we recognize that Executive Order 12,866 and OIRA guidance provide that agencies should analyze alternatives in their regulatory impact analyses, the agency chooses what these alternatives are, and they need not necessarily have anything to do with unrules. As a practical matter, for reasons we discuss below in Part III.B.2, it will be easier for strategically minded agencies to obscure carveouts and escape OIRA oversight of them than it is to escape OIRA scrutiny of rules. *Cf.* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1776-77 (2013) (discussing strategies agencies use to evade OIRA scrutiny).

251. Michael A. Livermore, *Cause or Cure? Cost-Benefit Analysis and Regulatory Gridlock*, 17 N.Y.U. ENV'T L.J. 107, 117 (2008) (capitalization altered); *see also* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1272 (2006) (suggesting that "OIRA does not carefully scrutinize deregulatory cost-benefit analyses"); Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1100 (2006) ("[W]hen agencies have offered proposals that involve deregulation rather than increased regulation, OIRA has not required a cost-benefit analysis."); Oliver A. Houck, *President X and the New (Approved) Decisionmaking*, 36 AM. U. L. REV. 535, 542 (1987) ("[OMB] has applied its criteria selectively, requiring no analysis for proposals that eliminate regulation, and no cost analysis for those that relax existing standards." (footnote omitted)).

252. Exec. Order No. 13,771, 3 C.F.R. 284 (2018), *reprinted in* 5 U.S.C. § 601 note.

solely on the costs of regulatory obligations and required that, “for every one new regulation issued, at least two prior regulations be identified for elimination” to offset the costs of the new regulation.²⁵³ Neither the executive order nor OIRA’s implementing guidance provided any assurance that the agency or OIRA will do anything to estimate the lost benefits from the regulatory obligations alleviated or eliminated.²⁵⁴ All in all, Executive Order 13,771 gave agencies additional incentives for amending regulations to carve out obligations rather than to impose new ones.²⁵⁵

When it comes to dispensations, administrative law’s procedural disparities are at their most stark. Most dispensations—of which simple decisions not to pursue enforcement are surely the most numerous—are granted through informal adjudication, about which the APA says virtually nothing.²⁵⁶ Of course, this absence of procedural attention also applies to any obligation-imposing informal adjudications, but, even so, obligation-alleviating dispensations will be inherently less constrained. An obligation-imposing informal adjudication needs to be based on some underlying obligation established through a more structured process. By contrast, obligations can be alleviated informally without anything more than the exercise of an agency’s enforcement discretion.²⁵⁷

Even when an agency’s dispensations have been based on an underlying agency process—such as the establishment of authority to grant dispensations in a regulation—that underlying process will treat dispensation authority more lightly. For example, provisions in a proposed agency regulation that would authorize dispensations in the future will be basically given a free pass with respect to the White House regulatory-review process. The possible effects of a waiver-authorizing provision in an otherwise economically significant new

253. *Id.* at 284.

254. See Joshua Linn & Alan Krupnick, *Ninety-Six Regulatory Experts Express Concerns About Trump Administration Reforms*, RESOURCES (May 24, 2017), <https://perma.cc/4NQJ-9CMF>.

255. See Susan Dudley, Opinion, *Regulating Within a Budget*, REGUL. REV. (Apr. 23, 2018), <https://perma.cc/FX4E-NC9U> (explaining how Executive Order 13,771 and related initiatives “provide new incentives for agency staff to examine existing regulations with the intent to modify or rescind cost-ineffective requirements”).

256. See Croston, *supra* note 133, at 314. Although Congress has sometimes separately imposed specific procedural constraints on how agencies issue dispensations, these procedures vary dramatically depending on the specific dispensation program at issue, leaving this area of the law in what scholars have described as “procedural disarray.” Shapiro & Glicksman, *supra* note 32, at 1161; see also *id.* at 1166 (“Congress has failed to specify procedures for many back-end adjudications; and . . . the process used for back-end adjustments varies from statute to statute, and even within a statute itself.”); NIELSON, *supra* note 33, at 39-41.

257. As discussed further in Part III.D below, judicial review of obligation-alleviating informal adjudications is also less likely.

regulation simply do not figure into OIRA's review.²⁵⁸ Yet, as we have seen, subsequent waivers can sometimes work to the detriment of a rule's purpose.²⁵⁹ For example, when the EPA has in the past analyzed the economic impacts of its annual establishment of the RFS, neither the agency's *Federal Register* preambles nor its underlying regulatory-impact analyses have included any quantified estimates showing how the benefits or costs of the rule might vary depending on whether the agency granted hardship exemptions authorized by the statute.²⁶⁰

In ways like these, agencies receive greater procedural room to maneuver when they alleviate obligations than when they impose them. This is not to say that all unrules escape all procedural scrutiny. But overall, administrative procedure tends to treat unrules with a lighter touch than it does agency actions imposing new obligations on private actors.

2. Tilted transparency

Obligation imposition is also subject to more demanding requirements for transparency than is obligation alleviation. Under the transparency provisions of the APA—also known as the Freedom of Information Act (FOIA)—all agency “substantive rules of general applicability” must be published in the *Federal Register*, with no exceptions.²⁶¹

258. Cf. Off. of Info. & Regul. Affs., Exec. Off. of the President, *Regulatory Impact Analysis: A Primer* (2011), <https://perma.cc/LRW3-MEMA> (making no mention of quantifying the impacts of possible waivers or exemptions). The absence of any explicit attention to the possibility of future dispensations in this primer matches what we have been told in conversations with OIRA staff, namely that the regulatory-impact-analysis process basically assumes away any future obligation alleviation. In effect, the neglect of dispensation authority means OIRA assumes that a new regulation will be fully implemented or that any waivers will be minimal or applied only when doing so will be net beneficial.

259. For a discussion of the risks of unrules, see Part I.B above.

260. See, e.g., *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486 (Dec. 12, 2017) (to be codified at 40 C.F.R. pt. 80); OFF. OF TRANSP. & AIR QUALITY, EPA, EPA-420-R-10-006, *RENEWABLE FUEL STANDARD PROGRAM (RFS2) REGULATORY IMPACT ANALYSIS* (2010), <https://perma.cc/KFR5-GVFP>. The preamble to the EPA's renewal of the fuel standard for the 2018-2019 period actually went out of its way to mention that “at this time no exemptions have been approved for 2018”—even though media reports indicate that the agency had been fielding requests for waivers from Carl Icahn's refinery and upwards of two dozen other refineries. 82 Fed. Reg. at 58,523; see also Jarrett Renshaw & Chris Prentice, *Exclusive: EPA Gives Giant Refiner a “Hardship” Waiver from Regulation*, REUTERS (Apr. 3, 2018, 9:03 AM), <https://perma.cc/TH5C-3FDK>.

261. 5 U.S.C. § 552(a)(1)(D). With the passage of the E-Government Act of 2002, agencies are now required to make all of their rules, as well as materials related to the development of those rules, available online. See E-Government Act of 2002, Pub. L. No. 107-347, § 206, 116 Stat. 2899, 2915-16 (codified as amended at 44 U.S.C. § 3501 note (Federal Management and Promotion of Electronic Government Services)). The federal government has created both *Regulations.gov* and a website for the *Federal Register* to

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Although this strict publication requirement for obligation imposition will ensure the transparency of expressly stated carveouts, implicit carveouts can be obscured within, or even entirely left out of, the text of a regulation.²⁶² Furthermore, dispensations can be completely opaque, and necessarily will be when they result from handshake agreements or no-action letters exchanged between agencies and regulatory obligatees.²⁶³ Granted, some agencies do, of their own accord, provide transparency even with respect to dispensations—the FCC, for example, deserves credit for docketing waiver requests and decisions online²⁶⁴—but these voluntary efforts to provide transparency surrounding dispensations are far from the norm.

To assess the public availability of information about dispensations, we examined random samples of seventy-five provisions in each of the *United States Code* and the CFR that authorize agencies to grant dispensations to

facilitate online access to rulemaking information. See REGULATIONS.GOV, <https://perma.cc/2G6H-WCSG> (archived Dec. 30, 2020) (to locate, click “View the live page”); FED. REG., <https://perma.cc/8A66-5HHS> (archived Dec. 30, 2020). In addition, the Regulatory Flexibility Act requires each agency twice a year to release an agenda of essentially all the rules it is planning to develop so the public can keep track of rules even before they are formally proposed. Regulatory Flexibility Act, 5 U.S.C. § 602; see also Exec. Order No. 12,866, 3 C.F.R. 638, 642-43 (1994), *reprinted as amended* in 5 U.S.C. § 601 note. The APA itself requires all notices of proposed rulemakings to be published in the *Federal Register*. 5 U.S.C. § 553(b).

262. See *supra* notes 65-67 and accompanying text.

263. Agencies’ general policies of nonenforcement—which follow from the same discretion that allows agencies to grant dispensations that effectively act as carveouts—arguably may even be kept from disclosure to the public as “information compiled for law enforcement purposes” that “could reasonably be expected to interfere with enforcement proceedings.” See 5 U.S.C. § 552(b)(7).

264. The FCC can waive any of its own regulations, see 47 C.F.R. § 1.925(a) (2019), and it further has significant waiver authority to “forbear” enforcement of provisions of the Communications Act under 47 U.S.C. § 160, see Deacon, *supra* note 76, at 1568-69. This sweeping dispensation authority does not require any transparency when the FCC issues a waiver. Still, the FCC manages to maintain a comprehensive and open-access database in which any individual can search for relevant information on a request for a waiver or forbearance. The information the FCC makes available tracks the progression of the agency’s decisionmaking process: the docketing of the petition; the collection of public comments (itself a self-imposed but laudable reform in the domain of dispensations); and the Commission’s final decisions. See EDOCS, FCC, <https://perma.cc/G3L5-F68D> (archived Dec. 30, 2020). The quality of these records may be one reason why these FCC dispensations appear to be more routinely subjected to scrutiny by reviewing courts. See, e.g., *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 904-05 (D.C. Cir. 2009) (upholding against an arbitrary-and-capricious challenge the FCC’s decision to grant forbearance of dominant-carrier regulations to incumbent local exchange carriers). After all, “[a]dequate review of a determination requires an adequate record, if the review is to be meaningful.” *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 249 (2d Cir. 1977).

Table 3
Transparency of Dispensations Authorized in Statutes and Regulations

Source	Percentage of sampled provisions		
	Transparency requirement	Any online information	List of dispensation recipients
<i>U.S. Code</i>	15%	39%	20%
CFR	20%	47%	16%

regulated businesses.²⁶⁵ We first reviewed the relevant statutory or regulatory text to determine whether it contained any requirements related to public disclosure of its dispensations—even if only information about their existence or the way to petition for relief. Only 15% and 20% of the provisions in our samples, respectively, contained anything remotely looking like a requirement or recommendation that an agency disclose any information about these dispensations.²⁶⁶ Although we could find some information online about some of the dispensations authorized by these provisions, for more than half we could find no information about even their possible existence. For no more than 20% of the dispensations authorized did agencies provide lists indicating for whom they had waived an obligation.

Based on our analysis, it is clear that the U.S. administrative state tolerates a considerable degree of secrecy over dispensations, even though the federal government is governed by a systematic requirement to ensure that rules are openly available to all.²⁶⁷ The notion of secret obligations is antithetical to the rule of law²⁶⁸—but not so, it seems, is the existence of secret alleviations of obligations.

265. We created the sample by searching in Lexis through the *United States Code* and the CFR for section headings that have the terms *waiver*, *exemption*, or *variance*—using the search *section(waiver or variance or exemption)*—and then coding a random subsample of the results. Trained research assistants working under our close direction conducted the coding, with intercoder reliability measures all in the acceptable range.

266. See *infra* Table 3.

267. One exception to this trend in openness of regulations that has provoked considerable objections from scholars and some governmental reforms lies with the practice of incorporation by reference. See generally Nina A. Mendelson, *Private Control over Access to the Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013).

268. FULLER, *supra* note 69, at 49-51; Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803, 808 (2018) (analyzing the use of secret law in the executive branch and identifying “distinct characteristics of specific secret laws that make them particularly odious—or particularly benign”).

3. The lack of self-reinforcing incentives

Another asymmetry exists in agencies' *incentives to comply* with procedural and transparency requirements for rules versus unrules. That is, even if agencies did need to follow identical procedural steps or to disclose the same information when imposing an obligation as when alleviating one, they will necessarily have an inherent reason for following those requirements when creating rules that does not apply when creating unrules.

Procedural and transparency requirements become effectively self-reinforcing with respect to obligation imposition.²⁶⁹ This is because obligations are really only obligatory when an agency can enforce them. But agency officials know that if they ever wish to enforce a regulation, they must follow the proper procedural steps in developing it, including publishing the regulation in the *Federal Register*.²⁷⁰ With respect to transparency requirements, failure to provide proper notice gives any purported obligatee a Fifth Amendment Due Process Clause objection to any enforcement.²⁷¹ Both the Federal Register Act and the APA also make clear that any regulation that has not been properly published cannot be enforced.²⁷² Unless an agency has given an obligatee sufficient actual notice, "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."²⁷³ Even in cases where the technical requirements of publication arguably have been met, courts stand ready to police the boundaries of fair notice for regulatory obligatees who become the target of enforcement without sufficient warning.²⁷⁴

269. For a discussion of the self-reinforcing nature of transparency requirements, see Cary Coglianese, *Illuminating Regulatory Guidance*, 9 MICH. J. ENV'T & ADMIN. L. 243, 246-47, 269 (2020). On self-reinforcing rules more generally, see Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U.L. REV. 655 (2006).

270. See 5 U.S.C. § 703 (providing that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement"); *id.* § 706(2)(D) (providing as a basis for setting aside agency action the lack of "observance of procedure required by law").

271. See U.S. CONST. amend. V.

272. On the need for rules to be published if they are to be treated as valid, see 44 U.S.C. § 1507 ("A document required . . . to be published in the Federal Register is not valid as against a person who has not had actual knowledge of it until . . . a copy [is] made available for public inspection . . ."); 5 U.S.C. § 552(a)(1) (flush language) (similarly precluding any validity to regulations or other documents required to be published in the *Federal Register*); see also 5 U.S.C. § 553(b) (requiring publication in the *Federal Register* of agencies' notices of proposed rulemakings).

273. 5 U.S.C. § 552(a)(1) (flush language).

274. See, e.g., *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.").

Unrules, by contrast, do not bring with them the same inherent self-reinforcing incentives for agencies to follow procedural and transparency requirements. With an unrule, the agency *does not want* to bring an enforcement action. It is seeking to alleviate obligations, not to create a duty that could be backed up by the threat of enforcement. As a result, with unrules, any procedural defects or failures to provide required transparency will not necessarily impede the agency from achieving its obligation-alleviation goal.²⁷⁵ The agency will still typically be able to accomplish the same objective simply by refraining from enforcing a rule against those entities included in a procedurally defective unrule.²⁷⁶

Thus, even though procedural niceties and robust transparency constitute defining features of administrative law,²⁷⁷ agency compliance with procedural and transparency requirements is not likely to be symmetric as between rules and unrules.²⁷⁸ Even if the same procedural and transparency requirements

275. This is similar to the problem inherent in getting agencies to be more transparent about issuing nonbinding guidance documents. See Coglianese, *supra* note 269, at 245-46. An agency's failure to follow a transparency requirement in issuing guidance does not, as an intrinsic legal matter, deprive the agency of what it often intends to achieve by issuing guidance, namely to communicate information—at least to those who in fact receive such guidance. Mandating transparency on its own simply does not provide an intrinsic incentive for agencies to follow those mandates for guidance or for obligation alleviation in the same way that they inherently provide an incentive with respect to obligation imposition.

276. Cf. *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985) (holding that agency decisions about whether to enforce legal requirements in individual cases are presumptively unreviewable by courts). Of course, this is not to deny that sometimes agencies could still have other incentives to comply with applicable transparency and procedural requirements. For example, sometimes agencies may not be able to accomplish the same policy objective through nonenforcement, especially in those instances where a private right of action exists. Nevertheless, it remains true that there will not be the same intrinsic incentive for unrules that exists with the imposition of obligations, since in the latter case an agency's ability to threaten to enforce new obligations will always be conditional on its having followed the applicable procedural and transparency requirements.

277. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 63-70 (3d ed. 2003); Cary Coglianese, Heather Kilmartin & Evan Mendelson, Report, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 930-31 (2009).

278. On top of these legal structures that make procedural and transparency requirements self-reinforcing when agencies impose obligations, agencies also have a practical incentive to make their obligations widely known. When they impose legal obligations, they seek to affect obligatees' behavior, which can happen only if those obligatees know about a rule. Cf. Walters, *supra* note 157, at 160 & n.341 (highlighting that agency staff, particularly lawyers, push agencies to clarify legal obligations *ex ante* to improve compliance with regulation). This enforcement incentive presumably does not apply with the same force to those carved out of a rule.

applied to unrules as they do to rules (which they do not), agencies have less reason to comply with these requirements when it comes to unrules.²⁷⁹

C. Lopsidedness in Judicial Oversight

Without knowledge of even the existence of an unrule, it is impossible for those negatively affected by it to challenge it in court.²⁸⁰ But even with such knowledge, those who seek judicial review of agency actions alleviating obligations can still face disproportionate barriers to relief, ultimately leaving rules with a somewhat lopsided degree of judicial oversight relative to unrules. In this Subpart, we explain why judicial oversight is generally both less available and less searching for unrules.

1. Barriers to legal mobilization

The lopsidedness in judicial oversight of unrules begins with a bias in terms of who is more likely to bring agency actions to the courts for review—and whether those actions are more likely to be rules or unrules. Administrative law—and the courts’ ability to reinforce that law—is particularly susceptible to a bias in the mobilization of legal claims.²⁸¹ Courts are reactive institutions that

279. Although in theory members of the public could rely on FOIA and request information about agencies’ carveouts and dispensations, they must take on the expense of litigating the request if it is rejected. *See* 5 U.S.C. § 552(a)(4)(E)(i). This is hardly on par with the proactive or affirmative disclosure that is encouraged by prohibitions on enforcement of nontransparent obligations. Often requests for information about carveouts or dispensations will be akin to a fishing expedition, since the requestor may not know the bounds of what exists. *See generally* Stephanie Alvarez-Jones, Note, “*Too Big to FOIA: How Agencies Avoid Compliance with the Freedom of Information Act*,” 39 CARDOZO L. REV. 1055, 1064–66 (2018) (citing 5 U.S.C. § 552(a)(3)(A), which requires an agency to respond only to requests that “reasonably describe[]” the records sought). Decisions to carve out certain actors or activities from the scope of a rulemaking might be made early on in the process before there is any requirement to publish the proposed rule’s text, and such informal, preliminary decisions may have no documentation whatsoever. Likewise, dispensations could have been made entirely informally—memorialized in a private letter or verbal assurance rather than in the pages of the *Federal Register*. For all of these reasons, members of the public will frequently lack enough knowledge even to know to ask for a specific dispensation for which they might need information. After all, it was only because of a leak to the press that the public and business competitors learned about EPA’s decision to grant waivers to Carl Icahn’s refinery and dozens of other refineries. *See* Renshaw & Prentice, *supra* note 122.

280. *Cf.* Petition for Review at 3–7, *Renewable Fuels Ass’n v. U.S. EPA*, No. 18–1154 (D.C. Cir. June 4, 2018) (arguing that the petition was not time barred because the “EPA did not even provide public notice that it had received or had acted upon *any* recent requests for an extension of a small refinery exemption”).

281. Political scientist E. E. Schattschneider called this a “mobilization of bias,” by which he meant “a bias in favor of the exploitation of some kinds of conflict and the suppression of others” that meant that “[s]ome issues are organized into politics while others are
footnote continued on next page

depend on affected interests bringing issues to them for their review. To activate administrative law, affected interests must have resources: information, time, money, and connections. Disparities in such resources within society in practice lead to imbalances of power and, ultimately, to a bias in judicial oversight of the administrative state.

Pathbreaking studies by Mancur Olson and James Q. Wilson have illuminated fundamental dynamics that contribute to a bias in legal mobilization. Olson focused on the political economy underlying the provision of collective goods—where all members of the public can benefit from a policy even if they do not contribute to its implementation.²⁸² In such circumstances, Olson showed, individuals have an incentive to free ride, letting someone else work to bring about the collective good. This basic logic means that collective goods will often go undersupplied, impeded largely by the transaction costs of “identifying, organizing, and coordinating” groups of individuals with shared but individually modest interests—and then getting them to cooperate and invest in collective action.²⁸³

Wilson applied a similar logic to explain the behavior of groups active in regulatory politics. He started with the basic truth that any regulation creates benefits for some individuals or groups while imposing costs on others. He then showed that the prospects for group mobilization to resist costs or claim benefits depend on how these costs and benefits are distributed. According to Wilson, because a regulatory position “will confer general (though perhaps small) benefits at a cost to be borne chiefly by a small segment of society,” the “incentive to organize is strong for opponents of the policy but weak for the beneficiaries, and since the political system provides many points at which opposition can be registered, it may seem astonishing that regulatory legislation of this sort is ever passed.”²⁸⁴

Together, Olson’s and Wilson’s work reveals that the deck is often stacked against the diffuse beneficiaries of regulation, especially when they are up against the concentrated targets of regulation—the cost bearers—who are better able to overcome inertia and mobilize to activate administrative law to

organized out.” E. E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 71 (1960).

282. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2 (1965):

If the members of a large group rationally seek to maximize their personal welfare, they will *not* act to advance their common or group objectives unless there is coercion to force them to do so, or unless some separate incentive, distinct from the achievement of the common or group interest, is offered to the members of the group individually on the condition that they help bear the costs or burdens involved in the achievement of the group objectives.

283. Aziz Z. Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?*, 66 STAN. L. REV. 217, 220 (2014) (citing OLSON, *supra* note 282, at 2, 22, 33-36).

284. Wilson, *supra* note 112, at 370.

constrain agencies in their imposition of obligations. Those upon whom obligations are imposed directly bear the associated costs of regulatory burdens and have reason to go to court to challenge the obligations. And, on the flipside, the creation of carveouts and the granting of dispensations can be enormously valuable to regulated entities facing the imposition of costly obligations, while any harms from unrules—such as unrealized regulatory benefits to the general public—may manifest only as diffuse losses, which will be more difficult to organize to resist through litigation.

One might think about the exemption Carl Icahn and big oil companies secured from the normal obligation of petroleum refineries to use renewable fuels.²⁸⁵ Icahn's company gained big; it had a strong incentive to get involved in the process to secure an exemption. Meanwhile, individual members of the general public who might have stood to gain from having more renewable fuel in the nation's fuel supply—to the extent that such fuel delivers environmental benefits or reduces the nation's vulnerability to global oil price shocks—each presumably lost only a small fraction of the overall benefit that the rule would deliver, if applied broadly. This basic bias in the incentives for legal mobilization has been confirmed by numerous empirical studies.²⁸⁶

As a result of this bias, those who would lose from unrules are less likely to activate the courts to uphold the parts of administrative law that conceivably do apply to unrules.²⁸⁷ In other words, the lopsidedness in judicial review between rules and unrules begins even before any lawsuits are filed. Differences in incentive structures and litigant resources will likely mean that agencies' efforts to alleviate obligations systematically receive less judicial scrutiny than efforts to impose obligations.

285. See *supra* notes 122-26 and accompanying text.

286. See generally FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL & BETH L. LEECH, *LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY* (2009); Susan Webb Yackee, *The Politics of Ex Parte Lobbying: Pre-proposal Agenda Building and Blocking During Agency Rulemaking*, 22 J. PUB. ADMIN. RSCH. & THEORY 373 (2012); Yackee & Yackee, *supra* note 121. But see CROLEY, *supra* note 235 (qualifying public-choice accounts of regulatory processes). By no means, of course, does the existence of this bias mean that industry always wins in the regulatory state. See Michael E. Kraft & Sheldon Kamieniecki, *Preface* to BUSINESS AND ENVIRONMENTAL POLICY: CORPORATE INTERESTS IN THE AMERICAN POLITICAL SYSTEM, at ix (Michael E. Kraft & Sheldon Kamieniecki eds., 2007) (explaining that businesses do not always prevail in the policy process); Gabriel Scheffler, *Failure to Capture: Why Business Does Not Control the Rulemaking Process*, 79 MD. L. REV. 700, 704 (2020) (arguing that “the view of the rulemaking process as captured is not warranted”).

287. We acknowledge that, as Richard Stewart has argued, today's interest group climate is surely more balanced than it was prior to the 1960s, but this does not mean it no longer exhibits any bias. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1670, 1716 (1975).

2. Barriers to getting into court

The bias in legal mobilization is only reinforced by the doctrine of standing—a constitutional prerequisite to invoking the “judicial power” of federal courts. As the Supreme Court articulated in *Lujan v. Defenders of Wildlife*²⁸⁸ and subsequent cases, for a federal court to review agency action, a challenger must meet three well-known elements: (i) a “concrete and particularized” injury that is “actual or imminent, not conjectural or hypothetical”; (ii) a “causal connection between the injury and the conduct complained of”; and (iii) a demonstration that a favorable court decision can redress the injury.²⁸⁹ Almost by definition, these elements can be readily satisfied for anyone upon whom the government has imposed a new obligation: The injury is the imposed obligation, which is caused by the challenged imposition and fully redressable if a court finds that the government acted unlawfully.²⁹⁰

Yet for anyone challenging an unrule, showing a “particularized” injury will often prove more difficult, especially when the harm is spread across the public rather than concentrated in an individual who has been or will be demonstrably affected.²⁹¹ On precisely these grounds, courts have in recent

288. 504 U.S. 555 (1992).

289. *Id.* at 560-61 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

290. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (noting that the Court has “held that a plaintiff satisfies the injury-in-fact requirement where he alleges ‘an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder’” (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979))); *see also* *Pub. Citizen, Inc. v. Trump*, 361 F. Supp. 3d 60, 64 (D.D.C. 2019) (“It is relatively easy to establish standing when you are the regulated party; it is more difficult to do so when the government fails to regulate the conduct of someone else.”); Sunstein & Vermeule, *supra* note 27, at 457 (“[T]he requirements of causation and redressability . . . might well be used to prevent regulated entities from having access to court on the ground that it is purely speculative whether a judicial ruling—for example, requiring compliance with some procedural requirement—will actually redress the alleged injury. But we have been unable to find even a single case in which the court of appeals has used standing doctrine in that way.”). Courts have on occasion erected other barriers to the redress of grievances about unrules. *See Fertilizer Inst. v. U.S. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (allowing EPA exemptions to remain in place despite concluding that the EPA “failed to provide adequate notice and comment,” in part because “no party challenged the specific exemptions set by the EPA”).

291. *Lujan*, 504 U.S. at 562 (“When, however, as in this case, a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed.”); *see also* Karl S. Coplan, *Petition Clause Interests and Standing for Judicial Review of Administrative Lawmaking*, ADMIN. & REGUL. L. NEWS, Spring 2009, at 3, 3 (“Current standing doctrine . . . favors petitioning activity by regulatory [targets] arguing for less regulation, for whom standing is presumed, while it disfavors petitioning activity by regulatory beneficiaries arguing for more

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years become more reluctant to grant standing to organizations seeking to challenge agency actions that eliminate or lessen regulatory obligations.²⁹²

As a result, the individual target of a new obligation will almost always be able to object to its imposition, but courts are less likely to hear objections to obligation alleviation. Those most directly affected—the recipient of a dispensation or the beneficiary of a carveout—will hardly ever object,²⁹³ leaving third parties as the only potential challengers.²⁹⁴ Standing doctrine will often present a meaningful barrier for those third parties to overcome if they wish to challenge an unrule.²⁹⁵

regulation, who . . . must meet a high burden of establishing distinct ‘injury in fact,’ causation, and redressibility [sic]’); Zachary J.F. Kolodin, Note, *Standing to Challenge Regulatory Failure in the Age of Preemption*, 22 N.Y.U. ENV’T L.J. 157, 166 (2015) (“Since industrial actors are regulated directly . . . it is far more likely that an industrial actor’s complaint with respect to a regulation will suffice for standing than will a regulatory beneficiary’s complaint.”). Although it may be more difficult to satisfy the standing test when challenging unrules, we do not deny that it still may be possible. After all, as Justice Kavanaugh has noted in a plurality opinion, “the Court has squarely held that a plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others.” *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2355 (2020) (plurality opinion) (citing *Heckler v. Mathews*, 465 U.S. 728, 737-40 (1984)). It may be that competitors of firms that benefit from an unrule may be able to satisfy the injury-in-fact requirement more easily than other types of unrule challengers.

292. Sunstein & Vermeule, *supra* note 27, at 453-54 (noting that in recent years the D.C. Circuit “has invoked the injury-in-fact test to deny standing to environmental, labor, and consumer organizations complaining of what they see as insufficient regulation”). These patterns in standing cases are traceable to the intellectual foundations of administrative law, which elevate the protection of private rights and property above public rights. See Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1433 (1988) (noting that, in the U.S. administrative law tradition, “[t]he interests of regulated industries could be protected through the courts, whereas the interests of regulatory beneficiaries were to be vindicated through politics or not at all”).
293. The recipient of a dispensation presumably would object only if it believes a waiver it received was more limited than one to which it was entitled by statute. See, e.g., *Fertilizer Inst.*, 935 F.2d at 1312 (declining to vacate exemptions that were created without adequate notice, because “no party challenged the specific exemptions” and the only “complaint about the exemptions” from the parties was that they were “not broad enough”).
294. Although § 555(b) of the APA opens the possibility of third-party intervention during agency adjudications, courts treat such intervention as discretionary at best. See *Nichols v. Bd. of Trs. of the Asbestos Workers Loc. 24 Pension Plan*, 835 F.2d 881, 897 (D.C. Cir. 1987).
295. The D.C. Circuit has noted that “‘when the [party] is not . . . the object of the government action or inaction [being] challenge[d], standing is not precluded, but it is ordinarily ‘substantially more difficult’ to establish.” *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002) (first alteration in original) (quoting *Lujan*, 504 U.S. at 562) (holding that a radio station licensee could not challenge the grant of a license to a competitor station).

3. Less searching judicial review

Even when litigants can overcome standing barriers, other doctrines make courts' scrutiny on the merits less searching in cases involving certain kinds of unrules. When dispensations derive from an agency's exercise of its nonenforcement discretion in individual cases, for example, prevailing doctrine makes these unrules virtually immune from judicial review.²⁹⁶ In *Heckler v. Chaney*, the Supreme Court held that agencies' decisions not to enforce are presumed to fall within the unreviewable category of actions "committed to agency discretion" by law.²⁹⁷ For similar reasons, courts reviewing waivers issued under generally standardless authorizations—such as those noting that an agency "may waive" various provisions²⁹⁸—will be more likely to deem such unrules as "committed to agency discretion."²⁹⁹ A district court held completely unreviewable the Department of Homeland Security's waiver of some two dozen laws that otherwise could have applied to the construction of a wall on the border with Mexico.³⁰⁰ Even when a waiver is deemed reviewable, courts sometimes appear to apply a lighter-touch arbitrariness review to such unrules.³⁰¹

296. Cf. Vermeule, *supra* note 43, at 1097 (surveying a number of "holes" that limit the coverage of the conventional presumption of reviewability). Nonenforcement in the administrative state has a parallel in prosecutorial discretion in criminal law. Rachel Barkow, who contrasts administrative law's emphasis on the control of discretion with several traditionally less constrained "pockets of mercy" within the criminal-justice system, notes that "most commentators worry more about the coercive power of prosecutors rather than [that] their power [is too] lenient"—that is, they worry about a power to enforce obligations (in this case, criminal prohibitions) rather than the effective power to alleviate them. Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1352, 1355 (2008).

297. 470 U.S. 821, 832 (1985) (quoting 5 U.S.C. § 701(a)(2)). The Court justified its holding in *Heckler* in part by reference to a disproportionate concern about regulators' obligation-imposition power, writing that "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.*

298. See, e.g., *supra* note 194 and accompanying text.

299. See *Heckler*, 470 U.S. at 830, 832 (interpreting § 701(a)(2) as applying when there is "no meaningful standard" to guide judicial review of an agency's actions). Or, if courts do find the agency action reviewable in such instances, the spongy nature of the statutory standard might well lead a court to conclude that the agency is entitled to deference. See *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 843-45 (1984). But see *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) (declining to defer to the FCC's broad construction of authority to "modify" a legal requirement).

300. *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 224-25 (D.D.C. 2019).

301. See, e.g., *C.K. v. N.J. Dep't of Health & Hum. Servs.*, 92 F.3d 171, 177, 183-84 (3d Cir. 1996) (applying rational-basis review to the Department of Health and Human Service's granting of a section 1115 waiver to New Jersey, and rejecting out of hand the suggestion that the "absence of formal findings" rendered the granting of the waiver arbitrary and capricious, so long as "the Secretary rationally could have determined

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The story is not much different once an agency imposes obligations on some actors or activities, but could plausibly have gone further to encompass other similar actors or activities. Although one might think that simple arbitrary-and-capricious principles would permit regulatory beneficiaries to challenge an agency's decision not to impose an obligation related to the purpose or scope of the rule,³⁰² that is not always the case. Courts have developed a host of doctrines that tend to bless agency decisions to hold back on obligation imposition—or at least they tend to treat those decisions with little serious scrutiny. For instance, the “de minimis doctrine” amounts effectively to a judicial approval of limited exemptions for certain conduct, as long as the obligations that would otherwise apply are so minor that they would only “yield a gain of trivial or no value.”³⁰³ It has even been said that the power to develop exceptions is “inherent in most statutory schemes,” even when the text does not specifically authorize such power.³⁰⁴

A related “administrative necessity” doctrine can sometimes allow agencies to develop more categorical exemptions even when statutes provide no explicit authorization.³⁰⁵ As the D.C. Circuit explained in *Alabama Power Co. v. Costle*, categorical exemptions should be allowed “where the conventional course” for dealing with impossibility through “case-by-case determinations[] would, as a practical matter, prevent the agency from carrying out the mission assigned to it by Congress.”³⁰⁶ In other words, rather than expending resources administering dispensations, an agency will sometimes be allowed to save itself time by writing a carveout.

Finally, agencies can also sidestep challenges to carveouts by invoking the “one-step-at-a-time” doctrine. In essence, this doctrine says that agencies may “promulgate regulations in a piecemeal fashion” rather than in one omnibus regulation that comprehensively addresses all issues germane to the regulatory

that the [state program] was ‘likely to assist in promoting the objectives’ of [Aid to Families with Dependent Children]” (quoting 42 U.S.C. § 1315(a)). Of course, we acknowledge that there are cases where courts have looked carefully at unrules. *See, e.g., Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 426-30 (D.C. Cir. 2018) (*per curiam*) (vacating 40 C.F.R. § 257.101).

302. Arguably, giving unrules a lighter touch runs contrary to the spirit of the Court’s canonical decision on judicial review under the APA’s arbitrary-and-capricious clause. *See Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (“We believe that the rescission or modification of an occupant-protection standard is subject to the same [arbitrary-and-capricious] test.”).

303. *Ala. Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979).

304. *Id.* at 360 (“[W]e think most regulatory statutes, including the Clean Air Act, permit such agency showings in appropriate cases.”). The Supreme Court’s decision in the *Little Sisters of the Poor* case is in a similar vein. *See supra* notes 208-11 and accompanying text.

305. *See Sierra Club v. EPA*, 719 F.2d 436, 463 (D.C. Cir. 1983).

306. 636 F.2d at 358.

goal.³⁰⁷ Even when Congress has mandated that an agency develop a regulatory scheme, this doctrine effectively gives the agency a pass when it comes to carveouts, at least in its initial rules. In some sense, this is the opposite power of what scholars have called “regulatory bundling.”³⁰⁸ It is the power to engage in regulatory unbundling.³⁰⁹

Perhaps the generally lighter-touch judicial review of unrules grows out of a misunderstanding of unrules’ prevalence and their consequences. For instance, in justifying the Supreme Court’s decision in *Norton v. Southern Utah Wilderness Alliance* to hold unreviewable an agency’s decision not to issue rules, Justice Scalia’s majority opinion characterized disputes over what we call unrules as mere “abstract policy disagreements.”³¹⁰ Yet in contrast to Justice Scalia’s suggestion that unrules are relatively innocuous, we have shown in this Article that unrules can have significant consequences for public health and safety, interest-group influence, and the rule of law. The ubiquity of unrules and their corresponding risks show why courts should take seriously claims of injury from an agency’s decision to create differential treatment via unrules. Courts should resist concluding that agency unrules are committed to agency discretion or that no law can guide judicial review of unrules.³¹¹ Instead, courts should ensure that the presumption of reviewability of agency action applies as much to unrules as to rules.³¹²

D. Steps Toward Reorienting Administrative Law

The unified framework and empirical analysis we have provided in this Article show that administrative discretion is considerably broader than many

307. See *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 409 (D.C. Cir. 2013); see also 2 AM. JUR. 2D *Administrative Law* § 131 (West 2020) (“The one-step-at-a-time doctrine rests on the notion that since agencies have great discretion to treat a problem partially, the court of appeals should not strike down a regulation if it is a first step toward a complete solution.”).

308. See Jennifer Nou & Edward H. Stiglitz, *Regulatory Bundling*, 128 YALE L.J. 1174, 1176-79 (2019); LEE ANNE FENNELL, SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE 212-14 (2019).

309. There are obviously parallels here to the *Chenery* doctrine, which says that agencies generally have discretion to engage in policymaking through rulemaking or through adjudication. See *SEC v. Chenery Corp.* (*Chenery II*), 332 U.S. 194, 202-03 (1947).

310. 542 U.S. 55, 66 (2004).

311. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that 5 U.S.C. § 701(a)(2) applies to preclude judicial review of agency action whenever the operative statute provides no law to guide a court’s review).

312. Cf. *Ctr. for Biological Diversity v. McAleenan*, 404 F. Supp. 3d 218, 235-36 (2019) (explaining why the presumption of reviewability should be overcome only “by an unambiguous statutory provision that plainly precludes jurisdiction,” but concluding that the waiver in the case was supported by such a preclusion provision).

judges and administrative law scholars typically assume. Yet today, administrative law continues to focus much more on one facet of that discretion—namely, discretion in imposing regulatory obligations—with much judicial and academic commentary overlooking the “second face” of administrative discretion: that which agencies exercise over the alleviation of obligations.³¹³ The real-world effects of this second face of discretionary power may simply be harder to see because of the biases we have discussed in the transparency requirements, administrative procedures, and judicial-review doctrines that govern unrules. But once one’s eyes are opened to seeing the operation of the second face of administrative power, to recognizing that it too poses risks of error or abuse, and finally to understanding that current administrative law doctrines and practices fail to address these risks, it then follows that judges and scholars should consider the task of reorienting or rebalancing administrative law.

Rebalancing administrative law is of course a substantial undertaking—one that requires determining precisely how to effectuate appropriate doctrinal and institutional change. Choices will need to be made about which doctrines (for example, the logical-outgrowth test or the law of standing) should be modified and precisely how those doctrines and procedures should be modified. Making these decisions wisely will require careful analysis, due consideration of tradeoffs, and proper attentiveness to potential unintended consequences. In making these decisions, reformers would do well to aim for symmetrical treatment of unrules wherever possible.³¹⁴ Toward that goal, any or all of the doctrines and procedures we have reviewed in this Part should be on the table.

Pulling back the curtain, as we have begun to do here, is a vital first step. But charting the path forward will be difficult if unrules continue to remain as obscure as they have been. Thus, the most important immediate step to take is

313. We acknowledge seminal work in political science that refers to a “second face” of governmental power that is essentially the power to refrain from exercising power. See generally Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 948 (1962); MATTHEW A. CRENSON, *THE UN-POLITICS OF AIR POLLUTION: A STUDY OF NON-DECISIONMAKING IN THE CITIES* 18-26 (1971); STEVEN LUKES, *POWER: A RADICAL VIEW* 20-25 (2d ed. 2005). In law, the two faces of power have been described as the “power to command”—or what we call obligation imposition—and the “power to defer”—or what we call obligation alleviation. Coglianese & Yoo, *supra* note 89, at 1591-96. Between the extremes of heightened judicial scrutiny and no scrutiny at all “lies the power to defer,” although it lies “usually close to the ‘no constraint whatsoever’ end of the spectrum, . . . at least absent any specific guidelines for action contained within an applicable statute.” *Id.* at 1596.

314. See generally Daniel E. Walters, *Symmetry’s Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455 (2020) (arguing that administrative law is increasingly marked by an asymmetry in the context of interpretive discretion, and cataloguing a variety of reasons why that trend is troubling).

to increase the transparency of unrules. Doing so will provide a basis for much-needed additional research and will help provide a way to ground decisions about future doctrinal reform. It could also help, in its own way, to address some of the risks of unrules—producing some sunlight that might serve as a disinfectant.³¹⁵ To that end, we close our inquiry by offering a few suggestions for improving the transparency of both dispensations and carveouts.

To address the obscurity of dispensations, Congress or the President could require, or agencies could impose on themselves, the consistent practice of maintaining online lists of granted dispensations. Similar publication requirements have been imposed by executive order on agencies with respect to their guidance documents.³¹⁶ As noted above, some agencies are already following this practice by publishing lists of dispensation recipients.³¹⁷ It would not be asking too much to have agencies follow this practice across the federal government.³¹⁸

Improving access to records of requests for and decisions on dispensations would go far in reducing the burdens of legal mobilization for the potential beneficiaries of obligations that are being dispensed, and may even reduce arbitrariness and abuse of power in the granting of dispensations. Of course, we have noted already that transparency requirements imposed on agencies suffer from a lack of self-reinforcing incentives to comply.³¹⁹ Options exist to alter incentives and improve compliance, such as the possibility of creating a cause of action under FOIA for challenging generalized agency policies and practices that lead to the underproduction of information, mandating independent audits of agency records, or perhaps even imposing personal liability on officials who willingly keep no-action letters from a public

315. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10, 10 (“Sunlight is said to be the best of disinfectants . . .”).

316. See Exec. Order No. 13,891, 3 C.F.R. 371 (2020), *reprinted in* 5 U.S.C. § 601 note.

317. See *supra* Part III.B.2.

318. Recent reports and recommendations issued by the Administrative Conference of the United States also provide agencies with a source of best practices. See *Adoption of Recommendations*, 84 Fed. Reg. 38,927, 38,931-33 (Aug. 8, 2019); *Adoption of Recommendations*, 82 Fed. Reg. 61,728, 61,742 (Dec. 29, 2017).

319. See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1122 (2017) (noting that certain features of FOIA “arguably create[] a perverse incentive for officials to classify more, not less,” agency information as exempt from disclosure); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 919-20 (2006) (acknowledging that “the transparency requirement is imposed . . . upon the state apparatus, which may choose not to comply”); Heidi Kitrosser, “*Trust Me*” and *Transparency Do Not Mix*, U. ILL. L. REV. ONLINE (Apr. 29, 2017), <https://perma.cc/B2MW-JBER> (discussing the “intrinsic weakness of any transparency strategy that depends on self-policing”).

repository.³²⁰ These possibilities should be explored further in an effort to improve the quality of recordkeeping on dispensations.

When it comes to reforming administrative law's approach to carveouts, we suggest two initial steps. First, mechanisms are needed that can better ensure that carveouts are not lost in the shuffle of the rulemaking process. When agencies publish notices of their proposed and final rules, in the future they could be expected to provide fair notice to the public of any decisions about classes or categories of potential regulatory targets that have been carved out of the rule, with an explanation of why these classes or categories are not covered. Agencies do sometimes disclose such information,³²¹ and the anticipation of arbitrary-and-capricious review by courts certainly give them some reason to discuss a rule's scope. But they are not otherwise required to discuss in detail the carveouts that they create. Going forward, agencies could be required to include a separate designated paragraph or section discussing a new or amended rule's scope in each preamble to a rule document in the *Federal Register*.³²² This discussion would provide the public with clearer information about those entities, activities, and time periods covered and not covered by a rule.

The second step would be to make regulatory analysis more evenly balanced between obligation imposition and alleviation. For example, OIRA could demand that agencies make plain how unrules—both carveouts and dispensations—figure into their regulatory proposals and account for them explicitly in their relevant analyses. Best practices in regulatory analysis already call upon agencies to quantify various uncertainties surrounding the

320. For a useful collection of enforcement mechanisms that could be modeled in this context, see Pozen, *supra* note 319, at 1107-11.

321. See, e.g., U.S. EPA, EPA 833-F-00-003, STORMWATER PHASE II FINAL RULE: WHO'S COVERED? DESIGNATION AND WAIVERS OF REGULATED SMALL MS4s (rev. 2012), <https://perma.cc/YC34-XYPB> (explaining which municipal systems are regulated and which are not under the agency's stormwater-discharge regulations).

322. This proposal is not unlike other proposals that agencies be required to publish a compact summary or scorecard of a proposed regulation's costs and benefits. See, e.g., Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1518 (2002) (proposing that agencies provide a one-page summary of their regulatory-impact analyses). A mandatory summary statement of individuals, entities, activities, and time periods falling both within and outside of a regulation's scope should be both simpler and less controversial than even a summary of benefits and costs. To some extent, the EPA's standard template for rulemaking documents already calls for something close to what we suggest in that it includes a standard section titled "Does this action apply to me?" See, e.g., Protection of Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act, 81 Fed. Reg. 82,272, 82,273 (Nov. 18, 2016) (to be codified at 40 C.F.R. pt. 82). Of course, the EPA's template exhibits its own biased focus on obligation imposition rather than obligation alleviation, as the agency uses this section of its template to indicate to whom the rule applies, avoiding saying to whom it does not.

impacts of regulatory obligations.³²³ These best practices could be expanded to encompass the expectation that agencies conduct sensitivity analyses around the degree of implementation of their rules and consider possible adverse consequences from any substantial exercise of obligation-alleviation authority by the agency in the future. Doing so would not only promote better agency decisionmaking; it would also put the public on better notice of the effects of unrules. Furthermore, retrospective studies of the actual use of dispensations could help provide better information about the implementation of regulations, in turn improving *ex ante* efforts to estimate the actual benefits and costs of proposed regulations.³²⁴

We do not pretend, of course, that these various steps toward increased transparency of both carveouts and dispensations will fully correct the imbalance in the administrative law system. But the first step—which we have taken in this Article—is to recognize that unrules are ubiquitous, that they present risks, and that they currently escape the full scrutiny given to agency decisions to impose rules. Only with such recognition can lawyers, judges, and legislators begin to develop more systematic reforms that will level the playing field between obligation imposition and alleviation. In addition, with such recognition, any initial efforts to increase the transparency of unrules in the day-to-day practice of administrative agencies should help jumpstart a virtuous circle of further deliberations over carefully calibrated reforms.

A variety of factors have undoubtedly contributed to the way in which administrative law has tended to overlook unrules. In bringing greater attention to the current administrative law system's myopia, we do not mean to claim anything here about how frequently agencies might deliberately take advantage of the shadows that the system casts over their use of unrules.³²⁵ But the current, imbalanced system of oversight does make it easier for agencies to take shortcuts, and this system also fails to consider fully the consequences of agencies' obligation-alleviating decisions. Agencies, after all, routinely confront the challenge of setting priorities and managing large tasks with limited staff and budgets.³²⁶ That challenge poses risks of error even among the

323. See Off. of Info. & Regul. Affs., *supra* note 258, at 14-15.

324. Cf. Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REGUL. ONLINE 57 (2013) (arguing for the expansion of retrospective reviews of the actual costs and benefits of important regulations that previously went through OIRA review).

325. We have not attempted in this Article to analyze the political economy behind agencies' decisions to create rules (as opposed to the political-economy factors pushing agencies to create unrules), although such an investigation would be worthwhile in future scholarship.

326. Cf. PAUL R. VERKUIL, VALUING BUREAUCRACY: THE CASE FOR PROFESSIONAL GOVERNMENT 48-49 (2017) (noting that the federal government has assumed many more responsibilities over the decades without meaningfully increasing the number of civil servants).

most well-intentioned of public servants. It also necessitates careful management of agencies' power both to impose and alleviate obligations. Just as it can take time and adequate resources to impose obligations in a thoughtful and responsible manner, agencies—and their overseers—must recognize that obligation-alleviating power also demands time and resources if it is to be exercised with care. Taking steps to reduce administrative law's bias in favor of unrules could go a long way toward helping encourage more thoughtful, fair, and effective efforts to alleviate obligations.

Conclusion

Outside the Federal Trade Commission building in Washington, D.C., stand two massive, limestone sculptures that neatly encapsulate the conventional view of government regulation. In polished Art Deco style, the sculptures each depict a muscular man grappling with a wildly excited horse.³²⁷ Judging from the title the artist gave to this work—"Man Controlling Trade"—the sculptures appear to have a straightforward meaning: The horse represents the free market, with its dynamic and potentially dangerous energy, while the man represents government's attempt to control economic activity and tame it to serve the public's interest. Yet because the sculptures freeze the man and the horse in stone, the meaning the artwork conveys visually is actually more ambiguous. Is the man pulling the horse back and trying to harness its energy, or is he instead simply struggling to release the horse from its restraint?

Buried within this visual ambiguity lies a deeper truth about regulation: A full account of the U.S. regulatory system must pay more attention to the fact that this system not only imposes obligations but avoids and lifts them as well. Every regulatory obligation contains its own limits—limits that carve some actors or activities out of its scope—and agencies always have opportunities to alleviate regulatory obligations even further by granting dispensations.

Although too often thought of as peripheral, unrules are an integral and highly consequential part of the regulatory state. They can also introduce distinctive risks of government failure. Not only can they undermine policy effectiveness, but they can also provide a ready source of favoritism and arbitrariness in administration. These risks are heightened by the fact that obligation alleviation remains less constrained by administrative law.

Recognizing unrules' ubiquity and centrality should make evident the need to rebalance administrative law through additional efforts to increase the oversight of, and constraints on, agencies' discretion to alleviate obligations. At

327. Elliot Carter, *Man Controlling Trade—Washington, D.C.*, ATLAS OBSCURA, <https://perma.cc/D374-ALX3> (archived Dec. 30, 2020).

a minimum, a reoriented administrative law would bring unrules out of the shadows and subject them to more robust requirements for transparency. Courts could also make more even-handed the law governing access to judicial review and the application of that review. Oversight institutions such as OIRA could scrutinize unrules more consistently so that the public has better information about how obligation alleviation might affect the costs and benefits of regulation.

Increased attention to unrules ultimately will advance the purposes served by having government subject to the rule of law. If administrative law is to control government so that it delivers meaningful public value and avoids injustice, then the law and lawyers need to recognize and respond to all of the consequential ways that government interacts with society, both those ways that seek to bring trade under control and those that loosen restraints.

Appendix

Examples of Regulatory Provisions Featuring Obligation-Alleviating Terms

Terms	Examples
<i>waive</i> <i>waives</i> <i>waived</i> <i>waiver</i> <i>waivers</i> <i>waiving</i>	<ul style="list-style-type: none">• “By application pursuant to § 1787.10, the Administrator may <i>waive</i> the Buy American requirement upon a showing that application of the requirement would be inconsistent with the public interest or impractical for the [Rural Utilities Service] Borrower.” 7 C.F.R. § 1787.13(a) (2020).• “You may request that we <i>waive</i> any specific requirement of this part. You may submit your request, with supporting documentation, separately or as a part of your postmarket surveillance submission to the address in § 822.8.” 21 C.F.R. § 822.29 (2020).• “The Administrator may <i>waive</i> the provisions of this subpart for a manufacturer or a specific engine family, as specified in paragraphs (b) (1), (2) and (3) of this section.” 40 C.F.R. § 91.501(b) (2020).
<i>exempt</i> <i>exempts</i> <i>exempted</i> <i>exemption</i> <i>exemptions</i> <i>exempting</i>	<ul style="list-style-type: none">• “Crude oil tankers engaged in coastwise trade are <i>exempt</i> from the requirements of §§ 151.2025 (ballast water management . . . requirements), 151.2060 (reporting), and 151.2070 (recordkeeping) of this subpart.” 33 C.F.R. § 151.2015(b) (2020).• “A vessel that is required to operate and maintain the mobile transceiver unit continuously 24 hours a day throughout the fishing year may be <i>exempted</i> from this requirement if a valid <i>exemption</i> report . . . is received by [the National Marine Fisheries Service Office of Law Enforcement] and the vessel is in compliance with all conditions and requirements of the [vessel monitoring system] <i>exemption</i> identified in this section and specified in the <i>exemption</i> report.” 50 C.F.R. § 660.14(d)(4) (2019).

Appendix continued on next page

Terms	Examples
<p><i>except</i> <i>excepts</i> <i>excepted</i> <i>exception</i> <i>exceptions</i> <i>excepting</i></p>	<ul style="list-style-type: none"> • “After the application of any pesticide on an agricultural establishment, the agricultural employer shall not allow or direct any worker to enter or to remain in the treated area before the restricted-entry interval specified on the pesticide labeling has expired, <i>except</i> as provided in this section.” 40 C.F.R. § 170.112(a)(1). • “A regulated entity to which a final suspension order in effect is applicable may request an <i>exception</i> from such order to allow it to engage in a particular covered transaction with a suspended person and any affiliates thereof.” 12 C.F.R. § 1227.10(a) (2020). • “Streambeds, banks, and flood plains will not be disturbed, <i>except</i> as may be necessary to construct, operate, and maintain irrigation, fisheries, utilities, roads, and similar facilities or improvements.” 36 C.F.R. § 292.16(c)(5) (2020).
<p><i>exclude</i> <i>excludes</i> <i>excluded</i> <i>exclusion</i> <i>exclusions</i> <i>excluding</i></p>	<ul style="list-style-type: none"> • “Actions listed below when considered individually and cumulatively do not have significant effects on the quality of the human environment and are categorically <i>excluded</i> from [National Environmental Policy Act] documentation.” 33 C.F.R. § 230.9. • “Manufacturers and owners of locomotives that operate only on non-standard gauge rails may ask us to <i>exclude</i> such locomotives from this part by <i>excluding</i> them from the definition of ‘locomotive.’” 40 C.F.R. § 1033.5(e). • “Pool plant means a plant, unit of plants, or a system of plants as specified in paragraphs (a) through (f) of this section, but <i>excluding</i> a plant specified in paragraph (h) of this section.” 7 CFR § 1124.7.
<p><i>variance</i> <i>variances</i></p>	<ul style="list-style-type: none"> • “The [Pension Benefit Guaranty Corporation] shall approve a request for a <i>variance</i> or exemption if [it] determines that approval of the request is warranted, in that it—(1) [w]ould more effectively or equitably carry out the purposes of title IV . . . ; and (2) [w]ould not significantly increase the risk of financial loss to the plan.” 29 C.F.R. § 4204.22(a) (2020). • “A supplier of water may request the granting of a <i>variance</i> pursuant to this subpart for a public water system within a State that does not have primary enforcement responsibility by submitting a request for a <i>variance</i> in writing to the Administrator.” 40 C.F.R. § 142.41.